[HIGH COURT OF AUSTRALIA.]

McINNES . . . . . APPELLANT;
DEFENDANT,

AND

WARDLE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1931.

MELBOURNE, *Oct.* 6, 7.

SYDNEY, *Nov.* 30.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Fire—Damage caused by escape—Independent contractor—Fire lit to burn scrub—Damage to neighbour's land—Lit during prohibited season—Liability of employer—Bush Fires Act 1913 (*S.A.*) (*No.* 1123), *sec.* 8.

The appellant employed an independent contractor to fumigate rabbits on his land; in the course of doing so, the independent contractor, during a prohibited season of the year, lit a fire, which was a usual and ordinary method used in the fumigation and destruction of rabbits. The fire spread to and on the neighbour's land and there caused damage.

Held, that the employer of the independent contractor was liable for the damage thus caused.

Black v. Christchurch Finance Co., (1894) A.C. 48, followed.

Decision of the Supreme Court of South Australia (*Napier* J.): *Wardle v. McInnes*, (1930) S.A.S.R. 450, affirmed.

APPEAL from the Supreme Court of South Australia

The respondent, Michael Ernest Wardle, brought an action against the appellant, Hugh Cameron McInnes, claiming £807 for damage caused by fire which was lit upon the neighbouring land occupied by the appellant. The fire was lit by McLeay, an independent contractor engaged by the appellant to fumigate the

rabbits on the property and to do some other work to the satisfaction of the appellant. There was no evidence of any express direction or authority to burn, and under the *Bush Fires Act* 1913 of South Australia it was an offence for any person between 15th October and 1st of the following February to burn any scrub (which includes bracken fern) or light or maintain any fire with the intention of burning any scrub on any land. In December of 1925 McLeay lit fires on the land rented by McInnes to burn off patches of fern which impeded his work.

The action was heard by *Napier* J., who gave judgment for the plaintiff therein for £317 damages: *Wardle* v. *McInnes* (1).

Further facts are stated in the judgments hereunder.

J. H. Moore (with him *E. F. Skewes*), for the appellant.

Thomson K.C. (with him *Beauchamp*), for the respondent.

Cur. adv. vult.

Nov. 30.

The following written judgments were delivered:—

GAVAN DUFFY C.J. AND STARKE J. In November of 1925, one McLeay agreed for a consideration to fumigate rabbits on property rented by McInnes on the Bordertown Road in South Australia. According to the deposition of McInnes, he told McLeay not to light fires, even to boil his "billy," and McLeay said he would be careful. *Napier* J., who tried the action, does not appear to have accepted this evidence; but it is immaterial, in our view, whether McInnes so directed McLeay or not. The learned Judge held, and rightly held, in our opinion, that McLeay was an independent contractor, that to exterminate rabbits on the property it was necessary to clear the bracken fern, and that an obvious and usual method of so doing, in suitable conditions, was by burning the same. By this means, the rabbits are driven into their burrows, which the burning of the ferns exposes. Under the *Bush Fires Act* 1913 of South Australia, it is an offence for any person between 15th October and 1st of the following February to burn any scrub (which includes

(1) (1930) S.A.S.R. 450.

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bracken fern) or light or maintain any fire with the intention of burning any scrub on any land. Those dates mark out the summer period in Australia, and grass and scrub are then usually very dry and fires spread with great rapidity. Nevertheless, McLeay in December of 1925 lit fires on the land rented by McInnes to burn off patches of ferns which impeded his work. The fire got away, and ultimately swept across the paddocks of the plaintiff Wardle, burning his fences, sheds, hay, wattles, clover and grass. The question is whether *McInnes* is liable for the damage so caused to Wardle. *Napier* J. held that he was; and we agree with him. The decision of the Judicial Committee in *Black* v. *Christchurch Finance Co.* (1) settles, in our opinion, the principle that an occupier of land is liable for damage by fire lighted in dangerous circumstances by an authorized person, whether servant or contractor, notwithstanding that the conditions of authority have not all been complied with or have been abused. "The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property. . . . And if he authorizes another to act for him, he is bound not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences" (*Black* v. *Christchurch Finance Co.* (2)). The prohibition of the *Bush Fires Act* against lighting fires from October to February only brings into relief the dangers that McInnes should have foreseen and provided against. So soon as *Napier* J. found that burning ferns and undergrowth was a usual and ordinary method used in the fumigation and destruction of rabbits, the liability of McInnes was clear, and the judgment of the learned Judge to that effect must be supported.

DIXON J. The fire, which destroyed the respondent's property, spread from land occupied by the appellant, where it had been lit in order to burn thickly growing bracken so that rabbit burrows covered by the bracken might be fumigated readily and effectively.

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

(2) (1894) A.C., at p. 54.

