1970 *Present :* Alles, J.

Mrs. B. NAMASIVAYAM, Appellant, *and* U. G. HEEN BANDA, Respondent

S. C. 17/68—C. R. Colombo, 94365

Delict—Non-mischievous animal—Mischief done by it—Liability of owner—Roman-Dutch law—Pauperian action—Noxal surrender—Obsoleteness of doctrine.

The plaintiff, while he was walking quietly along a lane, was bitten by the defendant's dog near the house of the defendant. There was no evidence to indicate that the dog was of mischievous habits with a tendency to attack innocent pedestrians. The plaintiff was awarded Rs. 500 by the trial Court as compensation for the injuries suffered by him. The defendant-appellant conceded that the sum of Rs. 500 was a fair compensation but submitted that under the law of Ceylon she was entitled to be permitted, alternatively, to surrender the dog or its value to the plaintiff.

***Held*, that although the pauperian action is available in Ceylon and the owner of the animal is liable for the full amount of the damage as compensation, the right of the owner to surrender the offending animal in lieu of paying damages (*noxae deditio*) is no part of our law today.**

APPEAL from a judgment of the Court of Requests, Colombo.

S. Sharvananda, for the defendant-appellant.

F. N. D. Jayasuriya, for the plaintiff-respondent.

Cur. adv. vult.

June 5, 1970. ALLES, J.—

This appeal raises interesting questions relating to the extent of a dog owner's liability for injuries caused by his animal to an innocent pedestrian.

The plaintiff was a car driver employed under Mr. Shelton Silva of Milagiriya Lane, Bambalapitiya. On the morning of 26th May 1966 he was on his way along Milagiriya Lane to a boutique to buy a newspaper, when the defendant's dog came out of her house and to use his own words " hung on to his hand " ; he shook it off and then the dog jumped at him and attacked him. He struggled with the dog in an endeavour to hold its head but the dog shook him off and bit him again. On raising cries the defendant's driver came on the scene but did not interfere fearing that he too would be bitten. Thereafter the defendant's driver brought a chain, tied the dog and led him away. The plaintiff had extensive injuries on his hands which prevented him from driving a car for three months ; he had to take treatment at the Medical Research Institute and spent a considerable sum on medicines. The learned Commissioner has granted to the plaintiff a sum of Rs. 500, which was the full amount of the compensation claimed by him in his plaint. Learned Counsel for the appellant does not canvass the findings of fact nor does he dispute that the sum of Rs. 500 was a fair compensation for the injuries caused to the plaintiff, but he submitted that under the law of Ceylon he was entitled to the alternative remedy of surrendering the dog or its value. The learned Commissioner has held on the evidence that the dog bit the plaintiff without any provocation but there was no evidence to indicate that the dog was of mischievous habits with a tendency to attack pedestrians.

In the Roman law there were three actions by which compensation could be claimed for damages caused by a dog, the earliest of which was the *Actio de pauperie*. *Pauperies* meant damage done without legal wrong on the part of the doer—*damnum sine injuria facientis datum*. An animal could do no legal wrong because it had no reason. It was only mischief done by animals therefore, which constituted *pauperies*. The action gave relief against the owner of a domesticated animal which acted viciously or from inward excitement contrary to the nature of its class. The basis of liability was *ownership*.

The Aedilitian action prohibited the bringing or keeping of certain animals on a public place or thoroughfare, either loose or so chained as not to prevent their doing harm. It was founded on *culpa* in its wide sense, but not on *culpa* in the sense of negligence. The Aquilian action dealt with damage due to the legal wrong of the doer—*damnum injuria datum*—but such damage might be due to negligence as well as to intent. It covered cases where the harm done by an animal resulted from the negligence of a man. It is not alleged in this case that the defendant was liable on the basis of *culpa* and it is not the case for the plaintiff that there was any negligence on the part of the defendant. Nor is it claimed that the Aedilitian action has any application to the facts of this case. In the leading case of *O'Callaghan v. Chaplin* [1] the majority of the Court (Innes, C.J., de Villiers, J.A., Kotze, J.A. and Stratford, A.J.A.) held that *noxae deditio* or the surrender of the animal was not a portion of the Roman Dutch law in force in South Africa. In doing so they followed the view expressed earlier by Villiers C.J. in *Parker v. Reed* [2] but the Court held that the decision in *Parker v. Reed* (supra) went too far when it further decided that as a necessary consequence, the liability of an owner for damage done by his tame animals *contra naturam sui generis* was also not a portion of the Roman Dutch law. Wessels J.A. however who delivered the dissenting judgment stated that the principle of liability was based on *culpa* and not ownership. Said he in the concluding portion of his judgment :—

