

Now, at common law it was the defendant's right to properly set out fire on his own land for the necessary purposes of husbandry, provided he or his servants managed it with due care, and if he did and damage was nevertheless done, he was not responsible on the ground that every man has a right to use his land in the way he thinks best, but in using fire, which is a dangerous substance, he must use proper precautions to prevent it extending to his neighbors. He must exercise the care and diligence which a prudent man would observe in his own affairs and which a prudent and conscientious man will observe as to the interests of his neighbors, but this amount of care varies, of course, according to circumstances: *Dean v. McCarty*, 2 U.C.R. 448; *Furlong v. Carroll*, 7 A.R. 161.

The plaintiff, however, while admitting this to be the law and contending the defendant was negligent, further contends that because of the non-observance of the by-law in not giving notice, the setting out of the fire which was otherwise lawful, was unlawful, and, therefore, the defendant is liable in any event, whether negligent or not, and refers to *Fletcher v. Rylands*, L.R. 1 Ex. 265, in support of this contention. This case decides that where one for his own purposes brings upon his land and collects and keeps there anything likely to do mischief, if it escapes, is prima facie answerable for all the damage which is the natural consequence of its escape.

By the Municipal Act, R.S.O. c. 223, s. 542, sub-s. 16, by-laws may be passed by the Councils of Municipalities "for regulating the times during which stumps, wood, logs, trees, brush, straw, shavings, or refuse, may be set on fire or burned in the open air, and for prescribing precautions to be observed during such times; and from preventing such fires from being kindled at other times," and by s. 479, sub-s. 17, the right to impose penalties is given for violation of any of these by-laws.

In pursuance of this statutory power, the Municipal Council of the Township of Scarborough passed the by-law in question, No. 316, which enacts, "(1). That from and after the passing of this by-law it shall not be lawful for any person or persons to set on fire or burn any stumps, wood, logs, trees, brush, straw, shavings, or other refuse, in the open air within the Township of Scarborough at any time between the 1st day of July and the 15th day of September in any year; nor at any other time or times during the year until after eight days' notice has been given to the owner or occupant of the adjoining property which might be injured thereby, of the intention of any person to set fire to or burn such material.

"(2). That any person contravening the provisions of this by-law shall be liable, upon conviction, to a fine of not less than two dollars nor more than fifty dollars, to be recovered before any Justice of the Peace for the County of York, to be collected by distress and sale of the goods and chattels of the offender," etc., etc.

By this s. 479, sub-s. 17, no power is given municipalities to interfere with the common law rights of parties who come within the by-laws, either