[HIGH COURT OF AUSTRALIA.]

WHINFIELD . . . . . APPELLANT;
PLAINTIFF,

AND

THE LANDS PURCHASE AND MANAGEMENT BOARD OF VICTORIA AND THE STATE RIVERS AND WATER SUPPLY COMMISSION OF VICTORIA
DEFENDANTS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 16, 17, 18, 22.

Griffith C.J., Isaacs, Powers and Rich JJ.

Fire—Duty to keep safe—Negligence—Camp fire lit in open—Permission of person having control of land—Fire for domestic purposes—Closer Settlement Act 1904 (*Vict.*) (*No.* 1962), *secs.* 4, 5—*Water Act* 1905 (*Vict.*) (*No.* 2016), *sec.* 28.

The Lands Purchase and Management Board of Victoria are constituted under the *Closer Settlement Act* 1904 as a body corporate for the purpose of acquiring Crown lands already alienated and disposing of them for the purpose of closer settlement, with powers of management pending sale. The land when acquired becomes Crown land as if it had never been alienated, and all sales and leases of it are made by the Crown, which under the Act is expressly treated as being in occupation of it. The State Rivers and Water Supply Commission of Victoria are constituted under the *Water Act* 1905 as a Government instrumentality charged with the duty of constructing and maintaining irrigation and drainage works, for which purpose they employ gangs of labourers. Several labourers belonging to a gang so employed by the Commission were camped on land which had been acquired by the Board under their powers, and a fire, lighted by one of the labourers for cooking purposes, by reason of his negligence spread to adjoining land and did a large amount of damage.

Held, that neither the Board nor the Commission were liable to the owner of the adjoining land for the damage so occasioned. The Board were not

liable because they had no authority to permit the occupation of the Crown land on which the fire was lighted. The Commission were not liable because, on the evidence, they did not occupy the land nor did they invite or direct the person who lit the fire to camp there.

Semble, by *Griffith* C.J. and *Isaacs* J., that the principle that a person who brings a dangerous thing upon his land is, apart from inevitable accident or the wrongful interposition of a third person, liable for all damage caused to another by its escape does not apply to a fire lawfully lighted for domestic purposes, or other ordinary purposes of occupation of land, and accidentally escaping without negligence.

Rylands v. *Fletcher*, L.R. 3 H.L., 330, and *Rickards* v. *Lothian*, (1913) A.C., 263; 16 C.L.R., 387, discussed.

Decision of the Supreme Court of Victoria affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Arthur Edward Whinfield against the Lands Purchase and Management Board of Victoria (hereinafter called the Board) and the State Rivers and Water Supply Commission of Victoria (hereinafter called the Commission), in which the statement of claim was substantially as follows:—

The plaintiff says that—

1. He is a farmer and grazier, residing at Staughton Vale, in the State of Victoria, and was at all times material the owner and occupier of allotments 135, 137 and 138, Parish of Bamawn, County of Bendigo, and of allotment 62, Parish of Ballendella, County of Bendigo.

2. The Board had at all times material (amongst other powers) power to acquire and take land for the purposes of the Closer Settlement Acts, and on 7th December 1911 had so acquired and taken and/or was in possession or occupation of (*inter alia*) certain land being part of allotment 94, Parish of Bamawn, County of Bendigo.

3. The Commission had at all times material (amongst other duties) the construction and completion and the care, management and control of all works of water supply or drainage authorized or directed by the Water Acts or any other Act to be carried out by it, which in or about the month of December 1911 included certain water channels in the Parish of Bamawn aforesaid, and on and for some time prior to 7th December 1911, with

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the licence, knowledge and/or consent of the Board or alternatively without such licence, knowledge and/or consent, the Commission and/or its employees or some of its employees was or were in temporary possession and/or occupation of the land referred to in par. 2 hereof, and/or had a camp or camps temporarily erected or established on such land.

