

KUTTALAM CHETTY v. VELU CHETTY.

C. R., Colombo, 14,065.

1902.
October 27
and 30, and
December 3.

Statutory duty—Neglect to perform—Damages to private person arising from such neglect—Failure to fence a well—Ordinance No. 27 of 1884, s. 3—Death by fall of bull into well—Right of owner of bull to claim damages.

Where a new duty is created by statute with a penalty for not performing it, the question whether a right of action is given by the creation of the new duty depends upon whether it appears from the terms of the statute that the intention was by the mere infliction of a penalty to protect the public and deter persons from committing breaches of the statutory duty, or to give a right of action to persons injured by the default complained of.

The Ordinance No. 27 of 1884, section 3, having imposed a duty upon the occupier of land on which a well is to cause it to be securely fenced and provided for a penalty for a breach of that duty,—

Held, that the owner of a bull which had fallen into and died in a well situated on a land which was occupied by the defendant, who had leased a portion of such land to the plaintiff, the owner of the bull, was entitled to recover damages from the defendant, he having failed to fulfil his duty imposed by law to fence the well.

THE facts of this case, and the authorities cited by counsel, appear in the judgment of the Court given below.

W. Pereira, for plaintiff, appellant.

Aserappa, for defendant, respondent.

Cur. adv. vult.

3rd December, 1902. MONCREIFF, J.—

The plaintiff sues for damages. The Judge finds that, if the defendant is liable, Rs. 75 is a fair sum to pay by way of damages. The plaintiff became the defendant's tenant in a part of premises sufficient to allow a chekku being turned; also in a cattle shed standing on the same premises, with the user of the open ground in the said premises. The use of the ground, which appears to have been for the benefit of his cattle, was enjoyed by the plaintiff in common with other persons, who were tenants of the defendant. The premises bear assessment No. 70, Silversmith street, Colombo. The defendant is the lessee of the premises; he is in possession of them, and occupies a house upon them. The plaintiff says that the defendant left open and unprotected a pit which had been dug for a chekku to be used by one Narayanan Chetty, who is also a tenant of the defendant, and that, in consequence of the negligence of the defendant, the plaintiff's bull fell into the pit and died. The Commissioner finds that the defendant did not dig the pit;

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Narayanan says that he dug it. If the case rested there, I should not interfere with the judgment of the Commissioner, which is in favour of the defendant.

We have, however, to consider the terms of Ordinance No. 27 of 1884, which the Commissioner passes by without comment. Section 3 of Ordinance No. 27 of 1884 imposes a duty upon the occupier of land upon which there may be now or at any time hereafter any well or artificial pit—whether he has or has not received notice under section 9, and whether the pit or well is in use or abandoned—“to cause the said well or artificial pit to be securely fenced to the height of two and a half feet above the level of the ground, unless any such well or artificial pit shall be so securely fenced already.”

By virtue of section 2 “the occupier” means the person in the actual occupation of the land, that is, in this case, the defendant.

The Ordinance is “to provide for the due protection of wells and artificial pits in this Colony.” The preamble recites that it is expedient to provide against accidents arising by reason of wells and artificial pits in this Colony being insufficiently fenced round or otherwise protected.

The Ordinance provides machinery for compelling the occupier to fence pits and wells in accordance with the duty imposed upon him, and section 13 provides for the infliction of a penalty for “a breach of any obligation imposed by this Ordinance.” The question is whether section 3 of the Ordinance created a duty for the non-performance of which the exaction of a penalty is the only remedy, or whether the duty is one which gives a right of action to persons who are injured by the neglect of those who commit breaches of obligations imposed by the Ordinance.

The older and somewhat conflicting authorities seem to have been discussed in *Atkinson v. Newcastle Waterworks Co.* (2 *Exch. Div.* 449), where it was laid down that, when a new duty is created by statute with a penalty for not performing it, the question whether a right of action is given by the creation of the new duty depends upon whether it appears from the terms of the statute that the intention was by the mere infliction of a penalty to protect the public and deter persons from committing breaches of the statutory duty, or to give a right of action to persons injured by the default complained of.

The answer to the question depends, according to Lord Cairns, upon what the particular statute is, and what the purview of the Legislature was.

The principle stated by Lord Cairns was followed in *Passmore v. Oswaldtwistle Council* (1898), *A. C.* 394, when Lord Halsbury

cited with approval the words of Lord Tenterden in *Doe v. Bridges* (1 B. & Ad. 859): "Where an act creates an obligation and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner." The same principle is followed in *Johnston & Co. v. Consumers' Gas Co.* (1898), A. C. 454, where, however, the words of Lord Cairns in *Atkinson v. Newcastle Waterworks Co.* are again adopted. Looking to the decisions in these cases, I think, with some diffidence, that I should not interfere with the Commissioner's judgment.

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