Present : Bertram C.J. and Garvin and Jayewardene A.JJ.

1924.

SAMED *v.* SEGUTAMBY.

358—D. C. Puttalam, 3,543.

Use of fire in agricultural operations—Spread of fire to neighbouring land —Action for damages—Has plaintiff to prove negligence on the part of the defendant ?—Contributory negligence,

The defendant cut down the jungle on his land and set fire to it in the course of some agricultural operations. The fire spread to the plaintiff's land and damaged his plantation. The plaintiff alleged negligence on the part of the defendant, and claimed damages. The defendant pleaded contributory negligence on the part of the plaintiff in exculpation.

A strip of 30 feet was cleared and reserved on the boundary of the plaintiff's land in the direction in which the fire would naturally be carried by the prevailing wind.

Plaintiff himself cleared a corresponding portion on his own land as an additional precaution. Neither side took the precaution to clear a strip to prevent the fire spreading in the event of a defection of the wind. The fire spread sideways, and got out of control.

The District Judge held that plaintiff had entirely failed to prove negligence on the part of the defendant ; that the defendant had taken all necessary precautions ; and that the spread of the fire was due to inevitable accident which could not be prevented by reasonable foresight. He also found that there has been contributory negligence on the part of the plaintiff, and dismissed plaintiff's action. The plaintiff appealed.

Held, that in an action for damages resulting from the spread of fire in the course of agricultural operations, the plaintiff must prove negligence on the part of the defendant.

It is not for the defendant to prove due diligence, but for the plaintiff to prove negligence ; but in some cases negligence may be inferred from the fact itself.

Held, that in the circumstances of this case negligence may be inferred from the facts themselves. There was no contributory negligence on the part of the plaintiff.

The Roman-Dutch law on the subject governs the rights of parties. Even if the English Common law is applicable to this case, there must be proof of negligence on the part of the defendant, and such negligence may be inferred from the facts and circumstances in the absence of direct evidence.

The proposition that the Roman-Dutch law, pure and simple, does not exist in this country in its entirety and that it is not the whole body of Roman-Dutch law, but only so much of it as may be shown or presumed to have been introduced into Ceylon that is in force here, does not apply to fundamental principles of the

common law enunciated by authorities recognized as binding wherever the Roman-Dutch law prevails. Such principles may in course of time become modified in their local application by judicial decisions, but it would be only by a series of unbroken and express decisions that such a development could take place.

Silva v. Silva[1] overruled.

THE facts are set out in the judgment of the District Judge (N. M. Bharucha, Esq.) :—

In this action the plaintiff sues the defendant for the recovery of Rs. 3,000, being damages caused to the coconut trees on his land called Sengalkattu Bown by a fire, which he alleges to have spread from the newly cleared chena belonging to the defendant. The alleged incident took place on September 15, 1922. Notice of the setting fire was given by the defendant to the plaintiff on or about September 1. The defendant's cleared chena is situated to the south of the plaintiff's land. It is not disputed that the defendant had left a reservation of about 40 feet wide between the cleared chena and plaintiff's estate to the north. The plaintiff had also cleared a similar reservation about 25 to 30 feet wide on his estate. After notice was given the plaintiff visited his land twice—once on September 5 and again on September 10. The plaintiff was apparently satisfied with the precautions taken by the defendant to prevent the spreading of fire to his land, and did not anticipate any danger. However, for the sake of greater safety, the plaintiff asked his witness, P. Mohammadu Meedin, to be present on the land with some men at the time the defendant set fire to the chena. Accordingly, Mohammadu Meedin was present on plaintiff's land with plaintiff's witnesses, Kuppe Pitchchi, Mana, and some others. It is alleged that just before the defendant and his men set fire to the cleared chena, Kuppe Pitchchi brought it to the notice of P. Mohammadu Meedin that sufficient space was not left between the cleared and felled jungle and the uncleared portion to the east on defendant's land. Kuppe Pitchchi suggested that at least a space of 30 feet should be cleared, otherwise the fire would spread to the uncut jungle and from there on to the plaintiff's land, as there was high wind blowing at the time. P. Mohammadu Meedin brought this to the notice of the defendant, but the defendant told him to mind his own business, and in spite of his remonstrance set fire to the felled jungle. It is suggested for the plaintiff that only a narrow passage was left between the cleared jungle and uncut jungle.

The fire therefore spread on to the uncut jungle from which sparks flew on to the plaintiff's land, which was covered with tall dry grass, and this was the cause of the damage suffered by the plaintiff.

The defendant says that he took all necessary precautions, and that fire which caused the damage did not originate from his cleared chena.

We have now to consider whether the defendant took all the reasonable precautions. It was submitted for the plaintiff that the defendant was guilty of negligence in setting fire to his chena : (*a*) on a windy day and (*b*) in not leaving a sufficient cleared space between the felled jungle and the uncut jungle to the east. It was also stated that the defendant would be liable to make good the loss suffered by the plaintiff if the fire which caused the damage originated from his land, whether negligence was proved or not in accordance with rule in

[1] *(1914) 17 N. L. R. 266.*

Fletcher v. Rylands [1] followed with approval in *Elphinstone v. Boustead*, [2] *Silva v. Silva* (*supra*), and *Korossa Rubber Co. v. Silva*. [3] The fact that defendant took necessary precautions is apparent from the plaintiff's evidence. When the plaintiff visited his land some days before the chena was set fire to, he was apparently satisfied with the precautions taken by the defendant and did not anticipate any danger to his land . . . .

