P.C. 6D1666

IN THE PRIVY COUNCIL
ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

January 12, 1966

No. 30 of 1965

B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

RUPERT WILLIAM EDESON HARGRAVE and WINIFRED HAZEL HARGRAVE (Trading under the firm name of GIDGEGANNUP AGENCY) (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

EDWARD R. TAYLOR AND ELIZABETH E. TAYLOR (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

RICHARD BRENNAND (Plaintiff) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

FREDERICK W. PRICE and GLADYS J. PRICE (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

REGINALD V. COUSINS (Plaintiff) Respondent

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

PETER W. WILLIAMSON EILEEN G. WILLIAMSON (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

JOHN R. GARSIDE and GWENDOLINE M. GARSIDE (Plaintiffs) Respondents

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(CONSOLIDATED BY ORDER DATED 13th APRIL, 1962)

RECORD OF PROCEEDINGS

INGLEDEW, BROWN BENNISON & GARRETT,
51, Minories,
London, E.C.3.
Solicitors for the Appellant.

MONTAGU'S and COX & CARDALE,
86 & 88 Queen Victoria Street,
London, E.C.4.

Solicitors for the Respondents.

IN THE PRIVY COUNCIL No. 30 of 1965

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

- and - **Appellant**

RUPERT WILLIAM EDESON HARGRAVE
and WINIFRED HAZEL HARGRAVE
(Trading under the firm name
of GIDGEGANNUP AGENCY) (Plaintiffs)
Respondents

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

Appellant

- and -

EDWARD R. TAYLOR and ELIZABETH
E. TAYLOR (Plaintiffs)
Respondents

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

- and - **Appellant**

RICHARD BRENNAND (Plaintiff)
Respondent

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

- and - **Appellant**

FREDERICK W. PRICE and GLADYS
J. PRICE (Plaintiffs)
Respondents

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

- and - **Appellant**

REGINALD V. COUSINS (Plaintiff)
Respondent

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

- and - **Appellant**

PETER W. WILLIAMSON and EILEEN G. WILLIAMSON (Plaintiffs)

Respondents

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

- and - **Appellant**

JOHN R. GARSIDE and GWENDOLINE M. GARSIDE (Plaintiffs)

Respondents

(CONSOLIDATED BY ORDER DATED 13TH APRIL, 1962)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

Description of Document	Date
PLAINTIFF'S EVIDENCE	
Evidence of ROBIN HAROLD TAYLOR	6th November 1962
Evidence of ROBERT CHARLES CARVELL	6th November 1962
Evidence of WALTER NIGEL FORWARD	6th November 1962
Evidence of EDNA MAY JONES	6th November 1962
Evidence of LEONARD WALTER CARVELL	6th November 1962
Evidence of EDWARD ROLAND LEE	6th November 1962
Evidence of GEORGE WILLIAM MACKEY	6th November 1962

Description of Document	Date
Evidence of HAROLD KEITH COOMBS	7th November 1962
Evidence of ANTHONY STUART WAYCOTT	7th November 1962
Evidence of ANGELO JOHN MILESI	7th November 1962
Evidence of REGINALD CHARLES MYERS	7th November 1962
Evidence of THOMAS JOHN WILLIAMSON	8th November 1962
DEFENDANT'S EVIDENCE	
Evidence of ALLAN WILLIAM GOLDMAN	8th November 1962
Judgment of the Supreme Court of Western Australia	9th January 1963
Notice of Motion by defendant for leave to address further argument to the High Court	26th September 1963
Affidavit of defendant	27th September 1963
Affidavit of Robert Ian Viner	7th October 1963
Affidavit of Metha Grant	2nd October 1963
Affidavit of Robert Ivon Grant	31st August 1963
Written submissions by defendant in support of motion for leave to address further argument to the High Court	30th October 1963
Written submissions by the plaintiffs Rupert William Edeson Hargrave and ors. in answer to the written submissions by the defendant	8th November 1963

EXHIBITS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED.

Description of Document	Date
Plan with measurements in regard to fire	
Plan put in by defendant	
Photograph of one of burning logs in the stock race on the defendant's property	
Photograph of hill similar to that at end of the valley on the west-southwest side of the defendant's property	
Statement of Defendant	2nd March 1961
Meteorological report as to weather conditions on 25th February 1961	16th July 1962
Statement at inquest of H.K. Coombs	
Photograph identifying tree near to which an inked circle is marked	
Panorama of defendant's property.	
Photograph taken inside stock race area showing burnt red gum tree	
Photograph of bushland outside N.E. corner of defendant's property	
Photograph showing fire damage in defendant's and Zinkler's property	
Photograph taken inside defendant's property on the east side looking south, north of homestead	
Photograph taken from east of homestead looking west toward Defendant's homestead	

Description of Document	Date
Photograph taken east of defendant's property looking west - foreground Wooroloo Brook - background race track	
Lithographic plan of locality	
Bundle of 5 photographs "A" to "E"	
Lithographic plan showing properties within Swan Guildford Road District (now Swan Guildford Shire)	
Extracts from Government Gazette dated 26th August, 1960 pp. 2569 and 2570	
Copy of extract read to witness Milesi from publication "Forest Fire Control and Use"	

IN THE PRIVY COUNCIL No.30 of 1965

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

ALLAN WILLIAM GOLDMAN (Defendant)

Appellant

- and -

RUPERT WILLIAM EDESON HARGRAVE and WINIFRED HAZEL HARGRAVE (Trading under the firm name of GIDGEGANNUP AGENCY) (Plaintiffs)

Respondents

AND BETWEEN:

ALLAN WILLIAM GOLDMAN (Defendant)

Appellant

- and -

EDWARD R. TAYLOR and ELIZABETH E. TAYLOR (Plaintiffs)

Respondents

AND BETWEEN:

ALLAN WILLIAM GOLDMAN (Defendant)

Appellant

- and -

RICHARD BRENNAND (Plaintiff)

Respondent

AND BETWEEN:

ALLAN WILLIAM GOLDMAN (Defendant)

Appellant

- and -

FREDERICK W. PRICE and GLADYS J. PRICE (Plaintiffs)

Respondents

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

Appellant

- and -

REGINALD V. COUSINS (Plaintiff)

Respondent

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

- and - **Appellant** 10

PETER W. WILLIAMSON and EILEEN G. WILLIAMSON (Plaintiffs)

Respondents

AND B E T W E E N:

ALLAN WILLIAM GOLDMAN (Defendant)

Appellant

- and -

JOHN R. GARSIDE and GWENDOLINE M. GARSIDE (Plaintiffs)

Respondents 20

(CONSOLIDATED BY ORDER DATED 13TH APRIL, 1962)

RECORD OF PROCEEDINGS

In the Supreme Court of Western Australia

No.1

Order for Consolidation of Actions made by the Honourable The Chief Justice Sir Albert Wolfe, K.C.M.G. 13th April 1962

NO. 1

ORDER FOR CONSOLIDATION OF ACTIONS MADE BY THE HONOURABLE THE CHIEF JUSTICE, SIR ALBERT WOLFE, K.C.M.G

IN THE SUPREME COURT OF WESTERN AUSTRALIA

H.No.52 of 1961
~~B.No.69 of 1961~~
~~P.No.43 of 1961~~
~~G.No.70 of 1961~~
~~C.No.85 of 1961~~
~~W.No.63 of 1961 and~~
~~T.No.12 of 1962~~

B E T W E E N:

RUPERT WILLIAM EDESON HARGRAVE and WINIFRED HAZEL HARGRAVE (trading under the firm name of GIDGEGANNUP AGENCY) ~~AND OTHERS.~~

Plaintiffs

- and -

ALLAN WILLIAM GOLDMAN

Defendant

ORDER FOR CONSOLIDATION

BEFORE THE HONOURABLE THE CHIEF JUSTICE IN CHAMBERS

FRIDAY THE 13TH DAY OF APRIL 1962

UPON READING the summons herein dated the 10th day of April 1962 and the affidavit of Theodore Rosslyn Ambrose sworn on the said 10th day of April 1962 both filed herein AND UPON HEARING the solicitors for both parties and also the solicitors for EDWARD ROBERT TAYLOR and EILEEN ELIZABETH TAYLOR the plaintiffs in the action against the same defendant being T. No. 12 of 1962 IT IS ORDERED (by consent) that:

1. The actions:

B. No. 69 of 1961
P. No. 43 of 1961
G. No. 70 of 1961
C. No. 85 of 1961

In the Supreme Court of Western Australia

No. 1

Order for Consolidation of Actions made by the Honourable The Chief Justice Sir Albert Wolfe, K.C.M.G. 13th April 1962

Continued

W. No.63 of 1961 and
T. No.12 of 1962.

be consolidated with this action.

2. Messrs. Jackson McDonald & Co. be substituted for Messrs. John O'Halloran & Co. as solicitors on the record for the said EDWARD ROBERT TAYLOR and EILEEN ELIZABETH TAYLOR in the action T. No. 12 of 1962.

3. The papers for the Judge should include:

(a) One Statement of Claim in respect of the actions:

H. No.52 of 1962 and
B. No.69 of 1961
P. No.43 of 1961
G. No.70 of 1961
C. No.85 of 1961
W. No.63 of 1961

with separate statements of the particulars of damage in each case, and

(b) The Statement of Claim in the action T. No. 12 of 1962, and

(c) One Statement of Defence in respect of the action T. No.12 of 1962, and

(d) One Statement of Defence in respect of the other 6 actions.

4. Liberty to apply for separate representation if any question arises which puts one plaintiff in a different position to the other plaintiffs is hereby reserved.

5. The actions be listed for trial at the ~~June~~ Sittings of this Court to be heard on dates to be fixed.

6. The costs of the consolidated action be on the Higher Scale in so far as the plaintiffs the said Edward Robert Taylor and Eileen Elizabeth Taylor if successful are concerned and also against them if the defendant succeeds; that the costs of the other plaintiffs or of the defendant

whoever succeeds be reserved for the Trial Judge.

7. The Costs of and incidental to this application be costs in the cause.

8. Liberty to apply generally in Chambers is hereby reserved.

I. MULFORD

ASSOCIATE.

This Order is extracted by Messrs. Jackson McDonald & Co. solicitors for the plaintiffs.

In the Supreme Court of Western Australia

No. 1

Order for Consolidation of Actions made by the Honourable The Chief Justice Sir Albert Wolfe, K.C.M.G. 13th April 1962 Continued

NO. 2

AMENDED STATEMENT OF CLAIM OF PLAINTIFFS RUPERT WILLIAM EDESON HARGRAVE AND WINIFRED HAZEL HARGRAVE

No. 2

Amended Statement of Claim of Plaintiffs Rupert William Edeson Hargrave and Winifred Hazel Hargrave 7th September 1962

AMENDED STATEMENT OF CLAIM OF RUPERT WILLIAM EDESON HARGRAVE AND WINIFRED HAZEL HARGRAVE PURSUANT TO LEAVE GRANTED AT TRIAL BY THE HONOURABLE MR. JUSTICE JACKSON ON 1st AUGUST 1962.

1. The Plaintiffs were on the 1st day of March 1961 the owners and occupiers of a sawmill situated on land at Gidgegannup owned by Edward Robert Taylor and Eileen Elizabeth Taylor (as joint tenants) and being the land comprised in Certificate of Title Volume 1220 Folio 709. The sawmill included a timber and iron building, diesel engine and other plant and sawn timber.

2. The Defendant is the registered proprietor and occupier of and carries on the business of a farmer in the Gidgegannup area known as Amaroo Stud and being the land comprised in Certificates of Title Volume 1098 Folio 245, Volume 1098 Folio 246 and Volume 1067 Folio 776.

3. The above mentioned properties are near one another.

4. On or about the 26th day of February 1961

In the Supreme Court of Western Australia

No. 2

Amended Statement of Claim of Plaintiffs Rupert William Edeson Hargrave and Winifred Hazel Hargrave 7th September 1962

Continued

a bush fire started on the Defendant's land when a tree standing on the Defendant's land became ignited. The Defendant was aware of the said fire and on or about the same day he caused the burning tree to be felled and he continued and increased the fire by adding or causing to be added to the fire bush material of a highly combustible nature.

Amended at trial the 7th day of November 1962 pursuant to leave granted this day

"And thus brought to his said premises such increased fire maintained it and permitted it to escape to the property of the said Edward Robert Taylor and the said Eileen Elizabeth Taylor".

5. The Defendant:-

(a) Contrary to Section 17 of the Bush Fires Act 1954 and Amendments burnt bush during a period in which burning off was prohibited.

(b) Contrary to Section 28 of the said Act failed on becoming aware of the fire referred to in paragraph 4 hereof to forthwith take all possible measures to extinguish the same.

6. On or about the 1st day of March 1961 the said fire escaped (inter alia) to the land of the said Edward Robert Taylor and Eileen Elizabeth Taylor whereon the present Plaintiffs' property mentioned in paragraph 1 hereof was and as a result the said property of the present Plaintiffs was destroyed or damaged and the Plaintiffs have suffered loss and have been put to expense.

Particulars of damage sustained by the Plaintiffs are as follows :-

1. Mill Building: Timber and iron £20

2.	40 Dorman Ricardo diesel engine	£300
3.	One 12" planing machine W.H. Hampton, Melbourne	30
4.	One 14" circular saw steel bench top fitted to wooden stand with shafting belting bearings and pulleys	25
5.	Shafting and bearings; two lengths of 1½" x 2½", two 2½ bearings, two 1½ bearings and pulley belts.	40
6.	Quantity of stacks short lengths 3 x 1 up to 6' x 1 up to 9'. Bundles of lattice laths, 3, 4, 5, 6. Garden stakes	100

7. The Plaintiffs say the Defendant:-

(a) was guilty of breaches of statutory duty as alleged in paragraph 5 hereof;

(b) allowed or permitted a fire he started on his property to escape to the property of the said Edward Robert Taylor and the said Eileen Elizabeth Taylor whereon stood the present Plaintiffs' sawmill and other property:

(c) was negligent in permitting such fire to escape to the property of the said Edward Robert Taylor and Eileen Elizabeth Taylor and thereby destroying or damaging the present Plaintiffs' property.

8. The Plaintiffs claim damages against the Defendant:

(a) For breach of a statutory duty as above alleged:

(b) In accordance with the doctrine of Rylands v. Fletcher;

(c) For negligence and nuisance

PARTICULARS OF DEFENDANT'S NEGLIGENCE

(i) The Defendant did not at any material time extinguish or attempt to extinguish the fire upon his land.

(ii) The Defendant continued the fire by adding or causing to be added to the fire material of a highly combustible nature thereby increasing the said fire at a time when he was aware or should have been aware of the dry and hot weather conditions then existing and of the likelihood of winds causing fire and/or sparks and embers to spread from this fire to other land in close proximity to his land and cause a fire thereon.

