Present: Wood Renton C.J. and De Sampayo J.

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

227—D. C. Kegalla, 4,372.

Damages by fire—Action for damages—Proof of Negligence—English law—Roman-Dutch law—Evidence Ordinance, ss. 32 and 33—Hearsay evidence—Statement by person who cannot be found—Report of Korala who was dead—"Double hearsay"—Affidavit of process server—Is it evidence to prove that witness cannot be found ?

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 N, 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 N made the statement. N disappeared before trial; the process server made a return to the effect that the subpoena could not be served on N. The Korala was dead before the trial.

Held, that the affidavit of the process server was legally admissible evidence *quantum valeat* to prove that N could not have been found; (2) that the evidence of the Arachchi that N had admitted that he had set fire to the jungle was admissible; (3) that the report of the Korala was admissible in evidence.

(*a*) The Korala's report must be taken to have been given "in the ordinary course of business," if not "in the discharge of professional duty."

(*b*) The Korala's delay in writing his report does not affect its admissibility. Section 32 (1) of the Evidence Ordinance does not require the entry or memorandum to which it refers to be practically contemporaneous with the statement recorded.

(*c*) The objection that the Korala's report introduces "double hearsay" is one that goes to the weight of the evidence, not to its admissibility.

A person who introduces a dangerous element, such as fire, on his land is responsible for whatever damage he may cause to others by its spreading, whether he has taken all the obvious precautions or not.

The Roman-Dutch law, pure and simple, does not exist in this country in its entirety. It has been modified in many directions, both expressly and by necessary implication by our statute law, and also by judicial decisions.

A villager to whom a chena was entrusted for the purpose of cutting down the jungle and clearing the land for coconut cultivation, on the condition that he should have a share of the minor products which might be raised on the land, was held not to have been an independent contractor.

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THE facts are set out in the judgment of the Chief Justice.

H. J. C. Pereira, for first defendant, appellant.

Bawa, K.C. (with him *Samarawickreme* and *Canakeratne*), for second defendant, appellant.

A. St. V. Jayawardene (with him *J. W. de Silva*), for plaintiffs, respondents.

Cur. adv. vult.

October 26, 1917. WOOD RENTON C.J.—

In this action the Korossa Rubber Co., Ltd., sue the defendants for the recovery of a sum of Rs. 30,000 as damages for the destruction of a number of rubber trees on their estate, Korossa, by a fire, which they allege to have spread from the adjoining estate of Marukwatura, belonging to the defendants. The plaintiffs pleaded that the defendants had felled, and by the deliberate and negligent act of themselves or their servants had set fire to, the jungle on a portion of their land adjoining Korossa estate, and that the fire had spread to and damaged Korossa estate. The defendants in their answer admitted the felling of the jungle, but said that they had left a strip of land six fathoms broad between the felled jungle and the plaintiffs' estate, and that, therefore, they had not failed to take any precautionary step which was, at that stage, usual or necessary. They further pleaded that, in any event, the plaintiffs had been guilty of contributory negligence in allowing dried leaves to accumulate upon their land. The case went to trial on the following issues: (*a*) Did the defendants themselves or by their servants set fire to the jungle on their land? (*b*) Did they do so negligently? (*c*) Did the fire in question originate on the defendants' land and spread therefrom to the plaintiffs' land? (*d*) If so, are the defendants liable in damages? (*e*) Have the defendants been guilty of contributory negligence as alleged in the answer? (*f*) What damages have been caused to the plaintiffs estate?

The learned District Judge gave judgment in favour of the plaintiffs for Rs. 23,880, with costs. The defendants appeal, and the plaintiffs have given notice of cross-objections to the judgment of the District Court on the grounds that the damages have, in certain respects, been under-estimated.

The incident in question happened on February 24, 1916. I see no reason to doubt the correctness of the findings of the District Judge as to the origin of the fire and as to the attendant circumstances. Korossa estate consists of two portions: lots 1, 2, 3, 4, 5, and 6 north of a railway reservation, and lot 7 and other allotments south of it. There is a drain between the two groups of lots. North and east of lots 1 to 7 is a chena belonging to the defendants. Still further east is an abandoned plantain garden, which also belongs to the defendants, and which has now reverted into jungle.

In this jungle stands a hut occupied by a man, Nicholas Pulle, who was, according to the defendants, a watcher, and according to the plaintiffs, a kangany, of the defendants. South of Nicholas Pulle's hut was a plantain plantation of the defendants in bearing. There had been a considerable felling of jungle in the defendants' chena some little time prior to February 24, 1916, and the felled material had been left lying on the ground immediately adjoining the plaintiffs' estate. On February 20, 1916, Mr. Sydney Smith, the visiting agent of Korossa estate, called the attention of Daniel, the defendants' conductor, to the condition of this felled jungle, and in particular to the facts that it was dry and inflammable, and that no protective belt of jungle, save a few trees, had been left between Korossa and his employers' chena, and asked him to give notice of any burning on the land. Daniel said that this would be done, and added that before firing he would leave a cleared belt of ground two chains in width between the northern boundary of the defendants' chena and Korossa estate. Daniel denied that he had had any conversation of this description with Mr. Smith, but the learned District Judge disbelieved him. His name was on the defendants' list of witnesses, but he was called by the plaintiffs. Ratnayake, the plaintiffs' conductor, acted as interpreter between Mr. Smith and him on the occasion in question, and stated that he had done so correctly. About 1 P.M. on February 24 Ratnayake and Juan Appuhamy, a kangany on Korossa estate, were in the former's house, when Daniel came up, informed them that the chena was on fire, and that the fire was extending to the rubber estate, and asked them to come to the rescue. "We rushed," says Juan Appuhamy, "towards the fire. The fire was near the boundary, distant about twenty or thirty fathoms from the conductor's bungalow. We saw the fire burning on the chena of defendants' estate adjoining Korossa estate. The fire was then four fathoms from our boundary. The clearing on defendants' chena was ablaze. As we ran to the fire we passed our factory, and collected three men there. There is an ela near this boundary. Our men and ourselves tried to extinguish the fire by throwing water, but we failed. Defendants' chena was cleared right up to our boundary, without any uncleared reservation. The fire extended to Korossa from the northern boundary." Daniel denied the episode of the visit to the conductor's bungalow. But here, again, the District Judge disbelieved him. The fire died out about 5 or 6 P.M. The question of the extent of the damage done by it to Korossa estate will be dealt with later. The same evening Juan Appuhamy went to Nicholas Pulle's hut. According to Daniel, the defendants' conductor, who was called as a witness by the plaintiffs, Nicholas Pulle was merely a "watcher." His duty was to protect plantations, and did not include the felling and setting fire to jungle on the chena. The District Judge, however, regarded Daniel as a witness both adverse to the plaintiffs and

