FLEEMING, ...APPELLANT.
ORR, ... RESPONDENT.

1855.
8th, 9th March.
3rd April.

Liability for a Dog.—If the owner of a dog keeps him properly secured, but another person improperly lets him loose and urges him to mischief, the owner is not liable.

Proof, therefore, that the dog of A. has killed the sheep of B., will not entitle B. to recover compensation from A.; for consistently with such proof, the dog may have been kept properly secured by A., and may have been improperly let loose and urged to mischief by a third person, without the knowledge, and even against the express prohibition of A.

Rule as to Facts found in a Judgment appealed from.—Under the Judicature Act, 6 Geo. 4, c. 120, s. 40, the Court of Review is confined to the facts found in the interlocutor complained of, and cannot look at the evidence by which those facts are supported.

Pleading,—Costs.—Where a party by pleading wrongly misleads his adversary, the House, though deciding in his favour on the merits, will not award costs.

ON the night of the 6th of February 1851, a fox-hound belonging to the Appellant destroyed eighteen sheep belonging to the Respondent.

The Respondent brought his action in the Sheriff Court of Dumbartonshire, claiming reparation.

The *Sheriff* ordered a proof, and evidence was gone into.

On the 24th of June 1852, the *Sheriff* having considered the cause, found it established that the Appellant's dog had destroyed the Respondent's sheep, and on that ground alone pronounced an interlocutor against the Appellant. Upon the question, whether the Appellant was chargeable with *culpa* or negligence, the interlocutor of the *Sheriff* was silent.

The Respondents appealed by way of advocation to the Court of Session, and on the 5th of March 1853, the Lords of the Second Division adhered to the interlocutor of the *Sheriff* with expenses. Hence the present Appeal.

Mr. *Rolt* and Mr. *Wood*, for the Appellant: The Scottish Judicature Act (*a*) renders the *Sheriff's* finding final as to the facts. To fix with liability, it must appear that the dog was known to be ferocious. The scienter is an indispensable element in all such cases (*b*).

[The LORD CHANCELLOR (*c*): There can be no doubt as to the law of England. The question is, Whether the law of Scotland is the same?]

We contend that it is. Lord *Stair* (*d*) so lays it down, and the Court below so decided in *Turnbull* v. *Brownfield* (*e*). There is an older case to the same effect, *Todridge* v. *Andron*, reported by Lord *Fountainhall* (*f*).

The *Solicitor General* (*g*) and Mr. *Anderson* for the Respondent: It is usual to keep a foxhound in a kennel. If it be *versans in licito*, the master is not liable; but if it be suffered to go at large, and damage ensue, common sense as well as the law of both countries, implies responsibility. The maxim is *Sic utere tuo ut alienum non lædas*, which means, So keep your dog as that he shall not injure your neighbour.

[The LORD CHANCELLOR: I see nothing in the finding of the *Sheriff* inconsistent with the supposition that this dog had been properly secured by the owner, but was let loose by another person (not only without

(*a*) 6 Geo. 4, c. 120, s. 40.

(*b*) Bull. Nisi Pr. 77. *Judge* v. *Cox*, 1 Stark, 285. *Beck* v. *Dyson*, 4 Camp. 198. *Brock* v. *Copeland*, 1 Espinasse, 202.

(*c*) Lord Cranworth.

(*d*) B. 1. t. 9, s. 5.

(*e*) 6 December 1735.

(*f*) 3 Supp. 223.

(*g*) Sir Richard Bethell.

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On Tuesday, the 3rd of April, the cause stood on the paper for judgment.

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, in this case the action was brought before the Sheriff of Dumbartonshire in June 1851, and the summons was in these terms: "That the Pursuer, Major Orr, was the proprietor of the lands and estate of Duilater, in the parish of Cumbernauld, and on the night of the 6th of February 1851, he had in two grass fields adjoining the parish road leading from Cumbernauld, and part of his estate, a flock of twenty-six sheep or thereby pasturing there, his property or his lawful possession." "That upon the morning of the 7th day of the said month of February 1851, it was discovered that eighteen sheep belonging to the Pursuer, and part of the said flock, had been during that morning or the preceding night worried or destroyed by dogs." "That one of the dogs found among the said sheep in the Pursuer's fields was of the fox-hound breed, and was the property of the Defender, John Fleeming, and had been for some time and after said occasion, in the custody, or keeping, or care of the other Defender, James Forrester, at his farm."

