Friday, November 15.

SECOND DIVISION.

[Sheriff Court at Cromarty.

GORDON *v.* MACKENZIE.

Reparation — Negligence — Contributory Negligence—Dangerous Animal—Injury by Bites of Dog—Patting Dog in Public Street.

In an action of damages for injury caused by the bites of a dog, brought against its owner, it was proved that the pursuer encountered the dog in a public street and patted it, whereupon it sprang upon him and bit him. The defender pled contributory negligence. The Court repelled the plea, *holding* that the patting of the dog by the pursuer did not amount to contributory negligence.

Proof — Witness — Admissibility — Action of Damages for Injury by Bites of Dog—Evidence as to Conduct of Dog Subsequent to the Raising of the Action.

In an action of damages for injury caused by the bites of a dog, *held* that the pursuer was entitled to lead evidence of attacks made by the dog on other persons subsequently to the raising of the action in order to show that the dog was of a vicious disposition.

On 1st June 1911 William Gordon, shoemaker, Cromarty, *pursuer*, with consent of his father, brought an action in the Sheriff Court at Cromarty against Robert Mackenzie, hotelkeeper, Balblair, near Inverness, *defender*, in which he claimed damages "laid at £100 sterling for personal injury sustained by pursuer through a dog belonging to the defender, and which he well knows to be of a vicious nature, being negligently allowed to be unchained or kept in proper custody, and which on 9th April 1911, as pursuer was standing on the public road near defender's residence at Balblair, attacked him and severely bit him on the cheek and lips and tore his clothes."

The pursuer averred that on 9th April 1911 he went to the defender's hotel to buy some biscuits, and "was standing in front of his residence [the hotel] . . . when a collie dog belonging to or in the possession of the defender walked across the road from the house to the pursuer without giving any warning, and, without being provoked in the slightest way, sprang upon him and severely injured his face and damaged his clothing." The dog was of a savage nature, and was well known to the defender and in the district as being of a vicious and savage disposition, and it ought to have been destroyed long ago. It had on various previous occasions attacked other persons.

The defender averred that the "dog was lying in front of the door of the defender's hotel when the pursuer approached him, and after calling to the dog, began to clap him. It is believed that the pursuer must have done something to irritate the dog, which the dog resented, and that it thereupon turned round and bit him;" and the defender denied that the dog was vicious, and had on previous occasions attacked other persons.

The pursuer pleaded—"(1) The pursuer having been bitten by a dog which belonged to the defender, and which was known by him to be of a vicious disposition, he is entitled to compensation for his injuries from the defender."

The defender pleaded—"(2) The pursuer having interfered with and irritated the defender's dog, and the said dog having hitherto been of a quiet and friendly disposition, the action should be dismissed, with expenses."

The Sheriff-Substitute (MACWATT) allowed a proof, in the course of which the pursuer proposed to lead evidence to show that the dog had bitten a lady on a date subsequent to the raising of the action. The defender objected, and the Sheriff-Substitute sustained the objection and disallowed the evidence.

On 24th January 1912 the Sheriff-Substitute pronounced this interlocutor—"Finds (1) that on the occasion libelled, and on the public road, the pursuer was severely bitten by the defender's dog, which was known to the defender to have bitten other persons previously and to be vicious; (2) that the defender was in fault in allowing the dog to be at large; (3) that the pursuer, who was a stranger to the dog, was patting the dog at the moment of the occurrence; (4) that the pursuer was in fault in so doing; (5) that the pursuer has failed to show that the injury sustained by him was, in the circumstances, directly attributable to the fault of the defender: Finds, therefore, in law that the defender is not liable in damages to the pursuer: Therefore assoilzies the defender from the conclusions of the writ."

Note.—"The pursuer claims compensation for injuries sustained through a bite from defender's dog—a collie. It was hardly disputed, and it is proved, that he was severely bitten on the cheek and mouth by the dog on the occasion condescended on. He maintains that defender is liable in respect (1) that the dog had bitten other persons previously and was therefore dangerous, and (2) that this was known to defender. I am of opinion that pursuer has proved both of these propositions. . . .

[*His Lordship then discussed the evidence, and expressed the opinion that the pursuer had proved that the dog had on two previous occasions attacked other persons, and that the defender knew of these attacks.*]

"Now if these facts be as I have held, it is settled law that the defender was in fault in keeping the dog, and was liable for any damage it might do thereafter by biting. In other words, it fell into the category of 'dangerous animals,' and defender kept it at his own risk and was bound to keep it secure—see *Burton* v. *Moorhead*, 1881, 8 R. 892, 18 S.L.R. 640, and list of cases appended. If, therefore, the animal had bitten the pursuer without any

provocation or meddling with it on his part, it was hardly disputed that (on the assumption before stated) the defender would have been bound to make compensation.

