
(1870) 08 CAL CK 0004

Calcutta High Court

Case No: None

Koegler

APPELLANT

Vs

Yule and Another

RESPONDENT

Date of Decision: Aug. 15, 1870

Judgement

Sir Richard Couch, Kt., C.J.

The substance of the plaint in this case is that the defendants were tenants to the plaintiff and his deceased partner of the upper floor of a godown in Clive Street, Calcutta; and that they loaded on the upper floor an unreasonable and improper weight of white lead and other merchandize, whereby it broke and fell in, and the goods of the plaintiff and his deceased partner were damaged. The suit was heard before Mr. Justice Macpherson, who considered that the only issue upon the plaint was, whether or not the defendants used the upper floor in an untenant-like and improper manner, and loaded an unreasonable and improper weight upon it, and finding that in the defendants' favor, he dismissed the suit with costs. The plaintiff has appealed from this decree. Before considering the question of law which, has been raised, it will be better to state the view I take of the facts. Mr. Justice Macpherson, says:--"It is clear upon the evidence that the general use of the godown by the defendants was not dissimilar to that of its former tenants, but there was this difference in the defendants' mode of using the room, that, in addition to wine and light goods such as had always been stored there, sixteen casks of white and red lead, and certain cases containing tin plates, were stored there at the time of the accident." This has not been disputed before us. Some evidence was given for the plaintiff that it is not usual in Calcutta to store heavy goods in an upper floor. That does not appear to have had any weight with the learned Judge, and I think rightly, because if the floor is not loaded in any part with a greater weight than it ought to be able to carry, the description of the goods is not material, and the letter of the 5th February 1869 puts no restriction upon the use of the godown, except that no combustible or hazardous goods should be stored in it: and it is not alleged in the plaint that it was part of the terms of the tenancy that heavy goods were not to be stored in it. There was also evidence for the defendants that heavy goods are sometimes stored on an upper floor. Upon the

evidence of the three professional witnesses, Mr. Justice Macpherson held that a warehouse floor should be able to carry 1■ cwt. per foot, and he concluded from the evidence that the goods which had been stored on the portion of the floor which fell gave a pressure of only 1 cwt. 1 qr. and 6 lbs. The learned Judge was satisfied with the evidence of Mr. Thomas Brown, an assistant to the defendants, as to the storing of the goods, and I see no reason for thinking that he was wrong in this, or that we ought to come to a different conclusion on this point. If the pressure was only 1 cwt. 1 qr. and 6 lbs., it would not make any difference whether the goods were light or heavy goods. But there is evidence in the case, not noticed in the judgment, which should be considered. Mr. Aitchison, one of the plaintiff's witnesses, who went to the premises a day or two after the accident, and examined the floor, said he agreed with Mr. Clark as to the weight of the floor, and he should not have considered such a floor calculated to store merchandize on. "I mean," he said, a floor having such a weight of brick-work "on the girders," that there ought to be a surplus strength of three-fourths after the merchandize was on; he would not expect a floor to break with half a cwt. above the average, and he said the floor had the appearance of having been a roof; he imagined it had been a roof originally. Mr. Osmond, another of the plaintiff's witnesses, said he did not consider the girders proper girders for a floor for merchandize, and that he would not anticipate danger from storing 1■ cwt. on a proper upper warehouse floor. Mr. Clark, the defendants' witness, said that he made about 35 tons distributed to be the breaking weight of the girders, in which the other witnesses agreed with him; that he made the weight of the floor 15 tons on each girder, and considered the proper load for an iron girder certainly not exceeding one-third of its breaking weight; that he considered 1 cwt. a low estimate for the weight of goods that might be stored, and those girders were only sufficient for the floor; even then they were loaded above the one-third; and that no unprofessional person who had not ascertained the state of the floor could have anticipated danger from it. Mr. Aitchison also said that no unprofessional man could judge that the floor was not suited for a warehouse. This evidence, I think, shows that the girders were not sufficient for the floor of an upper story to be used as a godown, which was what the plaintiff and his deceased partner let it for, and that the defendants had no reason to suspect that the girders were not sufficient.