4. The Commission, as the Board well knew, and/or the said employees of the Commission, as both defendants or alternatively the Commission well knew, was or were in the habit of lighting fires upon the said land referred to in par. 2 hereof during the period for some time prior to and/or inclusive of 7th December 1911.

5. On 7th December 1911 the Commission with the licence, knowledge and/or consent of the Board, or alternatively without such licence, knowledge and/or consent, and/or one William McTavish, one of the said employees of the Commission, with the licence, knowledge and/or consent of both defendants or alternatively of the Commission or alternatively without such licence, knowledge and/or consent, lighted upon the said land referred to in par 2. hereof a fire which itself, or a fire caused by a spark or sparks therefrom, spread to or on to the said land referred to in par. 1 hereof and destroyed the following property of the plaintiff:—(The property was then described in detail).

6. Alternatively with par. 5 hereof, on the said 7th December 1911 the Commission with the licence, knowledge and/or consent of the Board, or alternatively without such licence, knowledge and/or consent, and/or the said William McTavish, one of the said employees of the Commission, with the licence, knowledge and/or consent of both the defendants or alternatively of the Commission, wrongfully and/or negligently lighted a fire on the said land referred to in par. 2 hereof which itself, or a fire caused by a spark or sparks therefrom, spread to or on to the said land referred to in par. 1 hereof, and/or wrongfully and/or negligently, or through want of proper care or precaution, permitted such fire so lighted as aforesaid, or a fire caused by a spark or sparks therefrom to so spread to or on to the said land referred to in par. 1 hereof, destroying the property of the plaintiff particulars of which are set out under par. 5 hereof.

Particulars under par. 6:—

(*a*) The said fire was lighted in the open in an unprotected fire-place in hot and dry summer weather with the grass and other materials on the ground in a highly inflammable and dangerous condition, when the defendants or either of them or the said William McTavish knew, or ought to have known, that the said fire or a spark or sparks therefrom, if not carefully and completely watched or protected, might or would spread.

(*b*) No proper or sufficient precautions were taken by making a fire-break to prevent the said fire, or a spark or sparks therefrom, from spreading.

And/or (*c*) The said fire was not put out after being used but was left alight or partly alight without being watched or properly watched or without any other steps being taken to prevent it, or a spark or sparks therefrom, from spreading.

And the plaintiff claims against the defendants and each of them the sum of £2,944 5s.

By their defence the defendants (*inter alia*) alleged that if the matters mentioned in pars. 3, 4, 5 and 6 of the statement of claim, or any of them, were done or omitted by the employees of the Commission or any of them, which was denied, the same were not done or omitted at the request or with the authority of the defendants or either of them, or by the said employees or any of them in the course of their or his employment, or within the scope of their or his employment, or for the benefit of the defendants or either of them, and that such matters were and each of them was wholly unauthorized by the defendants.

The action was tried before *à Beckett* J. and a jury. At the close of the plaintiff's case the learned Judge stated that he would enter judgment for the Board. At the close of the evidence the learned Judge asked the jury to return a verdict for the plaintiff against the Commission and to assess damages if they thought that the fire lit by McTavish had been the cause of the damage, and, if they did not think that that fire was the cause of the damage, to return a verdict for the Commission. The jury found a verdict for the plaintiff for £2,230. Judgment was thereupon entered for the plaintiff against the Commission for £2,230 with costs, and for the Board against the plaintiff.

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The Commission thereupon appealed to the Full Court against so much of the judgment as ordered judgment to be entered against them, and the plaintiff moved for a new trial as between himself and the Board.

The Full Court allowed the appeal of the Commission, and dismissed the plaintiff's motion for a new trial.

From this decision both as to the Commission and as to the Board the plaintiff now appealed to the High Court.

