the security by selling the works and applying the price to the liquidation of their claim, I must say that they are suggesting a course which would be as destructive to their existence as a company and to their business and credit as the course proposed by the petitioners. I am therefore of opinion that the petitioners are entitled to have a winding-up order.

LORDS MURE, SHAND, and ADAM concurred.

The Court granted the prayer of the petitioner.

Counsel for Petitioners — Sol.-Gen. Robertson, Q.C.—Lorimer. Agents—Melville & Lindesay, W.S.

Counsel for Respondents—Balfour, Q.C.—M'Kechnie. Agent—George M. Wood, S.S.C.

Thursday, December 2.

SECOND DIVISION.

SMILLIE *v.* BOYD.

[Sheriff of Lanarkshire.

Reparation — Dangerous Animal — Dog — Contributory Negligence.

The pursuer, a pig-keeper, who was in the habit of calling at houses and collecting refuse for pigs, was severely bitten while collecting refuse at the defender's house, by his dog, which was known to both parties to have bitten several persons before. On the occasion in question the pursuer had been admitted to the premises by the defender's wife, who, believing her to have left, had let the dog out into the garden where she was. The defence was that the pursuer knew of the dog's nature, and had been told that if she persisted in coming to the house she did so at her own risk. *Held* that contributory negligence was not in the circumstances established, and that the defender was liable in damages.

This was an action of damages against Thomas Boyd, residing in Braeside Avenue, Rutherglen, for damages for the bite of a dog. The pursuer, Catherine Goldsmith or Smillie, a pig-keeper, who was in the habit of calling at houses in the district to collect refuse, which she obtained gratuitously for her pigs, was severely bitten while in the defender's garden on 7th October 1885 by a valuable collie dog belonging to him. It was not disputed that the dog had previously bitten other persons, and that the defender knew that. The defence was that the pursuer had by her own negligence brought the injury on herself. It was proved that the pursuer's father, who was in use to accompany her on her rounds, had previously been bitten by the dog, and the defender led evidence to show that he and she had both been warned against coming to the house because the dog had an antipathy to them, and that he had taken precautions, by putting a lock on a gate at the side of the house and within the garden, to prevent them going round to the back-door without being seen. It appeared, however, that they had not ceased to come, and that on the day in question the pursuer went to the door and rang the bell and was admitted at the front gate by the defender's wife, who then unlocked the side gate and took her round to the back-door, when it was found that there was nothing for her. The pursuer deponed that the defender's wife then told her she might pick some cabbage-blades in the garden and remove them. The defender's wife deponed that she could not swear she had not allowed her to stay in the garden for this purpose, and she might have told her she might go into the garden for cabbage-blades. About twenty minutes afterwards the defender's wife, being entirely ignorant that the pursuer was in the garden, went out with the dog into the garden. The pursuer was still there, engaged in pulling the blades, and the dog bit her. This action was brought in consequence. The pursuer concluded for £50 damages.

The Sheriff-Substitute (GUTHRIE) found that the dog was vicious, and was known to the pursuer to be so; that pursuer and her father had been often warned not to come on the premises lest the dog should attack them, and that the defender's wife had, on finding there was nothing for pursuer on the occasion in question, dismissed her; that she was in fault for being in the garden after being repeatedly warned of the danger. He therefore assoilzied the defender.

On appeal the Sheriff (CLARK) adhered, founding his judgment on the pursuer's fault as repeatedly admitted by herself at the time of the injury.

The pursuer appealed.

Argued for her—The pursuer was in the garden on the occasion in question on the invitation of the defender's wife, and was not a trespasser, and indeed there was no contradiction of her story that she was actually told to stay in the garden. The dog having been known to defender to be vicious, he was bound to use not reasonable only but absolute precautions to restrain it—*Burton* v. *Moorhead*, July 1, 1881, 8 R. 892.

The defender argued—It was unnecessary for him to say anything against the decision in *Burton's* case, but that decision did not involve that the pursuer could recover even if bitten by a dog which defender was bound to restrain, if she had herself been careless of her safety. It was proved that the pursuer was in fault, and at all events was in the garden to serve herself only, taking the risk of a danger she knew perfectly well; and further, that she had at the time attributed her injury to herself, and that was material evidence in the defender's favour—*Wilson*, June 21, 1883, 10 R. 1021. The question was, whether she was negligent, the very question put to the jury in *Sarch* v. *Blackburn*, 4 C. & P. 197, and on that question the Sheriffs were with defender. In *Daly* v. *Arrol*, reported *infra*, the Court had assoilzied the owner of a dog he knew to be fierce, and which had bitten, not a stranger, but one of his own workmen, the ground of judgment being that the pursuer was guilty of contributory negligence in unnecessarily approaching the dog.