(iii) The Defendant did not control or attempt to control the fire.

(iv) The Defendant by continuing and increasing the fire was unable to control and/or extinguish the fire.

(v) The Defendant did not take any or any suitable precautions to ensure that the said fire would not escape from his land to any other land in close proximity including the land of the said Edward Robert Taylor and Eileen Elizabeth Taylor whereon was standing the present Plaintiffs' sawmill and other property already mentioned.

THE PLAINTIFFS' CLAIM DAMAGES OF £515.

T.R. AMBROSE
COUNSEL

THIS AMENDED STATEMENT OF CLAIM is filed by Messrs. Jackson, McDonald & Co. of 55 St. George's Terrace, Perth, Solicitors for the Plaintiffs.

In the Supreme Court of Western Australia

No. 2

Amended Statement of Claim of Plaintiffs Rupert William Edeson Hargrave and Winifred Hazel Hargrave 7th September 1962 Continued

No. 3

Amended Defence of Defendant to Amended Statement of Claim of Plaintiffs Rupert William Edeson Hargrave and Winifred Hazel Hargrave 10th October 1962

NO. 3

AMENDED DEFENCE OF DEFENDANT TO AMENDED STATEMENT OF CLAIM OF PLAINTIFFS RUPERT WILLIAM EDESON HARGRAVE AND WINIFRED HAZEL HARGRAVE

AMENDED DEFENCE PURSUANT TO LEAVE GIVEN BY THE HONOURABLE MR. JUSTICE JACKSON AT TRIAL 1st DAY OF AUGUST 1962.

1. The defendant does not admit paragraph 1 of the Statement of Claim.

2. The defendant admits paragraph 2 of the Statement of Claim. The defendant does not admit paragraph 3 of the Statement of Claim.

3. As to paragraph 4 of the Statement of Claim the defendant admits that on or about the 26th day of February 1961 a tree standing on the defendant's land became ignited and that the defendant was aware of this. The defendant denies that he caused the said tree to be felled. The tree was felled by Harold Keith Coombes, Leonard Walter Carvell and George Doggett each acting upon the directions received by him from one Walter Nigel Forward a Fire Control Officer. Save as aforesaid the defendant denies each and every allegation pleaded in paragraph 4 of the Statement of

In the Supreme Court of Western Australia

No. 3

Amended Defence of Defendant to Amended Statement of Claim of Plaintiffs Rupert William Edeson Hargrave and Winifred Hazel Hargrave 10th October 1962 Continued

Claim.

4. The defendant says that the fire in the said tree was caused by lightning on the evening of the 25th of February 1961.

5. The defendant denies each and every allegation contained in paragraphs 5, 6, 7 and 8 of the Statement of Claim.

JOHN L.C. WICKHAM

No. 4

Reply of Plaintiffs Rupert William Edeson Hargrave and Winifred Hazel Hargrave to Amended Defence of Defendant 31st October 1962

NO. 4

REPLY OF PLAINTIFFS RUPER WILLIAM EDESON HARGRAVE AND WINIFRED HAZEL HARGRAVE TO AMENDED DEFENCE OF DEFENDANT

REPLY OF RUPERT WILLIAM EDESON HARGRAVE AND WINIFRED HAZEL HARGRAVE.

1. The Plaintiffs join issue with the Defendant on his amended defence.

2. As to paragraph 3 of such amended defence the Plaintiffs further say that even if HAROLD KEITH COOMBES LEONARD WALTER CARVEL and GEORGE DOGGETT felled the tree acting upon a direction received from one WALTER NIGEL FORWARD a Fire Officer (as to which the Plaintiffs put the Defendant to proof) the said persons so felled the tree in the presence of and with the concurrence and approval of the defendant and upon the said tree being felled the Defendant by his own conduct maintained continued and increased the fire as alleged in paragraph 4 of the Plaintiffs' amended Statement of Claim.

KEN HATFIELD

COUNSEL.

In the Supreme Court of Western Australia

No. 5

Reasons for Judgment of the Honourable the Senior Puisne Judge (Mr. Justice Jackson) 9th January 1963

NO. 5

REASONS FOR JUDGMENT OF THE HONOURABLE THE SENIOR PUISNE JUDGE (MR. JUSTICE JACKSON)

Hearing: 6, 7, 8, 9th Nov.1962
& 4th Dec.1962
Judgment: 9th Jan.1963

JACKSON S.P.J.

H.52/1961 & other consolidated actions

RUPERT W.E. HARGRAVE & WINIFRED H. HARGRAVE, trading as GIDGEGANNUP AGENCY

and

T.12/62 EDWARD R. TAYLOR and ELIZABETH E. TAYLOR

and

B.69/61 RICHARD BRENNAND

and

P.43/61 FREDERICK W. PRICE and GLADYS J. PRICE

and

C.85/61 REGINALD V. COUSINS

and

W.63/61 PETER W. WILLIAMSON and EILEEN G. WILLIAMSON

and

G.70/61 JOHN R. GARSIDE and GWENDOLYN M. GARSIDE

Plaintiffs

-v-

ALLAN W. GOLDMAN

Defendant

In the Supreme Court of Western Australia

No. 5

Reasons for Judgment of the Honourable the Senior Puisne Judge (Mr. Justice Jackson) 9th January 1963 Continued

Counsel for plaintiffs: K.W. Hatfield Q.C. and with him J.H. O'Halloran.

Counsel for defendant: F.T.P. Burt Q.C.: and with him J.L.C. Wickham.

This a consolidated action in which several plaintiffs who are owners or occupiers of land at Gidgegannup sue the defendant, a neighbouring owner and occupier, for damages which they sustained from a bush fire said to have commenced on the defendant's property and from there to have spread to the properties of the plaintiffs. By consent, no evidence as to damages has as yet been given until the issue of liability has been determined.

The Defendant who is 66 years old, lives alone on his property which is of 600 acres in two areas a little apart. It is lightly developed grazing property, on which he runs a herd of stud cattle, including some valuable cows. On Saturday, 25th February, 1961 between 5 0 and 6.0 p.m., there was a storm in this district with a lot of lightning but little rain. A big redgum, perhaps 100 feet tall and with a branchy top, which stood in a stockrace 100 yards or so from the defendant's house, was struck by lightning and commenced to burn in a fork of the tree, later measured to be 84 feet from the ground. The next morning, Sunday, the defendant could see the fire in the fork of the tree and realised at once that it could become dangerous unless dealt with. A lad named Robert Carvell had come to help him on the farm that day, but otherwise he was alone. The only equipment he had with which to fight a fire was a rubber-tyred tractor, fitted with a bulldozer blade and rake, and a 600 gallon tank fitted with a pipe in which several sprinklers were fixed which would water a path about 12 feet wide. The tank was mounted on a 2 wheel trailer, hauled by the tractor. There were good supplies of water available at the house, at a shed at the end of the stockrace and in some large pools in a creek 250 yards west of the stockrace.

The defendant realised that the tree would have to be felled to get at the fire. It had been ringbarked and was fairly dry. At an early hour, between 7. 0 and 8. 0 a.m. he telephoned a local farmer named Forward, who was the fire control officer under the Bush Fires Act for the Gidgegannup Ward of the Swan Road Board. There is some difference of recollection as to what was then said, but it is of little importance. Soon afterwards, the defendant again telephoned Forward, who agreed to get a tree-feller named Coombes to go to defendant's property to fell the tree. Coombes, with two other men, Len Carvell and Doggett, arrived to do this at about midday, the delay being due to Coombes doing some repair work on his motor vehicle. In the meantime, the defendant had not been idle. With his tractor, he had cleared a substantial area around the redgum, so that when it fell, it would drop into an area free of readily combustible material. There was in the stockrace a little dry grass and some dead tree tops (left after trees had been felled and millable timber recovered). The stockrace was about 180 yards long and 40 feet wide and ran approximately north and south. It was bounded on each side by a wire fence, beyond which to the east and west were paddocks, sparsely timbered, but with much more dry grass and dead tops. The butt of the redgum was only 4 feet or 5 feet from the west fence of the stockrace, so the defendant had to go into the western paddock to clear away leaves and grass that would burn. In additon, he used the tank and sprinklers to water the ground nearby to minimise the risk of the fire escaping. Meanwhile the day got hotter, and the fire in the tree increased. Small bits of burning leaves or bark fell from the top and caught fire to the bark at the base, and also caused two or three small fires in the stockrace, and set alight to a fair sized jarrah tree to the east of the stockrace. Fortunately there was only a slight breeze, and these fires did not spread. As the morning passed the defendant became concerned that no-one arrived to help him. He telephoned Mr. Williamson, the Road Board Secretary and also P.C. Lee at Mundaring and informed them of the fire and of the absence of

assistance.

Eventually Coombes arrived with a power chain saw and Len Carvell brought a knapsack spray which held 2 gallons or so of water. The tree was then burning fiercely in the fork, and the bark from the ground up was alight. They damped out the fire at the base using the knapsack spray and then Coombes felled it, so that it came down pointing towards the north, i.e. along the length of the race, but towards the centre. The defendant had been waiting on his tractor in the western paddock and as soon as the tree fell, he broke through the fence and using the rake attachment, he raked and pushed into the burning tree all combustible material within the control area which he had previously established. This consisted mainly of twigs and leaves and branches which had broken from the top of the redgum when it fell. When the tree hit the ground, the fire in the fork flared up, as was to be expected. It could not then have been at once extinguished with water, in the absence of a powerful pump to propel a jet of water onto it. Coombes tried to maintain, before me, that the fire could then have been doused with the knapsack spray, but this is completely contrary to the evidence he gave at the inquest, and I accept the bulk of the testimony that the knapsack spray would have been ineffective. Both Coombes and Carvell seemed to think that the defendant was wrong in pushing up broken tops and other inflammable material into the tree after it fell. This action naturally resulted in an immediate increase in the fire. But it is clear that he was primarily concerned with pushing in broken pieces of the tree which were already alight and he could not stop to separate out those which were not alight. The defendant's actions up to this stage appear to me to be unexceptionable, taking into account all the circumstances and the fire-fighting equipment available. The evidence of Mr. Milesi, the Fire Control Superintendent of the Forests Department,

and an undoubted expert on bush fires, strongly confirms this.

Coombes says that at that stage he suggested to the defendant that he should use water on the fire, but the latter took no notice. The defendant says he did not hear this suggestion because of the noise of his tractor, and this could well be so. Even had he heard, I doubt if he would have heeded the advice. He had, I think, decided how he would deal with the situation. I judge him to be a man who makes his own decisions and adheres to them with some obstinacy and certainly not one who would readily take advice from young men very much his junior.

However, Coombes, Len Carvell and Doggett then left, taking their saw and knapsack spray, and leaving the defendant and young Robert Carvell with the fire. During the afternoon the defendant had some visitors, but he seems not to have neglected the fire. The burning jarrah on the east of the stockrace fell down but the fire was contained there also. By the evening, the small debris had burnt up, leaving a steady fire in the redgum and another in the jarrah. Someone broke off the stop cock on the 600 gallon tank, which rendered it of no use thereafter. Before this, it had been used by one of the visitors to do some more watering around the burning trees. The defendant had also pushed more debris into the fires, and made the comment to Robert Carvell that "There'd be nothing left of it after he'd finished".

Next morning the defendant says he got up early between daylight and sunrise and inspected the fires. He found the redgum and the jarrah still burning and also two logs of blackbutt, 30 or 40 yards from the jarrah, towards the south of the stockrace. i.e. nearer to the house. He then decided to put out the fires, but before he commenced to do so, a Mr. and Mrs. Jones arrived, at, the defendant says, about 10.0 a.m. They came to look at some cattle and according to the defendant they did not

stay long and there was little conversation about the fires. After they left, the defendant says he put out the fires with water, using two 44-gallon drums (which he refilled once) and some buckets and a tin. He turned the burning logs over and watered them on both sides. After about two hours work, the fires were out.

Mrs. Jones tells a different story. She said that she and her husband arrived at the defendant's property at about 7.15 a.m. on that Monday, that Goldman took a while to answer the knock on the door and when he did come, had a pyjama coat on. In the meantime, Mrs. Jones had walked across to the southern end of the stockrace and had noticed two logs burning on the east of the race. She returned and spoke to Goldman and said "I thought you were down doing some burning off as I saw the smoke". He replied, "No, there was some excitement here on Saturday - a tree was struck by lightning." Mrs. Jones then said "Aren't you afraid it will get away? It looks dangerous" Goldman said "No, its quite alright - I've got the equipment to deal with it; I've got a bulldozer that I can put a ring round with and I have a 600-gallon water tank that I can put water round it with if I want to. It will be alright." Goldman also said he had telephoned the Road Board and the fire officer and the police and had reported it and that no-one would come and do anything about it and he added: "Why should I worry."

According to Mrs. Jones they then went inside the house where her husband was paid some money for work he had done for Goldman. They then had a look at some stock and soon afterwards she and her husband left to go to Midland Junction. She does not recall what time they left Goldman's property but it must have been about 8.30 a.m. because they arrived in Midland Junction about 9.30 a.m. after a drive of about 20 miles including one short stop. Before leaving the defendant's farm she said there was some talk about his playing bowls or getting some practice at bowls and that as they were going, Goldman came out of the house dressed in a navy blue coat and a

pair of grey trousers and carrying something in his hand. He got into his car and followed them out to the main road. She last noticed him somewhere behind them after travelling about two miles towards Perth.

Goldman on the other hand denises having left his property at all that day. He says that on the Monday night he again inspected the logs which he had put out with water, and that on the Tuesday he went to Perth to play bowls but both on the morning and in the evening of that day he again inspected the logs and found them apparently out. He did this again, he says, on Wednesday morning and then went to work on the other part of his property which is about a quarter of a mile southeast from the main property. Tuesday had been a hot day with a maximum temperature of 97° and an easterly wind varying from approximately 10 to 20 miles an hour, but Wednesday was a much hotter day with a maximum temperature of 105° and a very strong easterly wind blowing with hot gusts of 40 miles an hour or more.

The defendant says that at about 12.30 p.m. when working with Jones, the latter drew his attention to some smoke in the west. He at once drove to his house and on his arrival he found that a fire had burnt out most of the paddock on the west of his stockrace, and that the fire was then 1½ miles away to the west on a hill. His cows were gathered near the shed which is in the west paddock close to the southern end of the stockrace. Some bulls from another paddock to the south had fire around their feet. He let his stock out and got his bulldozer and cleared the fire away from the shed. At about this time, Forward, the Fire Control Officer arrived. His evidence was that at about 1.30 p.m. he received a fire call at his farm. He went at once to the defendant's property, which was two miles or so away, and there he saw the fire all to the west of the stockrace and none to the east. The fire was then about a mile beyond the creek and

travelling west at a fast pace. He saw Goldman putting a break around his shed. He stayed only a few minutes and left to get help and to find the front of the fire.