2. Upon these facts, then, I have to consider whether the defendants are liable for the damage which the plaintiff has sustained.

3. In the argument before us, the counsel for the plaintiff relied upon the rule of law laid down by the Court of Exchequer Chamber and the House of Lords in *Fletcher v. Rylands* L.R. 1 Ex., 265; S.C., 35 L.J. Ex., 155 and *Rylands v. Fletcher* L.R., 3 H.L., 330; S.C., 37 L.J. Ex., 161. There A. was the lessee of mines, and B. the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the

land above, and which also had been out of use for years, and were apparently filled with mud and the earth of the surrounding land. No care was taken by the engineer or contractor to block up these shafts, and shortly after water had been introduced into the reservoir, it broke through some of the shafts, flowed through the old passages, and flooded A.'s mine. The Lord Chancellor (Lord Cairns) said, "The principles upon which the case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or under ground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground, in quantities and in a manner not the result of any work or operation, on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their peril; and if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable." It appears to me that, applying that principle to the present case, the defendants are not, upon the facts which have been proved, liable for the injury which the plaintiff has sustained. The upper floor was let by the plaintiff and his partner to the defendants to be used as a godown, and the storing of goods there was a purpose for which it might, in the ordinary course of enjoyment, be used. The storing of the goods on the upper floor was a lawful user, and authorized by the terms of the tenancy. As long as the defendants used the upper floor in a reasonable and proper manner, and did not load an unreasonable and improper quantity of goods upon it, they were not using it for a purpose which the Lord Chancellor says he might turn a non-natural use. To make the principle applicable, it was necessary for the plaintiff to show that the defendants used the floor in an unreasonable and improper manner, and this he has failed to do; because, although in some cases an accident of this kind might of itself be evidence that the upper floor was unreasonably and improperly used, it cannot be so where it is proved that the floor was insufficient to bear the weight which might ordinarily and properly be put upon it. Where the facts are equally consistent with the presence or absence of negligence, the plaintiff cannot recover--*Cotton v. Wood* 8 C.B., N.S., 568 and the defendants are not bound to show that there was no negligence. Lord Cranworth said he concurred in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber:--"If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at

his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." But I think these words must be understood, with reference to the facts of the case before him, where the person was not the tenant of his neighbour, and the bringing the thing on the land was not in accordance with or authorized by the terms of a tenancy between them. This appears more clearly in Mr. Justice Blackburn's judgment. He says:--"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, and answer for the natural and anticipated consequence. And upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." Mr. Justice Blackburn does not say that, if the person damnified had let the reservoir to his neighbour, and he was only using it in the ordinary way, or had let the alkali works, and the fumes and vapours were only such as were ordinarily caused by the use of the works, that the tenant would be liable for the injury. None of the cases which he proceeds to notice would have supported this proposition, and I think it is clear, from the whole of his judgment, that he would not have applied the rule in such a case. In the case of landlord and tenant, the true rule seems to be that the tenant is not liable, unless the premises are used in an unreasonable and improper manner, or for a different purpose from that for which they were let. The operation of the rule *sic utere tuo ut non laedas alienum* is qualified by the tenancy, by which an authority is given to use the premises in a certain manner. It would be obviously unjust to make the tenant liable to make good to the landlord any injury to him which is caused only by the premises being so used. The case of *Murphy v. Black* 19 C.B., N.S., 190 was decided upon this principle. There it was held that the licence of the vendor of two ordinary lots of lands, the plaintiff standing in exactly the same position as if his lot had remained in the vendor's possession, took away that which would otherwise have been a cause of action for depriving his building of the support it had from the defendant's land. And *Rowbotham*

v. Walson 6 E. & B., 593; S.C., 8 H.L.C., 348 is an analogous case. The landlord has taken upon himself the risk of the premises being used as a godown, and the rent may be considered as partly paid for it. I think the true principle has been applied in this case, and that, upon the evidence which was given, the plaintiff is not entitled to recover for the damage he has sustained.

4. Mr. Justice Norman has authorized me to say that, although he does not entirely concur in this judgment, he does not think it necessary to give a separate one.

Markby, J.

I am of the same opinion.