Cohen and *Mann*, for the appellant. The fire lit by McTavish was lit with the permission or knowledge of the Board upon land over which they had control and from which they could have expelled the men camping there at any time, and they are liable for the damage caused by the spreading of the fire. The Board are in a similar position to the Railways Commissioners in relation to lands acquired by them in the performance of their duties: See *Closer Settlement Act* 1904, secs. 4, 5, 39, 41, 56, 65; *Land Act* 1901, secs. 10, 158; *Closer Settlement Act* 1907, sec. 2; *Closer Settlement Act* 1909, secs. 9 (2), 65, 91. They were the occupiers of the land where the men were camped, and being the occupiers they are liable for the acts of anyone lawfully on the land by their permission: *Salmond's Law of Torts*, 3rd ed., pp. 222, 223. The responsibility for fire brought on to one's land is independent of negligence. Fire is a dangerous thing and is within the principle of *Rylands* v. *Fletcher* (1): See *Filliter* v. *Phippard* (2); *Sheehan* v. *Park* (3); *Salmond's Law of Torts*, 3rd ed., p. 222; *Beven on Negligence*, 3rd ed., p. 496; *Threlkeld* v. *White* (4); *Piper* v. *Geary* (5); *Kelly* v. *Hayes* (6); *Kellett* v. *Cowan* (7); *Pollock on Torts*, 9th ed., p. 505; *Mitchellmore* v. *Salmon* (8); *Clerk and Lindsell on Torts*, 6th ed., p. 469; *Craig* v. *Parker* (9).

[ISAACS J. referred to *Black* v. *Christchurch Finance Co.* (10); *Rickards* v. *Lothian* (11); *Hardaker* v. *Idle District Council* (12).

(1) L.R. 3 H.L., 330.
(2) 11 Q.B., 347.
(3) 8 V.L.R. (L.), 25; 3 A.L.T., 98.
(4) 8 N.Z.L.R., 513.
(5) 17 N.Z.L.R., 357.
(6) 22 N.Z.L.R., 429.
(7) (1906) S.R. (Qd.), 116.
(8) 1 Tas. L.R., 109.
(9) 8 W.A.L.R., 161.
(10) (1894) A.C., 48.
(11) (1913) A.C., 263; 16 C.L.R., 387.
(12) (1896) 1 Q.B., 335.

RICH J. referred to *Pollock on Torts*, 9th ed., p. 503 (*m*); *West Cumberland Iron and Steel Co.* v. *Kenyon* (1); *Hughes* v. *Percival* (2).]

The fact that the fire is lit for domestic purposes makes no difference. The principle at any rate applies to a fire lit in the open. If there is no liability in the Board apart from negligence, there was evidence of negligence which should have been submitted to the jury. The Commission are liable because they were licensees and had the occupation of the land on which the fire was lit, and the men who were camped there came either by the direction or at the invitation of the agent of the Commission who knew that as an incident of camping fires would be lit. There was evidence that the men went to the camp at the invitation and for the convenience of the Commission and that the fire which caused the damage was incidental to the men being there. If that evidence was believed the Commission was liable: *White* v. *Jameson* (3). [They also referred to *Morier* v. *St. Paul, Minneapolis and Manitoba Railway Co.* (4); *Williams* v. *Jones* (5); *Ruddiman & Co.* v. *Smith* (6); *Whatman* v. *Pearson* (7); *Bowstead on Agency*, 4th ed., p. 356; *Stiles* v. *Cardiff Steam Navigation Co.* (8); *Applebee* v. *Percy* (9).]

McArthur K.C., *Pigott* and *Cussen*, for the respondents, who were not called on, referred to *Robinson* v. *Vaughton* (10).

Cur. adv. vult.

Sept. 22.

GRIFFITH C.J. read the following judgment:—This action was brought by the appellant against the respondents to recover damages for loss sustained by reason of the spreading of an open fire, which had been lighted by one McTavish, who was at one time an employee of the second respondents, and which spread to and destroyed the plaintiff's crops and caused him other damage. The case was presented in the statement

(1) 11 Ch. D., 782, at p. 787.
(2) 8 App. Cas., 443.
(3) L.R. 18 Eq., 303, at p. 305.
(4) 47 Am. Rep., 793.
(5) 11 L.T. (N.S.), 108; 13 L.T. (N.S.), 300.
(6) 60 L.T. (N.S.), 708.
(7) L.R. 3 C.P., 422.
(8) 33 L.J.Q.B., 310.
(9) L.R. 9 C.P., 647.
(10) 8 C. & P., 252.