At 12.45 p.m. that day, Mrs. Jones was at home. She saw some smoke in the east or north-east which she took to be from Goldman's property about 5 miles away. She went in her car to Goldman's place and there she saw smoke along the edge of the stockrace and thence to the west. She saw flames from the front of the fire which she thought was then about ¾ of a mile to the west, and was rapidly moving further west. In the end, it burnt through many miles to the Darling Range foothills, devastating the countryside as it went.

There was a peculiar incident in the early hours of the next morning, Thursday. At about 2.0 a.m. Coombes, Len Carvell and Doggett were on fire patrol in the property of a man named Zinkler, which abuts onto the northern boundary of the defendant's farm. They noticed some hundreds of yards from them, and within Goldman's property the headlights of a motor vehicle. Soon after, they saw 4 or 5 separate fires burning just inside Zinkler's boundary. They were burning in circles and were spaced some feet apart. It was apparent to Coombes and Carvell that they had been deliberately lit. An hour or so later they saw Goldman at the home of Carvell's mother. Goldman admitted that it was the headlights of his utility that they had seen, but claimed that he had been there to put out a fire in a tree stump. The evidence leaves little doubt that in fact Goldman had lit these fires deliberately.

Soon after lunch on that Thursday, Constable Lee called at the defendant's home and obtained a written statement from him in regard to the fire. It is unnecessary to quote this in full, but there are two passages which should be

referred to. The first follows Goldman's account of the redgum being struck by lightning. It proceeds -

> "I then made arrangements with Keith Coombs, of Gidgegannup to cut the tree down with his power saw and he arrived at about 12 noon on the 26th February 1961, and cut the tree down, I then extinguished the fire in the tree with water.
>
> I kept a watch on the tree for the rest of that day and the following day, but there was no sign of the fire starting up."

Later, when referring to the 1st March, the statement reads:

> "When I saw the fire first it was burning west of the shed and about two hundred yards south-west of the tree that had been struck by the lightning and was burning back towards the shed and had not burnt near the tree that had been struck by the lightning and it appeared that the fire could have started in the gully west of the shed.
>
> There is no shade up near the shed in the paddock where the stock was and the stock usually rested under the trees at the gully on the west end of the paddock.
>
> When I arrived home the stock was at the gate near the shed and it would appear that the fire must have started behind them or on the west end of the paddock and forced them to the gate on the east end.
>
> The stock was not scorched by the fire and if the fire had started from the tree that had been alight that I had cut down I believe that the fire would have gone through the paddock where the stock was and cut them off and forced them to go to the west end of the paddock and they would have been burnt.

I did not notice any other tree near the gully alight that could have been struck by the lightning and burning, but there could have been one as there are many large trees at the gully."

On the same Thursday, another fire control officer and farmer named Waycott went to the defendant's property and inspected the areas which had been burnt. He came to the conclusion in fact he said he was certain, that the fire had started from the trees near the stockrace. This witness was not cross-examined.

The same opinion was expressed by Detective Myers who not only inspected the property but flew over the whole area in an aeroplane and saw that to the north and east of Goldman's property there was no burning, but there was a continuous burnt area to the west from that property down to the Darling Range foothills. Myers also questioned Goldman about the fire, during a somewhat stormy interview on Sunday morning, the 5th March. He asked Goldman "Can you account for the fact that the bushlands on your northern and eastern boundaries are not at all affected by fires?" At first Goldman said he wasn't going to answer questions, but later said that the fire was started by a redgum about a mile to the south-west of the stockrace which had been struct by lightning and that the fire had burnt back to his property. There was some criticism levelled at Myer's evidence (not without justification), but I think his recollection is accurate in regard to this statement, because it was corroborated by Williamson, the Road Board Secretary, who was also present.

Myers also says that Goldman told him he went to Perth on the Monday - but from the transcript it would seem that this was a mistake by Myers, and that he meant to say Tuesday. According to Myers, when they were discussing the events of Sunday the 26th February, he asked Goldman "Did you use your tractor to heap up these logs?" to which Goldman replied -"I had to burn it all. How else was I going to put it out?"

Myers then said - "Do you usually put a fire out by adding fuel to it?" Goldman said: "You burn it out. That is the only way I know in which to put a fire out."

The above is no more than a brief summary of the evidence which took nearly four days to give. On these facts, the first question is whether the plaintiffs have established that the bush fire of Wednesday the 1st March started from the fires in the stockrace on the defendant's property, which were admittedly burning on the previous Sunday. This question cannot be answered with certainty, but on all the evidence, I consider that as a matter of probability the answer is in the affirmative. Mrs. Jones saw a fire on the east side of the stockrace on Monday morning, and Goldman admits that the redgum on the west side was then still burning. His case is that he spent two hours putting out these fires immediately after Mr. and Mrs. Jones left. I do not believe that he did so. Mrs. Jones was an honest and reliable witness and I do not think she was mistaken either as to her conversation with Goldman that morning or as to his leaving in his car when she did. That conversation is entirely inconsistent with an intention on Goldman's part at once to put out these fires with water; yet he says he had determined to do that before Mr. and Mrs. Jones arrived. His leaving in his car is also inconsistent with his evidence in which he says he applied water forthwith after they left. In his statement to Constable Lee, he says he put the fire out with water, but in the context he is referring to what he did on Sunday, and it is quite clear that he did not use water on the tree that day. Moreover, there are very strong indications that Goldman did not himself think it necessary to use water - witness his remark to the boy Robert Carvell that there would be "nothing left of it after he'd finished", and his comment to Detective Myers that the only way to put a fire out was to burn it out.

Had I accepted Goldman's evidence that

he extinguished the fires with water, in the manner he described, I would have found it very difficult to believe that they could have started up again and caused the bush fire on the Wednesday. It is true, as Mr. Milesi said, that redgums are notorious for smouldering for long periods; that they are difficult to put out, and that even when apparently extinguished with water, a fire in them can regenerate and throw dangerous sparks. But here, according to Goldman, he doused the fires thoroughly, rolled the logs over, and then inpsected them on Monday night, Tuesday morning and night and Wednesday morning and found no sign of smouldering. If he did all this, I cannot think, bearing in mind Goldman's long experience, that the trees could have been still liable to throw sparks and cause a fire.

However, as I have said, I reject Goldman's evidence in this regard. Thus I am left with evidence that the fires in the stockrace were burning on the Monday morning: that Goldman's general policy was to let them burn themselves out; and that redgums will smoulder and burn for a long time, for weeks or even for months if left alone. It is thus not only possible but probable that, in the conditions of extreme heat and strong easterly wind on the Wednesday, the fire from the redgum in the stockrace caused the bushfire. This view received strong support from the fact that, broadly speaking, the fire damage was to the west of the stock-race, that it was west of it when seen by Forward and Mrs. Jones soon after it commenced to burn, and that an experienced farmer and fire control officer in Waycott was certain that that was its origin. It is also supported, inferentially, by the evidence of the fires deliberately started on Thursday morning by the defendant (as I believe) along Zinkler's boundary. I can only interpret this as a recognition by him that the bushfire did commence from his stockrace, and a desire on his part to fabricate evidence which would suggest that it commenced further north.

It is also of significance that while

the defendant suggested to Myers and Williamson that the fire was caused by a redgum struck by lightning a mile or so west or south-west of his stockrace, he did not say that in his evidence. Perhaps the reason is obvious. In the first place, I would think it unlikely in an area of fairly small holdings that a redgum could burn from Saturday night to Wednesday morning without smoke being observed, coming either directly from that tree or from adjacent fires likely to be caused by sparks or burning debris from it. But, more importantly, it simply could not have started there and burnt back to the stockrace against a strong east wind by the time Forward and Mrs. Jones arrived there. It is true, as Mr. Milesi said, that lightning can readily start several fires in a small radius. But in this case, it can only remain a theoretical possibility that such a thing happened.

I must not leave this aspect of the case without mentioning two other matters. The first is the fact that the stock were near the shed when Goldman reached the fire. I think this is inconclusive, for the reason that it is not known where they were when the fire started. The second is Mr. Burt's argument that the redgum could not have been burning on Wednesday, because when observed later in that week, it was still lying in the stockrace, far from fully burnt out. The answer is, I think, that it could readily have been put out on Wednesday afternoon or Thursday. Indeed it might well have been then put out in the very manner described by Goldman, i.e. with water from drums applied by buckets.

I therefore hold that on Wednesday the 1st March the burning trees in the defendant's stockrace (probably the redgum) caused a fire to spread through the paddock to the west of the stockrace, and beyond that for many miles. Assuming, for the moment, what has not yet been proved, that the properties occupied or owned by the plaintiffs were in the path of this fire and suffered damage from it, the next

question is whether the defendant is in law liable for that damage. The plaintiffs assert that he is liable on three separate grounds -

1. That he adopted and used as his what was in the first instance an accidental fire so that it may be said to have become his fire, that it then escaped, and that he is liable for damage resulting from such escape.

2. That he was under a duty to the plaintiffs as nearby owners or occupiers of land to extinguish a fire on his land, even though it commenced by accident, that he negligently failed to do so, and is hence liable to the damage caused when it escaped.

3. That the defendant is liable for breach of statutory duties imposed on him by ss. 17 and 28 of the Bush Fires Act, 1954-58.

On the first ground, it is sufficient to say that the facts do not support the view that the defendant used or adopted the fire as his own. It was rather put as though, when confronted with a fire which started by accident, he used it to burn off a lot of useless dead tree tops, as if to save himself the bother of lighting a fire specifically for that purpose. On my view of the facts, nothing could be further from the truth: what ever Goldman did was plaintly directed towards putting out the fire and rendering it harmless. Even if, on the Sunday, his efforts were mistaken or misguided, it was all done with a view to the final extinguishing of a fire which he knew from the start to be a source of danger. For myself, I think there can be little quarrel with what he did at least until the early part of Sunday afternoon and probably until late in that day. But the suggestion that he pushed into the burning tree all sorts of other combustible material, to suit his own ends, simply will not bear examination.

Accordingly, the fire never became his fire; he did not make use of his land by burning off through the agency of the fire which he did not start. Hence, he cannot be liable for its escape, either in nuisance or under the rule in Rylands v. Fletcher.

It was also contended for the plaintiffs that the defendant, if he did not "adopt" the fire, at least "continued" it in the sense that, having become aware of it, he failed to extinguish it. Reliance was placed on the decision of the House of Lords in Sedleigh-Denfield -v- O'Callaghan, 1940 A.C. 880, which approved the dissenting judgment of Scrutton L.J. in Job Edwards Ltd. -v- Birmingham Navigations Proprietors, (1924) 1 K.B. 341. The former case concerned an artificial pipe or culvert which had been placed by a trespasser in a ditch on the defendant's land: because of the absence of a proper grating it became choked with leaves, with the result that rain water overflowed to the plaintiff's premises causing damage. The Job Edward's case related to an accumulation of refuse on certain land of which the owner was aware, although it was not caused by him: this refuse was found to be on fire, and the question was whether the owner was under any obligation to a neighbouring occupier to extinguish the fire. Scrutton L.J. quoted with approval the following passage from Salmond on Torts, 5th edn., 1920, p.260.

> "when a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonable prompt and efficient means for its abatement."

This passage was in turn approved by the House of Lords in the Sedleigh-Denfield case, but with reference to the particular facts then under consideration. At p.893 of the report of that case, Viscount Maugham said, with reference to the above passage:

> "The case of internal fires on large refuse heaps may require special consideration, but I think this statement of the law is correct at any rate in the case of a nuisance such as the one which is being considered on this appeal."

Throughout that case, it was emphasised that the defendant's liability in nuisance arose from his user of his land. Thus, at pp. 896-7, Lord Atkin said:

> "For the purpose of ascertaining whether as here the plaintiff can establish a private nuisance I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The occupier or owner is not an insurer; there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required, which is connoted in my definition by the word "use". "

In my opinion, on the facts of the case before me, neither of these decisions supports the view put by the plaintiffs that the defendant is liable to them in nuisance.

The second ground of claim is that the defendant was negligent in failing to extinguish the fire, after it had begun by accident. I am satisfied that had he taken reasonable care, he could, on the Sunday evening or at latest early on the next morning, have put out the fires in and near the stockrace by using water on them. It is not suggested that he did this until after Mrs. Jones had left his property on the Monday morning, and, as I have already said, I do not accept his evidence that he then did so. But assuming such a failure on his part to extinguish the fires, the question arises whether he was, at common

law and apart from the provisions of the Bush Fires Act, under any duty to do so. The plaintiffs say he was, and rely principally on three decisions, viz. Job Edwards -v- Birmingham Navigations Proprietors (supra). Howe v Jones, 1953, S.A.S.R.82, and Boatswain -v- Crawford (1943) N.Z.L.R. 109 which was followed and adopted without comment in Landon -v- Rutherford, 1951 N.Z.L.R.975

In the course of his judgment in the Job Edwards case, Scutton L.J. said at pp. 357-8.

> "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there, if he knows that if left alone it will damage other persons, if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it, that then if he does nothing, he has "permitted it to continue", and become responsible for it. This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under Rylands -v- Fletcher, I.R. 3 H.L. 330. I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours."

Again on p. 361, in discussing the effect of the Fires Prevention (Metropolis) Act, 1774:

> "This leaves the difficult question - suppose the fire is caused by a trespasser, as if he throws down a match; and suppose the owner comes by immediately afterwards, sees the small fire, and could with no trouble extinguish it by

> stamping on it, but does not do so, so that the fire spreads and damages his neighbour, is he freed by the statute? He is then aware of a dangerous thing on his land which may damage his neighbour, and which by reasonable care he can prevent from damaging his neighbour, and he does nothing. I agree that he is not an absolute insurer of that dangerous thing, for he did not himself create it, but I think on principle he is bound to take reasonable care of a dangerous thing which he knows to exist."

It is to be noted that the Lord Justice refers to the finding of something which is both dangerous and artificial and that in each passage he is contemplating the voluntary act of a stranger in throwing down a lighted match. He is not considering the case of a fire started accidently by lightning. A somewhat similar passage occurs in the judgment of Napier C.J. speaking for the Full Court of South Australia in Howe -v- Jones, supra, at p.87, but what was said there was clearly obiter as it was held that the defendant had lit the fire and had negligently allowed it to escape.

