Present: Bertram C.J. and De Sampayo J. 1920

WINTER *v.* MUDIANSE.

33—D. C. Kandy, 26,497.

Buffalo straying on the road—Car sustaining damages in attempt to avoid collision—Action against owner of buffalo for damages—Negligence—Noxal action.

The plaintiff, going along a road in a car, applied the brake to avoid a collision with a stray buffalo crossing the road. The car skidded, struck a building, and sustained damage. The plaintiff sued the owner of the buffalo for damages.

Held, that the claim was bad as the defendant was not guilty of negligence, as there was neither a common law duty nor at the date of the accident (before December, 1918) a statutory duty not to allow a buffalo to stray on the public road.

The principle of a noxal action does not apply to a mere capricious or unexpected act of an animal not in itself of a nature to cause damage.

THE facts appear from the judgment.

Cooray, for the appellant.

Croos-Dabrera (with him *Arulanandan*), for the respondent.

July 22, 1920. BERTRAM C.J.—

This is an interesting but very simple case. It is the case of some motorists coming along a public road and a stray buffalo crossing the road immediately in front of them. The chauffeur applies the brakes to avoid a collision. Unfortunately, the car is at a muddy or grassy spot. The car skids, and is propelled with some violence into a neighbouring ambalam, suffering considerable damage. The District Judge has found there was no negligence on the part of the defendant in the ordinary sense, but that, if there was any breach of any common law or statutory duty, he considers that the plaintiff was guilty of contributory negligence and so cannot recover.

First of all, in regard to the alleged negligence on the part of the defendant. The defendant was the owner of a buffalo, and it is suggested that it was negligence on his part to allow his buffalo to be on the public road. If there was any negligence, it must consist in a breach of a common law duty, for, at the time when this collision occurred, there was no statutory obligation for the owner of a buffalo to take measures to prevent his animal straying on the

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public road. Since the accident occurred there has been an amendment of the law. Section 94 (1) of the Road Ordinance, No. 10 of 1861, originally did not apply to buffaloes. By a subsequent amendment of the law introduced in the year 1918 the provision was extended to include all animals. That amendment has since been embodied in the new Local Government Ordinance, No. 11 of 1920, and by section 102 (1) of that Ordinance it is enacted, for the first time, in express terms, that "whosoever shall turn or suffer to be turned loose any buffalo . . . . or other animal on to or into any thoroughfare shall be guilty of an offence." That, however, was not the state of the law at the time of this occurrence. In the circumstances of this country, in agricultural districts buffaloes are allowed to stray freely into paddy fields, not under actual cultivation, and may make their way to the roads, and I do not think that, in view of the customs of the country, there was any obligation on the owner of this buffalo to keep it under restraint. I do not see, therefore, that the fact of this animal being upon the public road is in itself proof of negligence on the part of its owner. So far, therefore, as this action rests on this supposed negligence I think it must fail.

Mr. Cooray, who appeared for the appellant, attempted, as an alternative, to rest his case upon the principle which is expounded in *Voet 1, 9, 1*, namely, on the principle of the noxal action, and cited the case of *De Soysa v. Punchirala*.[1] He said that, independently of any question of negligence, if an animal belonging to any person does a wrongful act which causes damage, the owner of the animal is liable in damages to the extent at least of its value. He cited, however, no case in which that principle had been applied to an act which is not in the nature of an aggression. I do not think that that principle applies to a mere capricious or unexpected act of an animal not in itself of a nature to cause damage. No authority has been cited for the proposition, and from a cursory examination of the chapter in Voet it does not seem to me to cover such a case.

But even if we were to assume that there was any breach of duty on the part of the owner of the animal, or that he had a responsibility independently of any breach of duty, we have still to deal with the finding of the District Judge that there was contributory negligence on the part of the plaintiff. The District Judge himself visited the spot. He saw the place from which the car had skidded into the ambalam, and he realized by personal examination the extent of the damage done to the ambalam by the contact with the car. He was thus in a position to estimate the force with which the car was propelled into the ambalam. The District Judge uses certain expressions about furious driving which may not be fully justified by the evidence, and which, I think, are not necessary for

[1] *(1907) 10 N. L. R. 254.*

the purpose of his finding. His criticism of the driver seems to me to be rather too severe. But viewing the spot, seeing the fact that the accident took place at four-cross roads by a collection of boutiques where at the time a cart was standing, observing the force with which the car must have come into contact with the ambalam, he came to the conclusion that it would not have so come into contact with the ambalam if it had been travelling at a more moderate pace. He formed the opinion that the pace at which the car was travelling was not such as was justified by the local circumstances, that the driver ought to have slowed down when approaching the corner, and that as he failed to do so contributory negligence was proved. It does not seem to me that, apart from the expressions to which I have alluded, this finding of the District Judge is open to criticism. In my opinion the appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.