1950 *Present:* **Dias S.P.J. and Basnayake J.**

SELVADURAI, Appellant, *and* JAMIS APPUHAMY, Respondent

S. C. 523—D. C. Batticaloa, 606/Misc.

Delict—Damage by fire—Culpa—*Contributory negligence.*

A fire which was lighted on defendant's land spread to the plaintiff's adjoining land and caused damage to a number of coconut trees thereon. There was evidence to show that defendant knew that the south-west monsoon was on but took no precautions on that account. Although his land was 8 acres in extent he lit the fire about 20 fathoms from the plaintiff's land. He failed to inform the plaintiff or his servants. He had no watchers to watch the fire and prevent it from spreading to the plaintiff's land.

Held, that there was evidence of *culpa* and defendant was liable in damages. It was not contributory negligence on the part of the plaintiff not to have foreseen the danger and taken preventive measures to protect his property.

APPEAL from a judgment of the District Court, Batticaloa.

F. A. Hayley, K.C., with *S. Shanmuganayagam*, for the plaintiff appellant.

C. Renganathan, for the defendant respondent.

Cur. adv. vult.

April 5, 1950. BASNAYAKE J.—

The defendant is the owner of a land of about 8 acres which was in jungle and which at the material date he was preparing to bring under cultivation. On certain days in July and August, 1948, he cleared the jungle and set fire to it. On August 23, 1948, he heaped up at a place about 15 or 20 fathoms from the plaintiff's land all the material that had survived the previous fires and set fire to the heap. The fire spread to the plaintiff's land which adjoins and caused damage to a number of coconut trees thereon.

In this action the plaintiff seeks to recover the value of the damage sustained by him which he assesses at Rs. 1,000. The defendant admits that he caused a fire on his land and that it was that fire that spread to

the plaintiff's land and caused the damage alleged by the plaintiff. But he denies that he was negligent and alleges that the fire spread to the plaintiff's land owing to his contributory negligence.

The learned District Judge holds that the fire in the defendant's land spread to the plaintiff's land but that the fire spread not as a result of the defendant's negligence but in consequence of the plaintiff's contributory negligence. The plaintiff is dissatisfied with that decision and appeals therefrom.

The defendant admits that he set fire to his jungle on about three previous occasions after informing the Divisional Revenue Officer. He also admits that he did not inform the plaintiff or his servants on any of the occasions on which he caused the fires. He expected the headman to do so. The headman says that he informed the plaintiff's kangany between the 7th and 13th July, 1948, that the defendant's jungle would be set on fire but that he did not inform him of the fire on August 23, 1948.

The defendant states in his evidence: "I know that at the time the south-west monsoon was blowing. I know that during that time there would be wind. But when I set the major fire there was no wind. When I set fire to the heaps the wind veered round and carried the sparks. I know that in estates husks are put in drains."

The question that arises for decision is whether on the evidence the defendant is liable in damages. The law applicable to the case is the Roman-Dutch Law the source of which is the Lex Aquilia of the Roman Law. Grueber's translation of the relevant text reads [1]:

"By the action also which arises under the third chapter, *dolus* and *culpa* are provided against. Therefore, if a person has set fire to his stubble or brushwood and the fire has spread and has, in advancing, damaged the crop or vineyard of another, we have to inquire whether this has happened in consequence of his want of experience or of his negligence. For if he has lit the fire on a windy day, he is guilty of *culpa* (for a person also who brings about a state of things from which damage arises is considered to have done the damage), and the same fault lies with him who has not taken precautions to prevent the fire spreading. But if he has done everything which he ought to have done, and a sudden gust of wind has carried the flames on to the neighbour's land, he is free from *culpa* . . . . It must therefore be inquired, whether in cases where apparently damage is caused to another's property, it is to be attributed to the *culpa* of a certain person. Accordingly Paulus in the above passage says, in the case when a person has set on fire the stubble on his own ground and the fire has spread to the neighbour's crop or vineyard, it is to be asked whether this damage is due to his want of experience (for '*imperitia culpae adnumeratur*', see 7, Sec. 8 and 8, Sec. 1 above) or his negligence. This is obviously the case if a person has made the fire on a windy day, for he either knew or must have known that the fire would spread (8. Sec. 1 above); but it is also the case if he has lighted the fire on another day, and afterwards has not prevented

