1942 *Present :* **Wijeyewardene J.**

AMERASINGHE *v.* DE SILVA.

177—C. R. Galle, 22,994.

Negligence—Action for damages—Collision between plaintiff's car and defendant's buggy—Proof of negligence—Onus.

Where, in an action to recover damages caused to the plaintiff's car by a collision with the defendant's buggy, plaintiff's evidence was to the effect that the defendant's driver was unable to control his bull, which suddenly swerved to the right and collided with the car ,—

Held, that, if the issue had been raised, the onus would have been on the defendant to rebut the presumption that the driver was acting in the course of his employment.

Held, further, that the plaintiff had failed to prove negligence on the part of the defendant's driver.

APPEAL from a judgment of the Commissioner of Requests, Galle.

E. B. Wickremanayake (with him *S. Mahadeva*), for plaintiff, appellant.

U. A. Jayasundera (with him *P. Malalgoda*), for defendant, respondent.

Cur. adv. vult.

November 27, 1942. WIJEYEWARDENE J.—

The plaintiff claimed in this action Rs. 275 as damages from the defendant. He stated that his car was damaged as the result of the

negligent driving of the defendant's buggy cart by her servant. The Commissioner dismissed the plaintiff's action without costs, holding that the plaintiff failed to prove—

(i) that the driver of the buggy cart was acting in the course of his employment on the day of the collision.

(ii) that the collision was due to the negligence of the defendant's servant.

As regards ground (i) of his judgment the Commissioner has misdirected himself. In the answer there was no plea that the driver of the cart was driven on that occasion by her driver. Under these circumstances, the onus, even where an issue had been raised, would have rested on the defendant to rebut the presumption that the driver was acting in the course of his employment. No specific issue was raised at the trial on that point. It was not disputed that the cart and the bull belonged to the defendant and the cart was driven on that occasion by her driver. Under these circumstances, the onus, even where an issue had been raised, would have rested on the defendant to rebut the presumption that the driver was acting in the course of his employment.

I am unable to hold that the Commissioner has erred in holding that the plaintiff has failed to prove negligence on the part of the defendant or her servant. The plaintiff's evidence on the point was :—

> "The buggy was coming very fast. It was coming on its correct side. When it was about 1½ fathoms away, it swerved across the road towards my car. Before the cart swerved I was still going at 15 miles per hour. When the buggy came near my car I slowed down as the buggy was coming very fast. When the buggy swerved towards my car, I swerved my car to the left . . . . The head of the bull struck the car . . . . Before the impact the carter was holding the reins tight . . . . When I first saw the cart I did not see that the bull was uncontrollable. It was going at a moderate pace. As it came near my car it swerved to its right . . . . When the buggy was 1½ fathoms away from me I thought it was travelling at a dangerous speed."

The defence led no evidence to explain how the collision took place.

The relevant facts of this case are hardly distinguishable from those in *Manzoni v. Douglas*[1], where a horse drawing a brougham under the care of the defendant's coachman bolted suddenly and in spite of the coachman's efforts swerved on to the pavement and injured the plaintiff. The evidence led in that case for the plaintiff was that "the brougham was coming at a tremendous speech" and that "the coachman was trying his hardest to stop the horse and he was not able to do so" and that "the horse seemed to lurch . . . . coming across the road". Without calling on the defence, the trial Judge dismissed the action, holding that there was no case to go to the Jury. In appeal, Lindley J. said :

> "The plaintiff was walking on the foot pavement of a public thoroughfare and was knocked down by a horse drawing the defendant's brougham. If the case had been left there, it might be that the defendant was liable for the negligent driving of the servant.

[1] *(1880) 6 Q. B. 145.*

But the explanation was given by the plaintiff's witnesses, viz., that the horse had bolted and the defendant's coachman had lost all control over it. We do not know what it was that caused the horse to bolt; and therefore we have no evidence that it was caused by the driver's negligence or want of care."

The correctness of that view does not appear to have been questioned in any subsequent decision, though doubts have been expressed regarding some of the dicta in the judgment of Lindley J. in *Manzoni v. Douglas* (*supra*).

I would dismiss the appeal. The respondent is entitled to her costs in this court.

Appeal dismissed.