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MADRAS RECORD OFFICE.**Government of Madras.***Public works* **DEPARTMENT.**

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Dated	7-10-	1892.

Not to be folded or roughly handled

*Proceedings of the Madras Government, Public Works Department,
7th October 1872.*

Read the following letters —

No 72. From the Special Executive Engineer, Wynaad, to the Secretary to Government, Public Works Department, dated Vythery, 6th September 1872, No. 396.

I HAVE the honour to enclose certain proceedings named in the margin for the consideration of Government. The reason that these have not been sooner submitted is owing, in the first instance, to the suit not having been instituted as against Mr. Hasler in his official capacity, and then the delay in the Munsiff's Court in furnishing the requisite particulars.

1. It will be seen that the occurrence took place so far back as 5th January 1871; and it may also be noted that

1. 1. Plaint dated 22nd March 1872
1. 1. Deposition of Mr. Hasler, dated 6th April 1872
1. 1. Do of Mr J R Malcolm, dated 5th do
1. 1. Do of Dr Hewston, dated 5th do.
1. 1. Do. of Mr C T Wilkins, dated 5th do
1. 1. Do of Mr T W Rayne, dated 5th do
1. 1. Do of Mr A Pereira, dated 6th do
1. 1. Do of Mr T W Ditmas, dated 5th do
1. 1. Do of Mrs Macfarlane, dated 23rd July 1872.
1. 1. Proceedings of Munsiff's Court, dated 22nd September 1872.

Mr Hasler, the Range Officer, having been absent on leave for the Christmas holidays and having only returned on the 4th January 1871, a day previous to the accident, had no opportunity of personally inspecting the road, and is, therefore, not in a position to state more than what his orders on the subject of the stones placed on the road-side were. I may, however, mention that it is within my knowledge that he heard nothing of the accident having happened till many days afterwards, and that, therefore, at all events, no subsequent removal of the heaps of stones was made, at his instance, by way of contradiction to the plaintiff's assertion, that there was not room for him to drive past. The heaps of stone were collected for the purpose of building a culvert close to the spot, and very near the place the roadway had been stopped and a temporary track made for accommodation of traffic. It will be seen also that the plaintiff admits that he was aware that this material was being collected, and that he had driven over the road the previous day; he cannot, therefore, plead ignorance that the roadway was to some measure narrowed. He also admits, and it is notorious among those who know him, that he is extremely short-sighted, and that although he can see with a glass he cannot say whether he was using one at the time. I fancy that it is scarcely likely that he was using his glass, unless he wears spectacles, a question that was omitted to be asked. I know the plaintiff personally and have never seen him wearing spectacles. The time of the year when the accident happened was the full coffee-crop season, when the traffic along the road is greatest; there cannot be a shadow of doubt that numerous carts had been passing along the road throughout the day, and, as it was a moonlight night, they would also (as is the practice) have used the road long before any of the departmental work-people could have had an opportunity of removing the obstacle had it existed. It is proved that there was nothing to obstruct the road between 8 and 9 the following morning; and it is also a fact that the spot where the occurrence took place is about $1\frac{1}{2}$ miles from the nearest departmental cooly lines, while Mr. Malcolm's house is about the same distance, or a little more, in the other direction, and off the road, making it unlikely that news of the accident could have reached the work-people early enough to make them put the stone heaps further off from each other. Those who

know Canarese coolies would, if unprejudiced, scarcely admit the likelihood of their taking the trouble to effect such removal unless by special orders, even if they had heard of the accident. I must say I think it scarcely credible that while the road was admitted by the plaintiff himself not to be dangerously obstructed the previous day when he drove over it to Manantoddy, that it was used throughout the day and night by country carts, and was also perfectly safe early the following morning, just for the occasion of the plaintiff's moonlight drive, at an hour when he was naturally driving tolerably fast to get home to his dinner, the heaps of stones were purposely put closer together. It must be borne in mind that although the road is in use for wheel traffic, it is one under construction along its whole distance, and that where culverts or bridges have to be built it is absolutely necessary that material should be collected, and that if sufficient room is left to accommodate traffic while such work is going on, more cannot be demanded. It is not long ago that there was not a mile of road hardly in the whole district that could be used by wheels, even for slow traffic, and many were scarcely practicable for horsemen; to expect, therefore, that the same confidence and want of caution is reasonable, driving over country roads by night as would be in a presidency town or large cantonment is, I think, scarcely admissible; and if such a precedent were established, Government would be exposed to continual actions of such a nature. I do not mean for one instant to say anything against the plaintiff in the present suit (whose character secures him from any such insinuation), but I do know of some individuals who might meet with accidents which, if the principle of prior knowledge of an obstacle or danger on a road were to be held as not necessitating caution, would no doubt have frequent opportunities of bringing similar suits, for it would not be easy to prove whether insobriety had anything to do with such an incident, but it would not be at all unlikely, and, therefore, I think that it is desirable that this case should be dealt with by some legal authority of somewhat higher standing than the Munsiff of North Wynaad. My own theory is that a stone had in all probability either been accidentally dislodged from an adjoining heap by a pack bullock, or been purposely placed on the roadway by a cart driver to scotch his wheels, a practice that they are very prone to, and that Mr. Malcolm, a short-sighted man, driving at a tolerably rapid rate in a very rickety conveyance, bumped his wheel on the stone, and was jerked out. It will be observed that Mrs. Macfarlane's evidence supports this theory, and it is further strengthened by the fact that neither she nor her child was thrown out, nor was the dog-cart upset. Had the obstruction been a heap of stones, this latter could not have been avoided, and, moreover, unless the conveyance was being rapidly driven such a violent jerk could scarcely have occurred, but the obstacle would either have stopped the cart altogether or the wheel would have gone too gradually over it to cause such a shock. In that case I cannot see how any one can be held responsible unless the person placing the stone there could be identified. I do not know whether coolies employed on daily hire are in law constituted servants, and whether employes are liable for their acts when not in accordance with the orders given by them to such daily labourers.

