1907.
July 8.

Present: Mr. Justice Wood Renton.

DE SOYSA *v.* PUNCHIRALA.

C.R., Kandy, 3,927.

Injury by animals—Actio de pauperie—*Negligence*—Culpa—Lex Aquilia—*Liability of owner*—Noxæ deditio—*Domestic animals*—*Animals of a ferocious disposition*—*Damages.*

WOOD RENTON J.—If damage is caused by an animal which is ordinarily of a gentle disposition, but which for the time being was acting *contra naturam*, the owner is liable by the mere fact of ownership, irrespective of the question whether he was negligent or not; and it is open to him either to pay the damages which the offending animal has caused, or to surrender the animal itself.

If the offending animal is by species of a fierce disposition (*genitalis feritas*), or, although domestic by species, of mischievous propensities (*calcitrosus; petere solitus*), the owner is liable under the *actio de pauperie* to pay the full amount of damages without the alternative of noxal surrender.

If there has been negligence on the part of the owner, he is liable to be sued by the *Lex Aquilia* for the full amount of the damages without the alternative of noxal surrender.

ACTION for damages. The facts material to the report sufficiently appear in the judgment.

R. L. Pereira, for the plaintiff, appellant.

Wadsworth, for the defendant, respondent.

Cur. adv. vult.

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8th July, 1907. WOOD RENTON J.—

I have come to the conclusion that the decree appealed against must be set aside and the case sent back for further inquiry and adjudication.

It seems to me that there are two grounds on which this conclusion is necessary. In the first place, I am unable to agree with the learned Commissioner of Requests that the damage alleged was too remote. It is perfectly clear that if negligence had been averred and proved against the owner, he would be liable for damage of this kind. It may quite well be that the injured bull exaggerated the seriousness of its injuries, and acted unreasonably in plunging over the precipice, which unfortunately was close at hand. At the same time, these circumstances, in my opinion, do not prevent the accident from being the natural result of what happened to the appellant's bull in this case. In support of this proposition I refer to the English case of *Halestrap v. Gregory*,[1] also to the local case of *Malhamy v. Mudalihamy*.[2] The presence of the precipice no more makes the damage complained of here too remote than that of the wire fence in the former of these cases or the passing train in the latter. I do not think this question depends on whether or not negligence is alleged. There does not seem to have been any allegation or proof of negligence in *Malhamy v. Mudalihamy*.[2] It appears to me, in the second place, that the case has not yet been framed in a form clearly indicating what are the real issues between the parties.

Sitting here as a single Judge, I cannot over-rule or question the law which has been laid down in the cases of *Folkard v. Anderson* [3] and *Thwaites v. Jackson*.[4] It is clear, therefore, that in a case of this kind the remedy open to the plaintiff must depend on the circumstances under which the injury was caused. If it was caused by an animal which is ordinarily of a gentle disposition, but which for the time being was acting *contra naturam*, the owner is liable by the mere fact of ownership, irrespective of the question whether he was negligent or not, and it is open to him either to pay the damages which the offending animal has caused, or to surrender the offending animal itself. This is one form of the *actio de pauperie (Inst.* 4, *tit.* 9; *Dig.* 9, *tit.* 1; and see 21, *tit.* 1; *Voet* 1, ix. *tit.* 1), and although an owner's liability for injury caused by an animal belonging to him, irrespective of his own *culpa*, has been held to be obsolete in South Africa (*Nathan* iii., *ss.* 1690–91), I at least am bound to hold on the authorities above mentioned (and *cf.* also *Jacobs v. Perera* [5]) that it is still in force in Ceylon.

On the other hand, if the animal is by species of a fierce disposition (*genitalis feritas*), or, although domestic by species, of mischievous propensities (*calcitrosus; petere solitus*), the owner must

[1] (1895) 1 *Q. B.* 561.
[2] *Ram.* (1876) 288.
[3] *Ram.* (1860) 68.
[4] (1895) 1 *N. L. R.* 154.
[5] (1876) 2 *N. L. R.* 115.

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still, under the *actio de pauperie*, bear the full damages (see *Duraya v. Kira*;[1] *Van Leuwan* 4, 39, 6; 2 *Kotzé* 323, 324). The same result follows under the Aquilian Law, *Dig.* 9, *tit.* 2; *Voet* 9, *tit.* 2, if there has been negligence on his part. In these latter cases the alternative of *noxæ deditio* does not arise.

It appears to me to be desirable that the plaintiff-appellant in this case should have the opportunity, if need be by the amendment of her plaint, of showing her opponent what are the precise facts which she alleges, and which of the alternative remedies that I have mentioned she actually claims. The litigation seems to be launched by the plaint as an *actio de pauperie*, in which mischievous disposition is alleged. But the evidence on that point is so meagre that, if it cannot be strengthened, the question would arise whether the case should not be treated as one of a domestic animal acting *contra naturam*, in which event the defendant-respondent would have the alternative of noxal surrender. There is no averment of negligence in the plaint, but the subject seems to have been touched upon in the argument. An allegation of negligence would bring the case under the Aquilian Law. It is in the interest of both parties that these issues should be placed clearly before the Court. I set aside the judgment and send the case back to the Court of Requests. It will be open to the appellant, if she is so advised, to amend her plaint, within any limit of time that the Commissioner may fix, for the purpose of showing whether the remedy that she claims against the respondent is by way of an *actio de pauperie*, in one of its alternative forms, or an action under the Aquilian Law.

The appellant shall have the costs of this appeal. The costs of all previous and subsequent proceedings herein shall abide the event.

Appeal allowed; case remanded.

1 (1904) 1 *Balasingham* 48.