[HIGH COURT OF AUSTRALIA.]

WHITFELD . . . . . APPELLANT;
DEFENDANT,

AND

TURNER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1920.

SYDNEY, *Aug.* 24.

Knox C.J., Isaacs and Rich JJ.

Master and Servant—Negligence—Liability of master for act of servant—Lighting fire on master's land—Authority of servant—Limited authority.

Where a servant has authority to light a fire upon his master's land in the event only of a certain emergency arising, the question whether that emergency had or had not arisen is irrelevant in determining the liability of the master for damage caused to another person by a fire lit by the servant on the master's land and by the servant's negligence escaping on to that other person land.

Decision of the Supreme Court of New South Wales: *Turner* v. *Whitfeld*, 19 S.R. (N.S.W.), 345, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Charles James Turner against George Whitfeld, as nominal defendant for and on behalf of the Government of New South Wales, to recover damages for the destruction of timber, grass, fruit trees and fencing upon his land alleged to have been caused by a fire which was lit by the servants of the Government and which by their negligence spread to the plaintiff's land. The action was tried before a jury. It

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appeared that the Public Works Department was in possession of a block of fifty acres of land upon which a number of men were engaged principally in building a dam and preparing for the erection of certain buildings. On the day on which the fire occurred the officer in charge of the work was absent, and a ganger named Spinney was left in charge. There was evidence upon which the jury might find that if the Government's property was in danger of destruction or injury by reason of an existing fire, Spinney had authority to light another fire in order to burn a break, and so prevent the existing fire from spreading. Spinney's evidence was that on the day in question he saw a fire upon the land and, in order to prevent it spreading, he and the men under him lit fires and burnt a break, but that sparks and burning bark from the first existing fire were carried over the break, causing the fire which spread to the plaintiff's land. There was, however, evidence that when Spinney and those under him burnt the break no other fire was burning on the Government property, and that it was the fire which they lit which spread, by reason of their negligence, to the plaintiff's property. There was also evidence that Spinney lit the fire either to protect the property in case a fire should in the future break out, or in order to encourage the growth of grass on the burnt portion. *Cullen* C.J., before whom the trial took place, asked the jury to answer certain questions, which, with their answers to them, were as follows :—

(1) Did the damage complained of result from the lighting of fires on the Government land under the direction of the ganger, Spinney ? Yes.

(2) In causing these fires to be lit, was Spinney acting within the scope of his employment ? Yes.

(3) Was Spinney guilty of negligence in regard to (*a*) the lighting of the said fires ? Yes. (*b*) The control of the said fires ? Yes.

(4) When Spinney caused the said fires to be lit, was there a fire already burning on the Government land ? No.

The jury found a verdict for the plaintiff for £300.

The defendant thereupon moved before the Full Court by way of appeal to set aside the verdict and to enter a nonsuit or to enter a verdict for the defendant or to grant a new trial on the grounds (*inter alia*) : (1) that the verdict was against the evidence and the

weight of evidence; (2) that the learned Chief Justice should have directed the jury that there was no evidence which rendered the Government liable for the act of Spinney in lighting the fire complained of; and (3) that, the jury having found that there was no fire burning on the Government land, there was no evidence that Spinney had any authority from the Government to light a fire for the purpose of burning off and clearing the said land.

The Full Court dismissed the appeal with costs: *Turner* v. *Whitfeld* (1).

From that decision the defendant now appealed to the High Court.

Alec Thomson K.C. (with him *Addison*), for the appellant. There is no evidence that Spinney had any authority to light the fire which the jury found caused the damage. The only authority which can be found in the evidence is an authority to light a fire in order to protect the Government's property against actually threatened damage by an existing fire, and, as the jury have negatived the existence of such a fire, Spinney had no authority to light the fire which did the damage. The lighting of the fire by Spinney was not within the scope of his authority (*Stevens* v. *Woodward* (2)). If Spinney acted in an officious manner, thinking that he was protecting the Government property against some future possible injury or that he was benefiting the property, his act was not brought within the scope of his employment. See *Roberts, Wallace and Graham on the Duty and Liability of Employers*, 4th ed., p. 111.

[ISAACS J. referred to *Barnes* v. *Nunnery Colliery Co.* (3); *Gwilliam* v. *Twist* (4).]

Flannery K.C. and *Pitt*, for the respondent, were not heard.

KNOX C.J. In this case I think it is quite clear that the decision of the Full Court was right. There was evidence that under certain circumstances of emergency it would have been within the authority of Spinney to light a fire on this land. He lit a fire there, and owing to his negligent conduct in connection with that

(1) 19 S.R. (N.S.W.), 345.
(2) 6 Q.B.D., 318.
(3) (1912) A.C., 44, at p. 49.
(4) (1895) 2 Q.B., 84.

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fire it escaped, and the plaintiff sustained damage, for which he sued. That seems to me to conclude the matter. The fact that Spinney's authority to light a fire was only given to him in case of a certain emergency happening is nothing to the point. Lighting a fire was an act of a class which he had authority to do under certain circumstances. Whether the circumstances did or did not exist might be very relevant as between Spinney and his employer, but is not relevant as between his employer and the plaintiff. That view is completely borne out by the conduct of the case at the trial, when the real case set up by the defendant was that under the circumstances then alleged to exist Spinney had authority to light a fire and that there was no negligence. Having failed in that defence, the defendant cannot now turn round and say that under no circumstances was authority conferred on Spinney to light this fire.

For these reasons I am of opinion that the appeal should be dismissed with costs.

ISAACS J. I concur.

RICH J. I concur.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *A. G. de L. Arnold.*

B. L.