> "If a person keeps a dog he ought in law to be held to know the character of the animal. Some breeds are notoriously apt to be or become vicious, and this the owner ought to know. If he keeps such a dog he ought to keep it under control and if he fails to do so, he must be presumed to be negligent. It is difficult to lay down any hard and fast rule as to when there is *culpa* on the part of an owner or custodian of a dog and when not, though by our law a plaintiff need not allege and prove that the owner knew that his dog is vicious."

In *O'Callaghan v. Chaplin* there was an exhaustive analysis of the opinions of the Roman Dutch Law jurists of the 17th and 18th century by the learned Chief Justice of South Africa and Kotze J. A. and the ultimate view taken was that although the doctrine of noxal surrender had become obsolete, the law relating to *pauperies* was still in force in South Africa. The decision in *O'Callaghan v. Chaplin* was approved and applied in *S.A.R. v. Edwards* (1930) A.D. 3 at pp. 9, 10 (De Villiers C.J., Wessels J.A., and Curlewis J.A.). De Villiers C.J. and Wessels J. A. sat on the Bench in the earlier case of *O'Callaghan v. Chaplin*. De Villiers C.J. with whom the other two Judges concurred held that the *Actio de pauperie* was in full force in South Africa but that the right to surrender the offending animal in lieu of paying damages (*noxae deditio*) was obsolete.

[1] *(1927) A. D. 310.*

[2] *(1904) 21 S. C. R. 496.*

At pp. 9 and 10 he stated as follows :—

"The action lies against the owner in respect of harm (*pauperies*) done by domesticated animals, such, for instance, as horses, mules, cattle, dogs, acting from inward excitement (*sponte feritate commota*). If the animal does damage from inward excitement or, as it is also called, from vice, it is said to act *contra naturam sui generis*; its behaviour is not considered such as is usual with a well behaved animal of the kind."

The latest edition of McKerron on The Law of Delict (1965) p. 238 has regarded the law on the subject as being now settled in South Africa after the decisions in *O'Callaghan v. Chaplin* and *S. A. R. v. Edwards.*

A consideration of the law in South Africa is necessary in order to appreciate the corresponding law in our country and decide to what extent the pauperian action has been introduced into Ceylon. Indeed it was the submission of learned Counsel for the appellant that in the absence of any authority to the contrary, the *actio de pauperie* in its purest form as it was understood in the Roman law was applicable to Ceylon and that his client was entitled to the alternative remedy of noxal surrender or payment of the value of the animal.

I shall first deal with our local decisions before expressing my reasons for adopting the same view that found favour with the eminent Judges who sat on the Bench in *O'Callaghan v. Chaplin* and *S. A. R. v. Edwards.* In 1860 in *Folkard v. Anderson*[1] in an action brought by the plaintiff for injuries caused to him by the defendant's dogs the Commissioner dismissed the action holding that proof of the dogs' mischievous habits (technically called proof of *scienter)* was indispensable for the plaintiff's right to a verdict ; this would have been correct according to the English law where proof of *scienter* was necessary before an owner can be held liable but the Judges (Creasy C.J. and Morgan J.) held that the English doctrine of *scienter* had no application to our law. After dealing with the Roman and Dutch law in brief the Judges considered it desirable to state the law applicable to the administration of justice in Ceylon in the following terms :—

"Where a man's brute animal does an injury to another person (such injury not being done through mere accident, and not being provoked and caused by the wrongful act of the injured party, and not being immediately caused by the wilful act of a third person), the owner is always liable. But the owner's liability is limited if the animal were not of a genus naturally savage, and if also the individual animal were not of mischievous habits. The limit of the liability of such an innocent owner is this, the amount to be given for compensation must not exceed the value of the animal which did the injury. But if the animal were of a savage *genus*, or if though not of a savage

[1] *(1860-62) Ramanathan's Reports, p. 68.*

genus, it were of mischievous habits, whether the owner knew those habits or not, tho owner must make full compensation for tho injury done by the animal, and cannot limit the damages to bo assessed against him by the amount of the animal's value.