I think that Mohammadu Meedin and Kuppe Pitchchi and other servants of the plaintiff, who were on the land at the time, were satisfied with the precautions taken by the defendant, and did not anticipate any danger from spread of fire to their land. The defendant gave ample notice to the plaintiff, and both plaintiff and his men were satisfied with the precautions taken by the defendant. The defendant had cleared a sufficient strip of jungle between his cleared chena and plaintiff's land, and there must have been a space of at least 8 to 10 feet, if not more, between the felled jungle and the uncut jungle to the east, as long chulus are usually used in setting fire in such cases. In many cases a strip of jungle also acts as a protective belt against a spread of a destructive fire. The plaintiff has entirely failed to prove negligence on defendant's part. On the other hand, the proved facts of the case show that the defendant took all necessary precautions which were considered adequate by plaintiff and his servants. The spread of the fire was due to inevitable accident which could not be prevented by reasonable foresight. The rule in *Fletcher v. Rylands* (*supra*), therefore, does not apply in this case.

There is another reason why plaintiff's action fails. The plaintiff was given ample notice of the setting fire of the chena. The plaintiff took no steps to clear his land of the tall dry inflammable grass in the vicinity of the cleared chena, with the result that the grass caught fire by sparks and led to the damages complained of.

The plaintiff appears to have been guilty of bad husbandry. He is also guilty of gross negligence. When notice was given to him, it was clearly his duty to clear his land of this grass in the neighbourhood of the cleared chena that was likely to catch fire. The excuse given by the plaintiff that the land was being cleared on the eastern side at the time is not satisfactory. The plaintiff having received notice ought to have cleared his land of this grass sufficiently on the side of the defendant's chena. The plaintiff has, therefore, been guilty of negligence in this matter. This negligence is the proximate cause of the damage suffered by the plaintiff and disentitled him to relief he claims.

Setting fire to chenas after notice is the usual way of planting lands in this district. It cannot, therefore, be said that the use of fire for such a purpose is not a natural use. On the authority of *Rickards v. Lothian* [4] I would hold that the defendant is not liable, he having taken all adequate precautions.

In the view I take of the matter it is not necessary for me to consider the question of damages. I dismiss plaintiff's action, with costs.

E. W. Jayewardene, K.C. (with him *R. C. Fonseka*), for plaintiff, appellant.

C. S. Rajaratnam (with him *Croos Da Brera* and *Chas. de Silva*), for defendant, respondent.

[1] *(1868) L. R. 3 H. L. 330.*
[2] *Ram. (1872–76) 269.*
[3] *(1917) 20 N. L. R. 65.*
[4] *(1913) A. C. 263.*

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July 4, 1924. BERTRAM C.J.—

This is a case of damage to an adjoining plantation through fire used for a clearing operation, and the question involved in the appeal is, whether it is necessary for the plaintiff to prove negligence in order to entitle him to recover damages. In a series of cases containing most weighty dicta, it has been assumed that in such cases proof of negligence is not necessary, and that there is an absolute liability independent of any negligence. It has been held, in fact, firstly, that the rule in *Rylands v. Fletcher* [1] is in force in this country ; and secondly, that it applies to the use of fire for agricultural operations. The learned District Judge, however, has delivered a judgment which in effect challenges this assumption, and it has become necessary to examine the question afresh.

An examination so undertaken discloses a series of circumstances, which, in view of the assumption so continuously made in this Court, must be described as unexpected, and can hardly have been fully before the Judges who enunciated the dicta referred to. It is clear on this examination of the authorities that the rule referred to has never been applied to fire used for agricultural operations either in England or anywhere else. The law in England as to the use of fire for such purposes had an independent development, and was not referred to either in the judgments in *Fletcher v. Rylands* (*supra*), or in any case in which that case has been subsequently considered. In such standard text-books as *Salmond on Torts, pp. 245–250 ; Beven on Negligence, pp. 486–497 ;* and even *Pollock on Torts, pp. 489–491*, the opinion is expressed, or appears to be expressed, that proof of negligence is essential to the right to recover. Further in certain Canadian cases cited in *Beven, p. 496*, it appears to have been held that " where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time, and season, and managed with due care, he is not responsible for damage occasioned by it." So also in Scotland, with regard to the practice of " muirburning," it was held that " the party conducting such an operation as a muirburn should exercise the care and diligence which a prudent man would observe in his own affairs." Further, in a New Zealand case, which was carried to the Privy Council (*Black v. Christchurch Finance Co.*[2]) the law was declared by Lord Shand as follows :—

> " The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (*sic utere tuo ut alienum non lædas*)."

[1] *(1866) L. R. 1 Exch. 265 ; 3 H. L. 330.*

[2] *(1894) A. C. 48.*

This dictum was not necessary to the decision of the case, but it was quoted as an authoritative statement of the law in the Privy Council in our own local case (*Korossa Rubber Co. v. Silva*[1]). What is still more significant in connection with that case is that the Privy Council expressly reserved the question whether proof of negligence was necessary, and held that negligence had in fact been proved. Finally, there is no question that both in civil law and in the Roman-Dutch authorities which have adopted that law, negligence is essential to the action. See *Digest, 9, 2, 30, paragraph 3 :* "*At si omnia quæ oportuit observavit; vel subita vis venti longius ignem produxit, caret culpa.*"

I quote the whole passage from *Monro's Translation :—*

> "In the action arising on this section, as in the other, it is malice and negligence that are penalized ; consequently, if a man should set fire to his stubble or his thorns, in order to burn them up, and the flames increase and spread so as to injure the corn or vines of some one else, we have to ask whether it took place through his negligence or his want of skill. If he did it on a windy day, he is guilty of negligence as a man who gives an opening for damage to occur is held to commit it, and he exposes himself to the same charge if he did not take means to prevent the fire from spreading. But if he took all proper precautions, or a sudden gust of wind caused the spread of the fire, he is not guilty of negligence."