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generally untruthful, and had before him other evidence, which he accepted, and which I see no reason to reject, as to Nicholas Pulle's position. Juan Appuhamy, in his original examination, said that "he had long been the defendants' kangany." At a later stage in the proceedings he gave the following evidence on the point: "Nicholas Pulle is a kangany. He is called a kangany. He has men to work. I did not say that he was a watcher. I have seen him going to working parties ..... The plantain plantation was not made by Nicholas. But he made the plantain plantation in the adjoining portion to his house."

Kiri Banda, the Arachchi of Walgam wasama, another witness called by the plaintiffs, whom the learned District Judge regarded as having had a bias in favour of the other side, also described Nicholas Pulle as "the defendants' kangany."

Nicholas Pulle pointed out to Juan Appuhamy a burnt spot near his hut and on the north-east of Korossa. The fire had spread from there in a northerly direction under and through the jungle adjoining Nicholas Pulle's hut to the defendants' chena, and thence, caught and driven by the north-east wind which prevails at that season, it passed with ease and rapidity over the narrow strip of land which lay between the defendants' clearing and Korossa estate. Up to this point no legal difficulty arose as to the evidence adduced by the plaintiffs in regard to the origin and course of the fire. But they proposed also to prove a statement made by Nicholas Pulle (i.) to Juan Appuhamy on the evening of February 24, (ii.) to Kiri Banda, Arachchi, the same evening, and again on February 26, and (iii.) to Menikrala, Korala of Walgam pattu, on February 26, to the effect that he was himself responsible for the burnt spot which he had pointed out to Juan Appuhamy. The Korala on March 23, 1916, embodied Nicholas Pulle's statement in a report (P 8) to the District Judge. He died before the trial. Both the plaintiffs and the defendants put Nicholas Pulle's name on their list of witnesses. The former took out a summons to secure his attendance. The latter did not do so. He was admittedly not forthcoming at the trial.

The defendants argued that even if Nicholas Pulle's statement could be put in evidence, it would not bind them as an admission, since there was nothing to show that, within the meaning of section 18 of the Evidence Ordinance, 1895,[1] he was a person "expressly or impliedly authorized by them" to make any such admission. The learned District Judge upheld this objection, and his finding on the point was not challenged in this Court. But the District Judge also held that Nicholas Pulle's statement to Juan Appuhamy and to the Arachchi could be proved under section 32 (3) of the Evidence Ordinance[1] as a statement made by a person "who cannot be found," which "would expose him or would have exposed him to a criminal prosecution or to a suit for damages," and that the report

[1] *No. 14 of 1895.*

of the deceased Korala was also admissible under section 32 (2) of the same enactment as having been made in " the ordinary course of business."

The evidence on behalf of the plaintiffs with regard to the absence of Nicholas Pulle consisted, in the first place, of the somewhat enigmatic return of the process server that he had made inquiries at Marukwatura estate, but that the witness was " not known to one," or to himself (the writing is not clear), and of the following passages in the *vivâ voce* evidence: " Since the fire," said Juan Appuhamy, " he has disappeared. He disappeared two months after the fire." " Nicholas Pulle," said the Arachchi, " left my master's employ about three months after the fire. I do not know where he now is. He went on leave and never returned."

In cross-examination the Arachchi gave the following evidence: " Nicholas left for his village, but did not return. I cannot say if he was an Indian Tamil. He cannot now be found."

The defendants' counsel urged that the return of the process server, which is embodied in an affidavit, was not evidence, and that even if it was legally admissible, its language was so vague as to render it of no probative value. They contended that when the Legislature had desired to admit evidence by affidavit, it had done so in express terms. In this connection reference was made to sections 179 and 180 of the Civil Procedure Code, under which the courts of first instance may order any particular facts to be proved by affidavit, subject to the right of either party to apply for the production of the deponent for cross-examination *vivâ voce*, and also to sections 85 and 298 of the same enactment, under which the affidavit of the process server is expressly recognized as legal evidence. The Fiscal and his process server are, each in his own station, officers of Court, and, as a matter both of practice and of legal right, the Courts of this Colony look at the Fiscal's return for the purpose of seeing whether process has been served or not. I am inclined to think that sections 85 and 298 of the Civil Procedure Code should be regarded, not as limitative enactments, but merely as indicative of a legal method of proof to which the Courts, in the matters with which those sections respectively deal, may have recourse. Section 85 provides for the passing of a decree *nisi* in favour of a plaintiff, where the defendant makes default of appearance, and the Court is satisfied " by the affidavit of the process server, or otherwise," that process has been duly served upon him. Section 298 enacts that " if the Fiscal return to the writ of execution " that he is unable to find any property of a judgment-debtor, movable or immovable, the Court may, in certain circumstances, authorize the judgment-debtor's arrest. If the object of these two sections had been to legalize as evidence the Fiscal's return with the affidavit of the process server, they would, it seems to me, have been expressed in different language. I think that the affidavit of the

