[HIGH COURT OF AUSTRALIA.]

HAZELWOOD . . . . . APPELLANT;
DEFENDANT,

AND

WEBBER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *Nov.* 15, 16, 19; *Dec.* 19.

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

Fire—Damage caused by escape—Fire lit to burn stubble—Smouldering stump—Damage to neighbour's land—Careless Use of Fire Act 1912 (*N.S.W.*) (*No.* 28 *of* 1912), *secs.* 2, 5, 9*—*Bush Fires Act* 1930 (*N.S.W.*) (*No.* 14 *of* 1930)—*Fires Prevention* (*Metropolis*) *Act* 1774 (14 *Geo. III. c.* 78).

The appellant lit a fire on his land on 15th February 1933, for the purpose of burning off stubble. The stubble was burnt off as an ordinary farming operation, and in the way in which the majority of farmers in the district burn their stubble. During the operation a tree stump became ignited and smouldered until 20th February, when a high wind caused the fire from the stump to spread to and damage the respondent's land.

Held (1) that the burning of vegetation in the open in midsummer is not a natural or ordinary user of the land and therefore the appellant was liable independently of negligence for the consequences of the escape of the fire; (2) that

*The *Careless Use of Fire Act* 1912 (N.S.W.), as amended by the *Bush Fires Act* 1930 (N.S.W.), provides, by sec. 2:—"Whosoever ignites or uses or carries when ignited any inflammable material within one hundred yards of any stacks of corn, pulse, or hay or standing crops in an inflammable condition, or within ten yards of any growing crops, stubble-field, or grass land (the grass being in an inflammable condition), or within twenty-five yards of felled timber awaiting a running fire whereby the property of any other person is endangered, injured, or destroyed, shall for every such offence be liable for a penalty not exceeding fifty pounds or to be imprisoned with or without hard labour for any period not exceeding three months." By sec.

the *Careless Use of Fire Act* 1912 (N.S.W.), and the *Bush Fires Act* 1930 (N.S.W.) do not limit the liability under the common law except so far as they authorize the use of fire, and even in cases of authorized use liability is maintained if damage or injury is occasioned by the reckless or negligent use of fire.

Per Gavan Duffy C.J., *Rich*, *Dixon* and *McTiernan* JJ.: The *Fires Prevention (Metropolis) Act* 1774 is not now in force in New South Wales.

Reid v. *Fitzgerald*, (1926) 48 W.N. (N.S.W.) 25, approved.

Decision of the Supreme Court of New South Wales (Full Court): *Webber* v. *Hazelwood*, (1934) 34 S.R. (N.S.W.) 155; 51 W.N. (N.S.W.) 53, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 15th February 1933, Henry James Hazelwood, farmer, a member and formerly President of the Urana Pastures Protection Board, lit or consented to the lighting of a fire upon certain land, owned by him, at Urangeline, New South Wales, for the purpose of burning off about one hundred acres of stubble. The stubble was burnt off, but the fire lighted some tree stumps which smouldered for some time, and on 20th February sparks were blown, in a high wind, from one of these stumps on to adjoining land owned by Frederick John Webber, where it set fire to his grass, buildings and fences and did considerable damage. In an action brought by him in the Supreme Court of New South Wales, Webber claimed the sum of £1,500 from Hazelwood as damages for loss said to have been sustained by him through the careless, negligent and improper manner in which the fire had been lighted by Hazelwood and his servants, and the want of due and proper caution on their part which

3:—"Whosoever leaves, whether temporarily or otherwise, any fire which he has lighted or used in the open air before the same is thoroughly extinguished shall, for every such offence, be liable to a penalty not exceeding fifty pounds or to be imprisoned for any period not exceeding six months." By sec. 4:—"Notwithstanding anything in the next two preceding sections—(*a*) the occupier of any land may burn any straw, stubble, grass or herbage, or ignite any wood or other inflammable material on such land after he has cleared of inflammable substance a space of land around the straw, stubble, grass, or herbage intended to be burnt, or wood or other inflammable material intended to be ignited, of not less than sixty-six feet in breadth, and after he has given to the occupiers of all land contiguous to the land from or on which the straw, stubble, grass, or herbage is intended to be burnt, or wood or other inflammable material to be ignited, notice in writing at least twenty-four hours before burning or igniting as aforesaid of the time at which it is his intention so to burn or ignite; (*b*) the occupier of any grass lands may between five o'clock in the afternoon and four o'clock in the forenoon, burn off any grass or herbage from any such land in his occupation after giving the like notice in writing as hereinbefore directed of his intention so to do to the occupiers of all land contiguous to the land from which the

