1924/9

H I G H C O U R T 10:9:1924

Durack - Appellant (defendant)

and

Baker - Respondent (Plaintiff)

[Not Official]
Isaacs ACJ & with.

JUDGMENT

ISAACS: A C J :

This is an action in which the appellant was sued by the respondent for damages caused by a fire which had been lit on the appellant's land. The action was framed in three ways - the fire was said to be unlawful because of omission to comply with the Bush Fires Act 1902; then negligence was alleged by reason of various matters including these two - the appellant did not take any precautions to confine the fire to his own land and the appellant uuthorised the lighting and sanctioned the fire to be lit and to continue alight on his land under circumstances when it was highly dangerous to do so because of a strong wind then blowing. It is unnecessary to refer to the other instances of alleged omission. Then there was the third ground that the respondent was an injured person.

The case was heard by His Honour the Chief Justice of Western Australia when apparently His Honour said he was not prepared to find negligence and proceeded to determine the matter on the basis of Craig v Parker (8 W.A.L.R 161) adopting the principle laid down in Rylands v Fletcher.

The learned Chief Justice came to some conclusions of fact which were are not embodied in his judgment. But what does appear are the findings that the fire which caused the injury to the respondent originated from a stump which had been lit by Kampilla by defendants (appellants) direction and that the fire proceeding from that stump ultimately reached respondent's land by the agency of a strong wind from the north west whihh

carried it in the direction of the respondent's land.

The appellant having no finding of negligence against him challenges the law in Craig v Parker which is the subject matter of a great mass of authority and as indicated in Court the parties are raising the question whether burning off operation is always and in all circumstances a peril the omission to confine which renders a man liable.

If it were necessary it would be our bounden duty to deal with that matter. It is quite certain that where there is negligence there is liability and here if the Chief Justice was not prepared to find negligence he left that undetermined and even if he had determined it the circumstances in this case are such that we would have been at perfect liberty to decide it for ourselves because it is not a question of having to accept the evidence on one side in preference to that on the other; the question here turns on the evidence of the appellant himself.

The salient facts are that in February and March the two hottest and driest months Kappilla was employed to burn off ~~xxx~~ by the appellant - one man to do the operation - He set fire twice to that stump whence the damage came. It was burning for weeks. He lit it for the second time about a fortnight before the fire broke out. Apparently it was left unwatched and unattended except that he renewed it. Certainly it was left unattended at night because Kappilla was the only person who had anything to do with it: equally so during the day for there is no evidence that he gave it any attention, and then on March 10th when the fire came he saw the stump was burning; it had got below the level of the ground and he devoted no care to covering it up or protecting it as he might have done. He was working at some distance from this stump at the time the fire broke out and evidently he observed some fire smoking and after a time he went up to

it. The fire had caught in some grass in defendant's (Appellants) paddock but had not then reached that of the plaintiff (respondent) He made an attempt to stop it but was too late. The wind which was a stronger wind than had been experienced during that summer but was nothing phenomenal was sufficient to arouse the slumbering fire and cause the flame to spread. The result was it travelled down a distance of two miles and a half to the vicinity of respondent's house destroyed a good deal of his property and caused damage which has been assessed at about £700.

The only protection suggested was the fire break. It has been suggested it was quite sufficient to rely upon that fire break Negligence means an absence of due care. Due care is the care which is proper under the circumstances and must vary with those circumstances and when there is as was shown here valuable property the care which should be taken when it is admittedly a naturally dangerous instrument is considerable, and I think it is perfectly clear that the mere existence of the break that was constructed was altogether insufficient and must have been considered by any person properly viewing the circumstances insufficient to guard against the risk.

It is, as has been said very important to Australian Agricultu that the use of fire should be carefully considered. I say nothing about the limits of that consideration but it is equally clear that it is important to the Australian Agriculturalist to bear in mind it is a factor which should be carefully guarded and to Australia at large it is a matter of considerable importance he should use the amount of care demanded of all men who use this very powerful instrument - a power for good or ill - with the care which he is entitled to expect and which is not to be minimised, and in this case we think that the due amount of care was not reached.

Negligence therefore has been established and the judgment should be sustained. We do not think it necessary to offer any opinion on the other points mentioned.

I have spoken for my learned brother as well as for myself.

The formal judgment will be - Appeal dismissed with costs.