As it has been declared in the dicta above referred to that the English rule in *Rylands v. Fletcher* (*supra*) has been definitely received into our legal system, and that that rule is said to embrace the use of fire for agricultural purposes, it may be well to consider the evolution of the English law.

The cases which formed the foundation of that rule had nothing to do with fire. They were of two classes : The first class consisted of cases of cattle trespass. The absolute liability of a cattle owner for damages done by his cattle was a recognized principle of Roman law (see per Phear C.J. in *Babun Appu v. Sinno*[2]). The other class consisted of cases of animals known by the owner to be mischievous, *e.g.*, a boar, a bull, a dog, and a monkey (see *May v. Burdett*[3]). Here, the gist of the action was the keeping of the animal after knowledge of its mischievous propensities (see per Lord Denman C.J. on page 1227). "The negligence is in keeping such an animal after notice." *Rylands v. Fletcher* (*supra*) extended that principle to the case of a man who erects or brings on his land artificial constructions which are in their nature dangerous. But even in the judgment in *Rylands v. Fletcher* (*supra*) there are words which indicate a possible exception in the case of " work or operations in or under the land."

[1] *(1917) 20 N. L. R. 65.* [2] *(1879) 2 S. C. C. 90.* [3] *(1846) 9 Q. B. 101*

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The liability for the spread of fire rested on another basis. In English law such things were governed by particular customs of the realm. Thus it was by the custom of the realm that a carrier was held absolutely liable for goods entrusted to him, except where they were damaged or lost by an act of God or the King's enemies (see Lord Mansfield's judgment in *Forward v. Pittard*[1]). Similarly, by another custom, it was incumbent on a man carefully to guard his own fire. The custom is most explicitly set out in the old case from the Year Books of *Beaulieu v. Fingham* cited in *Piggott v. The Eastern Counties Railway Company*[2]: "*Quare, cum secundum legem et consuetudinem regni nostri Angliæ, hactenus obtentam, quod quilibet de eodem regno ignem suum salvo et secure custodiat, et custodire, teneatur; ne per ignem suum dampnum aliquod vicinis suis eveniat.*" The leading early case on the subject was *Tuberville v. Stampe*[3] which was decided in the ninth year of King William III.'s reign, and which is reported in various reports. There a servant of the defendant lit a fire to burn stubble, and—"*ignem suum tam improvide and negligenter custodivit quod defectu debitæ custodiæ ignis sui pred,*"—the clothes of the plaintiff in the close adjoining were burnt. Nothing is said here as to any absolute liability. In the subsequent case of *Vaughan v. Menlove*,[4] Tindal C.J. refers to the negligence in *Tuberville v. Stampe* (*supra*) as consisting in burning of weeds too near the boundary of the land. It does appear, however, in the report of *Tuberville v. Stampe* (*supra*) in *2 Comyn* that the question was raised whether it was necessary to show any special negligence in the defendant, and it appears to have been ruled that it was not necessary. All that is meant by this is, I take it, that negligence in such a case is presumed (see per Tenterden C.J. in *Becquet v. MacCarthy*[5]). Indeed, the Judges in *Tuberville v. Stampe* (*supra*) expressly declared that it was open to the defendant to show the absence of negligence, and that this would be a matter for consideration by the jury. See the report in *12 Modern 152*: "if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground, this is fit to be given in evidence." From where do Holt J. and the other Judges derive this principle? Clearly from the old Roman civil law with which English Judges in those days were familiar. Lord Holt's words are clearly nothing more than a translation of the sentence in the *Digest* quoted above: "*At si omnia quæ oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa.*"

It is true that in *Filliter v. Phippard*[6] Lord Denman C.J. states the ancient law or custom of England in terms which seem to imply an absolute liability, but the observation is *obiter* and would probably have been qualified had the point definitely arisen. Moreover, in that case the action was based upon negligence. The only

[1] *(1765) 1 Term Reports 27.*
[2] *(1846) 3 C. B. 241.*
[3] *1 Salk. 13 S. C., 1 Lord Ray 264, 1 Comyn 32.*
[4] *3 Bing. New Cases 468.*
[5] *2 B. & Ad. at p. 958.*
[6] *(1847) 11 Q. B. 347.*

question in that case was whether the fire could be described as accidental. It is also quite true that distinguished English Judges in the recent case of *Musgrove v. Pandelis*[1] do seem to favour the idea that in English law there was an absolute liability for the escape of fire, but the dicta to this effect are both *obiter* and obscure, and I question whether they are to be considered as authoritative. It appears to be clear, therefore, that even if we assume that the doctrine of *Rylands v. Fletcher* (*supra*), in so far as it relates to artificial dangerous contrivances or agencies, has been received into our legal system, to apply it to the case of fire used for clearing operations, would not only be not in accordance with English law, but would be directly contrary to the express provisions of our own common law.

Are we then to consider our own common law as superseded, because certain eminent Judges in previous decisions and dicta have ignored or repudiated it? On what principle can this be justified? These eminent Judges base their view upon the proposition that " the Roman-Dutch law, pure and simple, does not exist in this country in its entirety," and that " it is not the whole body of Roman-Dutch law, but only so much of it as may be shown or presumed to have been introduced into Ceylon " that is now applicable here. With the very greatest deference to the high authority of these Judges, I hesitate to apply such propositions to fundamental principles of the common law enunciated by authorities recognized as binding wherever the Roman-Dutch law prevails. Such principles may no doubt, in course of time, become modified in their local application by judicial decisions, but it would be only by a series of unbroken and express decisions that such a development could take place.

