Present: Schneider J.

1922.

SAIBO *v.* PERERA.

179—P. C. Kurunegala, 14,310.

Mischief—Shooting fowls trespassing on garden planted with vegetables—Law as to destruction and injuring of brute animals while committing trespass—Penal Code, s. 409.

It is mischief to inflict wanton injury upon an animal, the property of another, merely because it is trespassing upon premises.

Whenever a charge of mischief is preferred, before a Court can convict, it must be satisfied, not only that the injury had been inflicted, but that the facts and circumstances justify the inference of the presence of criminal intention or knowledge. Such an inference would not be justified unless they negative a reasonable inference that the act could be due to any other state of mind, such as accident, carelessness, or negligence, or *bona fide* belief in one's right . . . . . In every case the question has to be considered whether the act was done in the defence of some person's property. The nature of the damage which has been done, the kind of animal which was doing it, and other circumstances must needs be considered . . . . . In judging a man's state of mind in killing or injuring an animal, the valuable nature of the animal cannot be lost sight of. A person could hardly justify the destruction of an elephant, a horse, or a valuable cow, on the ground that he had done the act to protect a field under paddy, even if he has made an effort to drive it away. But, on the other hand, it is not as easy to keep pigeons or fowls from a plantation as other animals such as cattle, and if an accused person pleads that he had killed pigeons or fowls because he could not prevent them from damaging his crop of gram or other produce, it is obvious that he is not guilty of mischief, for the intention of the act seems clear that it was the protection of his property.

THE facts appear from the judgment.

Cader, for accused, appellant.—The Magistrate has found on the facts that the complainant's fowls " were making a nuisance of themselves " by entering the accused's garden and destroying the plantations. The accused had also put up a board giving warning that fowls found trespassing in his garden would be shot. The accused shot down the fowls, not with any malicious motive, but in defence of his own property. The case of *The King v. Menchohami*,[1] which the Police Magistrate has followed, applies to a different state of facts, viz., where the trespass was caused by a valuable animal which was going away from the land where the

[1] *(1906) 8 N. L. R. 309.*

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injury was inflicted. *Queen v. Sultan* [1] and the case reported in 5 *N. L. R. 23*, P. C. Panadure, 9,562, apply to similar facts. The local case directly in point is *Lowe v. Wasilino*,[2] in which it was held that the only remedy open to a complainant whose cow was shot dead whilst causing damage was a civil one. Mischief as defined by section 409 of the Penal Code corresponds to the "malicious injuries to property" as set out and defined by the English Statute, the Malicious Damages Act, 1861.[3] Cases under this Statute bring out the principle applicable to the facts proved in this case. *Smith v. Williams* [4] is directly in point. Counsel also cited *Daniel v. Jones*,[5] *Miles v. Hutchings*,[6] and *Bryon v. Eaton*.[7]

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The appellant was convicted of having committed mischief under section 409 of the Penal Code by shooting and killing two fowls belonging to the complainant, and was fined Rs. 25. He appeals. But he has no right of appeal, except upon a matter of law. Several statements are certified to in the petition of appeal as matters of law, but it would appear that the real matter of law involved in the appeal is the question whether upon the findings of fact arrived at by the Magistrate the offence of mischief is made out. What, then, are these facts?

The Magistrate holds that the accused is the owner of a garden planted with betel and vegetables, and that the complainant's fowls "were making a nuisance of themselves by frequently entering the accused's garden." He also accepts as proved that the accused had complained to the Police and to the Arachchi that fowls were constantly trespassing on his land. On the day preceding the shooting, he had actually put up a board giving warning that he would shoot fowls which entered his garden, and that people should not allow their fowls to trespass there.

In answer to the charge against him in this case, he admitted the shooting of the fowls, and said that he had shot them when they had entered his garden, and were actually committing damage.

