Appellate Jurisdiction. (*a*)

Regular Appeal No. 30 *of* 1869.

THE MADRAS RAILWAY Company carrying on business amongst other places at Royapooram within the local limits of Madras. } *Appellants.*

SRIMUN MAHAMUNDALESWARA KATARI SALVAH MAKARAJU VUNTHAY RAJAH MAHARAJA CUMARA VENKATAPERUMAL RAJA BAHADUR THARA MAHARAJULU GARU, ZEMINDAR OF KARVETINUGGER. } *Respondent.*

The plaint alleged that the Railway which was in plaintiff's possession had been seriously damaged by water escaping from the defendant's land in consequence of the bursting of a tank which was his property and at the time of the bursting was under his control, but the plaint did not contain any direct allegation of negligence on the defendant's part.

The Civil Judge dismissed the suit on the ground that the plaint disclosed no cause of action.

Held, reversing the decree of the Civil Court, that the case stated in the plaint called for an answer on the part of the defendant.

1870. *January* 18. *R. A. No.* 30 *of* 1869.

THIS was a Regular appeal from the Decree of E. F. Eliott, the Acting Civil Judge of Chittoor, in Original Suit No. 17 of 1868.

The plaint was as follows:—

The relief sought for.

The plaintiffs claim payment from the defendant of the sum of forty-five thousand Rupees, being damages sustained and incurred by them by reason of injuries done in the years one thousand eight hundred and sixty-five, and one thousand eight hundred and sixty-six to a line of Railway and the works connected therewith, the property of the plaintiffs, by the escape of water collected and kept by the defendant on his land, particulars whereof are hereinafter more particularly mentioned and set forth.

The subject of the claim.

The plaintiffs were in the year one thousand eight hundred and sixty-five and for some time previous thereto regularly working and carrying on for the purposes of public traffic a line of Railway extending from Madras on the eastern coast of the Indian Peninsula to Reddipully, in the taluq of Chitvail, in the District of Cuddapah, in the Presidency of Madras aforesaid.

(*a*) Present: Bittleston and Innes, JJ.

1870. January 18. R. A. No. 30 of 1869.

A portion of the said line of Railway to a length of thirty-one miles or thereabouts runs through the zemindary of Carvatenagarum, situate in the District of North Arcot, in the Presidency of Madras, entering upon the same at a point distant from Madras along such line of Railway forty-seven miles and seventy-two chains or thereabouts and again leaving the same at a point distant from Madras along such line of Railway seventy-eight miles and forty-two chains or thereabouts.

On the fifth day of December one thousand eight hundred and sixty-five a tank called or known as the Potoor tank situate on the west side of the plaintiffs' said line of Railway and in the aforesaid zemindary of Carvatenagarum, burst, and the water which escaped therefrom rushed with violence through the breach or breaches thereby made and against the embankment of the plaintffs' said line of Railway at a point distant from Madras aforesaid along the said line of Railway seventy miles and nine chains or thereabouts, and situate in the talook of Narayanavanum, in the District of North Arcot aforesaid and completely carried away a bridge, part of the plaintiffs' said line of Railway consisting of three fifteen feet arches together with a portion of the said embankment twenty yards in length or thereabouts, and the plaintiffs thereby sustained damages to the amount of eight thousand Rupees.

The said tank in the last foregoing paragraph hereof mentioned was, on the said fifth day of December one thousand eight hundred and sixty-five, the property of the defendant and owned by him. It was situated on his land and was subject to his management, control and care.

On the said fifth day of December, one thousand eight hundred and sixty-five another tank called or known as the Coyempetta tank, in the aforesaid zemindary of Carvatenagarum, burst, and the water which escaped therefrom flooded a large area of country to a considerable depth and coming in contact with the plaintiffs' said line of Railway at two points distant from Madras aforesaid along the said line of Railway seventy-nine miles and sixty-two chains, and seventy-nine miles and sixty-seven chains, respectively, and both situate in the talook of Chendragherry, in the District of

1870. *January* 18. *R. A. No.* 30 *of* 1869.

North Arcot aforesaid, carried away two bridges, part of such line of Railway, leaving breaches in the embankment of the said line of Railway forty-six yards and forty yards in length respectively. The said water so escaping as aforesaid by coming in contact with several culverts, part of the plaintiffs' works, connected with their said line of Railway and all situated in the same locality more or less injured the same, and the plaintiffs have thereby sustained damages to the amount of six thousand Rupees.