Boatswain -v- Crawford supra. was a decision of a single Judge. Johnston J., sitting on appeal from a Magistrate's Court. His Honour held that the result of the decision of the House of Lords in the Sedleigh-Denfield case (supra) was to render liable in damages an occupier of land who negligently allowed a fire, of unknown origin to escape from his land to his neighbour's. I have already referred to the fact that the Sedleigh-Denfield case was one based on nuisance arising from the user of an artificial pipe or culvert. But Johnston J. considered that it justified a finding against the defendant in the case before him based on negligence. In doing so, he held that an earlier decision of Richmond J. in Hunter -v- Walker (1888) 6 N.Z.L.R. 690 should not be followed. That decision had itself been based on a judgment of the Full Court of Victoria in Batchelor -v- Smith (1879) 5 V.L.R. 176 where it was held by Stawell C.J. and

Stephen J. that an owner or occupier of land upon which a fire accidentally occurs is under no duty, at common law, to put it out or prevent its spreading to adjoining properties. This decision was followed and adopted by the Full Court of South Australia in Havelberg -v- Brown (1905) S.A.L.R.1. - see particularly the judgment of Way C.J. at pp. 10-11.

There has been a good deal of uncertainty as to the true basis, historically, of an occupier's liability for damage done by fire spreading from his property. In Musgrove -v- Pandelis (1919) 2 K.B. 43 Bankes L.J. considered that an occupier was, at common law, liable.

> "(1) for the mere escape of the fire; (2) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; (3) upon the principle of Rylands -v- Fletcher".

But in his opinion, the strict liability mentioned under the first head was subject to the provisions of s. 86 of the Fires Prevention (Metropolis Act 1774, by which no action lies against any person in whose house or on whose estate "any fire shall accidentally begin". That statute has been held or assumed to apply throughout Australia, excepting New South Wales, see Fleming on Torts at p. 301, and the cases there cited.

On the other hand the High Court has held on several occasions that there is no absolute liability for the escape of fire, see Wise Bros. -v- Commissioner of Railways, 75 C.L.R. 59 at p. 70 per Starke J., citing earlier decisions.

In my opinion, the correct rule is that laid down by the Supreme Courts of Victoria and South Australia in Batchelor -v- Smith and Havelberg -v- Brown (Supra), viz. that the defendant is under no duty at common law to extinguish a fire on his property which occurs by accident, or to prevent

it spreading to the property of his neighbour. This accords with the broader rule that a landowner is under no liability for anything which happens to or spreads from his land in the natural course of affairs, if the land is used naturally - see per Lord Goddard C.J. in Neath R.D.C. -v- Williams (1951) 1 K.B. 115 at p. 122. It is because of this broad rule that a landowner has been held not liable for the natural growth and spread of wild thistles (Giles -v- Walker 24 Q.B.D. 656), or of prickly pear (Spark -v- Osborne, 7 C.L.R.51) or of rabbits (Anderson -v- Lockyer, 52 W.A.L.R. 60 per Wolff J. at p. 64) or for the flow of water in a natural watercourse across and beyond his land (Neath R.D.C. -v- Williams, supra), Giles -v- Walker, supra, has recently been doubted by the Court of Appeal in Davey -v- Harrow Corporation (1958) 1 Q.B. 60: but as it was strongly approved by the High Court in Sparke -v- Osborne, supra, it must be accepted in this Court as a correct decision.

For these reasons, I consider that Boatswain -v- Crawford, supra, is inconsistent with authority and wrong in principle and should not be followed, and accordingly that the plaintiffs must fail on this ground also.

It remains to consider the submission that the defendant is liable for breach of statutory duty arising under the Bush Fires Act. That Act is designed, according to its long title, to "make better provision for diminishing the dangers resulting from bush fires (and) for the prevention, control and extinguishment of bush fires". It establishes a Bush Fire Board with wide powers and authorises local authorities to appoint bush fire control officers and to establish local bush fire brigades. It seeks to prevent bush fires by elaborate provisions which include the gazetting of "fire protected areas" (s.16) and "prohibited burning times" (s.17), the defining of "restricted burning times", (s.18) and the declaring by the Minister of "bush fire emergency

periods" (s.21) Sections 22 to 26 regulate the burning allowed during either prohibited or restricted times, while ss. 27 to 35 contain a number of general restrictions and prohibitions and create certain offences. Section 48 provides that where one adjoining owner clears bush for a space of 10 feet from a dividing fence but the owner on the other side does not, the latter is bound, in the event of the fence being damaged by fire through his default, to repair it, and if he fails to do so, the first-named owner may repair the fence and recover the cost from the owner in default.

In this action, the plaintiffs contend that the defendant committed a breach of ss. 17 and 28 of the Act. The former provides in sub-s (8) that "a person who sets fire to the bush on land .... during the prohibited burning times ... is guilty of an offence" and a penalty is provided. It is admitted that the period, 25th February to 1st March 1961 was during a prohibited burning time. But it is clear from the facts as I have found them that the defendant did not "set fire to bush" so that he committed no offence against that sub-section. Hence no question arises whether the subsection inposes a civil liability on him.

Section 28 (1) (a) provides: "Where a bush fire is burning on any land -

(i) at any time in any year during the restricted burning times;

(ii) during the prohibited burning times; and

(iii) the bush fire is not part of the burning operations being carried on upon the land in accordance with the provisions of this Act - the occupier of the land shall forthwith, upon becoming aware of the bush fire, whether he has lit

or caused the same to be lit or not, take all possible measures at his own expense to extinguish the fire; "

Somewhat out of place - it follows sub-s. (2) but must be taken to relate to sub-s. (1)- a penalty is prescribed, being a fine of not less than £5 or more than £100. By sub-ss. (3) and (4), if the occupier fails to take measures to extinguish the fire, various named officers may enter his property and do so, and the expenses which they incur may be recovered from the occupier as a debt in any court of competent jurisdiction.

It will be at once observed that sub-s.(1) of s.28 imposes a very onerous duty upon the occupier of land on which, at relevant times a bush fire is burning. He must "take all possible measures" to put it out. It is hard to visualise a duty cast in more exacting terms. It is also apparent that the defendant when confronted with the bush fire on his land on 26th February 1961 did not take "all possible measures" to extinguish it. The question then is whether the section imposes on him a duty the breach of which exposes him to a civil action for damages at the suit of neighbouring owners or occupiers who suffered damage when the bush fire escaped. The plaintiffs must of course show that the escape of the fire was due to the defendant's breach of duty; but I think there can be little doubt that had the defendant complied with the section, the fire would have been put out on the Sunday night, or at least before the following Wednesday when it in fact escaped.

When a statute creates a new duty, the question whether an individual who suffers damage resulting from a breach of that duty can maintain a civil action against the person who committed the breach is in all cases a matter to be decided upon a consideration of the particular statute. "The only rule" said Lord Simonds in Cutler v. Wandsworth Stadium Ltd. 1949 A.C.398 at p.407, "which in all circumstances is valid is that the answer must depend on

a consideration of the whole Act, and the circumstances, including the pre-existing law, in which it was enacted."

It is unnecessary for me to restate the varying considerations which have influenced the Courts in the many cases on this subject to reach a decision one way or the other. These considerations have been summarised by Jordan C.J. in Martin v. Western District etc. Industrial Union. 34 S.R. (N.S.W.) 593 at pp. 596-8; by the Full Court of this State in Anderson v. Lockyer, supra; and by Romer L.J. in Solomons v. R. Gertzenstein Ltd. (1954) 2 Q.B. 243 at pp. 255-6. There is also the well known passage in the judgment of Dixon J. (as he then was) in O'Connor v. S.P. Bray Ltd. 56 C.L.R. 464 at pp. 477-8 which is referred to by Professor Fleming in his book on Torts, 2nd Edn. at p. 133, and indeed may well be regarded as the foundation for the following illuminating passage:-

> "Most important, perhaps among the latent premises which influence the judicial approach is that a penal statute will more readily be accepted as creating a civil remedy, if it enacts a safety standard in a matter where the person upon whom the duty is laid is already, under the general law of negligence, bound to exercise reasonable care. In such a case, the effect of the provision is only to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the conduct in question. This explains the readiness with which industrial safety regulations have been treated as conclusively determining the standard of care owed by employers for the protection of their workmen. Conversely, where the conferring of a private right of action would involve the recognition of an interest which is not otherwise protected by law against negligent

invasion, the courts have evinced a strong reluctance to extend the protection of penal statutes beyond the specific remedy actually provided. This is understandable because the jump from ordinary negligence to strict liability is one thing, that from no duty to strict liability is quite another".

Applying the principles laid down in the authorities cited, I have come to the conclusion that s. 28(1) (a) does not confer a civil right of action. The following considerations have influenced me in this decision.

First, the statute is clearly designed for the protection of the persons and property of the public generally, rather than any defined class. Second, the section provides its own means of enforcement, and this by two methods, namely the imposition of a penalty, and the recovery of expenses incurred by fire control officers and others upon the default of the occupier. Third, this is not a case where the general law imposes a duty to put out a fire started accidentally and the statute merely defines precisely what shall be done in furtherance of that duty. This is a case where, if the legislature did intend to provide a civil remedy, it has jumped from no duty to strict liability of the most exacting nature, namely the duty "to take all possible measures ... to extinguish the fire." Fourthly, Parliament has in the same statute, in s. 48 already referred to, expressly given a civil remedy in the case of failure to make fire-breaks along dividing fences. If it had meant to do so for a breach of s. 28 (1) (a) it is surprising that it did not say so expressly.

For these reasons, I consider the plaintiffs also fail in their claims in so far as they are founded on breach of the Bush Fires Act.

The consolidated actions should be dismissed with costs.

NO. 6

NOTICE OF APPEAL TO HIGH COURT OF AUSTRALIA

IN THE HIGH COURT OF AUSTRALIA

WESTERN AUSTRALIA REGISTRY

On appeal from the Supreme Court of Western Australia

Appeal No. 5 of 1963

B E T W E E N:

RUPERT WILLIAM EDESON HARGRAVE and WINIFRED HAZEL HARGRAVE (trading under the firm name of GIDGEGANNUP AGENCY) AND OTHERS
(Plaintiffs)
Appellants

- and -

ALLAN WILLIAM GOLDMAN
(Defendant)
Respondent

TAKE NOTICE that this Honourable Court will be moved by way of appeal at the next sittings thereof to be holden at Perth after the expiration of Six weeks from the filing of this Notice or so soon thereafter as Counsel can be heard on behalf of the above named Appellants for an Order that the whole of the Judgment of the Honourable the Senior Puisne Judge Mr. Justice Jackson of the Supreme Court of Western Australia delivered at Perth on the 9th day of January 1963 be set aside and for an Order that in lieu thereof the claims of the Respondent (Defendant) be dismissed and Judgment be entered for the Appellants (Plaintiffs).

The grounds of appeal are as follows:

1. The finding of the learned Trial Judge that the Respondent (Defendant) did not make use of his land by burning off through the agency of the fire and thereby adopting and/or continuing the fire was wrong and was against the evidence and the weight of evidence.

In the High Court of Australia

No. 6

Notice of Appeal to High Court of Australia 29th January 1963 Continued

2. The finding of the learned Trial Judge that the Respondent was not liable in nuisance by failing to extinguish the fire was wrong in law.

3. The finding of the learned Trial Judge that by reason of Section 86 of the Fire Prevention (Metropolis) Act 1774 (14 George 3 C 78) the Respondent was not liable for the escape of fire accidentally caused was wrong in law as such Section is not applicable to the escape of the said fire by virtue of Section 28 of the Bush Fires Act 1954-1958.

4. The finding of the learned Trial Judge that a breach of the duty imposed on the Defendant by Sections 17 and 28 respectively of the Bush Fires Act 1954-1958 did not create a civil liability enforceable by the Appellants (Plaintiffs) against the Respondent (Defendant) was wrong in law.

5. The finding of the learned Trial Judge that the Respondent was not guilty of negligence causing damage to the Appellants (Plaintiffs) was wrong in law.

The learned Trial Judge ought to have found

(a) That the Respondent did burn off his land through the agency of the fire and thereby adopted and/or continued and increased the said fire and that he was liable for its escape:

(b) That the Respondent being aware of the said fire and in failing to extinguish it permitted a nuisance to remain upon his land and was liable for its escape

(c) That the Respondent being aware of the fire on his land negligently permitted it to escape:

(d) (i) That Section 17 of the Bush Fires Act 1954 - 1958 imposed a duty

upon the Respondent not to burn off during a prohibited period and that a breach of this Section amounted to negligence :

(ii) That Section 28 of the Bush Fires Act 1954-1958 imposed a duty upon the Respondent to extinguish the said fire and that his failure to perform this duty amounted to negligence conferring on the Appellants (Plaintiffs) an enforceable right of action against the Respondent (Defendant):

(e) That the Respondent was under a duty to extinguish the said fire or prevent its spreading and that in failing to do so he was guilty of negligence causing damage to the Appellants' (Plaintiffs) property:

D A T E D the 29th day of January 1963.

Jackson McDonald & Co.
Solicitors for the Appellants

TO ALLAN WILLIAM GOLDMAN
the Respondent (Defendant)

AND TO his Solicitors
Messrs. Muir & Williams
81 St. George's Terrace,
Perth.

THIS NOTICE OF APPEAL was filed and delivered the 29th day of January 1963 by Messrs. Jackson McDonald & Co. Solicitors for the (Plaintiffs) Appellants whose address for service is at the Offices of Jackson McDonald & Co. 55 St. George's Terrace Perth.

In the High Court of Australia

No. 7

Order of the High Court of Australia allowing Appeal. 22nd November 1963

NO. 7

ORDER OF THE HIGH COURT OF AUSTRALIA ALLOWING APPEAL

IN THE HIGH COURT OF AUSTRALIA
WESTERN AUSTRALIA REGISTRY

On appeal from the Supreme Court of Western Australia

Appeal No. 5 of 1963

B E T W E E N:

RUPERT WILLIAM EDESON HARGRAVE and WINIFRED HAZEL HARGRAVE (trading under the firm name of Gidgegannup Agency) and others

(Plaintiffs) Appellants

- and -

ALLAN WILLIAM GOLDMAN

(Defendant) Respondent.

BEFORE THEIR HONOURS:

MR. JUSTICE TAYLOR
MR. JUSTICE WINDEYER
MR. JUSTICE OWEN

FRIDAY THE 22ND DAY OF NOVEMBER, 1963

This appeal from the order and judgment of the Supreme Court of Western Australia dated the 9th day of January 1963 coming on for hearing on the 17th 18th and 19th days of June 1963 at Perth in the State of Western Australia WHEREUPON AND UPON READING the transcript herein and UPON HEARING Mr. G.D. Clarkson with whom was Mr. John H. O'Halloran of counsel for the Appellants and Mr. F.T.P. Burt one of Her Majesty's counsel with whom was Mr. J.L.C. Wickham of counsel for the respondent the Court on the said 19th day of June 1963 ordered that the Appeal stand for judgment AND the appeal standing for judgment this day at Sydney in the State

of New South Wales IT IS ORDERED THAT:-

1. The appeal be allowed.

2. The respondent pay the appellants' costs of the appeal to be taxed.

3. The said order and judgment of the Supreme Court of Western Australia dated the 9th day of January 1963 be set aside and the case be remitted to the said Supreme Court.