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had allowed the fire to escape and extend to Webber's land The evidence established that the burning-off of stubble was an ordinary farming operation, and was a method used by seventy per cent of the farmers in the district in which the lands of the plaintiff and of the defendant were situate. It was also shown that as February is a summer month, the grass is then usually very dry and inflammable. A question put by the trial Judge to the jury as to whether there was any negligence on the part of the defendant or his servants was answered in the negative. The damage sustained by the plaintiff was assessed at £569. A verdict was thereupon entered for the defendant.

Upon an appeal by the plaintiff to the Full Court of the Supreme Court this verdict was set aside, and a verdict in the sum of £569 was entered for the plaintiff: *Webber* v. *Hazelwood* (1).

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

E. M. Mitchell K.C. (with him *Stuckey*), for the appellant. The evidence shows that in addition to the burning-off of the stubble being in accordance with local custom it was also a necessary measure for the proper cultivation of the land. Liability for accidental fires was not part of the law of England at the time of the settlement of New South Wales; therefore it was not at any time the law of this country. The intention of the Legislature as expressed in the statutes which followed the Imperial *Fires Prevention (Metropolis) Act* 1774, namely the *Careless Use of Fire Act* 1866, the *Careless Use of Fire Act* 1912, and the *Bush Fires Act* 1930, was that liability for damage from fires lit in the open depended in the civil Courts on negligence or recklessness. The burning-off of the stubble was

grass or herbage is intended to be burned." By sec. 5:—"(1) If the occupier of any land clears the same of inflammable materials for the space of twenty feet from any fence dividing such land from the land of any other owner or occupier, and such other owner or occupier neglects or omits so to clear his land, and any damage from fire happens to such dividing fence through such neglect or omission, the owner or occupier so neglecting or omitting to clear shall at his own costs and charges cause such fence to be repaired and re-erected . . ." By sec. 9:—"Nothing in this Act contained shall take away or interfere with the right of any person to sue for and recover, at common law or otherwise, compensation for or in respect of any damage or injury occasioned by the reckless or negligent use of fire."

(1) (1934) 34 S.R. (N.S.W.) 155; 51 W.N. (N.S.W.) 53.

an ordinary and reasonable use of the land; therefore the matter is within the exceptions from the rule enunciated in *Rylands* v. *Fletcher* (1), as formulated in *Rickards* v. *Lothian* (2). There is not any English case which extends the rule in *Rylands* v. *Fletcher* (1) to fires used for the ordinary purposes of husbandry. That rule was not referred to in any of the judgments of the Court in *McInnes* v. *Wardle* (3).

[RICH J. referred to *Whinfield* v. *Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* (4).]

That was a negligence case where it was held that liability does not attach for damage resulting from a natural and ordinary use of the land.

[STARKE J. referred to *Pett* v. *Sims Paving and Road Construction Co.* (5).]

The matter was also dealt with on the basis of negligence in *Whitfield* v. *Turner* (6). The jury negatived negligence. Burning-off is advocated by government departments in the course of administering the *Pastures Protection Act* 1912 (N.S.W.), the *Prickly Pear Act* 1924 (N.S.W.) and other statutes, for the purpose of eradicating various diseases from the land. The onus is upon the respondent to prove the burning-off was neither a natural use nor an ordinary use of the land (*Pett* v. *Sims Paving and Road Construction Co.* (7)). The relevant statutes of New South Wales provide a special rule in respect to fire, and in that way differentiate the position from anything which exists in England. Absolute liability does not arise in respect to a fire employed as an incident of essential farming operations.

[DIXON J. referred to *Turberville* v. *Stampe* (8).]

It was decided in that case that as regards domestic fires there is an unlimited liability, and a limited liability only as regards fires occasioned in the course of farming operations. The history of the law on this topic is traced in *Beven* on *Negligence*, 4th ed. (1928), vol. I., pp. 618 *et seq.* A person who exercises reasonable precaution in

(1) (1868) L.R. 3 H.L. 330.
(2) (1913) A.C. 263; 16 C.L.R. 387.
(3) (1931) 45 C.L.R. 548.
(4) (1914) 18 C.L.R. 606.
(5) (1928) V.L.R. 247.
(6) (1920) 28 C.L.R. 97.
(7) (1928) V.L.R., at pp. 256, 257.
(8) (1697) 1 Ld. Raym. 264; 91 E.R. 1072; 12 Mod. Rep. 152; 88 E.R. 1228.

