to administration. But in the present case neither of those things comes in the way, for the order had not been drawn up, and until an order is drawn up the Court can correct it. So that the Supreme Court had jurisdiction at the date of the application to make the appellants parties to the action, and we think they were entitled *ex debito justitiæ* to be made parties.

The appeal will therefore be allowed and the order of the Supreme Court will be discharged. By consent the costs of all parties will be paid out of the general corpus of the estate, including the costs of the application to *Hood* J.

Appeal allowed. Order appealed from discharged.

Solicitors, for appellants: *Abbott & Beckett.*

Solicitors, for respondents: *N. J. Casey*; *W. H. Lewis*; *J. B. Kiddle.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SPARKE . . . . . APPELLANT;
DEFENDANT,

AND

OSBORNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *July* 27, 28, 31.

Adjoining landowners, liability of—Failure to keep down noxious weed—Prickly pear growing naturally on land—Injury to neighbour's fence—Nuisance.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

An occupier of land is under no duty at common law to keep down a noxious weed, such as prickly pear, growing naturally on his land so as to

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prevent it from spreading or extending to his neighbour's land; and if, owing to his failure to keep it down, it grows in such a way as to damage his neighbour's fence that is not sufficient to render him liable.

Crowhurst v. *Amersham Burial Board*, 4 Ex. D., 5, and *Smith* v. *Giddy*, (1904) 2 K.B., 448, distinguished.

Decision of *A. H. Simpson* C.J. in Equity (*Osborne* v. *Sparke*, (1907) 7 S.R. (N.S.W.), 842), reversed.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity.

The respondent was the owner of a station property known as Ridgelands in New South Wales, and the appellant was the owner of land adjoining it on the eastern boundary. On the appellant's land there was growing a quantity of prickly pear, a very destructive and rapidly growing weed. The respondent brought a suit in equity against the appellant, alleging in his statement of claim that the prickly pear on the appellant's land had grown in such a way as to overhang the respondent's land and was spreading to his land from that of the appellant. He alleged that the prickly pear had damaged the fence on the boundary between his property and that of the appellant for a distance of about nine miles, by breaking down the wire netting attached to the fence for the purpose of keeping out native dogs, and that in consequence, through the gaps so made in the fence, native dogs had come upon his land and destroyed large numbers of his sheep. He claimed that the action of the appellant in failing to keep down the prickly pear was a trespass and a nuisance, and asked for an injunction restraining the appellant from allowing the prickly pear to grow in such a way as to overhang the fence, and for damages. It was not alleged that the appellant was in any way responsible for the introduction of the prickly pear to his land.

The appellant denied liability for the damage, if any, and on the suit coming on for hearing demurred *ore tenus* to the statement of claim. *A. H. Simpson* C.J. in Equity overruled the demurrer and referred to the Master-in-Equity to inquire and report as to damages (1). From this decision the present appeal was brought.

(1) (1907) 7 S.R. (N.S.W.), 842.

Pilcher K.C. and *Knox* K.C. (*Lingen* with them), for the appellant. An owner of land is not liable for injury caused to his neighbour by things growing on his land unless the injury is the result of some actual interference or negligence on his part. *Rylands* v. *Fletcher* (1) lays down the principle that in the absence of negligence the owner is not liable, if he leaves his land in its natural state, but if he brings anything upon it that may escape and become mischievous, even without negligence on his part, he will be liable for any injury naturally flowing from its escape. He must keep the dangerous thing in check at his peril. But as long as the land is left in its natural state the owner is under no duty at common law to safeguard his neighbour against injury arising from the spread of anything noxious. In *Crowhurst* v. *Amersham Burial Board* (2) the injury was caused by a yew tree planted by the defendant, and the Court rested its decision upon *Rylands* v. *Fletcher* (1). But for the defendant's act in bringing the tree on his land the injury would not have been caused. If a fire comes on a man's land by accident and without any intervention on his part, he is not liable for its spreading to a neighbour's land: *Batchelor* v. *Smith* (3): but if he lights a fire he does so at his own risk, and is liable for damage caused to others by its escape: *Sheehan* v. *Park* (4). So also if water that comes naturally on a man's land escapes and causes injury to another, he is not liable: *Peers* v. *Victorian Railways Commissioners* (5); *Whalley* v. *Lancashire and Yorkshire Railway Co.* (6). In *Smith* v. *Giddy* (7) an owner of land was held liable for injury caused to his neighbour by trees on his land. If it was intended to decide that the owner was liable for injury caused to his neighbour by any kind of growth upon his land, it is not in accordance with *Rylands* v. *Fletcher* (1). The decision was probably based on the fact that the trees in question were elm and ash trees, which are ornamental and valuable for timber, and consequently are usually cultivated and preserved by the owner. Even if not planted by the owner they are adopted by him. An owner is not liable for the spread of

(1) L.R., 3 H.L., 330.
(2) 4 Ex. D., 5.
(3) 5 V.L.R. (L.), 176; 1 A.L.T., 12.
(4) 8 V.L.R. (L.), 25; 3 A.L.T., 98.
(5) 19 V.L.R. 617; 15 A.L.T., 162.
(6) 13 Q.B.D., 131.
(7) (1904) 2 K.B., 448.

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thistles from his land to his neighbour though he could have prevented the damage by cutting the thistles periodically: *Giles* v. *Walker* (1). *Lemmon* v. *Webb* (2), which was relied upon by *A. H. Simpson* C.J. in Equity, was an action for abating a nuisance without notice. It does not affect the question of liability for damage caused by the alleged nuisance. The decision was that a nuisance caused by overhanging growths might be abated without notice because there was no necessity to go upon the land of the adjoining owner for the purpose of abating it. The plaintiff, in order to succeed in an action for damages caused by a nuisance, must show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary for the natural use of his land: per *Brett* J., *West Cumberland Iron and Steel Co.* v. *Kenyon* (3). There is no allegation here that the prickly pear came on the defendant's land during his period of ownership. This decision would render the defendant liable for every kind of noxious thing that came from his land to the plaintiff's land.