Then the summons states a great deal of correspondence which passed between Major Orr and Captain Fleeming; adding that Captain Fleeming, as owner of the foxhound, and James Forrester, as keeper of and having charge of the same, are conjunctly and severally liable to the Pursuer in the sum of 25*l.* sterling, the sum at which the sheep had been valued, and a certain sum for expenses.

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Defences were duly lodged for Defenders, by which the Defender, Captain Fleeming, admitted that he was the owner of a young foxhound in the keeping of the other Defender, Forrester, but denied that such foxhound had destroyed the sheep. The Defender Forrester further insisted that he was, under no circumstances, liable, because even if the dog had destroyed the Pursuer's sheep, still it was the owner alone who could be made responsible.

A condescendence and answers thereto were then duly lodged, and the same points were made as upon the summons and defences.

The cause then proceeded to proof, the trial occupying six or seven days; and, eventually, the *Sheriff-substitute*, on the 24th of June 1852, pronounced an interlocutor as follows: "The *Sheriff-substitute* having resumed consideration of the process finds, that on or about the 6th day of February 1851, eighteen sheep belonging to the Pursuer, and then pasturing in his fields near Dullater House, were attacked and destroyed by dogs; and one of these dogs, the only one that has been traced, was a foxhound, the property of the Defender, Mr. Fleeming, and then in the keeping and under the charge of the other Defender, James Forrester; finds in these circumstances that the said Defenders are liable for the loss thus sustained by the Pursuer: therefore repels the defences, and decerns against the Defenders in terms of the conclusions of the summons; finds the defenders liable in expenses, allows an account thereof to be given in, and remits to the Clerk of the Court to tax the same, and to report and decerns."

This interlocutor was afterwards on appeal to the *Sheriff-depute* adhered to by him; and the *Sheriff-substitute* thereupon fixed the Pursuer's costs at 39*l.* 17*s.* 10*d.*

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The cause was brought by advocation to the Court of Session, and the Defenders lodged additional pleas, insisting, in addition to their former grounds of defence, that, "Even if it should be held to be proved that the Advocator's dog killed any of the sheep, the Advocator cannot be found liable in reparation therefor to the Pursuer, in respect it has not been alleged or proved that the Advocator's dog was of vicious habits, or dangerous to sheep, and that this was known to the Advocator." The Pursuer insisted, as he had done before, that the Defender Fleeming, as owner, and the Defender Forrester, as custodier of the dog, were both liable; the fact of the destruction of the sheep by that dog having been sufficiently established by the proof.

The case was argued in the Court of Session, and the following interlocutor was pronounced, "The Lords having advised this case and heard the Counsel for the parties thereon, repel the reasons of advocation; adhere to the interlocutor complained of on the merits; repeat the findings therein; and remit to the *Sheriff*, with instructions to disallow in the Pursuer's account the expenses incurred in making up a record by condescendence and answers, and any revisals of the same, such condescendence having been moved for by the Pursuer, and being wholly useless; and with power to the *Sheriff* to decern of new for the expenses after such deduction; find the Pursuer entitled to the expenses in this Court; remit to the Auditor to tax the account thereof, and to report."

Against all these interlocutors the Defenders have appealed to your Lordships' House, and the case was argued a few weeks since.

On behalf of the Appellants, it was urged that by the law of Scotland, as by the law of England, in order to make the owner of a dog, or other animal, responsible for damage done by it, the person injured

must both aver and prove that the owner was aware of its vicious propensities; that here there was no such averment or proof; and consequently, the decision below could not be sustained.

