[HIGH COURT OF AUSTRALIA.]

SIMPSON . . . . . APPELLANT:
PLAINTIFF,

AND

BANNERMAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *Aug.* 3, 18.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Animals—Injury by dog—Liability of owner—Dog loose on premises enclosed by fence—Injury to person on public highway whilst resting hand on fence—Dog and Goat Act 1898 (*N.S.W.*) (*No.* 44 *of* 1898), *sec.* 19.*

Whilst passing along a public street in search of some timber that had gone astray, the appellant stood and looked over the close wooden fence separating the respondent's premises from the street, and, in doing so, being unaware of any danger, he placed his hand on top of the fence. The respondent's dog, which was running loose within the premises, sprang up and seized the appellant's hand, inflicting injuries.

Held, by the whole Court, that, as the respondent's premises were situate in a locality to which the *Dog and Goat Act* 1898 (N.S.W.) applied, the appellant was entitled under sec. 19 of that Act to recover damages from the respondent for the injuries sustained by him.

Held, further, by *Starke* J., that, the trial Judge having found that the respondent knew of the dog's mischievous propensity, the respondent was liable at common law for the injuries sustained by the appellant.

Decision of the Supreme Court of New South Wales (Full Court): *Simpson* v. *Bannerman*, (1931) 32 S.R. (N.S.W.) 126, reversed.

* The *Dog and Goat Act* 1898 (N.S.W.) provides, by sec. 19, that "The owner of every dog shall be liable in damages for injury done to any person, property, or animal by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner."

APPEAL from the Supreme Court of New South Wales.

The plaintiff, Henry Simpson, brought an action in the District Court for damages against John Gordon Bannerman, alleging, in alternative counts, (1) that the defendant wrongfully kept a dog of a fierce and mischievous nature and whilst so kept the dog attacked and bit the plaintiff as a result of which he suffered pain and damages, and (2) that the defendant so negligently and carelessly conducted himself in and about the care and management of a dog in the premises of the defendant that the dog attacked and bit the plaintiff with the consequences mentioned above. The grounds of defence taken at the hearing before his Honor Judge *Edwards* were a denial of wrongfully keeping a dog of a fierce and mischievous nature; a denial that the dog bit the plaintiff, any injury suffered by the plaintiff as alleged in the first count being alleged to have been brought about by his own act; and a denial of negligence in keeping the dog. The facts as found by the District Court Judge were substantially as follows:—The plaintiff, who was a builder and contractor, had ordered some timber to be sent to a house at which he was going to do some work. He went to the house and found that the timber had not been delivered there; he then walked along the street to see if the timber had been delivered at a nearby house, and, whilst standing on the footpath in the street, looked over the fence of the defendant's premises to see if it were there. The fence was a close wooden fence, 5 ft. 6 in. high, on the top of which was fastened a barbed wire at the height of six inches above the fence. In the act of looking over the fence the plaintiff incautiously put his hand on the top of the fence. No sooner had he done so than an Alsatian dog, on the inside and concealed from the plaintiff by the fence, sprang up and bit him on the hand, inflicting injuries. There were two gateways leading into the defendant's premises, and it was somewhere between them that the plaintiff rested his hand on the fence. Upon each gateway was a notice "Beware of the dog," but the notices were not seen by the plaintiff prior to his sustaining the injuries. His Honor found that the defendant knew of the dog's mischievous propensity. His Honor said he had no doubt that the plaintiff did not know that there was a savage, or any, dog on the premises. On returning about two hours afterwards,

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the plaintiff saw an Alsatian dog in the same place attack another man, who was delivering handbills. Judge *Edwards* refused to nonsuit the plaintiff; and, no evidence being tendered by the defendant, his Honor, basing his decision on the common law, found a verdict for the plaintiff in the sum of £50.