4. The costs of the parties up to the time of the entry of the Judgment appealed from abide the Order of the Supreme Court.

5. The sum of £50 paid into Court by the appellants as security for the costs of this appeal be paid out of Court to the appellants' solicitors.

By the Court

G.T. STAPLES

ACTING DISTRICT REGISTRAR.

THIS ORDER is extracted by Messrs. Jackson McDonald & Co., 55 St. George's Terrace, Perth, solicitors for the appellants.

The appellant's costs of the appeal have been taxed and allowed at the sum of £1,457. 0. 6. as appears by the certificate of the Taxing Master dated the 16th day of April, 1964.

In the High Court of Australia

No. 8

Reasons for Judgment of their Honours Mr. Justice Taylor and Mr. Justice Owen.

NO. 8

REASONS FOR JUDGMENT OF THEIR HONOURS MR. JUSTICE TAYLOR AND MR. JUSTICE OWEN

HARGRAVE and OTHERS

- v -

GOLDMAN

JUDGMENT

TAYLOR J.
OWEN J.

This is an appeal by two parties in a consolidated action from an order of the Supreme Court by which the claim of the appellants in respect of fire damage to their property was dismissed. The facts are that the respondent was the owner and occupier of a lightly developed grazing property, some six hundred acres in extent, near Gidgegannup in Western Australia. On Saturday the 25th February 1961 there was an electrical storm in this area and a tall tree with a branchy-top which stood about the centre of the respondent's property and relatively close to his dwelling, was struck by lightning between 5 p.m. and 6 p.m. It was observed shortly afterwards that a fork of the tree, more than eighty feet above the ground, was on fire. The tree was about two hundred and fifty yards from the western boundary of the respondent's property and a somewhat lesser distance from the eastern boundary. On either side the paddocks were sparsely timbered but they contained a quantity of dry grass and dead tree tops. It was impossible for the respondent to extinguish the fire whilst the tree was standing and early on the following morning he telephoned the fire control officer for the district - a local farmer appointed pursuant to the Bush Fires Act - and asked that a "tree feller" be sent out to cut the tree down. This was done about midday but, in the meantime, the respondent had by means of a tractor and dozer blade cleared

the area in the vicinity of the tree of all readily combustible material. In addition, he used a mounted six hundred gallon tank of water to spray the surrounding area so as to minimize the risk of the fire escaping.

When Coombes, the tree faller, arrived the tree was burning fiercely in the fork and the bark from the ground up was on fire, The fire near the base of the tree was damped out and the tree was cut down. It is unnecessary to elaborate the details of what then happened for the learned trial judge found - and his finding was not challenged - that up to this point the respondent's conduct in relation to the fire was not open to question. But his Honour also found that if the respondent had exercised reasonable care he could, on the Sunday evening or on the following morning, have put out the fire by the use of water. This, the respondent claimed, he did on the Monday morning. His evidence was to the effect that he doused the fire thoroughly, rolled the logs over and then inspected them on the Monday night, on the Tuesday morning and night, and again on the Wednesday morning. In particular, he said that he spent two hours extinguishing the fire immediately after the departure of two visitors to his property on Monday morning - Mr. and Mrs. Jones. But Mrs. Jones' evidence was that the respondent left the property in his car immediately behind the car in which she was travelling and this evidence was accepted by the learned trial judge. How long the respondent was away from the vicinity of the fallen tree that day does not appear. But it is clear that there was an abundance of evidence fully justifying the finding that he did not, as he alleged, spend any time immediately after the departure of the Jones' in extinguishing the fire. It was also established that the respondent was away from the property for a substantial part of the following day, Tuesday. On Wednesday morning the respondent went to work on a part of his property about a quarter of a mile or so distant from the vicinity of the fallen tree and about 12.30 p.m. Jones, who was working with him, drew

his attention to smoke visible in a westerly direction. The respondent at once drove to his home and found that fire had burnt out most of the paddock to the west of where the tree had stood and that it had then extended two and one-half miles further to the west. In the course of the afternoon it extended further to the west and in the course of so doing it caused damage to the appellants' property.

It is, we think, unnecessary to traverse the evidence in great detail but it is of some importance to notice the weather conditions which prevailed over the relevant period. An officer from the Perth weather bureau was called to give evidence of observations made at Guildford airport which, it was said, would reflect the conditions as they prevailed in the vicinity of the respondent's property. Particulars of these observations were as follows :-

Date	Wind Direction	Force	Temperature
Sunday 26th February	NW. till noon then a little S. of W. till 6 p.m. - then calm.		94 deg.
Monday 27th February	8 a.m. S. 10 a.m. S.W. 3 p.m. S.W. 8 p.m. S.	8 a.m. - 4-6 mph 12 noon - 10-13 mph 8 p.m. - 7-8 mph	86 deg.
Tuesday 28th February	Between S.E. to E. all day	10 mph at 9 am. freshening to 20 mph at 3 p.m., then easing.	97 deg.
Wednesday 1st March	E.N.E.	9 a.m. - 19 mph. 12 noon - 21-22 mph. 1 p.m. - 24 mph 1-2 p.m.-25-26 mph	105.2 deg.

The fire risk on these days was said to be severe and at some times dangerous. In particular it seems to have become dangerous on Wednesday the 1st March as both the temperature and the velocity of the wind increased. It will be seen, therefore, that the fire caused by the striking of the tree created a very considerable risk not only to the respondent's property but also to the surrounding countryside. But it is also clear that the fire in the fork of the tree could not be extinguished without felling the tree and there is no question that the respondent was guilty of any lack of care in causing this to be done. Nor, as we have already said, did the learned trial judge find any fault in any of the steps which the respondent took on Sunday 26th February and which were discussed in his Honour's reasons. However, he has found explicitly that on the Monday morning he could, by the exercise of reasonable care, have extinguished the fire and he rejected the respondent's evidence that he had taken adequate or reasonable steps to accomplish this. On the contrary he referred to evidence which indicated that the respondent's method of extinguishing a fire of this character was "to burn it out" and that this was inconsistent with his evidence that he had used water to extinguish it immediately after the departure of Jones. We think that there was abundant evidence to justify the finding of the learned trial judge that the respondent might by the exercise of reasonable care have extinguished the fire by the morning of Monday 27th February, and that he did not attempt to do so. Further, we are of the opinion that the evidence clearly demonstrates that he did not, at any time thereafter, take any steps which could be regarded as reasonable in the circumstances then prevailing to prevent the fire from spreading.

Before proceeding to consider the questions of law which were debated we

In the High Court of Australia

No. 8

Reasons for Judgment of their Honours Mr. Justice Taylor and Mr. Justice Owen.

Continued

should mention that the respondent challenged the finding of the learned trial judge that the fire which caused the damage had spread from or found its origin in the fallen tree. Upon this point counsel for the respondent said all that could be said but we think that the evidence leaves only one conclusion open. It is, in our view, beyond question that the fire spread from the fallen tree and we shall proceed to consider the case on that basis. We add that in reaching this conclusion we have, because of its unsatisfactory character in some respects, disregarded the evidence to the effect that early on the morning of Thursday the 2nd March the respondent lit a number of fires on land immediately to the north of his property.

In the circumstances to which we have briefly referred his Honour held that the respondent was under no liability to compensate the plaintiffs for the damage which they sustained. In particular he held that there was no liability in nuisance because the fire had been caused by lightning and the respondent could not be said to have thereafter "adopted" or "continued" it. In his opinion the appellants' claim was not supported by the views expressed in Sedleigh-Denfield v. O'Callaghan and Others (1940 A.C. 880) or by the dissenting judgment of Scrutton L.J. in Job Edwards Limited v. The Company of Proprietors of the Birmingham Navigations (1924 1 K.B. 341) which received the approval of a number of members of the House of Lords in the former case. Further, he was of the opinion, that the occurrance of the fire, caused, as it was, by lightening, did not impose upon the respondent any duty of care with respect to his neighbours. In stating this proposition his Honour referred to Batchelor v. Smith (1879 5 V.L.R. 176) and Havelberg v. Brown (1905 S.A.L.R. p. 1) and he rejected the decision in the New Zealand Case of Boatswain and another v. Crawford (1943 N.Z.L.R. 109). The proposition, his Honour said, accorded with the "broader rule that a landowner is under no liability for anything which happens

to or spreads from his land in the natural course of affairs, if the land is used naturally".

The case of Batchelor v. Smith was decided upon demurrer and the precise question which it decided was that the law did not impose upon the occupier of land any duty to extinguish a fire on the land which had been caused by spontaneous combustion. "No duty" it was said, "is cast on the defendant; he does nothing; he remains passive". But it was added "Had he interfered in any way, he might possibly have rendered himself liable". The decision in Havelberg v. Brown (supra) expressly followed that in the earlier case but we doubt whether the broad proposition upon which these cases rest can stand consistently with the relatively modern development of the concept of negligence. In particular, it is inconsistent in principle with the dissenting observations of Scrutton L.J. in Job Edwards Limited v. The Company of Proprietors of the Birmingham Navigations (supra). He said:

> "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has 'permitted it to continue', and become responsible for it. This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under Rylands v. Fletcher. I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours".

And at a later stage he expressed his agreement

with a passage from the 5th ed. of Salmond on Law of Torts -

> "When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement".

This passage and the observations of Scrutton L.J. received the express approval of Viscount Maugham, Lord Wright and Lord Romer in the Sedleigh Denfield Case (supra at pp. 893, 894, 910 and 913). Further, the proposition advanced in that case - namely, that if a trespasser comes on to land and creates a nuisance the occupier of the land is not liable unless he either adopts the act of the trespasser or does something in the nature of ratification after he becomes aware of its existence - was unanimously rejected. On the contrary, the effect of their Lordships' reasons was that an occupier, with knowledge or presumed knowledge of the existence of a state of affairs on his land which is a potential nuisance but which has been created by a trespasser, is, nevertheless, liable in the event of damage resulting therefrom to the lands of his neighbours if by the exercise of reasonable care the damage would have been avoided. This proposition, stated as it is, relates, in terms, only to potential nuisances brought into existence by a trespasser and no doubt it was so stated in order to deal with the particular facts of that case. But we can see no distinction relevant to the question of liability between potential nuisance created by trespassers and potential nuisances coming into existence "otherwise without the act, authority, or permission of the occupier". Indeed, in the passage already cited from Salmond the test of liability is propounded as a common one for nuisances of either character and the same notion is apparent in the final proposition as stated by Rowlatt J. in Noble v. Harrison

(1926 2 K.B. 332 at p. 338) when he said: "The result ... is that a person is liable for a nuisance constituted by the state of his property: (1) if he causes it; (2) if by the neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it". These propositions were referred to with evident approval by Dixon J., as he then was, in Toretto House Proprietary Limited v. Berkman (62 C.L.R. 637 at p. 657). Again, the test of liability propounded in the Sedleigh-Denfield case was applied in Slater v. Worthington's Cash Stores (1930), Ltd. (1941 3 A.E.R. 28) where the Court of Appeal held the occupier of premises liable for damage caused by a heavy fall of snow which had accumulated on the roof of premises during a severe snow storm which had come to an end some four days previously. The same test has also been applied by the Supreme Court of New Zealand in two cases concerning fires on country properties - Boatswain v. Crawford (supra) and Landon v. Rutherford (1951 N.Z.L.R. 975). In neither case was it alleged or proved that the defendant had originated the fire; the basis upon which the occupier in each case was held liable was that the damage complained of by the plaintiff could have been avoided by the exercise of reasonable care on the former's part. These later decisions were in accordance with the test of liability which we think has been authoritatively established and which is correctly stated in the brief passage we have quoted from Salmond and, accordingly, we think the learned trial judge erred on this branch of the case. We notice in passing, however, that in the last mentioned case the occupier admitted that he made no attempt to contain the fire and that Fell J. held that, in those circumstances, it was for him "to prove that it was impossible to do anything by taking reasonably prompt and efficient means to stop it spreading". We do not agree with this observation for in order to establish liability for negligence the plaintiff must always prove

that the damage of which he complains was caused by the breach of duty alleged.

In the present case the learned trial judge referred to a number of cases relating to such things as the natural growth and spread of wild thistles (Giles v. Walker (24 Q.B.D. 656)) and prickly pear (Sparke v. Osborne (7 C.L.R. 51) and the spread of rabbits (Anderson v. Lockyer (52 W.A.L.R. 60)) but we do not think that these cases throw any light on the problem in this case. No principle was enunciated in the first case, in the second the plaintiff's claim rested, not upon any allegation of negligence, but upon an assertion of strict liability whilst in the third the claim, which failed, was that there had been a breach of a statutory duty on the part of the defendant giving rise to private right of action.

This is enough to dispose of the case but it should be observed that the claim of the appellants does not rest merely upon the allegation that there was on the part of the respondent a failure to take reasonable steps to extinguish or prevent the spread of the fire in its original location in the fork of the tree. The respondent did, in fact, take some steps and these were initially taken as much for the preservation of his own property as of that of his neighbours. Indeed the taking of these steps was a measure which any prudent occupier would have adopted in the ordinary management of his property. It is, of course, a matter of general knowledge that trees in country areas are not infrequently set on fire by lightning and that, when observed, steps are taken to extinguish them or to contain them where possible as a matter of course. But when the tree in question here was cut down a hazard of a different character was created and it is beyond doubt that the respondent was under a duty to use reasonable care to prevent it causing damage to his neighbours in the country-side. The finding that, in the circumstances prevailing, he failed to

discharge his duty with the result that the appellants sustained the damage of which they complain is we think unassailable. We add that on this view it is of no consequence whether his liability rests in negligence or nuisance.