Upon these facts the Magistrate thought the accused was guilty of mischief, because, instead of shooting them, he might have driven them away. The Magistrate was of opinion that the case of *The King v. Menchohami* [8] justified the conviction.

I am unable to agree with his views, and as there appears to be some misapprehension as to what constitutes mischief in the case of the destruction and injuring the brute animals while committing

[1] *(1896) 2 N. L. R. 162.*
[2] *(1890) 9 S. C. C. 109.*
[3] *See Gour, Penal Law of India, vol. II., 2nd ed., pp. 1983–1984.*
[4] *56 J. P. 840, 1892; 9 I. L. R., 9. See Mew's Digest, vol. IV., p. 1435.*
[5] *2 C. P. D. 351.*
[6] *(1903) 2 K. B. 714.*
[7] *(1875) 40 J. P. 213.*
[8] *(1906) 8 N. L. R. 309.*

trespass or damage, I think it would be useful to consider the question somewhat fully.

The matter for consideration divides itself into two distinct questions. First, the general one as to the right of a person to destroy or injure a brute animal which is trespassing on his land ; and secondly, in what circumstances such destruction or injuring constitutes the offence of mischief.

The first of these questions has been considered in four old decisions of this Court from the standpoint of the liability to pay damages for the act of destruction or injury. In the earliest of these cases (*Oongo Naide v. Machlacham*[1]), decided in 1863 by Creasy C.J. and Thomson J., it was assumed without any discussion that the law was settled that an action lay to recover damages for having shot and injured buffaloes when they were trespassing upon a coffee estate.

The next is an anonymous case reported at page 182 of *Vanderstraaten's Reports*, which was decided in 1871. A cow in attempting to enter a field under crop was caught in a noose set in the boundary fence of the field and killed. It was held that no claim for damages was sustainable. This judgment is of value, in that it states that as regards the general law on the subject the Supreme Court could find nothing either in the Kandyan (the case was from the Court of Requests of Galagedara in the Kandyan Province) or in the Dutch law writers expressly deciding the point. It cites a passage from *Voet*[2] as the only authority to be found on the point, and as stating "that if a person dig pits or set nets to catch bears or deer in pathways, and without giving notice, he is liable to action if any other person's animals shall fall into the pits or nets ; but not so if in a place, where it was usual to set such traps." The judgment indicates that in default of anything more express in the Kandyan and Dutch law resort may be had to the English law. It adopts the law as laid down by Gibbs C.J. in *Deane v. Clayton*,[3] which was an action for damages for injury done to plaintiff's dog when pursuing a hare in defendant's wood by a dog spear set there by defendant for the purpose of killing dogs in pursuit of game. The dictum is this: "I conceive that, as far, at least, as civil rights are concerned, every man may guard his own land by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others. One mode of guard is the setting up such defences as render it dangerous for the animals of others to pass over our lands, and if after this they endeavour to pass without right, it is at the peril of their master's, who do not keep them within their own bounds. What the defendant has done was on his own land, and could not molest any other man in the exercise of any legal right, I cannot think that he was bound to consider the degree of mischief which those guards so set upon his own land might occasion

[1] *Ram. (63–68) 67.* [2] *Lib ix., chapter 2.* [3] *7 Taunton 489.*

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either to beasts or dogs that wrongfully encroached upon him. The wrong is when those dogs are permitted to wander into defendant's land, and if they suffer by such means, as the defendant had used for excluding or stopping all such aggressors, the fault is their own." The judgment proceeds to point out that this dictium of the Chief Justice was approved and followed by the whole Court of Exchequer in the subsequent case of *Jardin v. Crump*.[1]

The next local case was that of *Wijesinghe v. Templer and another*[2] decided by Berwick J. in 1879. He held that no claim for damages was sustainable for the destruction of a dog by poison laid out for the destruction of stray dogs by a person in his own premises, the dog not having been enticed to its destruction by such poison. The learned Judge who decided this case has been regarded as specially learned in the Roman-Dutch law. In his judgment he followed the principle enunciated in the English cases of *Dean v. Clayton* and *Jardin v. Crump* (*supra*), which I have already referred to regarding them as cases expounding the law consonant with the principles of the Roman-Dutch law which governed the question.

