(6.)

IN THE HIGH COURT OF AUSTRALIA

COMMISSIONER FOR RAILWAYS.

V.

AUSTRALIAN WOOL BROKERS AND PRODUCE COMPANY LIMITED.

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE.

on TUESDAY FIFTEENTH MARCH, 1955.

J. J. Gourley, Govt. Print., Melb.

C.7163/51

THE COMMISSIONER FOR RAILWAYS

v.

AUSTRALIAN WOOL BROKERS & PRODUCE COMPANY LIMITED

ORDER

Appeal dismissed with costs.

THE COMMISSIONER FOR RAILWAYS

v.

AUSTRALIAN WOOLBROKERS AND PRODUCE COMPANY LIMITED

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DIXON C.J.
McTIERNAN J.
WEBB J.
KITTO J.
TAYLOR J.

JUDGMENT

THE COMMISSIONER FOR RAILWAYS

V.

AUSTRALIAN WOOLBROKERS AND PRODUCE COMPANY LIMITED

DIXON C.J.
McTIERNAN J.
WEBB J.
KITTO J.
TAYLOR J.

JUDGMENT

This appeal arises in the course of litigation initiated by the respondent for the purpose of recovering damages which are said to have resulted from the escape and spread of a fire, on the 22nd January 1952, from lands of the appellant adjacent to the single track branch line which runs more or less east and west from The Rock to Westby. The fire had been deliberately ignited for the purpose of burning off vegetation on each side of the line and was an operation which is commonly undertaken to minimise the risk of fire from sparks or embers emitted by passing locomotives. The evidence showed that many thousands of miles of railway track are so treated in New South Wales each year and the operation which was conducted in this vicinity on the day in question was in keeping with the established practice.

The trial of the action took place before Herron J. without a jury and his Honour entered judgment for the respondent in the sum of £45,000. An appeal to the Full Court of the Supreme Court of New South Wales was dismissed and this appeal is brought from the order of dismissal. It should be observed that no suggestion was or is made that the learned trial judge misdirected himself on any issue of law and the appeal raises nothing but questions of fact for our consideration. Many witnesses were called and the trial was

lengthy. In the course of it many issues of fact arose for determination, and whilst a number of these were decided ultimately in favour of the appellant, sufficient were found in favour of the respondent to entitle it to succeed in the action. These brief observations are sufficient to indicate broadly the nature of the burden which, according to the principles to be applied in appeals of this nature, lay upon the appellant both before the Full Court of the Supreme Court and upon this appeal. (See Watt v. Thomas (1947 A.C. 484); Paterson v. Paterson (89 C.L.R. 212) (1953 A.L.R. 1095)). Counsel for the appellant was not unmindful of these principles and sought to establish that there was every reason why this court should regard itself as being in just as good a position as the learned trial judge to determine the issues in question. Nevertheless, many of the arguments addressed to this Court on behalf of the appellant were more appropriate to a completely independent consideration of the matters involved. They were arguments which had been addressed to the learned trial judge and, having found no favour with him, were repeated in this Court. Their substance, however, is not such that the appellant can contend successfully upon this appeal that they are sufficient to justify this Court in substituting its own findings for those of the learned trial judge. Indeed, we are by no means satisfied that his Honour erred in those matters or even inclined to think that he was wrong. With these preliminary observations in mind it is convenient to refer to the broad facts of the case.

The land of the appellant upon which the burning off operations were being conducted consisted of strips of land, each one chain wide, on either side of the line referred to. These strips were unfenced and on both the northern and southern sides they adjoined extensive farming lands. On the northern side, in the vicinity of the point from which the fire which caused damage to the respondent's property spread, is situated a property known as Lloyds' and on this property wheat had been