The said tank in the last foregoing paragraph hereof mentioned was, on the said fifth day of December, one thousand eight hundred and sixty-five, the property of the defendant and owned by him. It was situate on his land and was subject to his management, control, and care.

On the tenth day of October, one thousand eight hundred and sixty-six, the aforesaid tank called or known as the Coyempettah tank again burst, and the water which escaped therefrom rushed with such violence through a bridge, part of the plaintiffs' said line of Railway, and situated at a point distant from Madras aforesaid along such line of Railway seventy-eight miles and sixty-four chains or thereabouts and situate in the aforesaid talook of Chendragherry, that the revetment of the abutment of the said bridge was considerably injured thereby and the plaintiffs have thereby sustained damages to the amount of one thousand Rupees.

The said tank in the last foregoing paragraph hereof mentioned was, on the said tenth October, one thousand eight hundred and sixty-six, the property of the defendant and owned by him. It was situate on his land and was subject to his management, control, and care.

By reason of the several breaches so made in and the injuries so done to the plaintiffs' said line of Railway as mentioned in paragraphs 3, 5 and 7 hereof, public traffic over the same was more or less impeded, and the plaintiffs have thereby sustained damages to the extent of thirty thousand Rupees.

The plaintiffs through their attornies by a letter, dated eighth June, one thousand eight hundred and sixty-eight, demanded payment from the defendant of the said sum of forty-five thousand Rupees for the said injuries so done as

1870. *January* 18. *R. A. No.* 30 *of* 1869.

hereinbefore mentioned, but the defendant has neglected to reply to the said letter, and has not complied either wholly or in part with the plaintiffs' said demand.

The following judgment was delivered by the Civil Judge :—

The case came up for settlement of issues this day.

The defendant put in no written statement in answer, but his counsel raised a preliminary objection that there was no cause of action against the defendant in this suit, as no charge of negligence or default or otherwise had been preferred against him, and, until such was alleged, it could not be put in in evidence. He argued that in the plaint itself nothing more was stated than that the tanks were owned and controlled by defendant—vide paras. 4, 6 and 8, and that admitting the existence of legal damage as complained of, there is no charge of any wrongful act on the part of defendant, and until such a charge be preferred, there is no tort, for to create a tort, there must be 1st, existence of legal damage, 2nd, charge of a wrongful act. In this case there was the first element but not the 2nd, and that nothing is said that the breaches in the tanks complained of were by the wrongful acts of defendant, whereas in truth they were the acts of God or "vis major." He quoted *Addison on Torts*, pages 3 and 147, &c. in support of his view.

The plaintiffs' counsel in answer quoted *Fletcher* v. *Ryland*, Vol. 1, *Law Rep. Exchequer*, 265, and laid down the general proposition by Mr. Justice Blackburn therein, to the effect that a man is responsible for what he keeps on his land that is dangerous. He contended further that it is not necessary to mention a tort, and that whether the breaches complained of were by the wrongful acts of defendant or "vis major," could only be determined upon an issue to be recorded thereon and the evidence adduced in support thereof. He further declined on his own responsibility and in the absence of any instruction from his clients to prefer a charge of wrongful act against defendant even now when asked by the Court if he was prepared to do so.

The Court being of opinion that the preliminary objection raised by defendant's counsel holds good in point of law in the absence of a charge of a wrongful act against

1869. *January* 18. *R. A. No.* 30 *of* 1869.

defendant by plaintiffs which is even now when asked declined to be preferred by their counsel, the plaintiffs' counsel was given the option of electing between a withdrawal of the suit under Section 97 of Act VIII of 1859, or a dismissal of the same by the Court upon this preliminary objection and he chose the latter course.

The plaintiffs are accordingly non-suited with costs.

The plaintiffs appealed to the High Court against the decree of the Civil Court for the following reason, namely :—

For that the said decree is contrary to law,—

In that the plaint filed in above the suit did disclose a good and sufficient cause of action.

The Advocate General and *Mayne*, for the appellants, the plaintiffs.

Miller and *Srinivasa Chariyar*, for the respondent, the defendant.

