1895.
July 24.

THWAITES *et al. v.* JACKSON.

C. R., Nuwara Eliya, 882.

Brute animal—Injury by hunting dogs—Liability of owner for damages—Direct and consequential damages.

The owner of a pack of hunting dogs, which killed a calf while standing loose on a high road, is liable in damages to the owner of the calf.

The damages may include not only the value of the calf, but also the loss of milk consequent upon the death of the calf.

Folkard v. Anderson (*Rámanáthan's Reports, 1862, p. 68*) commented upon.

Per BONSER, C.J.—There seems to be no justification for the proposition stated in *Folkard v. Anderson* that the amount of compensation should not exceed the value of the animal which caused the injury.

THE plaintiffs raised this action for the recovery of damages arising from the loss of a calf killed by some hounds belonging to the defendant. Plaintiffs claimed Rs. 20 as the value of the calf, and Rs. 80 for loss of milk and butter consequent upon the death of the calf.

The defendant pleaded that the plaintiffs were not entitled to maintain this action, and answering to the merits, averred that while he was exercising with all proper care and precaution the right of hunting with his hounds, the calf in question strayed on the road, crossing the trail or scent of the defendant's hounds, and was seized and killed by them, notwithstanding all his efforts to prevent it; that the plaintiffs by their negligence contributed towards the accident; and that he tendered Rs. 20 to the plaintiffs as the value of the calf, which they refused to accept. He denied that plaintiffs had suffered any other damage.

The Commissioner held that plaintiffs' action was maintainable in law, but dismissed it, being of opinion that "the first plaintiff "was in the wrong in allowing his calf to stray on to and along "a public highway untended, and the defendant was in his right "when he passed along the highway with his hounds coupled."

The plaintiffs appealed.

Dornhorst (*Jayewardene* with him), for appellant,—

The Commissioner is wrong in holding that the defendant is not liable in damages to the plaintiff for the injuries caused by his dogs.

The case of *Folkard v. Anderson* (*Rámanáthan, 1860–62, p. 68*) settles the question. The law is also stated in *Voet, IX. tit. 1, p. 538*; also in *Van Leeuwen's Commentaries, bk. IV. ch. 39, § 6.*

Bawa, for respondent,—

The defendant is not liable, because the calf was in a place where it ought not to have been, and the plaintiff contributed to the accident by which the injury was occasioned. The rule that the owner of a dog is liable for injuries which it caused to another's animal, whether or not the owner knew of the vicious propensities of the dog, must be taken with the limitation that the animal injured was lawfully at the place where it received the injury (*footnote at p. 324 of Kotze's translation of vol. II. of Van Leeuwen's Commentaries, edition of 1886*). The presence of the calf on the high road was a violation of section 94 of Ordinance No. 10 of 1861, it being an offence to turn loose an ox, horse, &c., on a high road.

24th July, 1895. BONSER, C.J.—

The facts are not really in dispute. The defendant is the owner of a pack of hounds : he had been out hunting with them, and was returning home in company with his brother with the hounds along the high road. On their way they passed the plaintiffs' house, which stands close to the road. The calf had strayed on the road ; the hounds seized it, and in spite of all the efforts of the defendant and his brother to prevent the hounds attacking the calf, tore it to pieces. The defendant, on finding out who the owner of the calf was, seems to have acted as a man of good feeling would act. Seeing that his hounds had caused the death of this calf, he wrote to the plaintiff and offered her Rs. 20, at which he estimated the value of the calf, and an apology for what had happened.

But it appears that the loss of the calf itself was not the only damage that resulted from the act of the hounds. The cow, the mother of the calf, which was giving milk, owing to the loss of the calf, suddenly ceased to give milk. It is stated to be a well known fact that in Ceylon milch kine, if they lose their calf, cease to give milk, and that therefore the death of the calf necessarily occasioned further damage by reason of the loss of milk. The plaintiff therefore declined to accept the Rs. 20 offered, and claimed an additional sum of Rs. 80 for loss of the milk.

I think that under the circumstances the loss of the milk was

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a natural and probable consequence of the death of the calf, and therefore, if the defendant was liable for the death of the calf, he must be liable for these further damages.