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and about the lighting of a fire upon his land is not liable for damage done to a neighbour's property (*Black* v. *Christchurch Finance Co.* (1); *Hughes* v. *Percival* (2); *McInnes* v. *Wardle* (3)). The decision in *Black's Case* (4) was analyzed in *Pett* v. *Sims Paving and Road Construction Co.* (5) where it was decided that liability in respect to the burning-off of land used for agricultural pursuits rests on the basis of negligence and not upon the basis of the rule in *Rylands* v. *Fletcher* (6). The burning-off was not a special use of the land and did not bring increased danger to others; the method employed was reasonable, and has become a necessary incident of farming operations (*Rickards* v. *Lothian* (7)), especially in the district where the land is situate (*Madras Railway Co.* v. *The Zemindar of Carvatenagarum* (8)). *Sheehan* v. *Park* (9) was decided prior to *Rickards* v. *Lothian* (10), and therefore cannot now be regarded as a concluding authority on the matter; see also *Salmond* on *Torts*, 7th ed. (1928), pp. 344 *et seq.* The principle of absolute liability for damage arising from fire, irrespective of negligence or otherwise, was discarded in *Bugge* v. *Brown* (11).

[STARKE J. referred to *Jones* v. *Festiniog Railway Co.* (12).]

The question has been dealt with by the Courts in South Africa and Canada respectively (*Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.* (13); *Goch* v. *Youschak* (14)).

[STARKE J. referred to *Cyclopedia of Law and Procedure* (1908), vol. 29, p. 460.]

An occupier is not liable for fire caused through the use of his land in the ordinary way (*Rickards* v. *Lothian* (15)). Whether the land was used in an ordinary way is a matter dependent on the circumstances of each particular case, and is a matter for the jury (*Whinfield* v. *Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* (16)).

(1) (1894) A.C. 48, at pp. 53, 54.
(2) (1883) 8 App. Cas. 443.
(3) (1931) 45 C.L.R., at pp. 550 *et seq.*
(4) (1894) A.C. 48.
(5) (1928) V.L.R., at p. 258.
(6) (1868) L.R. 3 H.L. 330.
(7) (1913) A.C., at pp. 279 *et seq.*
(8) (1874) 30 L.T. 770.
(9) (1882) 8 V.L.R. 25.
(10) (1913) A.C. 263; 16 C.L.R. 387.
(11) (1919) 26 C.L.R. 110.
(12) (1868) L.R. 3 Q.B. 733.
(13) (1902) A.C. 381.
(14) (1924) 4 D.L.R. 508.
(15) (1913) A.C. 263.
(16) (1914) 18 C.L.R. 606.

The onus of proving in any particular case that the land was not used in an ordinary way is on the plaintiff or party complaining (*Pett* v. *Sims Paving and Road Construction Co.* (1)).

Roper (with him *Clancy*), for the respondent. The *Fires Prevention (Metropolis) Act* 1774, is not in force in New South Wales; the relevant section of that Act, sec. 86, was re-enacted in the same terms in the *Sydney Buildings Act* 1837, which was subsequently repealed (*Reid* v. *Fitzgerald* (2)). In any event those statutory provisions do not apply to fires produced intentionally or by negligence as here, but are limited to fires "accidentally" started (*Filliter* v. *Phippard* (3)). The provisions of sec. 4 of the *Careless Use of Fire Act* 1912 are not applicable to this case. It was not the intention of the Legislature, as expressed in that Act, to restrict the civil consequences which would flow from the use of fire in any circumstances. Under the common law in its original form a person was absolutely liable in respect of a fire which escaped from his land and did damage to his neighbour's land, unless he could show that its escape was due to an act of God or an act of a third party (*Turberville* v. *Stampe* (4); *Jones* v. *Festiniog Railway Co.* (5)). That absolute liability has been modified only to the extent shown in *Whinfield* v. *Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* (6) and *Bugge* v. *Brown* (7). Liability under the rule in *Rylands* v. *Fletcher* (8) still exists (*Musgrove* v. *Pandelis* (9); *Clerk and Lindsell* on *Torts*, 8th ed. (1929), pp. 385-412). The starting of the fire by the appellant was a contravention of the provisions of sec. 2 of the *Careless Use of Fire Act* 1912; he is liable for whatever consequences flow from that unlawful act. Fire is inherently dangerous (*Whinfield* v. *Lands Purchase & Management Board of Victoria and State Rivers & Water Supply Commission of Victoria* (6)). A higher standard of duty and liability is imposed upon an occupier who uses something which is inherently dangerous. Whether a particular thing is dangerous or not is a question of law. The

