SOLLAMUTTU *v.* FRASER.

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October 3.

C. R., Colombo, 17,816.

Trespass—Careless and negligent driving—Damage to third party—inevitable accident.

The driver of the defendant's horse, which had been alarmed by the rattle of the shutters of a shop, could not rein in the animal, but was able to some extent to guide it while rushing down the road. If he allowed the horse to continue in the line it took, death would have ensued. The only alternative was to turn to the left and take the chance of passing between a tree and some carriages, among which was the plaintiff's carriage. The driver guided the horse in that direction, but it came violently into collision with the plaintiff's horse and carriage, killing the plaintiff's horse and injuring his carriage.

Held, in an action brought to recover damages, that plaintiff was entitled to succeed.

MONCREIFF, A.C.J.—All trespass is *primâ facie* actionable. There is no action where the plaintiff himself has caused the injury, or where the acts complained of are due to inevitable accident, by which is meant an act which is neither intentional nor negligent.

THE facts of this case, as well as the authorities cited by counsel, appear in the following judgment.

Bawa, for appellant.

Van Langenberg, for respondent.

3rd October, 1902. MONCREIFF, A.C.J.—

The defendant was driving his carriage in Colombo, when the rattling of some shutters in the Arcade, opposite the Grand Oriental Hotel, startled his horse. There is no reason to believe that the horse was an excitable animal; but the sound alarmed it on this occasion, and it rushed down the road in the direction of the jetty.

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The driver retained his presence of mind. He was unable to control the horse, but to some extent he could guide it. At a particular point of the road he had to choose between two evils. If he continued in his course, death would almost certainly have ensued. The alternative was to turn to the left. That he did, hoping he might pass between a tree and some carriages, amongst which was one belonging to the plaintiff. The learned Commissioner has examined the spot, and in his opinion the hope of the defendant was quite illusory, because no carriage could have passed through the intervening space. The defendant's horse and carriage came into violent collision with those of the plaintiff, killing the horse and doing injury to the carriage. Upon these materials the plaintiff sued, alleging that the incident took place in consequence of careless and negligent driving on the part of the defendant.

The Commissioner has found that there was no negligence on the part of the defendant, but he says that the defendant cannot be excused unless he is able to show that his act was unavoidable, inasmuch as the defendant might have continued on his course—he might have drawn the horse to the right, but elected to draw it to the left. So the Commissioner thought that the act was not unavoidable, and he gave judgment for the plaintiff.

The defendant says that the Commissioner's law is wrong. The matter was argued at some length in this Court. First, I was referred to *Voet 9, 1, 5*, where it is stated that, if a horse which is not in an excitable state and not of fierce disposition causes damage accidentally to a bystander, neither the owner nor any one else is liable to be sued, so long as he is not in fault. The subject is touched upon by *Van Leeuwen, vol. II., p. 322*, where the principle is stated that "he whose animal causes damage to another must make compensation, or deliver up the animal for the same." There appears to be some doubt whether that law prevails. Under the Code Civil the general principle is that a man is responsible for, or liable to be called upon to repair, the injury caused to another man through his fault. The word is *faute* (*id quod non jure fit*). There is a subsidiary article in the Code to the effect that the owner of an animal, or he who uses it, whilst he is so using it, is responsible for the damage the animal causes, whether it is under his charge, or whether it has escaped from it. That bald statement of the law is qualified by the jurisprudence of the French Courts, which lay down that there is a presumption against him, unless there is proof that the case is one of pure accident or that the

act was the result of *vis major*, or that it was due to some fault committed by the person injured. I quote that because it seems to me to be substantially the law which prevails in England. For some centuries the decisions of the English Courts were conflicting. But it seems to me that undoubtedly the general principle was that *primâ facie* a man was liable to be sued in trespass—at all events before the Judicature Act—for the wrongful act which he had committed. After a long series of decisions, which were not all to the same effect, in the last century (1803), we find Lord Ellenborough, C.J., in *Leame v. Bray* (*3 East. 599*), saying that it was immaterial whether the injury was wliful or not. The same Judge, seven years later, in the case of *Knapp v. Salisbury* (*2 Campbell, 500*), says: "This is an action of trespass. If what happened arose from inevitable accident or from the negligence of the plaintiff, to be sure, the defendant is not liable". Of course, if the plaintiff has been guilty of negligence, and has therefore really brought about the injury inflicted upon him, the act is not that of the defendant, and an action will not lie against him. Therefore, we put that case out of consideration. But we come to two later decisions which seem to bring the English cases to a point. One is *Holmes v. Mather* (*10 Exch. 268*), where Baron Bramwell said that "if the act that does an injury is an act of direct force, *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful.

The other case is *Stanley v. Powell* (*1891*), *1 Q. B., p. 93*, a case where a sportsman, firing at a passing pheasant, struck with a pellet, which had glanced off a tree, a man who was carrying his cartridges. The whole history of this subject is gone into by Denman, J., who said that the jury had negatived negligence on the part of the defendant, and so in that sense he was not liable; but he added that, even if that consideration of negligence was out of view, the injury was accidental, and the defendant was not liable. Now, these two decisions I believe to be correct in substance, although the statement of the law is somewhat turned upside down. I take it to be a principle of English Law that all trespass is *primâ facie* actionable; that there is no action where the plaintiff himself has been the cause of the injury; that there is no action where the acts complained of are due to an inevitable accident, that is, as I understand the meaning of the words, acts which are not intentional and are not negligent. All acts which

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are neither of these two things are accidental. If sufficient care is taken, and there is no intention to do any wrong, there is nothing against the defendant but a case of accident.

Now, the Commissioner in this case, while holding the defendant was not negligent, say that the act, although not intentional, although not negligent, was yet not inevitable. For the reasons I have stated I think that the learned Commissioner is mistaken, that if a person, exercising all skill and presence of mind which are possible under the circumstances in order to escape certain death, draws his carriage from one side to another, he is doing a thing which he cannot be blamed for doing, and that, if injury results to a bystander, the injury is due to accident which cannot be avoided. For these reasons I think the appeal in this case should be allowed.