Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Black v. *The Christchurch Finance Company, Limited, from the Court of Appeal of New Zealand; delivered* 16*th December* 1893.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Shand.*]

On the 23rd December 1890 a fire was lighted on certain uncleared land, the property of the Respondents, and extended to the adjoining land of the Appellant, and there destroyed property of the admitted value of 1,600*l.* This action was brought by the Appellant against the Respondents for the recovery of the damage thus sustained, and the Appellant obtained a judgment for the sum of 1,600*l.* from Mr. Justice Denniston before whom the case was tried, but this judgment was reversed by the Court of Appeal.

The ground of the Plaintiff's claim is that the Defendants lighted or caused or procured the fire to be lighted on their own land in a negligent and improper manner, and wrongfully and negligently permitted the fire to spread to the lands of the Plaintiff, with the result that the injury complained of was done to the Plaintiff's growing crops of grass-seed, and fences and firewood. The defence was a denial of the Plaintiff's allegations, and it was further alleged that the Defendants did not authorise or empower any person to light or cause or procure to be lighted the fire which did damage to the Plaintiff.

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The trial took place before Mr. Justice Denniston on the 16th June 1891. Unfortunately the only question which was left to the jury was whether the fire which caused the damage had been lighted by a man named Nyman. This they answered in the affirmative, and the learned Judge reserved further consideration of the case. Afterwards on the hearing of a motion by the Plaintiff that judgment should be entered for him for the damages found due upon "the finding of the jury, the admissions "of the parties, and the Judge's notes of evi- "dence," and a counter motion by the Defendants for a new trial on the ground "that the finding of "the Jury is so defective that the Judge cannot "give judgment upon it," His Honour on the 15th July 1891 delivered decree in the Plaintiff's favour. His judgment explains the course which the trial took, and the reasons which induced him to ask the jury the limited question already mentioned, and it seems to be essential in the determination of the present appeal to keep in view the account thus given of what occurred at the trial. His Honour said that—

"At the trial it was proved by written agreement, produced and put in evidence, that the Defendant Company had contracted with one Wright to clear and burn the bush on land belonging to the Defendant Company. Wright swore that, at the request of the Defendant, and on its behalf, he had let the felling and burning of an additional piece of bush to one Nyman. This was not disputed at the trial. Neither of these questions could be said to have been in issue in the sense of being in doubt or dispute. The real and only dispute at the trial was, as to whether or no Nyman was the man who was seen on the evening of the 23rd of December lighting the fire in the Company's bush, which undoubtedly spread into the Plaintiff's land and did the injuries complained of. The Defendant called no evidence, and in charging the Jury I told them that there was only one question in dispute so far as the facts were concerned, and I proposed to submit only one to them; and that as there were questions of law involved, I would leave them to answer a specific issue, and reserve the law points for after discussion. No objection was made to my charge. The Jury found, as they could not avoid finding, that Nyman had lit the fire. No other issue was asked to be put to the Jury by the

Defendant's Counsel. There was never any doubt that, in lighting the fire, Nyman did so in his capacity of contractor or sub-contractor. It is not suggested that he did it for amusement or maliciously. Indeed, in the present argument, Mr. Joynt himself suggested that no one would dispute that his real object was to get the work done as early as possible, so as to get the contract money. The legal consequence of his having so lit the fire is another matter, but it is clear that, after the finding of the Jury, no disputes as to the facts can exist, and the only question left is one purely of law."

In the view which the learned Judge took of the law the question really turned on the meaning and effect of the contract by which the Defendants devolved the operations of clearing and burning the bush on Wright the contractor, and which was in these terms,—

"Contract, dated 15th July 1890.

"Joseph Wright with the Christchurch Finance Company, Limited.