The defendant might be under a duty if the provisions of the *Prickly Pear Destruction Act* 1901 had been followed, but under that Act there is no duty to keep down the weed until a certain notice has been given, and even then the duty is not a duty to the plaintiff but to the public. Where a Statute imposes a duty and provides a means of enforcing it, it can only be enforced in that way: *Pasmore* v. *Oswaldtwistle Urban District Council* (4). [They referred also to *Greenwell* v. *Low Beechburn Coal Co.* (5).]

Gordon K.C. and *Maughan*, for the respondent. If a man has growing upon his land a tree or other plant which overhangs his neighbour's land owing to his omission to cut it back, he is guilty of a nuisance and is liable for the damage caused thereby. The case is different from the case of a noxious thing escaping to a neighbour's land, in that the thing which did the harm is actually growing on the defendant's land and under his control. The plaintiff clearly has a right to lop the weed that overhangs his land to abate the nuisance, and the right of action for damage is

(1) 24 Q.B.D., 656.
(2) (1894) 3 Ch., 1; (1895) A.C., 1.
(3) 11 Ch. D., 782, at p. 787.
(4) (1898) A.C., 387, at p. 394.
(5) (1897) 2 Q.B., 165.

on the same footing. There is no difference in principle between the case of a natural wild growth and cultivated trees. The owner of the land is the owner of the growth in each case. It may be conceded that there is no liability for the spread of weeds to a neighbour's land by seeding because there the thing that injures the neighbour is an independent growth. But if the plant which causes the damage remains a part of the parent stem, the owner of it is liable. Whenever damage is caused an action for nuisance will lie: *Pollock on Torts*, 8th ed., pp. 406, 491; *Gale on Easements*, 8th ed., p. 473; *Earl of Lonsdale* v. *Nelson* (1); *Smith* v. *Giddy* (2). Every owner of land is under a duty to prevent things growing on his land from injuring his neighbour. In England no distinction has been made between the case of cultivated trees and wild growths.

[GRIFFITH C.J.—There is no analogy between the conditions in this country and those in England.]

The only difference is that there are more wild growths here than there. *Lemmon* v. *Webb* (3) is an authority for the plaintiff. So is *Pickering* v. *Rudd* (4).

[GRIFFITH C.J.—The right to abate a nuisance is not coincident with the right to bring an action for damages. A nuisance to a highway may be abated by a member of the public, but there is no private right of action.]

That is so in the case of a highway, but in the case of private property the rights are co-extensive if damage is caused. In *Smith* v. *Giddy* (2) there was no evidence of anything done by the defendant. The mere omission to prevent the trees from overhanging rendered the defendant liable to an action. In *Lemmon* v. *Webb* (3) there was nothing but ownership of the tree and omission to keep it cut back.

[ISAACS J.—Why, then, in *Crowhurst* v. *Amersham Burial Board* (5), did the Court lay so much stress on the fact that the defendants had planted the tree?]

Possibly because it was poisonous and dangerous. The action was not for overhanging, but for injury to the plaintiffs' horses. The plaintiff does not rest his case on *Rylands* v. *Fletcher* (6). It

(1) 2 B. & C., 302.
(2) (1904) 2 K.B., 448.
(3) (1894) 3 Ch., 1; (1895) A.C., 1.
(4) 1 Stark., 56; 4 Camp., 219.
(5) 4 Ex. D., 5.
(6) L.R. 3 H.L., 330.

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is not alleged that there is a dangerous thing on defendant's land. The liability is based on the duty of a landowner to use his land in such a way as not to injure his neighbour. The damage was something that the defendant could have prevented, yet did not. If the planting of the tree was material there would have been some reference to it in the pleadings in *Smith* v. *Giddy* (1). Ownership of the soil is the only test referred to : 1 *Hawk, P.C.*, 701 ; *Lemmon* v. *Webb* (2) ; *Ackroyd* v. *Campbell* (3). The fence should be presumed to be the property of the plaintiff as the injury to it is alleged as damage to the plaintiff.

[ISAACS J. referred to *Smith's Leading Cases*, 11th ed., p. 801 ; *Encyclopædia of the Laws of England*, vol. I., pp. 10, 296.]

Pilcher K.C., in reply, referred to *Pollock on Torts*, 8th ed., p. 349 ; *Beven on Negligence*, 3rd ed., vol. I., p. 406 ; *Farrer* v. *Nelson* (4) ; *Brady* v. *Warren* (5).

Cur. adv. vult.

July 31.

GRIFFITH C.J. This case arises upon what is called in New South Wales a demurrer *ore tenus* to the statement of claim in an equity suit. The plaintiff complains that he and the defendant are neighbours in the country, their common boundary extending for about nine miles ; that there is growing on the defendant's land near the plaintiff's boundary a noxious weed known as prickly pear, that in many places this overhangs the plaintiff's land and has damaged the dividing fence upon the boundary, by reason of which native dogs have got through and injured the plaintiff's sheep. The statement of claim does not allege that the prickly pear was brought there by the defendant or that the defendant is guilty of any negligence in the management or control of his land. The case is rested entirely upon the presence of the prickly pear on the defendant's land extending up to and injuring the fence. The learned Judge from whose decision the appeal is brought was of opinion that, in any case in which a man allows plants growing on his land to overhang his neighbour's land, that is a nuisance, and that the neighbour may either abate the

(1) (1904) 2 K.B., 448.
(2) (1894) 3 Ch., 1, at p. 15.
(3) 11 N.S.W.L.R., 470.
(4) 15 Q.B.D., 258
(5) (1900) 2 Ir., 632.