An appeal by the defendant to the Full Court of the Supreme Court was, by a majority, allowed on the ground that the plaintiff, being a trespasser, was not entitled to recover damages for the injuries sustained by him, inasmuch as the evidence was not sufficient to support a finding of *scienter* and did not establish an unreasonable or malicious user by the defendant of dangerous means for the protection of his property against trespassers: *Simpson* v. *Bannerman* (1)).

From this decision the plaintiff now, by special leave, appealed to the High Court.

During the hearing it was conceded by the parties that the *Dog and Goat Act* 1898 (N.S.W.) applied to the locality in which the respondent's premises were situate.

Herron (with him *B. J. F. Wright*), for the appellant. The judgment of the majority of the Full Court was based on matters which, not having been found as facts by the trial Judge, were not open to them (see *District Courts Act* 1912 (N.S.W.), secs. 142-144). An appeal is competent on a point of law only. The *Dog and Goat Act* 1898 applies, and sec. 19 of that Act creates an absolute liability as against the owner of the dog (*Grange* v. *Silcock* (2)). The question of absolute liability is dealt with in *Barnes* v. *Ward* (3)). Although the *Dog and Goat Act* altered the common law it did not create a new liability or cause of action within the meaning of the rule that where a statute creates a liability not existing at common law, and provides also a particular remedy for enforcing it, that remedy must be exclusively adopted (*Ex parte Finneran* (4)).

[DIXON J. referred to *May* v. *Burdett* (5).]

The mere fact that the dog in question was on private land does not absolve the owner (*Brown* v. *Eastern and Midlands Railway Co.* (6)).

(1) (1931) 32 S.R. (N.S.W.) 126.
(2) (1897) 77 L.T. 340; 13 T.L.R. 565.
(3) (1850) 9 C.B. 392; 137 E.R. 945.
(4) (1897) 18 N.S.W.L.R. 353.
(5) (1846) 9 Q.B. 101; 115 E.R. 1213.
(6) (1889) 22 Q.B.D. 391.

A person who, whilst lawfully using a public highway, is injured by a nuisance kept on another person's land has a right of action against that other person (*Harrold* v. *Watney* (1)).

[STARKE J. referred to *Hoyt's Pty. Ltd.* v. *O'Connor* (2).]

That case is distinguishable because there the defendant permitted an improper use of his property by trespassers which had the effect of causing injury to users of the highway. Even though he were a trespasser the appellant still retained some rights as against the respondent (*Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (3)). The trial Judge found that the keeping by the defendant of the dog in question was a source of danger intentionally created on the defendant's premises and was, in the circumstances, more than was reasonably necessary for the protection of such premises (*Excelsior Wire Rope Co.* v. *Callan* (4) ; *Mourton* v. *Poulter* (5)). The true rule is as stated in *Wilkins* v. *Manning* (6)).

[McTIERNAN J. referred to *Brock* v. *Copeland* (7).]

The duties of owners of land accessible to the public towards trespassers and licensees are dealt with in *Latham* v. *R. Johnson & Nephew Ltd.* (8). As to the involuntary nature of the trespass and the effect thereof, see *Salmond* on *Torts*, 7th ed., p. 470.

Spender, for the respondent. The *Dog and Goat Act* merely alters the burden of proof. Even on the assumption that all things as required by the Act have been proved, it does not necessarily follow that the appellant has a cause of action. The two causes of action are (1) the wrongful keeping of a dog and (2) the negligent keeping of a dog. An owner is entitled to keep a dog for the protection of his property, even if such dog has mischievous propensities (*Jordin* v. *Crump* (9)). In that case the Court was not satisfied that *Bird* v. *Holbrook* (10) was properly decided. So far as the rule of negligence is concerned, there must be the element of malicious damage present before a trespasser can establish a claim (*Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (11)). The same principle

(1) (1898) 2 Q.B. 320.
(2) (1928) 40 C.L.R. 566.
(3) (1929) A.C. 358, at p. 365.
(4) (1930) A.C. 404.
(5) (1930) 2 K.B. 183.
(6) (1897) 13 N.S.W.W.N. 220, at p. 222.
(7) (1794) 1 Esp. 203 ; 170 E.R. 328.
(8) (1913) 1 K.B. 398.
(9) (1841) 8 M. & W. 782 ; 151 E.R. 1256.
(10) (1828) 4 Bing. 628 ; 130 E.R. 911.
(11) (1929) A.C., at p. 367.

