

Present: Wood Renton J.

1913.

AIYAMPILLAI v. VAIRAVANATHA KURRUKEL et al.

21 and 22—C. R. Jaffna, 9,479.

Action to recover damages done by several dogs—One action against all the owners of dogs—Misjoinder—Civil Procedure Code, s. 14.

Plaintiff brought this action to recover the value of 24 sheep which, he alleged, were killed at the same time by several dogs owned (not jointly) by various persons, and joined the several owners as defendants in this action.

Held, that the defendants should not have been sued in one action.

THE facts appear from the judgment.

Wadsworth, for first defendant, appellant, in appeal No. 21.—The defendants should not have been joined in one action. They were admittedly not joint owners of the dogs. The cause of action is not one and the same against all the defendants. (*Appuhami v. Marthelis*,¹ *Sadler v. Great Western Railway Company*.²) The case relied on by the Commissioner of Requests (*Gooneratna v. Porolis*³) does not decide this point.

Balasingham, for the second and third defendants, appellants, in appeal No. 22, took the same objection.

Arulanandam, for the plaintiff, respondent.—The objection was not taken at the proper time—when the issues were framed. It would not be possible to apportion the liability if the defendants were to be sued in separate actions. That was why in *Gooneratna v. Porolis*³ the defendants were allowed to be sued together.

February 21, 1913. WOOD RENTON J.—

This appeal, and the allied appeal No. 22, C. R. Jaffna, No. 9,479, arise out of an action instituted by the plaintiff against the first, second, and third defendants for the value of 24 sheep alleged to have been killed by the defendants' dogs, and for damage caused to the plaintiff by not being able to manure his fields after the death of the sheep. The first defendant filed one answer. The second and third defendants filed another. The second and third defendants in their answer took the point that they and the first

¹ (1906) 9 N. L. R. 68.

² (1896) A. C. 450.

³ (1899) 4 N. L. R. 318.

1918.

WOOD
BENTON J.Aiyampillai
v. Vairava-
natha
Kurrukel

defendant could not be sued together, inasmuch as the plaintiff's cause of action against each of them was different. The case went to trial, however, solely on the merits. But the defendants' counsel returned to the charge on their point of law in their closing arguments. The learned Commissioner of Requests held that the three defendants had been properly sued together, inasmuch as their dogs had trespassed jointly, and he gave judgment in favour of the plaintiff against each of them on the facts. The Supreme Court gave leave to appeal in each case on the facts, and the defendants have appealed also on the law. There is no need to consider the evidence, for I have come to the conclusion that the appeals must be allowed on the law. The Commissioner of Requests regarded *Gooneratna v. Porolis*¹ as an authority in favour of his decision on the point of law involved in this case. The only point there, however, was the principle of the apportionment of damages done by cattle belonging to several owners. No objection to the constitution of the action was taken either in the District Court or in appeal. In *Appuhami v. Marthelis*² I had occasion to examine the authorities in regard to the joinder of causes of action under the Civil Procedure Code. In section 14 of the Code the words "in respect of the same cause of action" place the law of Ceylon in this matter precisely on the same footing as that on which the English practice stood before the substitution of the word "transaction" for the expression "cause of action" in the corresponding English rule. The case of *Sadler v. Great Western Railway Company*,³ makes it quite clear that, under circumstances such as we have here to deal with, there is a separate cause of action as against each defendant. In the more recent case of *Bullock v. London General Omnibus Company*,⁴ it is pointed out that the substitution in the English rule of the term "transaction" for "cause of action" has alone made it possible to join defendants in such cases as the present. The respondent's counsel contended that the objection in the present case had been taken too late, and could not be given effect to. I do not think that that argument can stand. The objection in question was raised in the answer of two of the defendants, and the third is equally entitled to the benefit of it. No doubt an issue should have been framed on the point. But there is no evidence on the record of any intention on the part of the defendants to abandon it. On the contrary, it was expressly relied upon in the concluding argument, and is dealt with at length by the Commissioner of Requests.

I set aside the decree under appeal, and direct that the plaintiff's action be dismissed with the costs of the action and of the appeal. The plaintiff's right to proceed against the first defendant separately, if he is so advised, is reserved.

Appeals allowed.

¹ (1899) 4 N. L. R. 318.

² (1906) 9 N. L. R. 68.

³ (1896) A. C. 450.

⁴ (1907) 1 K. B. 264.