(1) (1928) V.L.R. 247.
(2) (1926) 48 W.N. (N.S.W.) 25.
(3) (1847) 11 Q.B. 347, at p. 358; 116 E.R. 506, at p. 510.
(4) (1697) 1 Ld. Raym. 264; 91 E.R. 1072; Comb. 459; 90 E.R. 590.
(5) (1868) L.R. 3 Q.B. 733.
(6) (1914) 18 C.L.R. 606.
(7) (1919) 26 C.L.R. 110.
(8) (1868) L.R. 3 H.L. 330.
(9) (1919) 2 K.B. 43.

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burning-off, especially over so large an area, was not an ordinary and natural use of the land, nor was it a necessary operation. The evidence does not show that there was any disease in either the land or the crops. "Natural user" is a question which should be determined by the Court.

[DIXON J. referred to *St. Anne's Well Brewery Co.* v. *Roberts* (1).]

Assuming, without admitting, that the question was one for the jury, the onus was upon the appellant to show that the burning-off was a natural and ordinary user of the land; there was not any onus upon the respondent (*West* v. *Bristol Tramways Co.* (2)). The provisions of the *Pastures Protection Act* 1912, and the *Prickly Pear Act* 1924, referred to, only serve to show that the use of fire is a non-natural user of the land.

E. M. Mitchell K.C., in reply. The cause of action in *West* v. *Bristol Tramways Co.* (3) was framed in nuisance; the question of negligence did not arise in that case, but here it was the only question put to the jury. Moreover *West's Case* (3) does not deal with the ordinary use and occupation of the land. The decision in *Musgrove* v. *Pandelis* (4) conflicts with the decision of the Privy Council in *Rickards* v. *Lothian* (5), and should not be followed by this Court. The decision in *Job Edwards Ltd.* v. *Birmingham Navigations* (6) was based upon negligence or no negligence. *Jones* v. *Festiniog Railway Co.* (7) is distinguishable; the damage there complained of did not arise from an ordinary and natural use of the land, as here. What constitutes a natural use of land is shown in *Beven* on *Negligence*, 4th ed. (1928), vol. I., pp. 608, 609; see also *Smith* v. *Fletcher* (8).

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered:—

GAVAN DUFFY C.J., RICH, DIXON AND MCTIERNAN JJ. Apart from statute the common law imposed upon the occupier of land, who used fire upon it, a prima facie liability which was independent of negligence for the harm suffered by his neighbour as a natural

(1) (1928) 140 L.T. 1.
(2) (1908) 2 K.B. 14, at p. 24.
(3) (1908) 2 K.B. 14.
(4) (1919) 2 K.B. 43.
(5) (1913) A.C. 263; 16 C.L.R. 387.
(6) (1924) 1 K.B. 341.
(7) (1868) L.R. 3 Q.B. 733.
(8) (1874) L.R. 9 Ex. 64, at p. 67.

