1915.

Present: Shaw J.

VAN DER POORTEN *v.* MORRIS.

353—C. R. Kurunegala, 22,427.

Action for damages—Collision of motor car and motor cycle—Negligence.

In an action for damages, where the accident occurred through the negligence of both plaintiff and defendant, plaintiff's action must fail, because *in pari delictu potior est conditio defendentis.*

Although negligence of the plaintiff contributing to the accident, when it is merely negligence without which the accident would not have happened, will not excuse the defendant from being answerable for his negligence if he could have by reasonable care avoided the mischief, the plaintiff cannot recover if he has been guilty of negligence that actually caused the accident, wholly or in part.

THE facts are set out in the judgment.

F. M. de Saram, for appellant.

F. J. de Saram, for respondent.

Cur. adv. vult.

December 7, 1915. SHAW J.—

The appellant claimed damages for injury to his motor bicycle when being ridden by his son, in consequence of the negligent

[1] (1901) 5 N. L. R. 162. [2] 5 N. L. R. 24.

driving of a motor car by the respondent. The respondent, in reconvention, claimed damages for injury to his car caused by the negligent driving of the rider of the appellant's motor bicycle.

The Commissioner of Requests has dismissed both the action and the claim in reconvention, and from his decision the appellant has appealed, by leave of the Commissioner, to this Court. The respondent has given notice of objections to the decree under section 772 of the Civil Procedure Code, which in effect amount to an appeal from the finding of the Commissioner of Requests dismissing his claim in reconvention. Appellant's counsel has taken objection to this notice, on the ground that the respondent has not obtained leave to appeal, arguing that he can only, under the provisions of the section, take such objections as he could have taken by way of appeal, and that he could not have taken the objections in the present case unless leave to appeal had been obtained.

In view of the opinion I have arrived at on the law and facts of the case, it is unnecessary for me to express an opinion on this point.

The Commissioner has not found definite answers to the formal issues settled in the action, and indeed those issues do not very clearly raise the real questions in dispute between the parties ; but the effect of his judgment is that both parties were guilty of some negligence, which taken together actually caused the accident. He has accordingly dismissed both claims.

I think he is right in this finding, and I should have come to the same conclusion myself on the evidence. The vehicles were approaching one another on a very narrow road, at a rapid pace. Just at the spot where the collision occurred there was a heavy plank placed across a ditch on the respondent's side of the road, which, although it did not impede the actual metalled portion of the road, must have caused the respondent to swerve slightly from the course which he was taking, which was slightly on the grass by the side of the road, and which the wheel marks of the car show that he was pursuing, towards the side of the road on which the rider of the motor bicycle was approaching, leaving very little room for him to pass. He slowed down to ten or twelve miles an hour, according to his own evidence, which does not seem to me to have been a sufficient precaution under the circumstances, especially as he says that the rider of the motor cycle was riding unskilfully, and when fifty yards off showed signs of nervousness. On the other hand, the rider of the motor bicycle was evidently not very accustomed to the use of such a machine as he was riding, and had no driver's license, and was not keeping a very straight course, and his failure to do so no doubt assisted to cause the accident, which would not have happened to a more experienced rider.

On the strength of the statement of the law as laid down in *Radley v. London and North-Western Railway Company,*[1] I was

[1] *1 A. C. 759.*

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asked to say that although the rider of the motor cycle may have been negligent, nevertheless, as the defendant might by the exercise of ordinary care have avoided the accident, he is liable for the mischief done. The statement of the law in that case is as follows:—" The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification on the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The difficulty in the application of these propositions is the ambiguity of the phrase "contributed to the accident." In the case under consideration the plaintiff had improperly pushed some railway trucks, one of which was loaded, so that it would not pass under a bridge, up to a bridge upon a siding belonging to them. Subsequently the defendants negligently pushed the train of trucks with such force that the bridge was knocked down. Under these circumstances it is clear that the plaintiff's negligence was not the *causa causans* of the accident, but merely a *causa sine qua non*, and all I take the proposition laid down in the case to mean is that although negligence of the plaintiff contributing to the accident, when it is merely negligence without which the accident would not have happened, will not excuse the defendant from being answerable for his negligence if he could have by reasonable care avoided the mischief, it is not intended to lay down the proposition that a plaintiff can recover if he has been guilty of negligence that actually caused the accident wholly or in part.

The *dicta* in the English cases where there has been negligence on both sides are irreconcilable and often contradictory, but I am content to accept the statement of the law by Lord Halsbury in *Wakelin v. London and South-Western Railway Company*,[1] quoted by the Commissioner of Requests: "the plaintiff may indeed establish that the event has occurred through the joint negligence of both; but if that is the state of the evidence, the plaintiff fails, because in *pari delictu potior est conditio defendentis.*"

In my opinion the Commissioner of Requests was correct in dismissing both claims, and I therefore dismiss the appeal, with costs.

Appeal dismissed.

[1] 12 A. C. 45.