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process server was by the law of this Colony admissible in evidence for what it is worth. In *Beaufort (Duke of) v. Crawshay*,[1] Willes J. expressed the opinion that an affidavit of a witness's ordinary medical attendant would be admissible evidence for the purpose of proving that witness's inability from sickness or infirmity to attend Court. The language of the statute,[2] under which that case was decided, is no doubt different from the language of section 32 (3) of the Evidence Ordinance,[3] inasmuch as it provides for the fact of the sickness or infirmity of the witness being made to "appear to the satisfaction of the Judge," while in section 32 (3) of our local Ordinance [3] there are no words to this effect. I do not think, however, that much can turn on the difference between the language of the two enactments. The Indian case of *Empress v. Rochia Mohato* [4] shows that the affidavit of a process server was regarded by the Court as admissible evidence *quantum valeat* for the purpose of letting in under the corresponding section in the Indian Evidence Ordinance the deposition of an absent witness. It is, of course, true, as a general rule, that where it is sought to put in evidence the statement of an absent witness under section 32 or section 33 of the Evidence Ordinance,[3] proof must be placed before the Court that all reasonable efforts have been made to secure his attendance.[5] But the evidence required for that purpose must, to a great extent, depend on the manner in which a case is shaping itself at the trial. It is perfectly clear from the record in this case that the impossibility of producing Nicholas Pulle as a witness was admitted by the defendants themselves. The fact that he could not be found was elicited by their own counsel from Daniel, his clients' conductor, in cross-examination, with the very object, as we were frankly informed at the Bar on the argument of this appeal, of showing that the defendants knew as little of his whereabouts as the plaintiffs, and were certainly not keeping him out of the way. Neither in the argument in the District Court nor in the petition of appeal is it anywhere suggested that sufficient proof of the absence of Nicholas Pulle had not been given. The learned District Judge says that the fact that he could not be called was "admitted," and, in my opinion, this statement was fully justified in the whole circumstances of the case. For these reasons I think that the statement made by Nicholas Pulle to Juan Appuhamy and to Kiri Banda Arachchi was admissible in evidence. I come now to Nicholas Pulle's statement to the Korala. Daniel deposed at the trial that the Korala was dead, and the defendants' counsel did not dispute the correctness of this assertion. They maintained, however, (*a*) that there is no affirmative proof in the record that the holding of inquiries as to the origin of fires and the reporting of results of such

[1] *(1866) L. R. 1 C. P. 699.*
[2] *1 Wm. IV., c. 22, s. 10.*
[3] *No. 14 of 1895.*
[4] *(1881) I. L. R. 7 Cal. 42.*
[5] *Queen v. Oorloff, (1900) 1 Bro. 328.*

inquiries to the Courts fall within the scope of "the ordinary course" of the business of a Korala; (*b*) that the statement of Nicholas Pulle was not one that would or could have exposed him to criminal or civil liability, and that, therefore, it was not admissible under section 32 (3) of the Evidence Ordinance[1]; (*c*) that that enactment did not sanction "double hearsay," viz., a written statement by a headman, now deceased, of something said to him by a person "who cannot be found"; (*d*) that the Korala's report was contradicted by the *vivâ voce* evidence of the Arachchi; and (*e*) that, in any event, the Korala's delay of nearly a month in recording Nicholas Pulle's statement was sufficient to exclude it.

I will deal with each of these points in turn.

(*a*) The learned District Judge, in an interlocutory order made by him on April 28, 1917, [2] on the admissibility of Nicholas Pulle's statement, speaks of the Korala's record of that statement as a report made "in the current routine of official business." There is no evidence in support of that observation. But the reason is obvious. The Korala's report was objected to at the trial on a totally different ground, viz., that it could not be said to come under the clause in section 32 (2) of the Evidence Ordinance [1]: "When the statement.....consists of any entry or memorandum made in books kept.....in the discharge of professional duty." The report, it was argued in effect,[3] might have been part of the Korala's official work. "But 'professional duty' does not mean 'official work.'" Even in the petition of appeal, the Korala's report is merely alleged not to have been "legally admissible." No other ground of inadmissibility than that urged at the argument in the District Court is specified. It is certain that if the point had been taken in the Court below that the report could not be put in evidence because it was not an "entry or memorandum" made by the Korala "in the ordinary course of business," that point would not have been available to the defendants here. Nothing would have been easier than for the plaintiffs to have shown by *vivâ voce* evidence that in this country inquiries into, and reports upon, all sorts of incidents, ranging from fires up to family quarrels, that may give rise to civil or criminal proceedings are part of "the ordinary business" of headmen, that these inquiries are held, and reports given at the instance sometimes of private individuals, sometimes of the Courts, and that the reports themselves are official documents. It will be observed that the report here in question bears a serial number.

(*b*) I agree with the defendants' counsel to this extent, that before a statement is admitted under section 32 (3) of the Evidence *Ordinance*, [1] there should be something to show that it was made under the sanction of knowledge that it would tend to expose the

[1] *No. 14 of 1895.*

[2] *See Record, page 103.*

[3] *See Record, page 66.*

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person making it to civil or criminal liability. There are, I think, circumstances in the present case which afford evidence of that fact. Nicholas Pulle was approached on the very night of the fire both by Juan Appuhamy and by the Arachchi. The Korala questioned him in the presence of the Arachchi two days later. In the Korala's report his name appears as the first "defendant." These considerations indicate that Nicholas Pulle was being regarded and treated as a person who might be responsible in one way or another for the consequences of the fire, and his proved failure to render any assistance to the employés of Korossa estate or to Daniel, who were endeavouring to extinguish it, coupled with his subsequent disappearance, points to a consciousness on his part of the dangerous possibilities of the situation.

