of the realm and has not said that this custom has been used since time immemorial.

To this the whole court said: move on, for the common custom of this realm is common law.

THIRNING [C.J.] said that a man should answer for his fire which by misfortune burns another's goods.

And some were of opinion that the fire could not be called 'his fire', because a man cannot have property in fire: but that opinion was not allowed.

MARKHAM. A man is bound to answer for his servant's act, as for his lodger's act, in such a case. For if my servant or lodger puts a candle on a wall and the candle falls into the straw[13] and burns the whole house, and also my neighbour's house, in this case I shall answer to my neighbour for the damage which he has suffered.

The court granted this.

Hornby. Then he ought to have had a writ *quare domum suum ardebat* or *exarsit*.

Hill. It would be against all reason to put blame or fault on a man where there is none in him; for his servant's negligence cannot be said to be his doing.

THIRNING. If a man kills or slays another man by misfortune, he shall forfeit his goods; and he must have his charter of pardon by way of grace.

The court agreed with this.

MARKHAM. I shall answer to my neighbour for anyone who enters my house by my leave or with my knowledge, or is my guest or my servant's guest, if he does something with a candle (or whatever) by which my neighbour's house is burned. But if a man outside my house, against my will, sets fire to the thatch of my house, or elsewhere, so that my house is burned and my neighbours' houses also, I shall not be bound to answer to them for it, since it cannot be said to be ill-doing on my part when it is against my will.

Hornby. This defendant will be undone and impoverished for ever if this action is maintainable against him, for then 20 other suits will be brought against him for the same matter.

THIRNING. What is that to us? It is better that he should be utterly undone than that the law should be changed for him.

Then they were at issue that the plaintiff's house was not burned by the defendant's fire; ready; and the other side *econtra*.

13 It was the custom to cover floors with straw or rushes.

ANON. (1584)

LI MS. Misc. 488, p. 115 (Q.B.).

An action on the case was brought in the King's Bench and the plaintiff declared against the defendant upon the general custom of the realm for negligently keeping the defendant's fire so that the plaintiff's house was burned. The defendant came in and said for a plea (*protestando* that he kept the fire well) that the plaintiff's house which was so burned was a good way away from the defendant's house—namely, three houses or ten yards away—and when the defendant's house was burning a gust (*tempest*) of wind arose, which blew the fire on to the plaintiff's house, whereby the plaintiff's house was burned against his will. And he prayed judgment *Si action*.

WRAY C.J. That is no plea, for you must at your own peril keep your fire so well that no damage ensues therefrom to anyone.

Therefore he gave the defendant a peremptory day[14] to plead a good plea.

TURBERVILE v STAMPE (1697)

Record: KB 27/2121, m. 359; 3 Ld Raym. 250. Thomas Turbervile, esquire, brought a bill against John Stampe, gentleman, complaining that, whereas according to the custom of the realm of England every man is bound to keep his fire safely and securely day and night, lest for want of due keeping any damage should befall anyone: the defendant on 6 April 1697 was possessed of a heath at Stoke, Dorset, adjoining the plaintiff's heath, and so negligently and improvidently kept his fire in the said heath that the plaintiff's heath and furze was burned to the value of £40. The defendant pleaded Not guilty, and on 22 July 1697 at Dorchester assizes (Ward C.B., Rokeby J.) the jury found for the plaintiff with £18 damages and 40s. costs. The motion in arrest of judgment was heard in Michaelmas term 1697.

(a) 1 Ld Raym. 264 (untr.).[15]

... *Gould*, king's serjeant, moved in arrest of judgment that this action ought not to be grounded upon the common custom of the realm, for this fire in the field cannot be called 'his fire'; for a man has no power over a fire in the field, as he has over a fire in his house. And therefore this resembles the case of an innkeeper, who must answer for any ill that happens to the goods of his guest so

14 A day after which judgment would be entered by default if he failed to plead.

15 Also reported in Carthew 425; Comb. 459; Comyns 32; Holt 9; 1 Salk. 13; Skin. 681.

long as they are in his house; but he is not answerable if a horse be stolen out of his close.[16] And in fact in this case the defendant's servant kindled his fire by way of husbandry, and a wind and tempest arose and drove it into his neighbour's field, so that it was not any neglect in the defendant, but the act of God.

But this was not accepted: for, *per curiam*, as to the matter of the tempest, that appeared only upon the evidence and not upon the record, and therefore the King's Bench cannot take notice of it; but it was good evidence to excuse the defendant at the trial.

Then, as to the other matter, per HOLT C.J., ROKEBY and EYRE JJ., 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 be as well called 'his', the one as the other, for the property of the materials makes the property of the fire. And therefore this action is well grounded upon the common custom of the realm.

But TURTON J. said that these actions grounded upon the common custom had been extended very far. And therefore (by him) the plaintiff might have case for the special damage, but not grounded upon the general custom of the realm.

But by the other justices judgment was given for the plaintiff...

HOLT C.J. If a stranger set fire to my house, and it burns my neighbour's house, no action will lie against me. (Which all the other justices agreed.) But if my servant throws dirt into the highway, I am indictable: so, in this case, if the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit.

(b) 12 Mod. 152 (untr.).

... TURTON J. There is a difference between fire in a man's house and in the fields. In some countries[17] it is a necessary part of husbandry to make fire in the ground, and some unavoidable accident may carry it into a neighbour's ground and do injury there; and, this fire not being so properly in his custody as the fire in his house, I think this is not actionable as it is laid.

But, by HOLT C.J., ROKEBY and EYRE JJ., every man must so use his own as not to injure another. The law is general. The fire which a man makes in the fields is as much 'his fire' as his fire in his house: it is made on his ground, with his materials, and by his order, and

16 See pp. 555–556, above.

17 I.e. parts of the country.

he must at his peril take care that it does not through his neglect injure his neighbour. If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence. But now here it is found to have been by his negligence; and it is the same as if it had been in his house.

Judgment was given for the plaintiff.

The record shows that judgment for the plaintiff was signed on 23 November 1697, for £31, the court having increased the costs by £11.

(3) Custom of the realm: carriers

RICH v KNEELAND (1613)

Record: KB 27/1440, m. 1549; abstracted in Kiralfy, *Action on the Case*, p. 224, and in Hob. 17. John Rich brought an action on the case against Arthur Kneeland and declared that, whereas the defendant was a common hoyman and carrier by water (*communis nauta et vector*) and used to carry goods for hire between Milton, in Kent, and London; and whereas by the custom of the realm of England common hoymen and carriers ought to keep the goods and chattels delivered to them on their boats without loss, so that they should not be lost or spoiled through the fault of such common hoymen or carriers or their servants; and whereas the plaintiff on 20 January 1612 delivered to the defendant a portmanteau with £50 in it, to be carried, and gave him twopence: the defendant suffered the goods to be lost, through the fault of him and his servants, on 25 January. The defendant pleaded that on 21 January the plaintiff discharged him of the keeping of the goods. The plaintiff traversed this, and the defendant demurred. Judgment was given for the plaintiff, and the defendant brought a writ of error in the Exchequer Chamber.

Cro. Jac. 330, pl. 9 (untr.).[18]

... A writ of error being brought, it was assigned: first, because this action lies not against the common bargeman without special promise.

But all the justices and barons held that it well lies, as against a common carrier upon the land.

Secondly, they held that the traverse was good.[19]

18 Also reported in Hob. 17; sub nom. *Keeling v Rich*, 1 Rolle Abr. 2.

19 The point (according to Hobart) was that the defendant did not plead a discharge of the *carrying*.