The next case is *Carter v. Tothill*[3] decided in 1886 by Burnside C.J. It was an action to recover damages for shooting a dog while trespassing. The defence that the shooting was justified in that it had trespassed was held to be unsustainable in law. The learned Chief Justice refers to the more important cases decided locally up to that date and also to the English cases of *Vere v. Lord Cawdor*,[4] besides the other two English cases already mentioned. Upon a consideration of all those authorities, he deduces the principle to be that no person has a right to destroy the property of another because he was receiving or was likely to receive injury from it ; that the right only exists when the one person is unable by means less injurious to the other to protect himself, " as in the case, put by Lord Ellenborough, of a hare put in peril by a dog running after it inducing the necessity of killing the dog to save the hare." He cites the following doctrine of Gibbs C.J. in *Deane v. Clayton* (*supra*) as marking the distinction between the two classes of cases into which the subject could be divided : " It has also been said that because I could not justify killing or maiming dogs which were found wandering over my land without right, therefore I cannot justify the setting up a defence which is likely to produce the same effect. But the two cases are widely different. In the one, I make an immediate and direct attack upon the animals with no object in view, but their destruction, which I have no right to effect if they can be removed from my land by less violent means. In the other, I merely set up a guard against all wrong-doers generally. The primary object of this guard was protection to my property, but not mischief to others."

[1] *8 M. & W. 782.*
[2] *3 S. C. C. 1.*
[3] *7 S. C. C. 151.*
[4] *11 East 568.*

It would accordingly appear that from 1863 the law as stated in the judgment of Burnside C.J. was regarded as settled, and I will accept that to be the law.

I will now proceed to consider the second question, as to when it becomes mischief to shoot or injure brute animals when trespassing. There are three cases decided between 1890 and 1896, which might be regarded as forming one group. They are *Lowe v. Wasilino*,[1] *Ranghamy v. Bodia*,[2] *and Queen v. Sultan* (*supra*).

I must confess that I am unable to follow the law laid down in the cases of *Lowe v. Wasilino* and *Ranghamy v. Bodia* (*supra*) to the effect, respectively, that it was not mischief to shoot and kill a cow which had committed trespass and could not be noosed, or to cut a bull as it was escaping after committing trespass on a land. The law is not discussed in either case, and the facts stated in the judgments do not, in my opinion, if I may say so with all respect, warrant the holding that no mischief had been committed.

In the other case *Queen v. Sultan* (*supra*), it was held that it was not mischief to cut a buffalo with a katty after an ineffectual attempt to drive it out of a field into which it had trespassed, and while it was still treading down and eating the tender plants in the field. In deciding this case Withers J. refers to the definition of mischief in our Penal Code.

These three cases are referred to by Bonser C.J. in his judgment, also in an anonymous case decided by him in 1901, and reported at *page 23, vol. V., of the New Law Reports*. He said of them : "' I should be disposed, if it were necessary, to decline to follow them." I must say that I fail to understand why he included *Queen v. Sultan* (*supra*) in this condemnation, for it is quite distinguishable from the other two cases, and the decision is warranted by the facts and justified by what he himself held as constituting mischief, viz., the infliction of injury wantonly. In the anonymous case, he held that the accused was guilty of mischief, in that he had slashed with a knife and inflicted a cut on each of two cows which were trespassing on his paddy without having first made an attempt to secure them. He held that the meaning of the definition of mischief in the Code is that it is " a wrongful act to inflict wanton injury upon an animal which is the property of another person, merely because it is trespassing on your premises."