(*c*) The objection that the Korala's report introduces "double hearsay" is one that goes to the weight of the evidence, not to its admissibility. It could scarcely be contended that in a criminal trial before the Supreme Court or the District Court the deposition in the Police Court of a headman would not be admissible in its entirety under section 33 of the Evidence Ordinance,[1] merely because the headman had died since the committal of the accused, and the deposition contained a statement made to him by an absent witness. Clauses (2) and (3) of section 32 are, in my opinion, enactments as distinct from, and independent of, each other as sections 32 and 33 of the Evidence Ordinance.[1]

(*d*) and (*e*) The contradiction, on which defendants' counsel relied, between the evidence of the Arachchi and the report of the Korala is that, according to the former, on his first examination Nicholas Pulle pointed to a "heap of rubbish" as having been burnt, while the latter said that he described it as "a strip of jungle." But the District Judge regarded the Arachchi as a somewhat unsatisfactory witness. Juan Appuhamy corroborated the Korala on the point. "The burnt spot," he said, "was (at) a place where felled jungle had been stacked," and the Arachchi himself, when he was recalled at a later stage in the trial, admitted that the Korala had recorded accurately what Nicholas Pulle had said to him in his own presence. My brother De Sampayo has explained the meaning of the Sinhalese term made use of in the Korala's report. Section 32 (1) of the Evidence Ordinance[1] does not require the entry or memorandum to which it refers to be practically contemporaneous with the statement recorded. The Korala's delay in writing his report does not affect its admissibility.

For the above reasons, I am of opinion that the statement made by Nicholas Pulle to the Korala was rightly allowed by the District Judge to be put in evidence. The successive statements made by Nicholas Pulle to Juan Appuhamy, to the Arachchi, and to the Korala show that the fire which damaged Korossa estate, not merely

[1] *No. 14 of 1895.*

arose on the defendants' property, but was lit by their own kangany, acting, for aught that appears to the contrary, within the scope of his employment. The defendants endeavoured to get rid of their responsibility for Nicholas Pulle's act by alleging that they had divested themselves of all control over the chena in question in favour of a man, Boyagoda Bandara, who was to clear it for them as an independent contractor. Bandara was not called as a witness. Neither the defendants nor any reliable witness on their behalf came forward to speak to the terms of this alleged contract. They were content to stake this part of their case on the evidence of their conductor Daniel, whom the District Judge, with good reason, disbelieved in other matters. Daniel's testimony on the point was as follows: "Boyagoda Bandara got the land cleared on the agreement with defendants that he would be allowed to cultivate as a chena one-fourth of the land cleared by him and take the produce of the one-fourth only. We were to plant the remaining three-fourths of the clearing. Boyagoda Bandara employed his own men and effected the clearing. He was three months in the work of clearing." Now, even if this evidence were true, it would not necessarily exonerate the defendants from liability. Chenas are constantly cleared in this country under arrangements which give the contractor a temporary interest in the cultivation of the land cleared as a reward for his services, but are very far from depriving its owner of all effective control over the contractor's operations. It is settled law that in such circumstances the landowner is answerable for negligent and improper conduct on the part of the contractor, provided that the latter is acting within the scope of his employment.[1] Daniel's own undertaking to Mr. Sydney Smith not to fire the chena without notice shows that he did not himself regard Bandara as sole master of the situation.

The remaining questions involved in the appeal can be disposed of briefly. It results clearly from the evidence that the defendants were guilty of negligence in leaving no adequate protective belt between their chena and Korossa estate. The fire lighted by Nicholas Pulle must be regarded as an act done by themselves. Even although they may not have anticipated that the belt of jungle between their plantain garden and their chena would be insufficient to prevent the passage of fire from one to the other, the damage to Korossa estate would not have been done but for the mass of inflammatory material which they had themselves accumulated on their chena, and their failure to provide adequate safeguards for their neighbours' property. The evidence also shows that there was no contributory negligence on the part of the plaintiffs. At the season at which the fire occurred the plaintiffs were not guilty of bad husbandry, in allowing the leaves which fell from day to day on their estate, or even, in so far as these were present, pieces of felled