sown in the previous year. The crop was harvested late in December but on the 22nd January 1952 there remained a large area of standing straw which practically abutted on the appellant's land. Adjacent to the latter's land, and between it and the standing straw, there was a narrow verge of stubble. Both the straw and stubble, and indeed the vegetation generally in the area, was said to have been "tinder dry". There had been a very lush spring season followed by extremely dry weather at the end of 1951 and during January 1952 and, consequently, the bush fire risk was extremely high. Some indication of the prevailing conditions may be gathered from the fact that on the 12th December 1951 a "bush fire danger period" in respect of the area had been proclaimed pursuant to S. 7(2) of the Bush Fires Act, 1949. This period was proclaimed to extend until the 31st March 1952 and the effect of the proclamation was to bring into operation a statutory prohibition on the lighting of any fire upon any land within the area for the purpose of clearing such land of bush, stubble, scrub, timber, trees, grass or vegetative or other material except pursuant to a permit issued by, and the conditions, if any, prescribed by, the local council. This statutory prohibition did not apply to any fire lit by or under the direction of a "public authority" which term is sufficiently widely defined by the Act to include the appellant. To what has already been said should be added the fact that the day upon which the burning off operations took place on this particular section of the line was one of extreme heat; the shade temperature was said to be in excess of 100° and there was a light breeze moving from the north-west. Later in the day this breeze freshened a little and swung round to the south-west or south. We should, perhaps, add that there was credible evidence that on such days it was not unusual for "willy willies" to occur. These are rotating columns of air which vary in intensity from motions of little animation to movements of great force, but it was not suggested that any

violent disturbance of this nature took place that day.

Prior to the 22nd January 1952 the Lloyds' and other adjoining owners had been notified, pursuant to S. 7(1) of the Bush Fires Act, 1949, of the intention of the appellant to burn off on that day. Such notification resulted, on the 22nd January 1952, in the attendance upon the Lloyds' property adjacent to the railway track, of seven men who were land holders in the district. They had come to assist a ganger, one Miskell, and two fettlers, who were employees of the appellant, in the burning off operations and they brought with them two motor trucks equipped with water tanks and pumps - one of which was a power pump - and other fire fighting equipment. The railway employees were each equipped with a knapsack spray and leather beaters. The length of the track to be burnt off that day was about fifty-six chains on each side of the line and the operation started about 9 a.m. First of all, a strip of thirteen chains, or thereabouts, on the southern side of the line was burnt off. It is unnecessary to specify in detail the procedure which was adopted but the edges of the fire breaks which had been made on the boundaries of the railway land on this side of the line were watered. This fire break was about six feet wide and after the watering operations had been completed the burning off operations commenced from one end of the strip, the vegetation, generally, being burnt in from the fire break towards the railway line. This operation was completed without mishap and the procedure was repeated on a thirteen chain strip on the northern side of the line where the fire break was said to be some ten feet wide. Thereafter the two remaining strips of over forty chains were burnt off in successive operations. The unequal division of the strips to be burnt off was occasioned by the fact that the line was intersected by a foot crossing and this was treated as a fire break separating the first and second sections burnt off from those which were so treated later. The whole of the operation was completed without any serious mishap about 1.30 p.m. and an inspection was made of the area between that time and 2 p.m.

After the inspection all those present appear to have thought that the area was safe and the land holders left taking their equipment with them.

Counsel for the appellant attached great significance to the fact that, by common agreement, the area was then safe. Moreover, he relied strongly upon the fact that the manner in which, during the morning, the operations had been conducted had, apparently, commended itself to the land holders in order to negative any suggestion that the appellant's servants had been negligent in any respect. There is, we should think, considerable force in these submissions but they are of no assistance whatever in considering the later events of that day. There is no doubt that at 2 p.m. those who were then present felt that the major part of the hazardous undertaking had been completed successfully and that the area was then comparatively safe. Moreover, it seems, they felt it was no longer necessary for the more substantial fire fighting equipment to be retained in the vicinity. But it is beyond doubt that the area was still one of potential danger and that, although those present thought it comparatively safe, they were fully aware that for the next few hours at least vigilant and unremitting surveillance would be necessary in order to detect and promptly check any recurrence of fire in the area. Those who were present, doubtless, believed that the fire had been extinguished but, quite obviously, they were not prepared to conclude beyond question that this was so, for the land holders left with the assurance that Miskell and his fellow employees would patrol the area until about 4 p.m. The necessity of pursuing such a course was commonly recognised and, indeed, was made painfully clear by later events.