3. I have only further to state that the costs in the suit, up to date, have been plaintiff's Rupees 60, defendant's Rupees 47-9-0. Mr. Hasler did not apply to me

to take up the case officially prior to the hearing before the Munsiff, or I should have brought it to notice before.

4. I have now to ask instructions as to whether Government is disposed to defend the case or to appeal in case of an adverse finding by the Munsiff; I myself think that it would be best to have the points of law in question definitely settled.

5. There is evidently a clerical error in the heading of the Munsiff's proceedings which is dated 22nd September 1872.

No. 73. From the Government Pleader, to the Secretary to Government, Public Works Department, dated Madras, 23rd September 1872, No. 118.

I HAVE the honour to acknowledge receipt of the Proceedings of Government G O, dated 19th September 1872, No 136 in the Public Works Department noted in the margin, requesting my opinion whether a suit brought by a Mr. Malcolm against Mr. Hasler, a Range Officer in Wynaad, should be defended by Government.

2. As I understand, the position of affairs is that the suit is brought against Mr. Hasler as a private individual, issues settled and evidence taken and the case ripe for judgment, when the plaintiff suddenly discovers that he meant to have brought the suit against Government, as being liable for the negligence of their servants. Technically speaking, if Government takes no action in the matter, the suit ought to be dismissed at once. Plaintiff might either have sued Mr. Hasler or his official superior or the Government of which they are the servants. He chose to sue Mr. Hasler, and it turns out that that gentleman was not in charge at the time the orders were given for placing the stones said to have been the cause of the accident, and cannot, therefore, be liable; probably however Government would not wish to take advantage of any such technicality, but would prefer to treat this as a suit brought against them for damages for an accident caused by the negligence of their employes, and to have it decided whether there was any such negligence in the case as to make them liable. Certainly if any one is to be held liable in this suit the Government could hardly leave Mr. Hasler, who had personally nothing to do with the cause of the accident, to pay the penalty. If the Government concur in this view, an order might be passed to the effect that Government, though not bound to take any notice of this suit which was brought against a Government servant as a private individual, have no objection under the circumstances to treat the suit as if brought against them for the acts of their servants, and if the Court holds that the accident was caused by the negligence of their servants to pay the damages actually sustained by the plaintiff.

3. As to the question of the liability of Government in cases such as these, the law is that employes are liable for the wrongful acts of their servants, whether specially authorized or not, if done in the ordinary course of the business in which they are employed. No doubt the relation of master and servant for this purpose would be held to exist between Government and the coolies employed in making or mending these roads, who are under the immediate control and supervision of the officers of Government, and therefore constructively of Government and are engaged in Government work and paid out of public funds. If, therefore, the accident was caused by a heap of stones, or a single stone being placed by any

*Proceedings of the Madras Government, Public Works Department,
7th October 1872.*

of the coolies in the course of their work in such a position as to be dangerous to a person driving with reasonable care, the Government would, I think, be liable in the present case. What is reasonable care in such a case is a question of fact depending upon the general state of the road and the knowledge the person driving has of the probability of there being any obstacle in the way. Of course, as observed by Major Kennedy, a style of driving which might be prudent enough in a presidency town would be very rash on a Wynaad road, and doubtless the Court will take this into consideration.

4. The evidence, as to the immediate cause of the accident, is conflicting, but perhaps the balance of testimony is in favour of there having been a dangerous obstruction on the road, which plaintiff could not have known of and could not well have avoided. The gentleman who was riding in front appears only to have escaped an accident by his horse jumping over the obstacle. All this, however, is a question of fact which may be safely left to the Court upon the evidence already taken. If the Court should be in favour of plaintiff it might be submitted that he should pay his own costs, as he brought the suit against the wrong person; strictly speaking he ought to pay Mr. Hasler's costs.

5. I return the papers forwarded to me with the above proceedings.

No 74. ORDER THEREON, 7th October 1872, No. 2,339.

ESTABLISHMENT, No 9.

UNDER the circumstances brought to notice in this letter, His Excellency the Governor in Council will not object to the suit instituted by Mr. Malcolm against Mr. Hasler in the District Munsiff's Court at Manantoddy being defended at the public expense.

(True Extract.)

Colonel, R E,
Secretary to Government.

To Major R. B. Kennedy, with ten Enclosures.
To the Controller of Public Works Accounts.

Exd. E C. Shunker.

*No 2339
Public Works Department.
Proceedings of the Madras Government.
under date 7th October 1872.
Read the following:-
From the Offl. Secyrs Wynaad (H.E. No 396 of 7th Sep/70)
" The Govt. Reader { H. E. No 118 of 23rd September 1872 }
Madras }*

*Under the cir-
-cumstances brought to
notice in this letter
His Excellency the
Governor in Council
will not object to the
Suit instituted by Mr.
Malcolm against
Mr Hasler in the
District Munsiff's Court
at Manantoddy being
defended at the Public
Expense*

A high-contrast, black and white image showing a dense, abstract pattern of dark, irregular shapes against a light background, resembling a heavily textured surface or a close-up of a material. The shapes are fragmented and scattered, with some appearing as thin, elongated lines and others as more solid, irregular patches. The overall effect is one of extreme contrast and visual noise.

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To Major R. B. Keimer, etc.
 Controller of the Ordnance
 W-8-2-27/10/72 to Major
 O-C — 2/10/72 to Major

8-C - 2/10/32 photo