"I hereby contract with you for the falling and burning of bush on Section No. 31,438, in the following manner:—

"I will fall bush, scrub, saplings, and briars on the land, up to the size of 18 inches in diameter, about one foot from the ground, with the exception kounini, broadleaf, and eno, which I will strip of all limbs, and agree to burn everything up to the size of six inches in diameter, and I will start falling within three days from this date, and complete the falling by November the 30th 1890, and burn in a favourable time about February next. I to take all responsibility connected with burning off the bush, and all damages arising therefrom are to be made good and borne by me alone. The boundary being about two chains south of creek, and joining Mr. Black's fences on other boundaries, and that you should pay me 30/- per acre for falling and burning in the aforesaid manner, and the payments to be as follows:—2/3 payable on bush being fell, and the balance of contract paid on Mr. Belmer's certificate of completion.

"I to have the firewood at a royalty of 3/- per cord, and right to make road through the reserve to enable me to haul my timber to the main road."

The Defendants appealed against Mr. Justice Denniston's judgment, and by their notice of appeal they intimated that they would move the Court of Appeal "to set aside the judgment "given for the Respondent, by the Supreme "Court at Christchurch, on the 15th day of

" July 1891, and to enter up judgment for the " Defendant, with costs, on the grounds shown " by the statements of claim and defence, and " by the admission evidence and finding at the " hearing in the said Supreme Court."

This notice of appeal, it will be observed, did not again ask for a new trial, but invited the Court to dispose of the case on the record, and the admission evidence and finding at the hearing of the case by Mr. Justice Denniston, as that learned Judge had himself done.

Although the verdict given at the trial was an answer to one question only, and that a question the answer to which taken alone could not afford a solution of the legal point of the Defendants' liability, the Court of Appeal has entertained and disposed of the case on the view that the judgment of Mr. Justice Denniston fully explains the course which the trial took, and that judgment should accordingly be given on the evidence and the admissions, as the Defendants asked by their notice of motion. Taking this view, the Court of Appeal have concurred with Mr. Justice Denniston in holding that the decision of the case depends on the terms of the contract entered into between the Company and Wright, as to the legal effect of which however they have arrived at a different result. The Defendants' Counsel proposed in the event of their Lordships differing from the judgment of the Appellate Court that the case should still be remitted back to have a new trial on certain points on which they maintained the proof was not clear, but their Lordships are clearly of opinion, having regard to the course taken before the Courts below, that the appeal should be now disposed of as depending on the contract already referred to, in the light of the facts as these have been found or accepted as proved in the judgments of the Courts below. In this view

it appears to their Lordships that the act of Nyman in setting fire to the bush on the Defendants' land must be regarded as the act of the contractor. Mr. Justice Denniston expressly says with reference to what occurred at the trial :—" No other issue was asked to be put to " the jury by the Defendants' Counsel. There " was never any doubt that in lighting the fire, " Nyman did so in his capacity of contractor " or sub-contractor," and the learned Judges in the Court of Appeal have proceeded on substantially the same view of the result of the evidence and of what occurred at the trial on this point.

The case does not raise any general question of law, but seems to involve only the question whether the Defendant Company under the special terms of their contract are responsible for the act of Nyman in setting fire to the bush at a time when admittedly, with a north-west wind blowing, his act was attended with great risk of damage to the Plaintiff's property. It has not been disputed that if Nyman in what he did was acting under the Defendants' contract, by which the burning of the bush had been let or contracted for, the Defendants must be responsible for the consequences. 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 lædas*). And if he authorises 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. See *Hughes* v. *Percival* (8 L. R., App. Cas. 443), and authorities there cited.

Cases may indeed occur in which no precautions could be adopted which could reasonably be expected to avert the danger, of which the present appears to be a pretty clear instance, for it is scarcely conceivable that when once the fire was lit, not at a suitable or favourable time, but with the wind blowing as it was, any means which could be suggested would have saved the consequences which occurred. In any view no preventive means of any kind were adopted, and there can be no doubt as to the liability of the Defendants if they are responsible for Nyman's act.

Conflicting views have been taken by Mr. Justice Denniston on the one hand, and the Court of Appeal on the other, as to the effect of the contract with Wright which was entered into on the 15th July 1890. The fire took place on the 23rd December following. The Court of Appeal has held that a fire on that date, or on any date earlier than would be fairly covered by the words "about February next," could not be regarded as under the contract, and accordingly reversed the judgment of Mr. Justice Denniston in the Plaintiff's favour.