nuisance or bring an action, if damage is caused to him, and he thought that it made no difference whether the vegetation in question was a natural growth or had been planted, whether it was valuable property or a noxious weed. The mere allowing it to overhang was in his opinion wrongful, and actionable if followed by damage. It is admitted that there is no precedent for such an action in England, or, so far as appears, in any English speaking community. The plaintiff relied upon the case of *Crowhurst* v. *Amersham Burial Board* (1), which came before the Exchequer Division in 1878, and one or two other cases in which that case has been cited. That was an action by the plaintiff against the defendants for injury sustained by the plaintiff owing to the fact that a yew tree, which the defendants had planted in a cemetery belonging to them, had grown over the boundary between the cemetery and the plaintiff's land so that the plaintiff's cattle had fed upon the leaves and suffered injury. The Court rested their decision upon the doctrine established in *Rylands* v. *Fletcher* (2), that a person, who for his own purposes brings upon his land and collects and keeps there anything which is likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so he is *primâ facie* responsible for all the damage that is the natural consequence of its escape. But that doctrine applies only to acts of commission on the part of the owner of the land, and has nothing to do with the case of mere omission. The plaintiff also relied upon a later case, *Smith* v. *Giddy* (3), before two learned Judges of the King's Bench Division, in which it was held, according to the headnote, that an action lies against an adjoining landowner for allowing his trees to overhang the boundary to the damage of his neighbour's crops. In that case the trees were elm and ash trees, which had injured the plaintiff's fruit trees by overhanging them. The Court thought the case came within the principle of *Crowhurst* v. *Amersham Burial Board* (1). Whether what was said in that case was intended to apply to every instance in which a tree upon one piece of land belonging to one person overhangs land belonging to another is very doubtful. The trees in question were, as I have said, elm

(1) 4 Ex. D., 5.

(2) L.R. 3 H.L., 330.

(3) (1904) 2 K.B., 448.

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and ash trees, and it may, I think, be assumed that Judges sitting in England, dealing with a case of that sort, would recognize the fact that trees of that description were not mere wild growths that had sprang up by the process of nature and unforeseen by the owner of the land, but were probably regarded by him as cherished possessions, to which he paid as much attention and devoted as much care as if he had himself planted them. So that, upon the principle of *Crowhurst* v. *Amersham Burial Board* (1), *Smith* v. *Giddy* (2) can be supported upon the assumption that the learned Judges who decided it thought, if the fact was material, that the trees had been improved and kept by the owner, and, therefore, that it was not a case of mere omission, the trees having been actively cherished and protected by the owner as valuable property. The case need not have gone further than that. If it was intended to go any further there is no other authority of which I am aware for the position. I apprehend that the true principle is that which was stated by *Brett* L.J. in the case of *West Cumberland Iron and Steel Co.* v. *Kenyon* (3):—"This action is brought on the ground of an alleged breach of the maxim *sic utere tuo ut alienum non lædas*. The cases have decided that where the maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he cannot succeed. So he must fail if he only proves that the defendant has used his land otherwise than in the natural way, but does not prove damage to himself." In the case of *Giles* v. *Walker* (4), decided in 1890 before two Judges of the Court of Appeal sitting as a Divisional Court, it was held that this doctrine did not apply to the case of thistles which the owner of land allowed to grow on his own land, and which caused detriment to his neighbour by reason of the seeds flying across the boundary. The case was treated as hardly deserving of serious consideration. Lord *Cole-*

(1) 4 Ex. D., 5.
(2) (1904) 2 K.B., 448.
(3) 11 Ch. D., 782, at p. 787.
(4) 24 Q.B.D., 656.

ridge L.C.J. said (1):—"I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil." Lord *Esher* M.R. concurred. It seems to me that the only principle applicable to such cases is that laid down by *Brett* L.J., that if a man by the active use of his land injures his neighbour's land and so deprives him of the natural advantages that he would have derived from his land but for the conduct of the defendant, the defendant is liable, but that he is not liable for mere non-feasance. The other view seems to be founded upon some such misapprehension as that which existed for a good while with regard to the case of *Borough of Bathurst* v. *Macpherson* (2) which was supposed to have decided that a highway authority, from the mere fact of having possession of a highway, was liable for non-feasance, and was bound to keep the highway in a safe condition. That idea was finally exploded in *Sydney Municipal Council* v. *Bourke* (3) where it was pointed out that a liability of that sort, if it is to exist, must be created by the legislature. Now in the present case the growth was prickly pear. I cannot distinguish that from the case of thistles. If there is any difference, it is this, that a person who is afflicted by having prickly pear on his land is perhaps deserving of more sympathy than the man who only has thistles. Anyone who has seen prickly pear growing as it grows in some parts of Queensland, for instance, knows that it would be casting an intolerable burden upon the owner of the land if he were compelled to warrant all his neighbours from its spreading into their land. It was admitted that the owner of land on which this curse springs up is not responsible for its seeds being carried by birds or its leaves being blown over the fence or over an imaginary boundary line, or for its roots spreading underground. But it is said that there was a difference if the weed spread by its leaves growing out laterally without being detached from the stem and so injured the fence. If that is so, the rule must be founded upon some strange caprice such as one certainly would not expect to find in the common law. I can find no trace in the law of

(1) 24 Q.B.D., 656, at p. 657. (2) 4 App. Cas., 256.
(3) (1895) A.C., 433.

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any doctrine that would authorize the Court to say that the owner of land afflicted by nature with a curse of this sort is under any liability to his neighbour because he is unable to keep it down. As I have said, if there is any such liability it must be imposed by the legislature, and that appears to have been the view that has always been adopted. For I think in nearly all the Australian States provision has been made by the legislature for dealing with cases of this kind, requiring a person afflicted by accident with the presence of a pest of this sort, as well as animal pests, on his land, to take precautions to prevent the pest from spreading to his neighbours. But that is always done by the legislature, and special precautions are taken to endeavour to ensure the common benefit without causing special injustice to the individual.