But if our previous local authorities be examined, it will be found that they are by no means so formidable as might at first sight appear. They consist of *Elphinstone v. Boustead*[2] said to be a " Full Court Case " : *Babun Appu v. Sinno* (*supra*), *Silva v. Silva*,[3] and the *Korossa Rubber Co. v. Silva* (*supra*). In the first of these cases, the question of the necessity of the proof on the negligence was never argued, but was given up by the appellant. In the second case, *Babun Appu v. Sinno* (*supra*), the damage complained of was the burning of a fence and three neighbouring jak trees close to the defendant's boundary. The facts there suggest positive negligence. In the third of these cases, it was expressly declared that negligence was proved. In the case of the *Korossa Rubber Co. v. Silva* (*supra*), also the Judges found that negligence had been proved, and this finding was upheld by the Privy Council. Moreover, it is not correct to say that the principles of our own common law have been uniformly ignored. Three cases (*Allis v. Pitche Cando*,[4] *Kulatungam v.*

[1] *(1919) 2 K. B. 43.*
[2] *Ram. (1872–76) 268.*
[3] *(1914) 17 N. L. R. 266.*
[4] *(1887) 8 S. C. C. 95.*

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Sabapathi Pillai,[1] and *Tatham v. Chinniah*[2]) seem to have proceeded upon the basis of our common law. In the second case, the fire was domestic fire causing damage to a house, but such fire, and fire used for agricultural purposes, are on the same footing.

The principles of our own common law will be found most conveniently and fully summarized in *Nathan, vol. III., paragraph 1728*, and *Maasdorp, vol. IV., pp. 60–61*. I quote the following from *Maasdorp* :—

> " Of dangerous agencies one of the most common is fire. Where a person makes a fire upon his own ground, whether to destroy rubbish, or to keep down the vegetation, he is bound to use the greatest diligence and care and to take every precaution, for if he does not and the fire spreads on to the land of a neighbour and does damage there, he will be liable for the same."

The authorities differ as to whether positive negligence must be shown by the plaintiff, or whether proof of due diligence must not be given by the defendant. Voet holds that the burden of proof lies upon the plaintiff, and this view we should no doubt adopt, subject to the qualification that in some cases negligence may be inferred from the fact itself.

It appears, therefore, that applying the principles of our own law, it is necessary to consider in the present case whether the defendant was guilty of negligence. This is not an easy question to determine as the evidence is contradictory, and it is impossible that that of both sides could have been given in good faith. The facts appear to be that due notice was given by the defendant in the customary manner of his intention to burn down his jungle. A strip of 30 feet was cleared and reserved on the boundary of plaintiff's land in the direction in which the fire would naturally be carried by the prevailing wind. Plaintiff himself cleared a corresponding portion on his own land as an additional precaution. It was clearly necessary, however, that there should be a further strip cleared alongside the lot on which the firing was to take place, so as to prevent the fire spreading sideway in the event of a deflection of the wind. Defendant alleges that this was done, and that there was a reservation of 30 feet at the side of the lot. The Judge clearly does not believe this. Plaintiff's witness assert that only a strip of some 3 feet was left. The Judge, on what does not seem to me very adequate grounds, thinks that a strip of at least 8 or 10 feet must have been left. At any rate, it seems clear that the strip so left was insufficient. A deflection of the wind in fact occurred ; the fire spread sideways, got out of all control, and reached plaintiff's land at a place where no precautions had been taken on either side. It seems to me that negligence is clearly established. Indeed, this is a case in which

[1] *(1908) 11 N. L. R. 350.* [2] *(1905) 1 Leem. 17.*

negligence may be inferred from the facts themselves. The fire could not have spread sideways into other land of the defendant if a proper reservation had been made in that direction.

It is contended, on the other hand, that there was contributory negligence on the part of the plaintiff. When the fire reached his land, it kindled certain grass which was growing there. It was contended that the plaintiff ought to have foreseen that the fire would invade his land at this point, and ought to have cut down this grass. I cannot see that there was such an obligation on the plaintiff. It has indeed been laid down by Atkin L.J., in a recent case, *Ellerman Lines, Ltd., v. H. & G. Grayson, Ltd.,*[1] that a plaintiff cannot recover even though he may be under no obligation to the defendant if by the taking of some ordinary or reasonable precautions he could have avoided the consequences of the negligence of the defendant. This is quoted with approval by Lord Parmoor in *H. & G. Grayson v. Ellerman Line,*[2] where he puts it that it is a question of fact in each case whether such reasonable precautions ought to have been taken. But I think that this principle applies where some relationship is established between the plaintiff and the defendant. It can hardly apply where the defendant invades plaintiff's land at a place where he ought not to have come. Indeed, I view with the utmost distrust the proposition that a man who has brought about the invasion of the land of another and caused damage thereon can escape liability by pleading that that other ought to have taken precautions against the invasion. I would rule, therefore, that the contributory negligence is not made out.

It remains to deal with the question of damages. The learned Judge in the circumstances has made no finding on this point. The evidence of the Mudaliyar is uncontradicted by any evidence called on the other side. He estimates the damage at Rs. 1,939·88. This would appear to be a moderate estimate, inasmuch as it takes no account of the possibility of some of the trees burnt dying altogether. I think it best to accept this estimate. I would allow the appeal, and enter judgment for the plaintiff for this amount, with costs here and below.

GARVIN A.J.—I agree.