It is of some importance to mention at this stage that whilst firing the last section burnt off - on the northern side of the line - Miskell discovered an old wheat bag adjacent to the fire break and on the edge of the appellant's

land. He decided to remove it from this position and threw it ahead of him some ten or fifteen feet from the break. He says that he saw no sign of this bag subsequently, or, at least, not until it was pointed out to him after the subsequent fire had occurred, but he did find parts of two other bags in the burnt off area shortly after 2 p.m. After the land holders had left about that time Miskell, apparently, thought it desirable to walk over the more recently burnt off area and this he proceeded to do before having lunch with his companions. In the course of this walk he discovered these two bags and there is little doubt that they were smouldering at that time. He said that they "just seemed to be on fire" and he sprayed them with water from his knapsack spray. On returning from his patrol to the site chosen for lunch he again passed the two bags and, he says, they then showed no signs whatever of fire or smoke. Nevertheless, he says that he again sprayed them with water. This was about ten or fifteen minutes past two O'clock and, as there were no other signs of fire in the area, he proceeded to have lunch with his two companions. But some ten or fifteen minutes later his attention was directed by one of his companions to flame and smoke issuing from the standing straw in the Lloyds' property at a point about twenty-five or thirty feet from the bags which he had seen smouldering a little time before. He and one of his companions hurried to the scene with their sprays but they were unable to control the fire and the conflagration spread over a large area doing extensive damage to the property of the respondent and others. Subsequent investigation failed to disclose any fire track from the railway land to the point from which the flames and smoke had been seen to issue, but one of the respondent's contentions at the trial was that the inference was open that the spread of the fire resulted from a burning fragment being carried on the breeze into the standing straw or stubble.

Upon the evidence to which comparatively brief reference has been made the first question for the learned trial

judge was whether the fire did, in fact, spread from the appellant's land or whether it had an independent origin. Neither his Honour nor the Full Court had any doubt on this point. Nor, indeed, if the question were really open for our decision, would we entertain any doubt. Various suggestions were made, including the suggestion that the fire may have been caused by the exhausts of the motor vehicles which had left the scene a half an hour or so before the fire was observed, but, in the circumstances as they existed that day, it is, in our opinion, practically certain that it was caused by a burning fragment being carried from the railway land into the stubble or standing straw adjoining. If this is so, the inference that the fire originated in this fashion was clearly open and, upon the evidence, we should regard any other conclusion as quite unsound. The learned trial judge and the Full Court regarded this as the probable origin of the escape of the fire and we agree with them. We may add that we are of this opinion notwithstanding the evidence of the expert witnesses who expressed emphatic opinions that the fire in the Lloyds' property could not have originated in this way, for their views, in the ultimate analysis, depend upon the erroneous conclusion that at 2 p.m., or perhaps ten minutes later, the fire on the railway land had been completely extinguished. This, of course, was a question of fact for the trial judge and one upon which the opinion of experts was, and is, of little use. Nevertheless, the learned trial judge was criticised, in effect, for refusing to accept the evidence of these otherwise acceptable witnesses as conclusive on the point. We take the view that not only was his Honour entitled to disregard their evidence on this point but that consideration of their evidence left him with no other alternative.

It is, of course, quite impossible to describe the precise manner in which the fire spread and this,no doubt gave rise to the wide and varied allegations of negligence

which, originally, were made. Many of these were negatived by the learned trial judge and it is unnecessary to refer to them. But some of the issues raised were found in favour of the respondent and to those which are critical brief reference may be made. His Honour found the appellant's employees negligent in not clearing debris from the area which might "remain alight or continue to smoulder" after burning off operations had been completed. In particular, his Honour thought that to leave the portions of wheat bags in the area to be burnt off was, in the circumstances, some evidence of negligence. But the main fault which his Honour attributes to Miskell and his fellow employees was concerned with the events which occurred after 2 p.m. Among other things his Honour thought that it was imprudent for Miskell to suggest or acquiesce in the departure of the motor trucks and their personnel at 2 p.m. It was not, of course, within Miskell's authority to detain them if they wished to leave but there were many circumstances consideration of which might have induced them to stay. We need not again describe the general state of the district or refer to the heat of the day in question, but it is of importance to point out that the burning off operations had been conducted in thick grass which, in places, was as much as ten feet high, and the fire had been fierce and had engendered great heat. Moreover, his Honour thought that the process of spraying the burnt off area had not operated completely to extinguish the fire and, in places, had merely suspended the danger. The possibility that this was so was known to Miskell and his fellow employees who knew that when grasslands are burnt off there is always a danger of fresh outbreaks from smouldering material and, consequently, that vigilant and unremitting surveillance was still necessary after 2 p.m. In these circumstances the departure of the more substantial fire fighting equipment and its personnel created a situation in which the standard of care required of those remaining became