In my opinion there is no precedent for the action, and no principle of law upon which a liability can be founded. I think, therefore, that the appeal should be allowed.

BARTON J. This is an action brought in the Court of Equity by one of two adjoining owners of land against his neighbour, and is an attempt to hold the defendant liable, as for a breach of duty, for the consequences of the overhanging upon a boundary fence of prickly pear growing upon the defendant's land, which, it is alleged, causes and will continue to cause great loss and damage to the plaintiff, and has damaged the fence and has allowed the entrance of native dogs which have injured the plaintiff's flocks. The question arises upon a demurrer *ore tenus*. The statement of claim does not appear to be rested upon negligence, but upon a breach of duty which practically amounts to a nuisance. The arguments for the plaintiff rest on the cases which in some instances declare a liability for nuisance in the case of overhanging or projecting growths. The principle upon which cases of this kind rest is expounded in the case of *Rylands* v. *Fletcher* (1). In that case, in judgments delivered by Lord *Cairns* L.C. and Lord *Cranworth*, there was quoted with approval what was said by Lord *Blackburn*, then *Blackburn* J., in the Court of Exchequer Chamber, from which the appeal went to the House of Lords (2):—"We think

(1) L.R. 3 H.L., 330.

(2) L.R. 3 H.L., 330, at pp. 339, 340.

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 at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape." The same principle is applicable whether it is a case of bringing upon a neighbour's land, by a use which is not natural of one's own land, more water than otherwise it would have to bear, or of bringing upon one's own land something noxious, such as a vegetable or animal pest, by a use of one's land in some way beyond the ordinary and natural use. If such a use of one's own land brings as a consequence upon one's neighbour a loss or a burden which in ordinary circumstances he would not have to bear, the result is responsibility in law for that consequence. The principle is again illustrated in *Crowhurst* v. *Amersham Burial Board* (1). That is a case where yew trees were planted by the Amersham Burial Board some short distance from a railing fence between their cemetery and the plaintiff's property. The yew trees threw out branches beyond and through the railing upon the plaintiff's side, and their leaves became food for the plaintiff's horse, which ate them and was poisoned. The defendants were held liable upon the principle of *Rylands* v. *Fletcher* (2). That was an illustration of the comprehensiveness of the principle, applied as it was on the one hand to a question as to water between owners of adjoining property, and on the other to a question as to poisoning of horses by the leaves of a yew tree. The same principle was exactly applicable in each case. A third case which seems to me to have a very direct bearing upon the present question is *Giles* v. *Walker* (3). The head note of that case is as follows:— "An occupier of land is under no duty towards his neighbour to periodically cut the thistles naturally growing on his land, so as to prevent them from seeding; and if, owing to his neglect to cut them, the seeds are blown on to his neighbour's land and do damage, he is not liable." The land had been originally forest land. The defendant had gone into occupation in 1883, and the land had been brought under cultivation by the previous

(1) 4 Ex. D., 5.

(2) L.R. 3 H.L., 330.

(3) 24 Q.B.D., 656.

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occupier. The defendant proceeded to farm it. Before being cultivated it bore no thistles, but when the soil was turned over thistles sprang up all over it. There was nothing actively done by the defendant which was the subject of complaint. But he omitted to mow the thistles periodically so as to prevent them from seeding. The consequence was that before the action there were thousands of thistles on the land in full seed, and the seeds were blown on to the plaintiff's land which adjoined, where they took root and did damage. The damage so caused was the subject of the action. In the County Court the plaintiff succeeded; the Judge left to the jury the question of negligence, and they found that the defendant had been guilty of negligence. The case then went to appeal on the ground that the Judge was wrong in leaving to the jury the question of negligence. The report is very short, and the plaintiff's case was put by Mr. *Bray* in this way (1):—"If the defendant's predecessor had left the land in its original condition as forest land, the thistles would never have grown. By bringing it into cultivation, and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them. The defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbour. The case resembles that of *Crowhurst* v. *Amersham Burial Board* (2), where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died."

His Honor the Chief Justice has just read the judgment of Lord *Coleridge*, the substance of which is that there is no duty between adjoining owners to cut thistles the natural growth of the soil, which cannot be supposed to have been under the control of the defendant, and it is an illustration of the principle *sic utere tuo ut alienum non lædas*, because there was no such thing there as came within the meaning of the word *utere* at all. The defendant had done nothing that brought him within the operation of the rule, because he had not interfered with the growth.

(1) 24 Q.B.D., 656, at p. 657. (2) 4 Ex. D., 5.

It was nature and not his act which was responsible for what happened. That, it seems to me, is a very difficult case for the plaintiff to get over. This prickly pear plant is a natural growth in this country. It has become so, even if we are under a deep debt to somebody for having introduced it in the distant past. It is, as it is described by the plaintiff in his statement of claim, a noxious weed. It occupies practically the same position as the thistles in the case of *Giles* v. *Walker* (1), that is, it is a thing which had come there in early days so as to be at the time when the defendant occupied the land in the same position as if it had come in the course of nature. It is not alleged that he had any part in bringing it there, and whether it spread to the adjoining land by seeding and so caused damage, or whether damage arose from the prickly pear overhanging the fences and bearing them down, the reason of the thing is just the same. If the defendant in *Giles* v. *Walker* (1) was not responsible, neither, it seems to me, is the defendant here. I doubt whether there could be a clearer authority barring the way of the plaintiff to redress. But the plaintiff contends that, even in the case of trees which are the natural growth and have not been planted or brought on the land by the owner of the land, the owner is still responsible at law if any damage is caused to another through their overhanging his land, and that the same considerations apply to weeds such as prickly pear. And he relies upon the cases of *Lemmon* v. *Webb* (2) and *Smith* v. *Giddy* (3), and if there is anything in the plaintiff's argument, it must rest on the latter case, because *Lemmon* v. *Webb* (2) was cited merely for the value of some remarks that were not necessary to the judgment, but as to *Smith* v. *Giddy* (3), the plaintiff relies upon the decision itself. The latter case, which came after *Lemmon* v. *Webb* (2), was expressly rested upon *Crowhurst* v. *Amersham Burial Board* (4). I will read part of the judgment of *Wills* J. to show how far that reliance goes. The Court held that an action lay against an adjoining landowner for allowing his trees to overhang the boundary to the damage of the plaintiff's crops. *Wills* J. begins his judgment by stating (5) :—" that there is no case to

