1941 *Present :* **Moseley S.P.J. and Keuneman J.**

WIJEYRATNE *v.* PILLAI.

83—D. C. Balapitiya, 73.

Master and servant—Claim for damages arising from motor collision—Lorry driven by person not in owner's employment—Liability of owner—Civil Procedure Code, s. 772.

Plaintiff sued the defendant for damages for injuries sustained by plaintiff as the result of a collision between a bus in which the plaintiff was a passenger and a motor lorry owned by defendant and driven at the time of the collision by S, negligently and without proper care.

[1] *33 Calc. 928.*

It was found by the Judge that S was not the defendant's driver and that on the day in question, F, the regular driver, was driving the lorry when it set out on its journey and that at the time of collision the lorry was being driven by S.

There was no evidence that S was an incompetent driver or that the handing over of the lorry by F to S was the effective cause of the collision.

Held, that the defendant was not liable for the negligence of S.

Where there is an appeal against a decree, objection may be taken by the respondent under section 772 of the Civil Procedure Code to anything appealable in the decree out of which the appeal arises.

The words " any part of a decree " mean the whole of the decree or any part thereof.

British Ceylon Corporation, Ltd. v. The United States Shipping Board (36 N. L. R. 225), followed.

APPEAL from a judgment of the District Judge of Balapitiya.

L. A. Rajapakse, for the plaintiff, appellant.

G. Thomas (with him *A. C. Alles*), for the defendant-respondent.

Cur. adv. vult.

November 13, 1941. MOSELEY J.—

This appeal arises out of an action brought by the plaintiff against the defendant for damages for injuries sustained by the plaintiff as the result of a collision between a bus in which the plaintiff was a passenger and a motor lorry owned by defendant and driven, at the time of the collision, by K. E. Soysa, who was alleged to be defendant's driver, and to have driven the lorry negligently and without reasonable and proper care. The learned District Judge found that Soysa was not in the employ of the defendant, but that he " was acting for defendant's benefit ; and that the lorry was driven without due care ". He awarded the plaintiff Rs. 300 by way of damages without costs. Against this judgment the plaintiff appeals on the ground that the amount of damages awarded is inadequate and that there was no justification for depriving him of his costs. For reasons which will appear later discussion of neither of these points is necessary.

On the other hand the defendant gave notice in manner provided by section 772 of the Civil Procedure Code, that he would, at the hearing of the appeal, take certain objections to the decree. That objection which invites our consideration is to the effect that, in view of the finding by the District Judge that Soysa was not employed by the defendant, the latter cannot be held liable for any act of negligence committed by him, and that the plaintiff's action should therefore have been dismissed.

Counsel for appellant contended that it is not open for a respondent to take an objection which goes directly to the root of the matter ; that a statement of objection to a decree is of smaller scope than a petition of appeal ; and that a person aggrieved by a judgment should appeal in the ordinary way. He invited us to contrast the use of the words " any part of the decree " where they appear in section 772 of the Procedure Code with that of the words " any judgment, decree, or order " in section 73 of the Courts Ordinance (Cap. 6), and to infer therefrom

an intention on the part of the Legislature to limit the right conferred upon a respondent by section 772 to objections to something less than the decree as a whole. He cited, in support, the judgment of Schneider J. in *de Silva v. de Silva et al.*[1] in which, at page 295 the learned Judge expressed the view that in view of the language of section 772 "what was contemplated by the section was objection to a part of the decree, not to the whole of it . . . . " This judgment does not appear to have been considered by Macdonell C.J. in the later case of *British Ceylon Corporation, Ltd. v. The United States Shipping Board et al.*[2]. In that case the plaintiff's action against the first defendant was dismissed, as was the first defendant's claim in reconvention, but it was ordered that as between the plaintiff and the first defendant each party should pay its own costs. I may mention parenthetically that the head-note to the report of that case appears to be misleading, and the true position is to be found in the judgment of Macdonell C.J. at page 242. The first defendant appealed, asking to be given his costs in the Court below, and the plaintiff filed an objection under section 772 the ground of which was that the judgment was wrong in dismissing the plaintiff's action against first defendant and that judgment ought to be given against him. Macdonell C.J. referred to section 754 of the Code which contemplates an appeal against "any judgment, decree, or order of any original court" and to section 772 which permits a respondent, though he may not have appealed against any part of the decree, on giving seven days' notice, to "take any objection to the decree which he could have taken by way of appeal". The learned Chief Justice expressed the opinion that what the section says is "that where there is an appeal, whether against a decree or an order, objection may be taken to anything appealable in the decree out of which the appeal rises". With respect I may say that I am of the same opinion. Indeed, to whittle down the scope of the section, as we have been invited to do, seems to me to amount to doing violence to the language of the section. The words "any part of a decree", in my view, must mean the whole of the decree or any part thereof. I find then that the defendant's objection is one that may properly be taken. The question for decisions then is whether or not, in view of the District Judge's finding that Soysa was not in the employ of the defendant, and I may say at once that in my view that finding is correct, the latter can be held liable for the tortious act of Soysa.

