1912. Nov. 5. — Vries vs. Rex.

appeal, and until that time arrives this Court cannot very well express an opinion, however desirable it may be thought by the parties, and consequently we cannot make an order. There will be no order.

FAWKES, J., concurred.

[Appellant's Attorney, J. H. BEYERS.
Respondent's Attorneys, FRASER & SCOTT.]

[Reported by C. A. BECK, Esq., Advocate.]

MAASDORP, C.J., and FAWKES, J. November 9th, 1912.

BOBBERT *vs.* MARTIENS.

Damages. — Negligence. — Contributory negligence. — What constitutes.

In a Magistrate's Court action for damages due to negligence a plea of contributory negligence was based upon a state of things which existed prior to the negligence complained of in the summons:—Held, *on appeal, that the principle of contributory negligence could not be extended to include anything of which the plaintiff had been guilty prior to the negligence of the defendant.*

1912. Nov. 9. — Bobbert vs. Martiens.

Appeal from the Resident Magistrate of Senekal.

Appellant (plaintiff below) sued the respondent (defendant below) for £33 10s. as damages for the inferior lambs which had resulted to him through the defendant allowing his inferior ram to mix with his high-grade flock of ewes, at the same time tendering back the 67 lambs which had so resulted, or in the alternative for £23 10s. which plaintiff alleged was the difference in value of the lambs he got and those he would have got in the ordinary course.

The material facts in the case were briefly: plaintiff was the owner of a certain farm fenced in but not divided into camps, or partitioned off in any other way. Plaintiff engaged defendant as a servant upon certain terms, one of which was that the defendant should be allowed

free grazing for his stock. Defendant had an inferior ram amongst his sheep. Plaintiff warned defendant that his ram was not to mix with his (plaintiff's) sheep. Notwithstanding this warning defendant's ram was found on or about February 12th, 1912, amongst the plaintiff's ewes. Plaintiff mulcted defendant in the sum of £2 10s. for trespass and damages, and defendant was again warned. On three subsequent occasions in February and March the defendant's ram was again found amongst the plaintiff's ewes. Plaintiff's own rams were not put to the flock till considerably later. Five months after defendant's ram had been first found in the plaintiff's flock the flock began to lamb and 67 were born. The lambing continued until five months after the last occasion on which the defendant's ram was found amongst the ewes, and then ceased until the lapse of the five months after the plaintiff had put his own rams amongst his ewes.

The Magistrate took into consideration the relationship existing between the parties, and held that it was the master's duty to compel the servant to remove the ram from the farm, and that if he did not do so he had only himself to blame for the consequences. He therefore gave judgment for the defendant.

H. F. Blaine, K.C., for the appellant: There was no contributory negligence on the part of the plaintiff. The master was not compelled to order the ram off the farm. The defendant was warned. After that it was his duty to keep his ram from the plaintiff's sheep. He neglected that duty at his own risk.

The principle of contributory negligence cannot be extended to cover a state of things which existed prior to the negligence of the defendant, see *Johannesburg Municipality* vs. *Sheppard and Barker* (1906, T.S. 131).

C. L. Botha, for the respondent: The plaintiff did not exercise reasonable care when he allowed the defendant to come on to his farm knowing that he had this ram. Having done so he was under an obligation not to allow his flocks to graze promiscuously about the farm if he intended to hold the defendant liable for any damage

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that might ensue. He brought the injury upon himself and he must bear it. See *Beven* on Negligence, 3rd Ed., Vol. I, p. 149.

H. F. Blaine, K.C., was not called upon to reply.

MAASDORP, C.J.: One can quite understand how the Magistrate come to err in this matter; he went on the principle that Mr. *Botha* has referred to, viz., that it serves the plaintiff very well right. But that is not law; it is a sort of feeling one may have that if he suffered it is his own look out. The law recognises in this connection only negligence and contributory negligence. The principle of contributory negligence does not apply to the present case; it would only have applied as has been suggested, had the plaintiff seen the rams going to the ewes and he stood by and did not interfere. That would be contributory negligence; but it did not occur here. Plaintiff had a perfect right to run his ewes wherever he pleased on his farm, and he also had a right to allow the defendant to run his ram on his farm, but plaintiff very wisely in his agreement with the defendant stipulated that he had to keep the ram, which was of inferior breed, away from his ewes. The plaintiff was not obliged to keep his ewes away from the ram. Contributory negligence could only have been present had plaintiff specially agreed to keep his ewes away from the ram. Plaintiff was not obliged to do that. The farm was his and he had the right to graze his sheep where he pleased; the defendant had not the right to allow his ram to graze on the farm where he pleased. The arrangement made was perhaps foolish, but still there was no contributory negligence on the part of the plaintiff.

The appeal will be allowed with costs and judgment entered for the plaintiff and the case is sent back to the Magistrate to assess the damages.

FAWKES, J., concurred.

[Appellant's Attorneys, MARAIS & DE VILLIERS.
Respondent's Attorneys, BOTHA & GOODRICK.]

[Reported by C. A. BECK, Esq., Advocate.]