JAYEWARDENE A.J.—

This is an action to recover damages caused by fire. The plaintiff and the defendant are adjoining landowners. The defendant cut down the jungle on his land and set fire to it in the course of some agricultural operations. The fire spread to the plaintiff's land which had a young coconut plantation and damaged the plantation. The plaintiff alleged negligence on the

[1] *(1919) K. B. 514.*

[2] *(1920) A. C. 477.*

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part of the defendant, but no issue was framed on this allegation. The defendant pleaded contributory negligence on the part of the plaintiff in exculpation, and an issue was framed raising the question of the plaintiff's contributory negligence. The learned District Judge dismissed the plaintiff's action. He held that the plaintiff had entirely failed to prove negligence on the part of the defendant, that the defendant had taken all necessary precautions, and that the spread of the fire was due to inevitable accident which could not be prevented by reasonable foresight. He also found that there has been contributory negligence on the part of the plaintiff, who, although notified of the defendant's intention to set fire to the jungle, took no steps to clear his land of all dry inflammable grass in the vicinity of the jungle about to be burnt.

It is contended for the plaintiff that the judgment of the District Judge is erroneous, on the ground that the law applicable to cases of this kind is the English law which does not require proof of negligence or want of proper care and attention on the part of a person who brings a dangerous substance, like fire, to his premises, to render him liable to persons who have suffered damage by the spread of fire. In support of this contention reliance is placed on several local cases: *Elphinstone v. Boustead* (*supra*), *Babun Appu v. Sinno* (*supra*), *Silva v. Silva* (*supra*), and *Korossa Rubber Co. v. Silva* (*supra*), in which this Court applied what may be described as the *Fletcher v. Rylands*' rule to fire.

On the other hand, it is contended for the defendant that the Roman-Dutch law, which requires proof of negligence, governs the rights and obligations of the parties, and that even if the English law applied, negligence or want of care on the part of the defendant was a necessary ingredient. Two questions thus arise for determination :—

(1) Is this case to be decided on the principles of the English law or of the Roman-Dutch law ?

(2) If according to the principles of the English law, is proof of negligence or want of proper care on the part of the defendant essential ?

The Roman-Dutch law on the subject is perfectly clear and simple. It is embodied in the *Lex Aquilia*, which codified the law relating to wrongful damage to property, and forms *Book IX., tit. 2*, of the *Digest, and Book IX., tit. 2, of Voet's Pandects*. Voet repeats the Roman law practically word for word, and in paragraph 19, which deals with damage to property by fire, he says :—

" He who sets a light to his stubble or thorns for the purpose of burning them down, if the fire spreading damages or destroys a wood, vineyard, or crops belonging to some one else, and such negligence appears on the part of the person first lighting it, as when, it may be, he did this on

a windy day, or did not take precautions to prevent the fire spreading, for if he observed every precaution, and the wind suddenly came up and carried the fire further, he would not be to blame." (*Sampson's Translations, p. 314.*)

And Vander Linden put it shortly thus :—

> " In like manner, as there are *quasi*-contracts, so are there also *quasi*-crimes, as when we occasion damage to another by any act of ours which although not punished by law, yet on account of our negligence or inadvertence subjects us to damages. For instance . . . . where a fire occasioned in your house through your carelessness is communicated to mine." (*Book 1, chap. XVI., sec. 3.*)

But in *Elphinstone v. Boustead* (*supra*) it was conceded by counsel and declared by the Court that in an action for causing damage by fire, it was unnecessary to prove negligence on the authority mainly of *Fletcher v. Rylands* (*supra*) which laid down that if a man brings upon his land anything which would not naturally come upon it and which is in itself dangerous, and may become mischievous if not kept under proper control, though in doing so he may act without personal wilfulness on negligence, he will be liable in damages for any mischief thereby occasioned. He is bound " *sic uti suo ut non alienum lædat.*" The ingredient in *Fletcher v. Rylands* (*supra*) was water dammed up to form a reservoir, but in that case the same principle was held applicable to fire kindled on the premises for agricultural purposes. *Babun Appu v. Sinno* (*supra*) was a similar case where the jungle set fire to by the defendant was close to the common boundary, and the principle of *Fletcher v. Rylands* (*supra*) was applied, but the learned Chief Justice cited a passage from the Roman-Dutch law (*Van Leuven Censura Forensis, pt. 1, libv. d 31, s. 4*) to show that the same principle is recognized in Ceylon and constitutes the ground of right on the part of the person agrieved to claim compensation in cattle trespass cases, and he also said that " the defendant did a wrongful act towards the plaintiff by employing fire so near to the common boundary line as to destroy the plaintiff's fence." There is here this same sort of negligence as is found in the English case of *Tuberville v. Stampe* (*supra*). *Elphinstone v. Boustead* (*supra*) was not referred to, and it cannot be said that this case decided that the English law was applicable to cases of damage by fire, but it adopted the *Fletcher v. Rylands*' principle as it was in consonance with the principles of the Roman-Dutch law applicable to such cases.

In *Silva v. Silva* (*supra*) it was no doubt held that in view of the decisions in *Elphinstone v. Boustead* (*supra*), the principle of the English law applicable to such cases must be taken to have been

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introduced, but here, again, the Roman-Dutch law was adverted to, and the learned Judge held that even if the case had to be decided according to the Roman-Dutch law, the result would not have been otherwise, as the defendant had not used the utmost diligence and care and had not taken every precaution to prevent the fire spreading.

In *Korossa Rubber Co. v. Silva (supra)*, although the Court held that the English law was applicable, it also held that there was clear proof of negligence on the part of the defendants, so that they would be liable even under the Roman-Dutch law. In his judgment De Sampayo J. discussed the Roman-Dutch law: *Voet 9, 2, 12 ; Nathan's Common Law of South Africa, vol. 2, p. 1783 ;* and *Maasdorp's Institutes of Cape Law, vol. 4, p. 60 ;* and said :—

> " But these authorities do not help the defendants, even if the Roman-Dutch law as therein stated is to be applied. They all regard the burning of stubble or weeds on a windy day, without taking precaution to keep the fire within bounds, as a negligent act, for which the person who does it is liable to his neighbour into whose land the fire may spread. This is exactly what happened on this occasion. There was a high wind, characteristic of this part of the year; the defendants had on their chena a great quantity of inflammable material in the shape of dry leaves and trees, and they left no sufficient belt of uncleared jungle between their land and Korossa estate as a precaution against the spreading of a fire. Therefore, if negligence must exist, there was negligence on their part. But the truth appears to be that, since negligence is a matter of presumption, there is no essential difference between the English law and the Roman-Dutch law in regard to liability to damage caused by fire."

