

1957 Present : H. N. G. Fernando, J., and T. S. Fernando, J.

P. S. PERERA, Appellant, and H. JANIS PERERA, Respondent

S. C. 460—D. C. Panadura, 4,298

Delict—Irrigation headman—Seizure of cattle by him—His liability as bailee for reward—Burden of proof—Cattle Trespass Ordinance (Cap. 331), s. 7.

An Irrigation headman who takes charge of trespassing cattle in terms of section 7 of the Cattle Trespass Ordinance is in the position of a bailee for reward, and is liable to the owner of the cattle if, owing to absence of due diligence on his part, they are lost or stolen while they are in his custody. The onus is on him to prove that he exercised due diligence.

APPPEAL from a judgment of the District Court, Panadura.

Sir Lalita Rajapakse, Q.C., with *D. C. W. Wickramasekera*, for the plaintiff-appellant.

T. P. P. Goonetilleke, with *P. Somatilakam*, for the defendant-respondent.

Cur. adv. vult.

September 25, 1957. T. S. FERNANDO, J.—

This appeal raises the question of the nature of the liability of a headman towards an owner of cattle in respect of cattle taken charge of by him in terms of the Cattle Trespass Ordinance (Cap. 331), but lost while they are still in his custody. It has been stated at the Bar that there is no local case in which the nature and extent of this liability has been discussed.

The relevant facts may be summarised very briefly thus :—

The plaintiff had lent several buffaloes to a man called Babun to be used for the purpose of ploughing certain fields. Four of these buffaloes had been seized by one Jinoris on the allegation that they had got on to his lands and damaged his crops. Jinoris gave notice of seizure on 8th January 1954 to the defendant, the Vel Vidane of the area and an Irrigation headman within the meaning of section 7 of the Cattle Trespass Ordinance. The defendant, as he is required to do under the said Ordinance, went to Jinoris's land where the buffaloes were being detained and, with the aid of assessors, assessed the damage caused to Jinoris's crops; and, as the owner or owners of the buffaloes were not then known, took charge of the animals and had them brought over by about 7 p.m. that same evening to his own residing land. According to the defendant's evidence, which the District Judge has accepted, the animals were tied close to his house which was enclosed on all sides by barbed-wire fences. He retired to sleep, but at midnight he got up and looked through an open window of his bedroom and was able to see that the animals were still there where they had been tied on his land. He woke up again at 4 a.m. and looked out of his window only to discover that the animals had disappeared. He then found that the barbed wire had been cut at one place and he concluded rightly that the animals had been stolen from the premises. Babun, learning of the seizure of the buffaloes, came in search of them to the house of the defendant on the 9th January, but by the time he came the buffaloes had, of course, been stolen. There has since been no trace of these stolen buffaloes.

The learned District Judge has stated correctly that the question for decision is whether the buffaloes, while being in the custody of the defendant, were lost or stolen by reason of the negligence of the defendant. He has, in the course of his judgment, referred to certain relevant Roman-Dutch law authorities, but has dismissed the plaintiff's action on the ground that the defendant has not been negligent in any degree in looking after the buffaloes while they were in his custody. The loss of the buffaloes, according to the learned Judge, was occasioned by an act beyond the defendant's control.

If a Government officer fails to perform what is ordinarily part of his duty or what he has specially undertaken to perform, he will be held answerable for his negligence—see Nathan's Common Law of South Africa, Vol. III, page 1718. The liability of a person for doing negligently a thing which he is legally under a duty to do is formulated in the same treatise, at page 1744, as follows :—

“ It has been shown that, in the law of contract, the degree of negligence which is required in order to render a man liable varies according to the special contract which is in question, such as sale, lease, agency or bailment. In the law of torts no such careful distinction is made. If a duty is by law imposed on a person to do a thing, and he performs his duty negligently, and thereby injures another, he is liable even if he was guilty of slight negligence only. . . . Consequently, in the law of torts, it is sufficient if there has been a want of due

diligence on the part of the person charged with negligence. There must be just sufficient proof to indicate that the damage complained of arose from negligence, and not from mere accident."

In Nathan's Law of Torts (1921 ed.), at page 266, the learned author, discussing the liability of a poundmaster, states that "a poundmaster by virtue of his office has the duty imposed upon him of taking care of all animals impounded and entrusted to him. He has to obey all statutory regulations with regard to pounds. In addition, his position at common law is that of a *bailee for reward*, who must take the utmost care of what is entrusted to him. If a poundmaster deals with animals entrusted to him in the manner in which such animals are ordinarily and customarily dealt with, and during the course of such dealing injury results to the animals *without negligence on his part*, he is not liable But the poundmaster must exercise a high degree of diligence, and the onus is upon him to disprove even the slightest negligence on his part in dealing with the property in his custody."

The defendant, as a headman of the class referred to in section 7 of the Cattle Trespass Ordinance, was entitled to the fair and reasonable costs and charges for keeping the buffaloes during their detention, and, in my opinion, there is no reason why his position should not be regarded as being analogous to that of a bailee for reward. The nature of the liability of a bailee for reward is stated also in Wille's Principles of South African Law (4th ed., 1956) at page 427 as follows:—

"If the deposit is for reward, it is clear that the depositary is liable for any degree of negligence, unless by express agreement the property is stored at 'owner's risk'. If the depositary does not return the property at all, or if he returns it in a damaged condition, the onus is on him to prove, by a preponderance of probability, that the loss or damage was occasioned despite the exercise by him of due diligence, whether the contract is gratuitous or for reward."

There is no definite test in all cases to show whether a person has been guilty of negligence. The question whether a person has been negligent or not will depend on the circumstances of the particular case. In this case, the defendant brought the buffaloes and tied them near his house. What care did he take of them? He stated that he tied them close to his house and retired to sleep. He stated that he had asked a man to sleep on the verandah of his house as was his custom when he detained any animal in his premises. This man has not been called as a witness. We do not know whether he watched the animals at night; we are entitled to assume, on the defendant's own evidence, that all this man did was to sleep on the verandah. A watcher can hardly be said to have been on watching duty if he was actually sleeping. As learned counsel for the plaintiff pithily put it, a watcher's duty is to watch and not to sleep. The defendant himself had had a busy day on 7th January in connection with an application he had made to be appointed a Village Headman, and he has been busy on 8th January as well. In these circumstances it is not unlikely that the defendant himself was enjoying a well-earned sleep on the night of the 8th January! But even on an

acceptance of his evidence it can scarcely be contended that the defendant's own conduct in getting up once that night—at about midnight—constituted the exercise of due diligence in preventing the loss of the animals.

I am unable to resist the conclusion that the loss of the animals was occasioned by an absence of due diligence on the part of the defendant.

The plaintiff's evidence that the buffaloes are worth Rs. 800 was not contested. I would therefore set aside the decree dismissing the plaintiff's action and direct that judgment be entered for the plaintiff in a sum of Rs. 800 with costs in both courts.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.