Such a use of fire was hazardous at the season when this was done, and was, moreover, forbidden by statute. To burn vegetation at that time must be considered as introducing an exceptional danger, and not as an incident natural or proper in the use of the land in an ordinary manner. The fire was lit, not by the appellant or any of his servants, but by an independent contractor who for a lump sum had undertaken "to fumigate the rabbits on the property" and to do some other work, all to the satisfaction of the appellant. There was no evidence of any express direction or authority to burn, and, as it was an offence to light the fire, *Napier* J., by whom the case was tried, hesitated to infer that the contractor had any actual authority or permission to burn the bracken. His Honor considered that clearly he was free to do the work without burning, or for that matter without clearing, if he could; but on the other hand the appellant knew, or, if he did not know, should have contemplated, that there was a possibility of the contractor burning the bracken if he was required, as the terms of the contract might require him, to do the work effectively, and he was then left to do the work in his own way. He thought the contractor regarded burning as a common, if not a necessary, incident of such work in that country and believed himself to be required to destroy the bracken in some way in order to do the fumigation effectively. The learned Judge said that he took the view that the appellant knew, and, if he did not know, should have known, what was necessary in order to do the work to his satisfaction, and it was his business to see that the contractor knew what was required of him. To exterminate rabbits on the land it was necessary, in his Honor's opinion, to clear the bracken in places and the obvious method of clearing was by burning, which was certainly the common practice under suitable conditions.

Although there was some conflict of evidence, ample support can be found for these conclusions, which ought, I think, to be accepted. They amount to a finding that the appellant knew, or ought to have known, that in the course of operations conducted for his benefit upon land in his occupation, fire would be employed if, as was likely, its use was found necessary or expedient in the opinion of the person whom he had authorized to be there for the execution of the work.

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The duty of an occupier to take care that his land is so used and the operations carried out upon it are so managed that his neighbours are not exposed to injury by exceptional dangers is not confined to dangers arising from acts of himself and his servants. (See per *Littledale* J. in *Laugher* v. *Pointer* (1); per *Jessel* M.R. in *White* v. *Jameson* (2); and *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.* (3).) Such a finding involves the appellant in responsibility for the introduction of fire upon the premises he occupied. In my opinion his liability was established.

A further point was made upon appeal to the effect that no evidence had been led which supported the calculation of damages suffered by the respondent through the loss of grass and clover. The evidence was directed to a different method of computation, but I think facts were proved from which the learned Judge might reason to the assessment he made without the assistance of more experience of affairs than is allowable.

The appeal should be dismissed.

EVATT J. The decision of the Privy Council in *Black* v. *Christchurch Finance Co.* (4) establishes that a person who authorizes the use of fire in order to clear or burn off on land occupied by him is under a duty to neighbouring landholders to see that reasonable care is exercised to prevent the fire from spreading. The duty is unaffected by the fact that the person authorized to use fire is an independent contractor and that the contract gives the occupier no right to supervise the work. The occupier himself must see to it that due care is taken by the independent contractor and his servants.

The decision in *Black's Case* (4) applies here because of the learned Supreme Court Judge's findings of fact. The appellant knew that McLeay, the "independent contractor," would employ fire in order to burn off the bracken for the purpose of putting fumes into the burrows. Upon the facts the appellant must be taken as having expressly authorized McLeay to burn for the purpose of destroying the rabbits.

(1) (1926) 5 B. & C. 547, at p. 560; 108 E.R. 204, at p. 209.
(2) (1874) L.R. 18 Eq. 303, at p. 305.
(3) (1921) 2 A.C. 465.
(4) (1894) A.C. 48.

The only possible distinction between this case and *Black's* (1), is that in *Black's* the independent contractor was not only authorized but required to clear by burning. But in each case the occupier knew that danger would threaten his neighbours' property unless reasonable precautions were taken to prevent the spread of fire.

In the present case the Supreme Court has found that precautions were not taken and as a result the respondent's property was considerably damaged. The appellant failed in *his* duty to see that reasonable care was used.

The appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed. The incidence of liability for the damage sustained by the plaintiff cannot in this case be deflected from the defendant by the fact that the lighting of the fires which inflicted damage on the plaintiff was not authorized by the defendant, but was a mere casual or collateral act done by a person in the position of an independent contractor. Upon the facts as found by the learned Judge who tried the action, the pivots of the case are, in my view, the duty of the defendant as the occupier of the lands where the fires were lighted, and the fact that they were kindled in the course of carrying on operations on the land which were authorized by the defendant. The act of lighting the fires was done, it is true, by a person whom the learned Judge held to be in the position of an independent contractor. Moreover, "it is not suggested that he did it for amusement or maliciously" (*Black* v. *Christchurch Finance Co.* (2)). The nature of the duty of the occupier of lands which governs the defendant's liability in this case, was referred to by *Rolfe* B. in *Reedie* v. *London and North-Western Railway Co.* (3) in these terms:—"It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be, that in some cases he is so responsible. But then, his liability must be founded on the principle, that he has

(1) (1894) A.C. 48.
(2) (1894) A.C., at p. 51.
(3) (1849) 4 Ex. 244, at p. 256; 154 E.R. 1201, at p. 1206.

