Thursday, January 12, 1882.

SECOND DIVISION.

[Sheriff of Stirlingshire.

HENNIGAN *v.* M'VEY.

Reparation — Dangerous Animal — Liability of Owner where no Previous Injury done.

A boar escaped from its stye and entered a garden close to that of its owner. The pursuer, the person whose garden it had entered, having gone to drive it out, it turned on him and injured him. It was not proved to have previously injured anyone, but it was proved that its owner knew that it had more than once before escaped from the stye, and that at the time of the injury inflicted on the pursuer it was in a furious and excited state. *Held* that the pursuer was entitled to damages from its owner for the injury it inflicted, inasmuch as it was an animal dangerous if left at large, and absolute precautions to prevent it causing injury were therefore incumbent on its owner.

This was an action concluding for £50 damages for personal injury caused by a boar belonging to the defender. The facts were, that on 4th February 1881 a boar belonging to the defender, Anthony Hennigan, a pig-dealer, escaped from its stye and got into the garden of the pursuer, Patrick M'Vey, which immediately adjoined the defender's garden. The pursuer being informed of this circumstance, took a walking-stick and went to drive the boar out of his garden. He found it to be in an angry and excited state, owing to the presence of his own boar, which was kept in a stye in his own garden, and when he was about to drive it out with his stick it attacked him and inflicted injury upon his arm and thigh.

It was proved that the boar had twice previously to the defender's knowledge escaped from its stye. There was some evidence that on one of these occasions it had attacked the pursuer's son, but it was not proved that the defender knew that. On the other hand there was some evidence that it was a quiet and peaceable animal.

The Sheriff-Substitute (BUNTINE) found that the boar was ordinarily a quiet animal, but was enraged and excited on the day in question, and that the pursuer, who was well acquainted with the nature of such animals, was rash and imprudent in interfering with it when in that condition. He therefore found in law that the defender was not liable in damages to the pursuer.

He added this note:—"The boar is an animal *mansuetæ naturæ*, and accordingly its owner is not liable for any injury which may result from any sudden or unusual display of ferocity due to excitement, and contrary to its natural habits. The defender had no reason to suppose that it was likely to do harm to anyone. It is true that it had escaped from the stye more than once before this day, but it is not proved that on these occasions it had shown any bad temper or ferocity. But all animals, however tame, are in certain circumstances dangerous to meddle with.

"The boar in this case had been excited by the proximity of pursuer's boar, and was enraged and furious.

"It was foolish and rash in the pursuer in these circumstances to have tried to turn it out of his garden, and more especially was it foolish in the pursuer, because he must be held to be aware, as a pig-keeper himself, of the peculiar habits of the race of swine.

"His duty was to have intimated to the defender that his boar was trespassing, and to leave him to make the capture, and he would probably have been entitled to hold the defender liable in damages if any damage had ensued.

"He was not justified in tackling the excited animal singlehanded, and it would be unfair to hold the defender liable for his rashness and indiscretion.

"The only valid grounds of the pursuer's claim depended upon his being able to establish by proof his allegations that the animal was naturally savage and vicious, and that in the knowledge of defender, and that the defender had not used the proper means of keeping the animal in restraint.

"In the opinion of the Sheriff-Substitute, the pursuer has failed to prove any of these allegations, and must therefore be non-suited.

"The pursuer has, however, suffered serious injury, and in the circumstances the Sheriff-Substitute thinks that equity will be best considered by modifying the expenses of process, to be refunded to the defender by one-half."