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of claim in many alternative ways, which may substantially be reduced to four: (1) that the respondents the State Rivers and Water Supply Commission, whom I will call the Commission, were in temporary occupation of the land on which the fire was lighted by McTavish, and were therefore responsible for any damage caused by the spreading of a fire lighted upon it by their employees; (2) that they were so in occupation and knew that their employees were in the habit of lighting fires on the land; (3) that they or their servant McTavish with (or alternatively without) their consent lighted the fire; and (4) that they or McTavish did so negligently. As against the respondent Board the case was that they were the owners of the land, and that the possession of the Commission or their servants and what was done by them was taken and done with the consent of the Board.

The relevant facts of the case are not in dispute. The defendant Board are a body corporate established by Act No. 1962 for the purpose of acquiring Crown lands already alienated, and disposing of them for the purpose of closer settlement, with powers of management pending sale. The land when acquired becomes Crown lands as if it had never been alienated, and all sales and leases of it are made by the Crown, which under the provisions of the Act is expressly treated as being in occupation of the land. The land on which the fire occurred, which is known as Connington's Corner, is a portion of land so acquired, and lay within a fence enclosing about 400 acres. The enclosure was at the time when the fire occurred in the occupation of the Crown, if of any one, except so far as will hereinafter appear. The Board allowed cattle to graze on it on agistment, and part of it was also commonly used as a camping ground for travellers, who apparently had a standing licence to camp there, so far as such licence can be inferred from the absence of objection to their doing so.

The Commission is another Government instrumentality, which is charged with the duty of constructing and maintaining irrigation and drainage works, for which purpose it employs gangs of labourers. As such operations extend over a considerable distance it is obviously convenient that the men employed upon them should from time to time take up their abode near the particular

place where they are working, just as in the case of the construction of railways. And, as that part of the country is sparsely settled, and board and lodging in houses is not generally procurable, it is the practice for the men to live in tents, several men usually pitching their tents near one another. This is called a camp. The existence of such a camp necessarily involves the use of fire for cooking, and in cold weather for warmth, and the fires are of necessity out of doors. This may be taken to be the ordinary actual mode of use in Australia (and I suppose elsewhere) of the land on which such camps are pitched.

In the present case it appeared that a gang of about 15 men had been employed by the Commission under their officer, a Mr. Falkingham, at a place called Malone's, and had had a camp there. On 30th September the progress of the operations had brought them to a place near Connington's Corner, which was so far distant from the camp at Malone's as to render a change desirable. Falkingham accordingly looked out for a suitable locality near the new place of operations where a camp could be pitched. After inquiry he found that Connington's Corner was the only land in the neighbourhood available for the purpose—that is, I suppose, without leasing land from private owners. He asked his superior officer, a Mr. Gibbs, whether he thought there would be any objection to his camping there. Mr. Gibbs thought there would not be any. As the Board and the Commission were both Government instrumentalities, and Connington's Corner was already used by anyone who desired it as a camping ground, this conclusion was very natural. Accordingly Falkingham, without formally asking permission from the Board, pitched his tent on the land in question, and ten of the men in the employment of the Commission pitched their tents near his, the rest of the gang living in houses in the neighbourhood. The men were entirely free to live where they pleased. When they determined to camp at Connington's Corner their tents, which were their own property, and their other belongings were brought in a waggon at the expense of the Commission to the new camping ground, and the time occupied in moving or shifting camp was, not unreasonably, treated as time employed in the work of the Commission. Falkingham also put up a forge on the ground.