There may be cases in which animals not mischievous by *genus* or by habit, may be kept in such places and under such circumstance as to make them dangerous to the public. If in such cases injury is done by such animals, the owner is liable to make full compensation. "

Applying these principles to the case under consideration they hold that tho plaintiff was entitled to full compensation because there was abundant evidence that the dogs were of mischievous habits.

In *Jacobs v. Perera*[1] the plaintiff, a locomotive foreman, was attacked and bitten by the defendant's dog near its master's house when the plaintiff was quietly going along a public road to his daily avocations and without his having given the dog any provocation. The case came up for trial before Berwick, District Judge of Colombo, a keen student of the Roman-Dutch law. Berwick's judgment in the District Court is reproduced in the New Law Reports and makes interesting reading. He held, on a question of fact, that it was not established in evidence that the dog was one of mischievous habits. " If it was so ", said Berwick " there can be no doubt that the owner was guilty of, and responsible for, fault or negligence in allowing the animal to be loose on the public road, and must pay the whole value of the damage occasioned ; and he cannot evade this liability by either giving up the animal or its mere value ; our Roman-Dutch Law having preserved, with only a few modifications, the spirit of the Roman Law on the subject as contained in the titles " (he thereupon cites the relevant titles) " and this has been expressly recognised by our Supreme Court in the case of *Folkard v. Anderson* ". Berwick here deals with the liability for *culpa* under the *Lex Aquilia* and also with the *Actio de pauperie*. Continuing with his judgment Berwick deals with the proposition laid down in *Folkard v. Anderson* that the liability was limited to the *value of the animal* which did the injury and states that this observation of the learned Judges was *obiter* because there was a finding in the case that the dogs were of mischievous habits. He further contends that this proposition was not supported by the Roman law, where the rule was to condemn the defendant in the noxal action to pay the full damage or surrender the *noxa*, as it was called and be then absolved from further liability ; and he had his choice which of these he would do. There is not a word in the Roman law about his paying the value of the animal. Berwick supports his view from Voet and states that the texts draw a distinction between the word " *noxa* " which means the delinquent corpus and " *noxia* " which means the damage done. Berwick's ultimate finding was that the plaintiff should pay the full compensation decreed unless he forthwith *surrender to the plaintiff the*

[1] *(1876) 2 N. L. R. 115.*

dog in question, in which case he will be discharged from further liability. He was not bound to pay the value of the animal. When the case came up before a Divisional Bench of three Judges (Anderson C.J., Stewart, and Clarence JJ.) the Court took the view on the facts, overruling Berwick, that it was established in evidence that the dog was of "mischievous habits" and consequently granted the plaintiff full compensation. In this view of the facts the Court considered it unnecessary to decide the further question whether it was open on the pleadings for the plaintiff to claim that he was entitled to full compensation or whether the alternative remedy of noxal surrender was available to the defendant. However, the decision is authority for the proposition that the pauperian action was part of our law. In the penultimate paragraph of the judgment, the Supreme Court appears to have approved the statement of the law laid down in *Folkard v. Anderson* when it stated that " the Supreme Court in dealing with the legislation of Rome and Holland on the subject as applicable to Ceylon, put the value of the animal in the place of the animal itself. ". There has, however, been no detailed examination of the law cited by Berwick who came to the conclusion that the law was otherwise. Indeed in the later case of *Thwaites v. Jackson*[1] Bonser, C.J., after holding that the *actio de pauperie* was available in Ceylon and after stating that the law on the subject of injuries by animals has been fully laid down in *Folkard v. Anderson*, added at p. 158 that—

> " There is, however, one statement in the judgment in that case which I think the authorities hardly support. It is there stated that the limit of the liability of an innocent owner is that the amount to be given for compensation must not exceed the value of the animal which did the injury. I doubt whether that is a correct statement of the law. My impression is that there is no such limit to the amount of compensation. It is the duty of the Court to award the amount of damages, whatever that may be, and the only way by which the defendant can escape the payment of the full amount of the damages is by surrendering the animal which caused the injury."