On appeal the Sheriff (GLOAG) recalled these findings, and pronounced this interlocutor and note:—"Finds in point of fact—(1) That on 4th February 1881 a boar which belonged to the defender escaped from its stye, strayed into the pursuer's garden, and there attacked and injured the pursuer; (2) that the gate or wall of the said stye was insufficient to prevent the escape of the boar therefrom; (3) that the pursuer was aware of such insufficiency; (4) finds it not proved that the injury suffered by the pursuer was caused by his own rashness or fault: Finds in law that the pursuer was bound so to secure the said boar as to prevent it straying at large or entering into the premises of his neighbours, and that he was in fault in not securing the boar to that effect: Therefore finds the defender liable in damages to the pursuer in respect of the injury so suffered by the pursuer: Assesses said damages at the sum of £10, and decerns therefor.

"*Note.*— . . . The Sheriff therefore holds that the case falls to be decided on the footing (1) that the boar had not, to the knowledge of the defender, previously shown any dangerous disposition, but (2) that it was to the knowledge of the defender insufficiently secured.

"So standing the facts, it appears to the Sheriff that two distinct questions arise which cannot be safely mixed up, namely—(1) Whether the defender would be liable supposing it clear that no blame attached to the pursuer? and (2), if so, whether the pursuer was so much in fault as to relieve the defender?

"Supposing the boar had, through the failure of the defender to secure him sufficiently, strayed to the public road, and there attacked the pursuer, would the defender have been liable? Would the pursuer, on whom the injury lighted, require to suffer the damage done to him as a *damnum fatale*, or would he be entitled to be relieved in whole or in part by the defender? The Sheriff is inclined to think that in these circumstances he would be entitled to damages.

"If the injury had been by the bite of a dog in the circumstances stated probably there would have been no such liability, unless the dog were of a half-savage breed; but if, in such circumstances, the injury had been caused by a bull or a stallion the Sheriff has little doubt that there would be liability.

"The danger of allowing such animals to stray at large is obvious, and the Sheriff considers that the owner of such animals is very clearly bound to prevent them from straying on the highway unattended. Of course if a bull were enclosed in a field, and there injured either a trespasser or a servant, the case would be totally different, and the distinction is very clearly pointed out by Lord Benholme in the case of *Clark* v. *Armstrong*, July 11, 1862, 24 D. 1315. 'The master's responsibility,' his Lordship observes, 'is very great if he allow his cattle to wander on the highway at large, or without sufficient control, in case anyone be injured in consequence, or if they are put in a park through which there is a right-of-way unfenced. In all such cases the responsibility of the master is very great.'. Now, it appears to the Sheriff that the case of a boar left at large is more analogous to that of a bull or a horse than to the case of a dog. In this case the injury did not occur on the high road, but in the pursuer's private premises. But that difference certainly is not in favour of the defender. The Sheriff is, on the whole, inclined to hold that if no fault is attributable to the defender he would be entitled to damages.

"But the Sheriff-Substitute proceeds to a considerable extent on the ground that the pursuer was culpably rash in interfering with the boar when in a state of excitement, and that he brought his injury on himself. There is certainly a great deal in this view, and it is not without great hesitation that the Sheriff has thought it insufficient. Had the boar not been in a state of excitement the right of the pursuer to drive it from his premises could not be questioned. His right to drive it from his garden would be the same as his right to turn it out of his house had it got there. It is on an opinion as to the degree of excitement which the boar showed that the conclusion as to the pursuer's rashness must rest. Now there is, and can be, no evidence on the subject as to the apparent excitement of the boar before the attack but the evidence of the pursuer, and it is at least worthy of consideration that he depones that he did not think his interference dangerous, and in all probability he would not have interfered if he had thought it dangerous. Nor does it appear to the Sheriff that the force of that consideration is weakened by a speciality which is turned against him, namely, that he was well acquainted with the habits and peculiarities of these animals.

"Being so acquainted, and seeing the boar, he thought (so he swears) that he might drive it away without danger. That surely, if believed, is some evidence that there was not great evident danger.

"He depones, it is true, that the boar was foaming at the mouth, and the two animals seem to have been growling at one another, but they were not in actual conflict. There is no evidence that the pursuer was in any state of excitement or rage. He was but defending his own property, and the Sheriff cannot find proved such an amount of rashness in his doing so as to disentitle him to damages if otherwise entitled to them.