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Some time afterwards McTavish came into the employment of the Commission, and pitched his tent amongst those already there. On 7th December a fire which he had lighted in the open, probably to cook his breakfast, spread to the surrounding grass and occasioned the damage complained of. There was evidence from which a jury might find that the spread of the fire was attributable to his negligence. Upon these facts the learned counsel for the defendants asked that judgment might be entered for them. The learned trial Judge granted the application as to the Board, but refused it as to the Commission, as to whom he held that the only question was whether the fire was caused by McTavish. He refused to leave to the jury any question of negligence or any further question. The jury having answered this question in the affirmative, he entered judgment for the plaintiff for the damages assessed by the jury, £2,230. On cross appeals to the Full Court that Court entered judgment for the Commission and refused to disturb the judgment for the Board.

Before this Court it was strenuously contended that the case was governed by the doctrine of *Rylands* v. *Fletcher* (1), and that, if a fire intentionally kindled, no matter under what circumstances or for what purpose, spreads from land occupied by one man to that of another, the first is liable for any consequent damages. In support of this contention the opinions of some text writers were quoted, and the case of *Filliter* v. *Phippard* (2) was said to support it. That case was determined upon motion in arrest of judgment. The declaration alleged that the fire had occurred through the negligent and wrongful conduct of the defendant. The Court held that the Act 14 Geo. III. c. 78, sec. 86, was applicable to the case, but did not excuse the defendant under the circumstances alleged in the declaration, such a fire not being accidental within the meaning of the Act. It is obvious that a fire may be accidental in the ordinary acceptation of that word if it arises from a fire intentionally lighted being unintentionally and unexpectedly communicated to some inflammable material near it, just as much as if it arises from a flash of lightning. Even before that Act the cause of action in such a case was always formally based upon negligence, although in

(1) L.R. 3 H.L., 330. (2) 11 Q.B., 347.

some cases the evidence required to prove negligence was very slight, and the duty to prevent a fire on a man's own land from spreading to his neighbour's was regarded very stringently. In the case of *Black* v. *Christchurch Finance Co.* (1) and other cases cited to us the fire in question was fire intentionally lighted in the open country for the purpose of spreading on the surrounding ground, and the duty to keep such a fire within due bounds was practically treated as unqualified. In other words, the care required in such a case is such care as will prevent injury to others, unless excused by the act of God or *vis major*. But in no case has such a rule been applied in the case of a fire lawfully lighted for domestic purposes or other ordinary purposes of occupation of land and accidentally spreading without negligence. In *Jones* v. *Festiniog Railway Co.* (2) the act complained of was in itself unlawful, so that no question of negligence arose. As, for other reasons, it is not necessary to formally decide the point, I do not further pursue it, but I have thought it right to indicate my present opinion upon it.

I have already said that there was evidence of negligence on the part of McTavish. The question for determination is whether the defendants or either of them are or is liable for it. I will deal first with the contention that the Commission were in occupation of the land. I am quite unable to find any evidence of such occupation. The individual men were each, in a sense, in occupation of the bit of ground covered by their tents, and if any stranger had invaded or injured a tent the owner would have been entitled to bring an action of trespass. But it is absurd to suppose that the Commission could have done so. It is impossible indeed to suppose that there was occupation by any of the party of anything more than the bits of land covered by the tents and by the forge. It was contended that as Falkingham selected or found the site of the camp he must be taken to have taken possession of it for the Commission, and that the occupation by the men was therefore the Commission's occupation; but I cannot find any foundation for this argument. If, indeed, the Commission had been bound to provide board and lodging, or lodging only, for their men, there might have been

(1) (1894) A.C., 48.

(2) L.R. 3 Q.B., 733.

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some foundation, but the men were ordinary day labourers who had to find their own board and lodging.

It was also attempted to support the plaintiff's case on the ground that Falkingham directed, or at least invited or procured, the men to camp on the land in question. This argument does not rest on any occupation of the land by the Commission. So regarded, the case is in substance the same as if Falkingham had obtained from the owners of the land permission for the men to occupy it. The fact that it was vacant land, and that the permission was to put up their own tents instead of occupying shelter already existing on the land, cannot make any difference. It is impossible to contend that an employer who obtains lodgings for his employees upon a stranger's land thereby becomes responsible for any wrong they may commit while occupying them.

