Present : De Sampayo J.

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214—P. C. Colombo, 6,559.

Cattle trespass—Failure to give notice of seizure—Is it an offence? Penal Code, s. 289—Detention of cattle damage feasant*—Possession of cattle without a voucher.*

The failure on the part of a proprietor or occupier of land to give notice of the seizure of an animal is not an offence under the Cattle Trespass Ordinance, 1876, which can be punished under section 289 of the Penal Code. Such notice must be given if the owner or occupier desires to seek the remedy provided by the Ordinance for the recovery of damages caused by the trespass.

A person seizing and detaining cattle *damage feasant* is not guilty of an offence under section 8 of Ordinance No. 10 of 1898 for possessing the animal without a voucher.

THE facts appear from the judgment.

Garvin, S.-G., for the appellant.—A person seizing cattle is under a statutory duty to give notice of the seizure to the headman. The words of section 7 (Ordinance No. 9 of 1876) are, " Notice of the seizure *shall* be given."

The whole law on the subject of seizure of animals and the recovery of damages is now contained in the Ordinance. Failure to comply with the provisions of the Ordinance is punishable under section 289 of the Penal Code.

Possession of cattle without a voucher is prohibited by Ordinance No. 10 of 1898, section 67. P. C. Colombo, 5,674 (*S. C. Min., February 11, 1917*).

Canakeratne, for the accused, respondent.—The provisions of section 7 are only directory, and not imperative. The Ordinance has not taken away the common law rights. A person who seizes cattle *damage feasant* may bring an action for damages in a Civil Court or may proceed under the Ordinance. See *Thaver v. Gray*,[1] *Gunaratna v. Salmon*.[2] The owner of cattle may pay the damages immediately, and then there will be no need to come to Court, and only if the proceedings are in a Court can the Court impose a fine. Ordinance No. 10 of 1898 only penalizes the sale or transfer of cattle without a voucher; there is no sale or transfer when a person seizes trespassing cattle.

Cur. adv. vult.

[1] *(1882) 5 S. C. C. 60.*

[2] *(1898) 1 Tam. 79.*

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In this case the accused was charged by the police, under section 289 of the Penal Code, with having wilfully neglected or omitted to give notice of the seizure of a cow which had trespassed on his field, under section 7 of the Cattle Trespass Ordinance, No. 9 of 1876. To this the Police Magistrate added another charge, under section 8 of the Ordinance No. 10 of 1898, for possessing the cow without a cattle voucher. The accused was ultimately acquitted on both the charges, and the Solicitor-General has appealed.

The point which is most strenuously pressed is that section 7 of the Cattle Trespass Ordinance, 1876, imposes a duty on a landowner in all circumstances to give notice of the seizure of an animal, and that as no punishment is otherwise provided for the neglect to perform that duty, the accused is liable to be charged under section 289 of the Penal Code. I am unable to agree with this contention. The section no doubt provides that notice of the seizure "shall" be given, but in my opinion the provision means, not that notice should be given as a matter of absolute statutory obligation, but that it should be given if the landowner desires to seek the remedy provided in the Ordinance for recovering the damages caused by the trespass. It appears to me that it only states a condition to be observed in order to obtain the benefits of the Ordinance. In this connection the Solicitor-General points out that under section 7 the Court in which proceedings for recovering damages are taken must, in addition to the damages and charges of keep, award a fine, and he contends that the imposition of a fine makes the trespass an offence on the part of the owner of the animal, and therefore the duty to give the notice in question is of a public character, and not merely a condition to be fulfilled before proceeding under the Ordinance. I do not think that it necessarily follows that a fine is provided for as the punishment for an offence. It is noticeable that, although the proceedings for the recovery of damages are of a civil nature, there is no provision for stamps on the headman's report or the processes of Court, and the headman himself has to assess damages and give a report gratuitously. It may well be that the amount of the fine is really intended to cover all such expenses as should properly be payable to the Crown. In any event a cattle trespass case need not always reach the Court. If the cattle owner comes up immediately on the seizure and pays compensation, there is nothing to prevent the landowner from stopping there and giving up the animal. In such a case the Court will have no chance of imposing a fine. Again, under the Ordinance itself, it is only if the cattle owner does not tender the amount of the damages as assessed by the headman within a certain time that the headman's report is to be produced to Court and the proceedings initiated. I cannot therefore accept the argument that the provision for a fine has any bearing on the meaning of the requirement to