The contract was made expressly for the "falling and burning" of the bush on the Defendants' land. It proceeds in its second sentence to specify what the contractor is to fall, and what he is to burn. "I will fall bush scrub "saplings and briars on the land" &c., "and agree "to burn everything up to the size of six inches "in diameter." It then proceeds "and I will "start falling within three days from this date "and complete the falling by November the 30th "1890, and burn in a favourable time about "February next." Thus in three instances in the earlier part of the document the falling and burning of the bush are treated together as parts of one general operation for the clearance of the

ground. There follows a clause by which the contractor agrees to take all responsibility connected with burning off the bush and all damages arising from this. The price is then fixed at a lump sum of 30*s.* per acre "for falling and "burning," two-thirds to be paid on bush being "fell," and the balance paid on certificate of completion. The contract contains a further term that the contractor is to have the firewood at a royalty of 3*s.* per cord, and right to make a road through the reserve to enable him to haul his timber to the main road.

The contract taken as a whole is one for the clearance of the ground of all growing bush and timber, to be effected by the consecutive operations of felling and burning. It is stipulated that the first of these operations shall be begun at once, and concluded by the end of November following. Then follow the words on which the judgment of the Court of Appeal proceeds "and burn in a "favourable time, about February next." It is said that the specification of time to burn "about "February next" has the practical effect of separating the operations of felling and burning so completely as really to create two contracts, though for a lump payment, and that the contractor, if he went on the land sooner than "about "February" to light the bush, was to be regarded in the present question in the same way as an intruder or a stranger for whose act the Defendant Company would have no responsibility. Their Lordships are unable to agree with this view of the contractor's position. The contract bound the contractor "to burn in a favourable time." It cannot be suggested that if he had violated this condition only of his contract, the Defendants would have escaped responsibility. Having authorised and entrusted the operation of burning to another they must answer for his proceedings, however much he may have violated

their instructions or the detailed conditions of his contract with them. Their Lordships agree in the observation of Mr. Justice Denniston when he says with reference to the act of Nyman: — "I cannot distinguish between the legal con- " sequences of lighting a fire at an improper time " and of lighting it in an improper manner." In the present case the clearing of the land was authorised by a contract for felling and burning. It no doubt contained a stipulation that an interval should elapse between the two operations, presumably in order that the bush cut should be thoroughly dried so that the burning should be as complete as possible. It is not easy to say why "about February" should have been specified as the time of burning, for there is some evidence that the cocksfoot harvest which would be endangered is usually going on throughout that month. It may have been in order to secure a sufficient interval after the felling, which was to be completed not later than by the end of November, or because it was desired to have the ground fully cleared about February. But assuming that there was a violation of the terms of the contract on the contractor's part in burning so early as the end of December this cannot in their Lordships' opinion affect the Defendants' liability to third parties injured by the act of their contractor. It is clear that the contractor had the right under his contract to be on the ground from time to time as he thought fit, until the whole operations were completed for felling, for clearing away the timber he was entitled to remove, for making a road to enable him to do so, and for the burning of the bush. Their Lordships cannot adopt the view that the contracts for felling and for burning the bush are to be regarded as in any proper sense separate or independent, and that the separate contract to burn the bush did not come into operation until about February. There was but

one contract, to fell and to burn, that is to clear the land, and though the contractor disregarded the stipulation which the Defendants made with him as to the time of burning this cannot relieve them from responsibility. The Defendants might have stipulated that an interval of two months should elapse after the time of felling and before the burning should take place. If the contractor having leave under his contract to be on the land had allowed a shorter interval only, it could not be said he was a trespasser when he lighted the fire, so that the Defendants would not be liable for his act. So also if the contractor disregarded or violated stipulations as to the manner of lighting, or the place at which the fire should be lit. Their Lordships are unable to draw any distinction in legal principle between such cases and the present in which the condition related to the time at which the fire was to be lighted.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the Court of Appeal, and to restore the judgment of Mr. Justice Denniston. The Defendants will pay the costs of the appeal to the Appellate Court and of the present appeal.