[1] *Black v. Christchurch Finance Co. (1894) A. C. 48.*

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timber, to lie unremoved. Moreover, even if their action in doing so had been negligent, the fire would not have spread to Korossa estate at all but for the negligence of the defendant. In these circumstances, it becomes, strictly speaking, unnecessary to decide the interesting legal question debated before us as to whether the Roman-Dutch law on the point now under consideration has been superseded by the law of England. Under the Roman-Dutch law a person who starts a fire on his own land is bound to use the utmost diligence and care to prevent it from spreading on to his neighbour's property, and the plaintiff cannot recover damages without proof that the defendant has neglected to observe the diligence which the law requires of him.[1] Under the law of England, in accordance with the rule enunciated in the leading case of *Fletcher v. Rylands*,[2] a person who introduced a dangerous element, such as fire, on his land is responsible for whatever damage he may cause to others by its spreading, whether he has taken all the obvious precautions or not. In *Eastern and South African Telegraph Company v. Capetown Tramways Company*,[3] Lord Robertson, in delivering the judgment of the Privy Council, observed that the principle of *Fletcher v. Rylands* [2] was not inconsistent with the Roman law. The soundness of this view was doubted by Lord de Villiers in *Union Government (Minister of Railways) v. Sykes*,[4] and it has, in England, been pointed out in recent years that the rule affirmed in *Fletcher v. Rylands* [2] is not applicable to cases (*a*) of damage whose proximate cause is the malicious act of a third person, against which precautions would have been inoperative, in the absence of a finding that the owner of the property either instigated it or ought to have foreseen and provided against it, and (*b*) in which the user of the element which caused the damage was a natural one.[5] In the case of *Richards v. Lothian*, [6] from which I have cited these propositions, it was held that a reasonable supply of water or gas introduced into a house for domestic purposes was not a dangerous element within the meaning of *Fletcher v. Rylands*.[2] But I am not sure that the use of fire on an estate in order to burn down jungle, however lawful it might be, would come under the same category. As far back as 1876, however, it was admitted by counsel in the argument, and held by the Full Court in the judgment, in the case of *Elphinstone v. Boustead*, [7] that the principle laid down in *Fletcher v. Rylands* [2] had been adopted in this Colony. There is a ruling to the same effect by Lascelles C.J. and De Sampayo J. so recently as 1914.[8] It is well settled that the Roman-Dutch law, pure and simple, does not exist in this country in its entirety. It has been modified in many

[1] *Maas., vol. IV., 60, and Nathan, vol. III., p. 1783.*
[2] *(1868) L. R. 3 H. L. 300.*
[3] *(1902) A. C. 383.*
[4] *1913) South African L. R. Appl. Div. 156.*
[5] *Rickards v. Lothian, (1913) A. C. 263.*
[6] *(1913) A. C. 263.*
[7] *Ram. (1872–76) 268.*
[8] *Silva v. Silva, (1914) 17 N. L. R. 266.*

directions, both expressly and by necessary implication, by our statute law, and also by judicial decisions. The defendants' counsel admitted, what could not indeed be denied, that the Roman-Dutch law in Ceylon had been on some points not merely repealed, but impliedly affected by local enactments (see *Rabot v. De Silva* [1]). But they challenged the proposition that the Roman-Dutch law had been or could be abrogated or modified by the action of the Courts. The fact that this has been done is, however, incontestable,[2] and the process has not been confined to this Colony. In South Africa also it would appear that the Common law has been modified, not merely by statutory changes, but by local customs recognized and enforced by the legal tribunals.[3] Although there is no need for us to consider this aspect of the present case further, in view of the clear proof of negligence on the part of the defendants, which is established by the evidence, I desire to associate myself with the opinion expressed by Lascelles C.J. and De Sampayo J. in *Silva v. Silva*,[4] that the rule in *Fletcher v. Rylands* [5] must be taken to be in force in Ceylon.

On the question of damages, I have little to add to the observations of my brother De Sampayo, whose judgment I have had the advantage of perusing. The learned District Judge was justified, for the reasons which he gives, and which it is unnecessary for me to repeat, in preferring the estimate of damages made by Mr. Payne, supported as it was by Mr. Keyt's elaborate and detailed plan of the estate after the fire, to that of Mr. Patterson and Mr. Bamber. I agree, however, with my brother De Sampayo that the item of Rs. 5,000 should, on the grounds stated by him, be disallowed.

The main point taken in the plaintiffs' cross-notice of objections to the decree is that, in valuing the trees totally lost to the estate, the learned District Judge has drawn no distinction between the north garden, in which he had himself valued the damage on the basis that each tree was worth Rs. 24, and the south garden, in which he had assessed the value at Rs. 19.50 a tree, but has founded his computation on an average value of Rs. 20 for each tree on the estate. I do not think that in a matter of this kind we should be justified in disturbing the verdict of the District Judge on the question of damages. A similar observation applies with even greater force to the other minor objections in the plaintiffs' cross-notice.

I would reduce the damages to Rs. 18,880, and, with that modification of the decree, I would dismiss both the appeal and the cross-notice of objections. The plaintiffs are entitled to the costs of the action and of the appeal.

[1] (*1909*) *A. C. 376.*

[2] "*Roman-Dutch Law as it prevails in Ceylon,*" *by A. St. V. Jayawardene, 1901.*

[3] *Burge's Colonial and Foreign Law, second ed., vol. I. p. 303.*

[4] (*1914*) *17 N. L. R. 266.*

[5] (*1868*) *L. R. 3 H. L. 300.*

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In this action, which has been brought in respect of damage caused by fire, there are many questions of great importance for decision. The plaintiff company are the proprietors of a rubber estate known as Korossa estate, situated at Yatagama in the District of Kegalla. It is bounded on the south by the river Maha-oya, and is crossed by the railway line to Kandy. The defendants are the owners of an extensive coconut estate known as Marukwatura estate, to the south of the Maha-oya, and in connection with that estate they also own two portions of land on the same side of the river as Korossa estate and adjoining it on the east and north. The portion to the east is about 20 acres in extent, and is a plantain plantation, and was at the time in question in charge of a man named Nicholas Pulle, who occupied a hut there. The portion to the north is chena, of which the jungle was felled by the defendants in the beginning of 1916, with the view of clearing and planting the same with coconuts. On February 24 a destructive fire spread from the defendants' land into Korossa estate, and entirely destroyed or badly burnt several hundred rubber trees standing all over the estate, and accordingly the plaintiff company claimed from the defendants Rs. 30,000 as damages. It was alleged in the plaint that the defendants had by their servants and employés negligently set fire to the jungle on their land, and that, owing to such negligence and the defendants' failure to take proper precautions, the felled jungle of the chena was set on fire, and such fire spread into Korossa estate. The defendants took issue on this allegation, and further stated that the rubber plantation on Korossa estate had been thinned by cutting down the trees, and that a spark from a passing train had probably set fire to these felled trees and the large quantity of dry leaves lying all over the estate, and that the damage was caused thereby. In the alternative they pleaded contributory negligence by reason of the facts just mentioned. The case of the plaintiff company as developed at the trial was that Nicholas Pulle set fire to a heap of rubbish or jungle near his hut in the plantain plantation; that the fire found its way through a stretch of abandoned plantain plantation or jungle above the hut; and that, driven in a westerly direction by the high wind which generally prevails in this part of the year, it quickly caught the felled jungle in the defendants' chena, and ultimately spread from there into Korossa estate. The learned District Judge, in a very able and exhaustive judgment, decided in favour of the plaintiff company both on the facts and the law applicable to the case, and gave them judgment for Rs. 23,880 as damages, with costs of action. The defendants have appealed from this judgment, and the plaintiff company have also given a cross-notice in respect of the amount of damages.