For these reasons the appeal should, in our opinion, be allowed and the case remitted to the Supreme Court for the purpose of assessing damages. Having reached this conclusion it is unnecessary for us to consider the further ground upon which the appellants based their claim, that is to say, liability for the breach of a statutory duty imposed upon the respondent by s. 28 of the Bush Fires Act 1954-1958. We are, however, inclined to the view that the decision of the learned trial judge on this point was correct. It seems to us that it is impossible to regard a breach of s. 28 as giving rise to a cause of action for damages. It will be observed that the obligation imposed by that subsection upon the occupier of land to "take all possible measures at his own expense to extinguish" a bushfire burning on his land applies only to fires burning on any land during "the restricted burning times" and during the "prohibited burning times" and only where the "bush fire is not part of the burning operations being carried on upon the lands in accordance with the provisions" of the Act. "Restricted burning times", by definition, means the period of time from the first day of October in any year to the next following thirty-first day of May and "prohibited burning times" are those times declared by the Governor by notice published in the Gazette (s. 17). However, the operation of a declaration under this section may be suspended by the Minister so far as it extends to any particular land and the suspension may be subject to any conditions specified by the Minister. Further, it should be observed that many classes of burning operations may during the prohibited burning times be carried on

"in accordance with the provisions of the Act". We mention as instances the provisions of ss. 22 (2), 23, 24, 24A, 25 and 26. Accordingly, the suggestion that it was intended that a breach of s. 28 resulting in damage should give rise to a private right of action involves the notion that the right of action should, in part, be seasonal in character, in part, dependent upon the existence of a declaration under s. 17 and no relevant suspension thereof, and upon the fire in question not constituting "burning operations in accordance with the provisions of the Act". We would find it difficult to discover in legislation of this character an intention that s. 28 was intended to create rights 'inter parties' in relation to the control of fires or that a breach of its provisions should give rise to a private right of action.

After these reasons were prepared the respondent sought leave to re-open the appeal on the ground that fresh evidence had been discovered relating to the condition of the fallen tree and the immediate surroundings on the evening of Monday 27th February 1961. It was submitted that this evidence could not with reasonable diligence have been available at the trial and that the principles which, in the circumstances, we should apply, are those which would guide an appellate court in a motion for a new trial on the ground of the discovery of fresh evidence. Accordingly, we were asked to direct a general new trial should the judgment in favour of the respondent be set aside. On a mere reading of the Affidavits filed in support of the application we are not greatly impressed by the evidence said to have been discovered or the reason advanced why it was not forthcoming at the trial and think there is a great deal of substance in the submissions made on behalf of the appellant. Nevertheless, since the existing judgment must be set aside and the issue of damages remains to be determined, we think that in the circumstance the appropriate course for us to follow is to leave it to the trial judge to determine whether at this late stage - issues of fact relating to liability having been litigated and pronounced upon - he should permit the

respondent to re-open his case in order to adduce the fresh evidence. The reason why it was not available at the trial and the character and cogency of the evidence will, of course, be material matters for his consideration. That being so we think that we should set aside the order and judgment of the Supreme Court and remit the case to the Supreme Court for the assessment of damages if an application made to the trial judge by the respondent to re-open his case on the issue of liability be rejected or, if, notwithstanding the reception of the fresh evidence in question, or otherwise, the decision of the Court on the issues of fact relating to liability remains unchanged.

In the High Court of Australia

No.8

Reasons for Judgment of their Honours Mr. Justice Taylor and Mr. Justice Owen
Continued

NO. 9
REASONS FOR JUDGMENT OF HIS HONOUR MR JUSTICE WINDEYER

In the High Court of Australia

No.9

Reasons for Judgment of His Honour Mr. Justice Windeyer

HARGRAVE and OTHERS

- v -

GOLDMAN

I agree in the conclusions of my brothers Taylor and Owen. But, as the well-considered arguments that we heard raised some fundamental questions, I shall state my reasons for myself.

The respondent is an elderly man who lived alone on his grazing property of some six hundred acres of lightly timbered country near Gidgegannup. On Saturday, 21st February 1961, a tall red gum tree on his land was struck by lightning, and set on fire in a fork some eighty feet or more up from the ground. The respondent became aware of this next morning. Appreciating the danger of the fire spreading, he took prompt action. He telephoned the fire control officer under the Bush Fires Act, 1954-1958 (W.A.), the Road Board Secretary and others. Through them he obtained assistance to fell the tree, so that the fire could be brought under control. While awaiting the arrival of the tree feller he cleared

the ground near the tree with a bulldozer. The tree was cut down. As it fell sparks ignited another tree, which then fell down. As a result, there were two logs burning on the ground. Action was taken to contain both fires. Inflammable material, branches and debris lying nearby, was thrown upon them. This no doubt increased them temporarily; but it diminished the risk of their spreading and was done for that purpose. For that purpose too, the respondent, with the help of a visitor, watered the ground near the fires from a six hundred gallon tank mounted on a trailer until, unfortunately, the stopcock became broken, rendering this equipment no longer serviceable as a sprinkler. The respondent apparently thought that the logs could then safely be left to burn themselves out. But on the next day they were still burning. The respondent said that he then put water on them and put them out. But his Honour did not accept his evidence that he did this. There was evidence from which his Honour could infer that in fact the logs were, to the knowledge of the respondent, still alight on the Tuesday, when he went off to Perth, for the day, apparently thinking that there was no risk in leaving, or taking the risk of doing so. A Western Australian red gum, once alight, may burn or smoulder for a long time by reason of the resinous gum from which it derives its name. Tuesday and Wednesday were very hot days. On Wednesday the temperature reached 105 degrees, and a strong easterly wind was blowing. In the afternoon of that day the respondent, while away from his homestead on another part of his property, had his attention drawn to smoke. He returned to find a large bush fire. Part of his land was burnt out; and the fire had already gone about a mile and a half towards the west, and was travelling fast. In the ultimate result hundreds of acres, over many miles of the countryside, were devastated. The appellants are landowners, whose house and other property were destroyed. His Honour found, and on the evidence the finding was clearly justified, that the bush fire began from the burning logs on the respondent's land. He found too that until Sunday afternoon, and probably until late on that day, the measures that the respondent took to control the fire that the lightning had started were "unexceptionable, taking into account all the circumstances and the fire-fighting equipment

available". But his Honour considered that thereafter the respondent was at fault. He said "I am satisfied that had he taken reasonable care he could, on the Sunday evening, or at latest early on the next morning, have put out the fires ... by using water on them". Nevertheless, he held that he had committed no breach of duty to the Plaintiffs, the appellants, and dismissed the action.

The appellants' case is that on his Honour's findings they are entitled in law to damages. From their point of view it matters not under what rubric of the law of torts their claim should be placed. But the case is not one which can be decided without regard to legal categories and classifications of wrongdoing. In the argument the case for the plaintiffs was discussed as depending, alternatively or cumulatively, upon the common law as modified by the Fires Act of 1774, upon nuisance, negligence, the rule in Ryland v. Fletcher and breach of a statutory duty under the Bush Fires Act. The several theorems of law thus propounded may be considered separately. But, in considering each, it is necessary to bear in mind that the law of torts is developing today, as the common law has developed in the past; new situations are being subsumed under rules and principles that are proving extensive rather than restricted. This is largely the result of the expensive scope of the tort of negligence today.

(i) The common law and the Act of 1774; The early common law, or custom of the realm, made a man responsible in an action of case if his fire spread and burnt his neighbour's house. Much that appears in the cases collected in Comyn's Digest under the heading "Action upon the Case for Negligence: in keeping his fire" is now obsolete, but the main principles of the common law concerning fire still stand in the background of the law today. The earliest case, and the one often referred to in later reports, is Beaulieu v. Finglam (1401) Y.B. 2 Hen. VI f. 18. That it still has vitality appears from the quotation of the Year Book made by Lord Goddard C.J. in Balfour v. Barty-King (1957) 1 Q.B. 469 and recently by McGregor J. in Erikson v. Clifton (1963

N.Z.L.R. 705). The averment was that the defendant had so negligently kept his fire (ignem suum tam negligenter custodivit) that the goods of the plaintiff were burnt. What weight should be put upon the word negligenter there, and whether it was traversable, are questions that have been debated by very learned writers. We do not have to decide the issue between Wigmore, and Winfield; for, whatever it meant, the word did not import the modern idea of tortious negligence. It is therefore enough to say that, as Sir Percy Winfield showed, it is not correct that the spread of a fire created at common law an absolute liability altogether irrespective of any fault of the man from whose land it spread. The rule seems rather to have been that a householder was responsible for his fire - and that meant any fire lighted by an inmate of his house: but he was not responsible for a fire started by a trespasser. Although not absolute, this liability was rigourous; and counsel feelingly protested in Beulieu v. Figham: "the defendant will be undone and impoverished all his days if this action is to be maintained against him, for then twenty other such suits will be brought against him for the same matter". To which Thirning C.J. replied: "What is that to us. It is better that he be utterly undone than that the law be changed for him". And for three hundred years it continued virtually unchanged, as can be seen from Turberville v. Stampe (1697) That case, important in the development of the law of vicarious liability for the acts of a servant as well as in relation to fire, is reported in many places : by Lord Raymond, Salkeld, Comyns, Comberbach, Carthew, Skinner and elsewhere. Lord Raymond (1 ld. Raym. 264) gives the best report of the argument; but the record is set out in full by Salkeld (2 Salk. 726). A fire had been lit to burn off stubble in a field. The majority of the Court said "a man ought

to keep the fire in his field, as well from the doing of damage to his neighbour, as if it were in his house, and it may as well be called suus the one as the other": but it would be relevant to prove that "a wind and tempest arose and drove it into his neighbour's field". The ideas of remoteness of damage, and of unforeseen occurrences breaking the sequence of cause and consequence, were coming into the law. But the general principle remained: every man was liable for damage caused by his fire whether it was lit by him or by his servant. Parliament at last took a hand: the Act 6 Anne c.31 (1707) continued by 10 Anne c.14, provided that no action should be had against any person "in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby, any law usage or custom to the contrary notwithstanding", Blackstone stated the reason and policy of this as "for their own loss is sufficient punishment for their own or their servants' carelessness". The provision was continued in later enactments, culminating in the Fires Act, 1774, s.86 which provided that no action shall be against any person "in whose house, chamber, stable, barn or other building or on whose estate any fire shall accidentally begin...". This Act, it has generally been accepted, became part of the law of Western Australia on the foundation of the Colony: and it has not been repealed there. In terms it might seem to apply to this case, as it has been construed as applying to country lands as well as to houses in cities and towns. But, although some reliance was put upon it in the argument, I do not think it directly affects the question here. True, the fire in the tree did "accidentally begin"; for that phrase has been held to mean a fire that begins by inevitable accident, as distinct from

one caused intentionally or by the negligence of someone for whom the landowner was responsible; Filliter v. Phippard (1847) 11 Q.B. 347. But the effect of the statute is narrowed by the decisions that it does not apply when a fire, although beginning without negligence, spreads as the result of negligence. Musgrove v. Pandelis (1919) 2 K.B. 43, and see Job Edwards Ltd. v. Birmingham Navigations Proprietors (1924) 1 K.B. 341 and Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners (1951) 83 C.L.R. 353, at pp. 393-4, per Fullagar J. And that, according to the finding of the learned trial judge, was what happened here. But putting the statute aside does not mean that we are thrown back to their rigorous rule of the mediaeval common law. This Court has held that the old rules have been absorbed into the principle of Rylands v. Fletcher and that the strict liability of the common law is subject to the qualifications of and exceptions to that principle : Bugge v. Brown (1919) 26 C.L.R. 110 at pp. 114-5 Hazelwood v. Webber (1934) 52 C.L.R. 268..

(ii) Rylands v. Fletcher : The attempt made at the trial to base the plaintiffs' claim on the rule in Rylands v. Fletcher failed; and the argument before us virtually conceded that it rightly failed. Fire is a thing likely to do mischief if it escapes. Therefore, fire can come within the rule in the form in which it was enunciated by Blackburn J. although the complexity of the distinctions between a natural and non-natural user of land, that has resulted from the words Lord Cairns used, and between dangerous and non-dangerous things, makes the application of the rule uncertain in some cases of fire and explosion: see Read v. J. Lyons & Co. Ltd. (1947) A.C. 156 and Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) (1947)

75 C.L.R. 59. In the present case none of those uncertainties arises directly; but Rylands v. Fletcher is excluded simply because the respondent did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies. And he did nothing to make its presence there more dangerous to his neighbours. Therefore the appellants could only use the principle of Rylands v. Fletcher as somewhat distantly akin to this case, and by way of an approach to the proposition that their cause of action was in nuisance. To this I turn.

(iii) Nuisance : A nuisance has been defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it". This compendious description from Winfield on Tort (6th Ed. (1954) p. 536) states the essence of nuisance as a tort. But some particularity is required to give content to the phrase "unlawful interference". Generally speaking the term "nuisance" denotes a state of affairs that is either continuous or recurrent. It is, therefore, somewhat misleading to use the word "nuisance" of a situation from which harm may occur if care be not exercised, but from which no actual harm is currently occurring. A thing that dangerously overhangs a highway, and which may fall at any moment, is however commonly called a nuisance. It currently and continuously interferes with the safe enjoyment of a public right of way and is thus a public nuisance. But in the present case what the appellants relied upon was the law of private nuisance. And a fire that is presently harmless is not a nuisance, although it may be fraught with danger and arouse apprehensions of harm. It is not that the law ignores prospective nuisances or

threatening dangers. It does not, for their existence may be a ground for an injunction: Attorney-General v. Corporation of Manchester (1893) 2 Ch. 87. And there can be no objection to speaking of a "potential nuisance", as was done in this case, provided that it be remembered that the invasion of the common law rights of an owner or occupier of land does not occur until he suffers harm : cf. Torette House Pty. Ltd. v. Berkman (1940) 62 C.L.R. 637 at pp. 657-8 per Dixon J. The matter may seem to be one of classification and terminology, rather than of substance; but the boundaries of the law of nuisance are indefinite enough without allowing the word to beg the question. It is nearly a hundred years since Erle C.J. said of nuisance, in a judgment which, because of his resignation, was never delivered: "This cause of action is immersed in undefined uncertainty.... The maxim 'sic utere tuo ut alienum non laedas' is no help to decision, as it cannot be applied till the decision is made; and the use of the word 'nuisance' in the discussion prolongs the dispute, because it means both annoyance that is actionable, and also that which is not actionable; and where the question is whether an annoyance is actionable, the word "nuisance introduces an equivocation which is fatal to any hope of a clear settlement"; Brand v. Hammersmith and City Railway Co.(1867) L.R. 2 Q.B. 223 at p; 247.

One argument addressed to the learned trial judge, as it was to us, was that, whether the tire be considered as a present annoyance or as prospectively harmful, this case was altogether outside the law of nuisance, because, it was said, an action of nuisance arises out of some active use that a man makes of his land, liability being commonly attributed to the maxim sic utere tuo...

and, it was said, the spread of the fire in this case was not the result of any use by the respondent of his land. This is too narrow a view. An occupier of land who passively suffers a nuisance to continue may be liable although he did not originally create it. Moreover it is not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant, although commonly it does: Esso Petroleum Co. Ltd. v. Southport Corporation (1953) 2 A.E.R. 1204 at p. 1207; affirmed (1956) A.C. 218.