consequence of the escape of the fire. This prima facie liability might be answered by more than one ground of excuse or exception. The special responsibility arising from the use of fire has come to be regarded as no more than an application of a wider general rule governing the liability of occupiers of property and, perhaps, others who introduce an agency from which harm may reasonably be expected unless an effective control of it is maintained. The grounds of excuse or exception have arisen in the development of this general rule rather than in connection with the ancient strict liability for the escape of fire. Their precise nature and limits appear not yet to be well understood. In the present case, we are concerned with one only of these grounds. The fire, which travelled from the defendant's land to the plaintiff's, was lit by the defendant for the purpose of burning off stubble, a thing beneficial to the land which many farmers do. The use of fire for such a purpose is said by the defendant to be a recognized incident of the proper enjoyment of the land which, he claims, falls outside the application of the prima facie rule of absolute liability. The question whether this claim is well founded is that upon which the decision of the case must turn unless the common law has been superseded by statute. But, on behalf of the defendant, it is contended that in fact statute has abrogated or modified the common law rule in New South Wales. We do not think that this contention is correct. Sec. 86 of the *Fires Prevention (Metropolis) Act* 1774 (14 Geo. III. c. 78) was, we think, part of the law which, under 9 Geo. IV. c. 83, was originally in force in New South Wales. Its provisions, notwithstanding that the statute in which it occurs related to London, have been held of general application (*Richards* v. *Easto* (1)). It soon ceased, however, to be the formal expression of the law in New South Wales. Its provisions were transcribed in sec. 74 of the local statute of 8 William IV. No. 6, called the *Sydney Buildings Act* 1837. This section should, in our opinion, also be construed as of general application. The repetition of the section by the colonial legislation operated as an implied repeal of the British enactment so far as it applied to New South Wales. But, in its turn, the statute of 1837 was repealed. The repeal was effected by the *City of Sydney*

(1) (1846) 15 M. & W. 244; 153 E.R. 840.

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Improvement Act 1879 (42 Vict. No. 25). In *Reid* v. *Fitzgerald* (1), *Harvey*, C.J. in Eq., held that another section of 14 Geo. III. c. 78, viz., sec. 83, was not in force because it had been exactly reproduced by sec. 71 of 8 William IV. No. 6 which should be held, like its prototype, to be of general application. He said (2): "In my opinion the repeal of that Act would not have the effect of reviving the old Imperial enactment, even assuming it was at one time in force by reason of 9 Geo. IV. c. 83." It appears to be correct that the repeal would not revive the Imperial provision which the repealed statute had, in its application to New South Wales, previously repealed. For sec. 4 of the *Acts Shortening Act* (22 Vict. No. 12), uses the term "enactment," a term apt to include Acts of the British Parliament in force by virtue of 9 Geo. IV. c. 83. The Act of 1774 may, therefore, be regarded as not in force in New South Wales.

By the *Careless Use of Fire Act* 1866 (29 Vict. No. 21), lighting fires in the open was regulated under penal sanctions. Sec. 6 of the Act provided that nothing contained in the Act should interfere with the right of any person to recover at common law or otherwise compensation for damage occasioned by the reckless or negligent use of fire. This provision is repeated in the *Careless Use of Fire Act* 1912 (No. 28) which, together with the *Bush Fires Act* 1930 (No. 14), states when the lighting of fires in the open is allowable and when penal. An argument was advanced that, upon a proper consideration of this legislation it should be understood as an exhaustive statement of the civil as well as the criminal liability involved by the use of fire in the open, and that the civil liability was limited to its reckless or negligent use. We are unable to agree in this reading of the Act. We think that it was intended to justify civilly the use of fire in the manner and on the occasions prescribed by secs. 4 and 5 of the *Careless Use of Fire Act* 1912, subject to a condition that there should be no carelessness or recklessness, but otherwise to leave the law of civil liability unaltered.

The case, therefore, turns upon the question whether the use of the fire made by the defendant was such as to fall outside the strict liability independent of negligence and expose him to civil liability

(1) (1926) 48 W.N. (N.S.W.) 25. (2) (1926) 48 W.N. (N.S.W.), at p. 26.

only on the ground of negligence which the jury's verdict has negatived. The full enjoyment of the occupation of land according to the reasonable standards of behaviour prevailing in a community or locality is not possible without the occupier's making some use of things which, if there be a failure or removal of physical control or restraint upon their natural behaviour, will or probably will cause injury to neighbouring occupiers. The principle upon which a prima facie absolute liability appears to be imposed by the law is that no man should at the expense of his neighbour introduce upon his own land a potential source of harm which is considered to require continual and effective control or restraint to prevent mischief. If through a failure or relaxation of control damage to his neighbour occurs, although without negligence on his part, he should indemnify his neighbour. But when, to obtain effectual use and enjoyment of land in a reasonable manner according to its character and the uses for which it is adapted, occupiers find that the introduction of such a potential source of harm is generally necessary, to insist upon the prima facie rule would be to restrict the proper enjoyment of the land or to impose a special responsibility for loss arising from a danger to which by the recognized use of the land every occupier exposed himself and other occupiers. Accordingly, when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier, the prima facie rule of absolute responsibility for the consequences of its escape must give way. The terms in which the grounds of this exception from or exclusion of the prima facie rule have been described have varied, and, both because of this variation and of their indefiniteness, have been open to criticism. In his judgment in *Bamford* v. *Turnley* (1), where the earliest expression of the ground of the qualification appears, *Bramwell* B. spoke of the common and ordinary use of land as opposed to use in an exceptional manner. Lord *Cairns* in his speech in *Rylands* v. *Fletcher* (2), by which the generality of the qualification upon the rule was established, spoke of use "in the ordinary course of the enjoyment of land" and of

