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PERERA *v.* THE UNITED PLANTERS' COMPANY OF CEYLON.

C. R., Colombo, 9,807.

Collision—Negligence—Contributory negligence—Damages.

In an action for damages on the ground of injury done to plaintiff's person and his carriage by defendant negligently allowing his carriage to collide with the plaintiff's, the general rule is that the plaintiff cannot succeed if it is found that he himself has been guilty of negligence or want of ordinary care which contributed to the cause of the accident.

But though plaintiff's negligence may have contributed to the accident, yet, if the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

ACTION for damages on the ground that on the night of the 16th June, 1899, as plaintiff was driving his pony cart from Regent street to Jail road in Colombo, a tram car driven by one of the servants of the defendant company along the Maradana road collided with the pony cart, causing injury to the plaintiff's person and to his pony, cart, and harness. The Jail road was a continuation of Regent street and the Maradana road intersected it at right angles. The plaintiff alleged that the collision was due " entirely to the recklessness and negligence of the driver of the tram car," inasmuch as he drove it at a very high speed and failed to ring the alarm bell of the car or give any other timely warning of its approach.

The defendant company denied recklessness and negligence on the part of its driver, and alleged that the accident was caused solely by the negligence and carelessness of the plaintiff himself.

The Commissioner found that either no bell was rung or the ringing was not audible enough to warn off people coming into the Maradana road from Regent street, but he held that, as the tram car and pony cart were making for the same point from two different directions, the liability to give warning was as much

on defendant as on plaintiff. He further held that the tram car was moving at its normal speed, and that the plaintiff was driving his pony at a fast trot : " He let a somewhat loose rein on the pony, " and when near the tramway he found he had gone too far to be " able to restrain the animal and prevent its getting on to the tram " line.....Plaintiff knew that tram cars frequently passed and " re-passed the level crossing, that there was much traffic there, " and that one had to be very careful in crossing the tramway there. " The head light of the tram car shed a light on the road about eight " yards in front, and who but one with an utter contempt for his own " safety would have led himself into such a predicament as that in " which the plaintiff ultimately found himself?" The Commissioner, relying on *Censura Forensis*, *2*, *14*, *36*, held that the rule of the road with regard to carriages giving way to one another was as follows: " The less are to give way to the greater; those " on foot, for instance, to those on horseback; those on horseback " again to those driving a vehicle; and of these the empty are to " make room for the laden ones, and so on." He was of opinion that it was the duty of the plaintiff to have exercised the utmost caution before crossing the tram line, and to have made way for the tram car. He therefore dismissed plaintiff's claim.

Plaintiff appealed.

Wendt, for appellant.

Dornhorst, for respondent.

BONSER, C.J.—

This is an action against the Tramway Company by the owner of a cart which was damaged in consequence of a collision between the cart and one of the tram cars. The collision occurred at 10 o'clock at night. The plaintiff's cart was being driven by his brother and was coming down Regent street where Regent street crosses the Maradana road. The tramway runs along the Maradana road, and it appears that where these two roads cross the tramway cars stop to take up passengers. The pony and cart were being driven rather fast, according to the evidence, and the tram car was also coming up very fast. It is stated that at nights the tram cars travel faster than they do during the daytime. The pony cart had all but crossed the line, but not quite. The tram car caught the end of the cart, and the evidence is that after the collision the tram car did not stop at once but pushed the cart along some distance. There is no doubt that it was pushed on for some considerable distance. The statement of the driver of the tram car that it was not pushed a single yard is contradicted by the other witnesses of the Tramway Company.

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The Commissioner held that the plaintiff was acting in defiance of the law and the ordinary dictates of reason and common sense. He evolved a principle of law from a passage in the *Censura Forensis*—a principle of law of general application, which was this: "It is the duty of the smaller vehicle of two vehicles crossing each other to get out of the way of the other." Now the passage from which he deduced that principle was one which has nothing to do with a case of this kind. Van Leeuwen is dealing with a very narrow road where two vehicles meet, the road being so narrow that the vehicles *could* not pass each other, and he says that the rule of common sense is that the vehicle which can get away more easily must give way. It has nothing to do in a case of two vehicles both of which are using the road broad enough for both. Therefore I think that the rule of law by which the Commissioner purports to have decided this case has no existence.

We are thrown back then upon the general law. It is admitted by Mr. Dornhorst that the Tramway Company has no special privileges for usage of the high road. The tramway cars have the same right to use the road as other vehicles, and no greater right. It cannot be maintained that the tram cars could travel along the roads without observing the precautions observed by other vehicles. It was said that the plaintiff had been guilty of negligence, and Mr. Dornhorst argued that if the plaintiff was shown to be guilty of negligence there was an end to his case.

As I understand it, the law of negligence in this Island does not differ from the law of England on this point, and I decide this case on that assumption. It was clearly laid down by the House of Lords in the case of *Radley v. The London North-Western Railway Company* (*1 App. Ca. 754*) that it was not sufficient to disentitle the plaintiff to succeed, to prove that if there had not been negligence on his part the accident would not have happen. Lord Penzance in that case said that there were two propositions which governed cases of this kind: "The first "proposition is a general one to this effect, that the plaintiff in an "action for negligence cannot succeed if it is found by the jury "that he has himself been guilty of any negligence or want of "ordinary care, which contributed to the cause of the accident. "But there is another proposition equally well established, and it "is a qualification upon the first, namely, that though the plaintiff "may have been guilty of negligence and although that negligence "may in fact have contributed to the accident, yet, if the defend- "ant could in the result by the exercise of ordinary care and "diligence have avoided the mischief which happened, the "plaintiff's negligence will not excuse him."

Now it may be that the plaintiff was guilty of negligence in driving across the tramway at a high speed and not slackening speed to see if a tram car was approaching. But, on the other hand, it may be said that this being an ordinary stopping place, he could not have anticipated that a tram car would have been rushing across that place at a high speed. Again, it is recognized to be the duty of the tram cars when approaching a crossing to ring the bell to give notice of their approach. There is some conflict of evidence as to whether the bell was rung or not on this occasion. The plaintiff and his brother, who were in the pony cart, swear that there was no bell rung. One of the defendant's witnesses, who was standing near the spot, says that he did not hear any bell. The inspector and the motor-man say that the bell was rung, but they did not agree as to the distance the car was from the junction where the bell was rung. The Commissioner came to the conclusion that the bell was not rung, at least not near enough to be audible to the plaintiff. If that was so, there was negligence on the part of the defendant, which directly contributed to the accident; but even if the plaintiff is guilty of negligence in driving on the tram line as he did, was the motor-man guilty of negligence in not pulling up so as to avoid the accident? Now the evidence of the motor-man is that he could pull up his car within three-quarters of a yard. If a proper look-out had been kept, the motor-man must have seen this horse and trap trying to cross the line. The corner is not a very sharp corner: a person coming along Maradana road could see some little distance into Regent street before actually arriving at the crossing. I cannot help coming to the conclusion that if a proper look-out had been kept and the motor-man had been doing his duty, the car could have been stopped and the collision avoided. The fact of the cart being pushed on for some distance shows that the motor-man had not proper control of his machine, and confirms me in my opinion that the accident was due primarily to the motor-man not pulling up promptly, and that therefore the defendants must be held liable.

I therefore reverse the judgment of the Court of Requests and enter judgment for the plaintiff. If the parties cannot agree as to the amount of the damages, the case must go back to the Court of Requests to assess damages.