On the other hand, there are cases of damage by fire in which either the English law has been ignored or the principles of the Roman-Dutch law applied. Thus in *Allis v. Cheeny Pichecando*,[1] although the main question was whether the owner of the land was responsible for damage by fire caused by a contractor employed by him, Burnside C.J. said :—

> " The principle being, that where in the performance of a particular work by one landowner to his own property, danger to the property of an adjacent landowner is necessarily incurred, which throws upon the owner doing the work the duty of taking care that his neighbour is not injured, such owner cannot relieve himself of responsibility by employing a skilled agent or contractor to do it for him."

[1] *(1887) 8 S. C. C. 95.*

And Clarence J. said :—

"Clearing land in this manner is certainly an operation attended with damage to the property of adjoining landowners, and the man who burns off his land, as the phrase is, has cast upon him the duty of using the precaution necessary to prevent mischief. He does not discharge himself of responsibility merely by employing a contractor to do the work for him. That this is the law, there can be no doubt."

Here, there is no reference to *Fletcher v. Rylands* (*supra*) or to the principle enunciated therein that a person who brings a dangerous substance to his land does so at his risk, but the duty of taking care and using the precautions necessary is insisted on. This case was followed in *Tatham v. Chinniah* (*supra*) and *Schokman v. de Silva*[1] on the point that the master is responsible for the *tort* committed by his employee or agent, but, in the course of his judgment in the former case, Middleton J. said :—

"The principle which should govern our decision in this case is the well-known maxim *sic utere tuo ut non alienum lædas*. The defendants were anxious to clear their jungle by fire, and bound in doing so to take the greatest possible precautions that that dangerous element should not escape beyond their own boundaries. It is far from clear from the evidence that anything like proper precautions were taken by the third defendant, and if he was the servant of the second and third defendant there is no question as to their liability. The fact that there was illuk grass growing adjacent to the jungle about to be cleared ought to have made the three defendants more careful in their arrangements."

The reference to the maxim *sic utere tuo ut non alienum lædas* does not necessarily indicate that the Court was relying on the *Fletcher v. Rylands'* principle. The immediate reference to the failure to take proper precautions shows that the learned Judge was not relying on the English case, *vide Black v. Christchurch Finance Co.* (*supra*) and *Korossa Rubber Co. v. Silva* (*supra*). Then we have a case in which the Roman-Dutch law was relied on. This is *Kulatungam v. Sabapathi Pillai* (*supra*). That was a case in which the plaintiff, the lessor, sued the defendants, his tenants, for damages for the destruction of a house by fire while in the occupation of the defendants. One of the issues framed in the case was "whether the second defendant acted so carelessly and negligently and without taking due and proper care and precaution as to let the fire in the kitchen burn down the house ?" The

[1] *(1915) 1 C. W. R. 205.*

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plaintiffs had undertaken the onus in the District Court and had failed, but in appeal it was contended that the onus was on the defendants to show that the fire was due to unavoidable accident. The question of onus became important, for the District Judge had held that if the burden of proof lay on the defendant's shoulders, he would not have found in favour of the defendants. The question of onus was decided according to the principles of the Roman-Dutch law.

Wendt J. said :—

> "The incidence of the onus in a case of destruction by fire appears to have been the subject of controversy among the old jurists. *Grotius* (*Introduction, bk. III., chapter XIX., section 11 ; Maasdorp 395* citing the *Digest, bk. XIX., 2, 9, 3*) lays the burden on the lessee to prove unavoidable accident. In the analogous case of the contract of pledge, the same learned author says that the loss of the pledge by fire or robbery is considered as due to negligence, unless the defendant proves the contrary (*bk. III., 8, 4,* and compare *Van der Keesel, Thesis 540*). *Voet* (*bk. 9, 2, 20 ; Sampson, p. 325*) takes the opposite view, on the ground that the onus lies by the general rule on the plaintiff, and that negligence, like fraud, will not be presumed. His reasoning is not without force, but in the conflict of authority I am disposed to follow the ruling of Withers J., who, in the case of *Bastian Pillai v. Gabriel,*[1] held that the onus lay upon the defendant to prove that the destruction of the property hired by him was occasioned by unavoidable accident."

Bastian Pillai v. Gabriel (*supra*) was a case in which the plaintiff sued to recover the value of a jar given to the defendant on hire and destroyed by fire whilst in the latter's possession. Withers J. held that the onus was on the defendants to prove that the fire which destroyed the jar was occasioned by unavoidable accident. " If the jar was burnt in this way, then the defendant is not liable to make compensation to the lessor according to the Roman-Dutch law."

These cases are of considerable importance, and cannot be brushed aside on the ground that they dealt with the question of onus as between lessor and lessee, for the onus in a case between a lessor and a lessee is the same as that in a case between the owner and a neighbour, and is governed by the same principles (*Voet 9, 2, 20*). They apply the rules of the Roman-Dutch law with regard to the liability of a lessee or hirer for damages caused by fire as laid down in *Voet 19, 2, 31*. This would not be so, in my opinion, if the

[1] *(1892) 1 S. C. R. 264.*

English law had been introduced on the subject of liability for damage by fire.