(1) 24 Q.B.D., 656.
(2) (1895) A.C., 1.
(3) (1904) 2 K.B., 448.
(4) 4 Ex. D., 5.
(5) (1904) 2 K.B., 448, at p. 450.

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be found in the books in which the action has been held to lie against an adjoining owner for allowing his trees to project over the boundary where the only damage resulting from the projection has been a damage to the plaintiff's crops. It was pointed out by *Kelly* C.B., in *Crowhurst* v. *Amersham Burial Board* (1) that there was no precedent for such an action, and it was there suggested that there was much to be said on grounds of general convenience in favour of such an action not being maintainable." (That is, an action for allowing trees to project over a boundary where the only damage is injury to the crops). "But I am of opinion," his Honor says, "that the principle upon which that case was decided is enough to enable us to decide the present case in favour of the plaintiff. There the action was brought against the owners of a yew tree which they or their predecessors in title had planted on their land and which they had allowed to overhang their boundary, whereby the plaintiff's horse in the adjoining meadow feeding on the projecting branches was poisoned; and it was held that the action lay. The Court treated the case as an illustration of the rule in *Rylands* v. *Fletcher* (2), that a person who brings on to his land something that is likely to do damage if it escapes is responsible if that damage occurs. It seems to me that there is no distinction in principle between the damage occasioned in that case and the damage in the present. The injury to the plaintiff's fruit trees was the natural consequence of the defendant's trees being allowed to overhang. I have come to this conclusion with considerable reluctance, for I have a strong feeling that it is highly desirable not to establish new causes of action, if it can possibly be avoided, but I do not see how we can refuse to hold that this action lies without departing from the principle of *Crowhurst's Case*" (1). And *Kennedy* J., who followed, said (3):—"I cannot differentiate the present case in principle from *Crowhurst* v. *Amersham Burial Board*" (1). Now, if that decision was based only upon the authority of *Crowhurst's Case* (1), it is important to consider that in that case the decision was distinctly rested by the Lord Chief Baron upon the fact that the defendants had brought the thing upon their land,

(1) 4 Ex. D., 5.
(2) L.R. 3 H.L., 330.
(3) (1904) 2 K.B., 448, at p. 451.

had themselves planted the yew trees. It was not contended for an instant, apparently, that if the defendants had not by that act of planting become responsible for the existence of the overhanging yew trees, the action would have lain. And if this case of *Smith* v. *Giddy* (1) is not to be regarded as extending the principle, and in the judgment any intention to extend it is denied, then it must rest upon something, not to be found in the report, which goes to show that the defendant was actively responsible for the overhanging of the yew trees, as in *Crowhurst's Case* (2). I think that the authority of *Smith* v. *Giddy* (1) should be restricted within the bounds of the decision in *Crowhurst's Case* (2), and that, until there is some authoritative decision that for damage arising from the mere overhanging of trees an action will lie where the defendant has not in any way brought about the cause of damage, it will be desirable to withhold any affirmation of a defendant's liability for that state of affairs. If one looks at the express disclaimer in the judgment of any intention to extend the principle of *Crowhurst* v. *Amersham Burial Board* (2), *Smith* v. *Giddy* (1) cannot be regarded as deciding that the defendant is liable for the overhanging, except where it arises out of some actual intervention on his part by which damage is caused. I am of opinion, therefore, that *Smith* v. *Giddy* (1), which is the only case upon which the plaintiff can rely as an express authority for his position, does not overweigh the distinct authority of such cases as *Rylands* v. *Fletcher* (3) and *Giles* v. *Walker* (4), which establish that where ground or land is simply used in the natural and ordinary way, and where nothing is brought upon it, or manipulated while there, by the defendant so as to cause damage which would not otherwise have occurred, there is no cause of action. Holding that opinion, I agree with His Honor the Chief Justice that the appeal must be allowed.

O'CONNOR J. read the following judgment:—The plaintiff and the defendant are adjoining station-owners with a native-dog proof fence on their common boundary. The complaint is that

(1) (1904) 2 K.B., 448.
(2) 4 Ex. D., 5.
(3) L.R. 3 H.L., 330.
(4) 24 Q.B.D., 656.

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the defendant has allowed a noxious weed, called prickly pear, to grow on his land in such a way as to overhang the plaintiff's land over the fence, thereby making gaps in the fence which render it no longer dog proof.