The Court delivered the following judgments :—

BITTLESTON, J.—This suit was dismissed by the Civil Judge on the ground that the plaint discloses no cause of action. The plaint alleges that the Railway which is in plaintiff's possession and worked by them has been seriously damaged by water escaping from the defendant's land in consequence of the bursting of a tank which is his property and was at the time of its bursting under his management, control, and care ; but it does not contain any direct allegation of negligence on the part of the defendant.

On behalf of the plaintiffs it was argued before us that no allegation of negligence is necessary under such circumstances, and that the defendant having by means of the tank collected upon his land a large body of water which if it escaped was likely to cause damage to his neighbour's property, was bound at his peril to prevent its escape and was *primâ facie* responsible for any damage which resulted and which was an ordinary and natural consequence of such escape. In support of this proposition the recent case of *Fletcher* v. *Rylands* (*a*) was cited, and the judgments of the Exchequer Chamber and of the House of Lords in that case (*b*) are sufficient to show that that is the rule of English Law. But we have to apply not the rule of

(*a*) 1, Law Rep. Exch., 265.
(*b*) 3, Law Rep. House of Lords.

1870. *January* 18. *R. A. No.* 30. *of* 1869.

English Law but the rule of equity and good conscience; and I felt some doubt whether in this country, where the public benefit of storing water in tanks is generally so great, the doctrine laid down in *Fletcher* v. *Rylands* ought to be adopted, or whether it would not be more in accordance with equity and good conscience to hold the landowner to the more limited obligation only of using reasonable and proper care to prevent the escape of water from his tank. I have, however, come to the conclusion that the rule established in *Fletcher* v. *Rylands* may be safely and properly applied in this country to this extent at least, that such a case as is stated in this plaint calls for an answer on the part of the defendant. *Primâ facie* the land-owner is bound to keep his tank secure, and if it bursts and the water escapes and overwhelms his neighbour, he is liable to make compensation for the injury sustained; but the defendant may be able to show that he is excused from liability by special circumstances, and it is not necessary for us now to say what circumstances would furnish a sufficient excuse. In *Fletcher* v. *Rylands* it was thrown out by the Court that perhaps there would be a defence to the action if it could be shown that the damage was the consequence of *vis major* or of the act of God, and I would add that perhaps in this country it may be considered also a sufficient defence if it be shown that the district in question is one where the storing of water in large quantities in tanks is sanctioned by usage and is absolutely necessary for any beneficial enjoyment of the land itself, and that the defendant has used all reasonable and proper care for the purpose of preventing any mischievous escape of water; but this is special matter, which if it constitutes a defence, should be alleged by the defendant.

The degree of necessity for tanks or of benefit from the water of them even in India varies much in different districts; no general rule therefore can be laid down upon the ground of that necessity or benefit, especially no general rule which would conflict with the application of the maxim *sic utere tuo ut alienum non lædas* as that maxim is understood and applied by the law of England.

This view of the case renders it necessary to reverse the decree of the Civil Judge who must proceed to settle issues and hear and dispose of the case in the ordinary course.

1870. *January* 18. *R. A. No.* 30 *of* 1869.

But we think that the appellant's costs of this appeal should be costs in the cause and abide the event of the suit.

INNES, J.—I concur in thinking that there is a good cause of action set out in this case. I do not think that we need look beyond the doctrine of English law in this matter for the rule of equity and good conscience by which we are bound to determine it.

The question is whether there must be negligence in the defendent's acts in a case of this nature to give a cause of action against him for their consequences to the plaintiffs.

The general principle of English law is that if a man causes injury to another, however unwillingly, and damage follows, he is answerable if he could have avoided the act from which the injury has flowed. But were the act from which the circumstances complained of have arisen is in itself lawful and of a nature not likely to be attended with ill-consequences to others, or, being dangerous, yet has Legislative sanction for the doing of it in a careful manner, no *injury* is caused by damage arising from it unless the manner of doing the act is in the first case such as to jeopardize the rights of others, and in the second case such as was not contemplated by the Legislature.

This is what is meant by saying that in such cases there must be negligence to give a cause of action (*Smith* v. *Kenrick*, 18, *L. J. C. P.*, 172, *Jones* v. *Festiniog Railway*, 37, *L. J. Q. B.*, 214, in which *Vaughen* v. *The Taff Railway Company is* quoted.)