most exacting. The duty of exercising such a degree of care was not, according to the learned trial judge, discharged. According to his Honour "a minimum amount of patrolling was done after 2 p.m." and "none of the three men were keeping any particular watch on the section lastly burnt and any look out that was kept was only a casual glance by men indulging in a period of relaxation after the strenuous morning's work on a hot day". Nor were the men so stationed at lunch as to be able to proceed quickly to the scene of any fresh outbreak and this, according to his Honour, was a serious matter, having regard to the limited equipment which remained with them after 2 p.m.

The Full Court was content to base its finding upon the failure of Miskell to deal effectively with the bags which he found smouldering shortly after 2 p.m. No doubt Miskell thought that he had extinguished them, but he had formed the same impression concerning everything in the area some little time before. The test whether Miskell failed, at this stage, to exercise that high degree of care which the occasion demanded cannot, as was suggested by counsel for the appellant, be resolved by a consideration of what he believed. The matter for consideration is what he, in fact, did, for upon the evidence his belief was founded upon an inadequate examination of the bags. He saw them smouldering upon the ground and sprayed them. On returning past them they did not appear to be smouldering but they were of a substance which would continue to smoulder indefinitely unless completely extinguished. We agree with the Full Court in thinking that the exercise of that degree of care which the occasion demanded could only have been discharged by a more meticulous examination of the bags. At the best Miskell's examination of them could only satisfy him that those parts of the bags which were visible were not still smouldering and it was imprudent on his part to assume that because the visible parts were not smouldering and, because, for a moment or two, there

was no sign of smoke, that other portions of the bags not visible to him were not still burning.

We have not attempted to traverse the whole of the evidence in the case but the references which have been made show clearly that there was evidence upon which the findings of the learned trial judge could have been reached. Indeed, counsel for the appellant conceded quite frankly that if the verdict were that of a jury it would not be open to attack. It was, however, pressed upon us that we should form our own opinion on the facts. This Court, it was said, is in just as good a position as the trial judge to consider and evaluate the evidence and should, as upon a complete re-hearing of the case, form its own independent view. We could not disagree more. There was considerable conflicting evidence and, in relation to that conflict, the learned trial judge enjoyed the advantage denied to this Court of seeing and hearing the witnesses and observing the respective cases of the appellant and the respondent as they developed during the course of a long trial. In these circumstances the principles which have so many times been enunciated - and most recently in Watt v. Thomas (1947 A.C. 488) and in this Court in Paterson v. Paterson (89 C.L.R. 212) (1953 A.L.R. 1095) - require us to give the greatest weight to the findings of the learned trial judge unless the reasons given by him are unsatisfactory or unless for other reasons we are satisfied that his findings are erroneous. Both the volume and detail of the evidence in the present case were such that a multitude of issues - some of major importance and some of comparatively minor significance - arose and it would be surprising to find complete agreement between any two tribunals on each and every one of them. In these circumstances failure or refusal to accept the findings or observations of the trial judge on some individual issues in the case may very well be quite insufficient to upset the broad conclusions upon which his judgment rests. Nor, in such a case as this, is it open to

attack on the ground that in making some of his findings he refused to accept on some points the evidence of witnesses who on other matters may well have been acceptable to him. We refer in particular to the expert evidence and are constrained to add that not only was there justification for the course which his Honour took with respect to that evidence but that complete acceptance of it by any Court would, to say the least, be surprising.