There was evidence, which was properly accepted, that the defendant's regular driver was one Fernando, and that on the day in question Fernando drove the lorry when it set out from Colombo on its journey to Elpitiya in the course of which the collision occurred. It was also, in my opinion, properly found that, at the time of the collision, the lorry was being driven by Soysa. How, when, and where Soysa assumed control of the lorry is a point upon which there is complete absence of evidence. There is no evidence of any person who saw Fernando at the time of, or shortly after, or at the scene of, the collision.

According to *Pollock's Law of Torts (8th ed., page 81)*, it is doubtful whether a servant has any authority, implied by law to delegate his duty to a stranger, even in case of sudden necessity, so as to make his employer

[1] *27 N. L. R. 289.* [2] *36 N. L. R. 225.*

liable for that stranger's acts and defaults. At all events he has not such authority where it is possible to communicate with the employer. This was held to be so in *Gwilliam v. Twist and another* [1] where A. L. Smith L.J. said :

> "It is clear that it is not prima facie within the scope of a coachman's employment to delegate the duty of driving to other persons . . . . To constitute a person an agent of necessity he must be unable to communicate with his employer ; he cannot be such an agent if he is in a position to do so. The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity."

In the present case there is nothing to show that there was a case of sudden necessity, or that, if there was, it was impossible for Fernando to communicate with defendant.

There is, however, another case in which an employer may be held liable for the act of a stranger. That is where, by negligence of a servant, opportunity is given for a third person to commit the wrongful or negligent act which is the immediate cause of the damage complained of. In *Engelhart v. Farrant & Co., and T. J. Lipton* [2] the defendant employed a driver, and a lad, who had nothing to do with the driving, to go in the cart and deliver parcels to customers. The driver left the cart and, in his absence, the lad drove on and came into collision with plaintiff's carriage. Lord Esher M.R., held that the negligence of the driver was the *effective cause* of the damage suffered by the plaintiff and that the defendant was liable therefor. The principal stated in that decision was considered in *Nalini Ranjan Sen Gupta v. Corporation of Calcutta* [3], and was considered to be well established. The last-mentioned case, however, was one in which a chauffeur left a car in charge of a cleaner who attempted to drive the car and brought it into collision with a lamp-post. Walmsley J. drew a clear distinction between a motor-car with the engine at rest, and a horse-drawn van with the reins attached to a hook as was the case in *Engelhart v. Farrant & Co. and T. J. Lipton* (*supra*). He considered that a much larger measure of interference was needed in the case of a car, and did not, on the evidence before him, consider that the act of the chauffeur, in leaving the car, could be regarded as negligence.

Counsel for the appellant relied upon the rule laid down in *Engelhart v. Farrant & Co. and T. J. Lipton* (*supra*) and also referred us to *Priestly v. Dumeyer* [4] briefly reported in *Bisset and Smith's Digest of South African Case Law, at page 770.* In that case it was held that the negligence of a driver in handing over the reins to an incompetent person was the effective cause of the ensuing accident, and that the defendant (the driver's employer) was liable. There is, however, in the present case, no evidence that the man Soysa was an incompetent driver. Following the distinction which was drawn in the Indian case mentioned above, and in view of the lack of evidence on the point, I find myself unable to hold that the handing over by Fernando to Soysa was the effective cause of the collision.

Counsel for the appellant finally took up the position that the District Judge's finding was that Soysa was acting for defendant's benefit, and

[1] *(1895) 2 Q. B. 84.*
[2] *(1897) 1 Q. B. 240.*
[3] *I. L. R. 52 Cal. 983.*
[4] *15 S. C. 394.*

that defendant is consequently liable. The learned District Judge dealt with this point somewhat summarily in the following words :—

> "Defendant says that on this day the lorry was being used for the purpose of transporting goods for him from Colombo to Elpitiya and, as Edmund Zoysa was acting as driver in the course of this trip I have to hold that defendant is liable for damages caused by this collision."

It is apparently on that basis that the learned District Judge found that Soysa was acting for defendant's benefit. It seems to me difficult to support this finding. In examination-in-chief the defendant said: "I did not receive from S. M. Fernando that day's collection". In cross-examination he said : "S. M. Fernando did not pay me collections for two or three days. I deducted that amount from his salary". This evidence seems to me to fall distinctly short of proving that the defendant in any way ratified the tort of Soysa. Having found that Soysa was not employed by the defendant to render the latter liable it was essential that there should be a finding of ratification. There is, in my opinion, no evidence to support such a finding.

For these reasons the plaintiff's action must fail. The appeal is dismissed with costs, the cross-objection is allowed, and the judgment of the lower Court is set aside. Judgment will be entered for the defendant with costs.

KEUNEMAN J.— I agree.

Appeal dismissed.
Cross-objection allowed.