Where however the injury is traceable to an act which is forbidden by law or which though not forbidden by law is in its nature mischievous and liable to cause injury, negligence need not be alleged. The law requires a man to calculate the consequences of his acts; and if the natural consequences of an act are either necessarily mischievous or liable to become so, no allegation of negligence is necessary to set out a good cause of action for the injurious consequences, the circumstances being such as to show that the rights of others were jeopardized by the very nature of the act.

This is exemplified by the case of *May & Wife* v. *Burdetth*, 16, *L. J. Q. B.* 64, in which the keeping of the vicious monkey however carefully was indictable as a nuisance and

1870. *January* 18. *R. A. No.* 30. *of* 1869.

was therefore an act fordidden by law, and numerous other similar cases, and by the cases of *Tennant* v. *Goldwin*, (*a*) and *Rylands* v. *Fletcher* in which the decision depended upon the question whether the defendant's act *irrespective of negligence* involved the risk of injury to others.

In the present case the plaintiff traces the injury and damage for which he seeks compensation to the collection of large quantities of water in tanks which in the absence of any proof to the contrary (and we can at present not look beyond the plaint) was an act to which the defendant was not compelled and which therefore he might have avoided. The keeping large quantities of water in tanks necessarily involves the risk of the water escaping and invading the neighbouring lands and there doing damage and the rights of others are thus put in peril, and this is a case therefore in which negligence need not be alleged. In the course of the argument there was some discussion of the question of whether this case in differing from *Rylands* v. *Fletcher* in the circumstance of the tanks being probably ancient and the plaintiffs having come but lately on the ground was distinguishable from it in principle, and I think that, in respect to the question of whether a cause of action is set out, it is not

There are undoubtedly cases as was noticed by Blackburne, J. in delivering the judgment of the Court of Exchequer Chamber in *Rylands* v. *Fletcher* in which the circumstances are such as to show that there is an implied contract on the part of plaintiff to take upon himself the risk of the damage happening of which he complains, and there is then no injury as in the case put by Lord Holt in *Goldwin* v. *Tennant* in which a man newly makes a cellar under the old privy of another.

There are also cases in which the act causing damage or to which damage is traced is so necessary to the safety of the defendant's interests or the public interests that he is entitled to do it notwithstanding that damage to others arises from it, and in this case though there may be damage there is no injury.

This is exemplified in the case of *Rex* v. *Commissioners of Sewers* for *the level of Pagham* (8, *B. & C.*, 360 in which the application for a mandamus was refused on the ground

(*a*) Lord Raym. Reports, 1093.

1870. *January* 18. *R. A. No.* 30 *of* 1869.

that though the plaintiff had sustained damage the Commissioners had done no wrong, for they were only doing what was absolutely necessary to protect the interests which they were appointed to protect.

But into the question of whether the present case is one which falls within either of these classes we are not entitled to enter.

We are at present only on the question of whether a cause of action is alleged, not whether it can be sustained, and are not in a position to consider what are merely matters of defence. The decree of the Civil Judge must be reversed and the case remanded with directions to the Civil Judge to restore the suit to its original number in the Register and proceed with the investigation of it.

Appeal allowed.

Appellate Jurisdiction. (*a*)

Referred Case No. 57 *of* 1869.

MAADAN *against* ERLANDI.

The plaintiff sued to recover the amount of marriage fees which the defendant became liable to pay for the use of a temple upon the defendant's marriage with a woman residing in the village wherein the temple was situated by virtue of a long established custom.

Held, that, the existence of the alleged immemorial custom not having been established, the plaintiff was not entitled to maintain the suit.

Semble, that if the existence of the custom had been made out there would probably be an obligation to pay the fees claimed.

1870. *January* 19. *R. C. No.* 57 *of* 1869.

THIS was a case referred for the opinion of the High Court by C. Coonjan Menon, the district Munsif of Temalpuram, in Suit No. 547 of 1869.

The following was the case:—

This is a suit brought for the recovery of Rupees 2 with interest being the amount of marriage fees which, according to an alleged custom of long standing, defendant became liable to pay the temple of which plaintiff is the treasurer and manager, on his (defendant's) marrying a woman in December 1868 from the village wherein the temple is situated.

(*a*) Present: Scotland, C. J. and Collett, J.