The argument on the appeal was long and the references to the evidence were voluminous, but nothing which was advanced satisfied us that any of his Honour's substantial findings were wrong and this is enough to dispose of the appeal. But in view of the course which the appeal took, however, we should add that we formed and have retained a firm opinion that the finding that the fire spread from the appellant's land and that the resultant conflagration was the result of negligence on the part of the appellant's employees was not only justifiable but most reasonable and one to which, quite independently, we should have come. We do not mean that the conduct of Miskell and his fellow employees was grossly negligent or reckless. On the contrary they appear to have conducted the greater part of their hazardous task with considerable care but the operation and circumstances were such that the most exacting care and vigilance were necessary. A failure at any point of time to maintain this high standard would, if it resulted in damage, leave the appellant liable. In our view the finding that there was such a failure was justified and accordingly the appeal should be dismissed.

Most of what has so far been said is concerned with the issue of negligence. At the trial, however, the respondent claimed, alternatively, that the defendant Commissioner was in the circumstances under a strict liability for the damage done by the escape of the fire he had ignited and the proof of an actual failure on the part of his servants to exercise reasonable

care was unnecessary. After very full consideration it was held in this Court that a strict liability of this kind is incurred by the use of fire in midsummer to burn vegetation in the course of agriculture: Hazelwood v. Webber, (1934 52 C.L.R. 268). In a judgment in which four members of the Court joined reference was made to the statement of Lord Moulton in Rickards v. Lothian, (1913 A.C. 263 at p. 280) that not every use of land brings the principle into play: "It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community". The joint judgment then proceeds: "Now in applying this doctrine to the use of fire in the course of agriculture, the benefit obtained by the farmer who succeeds in using it with safety to himself and the frequency of its use by other farmers are not the only considerations. The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are even more important factors. These depend upon climate, the character of the country and the natural conditions. The question is not one to be decided by a jury on each occasion as a question of fact. The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land, and of what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment. In Australia and New Zealand, burning vegetation in the open in midsummer has never been held a natural use of land". - 52 C.L.R. at p. 278.

The extreme danger to which such a use of fire may expose the neighbourhood is well illustrated by the facts of the present case. The countryside was like tinder. The heat of the sun was intense. A widespread conflagration was almost certain unless those engaged in the operation succeeded in preventing the escape of fire while they used it and in

extinguishing every spark or ember afterwards. The reason why the defendant Commissioner undertook an operation fraught with so much hazard to others was simply for fear that sparks from some engine of his, while travelling upon the line, should ignite the grass or bush. Under the Commissioner's statute he must "maintain the railways and all works in connexion therewith in a state of efficiency": S. 33 of the Government Railways Act 1912 (N.S.W.). There is no express power to clear vegetation from the railway by burning, but a question arises whether the existence of an absolute or strict liability is negatived by the implications which may be found in the statutory duty to maintain the railways, the statutory authority to run steam locomotives, and the factual considerations lying in the inevitable growth of vegetation beside and indeed upon the tracks, the custom of using fire to destroy the vegetation, the absence of any really practicable alternative means, and the great difficulty, if not impossibility, of doing the work over the vast mileage of the railway system before the heat of the summer comes.

It was suggested for the defendant Commissioner that the operation is one for the general benefit of the community and that, for that reason, the rule of strict liability is inapplicable. This seems a far-fetched suggestion. It is not enough that railways are a public utility. The idea that because a spark from an engine might set the country alight, if it fell in dry grass on the railway property, it is for the general or common benefit to burn the grass seems to treat the responsibility of the Commissioner so to conduct the railways as to avoid doing damage to others as if it were an obligation to confer some positive material advantage upon neighbouring landowners in which they would share in common: cf. Smeaton v. Ilford Corporation (1954 Ch. 450 at pp. 469-471) Upjohn J.

The real question is whether the situation is one warranting implications which relieve the Commissioner from what

otherwise would be a strict liability for the damage done by the escape of fire ignited by his servants for the purpose of burning vegetation on and beside the railway. It is not altogether easy to see why such implications should be spelt out, but it is not a matter which the facts of this case make it necessary to determine. For, assuming that only a duty of care rested on the Commissioner, the circumstances proved in evidence seem clearly enough to establish that the fire arose from a failure, at a point, in the fulfilment of that duty.

The reasons which have already been given require the conclusion that the appeal should be dismissed.