Prickly pear, as is well known, is a pest in this and other States of Australia, deteriorating the value of land on which it grows, spreading so rapidly and being so difficult to eradicate that its extermination has been the subject of State legislation for the last twenty years, and under the Act at present in force in New South Wales, the *Prickly Pear Destruction Act* 1901, any landowner may be called upon by the Government to exterminate prickly pear growing on his land, and if he fails to do so, he will become liable to a penalty recoverable on summary conviction. As might be expected under these circumstances, there was no suggestion that the defendant had by any act of his brought the prickly pear on his land, nor was it alleged that he had done anything which would tend to make it grow over the plaintiff's land more rapidly or more abundantly than it would in the course of nature. The wrongful act charged was, therefore, not an act of commission, but an act of omission—the omission to discharge a duty to the adjoining owner. That duty was stated by Mr. *Gordon* substantially in these terms:—Every owner of land on which there is prickly pear is bound at his peril to prevent its growing on his boundary in such a way as to overhang his neighbour's land, and if damage arises to the neighbour from neglect of that duty, the landowner is liable to an action for nuisance at the suit of his neighbour. The Chief Judge in Equity upheld that contention in these very general terms (1):—"In my opinion the principle is clear. If a man allows his trees to overhang his neighbour's land and do him damage, that is a nuisance, and the neighbour may either abate the nuisance or bring an action. And to my mind it makes no difference in principle whether the trees have been planted by the defendant or his predecessors or whether they are of natural growth, nor whether they are valuable property or merely noxious weeds; in each case if they have been *allowed* to overhang and do damage the above remedies are available."

(1) (1907) 7 S.R. (N.S.W.), 842, at p. 844.

If that is a correct statement of the law, then in the circumstances existing in all the States a very heavy burden is placed on all landholders on whose land prickly pear is growing. The matter for our determination is whether the law does or does not impose that burden in such a case as the present. In the circumstances with which we are now dealing a landowner's obligations to his neighbour in respect of his land are summed up in the maxim, "*Sic uters tuo ut alienum non lædas*," so clearly expounded in *Rylands* v. *Fletcher* (1). Setting aside questions of custom and servient and dominant tenements which do not arise here, the landowner is entitled to what Lord *Cairns* L.C. calls in that case the "natural user" of his land, and if by reason solely of the ordinary operations of nature on his own land damage may happen to his neighbour, he is not responsible for that damage, nor is he under any obligation to take action to prevent its happening. It was on that ground that *Giles* v. *Walker* (2), an appeal from the County Court, was decided, and the principle of that decision is exactly applicable to the matter in hand. In that case the defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but immediately on its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and for several years before the injury complained of arose there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the winds in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the County Court. The defence was that, as the defendant had not brought the thistles on the land, but they grew there naturally, there was no obligation on his part to mow them so as to prevent the seed from being carried on to his neighbour's land. Lord *Coleridge* C.J. in the Court of Appeal disposed of the case in these words (3):—"I never heard of such

(1) L.R. 3 H.L., 330.
(2) 24 Q.B.D., 656.
(3) 24 Q.B.D., 656, at p. 657.

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an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed." In that view Lord *Esher* M.R. concurred.

In the circumstances before us prickly pear is as much a "natural growth of the soil" as thistles were in that case, and I can see no difference in principle between the legal duty to so keep thistles as to prevent their seed from being blown on to adjoining land and so to keep prickly pear as to prevent its overhanging the adjoining land. The plaintiff however relied on *Smith* v. *Giddy* (1), and on a general statement of the law in *Pollock on Torts*, 8th ed., pp. 349, 406. In *Smith* v. *Giddy* (1), the plaintiff claimed that he had sustained damage by reason of certain elm trees and ash trees growing on the defendant's premises overhanging the plaintiff's premises and interfering with the growth of his fruit trees. The County Court Judge nonsuited the plaintiff, holding that his only remedy was to abate the nuisance by cutting back the overhanging trees himself. On appeal to the King's Bench Division, *Wills* J. and *Kennedy* J. held that the action was maintainable. Both learned Judges rested their judgments expressly on the decision in *Crowhurst* v. *Amersham Burial Board* (2). It is to be noted, however, that in *Smith* v. *Giddy* (1), the question of fact, which was treated in the former case as one of the most important factors in the decision, was not raised, namely, whether the trees causing the injury had or had not been originally brought on the land by the defendant or his predecessors in title. It may be that, having regard to the nature of the trees, both parties took it for granted that the defendant or his predecessors in title were responsible for bringing the trees on his land, or had dealt with them in such a way as to adopt them for purposes of use or ornament in the occupation of the premises. On that assumption the case may be supported as an application of the principles laid down in *Crowhurst* v. *Amersham Burial Board* (2). But, unless that is assumed, the decision cannot be supported on any principle known to the British law. In *Crowhurst* v. *Amersham Burial Board* (2), *Kelly* C.B. who delivered the judgment of the Court,

(1) (1904) 2 K.B., 448.

(2) 4 Ex. D., 5.

based his decision expressly on the principle laid down in *Fletcher* v. *Rylands* (1), in these words (2):—"The principle by which such a case is to be governed is carefully expressed in the judgment of the Exchequer Chamber in *Fletcher* v. *Rylands* (3), where it is said, '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 at his peril; and if he does not do so is *primâ facie* answerable for all the damage which is the natural consequence of its escape.'"

It was taken as proved that the yew tree was analogous to "a thing likely to do mischief if it escaped," but in order to determine whether the landowner was under an obligation to keep it within his own land at his peril, it was deemed necessary to ascertain whether he or his predecessors in title had brought it there. In reference to that the learned Chief Baron says (4) in referring to the facts on which the decision is based:—"In the first place, we consider that the Judge has so found the facts, as to the planting and growth of the yew trees, as to preclude the supposition of mere accident: and that the trees must be taken so to have been planted and grown, with the knowledge of the defendants, as to make them responsible for whatever might be the direct consequence of the original planting." On these facts the judgment is expressly based.

The decision is therefore an authority for the proposition that, where a landowner brings on his land a tree the branches of which if allowed to overhang a neighbour's land will be likely to cause injury to the neighbour, there is imposed on the landowner a duty to keep the tree so clipped that it shall not overhang, and a neglect of that duty to the damage of the neighbour will be actionable. The case is certainly not an authority for the proposition that there is a duty on a landowner to keep from overhanging his neighbour's land every tree or plant which may cause damage by so overhanging, irrespective of whether it was brought there by the landowner or was the natural growth of the land in a state of nature.