Bonser C.J.'s view supports Berwick D.J.'s criticism of the statement of the law in *Folkard v. Anderson* and that statement of the law must therefore be subject to the infirmity that it does not correctly state the law on the subject.

In *De Soysa v. Punchirala*[2] Wood Renton J., sitting as a single Judge, felt himself bound by the statement of the law in *Folkard v. Anderson* and the decisions in *Thwaites v. Jackson* and *Jacobs v. Perera* and made the following observations :—

> " If it (the injury) was caused by an animal which is ordinarily of a gentle disposition, but which for the time being was acting *contra naturam*, the owner is liable by the mere fact of ownership, irrespective of the question whether he was negligent or not, and it is open to him

[1] *(1895) 1 N. L. R. 154.*

[2] *(1907) 10 N. L. R. 254.*

either to pay the damages which the offending animal has caused, or to surrender the offending animal itself. This is one form of the *actio de pauperie* (Inst. 4, tit. 9 ; Dig. 9, tit. 1 ; and see 21, tit. 1 ; Voet 1, ix. tit. 1), and although an owner's liability for injury caused by an animal belonging to him, irrespective of his own *culpa*, has been held to be obsolete in South Africa (Nathan iii., ss. 1690–1691), I at least am bound to hold on the authorities above mentioned (and cf. also *Jacobs v. Perera*) that it is still in force in Ceylon."

Therefore the law of Ceylon as it stood in 1907 would appear to have recognised the liability of the owner of the animal under the *actio de pauperie* coupled with the liability to surrender the offending animal, but not its value, in the case of an animal of gentle disposition which acts *contra naturam* in causing injuries to a person.

The question that presently arises is whether we in Ceylon in the year 1970 should yet be bound by the law laid down over a hundred years ago in *Folkard v. Anderson*. There are several reasons for taking the view that the statement of the law laid down in *Folkard v. Anderson* has no binding force. We are dealing in the instant case with non-mischievous animals whereas, as stated by Berwick in *Jacobs v. Perera*, the dogs in *Folkard v. Anderson* were found to be dogs of mischievous habits and the "opinion therefore as to the nature of the liability in the case of non-mischievous habits was a mere *obiter dictum*, and given in a solitary case." Berwick therefore felt himself justified in considering the question of law an open one ; it has been established that the statement of the law to the effect that the liability was limited to the value of the dog was not justified, a view that has been endorsed by Sir John Bonser in *Thwaites v. Jackson* and finally, the statement having been made over hundred years ago, it is relevant to consider whether this principle has any practical effect today.

With all respect to Wood Renton J., I am of the view that it was open to him, if he thought that the law in relation to noxal surrender was obsolete, to take such a view in *De Soysa v. Punchirala*. The decisions in *Thwaites v. Jackson* and *Jacobs v. Perera* were decisions of a single Judge and as I have already indicated the statement of the law in *Folkard v. Anderson* did not have the binding force which Wood Renton J. thought it had in 1907 and certainly today in 1970 the statement is of lesser efficacy than it was over 60 years ago. In *Winter v. Mudiyanse*[1] Counsel for the appellant sought to rest his case on the principle of the noxal action and cited *De Soysa v. Punchirala* but Bertram C.J. expressed the view that the principle did not apply to a mere capricious or unexpected act of an animal which caused damage. The learned Chief Justice had no occasion therefore to consider whether the action itself was obsolete and no argument was presented to him on such a view.