The respondent had, however, a stronger answer to the case in nuisance. It was that the fire was not something for which he could be held responsible: he did not start it; he did not increase the danger of it; he did nothing to make himself responsible for it; all that he did was done with a view to making it harmless. The appellants sought to meet this by saying that although the respondent had not created the nuisance, or potential nuisance, he had continued it. They relied upon the well-known statement by Viscount Maugham in Sedleigh-Denfield v. O'Callaghan (1940) A.C. 880 at p. 894 that "an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so". There an artificial structure, a drain which was in a defective state, gave rise to a nuisance when it rained. The defendant had not constructed the drain. But he suffered it to remain defective. He did not take any steps to remedy it. He thus adopted or continued it. But here the respondent did take steps to eliminate the potential nuisance. They proved ineffectual it is true. But does that mean that he adopted or continued the fire so as thereby to become responsible for it and liable for the

harm it might do? The appellants rely heavily upon the remarks of Scrutton L.J. in Job Edwards Ltd. v. Birmingham Navigations Proprietors, supra, in his judgment which was approved by the House of Lords in Sedleigh-Denfield's Case. He said: "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping of a fire just beginning from a trespasser's match he can extinguish it; and then if he does nothing, he has 'permitted it to continue', and become responsible for it". The Supreme Court of South Australia has suggested that the rationale of this is that "the risk might be so plain, and the remedy so easy and so obvious, that anyone would say that the failure to deal with the situation was equivalent to approval, and that, by failing to take this step, the landowner had continued or adopted the fire": How v. Jones (1953) S.A.S.R. 82, at p. 87. That may explain a case where nothing of any significance was done. But it seems artificial in the case of a man who takes steps, although in the result ineffectual, to eliminate the danger. Trying to get rid of a thing can hardly be evidence of approval of it. Instead of imputing to the respondent an intention contrary to his real intent, the straightforward approach, in a case such as this, seems to me to be to ask; was he not liable in negligence? The essential question then is not: did the respondent continue the fire as a nuisance? It is: was he negligent in not rendering it harmless?

(iv) Negligence: The distinction between nuisance and negligence is not altogether clean cut. Until the recognition in

modern times of negligence as a tort in itself, many actions of case which we would today say were based on negligence were described as being for nuisances. The cases collected under "nuisance" in the third edition of Bullen and Leake shew this. Negligence is not a necessary element in nuisance, although it may be an ancillary element in some forms of nuisance: see Jacobs v. London County Council (1950) A.C. 361 at p.374 per Lord Simonds and Sedleigh-Denfield's Case, supra at p.904, per Lord Wright. The distinction between nuisance and negligence as separate torts may be of little, if any, importance for the ultimate decision of this case. But is of some significance in considering the decisions relied upon in the argument. At the present day, and for present purposes, it may, I think, be stated as follows.

In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person (an owner or occupier of land) in his enjoyment of his land.

In negligence liability is founded upon the negligent conduct of one person causing, to any degree, foreseeable harm to the person or property of another person (not necessarily an owner or occupier of land) to whom a duty of care was owed.

(v) Duty of care: In the present case the learned trial judge found expressly that, had the respondent taken reasonable care, he could have put out the burning logs. I take it that his Honour meant by this that the respondent did not act as a reasonably careful man, who had a duty to extinguish the fires, would have acted in the circumstances. That, the appellants say, is a finding of negligence on which

they are entitled to judgment, and again they refer to the illustration that Scrutton L.J. gave, in the passage I have quoted above, of stamping out a fire. His Lordship there recognised that, although the case had been debated as one of the duty to abate a nuisance, his proposition made liability depend on negligence. And he said : "I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours".

Counsel for the respondent challenged the validity of this proposition, or at least its application in this case. The respondent, he urged, had no legal duty to the appellants to extinguish the burning logs or render them harmless. His argument lead him to some observations concerning the concept of duty of care, as an element in the tort of negligence. This is a subject on which there is now a large body of learned academic literature. We were referred to some of the articles and text books. I have read them and others. But it seems to me unnecessary to go far into the matter here. It may be that insistence upon a duty of care as a separate element in liability for negligence is, in theory, unnecessary; for it may be comprehended in the idea of negligence itself, an act or omission being careless only when a reasonable man would appreciate, if he thought about the matter, that it could have harmful consequences. As long ago as 1897 Holmes J. suggested that the idea of a duty of care was a superfluous addition to the requirement of reasonable care : 10 Harvard Law Review at p.47. And Professor Buckland, fittingly enough

as a Roman lawyer, thought the duty of care "an unnecessary fifth wheel on the coach, incapable of sound analysis and possible productive of injustice". He realized, however, that it was "certainly a part of our law". 51 Law Quarterly Review 637. Sir Percy Winfield took the same view in an article in the Columbia Law Review (Volume 34 pp.41-66) reprinted in his Select Legal Essays pp. 70-95. The matter is now beyond purposeful debate, except as an exercise in juristic philosophy. The concept of a duty of care, as a prerequisite of liability in negligence, is embedded in our law by compulsive pronouncements of the highest authority. And it may well be that it could not be otherwise, if the law of negligence is to have symmetry, consistency and defined bounds, and its application in particular cases is to be reasonably predictable. It is worth nothing that, although the duty of care has no place as a separate element in the civil law of fault, Continental courts have had to meet the same problem as the common law courts have; and they have dealt with it in somewhat the same way. Thus it has been said that "French lawyers have been brought to the point of acknowledging the need for something not very far removed from the English duty of care". Lawson, Negligence in the Civil Law (1950) p. 31; and see Millner, Contrasts in Contract and Tort, in Current Legal Problems 1963 at p.85 cf. Ryan, An Introduction to the Civil Law (1962), pp. 114-5.

In the recent, and most important, case of Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., (1963) 3 W.L.R. 101 at p. 150 Lord Pearce said: "The law of negligence has been deliberately limited on its range by the courts' insistence that there can be no actionable negligence in vacuo without existence of some duty to the plaintiff". But it would, I consider, be wrong to

conclude from that, and from descriptions such as a "control device", that appear in text books that the controlling element, duty of care, was imposed upon the law of negligence in order to confine its twentieth century expansiveness. Rather, it seems to me, it had an earlier origin and grew up almost inevitably as negligence grew to be a separate tort. For example, in Bacon's Abridgment 6th Ed. (1807) it is said under "Action on the Case" that : "In some cases an injury happens to a man in his property, by the neglect of another; yet if by law he was not obliged to be more careful no action will lie". And throughout the nineteenth century the courts held in numerous cases than on particular facts there was a duty on which an action of case could be founded - whether it was then classified as in nuisance or negligence is immaterial. As an illustration, it is enough to refer to Brown v. Mallett (1848) 5 C.B. 599. When Lord Esher, then Brett M.R. made his famous generalization in Heaven v. Pender (1883) 11 Q.B.D. 503, his purpose was to state the circumstances in which "a duty arises to use ordinary care and skill...". But we cannot, having regard to what has been decided in other cases, decide whether in a given case there is a duty of care simply by resorting to Lord Esher's generalization, even when qualified by the notion of proximity, not in the sense of physical nearness but in the metaphysical sense defined by Lord Atkin in Donoghue v. Stevenson (1932) A.C. 562, at pp. 580-1. How then are we to decide whether the respondent was under a duty of care in this case? His counsel having raised the question, answered by quoting Du Parcq L.J. in Deyong v. Shenburn (1946) 1 K.B. 227, at p. 233: "There has to be a breach of a duty which the law recognises, and to ascertain what the law recognises regard must be had to the decisions of the courts".

Thus, the argument ran, if no court has said that there is a duty in a case such as this, then we cannot now say there is such a duty. But that extreme view of the "wisdon of our ancestors" cannot be accepted today. Lord MacMillan's words will bear quoting once again: "The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed"; Donoghue v. Stevenson supra at p. 619. And I would respectfully add a reference to Lord Devlin's speech in Hedley Byrne's Case, supra, in particular to two passages. One, the sentence, "English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity". The other: "Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a judge to be invited on the facts of any particular case to say whether or not there was 'proximity' between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops". The warning that is implicit in this is important. We are concerned with categories, not with the special facts of a particular case.

This case is not one in which the obligation to use care and skill arises from an undertaking to do some work for the benefit of another. In a case of that kind an obligation to exercise due care and skill arises from the entering upon the work, whether for reward or gratuitously. But here what the respondent did in relation to the fire was not done pursuant to any undertaking to the appellants, nor was it done specifically for their benefit. It did not increase the danger of the fire

spreading. Probably it diminished it. It seems to me impossible to say that, because the respondent did something to control the fire, he incurred a liability that he would not have incurred had he done nothing. If that were the law, a man might be reluctant to try to stop a bush fire lest, if he failed in his endeavours, he should incur a liability that he would not incur if he remained passive. The question comes to this: In a case such as this has the occupier of land a duty at common law - I put statutory obligations aside for the moment - to act at all? It was said that we must go to Donoghue v. Stevenson and that the principle of proximity would supply the answer. Fullagar J. wrote of Donoghue v. Stevenson supra (in a paper published in the Australian Law Journal Volume 25 p. 278) "It was not, of course, intended to make, and it does not make, everything nice and easy".

Lord Atkin's well known generalization explains the scope of a duty of care, that is to say it states who can complain of a lack of care when an obligation of care exists. But I venture to think that it is a mistake to treat it as providing always a complete and conclusive test of whether, in a given situation, one person has a legal duty either to act or refrain from acting in the interests of others. The very allusion shews that it has not this universal application. The priest and the Levite, when they saw the wounded man by the road passed by on the other side. He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did. The lawyer's question must therefore be given a more restricted reply than is provided by asking simply who was, or ought to have been, in contemplation when something is done. The dictates of charity and of

compassion do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him. The call of common humanity may lead him to the rescue. This the law recognizes, for it gives the rescuer its protection when he answers that call. But it does not require that he do so. There is no general duty to help a neighbour whose house is on fire.

The question in this case, however, is not whether a man must aid another who is in distress or rescue him from a peril. It is whether he must try to forestall and prevent a peril. A man who, while travelling along a highway, sees a fire starting on the adjacent land is not, as far as I am aware, under any common law duty to stop and try to put it out or to warn those whom it may harm. He may pass on, if not with a quiet conscience at least without a fear of legal consequence. Has the occupier of land a legal duty to his neighbour in respect of a fire that he finds on his side of the boundary fence, but none in respect of a fire that he sees on his neighbour's land just across the boundary, assuming in each case that he realized what might be the consequences to his neighbour of his own inaction? If so, on what principle of the law of negligence does the distinction depend? I do not find such questions easy. The doctrine of proximity does not give the answer, because the question assumes both physical proximity and the metaphysical proximity of Lord Atkin's doctrine. But we may, I think, push such troublesome problems into the background. The trend of judicial development of the law of negligence has been, I think, to found a duty of care either in some task undertaken, or in the ownership, occupation, or use of land or chattels. The occupier of land has long been liable at common law, in one form of action or another, for consequences flowing from the state of his

land and of happenings there, not only to neighbouring occupiers, but also to those persons who come upon his land and those who pass by. And, as I have remarked elsewhere, the tendency of the law in recent times has been to lessen the immunities and privileges of landowners and occupiers and to increase their responsibilities to others for what happens upon their land. To hold that the respondent had a duty to his neighbours to take reasonable care to prevent the fire on his land spreading would be in accordance with modern concepts of a land occupiers obligations. If it be a new step in the march of the law - and I do not think that really it is - then it is not a step which we need hesitate to take if nothing stands in the way. New precedents must accord with old principles, but as Lord Abinger C.B. once said; of an action for which no precedent was adduced, "We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other": Priestly v. Fowler (1837) 3 M & W. 1 at p.5.

But this is not a case that is bare of all authority. The learned trial judge based his conclusion on certain earlier decisions. The one most directly in point is Batchelor v. Smith (1879) 5 V.L.R. 176, a judgment of the Supreme Court of Victoria (Stawell C.J. and Stephen J.) allowing a demurrer to a declaration alleging damage by spread of fire from the defendant's land. The Chief Justice in giving his reasons said "It is the duty of any person who originates or brings any matter, animate or inanimate, attended with danger, on his ground, to keep it within due bounds; but there is no authority for the proposition for which the plaintiff contends, that, not having brought it, he must remove it". Stephen J.

concurred saying "The foundation of the whole case is that no duty was cast on the defendant to extinguish the fire". But the declaration had expressly alleged that the defendant, although aware of the danger to his neighbour, allowed the fire to remain burning on his land for the purpose and with the intention of burning and destroying certain stubble, reeds, sawdust and refuse. In the face of that, it is hard to see why the demurrer was allowed or what Answer there was to counsel's argument that the defendant had adopted the fire as his own, and become responsible for any injury resulting from it, just as if he had lighted it himself. The case seems to have been argued on the basis of Rylands v. Fletcher and strict liability, and the decision, when analysed, cannot be regarded as of much weight in the present case. But its dogmatic denial of a duty has not been without effect. It was relied upon in the Supreme Court of New Zeland in Hunter v. Walker (1888) 6 N.Z.L.R. 690, where it was held that the defendant was not liable for the spread of a fire that he had not lighted, although he could have put it out or checked it had he taken timely action. In 1905 it was again relied upon, this time in the Supreme Court of South Australia in Havelberg v. Brown (1905) S.A.L.R. 1 But when the judgments in that case are studied in the light of the facts, it appears that all that was decided was that there was no absolute duty upon the defendant there to extinguish or control a fire of unknown origin that he had discovered on his land; and that there was no evidence that, in doing what he did in regard to it, he had acted otherwise than as a prudent man would act. That decision really carries the present matter no further. Neither does Black v. Christchurch Finance Co. (1894) A.C. 48. That case and also McIness v. Wardle (1931) 45 C.L.R. 548 and the

very recent case in New Zealand of Eriksen v. Clifton supra, all turned upon the responsibility of a landowner for the acts of an independent contractor who lit a fire. None of them was concerned with a negligent failure to extinguish or render harmless a fire of unknown origin. However, that question arose directly in Boatswaine v. Crawford (1943) N.Z.L.R. 109. There a landowner, although told of a fire on his land, negligently failed to take reasonable steps to extinguish it, as in its early stages he could have done. Johnston J. held that he was liable for the consequences of its spreading beyond his land. He based his conclusion on Job Edwards Ltd. v. Birmingham Navigations Proprietors, supra, and on the approval of it in Sedleigh-Denfield's Case, supra.