Next comes a case decided in 1899 by Lawrie J., also anonymous, which is reported at page 63 of *Koch's reports*. He refers to the above cases and others, but holds that it was mischief to kill or maim buffaloes, merely because they were trespassing and damaging a field without any attempt being made to drive them away. He says: "It is, I think, a well-established law that to kill or maim an animal when it is trespassing is not wrongful, if there be no other way of

[1] *(1890) 9 S. C. C. 109.*

[2] *(1893) 2 C. L. R. 176.*

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preventing the destruction of property, but that the mere fact that a beast is trespassing does not justify the killing of it. It must be proved that it was doing harm, and that there was no other way of getting rid of it. It seems to me that it would be mischief to shoot a valuable horse which had strayed into a pasture field, for even though it might be difficult to catch and secure it, it was in fact doing no harm, or only a harm which could be assessed at a small sum."

It was following the judgment of Bonser C.J., that Wendt J. in 1905 decided *The King v. Menchohami* (*supra*), which the Magistrate in this case regarded as an authority for convicting the accused. The facts of that case were these. A bull had trespassed on accused's garden and had damaged some coconut plants. It was chased by the accused and was going away, and would presumably have left the garden, when the accused hacked at it and cut it. He held that the accused was guilty of mischief. The reason for the decision is put thus : "The cut inflicted by the accused was, therefore, an injury caused without a previous ineffectual attempt to save the land from further damage."

The result then of these cases is that it is mischief to inflict wanton injury upon an animal, the property of another, merely because it is trespassing upon your premises.

It seems to me that this is too bald a statement of the law, and that it would be useful to look into the definition of mischief in our Penal Code, with a view to the consideration of how it should be applied to the facts of any particular case. The definition is clear that the mere doing of an act resulting in injury to property is insufficient to constitute the offence. Such an act may render the doer liable to an action for damages. To constitute the offence it is required that the act should be done by the person with the intention to cause, or with the knowledge that he is likely to cause, wrongful loss or damage that is, loss or damage by unlawful means (sections 21 and 408, Penal Code).

Mischief in our law is, therefore, analogous to "malicious injury to property" in the English criminal law. Cases decided in the English Courts would undoubtedly be of assistance to us in applying the law to a given set of facts. Counsel for the appellant cited three cases under section 41 of *24 and 25, Vict. c. 97*, which makes it a crime for any person to "unlawfully and maliciously kill, &c.," any dog, bird, beast, or any other animal.

The first of these was the case of *Smith v. Williams*,[1] in which according to *Mew's Digest* (vol. 4, p. 1435)—the report not being available to me—it was held that it was not obnoxious for a person to kill fowls which were trespassing after he had given warning to their owner. The reason given being that the killing was not "unlawful."

[1] *(1892) 9 T. L. R. 9.*

The second case was that of *Daniel v. James*,[1] where it was held that a person was not guilty under that law who had killed a dog by placing poisoned flesh in his garden for the purpose of destroying the dog which was in the habit of straying there. The *ratio decidendi* was that the act was done under an impression, whether right or wrong, that the person was justified in protecting his premises from a trespass by such means, especially after he had given notice.

The third case was *Miles v. Hutchings*,[2] where a game-keeper was held not guilty upon a charge of having shot and killed a dog while it was near an aviary, in which pheasents, the property of his master, were confined for breeding purposes. The learned Judges were of opinion that the test of the accused's liability was whether he acted under the *bona fide* belief that what he was doing was necessary for the protection of his master's property, and that it was the natural way in which property could be protected.

These cases are helpful as indicating that where malice is an ingredient of a crime, a person is not guilty who does the act under a *bona fide* belief that he is justified in doing it.