As regards the facts, the evidence which the learned District Judge has recorded and discussed at length in his judgment leaves

no room for doubt that the fire originated in the defendants' plantain plantation, and took a north-westerly course and entered Korossa estate at some point or points in the northern boundary as alleged by the plaintiff company. The suggestion on behalf of the defendants that the fire was caused by a spark from a railway engine falling upon the dried rubber leaves on Korossa estate, or on the felled jungle on the defendants' land, and that the fire then spread from one land into the other, and that in either case the injury caused was the result of an accident or wrongful act of a third party, receives no support from the evidence. I think the District Judge is right in holding that a heap of rubbish or jungle was deliberately set fire to on the defendants' plantain plantation near Nicholas Pulle's hut, and that this was the origin of the whole conflagration. The only question is whether it was Nicholas Pulle who set fire to that heap. The evidence bearing on this point consists of the oral evidence of Juan Appuhamy, kangany of Korossa estate, and the Arachchi of Walgama, and of the written report of the Korala since deceased Juan Appuhamy said that Nicholas Pulle did not come to Korossa or give any help while the fire was going on, but later on pointed out a burnt spot at the back of his hut. The Gan-Arachchi, who was the first headman to be brought to the scene of the fire, questioned Nicholas Pulle, who stated that he had that morning set fire to a heap of rubbish, but could not say that the fire extended to the chena. The Arachchi, in view of the gravity of the matter, wanted his superior officer, the Korala, to be called in, and accordingly the next day the Korala came and made inquiries and subsequently made a report, in which he stated, among other things, that Nicholas Pulle admitted at the inquiry that " he had set fire to a strip of jungle on the estate on which he was living." I have looked into the original report and I find that the expression which has been translated as " strip of jungle " is *roda*, and really means scrub, and may be intended to mean rubbish or dried jungle stuff collected into a heap. The Arachchi's evidence and the Korala's report as to the statements made by Nicholas Pulle were objected to in the Court below as being inadmissible, and the same objection is urged before us. Neither side was able to reach Nicholas Pulle, who disappeared within a couple of days after the fire. Under section 32, sub-section (3), of the Evidence Ordinance, No. 14 of 1895, the statements made by Nicholas Pulle will be admissible if he cannot be found. A subpœna was issued on him to attend as a witness for the plaintiff company, but was returned unserved, the process server stating in his affidavit that he could not find him at the estate (which was his last known place of abode), and that no one could say anything as to him. At the trial M. B. Daniel, conductor of the defendants' estate, was called as a witness by the plaintiff company, and in cross-examination by counsel for the defendants themselves he said that Nicholas Pulle took leave and went away and did not

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return and added, "I cannot say whether he was an Indian Tamil. He cannot now be found." The defendants' counsel explained to us that this was elicited in cross-examination, as there had been a suggestion that Nicholas Pulle was purposely kept away by the defendants, and he frankly admitted that he probably told the Court that the defendants were unable to call Nicholas Pulle because they did not know where he was. The District Judge says in his judgment that it was admitted that Nicholas Pulle could not be found, and, even apart from any admission by counsel, I think that under all the circumstances, and especially in view of the evidence of the defendants' conductor Daniel, it must be concluded that Nicholas Pulle could not be found for the purposes of the trial. I may here refer to an objection taken to the Fiscal's return to the subpœna. It was said that the Court could only look at the return to see whether the subpœna was served or not, but could not recognize the reason given in the process server's affidavit, but that the process server himself should have been called. The Indian case, *The Emperor v. Rochia Mohato*,[1] which was cited does not support the contention; on the contrary, the whole return appears there to have been utilized for the purpose of ascertaining what efforts had been made to serve the process. *Re Asmavi Muthirigan* [2] is still less applicable. That was a case under section 33 of the Evidence Act, which requires that, before admitting a deposition in evidence, the Judge should satisfy himself that the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. What the Court decided in that case was that the Judge should not merely accept the statement of counsel on this point, but should have evidence before him upon which to satisfy himself. In my opinion the Court may, and even should, look at the Fiscal's return as a whole, in order to find out the reason why its officer has not executed its process. In this connection reference may be made to *Higham v. Ridgway*,[3] which is an authority for saying that where the contents of a document are connected together, and where a statement is only explainable by the context, the whole document should be admitted. A further ground on which the statements of Nicholas Pulle can be admitted in the circumstances of this case is that they were against his pecuniary interests, or that they would expose him, or would have exposed him, to a criminal prosecution or to a suit for damages. That they would have exposed him to a suit for damages, whatever their effect might be on the position of his masters, the defendants, admits of no doubt. I am myself further inclined to think that the reason for this exception to the rule against the admissibility of hearsay evidence requires that the person making the statement should be conscious of the fact that he was exposing himself to criminal or civil liability. The circumstances