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applies in "savage dog" cases as in "dangerous machinery" cases. *Excelsior Wire Rope Co.* v. *Callan* (1) is distinguishable because the claim there was dealt with on the basis that the person injured was a licensee and not a mere trespasser. In any event, adequate warning was given that a dog was continuously on the premises (*Mourton* v. *Poulter* (2)). The trial Judge misdirected himself and should have granted a nonsuit. The placing of his hand on, and the looking over, the respondent's fence by the appellant did not constitute a reasonable user by him of the highway within the meaning of *Harrold* v. *Watney* (3). It cannot be said that the keeping of a savage dog on the respondent's side of the fence was an interference with the rights of users of the highway. As regards sec. 19 of the *Dog and Goat Act* the statement of the law as laid down in *Wilkins* v. *Manning* (4) is the correct one, and when the Act was re-enacted in 1898 it was the intention of the Legislature to give effect to that decision (*Dale's Case* (5)). The history of sec. 19, as traced from the Act 6 Wm. IV. No. 4, shows that it should be confined to abating nuisances created by dogs at large on the streets. The section was not intended to impose an absolute liability upon owners. Upon the appeal it was not necessary to traverse each and every finding of fact as this had been done by the application for a nonsuit.

Herron, in reply.

Cur. adv. vult.

Aug. 18. The following written judgments were delivered:—

GAVAN DUFFY C.J., DIXON, EVATT AND MCTIERNAN JJ. The appellant was bitten on the hand by the respondent's Alsatian dog which, according to the findings of the District Court Judge, had to the respondent's knowledge a propensity to attack mankind.

The appellant sustained the injury through placing his hand on top of the fence separating the respondent's premises from the street while he stood looking over the fence in search of some timber that had gone astray. The dog, which was running loose within, sprang up and seized his hand. The appellant recovered damages

(1) (1930) A.C. 404.
(2) (1930) 2 K.B. 183.
(3) (1898) 2 Q.B. 320.
(4) (1897) 13 N.S.W.W.N. 220.
(5) (1881) 6 Q.B.D. 376, at p. 453.

in the District Court as at common law on the ground that, although he committed a trespass by placing his hand upon the top of the fence, nevertheless the presence of the dog near the highway separated from it only by such a fence was a source of danger intentionally created by the respondent in excess of any reasonable protection of his property. Upon appeal to the Supreme Court by the now respondent the judgment was reversed by *Harvey* C.J. in Eq. and *Davidson* J. (*Halse Rogers* J. dissenting). This decision was also based upon the common law. It proceeded upon the view that unless the animal had been deliberately kept for the purpose of inflicting serious injury upon trespassers the appellant could not complain.

Before us it was conceded that the *Dog and Goat Act* 1898 applied to the locality where the mischief occurred, and, as we think that the appellant was entitled under sec. 19 of that enactment to recover damages for the injury, we find it unnecessary to consider the respondent's common law liability. Sec. 19 provides : " The owner of every dog shall be liable in damages for injury done to any person, property, or animal by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner." The opening words of this provision express a liability without condition or qualification. It may be said that the very generality of its terms provokes attempts at restriction by implication. No doubt it is improbable that the Legislature meant that circumstances sufficient to justify or excuse the intentional infliction of harm by the owner should afford no answer to his statutory liability for injury done by his dog. Perhaps an even greater limitation than this is required upon the meaning of the provision. But, however this may be, we are quite unable to adopt an interpretation of the section which excludes liability to a person who does no more than thoughtlessly place part of his body within the close where the dog roams.