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not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others." In the present case the learned Judge found that the fires which were lighted on the defendant's land "swept across the plaintiff's paddocks, burning fencing, sheds, hay, clover and grass in passing." The defendant was by law bound so to use the land of which he was the occupier as not to cause damage to his neighbours. The statement of *Rolfe* B. above-mentioned is quoted with approval by *Bruce* J. in *Greenwell* v. *Low Beechburn Coal Co.* (1), who also discusses the dictum of *Littledale* J. in *Laugher* v. *Pointer* (2). That dictum is as follows:—"And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises."

The findings of the learned Judge who tried the action as to the circumstances in which the independent contractor lighted the fires are as follows:—"I find that he was employed to destroy the rabbits by fumigating the burrows, and he was to do this work to the satisfaction of the defendant. If that meant, as McLeay understood, that he was to exterminate the rabbits on the land, I think that it was necessary to clear the bracken in places, and the obvious method of clearing—which was certainly the common practice under suitable conditions—was by burning. There was no evidence of any express direction or authority to burn, and the act of lighting a fire during the months of December or January was an offence under the *Bush Fires Act* 1913, sec. 8. For this reason I hesitate to infer that McLeay had any actual authority or permission to do the unlawful act of burning the bracken. Clearly he was free to do the work without burning, or, for that matter, without clearing, if he could. On the other hand, I think that the defendant knew—and if he did not know, he should have contemplated—that there was

(1) (1897) 2 Q.B. 165, at p. 177.
(2) (1826) 5 B. & C., at p. 560; 108 E.R., at p. 209.

a possibility of McLeay setting fire to the bracken if he was required (as under the terms of the contract he might be) to do the work effectively, and was then left to do it in his own way. The defendant testified that he did not expect McLeay to cut the bracken, or do more than fill the holes on sight. He said that it never occurred to him that McLeay would be expected to cut the bracken, or destroy it by burning, or in any other way. But there is evidence which leads me to think that this hardly represents the state of his mind at the time, and, if I am wrong in this, I can only say that it is unfortunate that he did not communicate his mind to McLeay; but on the contrary procured McLeay to promise to do what I think it was impossible to do without clearing."

These findings which are amply supported by the evidence leave no room for the defendant to escape from responsibility for the damage which the plaintiff suffered. Moreover, upon those findings the applicability and cogency in the present case of the statements of Lord *Watson* and Lord *FitzGerald* in *Hughes* v. *Percival* (1), where the principle is portrayed upon which the liability of the appellant in that case was founded, are obvious. Lord *Watson* said (2):—"I am of opinion that the appellant could not establish a good defence to the respondent's claim, by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. It appears to me that he could not escape from liability unless he further proved that it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt of cutting the wall. I can find no allegation to that effect, nor do the statements made by the appellant's counsel appear to me to sustain the inference that the cutting of the wall was an act of that improbable description. It is not said that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-judged, was dictated by any other motive than a desire to perform their work efficiently. In these circumstances the only inference in fact which I can draw is that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that

(1) (1883) 8 App. Cas. 443, at pp. 451, 455.
(2) (1883) 8 App. Cas., at p. 451.

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they obeyed the direction. These precautions ought, no doubt, to have been taken by the contractor; but in accordance with the principle laid down in *Bower* v. *Peate* (1) and *Dalton* v. *Angus* (2), it was no less the duty of the appellant, as in a question with the respondent, to see that they were strictly observed." Lord *FitzGerald* said (3):—"The conclusion I have reached is, that the defendant had undertaken a work which as a whole necessarily carried with it considerable peril to his neighbours. In the execution of that work the party-wall at Barron's side was so injured that it fell in, and its fall dragged down the new building and injured the plaintiff's party-wall and premises. What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be *culpa levissima*." See also *Stewart* v. *Adams* (4).

Notwithstanding the contract with the independent contractor, the appellant, in my opinion, remained subject to the duty, already described, which the law imposed upon him as occupier, and as the damage which the respondent sustained was a consequence of the appellant's failure to fulfil that duty, the judgment in favour of the respondent must stand.

I can see no reason for reducing the damages which were awarded.

Appeal dismissed with costs.

Solicitors for the appellant, *W. J. Denny & Stanley.*

Solicitors for the respondent, *Varley Evan & Thomson.*

H. D. W.

(1) (1876) 1 Q.B.D. 321.
(2) (1881) 6 App. Cas. 740, at p 829.
(3) (1883) 8 App. Cas., at p. 455.
(4) (1920) 57 Sc.L.R. 83.