[PRIVY COUNCIL.] 1919.

Present: Viscount Haldane, Lord Buckmaster, and Lord Dunedin.

KOROSSA RUBBER COMPANY *v.* SILVA *et al.*

Damage by fire—Action for damages—Proof of negligence—Evidence Ordinance, ss. 32 and 33—Hearsay evidence—Statement by person who cannot be found—Report of Korala who was dead—Method of assessing damages.

A destructive fire spread from defendants' land to plaintiffs' estate and destroyed a number of rubber trees. In an action for damages plaintiffs sought to prove that the fire was caused by the act of the defendants' kangany P, who admitted to the Arachchi and to the Korala that he set fire to a heap of rubbish or jungle near his hut on defendants' land. The Korala made a report, in which was recorded the admission. The report was written nearly one month after P made the statement. P disappeared before trial; the process server made a return to the effect that a subpœna could not be served on P. The Korala was dead before the trial.

Held, (1) that the evidence of the Arachchi that P had admitted that he had set fire to the jungle was admissible.

(2) That the report of the Korala was admissible in evidence.

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.

The method of assessing damages indicated.

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THE facts are set out in the judgment of the Supreme Court (*20 N. L. R. 65*).

May 16, 1919. Delivered by LORD DUNEDIN:—

This is an action for damages at the instance of the plaintiff rubber company against coterminous proprietors, from whose property a forest fire invaded the plaintiffs' property and injured the rubber trees. The learned District Judge found that negligence had been proved against the defendants, and gave judgment for a certain sum of damages. The Appeal Court affirmed on the merits, but reduced the amount of damages by Rs. 5,000. From this judgment appeal and cross-appeal had been taken by the defendants and plaintiffs, respectively.

As regards the merits, it was not matter of controversy that the fire originated on the property of the defendants and spread to the property of the plaintiffs. It was alleged, and held to be proved by both Courts, that the origin of the fire was the setting on fire of a heap of rubbish by one Pulle, a servant of the defendants. In their argument the defendants made two points. First, they said that the fact of Pulle's having set fire to a heap of rubbish was only proved by evidence which ought not to have been admitted. Secondly, they said that the setting on fire of the rubbish heap did not infer negligence, and that, without negligence on the part of the defendants' servant, they could not be held liable. Pulle, who was a watcher in the defendants' employment, and lived in a hut not far removed from the boundary of the two properties, disappeared two days after the fire, and could not be found at the time of the trial of the action. It was supposed that he had gone back to India. In these circumstances, the plaintiffs tendered as a witness the Arachchi or headman of the village, who sent for Pulle and questioned him, and to whom Pulle admitted that he had set fire to a rubbish heap. They also tendered in evidence a report made by the Korala, the superior officer of the Arachchi, in which he stated that Pulle had made the same admission. The Korala had died before the trial. The admissibility of this evidence depends on the provisions of the Evidence Act of 1895. Section 32 of the Act is as follows:—

> Section 32.—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—
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> (1) . . . . . .
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> (2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty . . . . . .

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if tried, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

Their Lordships agree with the opinions of all the learned Judges, who have held that the evidence of the Arachchi fell within sub-section (3) and the report of the Korala under sub-section (2). It was, their Lordships consider, admissible for the learned Judge to consider the whole proved facts of the case, and not merely the statement itself, as was urged by the learned counsel for the appellants, in order to say whether the circumstances disclosed that an action of damages would have lain against Pulle. As regards the report of the Korala, they agree that it was made in the ordinary course of official business, and that being so, the statement therein contained that Pulle had admitted setting fire to the rubbish was undoubtedly " a relevant fact."

There being, therefore, no good objection to the admission of the evidence, their Lordships have before them the concurrent findings of both Courts that there was negligence on the part of the defendants' servant in orginating the fire and taking no precautions against its spreading. It is unnecessary to quote the evidence as to the condition of the wood where the fire was started and the proximity of peculiarly inflammable material. It is a purely jury question, on which the two tribunals have been unanimous. Such a finding their Lordships would not readily disturb. The learned counsel for the appellants laid stress on the fact that the mere firing of rubbish did not *per se* infer negligence. But what constitutes negligence is a question of circumstances, and circumstances include surroundings. In the case of *Black v. The Christchurch Finance Company*,[1] Lord Shand, delivering a judgment of this Board, 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 the fire extending to his neighbour's property (*sic utere tuo ut alienum non lædas*)."

The same criterion, *mutatis mutandis*, has been applied in the circumstances and the surroundings here, and the verdict has been adverse to the defendants.

On the merits, therefore, their Lordships agree with the very careful and able judgments of both Courts as to negligence. But they think it quite unnecessary to discuss the law of such cases as *Fletcher v. Rylands*,[2] or to consider what would have been the result if no negligence had been proved.

There remains the question raised by the cross-appeal. The Trial Judge calculated the damages by valuing the nett profit

[1] *(1894) A. C. 48.*

[2] *3 H. L. 330.*

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derived from each tree which he put, in the case of a totally destroyed tree, at Rs. 4 per annum. This he capitalized at five years' purchase, and then multiplied the sum by the number of trees. After a certain addition in respect of partially-damaged trees, he added Rs. 5,000 for the cost of re-planting and for the increased cost in the working of the part of the estate which was left. On appeal this sum was disallowed, the Appeal Court holding that, as the spoiled trees had been replaced at full value in money, no other sum fell to be added. Their Lordships think that the learned Appeal Judges have scarcely adverted to the fact that the Trial Judge capitalized the nett profit and not the gross. Admittedly there were constant charges, equivalent to what is known as oncost in manufactures, which would not be diminished by the fact that only half the trees were left in cultivation. In allowing for the damaged trees on the basis of nett profit, there is no allowance for the contribution which, so to speak, those trees would make to the oncost charge. There is, therefore, no allowance twice for the same thing in the method adopted by the learned Trial Judge, and his figure of Rs. 5,000 must be restored.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, to allow the cross-appeal, and restore the judgment of the Trial Judge. The respondents in the appeal and the appellants in the cross-appeal to have their costs before this Board.

Appeal dismissed.