(1) L.R. 3 H.L., 330.
(2) 4 Ex. D., 5, at p. 10.
(3) L.R. 1 Ex., 265, at p. 279.
(4) 4 Ex. D., 5, at p. 9.

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The passage in *Pollock on Torts*, relied on by Mr. *Gordon*, refers only to two authorities, the judgment of Mr. Justice *Best* in the case of *Earl of Lonsdale* v. *Nelson* (1) and *Smith* v. *Giddy* (2). I have already shown that the latter can be no authority for such a proposition. Mr. Justice *Best's* judgment is dealing with the right of abatement in quite another matter, kind of injury by nuisance.

In making a general statement, with reference to the rights of a person injured by a nuisance to abate it, he says that a person may abate the nuisance of overhanging trees by clipping them himself without notice to the owner. It is true that incidentally he speaks of allowing branches to overhang as a most unequivocal act of negligence. But the proposition stated in the text book relied on by the respondent did not come up for discussion in that case. No such principle is laid down there, nor is there any statement in the judgment which authorizes the broad statement made by the learned authors. On the other hand, in the last edition of *Beven on Negligence*, the learned editors, in commenting on *Smith* v. *Giddy* (2), point out that it is plainly distinguishable from *Crowhurst* v. *Amersham Burial Board* (3), and suggest that if the learned Judges in that case had considered *Giles* v. *Walker* (4) they would probably not have affirmed the proposition in the general terms used in their judgment.

I am of opinion, therefore, that neither on principle nor on authority is there any justification to be found for extending the liability of a landowner as far as the decision under appeal would carry it. It is not necessary here, nor would it be possible, to lay down generally the proposition that a landowner is under no circumstances bound to keep a tree or plant of natural growth from overhanging his neighbour's land. There may be circumstances under which the overhanging of a tree or plant the natural product of the soil would, if it caused damage to the adjoining landowner, amount to an actionable nuisance. But in all such cases there must have been some act done by the landowner in the use of his land which has rendered the wild growth more likely to injure, or there must have been some use or adoption of

(1) 2 B. & C., 302, at p. 311.
(2) (1904) 2 K.B., 448.
(3) 4 Ex., 5.
(4) 24 Q.B.D., 656.

it by the landowner which put it in the same position as a growth brought by him upon his land. In the present case no such elements of liability exist. A noxious weed, which for the purposes of our decision must be taken to be a natural growth, is upon his land. In the course of nature it grows so as to overhang the plaintiff's land. For that overhanging the defendant cannot under any principle of law be made liable.

For these reasons I am of opinion that the decision in the Court below must be set aside and the appeal allowed.

ISAACS J. read the following judgment:—The respondent's case rests upon the contention that every landowner is bound at his peril to prevent damage to his neighbour by reason of plants of any kind extending over his boundary, and irrespective of whether their growth and development are entirely the work of nature or not.

In my opinion that contention cannot be sustained. If the plant which has caused the damage is entirely a product of natural causes; if the defendant and his predecessors have done nothing in the way of planting, trimming, guiding, cultivating or other interference which has affected the growth, development or condition of the plant; if in no way the existence or dangerous character of the vegetation is attributable to any act of the defendant or those for whom he is responsible, he is not answerable for the damage. The adjoining owner may lop overhanging branches as he pleases, and so guard himself against any nuisance to him or his property: *Lemmon* v. *Webb* (1); but he cannot recover from his neighbour compensation for a burden which nature alone has imposed upon him, and to which his neighbour has not in any degree contributed. Here the damage is not in any form, directly or remotely, the result of the act of man. In the absence of any special relation between the parties, their respective rights in this connection must depend upon the principle of law embodied in the maxim "*sic utere tuo ut alienum non lædas.*" In *Tenant* v. *Goldwin* (2) *Holt* C.J. says:—"Every one must so *use* his own, as not to do damage to another," and "every man must take care to *do* his neigbour no damage."

(1) (1895) A.C., 1.

(2) 2 Raym. (Ld.), 1089, at p. 1092.

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This is the fundamental principle which has governed all relevant decisions, of which *Rylands* v. *Fletcher* (1) is the leading case, and *Snow* v. *Whitehead* (2); *Ballard* v. *Tomlinson* (3), are examples. In *Snow* v. *Whitehead* (4) *Kay* J. states the rule in these words :—"Any one who brings on his land that which in a natural state of the land would not be there, whether it be filth or water, or whatever else it be, is bound to keep it there, and answerable if it escapes in any way and injures the land of his neighbour unless it be owing to the neighbour's default." There are two decisions which appear to me to definitely mark the respective limits of liability and non-liability. The first is *Crowhurst* v. *Amersham Burial Board* (5). If the respondent's view were correct the decision could have been rested simply upon the admitted fact that the branches of the yew tree were overhanging the plaintiff's land and caused him damage. But the learned Chief Baron felt it necessary to include within the essential facts, not merely that the trees were the result of artificial planting, but that the planting was not a mere accident, and that the trees were so planted and grown with the knowledge of the defendants as to make them responsible for whatever might be the consequence of the original planting. This position once reached, the rule governing *Rylands* v. *Fletcher* (1) became at once applicable, namely, that the person, who for his own purpose brings on to his land anything likely to do mischief, must retain it there at his peril. The learned Chief Baron puts the question in these words (6):—"Was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupier of the adjoining field, which, when damage arose from it, would give the latter a cause of action?"