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On the other hand, the Respondent maintained, that by the law of Scotland, differing from that of England, knowledge on the part of the owner of the vicious propensities of his dog is not necessary to make him responsible for any damage that the dog may occasion; that it is sufficient to show that in fact the dog occasioned damage, or at all events that he did so in consequence of want of due care on the part of his owner.

In order to come to a just conclusion on this Appeal, it is necessary to look attentively to the terms of the interlocutor appealed from. I say "interlocutor," for though the Appeal is directed in form against four interlocutors, the whole question turns in fact on the first — that is, the interlocutor of the *Sheriff-substitute*, which "finds in these circumstances that the said Defenders are liable for the loss." Whether the facts proved before the *Sheriff* did or did not warrant this finding in point of fact is not a matter on which your Lordships have any right to adjudicate; for by the Judicature Act (*a*) it is enacted, "That when in causes commenced in any of the Courts of the Sheriffs, or other inferior Courts, matter of fact shall be disputed and a proof shall be taken, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the

(*a*) 6 Geo. IV. c. 120, s. 40.

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several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends or is affected by matter of law."

Here the Court of Session merely repeats the finding contained in the interlocutor of the *Sheriff*, which therefore must be taken as specifying all the facts material to the case and established in proof. To the evidence itself your Lordships have no right to look. The only question for decision is, whether the facts found do or do not make the Appellants liable to the Respondent for the loss of his sheep. Now the only facts found are that the sheep of the Respondent, while pasturing in his fields, were attacked by dogs, one of which, a foxhound, was the property of the Appellant Fleeming, and then in the keeping of the other Appellant Forrester. Unless, therefore, by the law of Scotland the owner of a dog and the person in whose keeping the dog is, are necessarily and in all cases responsible for the damage occasioned by that dog in the destruction of the sheep of another, the interlocutor does not state facts warranting the finding which makes the Appellants liable.

Now, my Lords, I think it clear on all the authorities that the liability of the owner cannot be carried to the extent which such a proposition involves. It cannot be that because I am the owner of a dog, it may be, of gentle habits, which I have properly secured, therefore, if another person, without my consent, or, it may be, contrary to my express prohibition, lets the dog loose and urges him to attack the sheep or cattle of another, I am responsible for the injury thereby caused.

If it be said that this was not the state of facts actually existing in the case now under appeal, I answer that the Legislature has forbidden us to look

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for the facts to anything beyond the four corners of the interlocutor. The Court of Session was bound to take care that all the facts which they considered material to a right decision should be there found; and all which there appears is that the damage was caused to sheep which were pasturing on the lands of the Respondent by a foxhound, of which one of the Appellants was owner and the other keeper. If, in order to make the owner liable, it was necessary that he should have been aware of the mischievous propensities of the dog, that should have been found. If that is not essential by the law of Scotland, in order to fix the owner with responsibility, but if some *culpa* or negligence on his part is essential, then that *culpa* or negligence ought to have been found. The interlocutor cannot be sustained unless, without either knowledge of the vicious habits of the dog or any want of care in securing him, the owner is in all cases responsible for any damage which he occasions to sheep which are depasturing on the land of their owner.

That this is not the law of Scotland may, I think, be safely assumed, not only from the absurdity to which a contrary doctrine would lead, but even from the opinions expressed by the learned Judges in this very case. It is true that the *Lord Justice-Clerk*, at the end of his judgment, does intimate an opinion that without any negligence on the part of the owner, he might have been made liable from the mere fact that his dog had got loose and worried the sheep. This, however, cannot be relied upon as the deliberate opinion of that very able Judge, and his judgment clearly proceeded on other grounds. Lord *Cockburn* considers negligence in the case of the dog to be necessary in order to constitute liability in the owner; and he likens the case to that of a party negligently using a dangerous weapon. Lord *Murray* considers that

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the law of Scotland does not differ from that of England, but that in neither country can the owner be made responsible unless he was aware of the vicious propensities of the animal. Lord *Wood*, though he concurred with the majority of the Court in holding the Appellants liable, yet considered that in order to create responsibility there must be *culpa* or negligence on the part of the owner.