[1] *(1881) I. L. R. 7 Cal. 42.*

[2] *(1915) I. L. R. 39 Mad. 449.*

[3] *10 East. 109.*

of this case satisfy me that Nicholas Pulle was conscious of that fact. It was to him that both those in charge of Korossa estate and the two headmen, when they made inquiries, looked as the party responsible for the origin of the fire. The report of the Korala, which was given for the purpose of an action to be instituted, even names him as a "defendant." The circumstance that he carefully abstained from coming forward and helping in the putting out of the fire, and that he soon disappeared altogether, points in the same direction, and shows that he was apprehensive of a certain risk to himself. It remains to consider another point with regard to the admission of the Korala's report. He died before the trial of this action, and the question is whether and how far the report is admissible as a statement made by the Korala "in the ordinary course of business" or "in the discharge of professional duty" within the meaning of section 32, sub-section (2), of the Evidence Ordinance. A Korala is an officer mostly concerned with inquiry into crime and with the Government revenue of his division, but although nothing is disclosed in this case as to his duties in connection with civil disputes between private parties, it is well known that a headman is, as a matter of fact, called in officially on such occasions, and gives reports as to the result of immediate inquiries made by him, and his evidence at the subsequent legal proceedings is desiderated both by the party and the Court. I should be surprised if the Korala and the Arachchi were not informed and did not act on the occasion of such an extensive fire as this. In my opinion the Korala's report must be taken to have been given "in the ordinary course of business," if not "in the discharge of professional duty." The last point of law is whether the statement of Nicholas Pulle embodied in the report is admissible, because it is said to be double hearsay. I have already expressed my opinion in another connection that the whole context ought to be looked at, especially where one part is required to explain another. Under the English law of evidence the general rule appears to be that only so much of a statement is admissible as was necessary for the person concerned in the ordinary course of business to make, and not so far as it contains collateral matters. *Chambers v. Bernascion.*[1] But this restriction has no operation under the Indian Evidence Act or under our Evidence Ordinance. The fact of the matter being collateral goes not to the admissibility of the evidence, but to its weight. See the judgment of the Privy Council in *Zakeri Begum v. Sakina Begum.*[2] That decision is of special importance. There the register of marriages kept by a deceased Muhammadan priest was admitted to prove the amount of dower promised to the bride. The report shows that the priest entered this particular in the register from the statements made in his presence and in answer to his questions by the persons concerned at the time of the celebration of the marriage. In the

[1] *1 C. M. & R. 347.*

[2] *(1892) I. L. R. 19 Cal. 689.*

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present case the statement made to the Korala in the course of his inquiry as to the cause of the fire is hardly a collateral matter; it relates to the very business in hand, and is, I think, admissible on that ground. But, in any event, the above decision of the Privy Council appears to me to justify the admission of the statement made by Nicholas Pulle to the deceased Korala during the investigation into the circumstances of the fire.

It is, however, not absolutely necessary for the plaintiff company to prove that it was Nicholas Pulle who set fire to the heap of rubbish or jungle. It is sufficient to show that the fire originated on the defendants' land. There is generally a presumption that every fire originating upon a person's premises, the original kindling of which cannot be traced, was kindled by the owner of the premises or by his servants, for whose acts he was responsible. In the absence of any proof, as in this case, that the fire was due to the unauthorized act of a stranger, it will be presumed to be his fire. *Becquet v. Macarthey*,[1] *per* Lord Tenterden C.J. It is contended in this case that, even so, the law applicable is the Roman-Dutch law, and that on the principles of that law the defendants are not liable unless there was negligence. The references made are to *Voet 9, 2, 19, Nathan's Common Law of South Africa, vol. 2, p. 1783*, and *Maasdorp's Institutes of Cape Law, vol. 4, p. 60*, but these authorities do not help the defendants, even if the Roman-Dutch law as therein stated is to be applied. They all regard the burning of stubble or weeds on a windy day, without taking precautions to keep the fire within bounds, as a negligent act, for which the person who does it is liable to his neighbour into whose land the fire may spread. This is exactly what happened on this occasion. There was a high wind, characteristic of this part of the year; the defendants had on their chena a great quantity of inflammable material in the shape of dry leaves and trees, and they left no sufficient belt of uncleared jungle between their land and Korossa estate as a precaution against the spreading of a fire. Therefore, if negligence must exist, there was negligence on their part. But the truth appears to be that, since negligence is a matter of presumption, there is no essential difference between the English law and the Roman-Dutch law in regard to liability to damage caused by fire. In *Eastern and South African Telegraph Co. v. Capetown Tramways Co.*,[2] where it was argued that the principle of *Fletcher v. Rylands* [3] had no place in the Roman-Dutch law, Lord Robertson, who delivered the judgment of the Privy Council, said: " Their Lordships are unable to find adequate grounds for this view, and it was not maintained at the Bar. It is not supported by the texts or decisions which illustrate the full recognition of the right of an owner freely to use his property for natural purposes, even though loss to his neighbour may result. Nor, on