For these reasons we think the appeal should be allowed, and the judgment of the District Court restored.

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Starke J.

STARKE J. The judgment for the plaintiff in this action for £50 can, in my opinion, be supported either at common law or under the *Dog and Goat Act* 1898, sec. 19. "A person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and . . . if it does mischief, negligence is presumed without express averment" (*May* v. *Burdett* (1)).

In the present case the defendant kept a large and powerful Alsatian dog which the learned Judge who tried the action described as very savage. There was some evidence, though weak, which the learned Judge accepted, that the defendant had knowledge of its mischievous propensities (*Judge* v. *Cox* (2)). The defendant kept the dog at his house which was enclosed by a close boarded fence, 5 ft. 6 in. high, with a barbed wire along the top of the fence. The enclosure adjoined a public street. The dog was not confined in any way, and was large and powerful enough to spring as high as the top of the fence. The plaintiff was passing along the street, looked over the defendant's fence, and without a thought of danger put his hand upon the fence, and was immediately bitten by the dog.

The rule of responsibility in the case of dogs known to have mischievous propensities, though stated in absolute terms, depends upon the relation of the person complaining of injury to the keeper of the dog and the circumstances under which the injury was sustained. It is not unlawful to keep a savage dog. "Undoubtedly, a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it" (*Sarch* v. *Blackburn* (3)). But if a person goes on premises for no lawful purpose and is bitten he cannot complain of that which was brought upon him by his own act (*Sarch* v. *Blackburn*). And so if a person teased or excited such a dog so that it bit him. A keeper of a vicious dog has been guilty of no breach of duty towards such persons. Persons, however, passing along a public street are entitled to protection from dogs known to be vicious, and the keeper of such a dog must, in my

(1) (1846) 9 Q.B., at p. 112; 115 E.R. at p. 1217.

(2) (1816) 1 Stark. 285; 171 E.R. 474.

(3) (1830) 4 C. & P. 297, at p. 300; 172 E.R. 712, at p. 714.

opinion, secure it at his peril. The standard of duty in such a case is far higher than that of the ordinary and prudent man. The owner must take sufficient precaution that the dog shall do no injury to the public passing along the highway. A member of the public is not deprived of this protection if he unwittingly places his hand upon the fence surrounding the place in which the dog is kept or any part of his body within the dog's reach. The same result flows from the provisions of the *Dog and Goat Act* 1898, sec. 19. It was conceded that the Act applies to the present case. In my opinion, the effect of the Act obliges the owner of every dog to secure it at his peril. It alters the rule of the common law making it essential to prove that the keeper of a vicious dog had knowledge of its vicious propensities. But it also deals with the case of actual negligence. It seems that an action could also be maintained at common law for negligently keeping a dog that did harm though the keeper had no knowledge of any vicious propensities (*Beven* on *Negligence*, 3rd ed., p. 527; *Fardon* v. *Harcourt-Rivington* (1)). The Act renders it unnecessary in such a case to establish that injury was attributable to any neglect on the part of the owner. But responsibility imposed by the Act upon the owners of dogs, though stated in absolute terms, still, in my opinion, depends as at common law upon the relation of the person complaining of the injury to the owner of the dog and the circumstances under which the injury was sustained. Nothing, however, in the circumstances of the present case relieves the owner of the responsibility cast upon him by the Act to keep and secure his dog at his peril. The plaintiff was, as I have said, passing along the public street and the owner was bound to take sufficient precaution that his dog should do no injury to persons so using the street.

The appeal should be allowed.

Appeal allowed. Order of the Supreme Court discharged. Verdict of the District Court restored. Respondent to pay the costs of this appeal and of the appeal to the Supreme Court.

Solicitors for the appellant, *Rowley, Roseby & Co.*
Solicitors for the respondent, *Hunt & Hunt.*

J. B.

(1) (1930) 47 T.L.R. 25.