The truth plainly is, that the Judges, in fixing the Appellants with liability in the present case, proceeded on grounds to which, by the express enactment of the Legislature, your Lordships are disabled from attending. We can look only to the interlocutor of the *Sheriff*, adopted as it is by the Court of Session, and negligence on the part of the Appellants certainly is not expressly or by necessary implication to be inferred from anything there to be found.

I regret that we should be obliged to decide the present appeal on this apparently technical ground; but the Legislature has for good reasons forbidden us to do more than to decide whether the facts stated on the face of the interlocutor warrant its conclusions; and as the interlocutor here contains nothing necessarily showing either knowledge of the vicious propensities of the dog or want of due care in keeping him, I think it quite clear that there is nothing to fix the Appellants with responsibility.

This view of the case excludes the consideration of what was addressed to your Lordships in argument as to the difference or supposed difference of the law of England and the law of Scotland on this subject. According to Lord *Stair*, indeed, the law in the two countries is the same. This opinion was adopted by Lord *Murray*, and receives great confirmation from the two old cases of *Todridge* v. *Andrews* and *Turnbull* v. *Brownfield*, referred to in the argument. But sup-

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posing those authorities not to have existed, and that by the law of Scotland it is sufficient, in order to fix liability on the owner, to allege and prove that he was guilty of negligence in the mode of keeping his dog, and that it is not necessary to add that he was aware of its vicious propensities,—how far is this substantially different from the English law? The reason why by the English law it is necessary to allege and prove the *scientia* is, that in the case of an animal *mansuetæ naturæ* the presumption is that no harm will arise from leaving it at large. Starting from that presumption, it follows that there cannot be blame or negligence in the owner merely from his allowing liberty to an animal which has not by nature the propensity to cause mischief. Blame can only attach to the owner when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits, and, therefore, according to the English law, it is necessary to aver and prove this knowledge on the part of the owner. But, after all, the *culpa* or negligence of the owner is the foundation on which the right of action against him rests, though the knowledge of the owner is the medium, and the only medium, through which we in England arrive at the conclusion that he has been guilty of neglect—and in that sense it is said that the *scientia* is the gist of the action.

If a different rule prevails in Scotland, and if there it is sufficient to allege negligence on the part of the owner, without averring or proving his knowledge of the animal's habits, it is not that the foundation of the action is different, but that the Scotch law does not so readily permit the owner of an animal to rely on the general consequences flowing from its being supposed to be an animal *mansuetæ naturæ*, a supposition

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which experience shows to be very often far from the truth, and which I am inclined to think that we in England have sometimes too readily acted on.

I have made these few remarks for the purpose of showing that the difference in the laws of Scotland and England on this subject, if difference there be, consists not in the fact that *culpa* on the part of the owner is the foundation on which redress is given in Scotland, whereas something more is required in England, but that in England it is assumed that *culpa* (which is in both countries the sole ground of the action) cannot exist without knowledge on the part of the owner of the animal's habit. But however this may be, as the present interlocutor states no *culpa* whatever, I am clearly of opinion that it cannot be supported.

Two objections of a technical nature were relied on. First, it was said that the plea disputing the Appellants' liability on any ground other than by denying the fact that the dog in question caused the mischief was a plea raised for the first time on the advocation, and it was said that no plea inconsistent with the original pleas before the *Sheriff* ought to have been admitted by the Court of Session. There are several answers to this objection. In the first place, on such a point, being a mere matter of practice, this House would be very unwilling to act on grounds not urged before the Court below, or which, if brought before them, must have been considered by the Judges as entitled to no weight, for it is not even glanced at in their opinions. But further, the Act of Sederunt of July 1828, Section 25, to which we were referred in argument, expressly authorizes the adding of additional pleas when a judgment is recorded by advocation; and it is palpably a mistake to treat this as a plea inconsistent with what had been pleaded before the

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Sheriff; it is additional to but in no wise inconsistent with what was there pleaded.

