191 *Present:* Schneider A.J.

## JINASENA *v.* ENGELTINA *et al.*

*50—C. R. Colombo 63,937*

*Coconut tree overhanging neighbour's land—Top blown down by high wind—Action for damages—No proof of negligence.*

A coconut tree with a thin stem standing on defendant's premises overhung plaintiff's workshop. The top of the tree was blown down during a high wind and caused damages to plaintiff.

*Held*, that in the absence of proof of negligence the defendants were not liable in damages.

SCHNEIDER A.J.—The mere fact that a coconut tree overhangs a neighbour's land, and the mere fact that it had a thin stem, do not render the tree a "dangerous element." Unless there was some thing extraordinary in the manner of the tree in question overhanging the plaintiff's land, or in the state of its trunk, the plaintiff should have averred and proved negligence. In the absence of evidence that the tree was old and rotten, the damage must be attributed to the action of the wind."

THE facts are set out in the judgment of the Commissioner of Requests (T. B. Russell, Esq.):—

It is admitted that defendants' tree fell on plaintiff's workshop and did the damage alleged in the plaint. Defendants in their answer allege that the fall was due to inevitable accident—an act of God—in the shape of unusually strong blowing. While framing the issues defendants' counsel argued that the plaint did not disclose a cause of action, as only *damnum* was alleged and not *injuria*. This was equivalent to saying that the plaint should in this particular instance have alleged negligence on defendants' part. I held against this plea, and decided that the burden was on defendants to prove an act of God. It is clear law that where a person brings on to his land anything that is liable to escape on to his neighbour's land and do damage he is liable without proof of negligence. *Fletcher v. Rylands.*[1] The rule in this case has been held to apply to solid bodies as well as to fluids, and even where the "escape" is due to a latent defect (*Clerk and Lindsell, p. 439*). In the present case I am satisfied on the evidence that the tree was overhanging the plaintiff's workshop, and that it had a thin stem. These are patent defects, not merely latent ones. Defendants have quite failed to satisfy me that there was any extraordinary blowing at the time of the accident, *i.e.*, that there was anything more than the usual wind which may be expected in the month of May. They have therefore, failed to prove an act of God. Plaintiff avers that he gave defendants notice to cut down the tree. I do not consider that he has proved this satisfactorily, but under the circumstances I do not think that notice was necessary. Plaintiff will have judgment as prayed for, with costs.

The defendants appealed.

[1] *3 H. L. 330.*

*L. M. D. de Silva*, for appellants.—The plaintiff's cause of action, if any, should be based on negligence. The burden of proof of negligence is on the plaintiff (see *19 N. L. R. 129*). The evidence in this case does not establish negligence. *Fletcher v. Rylands* [1] does not apply to this case, as a coconut is not a dangerous element. *Damnum absque injuria* is not actionable. *4 Maasdorp, p. 2; Pollock on Torts, p. 150.*

*Bartholomeusz* (with him *Oorloff*), for plaintiff, respondent.—The burden of proof was rightly cast on the defendant, as the fact of injury was admitted. Besides, negligence has been proved by the plaintiff.

June 6, 1919. SCHNEIDER A.J.—

In this case the plaintiff sued the defendants to recover Rs. 200 as damages sustained by him by the falling of a coconut tree which stood on defendants' premises. In his plaint he made no allegation of negligence on the part of the defendants. In their answer the defendants pleaded that the top of the tree was blown down during a high wind, and that the damage was the result of an act of God or *vis-major*. The important issue tried was " Was the damage due to an act of God? " The learned Commissioner gave judgment in favour of the plaintiff. He thought this case came within one of the rulings in the well-known case of *Fletcher v. Rylands*,[1] that no negligence need be proved where damage is caused to one man by the escape of something dangerous which another man had brought into or kept on his own premises. He regarded the fact that the tree in question in this case overhung the plaintiff's workshop and had a thin stem as obviating the necessity of the plaintiff's proving negligence. I do not think so. The planting of a coconut tree on one's own land is a lawful act, and is the making of lawful use of the land. The mere fact that when that plant has become a tree a part of its overhangs the neighbouring land. And the mere fact that it had a think stem, do not render the tree a dangerous element, or even a danger to the neighbouring land. Wherever we cast our eyes about in the Island we see coconut trees on one man's land overhanging his neighbour's land. It is nothing extraordinary to find the stems of some of these overhanging trees thin. It is a matter of common knowledge that the stem of a coconut tree is very strong.

Thus, unless there was something extraordinary in the manner of the tree in question overhanging the plaintiff's land or in the state of its trunk, the plaintiff should have averred and proved negligence before he could obtain damages against the defendants. But he has proved neither of these things. He did state that he thought the tree was dangerous, and had sent messages to the

[1] *3 H. L. 330.*

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defendants to remove it, but this statement is disbelieved by the learned Commissioner, and rightly so. In the absence of evidence that the tree was old and rotten, the damage must be attributed to the action of the wind. The defendants cannot be held liable, unless it proved that they were aware that " the usual wind which may be expected in May " (as the Commissioner puts it) would break the trunk.

I, therefore, set aside the decree, and dismiss the plaintiff's action, with costs, to be fixed by the Commissioner. The defendants will have their costs of this appeal.

*Set aside.*