The omission there referred to did not mean omission to prevent the encroachment of a tree, for the origin or condition of which the defendant was in no way responsible, but the omission to guard against the natural consequences of the defendant's own act. Absolute and complete inaction in relation to land is not use

(1) L.R. 3 H.L., 330.
(2) 27 Ch. D., 588.
(3) 29 Ch. D., 115.
(4) 27 Ch. D., 588, at p. 590.
(5) 4 Ex. D., 5.
(6) 4 Ex. D., 5, at p. 9.

of the land, and the maxim *sic utere tuo, &c.*, does not apply. It was on this principle that in *Giles* v. *Walker* (1) the defendant was held not liable for the spreading of thistles to the plaintiff's land.

Nature alone had caused the damage; and he who sustained it had to bear it. The loss lay where it fell. Mr. (now Justice) *Bray* was of counsel for the plaintiff and sought in that case to escape from this obvious difficulty by urging that the defendant, by cultivating his land and so disturbing its natural condition as forest land, had been the active though remote cause of the injury.

But to accede to this would have been rewarding ingenuity at the expense of sound sense. Unless that case can be distinguished in principle from the present it is, of course, fatal to the plaintiff. It was sought to establish a distinction in this respect, that there the seeds first separated themselves from the defendant's thistles and fell upon the plaintiff's land as no part of the defendant's property, whereas in the present case the objectionable intrusion was by a still connected portion of a tree which grew on defendant's land. But that argument cannot prevail. If a man lit a fire on his land and sparks flew over into his neighbour's land and destroyed the crops, he could scarcely claim exemption on the ground that the conflagration between his and his neighbour's land was not one continuous sheet of flame. The particular mode in which the damage is sustained, whether by overhanging leaves, or poisonous particles separately passing from one property to the other, is immaterial. The vital question is, did the defendant, or those for whom he is responsible, do anything to cause the damage. In the contemporaneous reports of *Giles* v. *Walker* (1), this clearly appears as the test. In the *Law Journal Report* (2) Lord *Esher* M.R., in answer to Mr. *Bray's* ingenious argument said:—"The defendant did not bring the seed there;" that is on to the defendant's land—in other words, did not plant his thistles; and in referring to *Crowhurst's Case* the learned Judge observed:—"There the yew tree had been taken on the land and planted there by the Burial Board." In the *Law Times Report* (3) his

(1) 24 Q.B.D., 656.
(2) 59 L.J.Q.B., 416, at p. 417.
(3) 62 L.T., 933, at p. 934.

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Lordship said *in arguendo* :—" This damage is not caused by any act of the defendant. Can you show us any case that goes so far as to say that, if something comes on a man's land for which he is in no way responsible, that he is bound to remove it, or else prevent its causing injury to any of his neighbours ?" The only reply learned counsel could make to that question was to refer to *Crowhurst's Case* (1) which the Master of the Rolls answered as already mentioned in the *Law Journal*. This point is made evident in the report of the case in the *Justice of the Peace* (2). I therefore see no possibility of distinguishing the present case from the high authority of *Giles* v. *Walker* (3).

Between the initial act of planting which originates the evil as in *Crowhurst* v. *Amersham Burial Board* (1) and complete abstention from all interference whatever, as in *Giles* v. *Walker* (3), there may be intermediate acts of a character which involve liability. Such a case is exemplified by *Turner* v. *McChesney* (4) where *Williams* J. held the defendant responsible for damage caused to a neighbour's fence by a native tree falling upon it. The liability was sustained because the defendant had burnt the scrub on his land and weakened the tree and so by his act altered its natural condition. *Smith* v. *Giddy* (5) must be understood, especially when the collateral reports of that case are looked at, as a case of artificially planted trees, and for which planting the defendants were considered responsible. There is no doubt this assumption was made by the learned Judges who decided it, and whether the facts warranted the assumption or not is immaterial. The appeal must, in my opinion, be allowed.

HIGGINS J. read the following judgment :—The plaintiff's case is now limited to this—that prickly pear growing on the defendant's land has damaged the fence on the boundary between the plaintiff's land and the defendant's, by breaking down the dog proof wire netting attached to the fence. There is no allegation that the plaintiff is owner, or part owner, of the fence. Of course, if the fence belongs to Sparke, the defendant, he may take it down with impunity. There is no common law liability to fence

(1) 4 Ex. D., 5.
(2) 62 J.P., 599.
(3) 24 Q.B.D., 656.
(4) 20 N.Z.L.R., 768.
(5) (1904) 2 K.B., 448.

his land, or to keep it fenced, or to maintain wire-netting. On this demurrer the statement of claim should be read strictly against the plaintiff; but the parties desire, I understand, to deal with the dispute on the assumption that Sparke has no right to break down this fence. The short answer is that he is not breaking it down. The prickly pear is breaking it down; and the prickly pear is not Sparke's agent or instrument, does not even come on his land by his acts or with his assistance. No doubt, he is passively allowing the prickly pear to grow and to spread; but I know of no duty imposed by the British common law—apart from such statutory duty as Parliament may impose —on a landowner to do anything with his land, or with what naturally grows on his land, in the interests of either his neighbour or himself. If he use the land, he must so use it as not thereby to injure his neighbours: *sic utere tuo ut alienum non lædas.* But if he leave it unused, and if thereby his neighbours suffer, he is not responsible. So long as he does nothing with it, he is safe. It is not he who injures the neighbour—it is Nature; and he is not responsible for Nature's doings. The cases which have been cited show clearly enough the right of the neighbour to lop off the branches projecting over his land; but we have not been referred to any case in which it has been held that the owner of land is responsible to his neighbours for a nuisance or other damage which he did not create, and which is not owing to any action on his part. The authorities have already been amply cited and discussed.

Appeal allowed. Judgment appealed from reversed. Suit dismissed with such costs as are payable on allowance of demurrer ore tenus. Respondent to pay the costs of the appeal.

Solicitors, for the appellant, *Norton, Smith & Co.*
Solicitors, for the respondent, *Wilkinson & Osborne.*

C. A. W.