[1] *(1831) 2 B. & Ad. 958.*

[2] *(1902) A. C. 381.*

[3] *(1868) L. R. 3. H. L. 330.*

the other hand, does the prominence given to *culpa* in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on the civil law." This decision, it is true, was commented on in *Union Government v. Sykes*[1] by Lord de Villiers, who thought that the opinion there expressed was *obiter dictum*. But his own view in that case was likewise *obiter*, inasmuch as the case was decided on the finding of the majority of the Judges that the presumption of negligence had been negatived by the defendant by evidence. However this question may stand, I think that the principle of *Fletcher v. Rylands* [2] has been adopted in Ceylon, and must be considered as governing such cases as the present. It must be remembered that it is not the whole body of Roman-Dutch law, but only so much of it as may be shown or presumed to have been introduced into Ceylon, that is now applicable here. We must also recognize the process of evolution, since the British occupation, by the tacit adoption of English principles in various legal matters. Such subjects as personal obligations arising from delicts or torts are peculiarly liable to the effect of such a process. Accordingly we find that in *Elphinstone v. Boustead*[3] the Full Bench of the Supreme Court declared the law as to damage caused by such an element as fire to be that enunciated in *Fletcher v. Rylands*.[2] The English law was again applied in *Babun Appu v. Sinno*,[4] and *Fletcher v. Rylands* was referred to. There are other cases which involved other points, but the applicability of the English law seems never to have been questioned. See, for instance, *Christombo Allis v. Pitche Cando*,[5] *Corea v. Saul Hamidu*,[6] *Schokman v. De Silva*.[7] The point, however, was directly raised in *Silva v. Silva*,[8] and it was expressly held that the English law must be taken to prevail in Ceylon.

It is, perhaps, convenient now to notice an argument raised on a minor point. It appears that the defendants' chena to the north of Korossa estate was entrusted to a villager named Boyagoda Bandara, for the purpose of cutting down the jungle and clearing the land for coconut plantation, on the well-known terms that for his trouble he should have a share of the minor products which, as usual, might be raised in the land. It was said that Boyagoda Bandara was an " independent contractor," and that any act or negligence on his part would not affect the plaintiffs. This point is not quite relevant, for the fire as found did not originate in the chena, but in the adjoining plantain plantation, which was in charge of Nicholas Pulle. In any case Boyagoda Bandara was in no sense an " independent contractor," but was a person employed to do a certain work for remuneration or hire in kind; and, moreover, there is nothing to show that the defendants in their arrangements with Boyagoda Bandara had deprived themselves of the control which a landowner ordinarily

[1] *S. L. R. (1913) A. D. 161.*
[2] *(1868) L. R. 3. H. L. 330.*
[3] *Ram. (1872–76) 268.*
[4] *(1879) 2 S. C. C. 90.*
[5] *(1877) 8 S. C. C. 95.*
[6] *(1915) 1 C. W. R. 110.*
[7] *(1915) 1 C. W. R. 205.*
[8] *(1914) 17 N. L. R. 266.*

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retains and exercises in such cases. *Christombo Allis v. Pitche Cando* and *Schokman v. De Silva* (*supra*) are direct authorities against the defendants on this point.

It was also argued on the authority of such cases as *Rickards v. Lothian* [1] that a person was entitled to use fire for natural and ordinary purposes without incurring any liability. But I do not agree that setting fire to a jungle is an ordinary operation. It is, if anything, an extraordinary operation, though it is true that burning is the usual method of clearing jungle lands for plantation, and I think the use of fire for such a purpose is not a natural use in the sense contemplated by the decisions referred to. But the same authorities show that, in the case of natural use of fire or water, all reasonable precautions should be taken to prevent injury to the neighbour's property. The defendants have made no attempt to prove that such precautions were taken in this case, and I have already alluded to the facts which point to the contrary.

The plea of contributory negligence may be disposed of in a few words. It is true that a number of felled rubber trees and a large quantity of dropped leaves were lying at this time on Korossa estate. The extent of the damage might probably have been less if this material did not exist, but there is nothing to show that the damage could have been wholly avoided. Certainly it was impossible for the plaintiff company to remove the trees or the leaves at the time of the sudden outburst of fire. In my opinion the negligence, if any, was too remote to furnish any defence on that score. Moreover, it is in evidence that in wintering time, as this was, a large quantity of leaf drops on every rubber estate, and is generally allowed to remain and rot and become gradually absorbed into the ground. Even if the removal of this material was possible under the circumstances, the defendants had failed to give the usual notice of their intention to set fire to any jungle, though their responsible agent had been warned and had promised to give such notice. I think the defence of contributory negligence fails.

There remains the question of damages. I have no reason to disagree with the District Judge as regards the extent of injury done to Korossa estate and the assessment of damages generally. But there is one item which requires consideration. He has allowed a sum of Rs. 5,000 under the head of " indirect loss " due (1) to increased working expenditure on a reduced crop, (2) to general depreciation, and (3) to the necessity of cutting out the damaged trees and re-planting. I do not think, however, that, having regard to the method of assessment, this item should be wholly allowed. The District Judge has taken the value of the totally damaged trees at Rs. 20 per tree, and capitalized it on a basis of six years' purchase, and on that footing he has allowed a sum of Rs. 17,000. He has also allowed two sums of Rs. 1,560 and Rs. 320 in respect of the loss

[1] *(1913) A. C. 263.*

of crop from the trees set back or slightly damaged. This means that he has restored the plaintiff company to the same position as if they had an undamaged estate. Therefore, the constant charges and working expenses are hypothetically the same as before. Consequently, I think, no allowance ought reasonably to be made in respect of the increased cost of production on the undamaged trees. It should be noted also that the plaintiff company are getting at once a lump sum as the value of the damaged portion of the estate, and the interest thereon should likewise cover the proportion of working expenditure. The District Judge has not separately allocated the indirect loss due to general depreciation and the expense of cutting out trees and re-planting, but from the estimate submitted by Mr. Payne, the superintendent of Korossa estate, I gather this will be represented by a comparatively small sum. In any case, I think for the reasons already given, any such sum should come out also.

I would modify the decree by reducing the damages to Rs. 18,880. Subject to this modification, I would dismiss both the appeal and the cross-notice of objection. Considering the nature of the appeal, I think the plaintiff company are entitled to costs of appeal.

Varied.