[1] *(1920) 22 N. L. R. 153.*

I agree with Counsel for the appellant that if the statement of the law in *Folkard v. Anderson* was binding on me, I would have to hold that the doctrine of noxal surrender was part of our law, but in view of the observations I have made about that case, and fortified as I am by the view taken by such an eminent Roman Dutch scholar as Berwick, I feel that it is open to this Court to consider whether, today, the doctrine of noxal surrender should form part of our law.

In *Parker v. Reed* De Villiers C.J. has given very cogent reasons why in 1904 the doctrine of noxal surrender has become obsolete in the Cape Colony. He traces the history of the action in Roman-Dutch Law and concedes that it was introduced into the colony, but is doubtful whether the action is still maintainable in the Courts of the Colony. Said he at pp. 502, 503—

"In every case in which the owner of an animal has been held liable in this colony for mischief done by it, there has been proof of some degree of *culpa*, rendering the owner liable under the Aquilian law, rather than under the Law of the Twelve Tables. In no case has the owner tendered to surrender the offending animal, in order by that means to escape liability. It goes without saying that in a pastoral country like this cases of injury done by animals to each other or to human beings without any fault on the part of their owners, must be a matter of very frequent occurrence. The fact that the persons injured have never sought to recover damages without, at all events, alleging negligence or circumstances from which *culpa* might be inferred, and the further fact that persons whose animals did the mischief have never attempted to escape further liability by surrendering such animals, go far to prove a general custom which is inconsistent with the rule of the Roman law. Not only is there no reported case in which any South African Court has recognised that rule, but there are several *dicta* of our judges which are somewhat at variance with the rule."

....."The liability followed the animal or the slave, as the case might be, and only attached to the owner so long as he remained the owner. It was a primitive law which is hardly consistent with modern notions regarding the nature of animals, and their relations to their owners and others than owners. If that law were still in force, some extraordinary results might follow. Supposing, for instance, a valuable horse were causelessly and contrary to its usual habits to commit a serious injury, and were then sold at a high price to a person who had never heard of the injury. The purchaser would be liable in damages to the person injured, unless he were prepared to surrender the animal. The seller may have spent the money, or left the country, and purchaser would find that with the horse he had purchased a liability, which he could only get rid of by getting rid of the horse also. If such is still the law, it must, of course, be enforced, but it appears to me fairly to fall within the principles laid down in the case of *Seavill v.*

Colley (9 Juta, 39). The presumption is that the law relating to *pauperies* is still in force, but this presumption cannot prevail in the absence of any recognition, judicial or otherwise, of the existence of such a law, and in the face of repeated decisions, which require proof of some degree of *culpa* in order to attach liability to the ownership, custody, or use of property."

These observations might well apply to the conditions in Ceylon. There is no case in Ceylon where the principle of the *noxae deditio* has been applied in spite of dicta in the judgments already cited which maintain that this alternative remedy is available under our law. Furthermore if one of that breed of the canine species which is popularly known as a "rice hound" were to cause serious injury to a person which entails heavy and expensive medical treatment for a considerable period, it would be farcical if the owner of the animal was able to discharge his liability by the expedient of offering to surrender such an animal. It can hardly be urged that by surrendering the offending animal the equities of the situation have been satisfied.

The question whether the action has fallen into desuetude depends on the principle stated in *Scaville v. Colley* [1] referred to in the judgment of De Villiers J. in *Parker v. Reed* :—

> "The presumption is that every one of these laws, if not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognised and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse."

These observations apply with equal force to the position of the law in Ceylon and it may fairly be assumed that the law relating to noxal surrender in Ceylon has now fallen into desuetude.

I therefore think that learned Counsel's contention that his client should have been permitted, if he so wished, to surrender the dog to the plaintiff as an alternative remedy has no foundation either on the principles of common sense or the development of the law in Ceylon. Although the pauperian action is available in Ceylon and the owner of the animal is liable for the full amount of the damage as compensation, the alternative remedy of the noxal surrender is no part of our law. The appeal is therefore dismissed with costs.

Appeal dismissed.

[1] *9 S. C. p. 39 at p. 44.*