At advising—

LORD YOUNG—In this case—knowing that an application by the pursuer to dispense with printing was to be made—I thought that I might usefully read through the evidence and the Sheriff's judgment. When I had done so my impression was that in this case the indulgence of dispensing with printing the record should be granted,

and we did grant it. But the whole evidence—or at least all the important parts of the evidence—has been read to the Court. The whole case rests on the evidence of the pursuer and of Mrs Boyd, and a great part of that evidence leaves no ground for controversy as to the facts. It is clear that the defender is the proprietor of a vicious dog—a dog known by him to have been vicious, although he seems to have been an intelligent and nice enough dog for all that. Well, the pursuer, a married woman, keeps pigs, and her father, who lives with her, seems to keep pigs also, and she is in the habit of going about the houses in the neighbourhood to carry off the refuse of broken victuals, &c., which are useless to their owners, but are useful to the keepers of pigs. Upon this occasion in October 1885 the pursuer went to the defender's house for that purpose; she went to the front door and rang the bell; the defender's wife saw her and knew her, and from previous experience knew what her errand was, and the pursuer says that she (Mrs Boyd) then went to the gate leading to the back premises, unbolted the gate, and allowed her (the pursuer) to go in. She invited her to go in and to go round to the kitchen door to see if there was any "brock," as she calls it, for her or not. Here we come upon an immaterial point in which these two witneses differ. Pursuer says that she got some "brock." Mrs Boyd says that there was none, and that she gave the pursuer none, but that is quite immaterial. Up to this point the pursuer was not a trespasser. She was there on the invitation of the defender's wife on a humble but very useful errand.

The next matter, however, is one on which it is desirable to refer to the evidence of the two witnesses whom I have mentioned as being the only really important witnesses. The pursuer's evidence is this—"Mrs Boyd then asked me to take away some cabbage-leaves out of the garden; these were the blades left on the stalks after the cabbage is cut off. I went into the garden and was gathering the blades when the dog bit me. I did not see where it came from. It seized me by the left leg and threw me down on the green, till my screams brought Mrs Boyd to my assistance." What Mrs Boyd says on this point is this—"I answered the door. I went through the house again and opened the back-door, and let her in by the garden. (Q) When you let the pursuer in by the back-gate did you go into the scullery?—(A) I had no refuse to give her. (Q) Did you ask her to go in among the vegetables and get some cabbage-leaves?—(A) I could not swear I did, but her father and she were in the habit of taking everything they could. When I let the pursuer in I did not know I had no 'brock' to give her. I may have told the pursuer to go into the garden for the cabbage-leaves. (Q) Was your attention next attracted by a scream from the pursuer?—(A) No. (Q) Did you not go out to her assistance in consequence of the dog having attacked her?—(A) I let the woman in, and when I found there was no 'brock,' I went into the house and shut the door. The dog was in the house with me, and about twenty minutes afterwards I said to the dog, 'Run away and fetch coals for the kitchen fire.' I went out with him, and the pursuer was there among the cabbages, and the dog ran forward and bit her."

Now, I should not regard that evidence by Mrs Boyd as a contradiction of the pursuer's statement, but rather as a confirmation. For although Mrs Boyd will not swear that she asked the pursuer to go into the garden to get cabbage-leaves, she says it was a most likely thing for her to do; that the pursuer and her father were in the habit of going there and taking everything they could—everything which was useless to the defender, and which it was a relief to him to get rid of. Then was the pursuer in the garden with the permission and on the invitation of the defender's wife? I say on all the evidence that she was. It is not suggested that while in the garden she was doing anything wrong or dishonest; well, then, while according to the evidence she was on the defender's premises with the permission and by the invitation of the defender's wife, she was bitten by his dog which was known to him to be vicious. Now, let us attend to the findings in fact of the Sheriff—"Finds that the dog was known to the pursuer to have bitten several persons, and to be of a vicious disposition: Finds that the pursuer and her father had often been warned not to come upon the defender's premises lest the dog should attack them." I should have expected rather a finding to the effect that the dog was known to the defender to be vicious, and I could not have pronounced the other part of the finding of fact. I think that there is evidence that they were told that the dog was vicious, and they had better not come; I should not have said it was all one way, though I think there is evidence to that effect. But I should not have thought that evidence very material unless it could be shown that she was disobeying orders, and was where she was against the orders of the defender or of his wife Mrs Boyd. But that is not the case here; she was not there in violation of orders, but by Mrs Boyd's express desire and will. Then the judgment goes on—"Finds that on the said 7th of October the defender's wife admitted the pursuer to the garden, and after finding that there was no broken meat or refuse for her, dismissed her: Finds that sometime after the defender's wife went out for coals, taking the dog with her: Finds that the pursuer was still in the garden picking cabbage-leaves, and that the dog at once attacked and bit her."

Now, I could not have come to the conclusion that the pursuer was sent away when it was found that there was no "brock" for her. The evidence would not bring me to that conclusion. And then comes the material part of the interlocutor—"Finds that the pursuer was in fault in being still in the garden after being repeatedly warned of the danger: Therefore assoilzies the defender, and decerns."