The other point was that made by the *Solicitor General*, that by the law of Scotland it is sufficient to allege damage, and that this *primâ facie* imputes negligence or blame, and that it lies on the opposite side to set up circumstances of justification. This can obviously be a rule of pleading only, if any such rule exists, as to which I offer no opinion. It is impossible that it can apply to the finding of the Court, which, by express statutable provision, must state the material facts, that is, all the material facts warranting the conclusion against which the opposite party have no opportunity or right to make any observation.

My Lords, I have only further to mention that my noble and learned friend (*a*), who is absent, fully concurs in the view which I have taken of this case.

(*a*) Lord Brougham.

The following are the remarks of Lord Cockburn, who concurred in the decision of the Court below :—

I never had any doubt that if my dog worries the sheep of another I am liable.

It has been urged that the owner's knowledge of the vicious propensities of the dog is requisite to make him civilly responsible, and that he is not liable for damage done by the animal, unless such knowledge be proved; but I think that the argument to which I have just now adverted is quite absurd. The vicious tendency of the animal never can be known until some mischief is done; so that the result of the argument would be, that every dog is entitled to have at least one worry, and every bull one thrust, without rendering its master responsible. It may be that such is the law of England, and it rather appears that they have in that country an unbounded toleration for a first offence. But, in the law of Scotland, it is no matter if the animal belonging to the defender, and committing an injury, have four legs or only two. Suppose my coachman, a person in whose skill and care I have from long experience unbounded confidence, drives my carriage over a child, will it be any defence to me that he never did it before?

There is a well-known principle of the law of Scotland which, I think, is sufficient to carry us through this case. It is, that a

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Under these circumstances I have to move your Lordships that the Interlocutor be reversed. I do not think that the Court of Session ought to have given any costs below, and therefore I shall move that the Interlocutor be reversed without costs.

Mr. *Solicitor General:* Will your Lordship forgive me,—probably the course which the House would think fit to adopt would be to reverse the Interlocutor and make a Declaration, and remit the case, because the House knows nothing of the evidence which was taken; it knows only the findings in the *Sheriff's* Interlocutor. One of the Judges speaks of there being proof of negligence, but that it was unnecessary to go into it. Your Lordships, therefore, would merely remit the Cause, because there may be abundant proof of negligence or *culpa* in the evidence that was actually taken.

party negligently using a dangerous instrument shall be liable for the injury occasioned by his negligence. It is to me quite clear that there was negligence here; and that there is negligence in every case in which a dog of this nature is so left that he can get at sheep. A man is surely liable for the injurious results of the natural tendency of an animal kept by him, if he does not prevent that tendency from producing those results. Now, it is a natural tendency of such dogs to run after sheep. It is only by education and training that they are brought to run after foxes only. In its untrained state no dog of this kind would waste its energies in running after a fox if it got a good sheep, for the plain reason, that a sheep is much more easily caught, and is best worth catching. The tendency to worry sheep is, therefore, a natural tendency in such dogs, and for neglecting to guard against it the owner is responsible. On that ground alone I think the Defender liable.

But a far more important ground of liability than these strictly legal considerations is the common usage and understanding of this country. It is a point which I never heard doubted. There have been plenty of such actions in the Sheriff Courts; but there the discussion has always been on the question of fact, whether the mischief was truly done by the dog of the Defender. But I do not think it was ever doubted before, that if the fact was established, the Defender was liable for the sheep worried by his dog.

The LORD CHANCELLOR: I have looked through the evidence, although I have not remarked upon it, and I do not think there was proof of negligence; but in mercy to the parties I should recommend your Lordships not to give any countenance to further litigation by remitting the cause. I need hardly say that we shall not give expenses.

Mr. *Anderson:* The reversal will include that.

Mr. *Connell:* Is it not intended, my Lord, to give the Appellants their own costs in the Court below?

The LORD CHANCELLOR: No, certainly not. The Appellants misled the Respondent by pleading wrongly below. I do not wish to give any costs at all.

It is *ordered* and *adjudged*, by the Lords Spiritual and Temporal in Parliament assembled, That the said Interlocutors, so far as complained of in the said Appeal, be, and the same are hereby reversed.