TU'IPULOTU TONGA MATAELE v. MAILE NIU.

(Civil Action. Hunter J. Nuku'alofa, 3rd April, 1956).

Tort — Fire — Destruction of neighbour's building — Application of principles of English law — Rule in Rylands v. Fletcher — Does an action in tort lie in Tonga — Negligence.

The Plaintiff in her writ claimed £3,244/12/0 damages from the Defendant for the destruction of her building.

The Plaintiff owned a large building in the main street in Nuku'alofa. Next door to this building the Defendant erected a building which he used as a picture show. The picture show building complied with all government Regulations and the cinematograph machinery had been inspected and approved by the authorities. On the 26th October, 1950 a fire accidentally started in the picture show, spread to the Plaintiff's building and both buildings were completely destroyed.

HELD. The English principles should be applied and that in the absence of negligence on the part of the Defendant in starting the fire or in allowing it to spread on to his neighbour's property he was not liable for the damage.

Verdict for the Defendant.

Koloamatangi appeared for the Plaintiff.

Finau appeared for the Defendant.

C. A. V.

HUNTER J.: This is one of those unfortunate cases in which one of two innocent persons must suffer through no fault of his own.

The Plaintiff is suing the defendant for £3,244/12/0 damages for the destruction of her building. The Defendant was a picture show proprietor carrying on his business in a building next door to a building owned by the Plaintiff. In 1950 a fire started in the Defendant's building and spread to and completely destroyed the building of the Plaintiff together with its contents.

The Plaintiff submits that the rule in Rylands v. Fletcher applies, and that as the defendant brought a dangerous thing on to his property he is responsible for any damage caused should the dangerous thing escape. Presumably the dangerous thing that the defendant brought on to his land was the cinematograph projector and the films, but there is no evidence before me that a cinematograph projector or films are dangerous and in any case it was not the projector or the films which caused the damage. Counsel further submits that even if the case does not come within the rule in Rylands v. Fletcher the defendant is still liable under the English common law since it was his fire which caused the damage.

The Defendant's counsel says that no such action as this lies in Tonga; there has never been a similar action (and that is apparently correct) and that I have no right sitting as a judge in Tonga to apply the principles of Rylands v. Fletcher or the English law regarding fire.

It seems to me, as I have said before today, that the principles of English law must apply here. If one is precluded from looking beyond the 1928 edition of the laws and the subsequent legislation, the proper administration of justice in the Kingdom becomes unworkable.

The law of torts (and this is an action in tort) as a subject is not dealt with by the statutes and yet this is one of the most im-

portant branches of the law in any judical system. If citizens are denied the right to recover damages for civil wrongs, justice and law in the Kingdom would be brought into contempt. Although Tonga has no statute dealing specifically with torts or enumerating the civil wrongs which sound in damages it will be seen from a perusal of the statutes that such actions are contemplated : e.g. Section 16 of Chapter 4 refers to actions of debt or damages.

It has been said that at common law an occupier is absolutely liable for damage done by fire independantly of any negligence either on his part or that of anyone else. The authority for this is doubtful and as long ago 1697 Holt C. J. recognised that the liability for fire is based on the negligent lighting or care of it. In the early part of the 18th century an act was passed (6 Anne c. 31) in England which provided that no action could be maintained against any person in whose house a fire begins accidentally. This act was repealed and re-enacted by the Fires Prevention (Metropolis) Act 1774 and it is suggested by Salmond that the statute is merely a declaration of the Common law, for this seems to have been the rule of common law before the act of Anne. The result of this is that from about 1798, and probably before, the English rule was that a person is not liable for a fire which spreads from his building unless it came into being through his negligence or escaped from his building through his negligence. Even if this rule has only a statutory basis I think I should apply it here as the statute in which it is founded was passed long before 1875 when the Tongan constitution came into being.

As a result of this, in order to succeed in the present case the Plaintiff must prove that the Defendant was negligent either in causing the fire or negligent in preventing it from spreading to the plaintiff's property.

In my view the Plaintiff has failed to discharge this onus. May be Res Ipsa Loquitor applies and the very presence of the fire is prima facie evidence of negligence. I am not sure of this but assuming that it is so I think that the Defendant has answered it.

He gave evidence that his building had been inspected and approved, and indeed had been inspected shortly before the fire. His explanation of the fire was that the film split and jammed in the projector and that the heat from the light set it on fire. He said that the film was apparently in good order and had been used on the four previous nights without any trouble. In view of this evidence I am not satisfied that he was negligent in the management of the machine and I am satisfied that once the fire had started he did all that a reasonable man could be expected to do to control it in view of the existing circumstances.

I therefore find a verdict for the Defendant.

Finau asks for costs.

Koloamatangi : Objects.

Finau : I withdraw my application I will not charge my client.

Verdict for Defendant. No order as to costs.