Now the requirements of our law of the presence of intention or knowledge suggests the question, as Gour says[3]: "Should it be actual intention or knowledge or such as may be presumed from the nature of the act." "Whenever criminality in the Code depends upon the presence of intention or knowledge, it requires proof of the actual or primary intention or knowledge, and not merely, of a presumed state of the mind which, though admissible in English law, is not consistent with the conception of crime in the Code.[4] But of course, while what the Court has to find is the primary intention, still the Court is well justified in inferring it from the nature of the act and the circumstances surrounding it. But what it has to find is the real and not a hypothetical intention or knowledge, though in most cases it is a matter of inference rather than of direct proof, as such it is a question of fact and not of law. But being a part of the definition of the offence, it must be established by the prosecution, who must establish facts and circumstances, from which the Jury or the Judge may justifiably infer the presence of the intention or knowledge which makes the injurious act criminal. Such act must then negative a reasonable inference that it could be due to any other state of the mind, such as accident, carelessness, or negligence, or *bona fide* belief in one's right."

It would appear, therefore, that whenever a charge of mischief is preferred, before a Court can convict, it must be satisfied not only that the injury had been inflicted, but that the facts and circumstances justify the inference of the presence of criminal intention or knowledge. Such an inference would not be justified, unless

[1] *C. & D. 351.*
[2] *(1903) L. R. 2 K. B. 714.*
[3] *Penal Code of India, section 4389, p. 1897 (2nd ed.).*
[4] *(1906) 8 N. L. R. 309.*

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they negative a reasonable inference that the act could be due to any other state of mind, such as accident, carelessness, or negligence, or *bona fide* belief in one's right. Illustrations of each of these states of the mind will be found in Gour. I would give these. A carter who in his endeavour to get out of the way of a car drives his cart into it and damages the car is not guilty of mischief. His act is due to stupidity. A person who neglects to take care of his cattle so that they trespass into a field under crop and damage the crop would not be guilty of mischief. His act is due to negligence. But if he had purposely driven the cattle into the field, it would be otherwise.

As regards *bona fide* belief, section 72 of the Penal Code must not be lost sight of. It enacts that "nothing is an offence which is done by any person who, by reason of a mistake of fact, and not by reason of a mistake of law, in good faith belives himself to be justified in law in doing it."

Gour cites the case of *Kaikhusro*,[1] as an illustration. The prosecutor was a tenant of B's employer. As the rent had fallen into arrear, B obtained a distress warrant, the execution of which was entrusted to A. A and B forced open the prosecutor's lock in the execution of the warrant, which neither had the right to do. It was held that they were not guilty, as not possessng the knowledge of causng wrongful loss. There is such a thing as the right of private defence of property. Its recognition underlies the English cases mentioned under the head of malicious injury to property. Our Code contains express provision in section 96 for its exercise in certain cases. The definition of mischief is so worded as to recognize the existence of this right. Hence in every case the question has to be considered whether the act was done in the defence of some person's property. The nature of the damage which has been done, the kind of animal which was doing it, and other circumstances must needs be considered.

According to the definition of animal in the Code (section 47), domesticated birds, like pigeons and fowls, are included within the term equally with such valuable animals as a horse, an elephant, a head of cattle, or a well-bred dog.

In judging a man's state of mind in killing or injuring an animal, the valuable nature of the animal cannot be lost sight of. A person could hardly justify the destruction of an elephant, a horse, or a valuable cow, on the ground that he had done the act to protect a field under paddy, even if he has made a effort to drive it away. But, on the other hand, it is not as easy to keep pigeons or fowls from a plantation as other animals, such as cattle, and if an accused person pleads that he had killed pigeons or fowls, because he could not prevent them from damaging his crop of grain or other produce, it is

[1] *(1898) B. U. C. 949.*

obvious that he is not guilty of mischief, for the intention of the act seems clear that it was the protection of his property.

In this case it is held by the Magistrate that the accused had suffered by the trespass of the fowls belonging to the complainant on many occasions, and that he had actually posted up a warning. He could do no more. The destruction of the fowls was done for the protection of his property, and not with the intention or knowledge of causing wrongful loss to the complainant.

I therefore set aside the conviction, and acquit the accused.

Set aside.