"The Sheriff has thought it necessary to refer to the various decisions in England and Scotland on the subject of injuries from animals. He refers to Addison on Torts, ed. 1870, pp. 175 *et seq.*, as summarising (correctly as he thinks) the English decisions; and he may refer to the cases of *Clark* v. *Armstrong; Renwick* v. *Rothberg*, July 2, 1875; *Cowan* v. *Dalziel*, November 23, 1877, 5 R. 241; and *Burton* v. *Moorhead*, July 1, 1881, 18 Scot. Law Rep. 640, decided in the Court of Session. No decision was referred to having any special application or closely approaching the present in its details."

The defender appealed to the Court of Session, and argued—This was a quiet animal, and no danger was to be expected from it, and none would have happened but for the pursuer's own fault in attacking it when it was excited. For the damage it might have done when trespassing on pursuer's garden the defender might be liable, since that was damage which he might reasonably have expected, but the injury to pursuer was one the possibility of which he could not be expected to have had in view.

Authorities—*Cox* v. *Burbidge*, January 18, 1863, 32 L.J. C.P. 89; *Lee* v. *Riley*, May 5, 1865, 34 L.J. C.P. 212; Bigelow on Torts, 478.

The respondent's counsel was not called on.

At advising—

Lord Justice-Clerk—Some questions in this category of law are of some difficulty. They were all considered very recently in this Division in the case of *Burton* v. *Moorhead*. It is not questioned that though a domestic animal becomes infuriated or savage on a particular occasion, and does damage, its owner is not liable if there was no reason to expect that injury might be caused by it. If the owner has reason to suspect it will do injury if it be left at large he is responsible if he does not take reasonable precautions—indeed absolute precautions—against that. Here we have such a case. This boar was kept by the defender in a stye from which it could easily get out, and it cannot be disputed that it was of such a nature that it could be easily infuriated. Indeed, strangely enough, it was made part of the defence that it was so much so that the pursuer ought to have let it alone till the defender came.

It is clear that the defender's precautions were not sufficient, because the boar had got out before. Now, I should have thought that it is matter of common knowledge that a boar, although it may in a sense be a domestic animal, is certainly not *mansuetæ naturæ*, and that upon the slightest provocation it will do such mischief as it did in this case. That, I say, is matter of common knowledge, and the obligation upon the defender therefore was to take absolute precautions against its escape. I agree with the judgment of the Sheriff. He has very clearly stated the reasons of his judgment, and I concur in them entirely.

Lords Young and Craighill concurred.

Lord Rutherfurd Clark—My only doubt is whether the injury was not caused by the pursuer's own rashness in atttacking, as he did, without apparent necessity, the boar which he

found in his garden, but as your Lordships are all opposed to that opinion, I do not enter on that question, and do not dissent from your Lordships' decision.

The Court affirmed the interlocutor of the Sheriff.

Counsel for Appellant—Lorimer. Agent—J. K. Lindsay, S.S.C.

Counsel for Respondent—Darling. Agent—W. G. L. Winchester, W.S.

Saturday, January 14.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LAMB AND OTHERS *v.* KASELACK, ALSEN, & CO., AND GILLESPIE & CATHCART.

Ship—Freight—Charter-Party—Bill of Lading—Dead Freight—Demurrage.

A charter-party provided that "the owners shall have an absolute lien on the cargo laden on board for all freight, dead freight, and demurrage." Bills of lading for certain parts of the cargo shipped on board by the charterer, and transferred to onerous consignees, provided that freight should be at a certain rate, "other conditions as per charter." *Held* that the owner was entitled as against the consignees to a lien over their portion of the cargo for the freight due on another portion for which no consignee appeared at the port of discharge, since the obligation of the charterer imported into the bill of lading was that every portion of the cargo should be liable for the whole.