give notice of the seizure. The view I have expressed, that the giving such notice is only a condition to be fulfilled for securing the benefit of the Ordinance, is supported by section 10, which provides that "all rights to the benefit of any of the provisions of this Ordinance shall be forfeited, unless the notice required by section 7 shall have been given within forty-eight hours from the time of seizure." It is argued for the accused that this is a punishment expressly provided by the Ordinance for the failure to give notice, and that therefore section 289 of the Penal Code does not apply. It is not necessary to go that length; it is sufficient to say that section 10 makes it clear that the failure to give notice is not such a neglect of statutory duty as it penalized by section 289 of the Penal Code. The following observation of Lawrie A.C.J. in *Rampukpothe v. Silva* [1] appears to me to be quite just: "I think it dangerous to rely on the 289th section of the Penal Code as giving authority to punish criminally acts or omissions which have not been declared by the Legislature to be offences. For example, the Civil Procedure Code imposes many duties . . . ., the wilful disobedience or infringement of which are not offences." Section 10 of the Cattle Trespass Ordinance provides that "nothing herein contained shall be held to take away or affect any right which the Crown or any person may have at common law for redress in respect of any damage sustained by trespass of animals." Now, at common law a landowner is entitled to seize and detain an animal *damage feasant* until damages and costs of keep are paid. Under the Roman-Dutch law the detention should be in the *publicum stabulum* or public pound, but as there is no pound of that description in Ceylon, it has been held that the landowner himself may detain the animal. See the Full Court decision in *Thaver v. Gray*.[2] The argument in that case is better reported, and all the authorities are cited in *Wendt's Reports 11*. The Solicitor-General suggested that that decision was wrong, inasmuch as the headman was constituted the official custodian of a trespassing animal, and there was thus a kind of *publicum stabulum* in Ceylon. But I cannot review a Full Court decision, and, moreover, the argument as to the effect of the headman's charge of the animal appears to me to be unsound. There is no obligation on the private person under the Ordinance to deliver the animal to the headman, but only the headman is empowered to take it into his charge, which is a different thing. Further, the detention by the headman is not for the same purpose as detention in *publicum stabulum*, but for the special purpose of proceeding under the Ordinance, which provides an alternative remedy, and the headman himself is to take charge of the animal only if the amount of the assessed damages is not immediately paid. If the common law remedy has disappeared, as contended, there is no meaning in the proviso to section 10 of the Ordinance,

[1] *(1897) 4 Bal. 139.*

[2] *(1882) 5 S. C. C. 60.*

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which conserves, not merely the right of action for damages, but the right at common law " for redress in respect of any damage sustained by trespass of animals." If, then, the common law remedy by way of detention still exists, and the accused chose to rely on it, and abstained from giving notice of the seizure for the purposes of the alternative remedy under the Ordinance, it follows that he did not neglect a statutory duty, and could not be prosecuted under section 289 of the Penal Code.

The other charge under section 8 of the Ordinance No. 10 of 1898 is equally unsustainable. Section 5 of that Ordinance provides for regulations being made, *inter alia*, " for prohibiting the sale or transfer of cattle except upon a voucher, &c.," and the regulation framed thereunder prohibits " the acquisition of cattle from any person in any way except by inheritance or by birth in the penfold, unless the recipient receives with the animal the prescribed certificate. " This action and regulation aim at the acquisition of cattle without a voucher in any mode other than those indicated, and accordingly it was held by Wood Renton C.J. in 67—P. C. Colombo, 5,674,[1] which was cited by the Solicitor-General, that where a person had won an animal in a raffle, and was in possession of it, he could not be said to be " lawfully entitled to the possession " of the animal within the meaning of section 8 of the Ordinance. It is clear that these considerations do not apply to the case of a person who has seized and detains cattle *damage feasant*. Such a person does not acquire the animal in any sense, and requires no voucher, and, indeed, it is not possible for him to obtain a voucher from the cattle owner, nor has the headman or other officer any authority to grant him one. He is under the common law, as already explained, lawfully entitled to the possession of the trespassing animal until the damage caused is paid to him, and he therefore comes within the exception in section 8 of the Ordinance. It appears that in the present case the accused has had the cow in his custody for about a year since the seizure, and the Solicitor-General depreciated such possession being sanctioned, as otherwise a cattle thief could easily defeat justice by setting up such a defence. Inconvenience of this kind cannot, however, alter the law. A landowner who seizes a trespassing animal and gives no notice thereof, but keeps it himself for a long time, may run the risk of suspicion of theft, but, nevertheless, if he can establish the facts, he is not criminally liable.

In my opinion the verdict of acquittal is right. The appeal is dismissed.

Appeal dismissed.

[1] *S. C. Min., Feb. 11, 1917.*