It is thus apparent from a review of the decisions on the point that the principle laid down in *Fletcher v. Rylands* (*supra*) has not been uniformly applied as governing the rights and liabilities of parties in actions for damages arising from fire, and speaking from my experience at the Bar, it has invariably been the practice for a defendant to plead and prove that he had taken the usual and necessary precautions to prevent the spread of fire to the plaintiff's land. Such evidence has never been objected to as being irrelevant in view of the judgment in *Elphinstone v. Boustead* (*supra*). But it is said that *Elphinstone v. Boustead* (*supra*) is a Full Bench decision, and that the Roman-Dutch law on the point has been abrogated by it and held to have been so abrogated by the Judges in *Silva v. Silva* (*supra*). It is therefore necessary to examine the binding effect of *Elphinstone v. Boustead* (*supra*). There it was conceded by counsel that the principle laid down in *Fletcher v. Rylands* (*supra*) applied to cases of the present kind, and as the point was not discussed, the Court did not think it necessary to enter upon it. Is such a decision authoritative and binding ? Black in his "*Law of Judicial Precedents*" says at p. 43 :—

> "The authority of a precedent extends only to rules or principles of law expressly decided or tacitly assumed by the Court itself. In either case, there must have been an application of the judicial mind to the question of law involved, whether the result is explicitly stated or not. Hence when counsel in the argument of a case assume a certain principle advanced by them as correct law, and the Court decides the case upon the assumption thus made by counsel, without discussing the correctness of the assumption, the opinion is not authority as to the legal validity of the principle so taken for granted. The rule is the same as to matters which, without being submitted to the Court for determination, are simply treated as settled by the parties on both sides without objection."

This seems to be in consonance with what Lord Denman C.J. said in the celebrated case of *O'Connel v. Regina,*[1] where referring to a dictum of Lord Mansfield in another case, he said :—

> "I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for law falls within the description of 'law taken for granted.' If a statistical table of legal propositions shown be drawn out, and the first column headed 'Law of Statute,' and the second 'Law of Decision'; a third column, under the heading of 'law taken for granted,'

[1] *(1844) 11 Cl. & F. (H. L.) 155 (372).*

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would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience that the mere statement and re-statement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconciliable to some clear legal principle."

Something might be said in support of such a decision if it has been consistently followed in practice and adopted by the Courts, but as I have pointed out the Courts have acted on principles inconsistent with the principle taken for granted there or where the same principle has been acted upon, reliance was not placed on that decision, but it has been acted upon as it is similar to those found in the Roman-Dutch law.

It was only in *Silva v. Silva* (*supra*), twenty-eight years later, that *Elphinstone v. Boustead* (*supra*) was expressly referred to and held to have introduced the principle of the English law. In the *Korossa Rubber Co. v. Silva* (*supra*), Wood Renton C.J. said :—

" As far back as 1876, however, it was admitted by counsel in the argument, and held by the Full Bench in the judgment in the case of *Elphinstone v. Boustead* (*supra*) that the principle laid down in *Fletcher v. Rylands* (*supra*) had been adopted in this Colony."

And De Sampayo J. said :—

" Accordingly we find that in *Elphinstone v. Boustead* (*supra*) the Full Bench of the Supreme Court declared the law as to damage caused by such an element as fire to be that enunciated in *Fletcher v. Rylands* (*supra*)."

I do not think it is quite correct to say that in *Elphinstone v. Boustead* (*supra*) the Full Court either " held " or " declared the law " to be as stated by these two learned Judges, in view of the fact that the Full Bench of this Court expressly refrained from entering upon a discussion of the question as it was not argued before it. It merely acted on the concession of counsel. There is, therefore, no ground for stating that the Roman-Dutch law on the point had been abrogated by our Courts. The proclamation of 1799 established the Roman-Dutch law as it " subsisted under the ancient Government of the United Provinces " as our common law, and the presumption is that every one of these laws, if not repealed by the local Legislature, is still in force : see *Thurburn v. Steward* [1] and the judgment of De Villiers C.J. in *Seaville v. Colley* referred to in *Nathan's* introduction to " *The Common Law of South Africa* " at page 24. But this Court has also declared parts of the Roman-Dutch law inapplicable on various grounds (see

[1] *(1871) L. R. 3 P. C. 478.*

Roman-Dutch Law: as it prevails inCeylonby A. St. V. Jayawardene, pp. 22–25, and *Korossa Rubber Co. v. Silva (supra) at p. 75*).

But there is no decision by which this Court has declared that the Roman-Dutch law on the subject of damage by fire is inapplicable in this Colony by its being obsolete or for any other reason. It is not a special or local law which is only suited to conditions in Holland and unsuited to local conditions. It is a law of general application, and it cannot be suggested that it was not imported to Ceylon. This law is to be found in the works of institutional and other writers on the Roman-Dutch law recognized in Ceylon and appealed to in the Colony upon all questions of Roman-Dutch law. As this Court said in 1835: " If the right exists, it is not the less law because hitherto suitors may not have thought it expedient to exercise it." *Morgan's Digest, p. 61.* Other parts of *Voet's Pandects, bk. IX., tit. 1 to 4*, which contains the Roman-Dutch law of torts, have been held applicable in Ceylon (see *Pereira's Laws of Ceylon, bk. 2, chap. 1, section 4*), where this learned author practically reproduces the whole of *Voet, bk. IX., tit. 1 and 2*, including the section dealing with fire (p. 752), although at page 743 he has drawn attention to the effect of the decision in *Elphinstone v. Boustead (supra)*. In these circumstances, I come to the conclusion that there is no binding decision which compels us to hold that the English law relating to damage by fire has been introduced into Ceylon, and that the principle laid down in *Fletcher v. Rylands (supra)* with regard to dangerous animals or things had been held applicable to Ceylon in suppression of the Roman-Dutch law on the subject. The Roman-Dutch law on the subject must therefore govern the rights of the parties, and there must be proof of some negligence on the part of the person lighting the fire before he can be cast in damages.