By charter-party entered into at Glasgow on 4th June 1879 between Roberts and Burdis, on behalf of the owners of the vessel "Lewis M. Lamb," and Robert Stephens, that vessel was chartered by Stephens to proceed to Patagonia, and there load a cargo of guano or other lawful merchandise. The material parts of the charter-party were, that the ship should "proceed, as directed by the charterer or his agent, to Monte Video, for orders for the Guano Islands, on the coast of Patagonia, east coast of South America, not beyond 50 degrees south, and there load as customary, with the ship's boats and crew, a full cargo of guano or other lawful merchandise, and being so loaded she shall therewith proceed to a port of call and discharge in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive. Orders to be given by telegram immediately on receipt of telegram of ship's arrival, or lay-days to count, and deliver the said cargo agreeably to bills of lading, and according to the custom of port, and so end the voyage and charter. (The dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted.) The freight to be paid on final delivery of the cargo, in cash, at the rate of 42s. 6d. sterling per ton of 20 cwt., if discharged in the United Kingdom, with 2s. 6d. per ton extra if discharged on the Continent, with £10 gratuity to the captain for his extra care and attention to the business of this charter. Should the vessel be ordered direct at her final loading to her port of discharge, 1s. 6d. per ton is to be deducted from the above rates of freight. The vessel to be consigned to charterer's agents at port of discharge, paying the usual commission once only of 2½%, which includes custom-house business inwards. The vessel, if required, is to take a boat, guano bags, materials, &c., from Monte Video, also the charterer's agent and labourers, to and from the coast; and after the vessel is loaded land them at Port Desire, Monte Video, or any other place on the way home that may be arranged, free. The charterer to pay any port charges that may be incurred in consequence of the vessel calling to land labourers, material, &c.,; but she is not to lie longer than forty-eight hours at her port of call, unless compelled by stress of weather. The charterer pays and provides the labourers with rations while on shore, also will provide water-casks, the vessel to provide the men with rations while going to and from the coast or islands, and also with water. The vessel is not obliged to take the cargo beyond 50 yards from the beach or place of shipping. Sixty running days are to be allowed for loading the said vessel at the islands, to commence twenty-four hours after arrival at place of loading, and end when she has finished taking in cargo. Any days on demurrage at the rate of 4d. per register ton per working day. The owners shall have an absolute lien on the cargo laden on board for all freight, dead freight, and demurrage. The owners engage that the said vessel, her boats, crew, and materials, shall be kept up in the same good and efficient state during this voyage, and the captain and crew shall render all usual and customary assistance in working the cargo. . . . Bills of lading to be signed by the captain for the cargo when presented to him, but at not less than the chartered rate. No claim for demurrage nor dead freight will be allowed, unless intimated to charterer's agent by the captain in writing when getting his final sailing orders from the coast. Penalty for non-performance of this charter, the amount of freight. The brokerage on this charter is at five per cent. on the gross amount of freight, is payable to Alston & Tulloch by the vessel as customary, and may be deducted from the freight unless previously paid. The vessel to provide six men (labourers) with rations and waters, same as crew, for which charterer will allow 1s. 9d. per man per day, on board and on shore. Disbursements to not exceeding £50 sterling to be advanced at Monte Video by merchant, subject to cost of insurance."

Stephens, the charterer, accompanied the vessel, which arrived at the Guano Islands on 11th November 1879, having on board labourers for the purpose of assisting in loading the guano. Work was begun on 13th November. On 29th November a portion of the cargo had been shipped, and the master executed bills of lading in the following form—"Shipped, in good order and well-conditioned, by Robert Stephens, on board the good ship or vessel called the 'Lewis M. Lamb,' whereof T. Williams is master for the present voyage, and now at , bound for a port of call in the United Kingdom for orders, to say, one hundred tons guano, fifteen water puncheons, the same being marked and numbered as on the margin, and to be delivered in the like good