[1] *Grueber's The Lex Aquilia, p. 126–127.*

it from spreading (27 Sec. 9 above) . . . . . If, therefore, the man who has set fire to his stubble has done everything to prevent the fire from spreading, and nevertheless, by a sudden gust of wind, the flames have been carried to the neighbour's crop or vineyard, he will not be liable, for he has done all in his power to deprive the act of kindling the fire of its dangerous character, therefore '*caret culpa*'. This decision suggests the question whether a person, in order to escape liability under the Aquilian statute, is bound to be as careful and diligent as possible. It is clear from the following fr. 31, that only such *diligentia* is required as is peculiar to a *bonus pater familias*. Accordingly, if in the above case the person who has lit the fire has done what a *diligens pater familias* would do under the circumstances of the case, in order to prevent the fire from spreading, he will not be liable, although an extremely cautious or careful man might have avoided the damage."

In the case of *Van Tonder v. Alexander* [1], Kotze J.P. discussing the question of damage by fire after referring to the Digest and Voet says at pages 187-188:

"As in the present instance the fire was lighted on a windy day, and there is no evidence that the defendant had a competent staff at hand to check the fire if occasion arose, there can be no doubt that, had the wind continued in the same direction as it blew at first, the defendant would have been liable. The only difficulty arises from the fact that the damage to the plaintiff was caused by the wind suddenly veering. But should the simple fact of the wind having changed relieve the defendant of liability? I think not. The defendant lit a fire in a wind, and not having provided a sufficient staff of men or other adequate means of controlling it, he was in the same position on the wind changing as he would have been if the wind had freshened in a high degree in the same direction, in which case he would certainly have been liable."

Voet's opinion is that (Bk. IX. Tit. II, sec. 19—Sampson's Translation, p. 324) "he who sets alight to his stubble or thorns, for the purpose of burning them down, if the fire spreading damages or destroys a wood, vineyard, or crop belonging to some one else, and some 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" is liable in damages.

In the instant case the defendant's evidence indicates that he knew that the south-west monsoon was on but took no precautions on that account. Although his land was 8 acres in extent he lit the fire about 20 fathoms from the plaintiff's land. He failed to inform the plaintiff or his servants. He had no watchers to watch the fire and prevent it from spreading to the plaintiff's land. All these omissions go to prove that he did not take the care which the law required him to take. He is therefore liable. As observed by Kotze J.P. in the case of *Van Tonder v. Alexander* (*supra*): "It is not necessary in a case of this kind to consider the degree of negligence very minutely, for *in lege Aquilia et levissima cupla venit*, as Ulpian says in the Digest (9, 44 pr.)."

[1] *(1906) E. D. C. 186.*

The cases of *Korossa Rubber Co. v. Silva*[1] and *Samed v. Segutamby*[2], which were cited at Bar, support the view I have taken.

On the plea of contributory negligence raised by the defendant, I wish to observe that it has not been shown that the plaintiff was under any legal duty to take precautions against the spread of fire from the defendant's land to his. In the circumstances there can be no question of contributory negligence on the part of the plaintiff.

The appeal is allowed with costs here and below. The plaintiff's damage will be computed at the rate agreed on by the parties in the course of the trial.

DIAS S.P.J.—I agree.

The case of *Samed v. Segutamby* [3] which is the decision of a Divisional Bench shows that the doctrine of " absolute liability ", or, as it is now called, the rule of " strict liability " laid down by the case of *Rylands v. Fletcher* [4] either in England or Ceylon does not apply to the spread of fire caused by *agricultural operations*. In such cases the law applicable in Ceylon is the Roman Dutch Law, i.e., *culpa* must be proved. It is not contributory negligence on the part of the plaintiff not to have foreseen the danger and taken preventive measures to protect his property.

Appeal allowed.