I cannot find that the defender was in fault. I am of opinion that she was in the defender's premises by the permission and on the invitation of the defender's wife, and I am of opinion that she was not in fault. I cannot put into words the fault she is supposed to have committed. The case comes to be this—A vicious dog, which is known by its owner and keeper to be vicious, attacks and severely wounds a person who is lawfully, and without any fault at all, on the premises of its owner, and that being so, is there not liability here? I think there is, and but

for the circumstance that the Sheriffs have come to another conclusion, I should say an exceptionally strong and clear case of liability. If your Lordships think proper I should therefore propose to recal the judgment of the Sheriff, and find the pursuer entitled to damages as well as to expenses, and the damages I would propose should be fixed at £30.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK—I quite agree in the judgment proposed by Lord Young, but I only wish to say one word in regard to the case of *Arrol*, because I think that that case illustrates a distinction sometimes lost sight of. If a dog is known to be vicious, then there is an obligation on the owner of the dog to keep it in proper restraint. But knowledge that he is a vicious dog does not impose an obligation on the friends and acquaintances of the owner to stay away from his premises. They are bound to exercise a reasonable amount of precaution, but that is all. In this case the proprietor ought to have kept the vicious animal in restraint, and it is quite clear that he was in fault in not so restraining him. But in the other case—that of *Arrol*—the dog was restrained; he was securely chained up, but the injured man in taking a short cut out of the works went within the length of his chain, so that the restraint was neutralised by the man going too near the dog. I quite concur in the present judgment.

The Court pronounced this interlocutor—

"The Lords . . . find that on the occasion libelled the pursuer, while in the defender's garden by permission and on the invitation of his wife, was attacked and severely bitten by his dog, which was known to him and to his wife to be vicious: Find that the defender was in fault in allowing the dog to be at large, and is liable in damages to the pursuer, who did not by fault or negligence on her part induce the said attack: Therefore sustain the appeal, recal the judgments of the Sheriff and Sheriff-Substitute, assess the damages at £30," &c.

Counsel for Pursuer—Steele. Agent—E. Bruce Low, S.S.C.

Counsel for Defender—Sym. Agent—D. Hill Murray, S.S.C.

Friday, June 25.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

DALY *v.* ARROL BROTHERS.

Reparation—Dangerous Animal—Dog—Contributory Negligence.

A workman was bitten in his master's yard when passing within reach of a dog chained there, and which was known by the master to have previously bitten more than one person. *Held* that, in the circumstances, the workman was acting incautiously in going near the dog, and that the injury was due to his own carelessness, and not to any want of precaution on the part of his master.

This was an action by Myles Daly, a boiler-maker, against Arrol Brothers, engineers, Glasgow, in whose employment he was at the date of the injury after mentioned.

The defenders had in their works a large watch-dog, which was chained in a kennel in their yard by a chain about six feet long. This dog had, previously to 13th June, attacked and bitten two workmen in the works who came in without lawful reason when it was off the chain. Its kennel was in a part of the yard where it was not usual or necessary for workmen to pass. On 13th June 1885 the pursuer, during working hours, was passing the kennel within reach of the chain. The dog came out and bit him very severely, and this action was raised in consequence. The pursuer denied, but it was proved, that he had known before he was bitten of the dog being chained there.

The Sheriff-Substitute (SPENS) found, after findings to the effect above explained, that the pursuer was barred by his own contributory carelessness from recovering damages, in respect he went too close to the kennel, even if *culpa* had been proved against defenders, which, however, he held not proved. He therefore assoilzied them.

The pursuer appealed to the Court of Session, and argued that the dog having previously bitten, and the master being well aware of that, it was his duty either not to keep the dog, or to take not only reasonable but effective precautions against it doing injury.

Authorities cited—Stair, i. 9, 5; *Sarch* v. *Blackburn*, 4 Carrington & Payne, 297; *Clark* v. *Armstrong*, July 11, 1862, 24 D. 1315; *Burton* v. *Moorhead*, July 1, 1881, 8 R. 892; Addison on Torts, p. 115.

The Court pronounced this interlocutor:—

"Find that on the occasion mentioned in the record the defenders' dog was lodged in their works in a kennel, to which it was attached by a chain 6 feet in length: Find that the pursuer was aware of the presence of the dog there, but nevertheless approached it so near as to be within range of the chain, and was attacked and bitten: Find that the injury thus sustained by the pursuer is attributable to his own fault, and not to any fault on the part of the defenders: Therefore dismiss the appeal: Affirm the judgment of the Sheriff-Substitute appealed against: Of new, assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer—Rhind—A. S. D. Thomson. Agent—

Counsel for Defenders—Jameson—Napier. Agents—J. & J. Ross, W.S.