There remains the question whether if the English law applies to cases of this kind, there must be proof of negligence. What counsel conceded in *Elphinstone v,. Boustead (supra)* was not that the English law applied, but that the principle laid down in *Fletcher v Rylands (supra)* was applicable. Does the decision in *Fletcher v. Rylands (supra)* apply to fire brought to one's land for a necessary purpose ? It is significant that in the judgments of the English Courts through which that case passed, no reference is made to fire which is obviously an element of a most dangerous character. The Lord Chancellor (Lord Cairns), in the course of his judgment in that case, said :—

> " On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and

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> in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in their mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their own peril."

Thus limiting the application of the doctrine to " non-natural user " of dangerous substances, and in *Nicholls v. Marsland* [1] Bramwell B., who was one of the Judges who decided *Fletcher v. Rylands* [2] when it was before the Court of Exchequer Chamber distinguished that case from the latter, and said :—

> " But this case and the case I put of the chimneys are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community."

The application of the *Fletcher v. Rylands'* principle therefore depends on the object or purpose for which a dangerous thing is kept on one's land. Referring to *Fletcher v. Rylands (supra)*, Smith in his *Law of Negligence, 2nd ed., p. 40*, remarks :—

> " The question what is a dangerous thing must be one for the jury. Whether a thing is sufficiently dangerous to be kept at a man's peril must depend on the locality, the quantity, and the surrounding circumstances, and I am not aware of any case which has decided that setting fire to weeds or agricultural produce comes within this rule."

Counsel who argued this case, although he cited a large number of cases, was unable to produce a single case in which fire brought for agricultural or domestic purposes was treated as falling within the meaning of the term " dangerous substance " as defined in *Fletcher v. Rylands (supra)*.

On the other hand, in the case of *Black v. Christchurch Finance Co. (supra)* which was decided by the Privy Council, Their Lordships said :—" The lighting of a fire on open bush land where it may readily spread to adjoining property and cause serious damage is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent his fire extending to his neighbour's property (*sic utere tuo ut alienum non lædas*)." This passage was adopted by Lord Dunedin when delivering the judgment of the Privy Council in the local case of *Korossa Rubber Co. v. Silva (supra)*.

And Beven in his *Law of Negligence, p. 494*, shows that in countries like Canada, where burning off jungle land for agricultural purposes is not an uncommon operation, the person who sets fire is not liable if the jungle is burnt " at a proper place, time, and

[1] *(1870) L. R. 3 P. C. 478.*

[2] *(1875) L. R. 10 Ex. 255.*

season, and managed with due care." In *Rickards v. Lothian*[1] where the ingredient was water as in *Fletcher v. Rylands* (*supra*) and damage was caused to property on a lower storey by an overflow of water from the top floor, it was held by the Privy Council distinguishing *Fletcher v. Rylands* (*supra*) that as the water was on the premises for the ordinary and proper uses of the house, that although the occupier of the top floor was bound to exercise all reasonable care, he was not responsible for damage not due to his own default. These authorities seem to me to clearly indicate that the *Fletcher v. Rylands* (*supra*) rule has no application to any substance, which, if it escapes, is likely to become dangerous, when the substance is being put to its " natural use," or to a " reasonable use in a way beneficial to the community," or for " agricultural or domestic purposes at a proper place, time, and season, and with due care."

In the case before us, the defendant was, in burning the jungle, carrying on an agricultural operation common in this country, preparatory to planting up his land. To his case the *Fletcher v. Rylands* (*supra*) rule would not apply, and he would not be liable to anybody who has suffered by the escape of fire unless there has been negligence on his part. It was also contended that under the English law, apart from *Rylands v. Fletcher* (*supra*), any person who kindles a fire on his land is liable for all damage caused by such fire, irrespective of negligence, that is, that he does so at his risk, and that the English law applicable in Ceylon is the common law unaffected by statutory modifications.

It is said that under the common law an occupier was absolutely liable for damage done by fire independently of any negligence on his part, or that of any one else, whether accidentally or not. This law was altered by a Statute passed in the reign of Queen Anne, reproduced in 14 Geo. III., c. 78, s. 86, which abolished liability where " any fire shall accidentally begin." Persons here are not to get the benefit of this statutory amelioration, but are to be exposed in the full rigour of what is said to be the common law. If effect is to be given to learned counsel's contention, people in this country would be liable even for accidental fires. Fortunately, the common law is not as stated by counsel for the appellant, and the opinion of text-book writers of repute referred to by my Lord the Chief Justice is that liability for damage by fire is based on the negligent lighting or care of it. So that, even if the English common law is applicable to this case, there must be proof of negligence on the part of he defendant, and such negligence may be inferred from facts and circumstances in the absence of direct evidence.

As regards the plaintiff's contributory negligence, I cannot see how such a plea can be a defence in a case of this kind. The duty is cast on the defendant by law of taking all the necessary precautions to prevent fire spreading, and if the plaintiff's land is in a

[1] 34 L. J. Ex. 181.

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condition likely to catch fire easily, the defendant's duty becomes more onerous, but it does not throw on the plaintiff the duty of clearing and preparing his land to enable the defendant to burn his jungle, weeds, &c., successfully and without damage to others. Otherwise we would be casting on the plaintiff a duty which the law nowhere imposes on him.

On the facts I see no sufficient reason to disagree with the conclusion arrived at by the Chief Justice, and I agree to the order proposed by him.

Appeal allowed.