(1) (1860) 3 B. & S. 62, at p. 83; 122 E.R. 25, at p. 33.

(2) (1868) L.R. 3 H.L., at pp. 338, 339.

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"non-natural use." Others have preferred the simple epithets "extraordinary" or "exceptional." But in the decision which finally confirmed the general application of this exclusion of absolute responsibility, namely, *Rickards* v. *Lothian* (1), Lord *Moulton* defined the rule to be that the occupier's liability independent of negligence arose from "some special use bringing with it increased danger to others" and "not merely . . . the ordinary use of the land or such a use as is proper for the general benefit of the community." Now in applying this doctrine to the use of fire in the course of agriculture, the benefit obtained by the farmer who succeeds in using it with safety to himself and the frequency of its use by other farmers are not the only considerations. The degree of hazard to others involved in its use, the extensiveness of the damage it is likely to do and the difficulty of actually controlling it are even more important factors. These depend upon climate, the character of the country and the natural conditions. The question is not one to be decided by a jury on each occasion as a question of fact. The experience, conceptions and standards of the community enter into the question of what is a natural or special use of land, and of what acts should be considered so fraught with risk to others as not to be reasonably incident to its proper enjoyment. In Australia and New Zealand, burning vegetation in the open in midsummer has never been held a natural use of land. That it should be so considered does not appear to have occurred to the Supreme Court of Victoria. "If a person choose to bring fire into an arid place, he does so at his own risk, and the question whether he was guilty or not guilty of negligence as to the fire spreading does not arise" (per *Stawell* C.J., *Sheehan* v. *Park* (2)). Nor to that of New Zealand. "It is admitted that . . . the law in New Zealand is that if a person lights a fire on his own land he must at his peril prevent its spreading to the land of his neighbours" (per *Williams* J., *Kelly* v. *Hayes* (3)). In Canada the view taken in the Western Provinces has been the same : see *Goch* v. *Youschak* (4), although in Upper Canada a contrary doctrine was adopted as early as 1846 (*Dean* v. *McCarty* (5)) ; see the judgment of *Patterson* J. in *Furlong* v. *Carroll* (6).

(1) (1913) A.C. 263, at p. 280.
(2) (1882) 8 V.L.R. (L.), at p. 28.
(3) (1902) 22 N.Z.L.R. 429, at p. 433.
(4) (1924) 4 D.L.R., at p. 513.
(5) (1846) 2 W.C.R. 448.
(6) (1882) 7 Ont. App. 145, at p. 161.

Nothing which was said by the Privy Council in *Black* v. *Christchurch Finance Co.* (1) supports the view that burning vegetation in such countries as New Zealand and Australia is anything but an extraordinary or special use of land involving exceptional danger to others. Indeed, Lord *Shand* said (2):—"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 (*sic utere tuo ut alienum non laedas*)."

In our opinion the operation of burning stubble exposed the appellant to liability independently of negligence for the consequences of the escape of the fire.

We think the appeal should be dismissed.

STARKE J. The respondent brought an action against the appellant, for that the appellant lighted and kept a fire on his land in such a negligent and improper manner that it escaped and extended into the lands of the respondent, whereby the respondent sustained considerable damage. On the 15th February 1933 the appellant, who is a farmer, lit or consented to the lighting of a fire upon his land, for the purpose of burning off 100 acres of stubble. The stubble was burnt off, but the fire lighted some stumps, which smouldered for some time, and on the 20th February—as the argument before this Court conceded—sparks were blown, in a high wind, from one of these stumps on to the land of the respondent, and set fire to his grass, buildings and fences, and did considerable damage. The evidence established that burning off stubble is an ordinary farming operation, and was a method used by sixty or seventy per cent of the farmers in the district in which the appellant and the respondent had their lands. But it must be observed that February is a summer month, and the grass is then, usually, very dry and inflammable. The action was tried before a jury, which specifically found, in answer to a question put by the learned trial Judge, that the appellant was not guilty of any negligence which caused damage to the plaintiff. A verdict was thereupon entered for the appellant. Upon motion,

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

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

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however, to the Supreme Court of New South Wales to set aside this verdict, or for a new trial, the verdict was set aside and judgment was entered for the respondent for damages £569, which, as the jury found, the respondent had sustained by reason of the fire. An appeal is brought to this Court from that judgment.