As against the Board the case rests entirely upon the permission (alleged but not proved) to camp on land of which they had control. It would be a shocking thing to lay down as a rule of law that in a country like Australia, where probably hundreds, if not thousands, of men travelling on foot in sparsely settled districts ask every day for permission to camp for the night on private property, the owner by granting such poor hospitality becomes responsible for the lighting of a fire by the wayfarer to boil his "billy" or keep himself warm. Apart from this consideration the well known rule that the doctrine of *respondeat superior* does not apply as between principal officers of Government and their subordinates, except for wrongful acts in which the former are personally concerned, is sufficient to protect them. The Board are mere agents and managers of the land for the Crown, and the most that can be alleged against them is that they did not prevent the men from camping on the land.

For these reasons I think that the appeal must be dismissed.

ISAACS J. read the following judgment:—The first contention on behalf of the appellant was that, assuming the respondents answerable for the act of McTavish, they were liable on the principle enunciated in *Rylands* v. *Fletcher* (1). The proposition

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

urged—one of great general importance—was, that fire being always dangerous unless confined, a person who introduces it upon his own land is, apart from the effect of inevitable accident or the wrongful interposition of a third person, liable for all damages caused to another by its escape. The course taken at the trial in treating negligence as immaterial, and which may be repeated on any future occasion of a similar nature, assumed the accuracy of that proposition. The decision of the Full Court in no way refers to that course being otherwise than unquestionably right. The contention has been so strongly pressed and fully argued that I think it proper to express my views upon it, more particularly as it raises in itself, if incorrect, a distinct ground upon which the appellant's right to an immediate judgment may be denied.

During the argument I expressed the opinion that the judgment of the Privy Council in *Rickards* v. *Lothian* (1) had finally and authoritatively settled the law on a basis opposed to so broad a responsibility. I adhere to that opinion and, with one exception, leave out all consideration of earlier cases. The decision in *Rickards* v. *Lothian* (1) and also the judgment in *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.* (2) there cited, particularly when read together, place the law very definitely on a much more reasonable foundation. There are intermediate cases which, however, need no reference now.

There are really two questions involved in the proposition contended for: (1) the liability of the occupier of the land from which the dangerous thing escapes, and (2) the nature of the damage for which he is responsible. The consideration of each assists in the determination of the other, and so the matter has been regarded in the two decisions referred to. As to liability, *Rickards* v. *Lothian* (1) decides, as I understand it, that before the principle of *Rylands* v. *Fletcher* (3) can be invoked at all, it must appear that the use of the land in the course of which the dangerous thing was introduced was a non-natural use. In other words, it is not correct to say that the mere introduction of a foreign element which is dangerous in the event of escape,

(1) (1913) A.C., 263; 16 C.L.R., 387. (2) (1902) A.C., 381.
(3) L.R. 3 H.L., 330.

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is itself a non-natural use. Granting that fire and gas are inherently dangerous if they escape and that water in certain situations or in considerable quantities is similarly dangerous, still there is always a condition precedent to the application of the doctrine of *Rylands* v. *Fletcher* (1), namely, that the user of the land for the purpose of which these dangerous elements were introduced was not the natural use of that land. This is expressed in the following words of Lord *Moulton* (2). After stating that the unauthorized act of a stranger would be a sufficient answer to a claim where a potential or *primâ facie* liability existed, the learned Lord said:—"But there is another ground upon which their Lordships are of the opinion that the present case does not come within the principle laid down in *Fletcher* v. *Rylands* (3). It is not every use to which land is put that brings into play that principle. 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. To use the language of Lord *Robertson* in *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.* (4), the principle of *Fletcher* v. *Rylands* (3) 'subjects to a high liability the owner who uses his property for purposes other than those which are natural.'" Further on he explains (5) that the supply of water to the various parts of a house—that is, water from a source entirely extraneous to the property—"is not only reasonable but has become, in accordance with modern sanitary views, an almost necessary feature of town life. It is recognized as being so desirable in the interests of the community that in some form or other it is usually made obligatory in civilized countries. Such a supply cannot be installed without causing some concurrent danger of leakage or overflow. It would be unreasonable for the law to regard those who instal or maintain such a system of supply as doing so at their own peril, with an absolute liability for any damage resulting from its presence, even when there has been no negligence." The supply of gas is placed by his Lordship