The question, therefore, which we have to consider is, whether the defendant is liable for the death of the calf. The law which governs the case of injuries caused by animals is the Roman-Dutch law, which differs from the English law. The law will be found stated in *Voet, bk. IX. tit. 1*, under the heading *Si quadrupes pauperiem fecisse dicatur*, and, shortly speaking, it is this, that if an animal of an ordinarily gentle disposition commits any damage without any fault on the part of its owner, or without any provocation on the part of the person or animal injured, the action *de pauperie* lies at the suit of the person injured or the owner of the animal injured, against the owner of the animal which inflicted the injury. That action is a noxal action, that is to say, it is open to the defendant, instead of paying the damage, to hand over the animal to the plaintiff in satisfaction of his claim ; but if he did not hand over the animal, he was liable to pay whatever damage was assessed. If, however, there was any fault on the part of the owner of the animal, if he had incited the animal to commit the injury, or if he had taken the animal to a place where it ought not to be, or if he had not held the animal in when another man might have done so, or was in any other way in fault, then the *actio de pauperie* would not lie, but he was liable under the *lex aquilia* to the full amount of the damage, and could not avail himself of the privilege of giving up the animal in compensation

In the present case, it was said that the defendant was not liable because the calf was wrongfully on the highway, and reliance was placed upon a note in the English translation of *Van Leeuwen's Commentaries of the Roman-Dutch Law, vol. II., p. 324*, where the translator, the Chief Justice of the Transvaal, who is an eminent jurist, limits the general proposition as stated in the text of *Van Leeuwen* by this qualification, that the animal injured was lawfully at the place where it was injured, and for this qualification he refers to a case decided by the High Court of the Cape Colony. Unfortunately we have not got a report of that case, which it is quite possible to give that qualification a meaning not inconsistent with the law laid down by *Van Leeuwen*. It may be that, if the injured animal was trespassing on the property of the owner of the animal which did the injury, the owner would not be liable. But the facts of this case show nothing of that kind. As far as the defendant was concerned, the calf was lawfully in the place where it was injured.

Then it was suggested that its presence on the road was unlawful under section 94 of the Ordinance No. 10 of 1861, which renders it an offence to turn loose, or suffer to be turned loose, any ox, sheep, or goat on any road, but this calf was not an ox, nor was there any evidence that it was turned, or suffered to be turned loose on the road.

Then it was suggested--and it was the ground apparently on which the Commissioner decided against the plaintiff—that the plaintiff was guilty of contributory neligence by allowing the calf to be on the road untended. It seems to me that this defence cannot avail the defendant. Assuming that there was negligence in not having the calf attended by some one, yet the negligence, if it is to be a defence, must be shown to have contributed directly to the death of the calf.

There is no evidence to show that, if some one had been there in charge of the calf, the hounds would not have killed it. If the defendant and his brother could not prevent the hounds from killing the calf, it is not likely that anybody else would have been able to prevent it. This defence, if valid, would lead to this result: that all persons must cease to use the high road for the passage of calves and such-like animals when the defendant's pack of hounds is likely to pass that way. That is a proposition which refutes itself.

I therefore hold that the defendant is liable for the death of this calf, and that he is liable to the amount of damages claimed by the plaintiff.

But as a matter of fact the question of the defendant's liability was never in dispute.

Two issues were framed by the Judge—first, did the action lie? which he decided in favour of the plaintiff; second, if it did lie, what was the amount of damages?

The only issue on which evidence was given was that as to the *quantum* of damages, and it appears to me that the Commissioner was wrong, after trying the question as to the *quantum* of damages, in turning round and dismissing the action without giving the parties an opportunity of adducing evidence on the issue of liability. In fact, he decided against the plaintiff without hearing her. The only evidence given for the plaintiff was evidence as to the amount of damages.

I may mention that in the case of *Folkard v. Anderson* (*Rámanáthan's Reports, 1860-62, p. 68*) the law on this subject of injuries by animals is fully laid down. There is, however, one statement in the judgment in that case which I think the authorities hardly support. It is there stated that the limit of

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the liability of an innocent owner is that the amount to be given for compensation must not exceed the value of the animal which did the injury. I doubt whether that is a correct statement of the law. My impression is that there is no such limit to the amount of compensation. It is the duty of the Court to award the amount of damages, whatever that may be, and the only way by which the defendant can escape the payment of the full amount of the damages is by surrendering the animal which caused the injury.