The use of fire involved at common law the strictest responsibility, and decisions in modern times have brought that responsibility into line with what *Blackburn* J. (1) called "the general rule of common law . . . given in *Fletcher* v. *Rylands*" (2) (*Filliter* v. *Phippard* (3); *Fletcher* v. *Rylands* (2); *Jones* v. *Festiniog Railway Co.* (4); *Black* v. *Christchurch Finance Co.* (5)); "when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril; and is liable for the consequences if it escapes and does injury to his neighbour" (1). Exceptions from this liability have been recognized, and the critical question is whether the appellant has established that the present case is within any such exception.

One contention was that the statute law of New South Wales had established the rule that liability for damage by fire now depended upon want of reasonable care and prudence in the use of fire, or in other words, upon negligence. It is unnecessary to go through all the legislation referred to by the learned counsel who argued the case for the appellant, because the argument in the end rests upon the *Careless Use of Fire Act* 1912, (No. 28) and the *Bush Fires Act* 1930 (No. 14). But those Acts do not limit the common law liability except in so far as they authorize the use of fire ((1912) No. 28, secs. 4 and 5), and even in those cases liability is maintained if damage or injury is occasioned by the reckless or negligent use of fire (Act 1912 (No. 28), sec. 9). It was conceded that the appellant could not bring himself within the terms of any authority to use fire given by those Acts.

The other ground of exception suggested from the rule of absolute liability was that the appellant's was an ordinary use of his land, or such a use as was proper for the general benefit of the community

(1) (1868) L.R. 3 Q.B., at p. 736.
(2) (1868) L.R. 1 Ex. 265; L.R. 3 H.L. 330.
(3) (1847) 11 Q.B. 347; 116 E.R. 506.
(4) (1868) L.R. 3 Q.B. 733.
(5) (1894) A.C. 48.

(*Rickards* v. *Lothian* (1); *Madras Railway Co.* v. *The Zemindar of Carvatenagarum* (2)). The limits of this exception have never been very clearly defined. A man is entitled to the reasonable enjoyment of his land; he may build upon it, and in modern times it is but a reasonable enjoyment of his rights in respect of his land that his buildings should be equipped with fireplaces or apparatus for heating his premises, and with a water and gas supply and a sewerage system; such a user of land would be but a reasonable enjoyment of his rights in respect of his land. So, he may farm his lands, and conduct his farming operations in the ordinary manner. He may fertilize his land, and may make reasonable provision for watering his stock by means of dams, &c. The law relating to the legitimate enjoyment of lands must necessarily develop as conditions alter and methods improve. What may be regarded as a dangerous and extraordinary use of lands in one generation may well, in another, become but an ordinary and legitimate enjoyment of those lands. Indeed in some cases the question may become one of fact (*Whinfield's Case* (3); *Beven* on *Negligence*, 4th ed. (1928), vol. I., p. 608). But burning off stubble, when it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger. And I cannot agree that such an operation is an ordinary or natural or reasonable use or enjoyment of land, even if sixty or seventy per cent—or all— of the farmers in the district in which the land is situate take the risk. Nor do I agree that such an operation involves any question whatever for a jury. The facts in the case were not in dispute, and on those facts the jury should have been directed, as a matter of law, that the appellant burnt off his stubble at his peril, and that his liability was independent of any negligence on his part.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *P. W. McCarthy*, Lockhart, by *W. J. Maclean*.

Solicitor for the respondent, *F. J. Lappin*, Lockhart, by *J. G. J. Richards*.

J. B.

(1) (1913) A.C. 263.
(2) (1874) L.R. 1 Ind. App. 364; 30 L.T. 770.
(3) (1914) 18 C.L.R. at p. 620.