(1) L.R. 3 H.L., 330.
(2) (1913) A.C., 263, at pp. 279, 280; 16 C.L.R., 387, at pp. 400, 401.
(3) L.R. 1 Ex., 265; L.R. 3 H.L., 330.
(4) (1902) A.C., 381, at p. 393.
(5) (1913) A.C., 263, at p. 281; 16 C.L.R., 387, at p. 402.

on practically the same footing in the words "the domestic supply of water or gas."

Now, it seems to me to follow that where the question is as to a domestic fire, a fire lit for the purpose of cooking food or supplying bodily warmth, the position of the person lighting it is inherently stronger, because its essentiality as a feature of life is based on the common requirements of humanity. No one can assert that the presence of such a fire is "an increased danger," that is, increased beyond that occasioned by the ordinary use of the land, or, phrasing the notion differently, that the use of the land for such a purpose is a "special use." On the contrary, fire for the maintenance or ordinary comfort of life, is a necessary adjunct of civilized existence, and an elemental purpose of the use of land by the human race.

Unless, therefore, some default or negligence be proved in respect to such a fire, no responsibility for its spreading is incurred. That is a common risk which members of society mutually accept. The allegation of negligence which we find in the early cases can be understood. The reason upon which this conclusion is rested is made further apparent in the judgment of the Judicial Committee in the earlier case of *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.* (1). There the telegraph company sued the tramway company for collecting large quantities of electricity, which escaped and prejudicially affected the operation of certain delicate telegraphic instruments, thereby disturbing the cable messages of the plaintiff company. The Privy Council held that, so far as liability went, the tramway company were within the rule of *Rylands* v. *Fletcher* (2). Electricity in the quantity stored was capable when uncontrolled of producing injury to life and limb, and to property, and so the defendants would have been liable for such damage as was contemplated by *Rylands* v. *Fletcher* (2). But, said Lord *Robertson*, the liability does not extend to damage arising from the application of the injured party's property to "special uses" whether for business or pleasure. Note the words "special uses" are there used with respect to the plaintiff's land on which the damage occurs, just as Lord *Moulton* uses

(1) (1902) A.C., 381. (2) L.R. 3 H.L., 330.

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the term "special use" in connection with the defendant's land from which the cause of damage proceeds. Lord *Robertson* says (1):—"A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands* v. *Fletcher* (2), which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as showing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain." This makes it clear that the liability for breach of this absolute duty of insurance, though higher in its nature, is not in its incidence necessarily coextensive with the responsibilty for breach of the relative duty of care, that is to say, for negligence. The Privy Council accordingly held in that case that as negligence was negatived, the plaintiff could not on mere proof of the breach of the absolute duty of insurance recover in respect of the very special damage claimed, though in fact resulting from the escape of the electricity.

Whether in a given case the use to which the land is put in respect to a dangerous element that has escaped, is natural or non-natural, ordinary or special, normal or abnormal (see *Barker* v. *Herbert* (3)), is to be determined by the circumstances, and is not capable of reduction to an undeviating formula. These two decisions, by their explanation of the doctrine of *Rylands* v. *Fletcher* (2), have thus placed the adjustment of the mutual rights of property owners on a much less arbitrary and much more reasonable basis than is sometimes supposed.

If, therefore, in the circumstances of this case the assumption of the defendants' responsibility for the act of McTavish could be established, the question of negligence on his part would have to be sent to a jury to consider.

