

The whole law on this point was dealt with both by Lord Wrenbury (then a Lord Justice of Appeal) and the late Lord Justice Kennedy in the case of *Cope v. Sharpe* (No. 2), to which we have already referred. The facts in that case may be briefly stated as follows: The plaintiff was the owner of land the shooting over which was let. The defendant was the head gamekeeper and bailiff of the lessee of the shooting. A fire broke out on a part of the land. At some distance there was a covert affording shelter to nesting pheasants. Some fifty persons were engaged in beating out the fire, when the plaintiff set fire to some strips of heather between the main fire and the covert, with the view of preventing the main fire reaching and destroying the nesting pheasants. The fire was eventually put out by the fifty persons alluded to. An action was brought by the owner of the land against the defendant for trespass. The important point to note is that the setting fire to the heather between the main fire and the covert proved, as events turned out, to be unnecessary, however expedient it may have been to burn the heather.

Mr. Justice Phillimore and Mr. Justice Hamilton took the view that the defendant had not justified his trespass. In the court below, the judge had put these two questions to the jury: "Was the method adopted by the defendant in fact necessary for the protection of his master's property? If not, was it reasonably necessary in the circumstances?" The jury answered the first question in the negative, and the second in the affirmative. "The question we have to decide," said Mr. Justice Phillimore, "is whether a defendant relying on necessity as a justification of a trespass to land or goods, and possibly also of a trespass to the person, can be justified by anything short of actual necessity." His Lordship expressed the opinion that actual, not merely apparent, necessity for interference must be shewn in justification. Mr. Justice Hamilton was of a like opinion.

The Court of Appeal, however, took a different view. It is true that Lord Justice Vaughan Williams dissented from the