The learned trial judge, after a careful review of the cases, came to the conclusion that he should not follow Boatswain v. Crawford, supra. He considered that the correct rule was laid down in Batchelor v. Smith, supra. He was influenced in this view because he said it "accords with the broader rule that a landowner is under no liability for anything which happens to, or spreads from, his land in the natural course of affairs if the land is used naturally". To that proposition I now turn.

(vi) Things naturally on land : His Honour's statement echoes, but adds some words to, what Lord Goddard C.J. said in Neath Rural District Council v. Williams (1951) 1 K.B. 115, at p. 122, where a miscellany of illustration appears. But, like all propositions of a general character, the difficulty is not in its statement but in its application. Is country land in Australia "used naturally" if the occupier, aware of the risk of a bush fire that may cause a disaster to himself and his neighbours,

does not act as a reasonably prudent man would act with a view to preventing this? Speaking generally, it is no doubt true that the law does not impose a duty upon anyone to arrest the processes of nature. But we are not concerned with generalities, but with the question whether the occupier of land must take care in the interests of his neighbours to prevent, if by reasonable measures he can, a small fire upon his land spreading and become a bush fire. That an answer to that question, arising in Australia today, should be sought for in a case about thistledown in England would surely surprise anyone who was not a lawyer. Are we - by examining what courts have said in cases about thistles, prickly pear, roots of trees and the branches of trees, trees deliberately planted and trees growing naturally, rolling rocks, rabbits, weeds in watercourses, silt in streams, seaweed, snow and surface water - to abstract some general principle, to add qualifications to it, and then to try to apply it to a fire which lightning lit? I do not think so. If this were the way by which to proceed, I would be content to say that I see more resemblance between snow - see Slater v. Worthington Cash Stores Ltd. (1941) 3 A.E.R. 28 - and fire than I do between fire and thistledown; and that I cannot choose between growing prickly pear and dead seaweed as analogies with fire, and am prepared to discard both. But I do not think this is the way by which we must proceed. Therefore, although I shall refer to some of the cases that were cited, I shall not examine all of them.

In some of the cases concerning things naturally on land the plaintiff's claim was based on nuisance: in some on negligence; in some on the doctrine of Rylands v. Fletcher. The foundation stone of the doctrinal edifice appears to be Giles v. Walker (1890) 24 Q.B.D. 656,

the case of the thistles. The action was in negligence. Lord Coleridge C.J. disposed of it by saying: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed". Lord Esher agreed. Recently the decision has come in for some criticism. The thistles, although no doubt a natural growth, had only grown on the defendant's land after he had turned it from forest into ploughed land. And in Davey v. Harrow Corporation (1958) 1 Q.B. 71, Lord Goddard C.J. in delivering the judgment of the Court of Appeal, quoted a remark that Lord Esher had made during the argument, as reported in the Law Times : "This damage is not caused by any act of the defendant. Can you show us any case which goes so far as to say that, if something comes on a man's land for which he is in no way responsible, that he is bound to remove it, or else prevent its causing injury to any of his neighbours.?" 62 L.T. 934. Lord Goddard's judgment, in which he acknowledged his indebtedness to an article by Doctor Goodhart (Liability For Things Naturally on the Land 4 Camb. L.J. 13), went on, quoting directly from that article: "Apparently counsel did not reply, but had he known of Margate Pier and Harbour Proprietors v. Margate Town Council (1869) 20 L.T. 564, it would have been a complete answer". In that case seaweed had been cast ashore by the sea. Left to lie, it became a nuisance to the neighbourhood. It was held that the landowner on whose land it was could be compelled to remove it.

The only other case to which I need make particular reference is Sparke v. Osborne (1908) 7 C.L.R. 51, the prickly pear case. The decision influenced the American Restatement of the Law of Torts. The facts are well known. An injunction

was granted by the Supreme Court of New South Wales to restrain the defendant from allowing prickly pear growing on his land to overhang, and in parts to break down, nine miles of dog-proof fence, thus allowing dingoes to get at the plaintiff's sheep and also causing prickly pear to spread in his land. On the appeal to this Court counsel for the respondent sought to uphold the injunction by a contention that "every owner of land on which there is prickly pear is bound at his peril to prevent its growing on his boundary in such a way as to overhand his neighbour's land" (see 7 C.L.R. 51, at p.66). It was this absolute proposition that the Court rejected. Griffith C.J. said : "Anyone who has seen prickly pear growing as it grows in some parts of Queensland, for instance, knows that it would be casting an intolerable burden upon the owner of the land if he were compelled to warrant all his neighbours from its spreading into their land" : 7 C.L.R. 51 at p.59. Doctor Goodhart seems to have thought that this statement of Sir Samuel Griffith, who knew more about Queensland than most men, was inconsistent with his later reference to the prickly pear Acts, which require a person to take precautions against the spread of the pest; for in his article he said : "Apparently the burden is not so intolerable when imposed by legislation". It is not, for the legislature recognised that what must be done in a given case depends upon what is practicable, and provided an elaborate administrative control with discretionary power "in an endeavour to ensure the common benefit without causing special injustice to the individual", as Griffith C.J. expressed it. The legislative requirements were inconsistent with the absolute common law duty contended for. The case occurred in 1908 when many millions of acres were infested by the rapidly spreading pear in many places so heavily infested as to be quite useless. The pest could only be eradicated at a cost which made the task

unprofitable. It was not until later that the cactoblastus recovered this "lost province". A learned writer in the Harvard Law Review (1943) Volume 56 p. 772, recognized the ground of the decision: "On ordinary nuisance principles the practical basis for the decision in Sparke v. Osborne would rest on the fact that it would be an 'intolerable burden' on the landowner to require him to check this particular pest, so that failure to do so would not constitute an unreasonable use of land, even though considerable injury resulted to the plaintiff and the prickly pear lacked any utility". All the members of the Court in their judgments gave, as reasons for not imposing this burden on the defendant, the facts that the prickly pear had not been brought on to his land by him; that its presence there, and its spread therefrom were the work of nature; that he could not in the circumstances be held liable for a mere non-feasance. They put some reliance on Giles v. Walker supra, and they distinguished the cases of trees overhanging a boundary. But the observations in the judgments concerning exoneration for the consequences of things coming naturally on land should be read in relation to the topic under discussion, that is growing things, trees and noxious plants. Bush fires were not in the mind of the Court at all. And the question of a duty of care did not arise, for the plaintiff did not base his claim on negligence, but on an allegation of strict liability. I therefore put the prickly pear case aside.

In the result no more, I think emerges from the cases than one would have expected, namely that liability for negligence depends ultimately upon a concept of fault and that no man can be held at fault, morally or legally, simply for a happening not caused by any human agency: and that often the law

does not hold a man at fault because he does not take any steps to arrest the consequences of such a happening, although he knows they may be harmful to other person : but that sometimes it does.

(vii) Conclusions : In my opinion a man has a duty to exercise reasonable care when there is a fire upon his land (although not started or continued by him or for him), of which he knows or ought to know, if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished. Of course, if the fire were brought by him upon his land - in the sense of being started or intentionally kept alight there by him or anyone for whose acts he was responsible - his duty would not be merely to take reasonable care: it would be the strict duty of Rylands v. Fletcher.

Strong support for the existence of a duty of care to prevent the spread of fire is to be found in the House of Lords' approval in Sedleigh-Denfield's Case, supra, of the judgment of Scrutton L.J. in Job Edwards' Case, supra. We do not have to consider what things other than fire might come within his Lordship's general words "a thing which may, if not rendered harmless cause damage to neighbours". The dangers of fire have, from the earliest days of the common law, given rise to special responsibilities; and not only in the common law. In Roman law negligence in watching a fire lit by another was an exception, or apparent exception, to the general rule that mere omissions were outside the Lex Aquilia; see Digest IX, 2,27. Coming back to modern times: In the United States, although the rule does not seem to be uniform, it is well established in some jurisdictions that a person on whose premises an accidental fire starts must exercise reasonable care to prevent it from spreading after he has notice of the fact, although he has no connection with its origin: see American Law

Reports Annotated, Vol. 42, p. 821, Vol. 111 p. 1149, Vol. 18, 2nd p. 1097. And that a negligent failure to prevent the spread of a fire of unknown origin creates liability seems to be the rule in Canada also : see Des Brisay v. Canadian Government Merchant Marine (1941) 2 D.L.R. 209; Mainella v. Wilding, (1946) 2 D.L.R. 749.

The New Zealand decision in Boatswain v. Crawford supra, is, I respectfully think, correct. But I would not myself treat the liability which arises in a case such as this as involved in any way with nuisance. One way of stating the ground of liability is that a land occupier is liable if, by his negligence, a potential nuisance is permitted to become an actual nuisance. But I do not think that the liability arising from a negligent failure to extinguish or confine a fire is a liability only to neighbouring landowners or occupiers. Liability in negligence extends to other persons who may be harmed, that is to say, to those who are neighbours in the lawyer's sense as well as those who dwell in the neighbourhood. The grave and widespread consequences of a bush fire may make the liability of a careless individual ruinous for him; but this only emphasizes the seriousness of the duty of care.

(viii) The Bush Fires Act : The Bush Fires Act of Western Australia, s.28 (1) (a) provides that, where a bush fire is burning on any land in the circumstances set out (and these would, it seems, include the fire in this case): "the occupier of the land shall forthwith, upon becoming aware of the bush fire, whether he has lit or caused the same to be lit or not, take all possible measures at his own expense to extinguish the fire". Failure to do so is punishable by a fine not exceeding £100. It may be that "all possible

measures" means all reasonably practicable measures; but, whatever it means, I agree with the learned trial judge in thinking that this provision does not of itself create any civil right. But neither in my opinion does it supplant or limit the common law duty: cf. Edwards v. Blue Mountains City Council (1961) 78 W.N. (N.S.W.) 864. The bush fire legislation takes different forms in the different States. But the general effect in all States is, I think, that, as it was put by Gavan Duffy C.J. and Starke J. in McInnes v. Wardle supra at p.550, it "brings into relief the dangers to be foreseen and provided against". Here the respondent foresaw the dangers. He took some measures to provide against them, and notified the fire control officers. But His Honour held that he negligently left the fires when he could have extinguished them.

I would allow the appeal.

Since I wrote what appears above, affidavits have been filed on behalf of the respondent to the effect that there is evidence, not called at the trial, tending to show that the respondent did in fact extinguish the fires in the logs. The parties have forwarded to us their written submissions in relation to the admissability of this material. I need say no more of it than that I entirely agree with what has been said by Taylor and Owen J.J. and with the order they propose.

NO. 10

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 10th day of August, 1964

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

Mr. Boyd-Carpenter
Sir Edward Boyle
Mr. Carr
Mr. Thomas

WHEREAS there was this day read at the Board

In the Privy Council

No.10

Order granting special leave to appeal to Her Majesty in Council 10th August 1964

Continued

a Report from the Judicial Committee of the Privy Council dated the 28th day of July 1964 in the words following, viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October, 1909 there was referred unto this Committee a humble Petition of Allan William Goldman in the matter of an Appeal from the High Court of Australia between the Petitioner and Rupert William Edeson Hargrave and Winifred Hazel Hargrave (Trading under the firm name of Gidgegannup Agency) Respondents and between the petitioner and Edward R. Taylor and Elizabeth E. Taylor Respondents and between the Petitioner and Richard Brennand Respondent and between the Petitioner and Frederick W. Price and Gladys J. Price Respondents and between the Petitioner and Reginald V. Cousins Respondent and between the Petitioner and Peter W. Williamson and Eileen G. Williamson Respondents and between the Petitioner and John R. Garside and Gwendoline M. Garside Respondents setting forth that the Petitioner desires to obtain special leave to appeal from a Judgment of the High Court of Australia delivered on the 22nd November 1963 allowing subject to the grant by the Trial Judge of a new Trial an Appeal from the judgment given on the 9th January 1963 in the Supreme Court of Western Australia dismissing the Respondents' claims for damages: that the Petitioner was the owner and occupier of a grazing property and a tree upon this property was struck by lightning and commenced to burn and in order to control the fire the Petitioner caused the tree to be felled and subsequently contained the fire in the tree and other fires thereby caused and after the fires had subsided the Petitioner took no further action and allowed one or more logs to continue to smoulder and several days later a fire held to have originated from one of the smouldering logs spread into the adjacent properties of the

Respondents; that the Respondents claimed damages against the Petitioner in the Supreme Court of Western Australia and the seven Actions were consolidated by Order dated the 13th April 1962: that on the 9th January 1963 the Court gave Judgment in favour of the Petitioner: that the Respondents appealed to the High Court of Australia which allowed the Appeal on the 22nd November 1963 and remitted the Action to the Supreme Court of Western Australia to consider an Application by the Petitioner for leave to reopen his case by adducing fresh evidence and in the event of such Application being refused or the findings of fact remaining unchanged to assess Damages: that the Petitioner's application to reopen his case was refused on the 19th December 1963 and Judgment was entered for the Respondents for damages to be assessed: that on the 9th April and the 21st May 1964 the Petitioner applied to the Supreme Court of Western Australia to extend his time for appealing to the Full Court against the refusal of his Application to reopen his case but both applications were refused: that on the 9th June 1964 Damages were assessed at a total of £3,600: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the said Judgment of the High Court of Australia dated the 22nd day of November 1963 or such further or other order as to Your Majesty may appear fit and proper:

"THE LORDS OF THE COMMITTEE in obedience to His Late Majesty's said Order in Council have taken the humble Petition into consideration and having heard counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his appeal against the

In the Privy Council

No. 10

Order granting special leave to appeal to Her Majesty in Council 10th August 1964

Continued

Judgment of the High Court of Australia dated the 22nd day of November 1963 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E.N. LANDALE

IN THE PRIVY COUNCIL
ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

No. 30 of 1965

B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

RUPERT WILLIAM EDESON HARGRAVE and WINIFRED HAZEL HARGRAVE (Trading under the firm name of GIDGEGANNUP AGENCY) (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

EDWARD R. TAYLOR AND ELIZABETH E. TAYLOR (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

RICHARD BRENNAND (Plaintiff) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

FREDERICK W. PRICE and GLADYS J. PRICE (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

REGINALD V. COUSINS (Plaintiff) Respondent

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

PETER W. WILLIAMSON EILEEN G. WILLIAMSON (Plaintiffs) Respondents

AND B E T W E E N : ALLAN WILLIAM GOLDMAN (Defendant) Appellant

- and -

JOHN R. GARSIDE and GWENDOLINE M. GARSIDE (Plaintiffs) Respondents

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(CONSOLIDATED BY ORDER DATED 13th APRIL, 1962)

RECORD OF PROCEEDINGS

INGLEDEW, BROWN BENNISON & GARRETT,
51, Minories,
London, E.C.3.
Solicitors for the Appellant.

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Solicitors for the Respondents.