That brings me to the second branch of the case, which, though

(1) (1902) A.C., 381, at p. 393. (2) L.R. 3 H.L., 330.
(3) (1911) 2 K.B., 633, at p. 645.

less extensive in its interest, is very important to Victoria. The Lands Purchase and Management Board is not the possessor or occupier of the land. The Crown is both. The Board is only a statutory servant of the Crown created for the purpose of performing certain duties to the Crown in relation to the land, and for that purpose invested with specified powers and duties, but its duties and responsibilities are to the Crown, and it has no power to assent as owner of the land to its occupation by any other person outside the purview of the Closer Settlement provisions. All moneys received by the Board are required by sec. 11 of Act No. 1962 to be paid into the Public Account, which is subject to the provisions of the *Audit Act*, and is strictly Crown moneys. The Board was rightly held free from all liability. The State Rivers and Water Supply Commission, which is differently constituted, it is urged, established an encampment, and either ordered or assented to McTavish setting up his tent as part of their encampment. In my opinion no jury, viewing the evidence as a whole, could reasonably so find. Whatever might have been the case had the written reports and the fact of the Commission paying for the transfer of the men's tents gone unexplained, the position is that a full and uncontroverted explanation is given which entirely negatives any reasonable possibility of the fact being as alleged. There is, therefore, no case to go to the jury on this point, and I agree the appeal should be dismissed.

I wish to repeat what I said at the close of the argument: that I trust the Crown, though quite justified in defending the legal position, will in its discretion take into consideration the fact that McTavish was its servant, that his act had been found by the undisturbed finding of the jury to have originated the damage, and that there is evidence on which a jury might, if asked, have found negligence; and that the appellant has without any fault on his part been seriously injured. My brother *Rich* authorizes me to add that he also repeats his concurrence in this last observation.

POWERS J. I have had the privilege of reading the judgment

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of the Chief Justice, and I concur in it and in the reasons given for it.

RICH J. I agree that the appeal should be dismissed. It is unnecessary to express any opinion as to the applicability of the doctrine of *Rylands* v. *Fletcher* (1), as I hold that the defendants are not responsible for the acts of McTavish.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. T. Keane.*

Solicitor, for the respondents, *Guinness*, Crown Solicitor for Victoria.

B. L.

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

Cons/Foll *Commonwealth* v *Connors* 86 ALR 247

Foll *Tracy Village Sports & Social Club* v *Walker* (1992) 111 FLR 32

Dist *HIH Casualty & General Ins Ltd* v *Territory Ins Office* (1998) 120 NTR 24

Foll *Entrad Tyres Pty Ltd* v *Hollingsworth* 83 FLR 1

Refd to *Roycroft & Telstra Corporation, Re* (1996) 44 ALD 732

Dist *HIH Casualty & General Ins Ltd* v *Territory Ins Office* (1998) 120 NTR 24

Refd to *Woodruffe* v *Northern Territory of Aust* (2000) 10 NTLR 52

Appl *Brady & Australain National Railways Commission, Re* (1987) 13 ALD 187

Appl *Telstra Corporation* v *Roycroft* (1997) 47 ALD 671

Refd to *Harbutt & Dept of Defence, Re* (1998) 51 ALD 159

Appl *McCarthy & Comcare, Re* (2002) 66 ALD 751

Appl *Willis & ATC, Re* 19 ALD 665

Foll *Remington Products Inc, Re application by* 18 IPR 251

Appl *Entrad Tyres Pty Ltd* v *Hollingsworth* (1985) 62 ACTR 43

[HIGH COURT OF AUSTRALIA.]

MURRAY . . . . . APPELLANT;
PLAINTIFF,

AND

BAXTER AND OTHERS. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Dec.* 2, 3, 15.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Employer and Workman—Compensation—Delay in bringing proceedings—"Mistake" — "Other reasonable cause" — Workmen's Compensation Act 1910 (*N.S.W.*) (*No.* 10 *of* 1910), *sec.* 12.

Sec. 12 of the *Workmen's Compensation Act* 1910 provides that "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable . . . unless the proceedings for recovering compensation