"But the defender contended that even assuming the dog's propensity and his knowledge, the pursuer was in fault in 'clapping' the dog, and that he is not liable. Now the pursuer denies that he 'clapped' the dog, although admitting that as it approached him he put out his hand with the intention of doing so. But the witness M'Cormack, who was standing near when the bite occurred, says that he saw pursuer bending over the dog patting it, and that while he was doing so it sprang at him and bit him. It is possible that M'Cormack is lying, but I am bound to say I saw nothing either in his manner or the matter of his evidence to lead me to doubt his truth. The probabilities are all in favour of what he says, and I come to the conclusion that in point of fact the pursuer was patting the dog when the thing occurred. In so acting towards a dog to which he was a stranger I think he was doing a rash thing and was in fault. No prudent person will touch another's dog in the street unless he knows that it is of an amiable character. Many a dog if touched by a stranger will bite—either through fear or vice—which would not if left alone. Now the effect of pursuer's action is in my opinion this, that it is impossible to say that the dog would have bitten had pursuer not interfered with it, and it is therefore impossible to affirm that the damage was directly due to the fault of the defender. It is of course equally impossible to say that the occurrence was in fact due to the pursuer's contributory negligence, as the bite might have been given even had pursuer not touched the dog. But it is in my opinion a case where *sibi imputet* applies. As the pursuer has failed to show that he was injured directly through the fault or negligence of the defender, the defender falls therefore to be assoilzied.

"I regret this result, because pursuer was rather severely bitten, and will be marked for some time, if not for life. If I had decided in his favour I should have assessed the damages at £35."

The pursuer appealed to the Second Division of the Court of Session, and argued—(1) The defender was liable for the injury to the pursuer caused by the defender's dog. The evidence showed that the dog was of a vicious disposition, and that the defender was aware of the fact. The dog had in point of fact previously bitten another person, but it was unnecessary for the pursuer to show that the dog had actually bitten anyone else, if he showed that the defender had reason to believe it might do mischief—*Renwick* v. *Von Rotberg*, July 2, 1875, 2 R. 855. Since the dog was of a vicious disposition, the defender had no right to keep it at all unless he kept it in such a way as to make it perfectly secure—*Burton* v. *Moorhead*, July 1, 1881, 8 R. 892, *per* Lord Justice-Clerk at p. 895, 18 S.L.R. 640, at p. 642. The keeper of a ferocious dog, if he knew it to be ferocious, was in exactly the same category as the keeper of a naturally wild animal—*Baker* v. *Snell*, L.R., [1908] 2 K.B. 825, *per* Kennedy (L.J.) at p. 834; *Filburn* v. *People's Palace and Aquarium Company*, 1890, L.R., 25 Q.B.D. 258. The following authorities were also referred to—*M'Donald* v. *Smellie*, June 20, 1903, 5 F. 955, 40 S.L.R. 702; *Smillies* v. *Boyd*, December 2, 1886, 14 R. 150, 24 S.L.R. 148; *Hennigan* v. *M'Vey*, January 12, 1882, 9 R. 411, 19 S.L.R. 334; *Cowan* v. *Dalziels*, November 23, 1877, 5 R. 241, 15 S.L.R. 151; *Worth* v. *Gilling*, 1866, L.R., 2 C.P. 1; *Charlwood* v. *Greig*, 1851, 3 Car. & K. 46; *May* v. *Burdett*, 1846, Ad. & Ellis, 9 Q.B. 101. (2) The pursuer was not guilty of contributory negligence. The fault of the pursuer must be as clearly established as the fault of the defender which was the ground of the action—*M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, *per* Lord Neaves at p. 413, 9 S.L.R. 239. The patting of the dog by the pursuer did not amount to contributory negligence. He might have patted the dog with the idea of conciliating it, and he was entitled to assume that it was an amiable dog, especially in view of the fact that he encountered it loose at the door of the defender's hotel. The case of *Daly* v. *Arrol Brothers*, June 25, 1886, 14 R. 154, 24 S.L.R. 150, was in contrast to the present case. In *Daly's* case the pursuer was held to be guilty of contributory negligence, because he had rashly ventured within the range of the chain of a chained watch-dog. (3) The evidence led before the Sheriff was of itself sufficient to show that the dog was of a vicious disposition, but the Sheriff erred in rejecting the evidence of the vicious conduct of the dog after the date of the raising of the action, because the dog's nature had not changed, and if it was shown to be of a vicious disposition at a time subsequent to its attack on the pursuer, it was presumably of the same disposition when it attacked him.

Argued for the respondent—(1) The evidence did not show that the dog was of a vicious disposition and that the defender knew it. The case of *Charlwood* v. *Greig* (*cit. sup.*) was different, because there the dog's master was aware of an instance where the dog had bitten another person. (2) In any event the pursuer was guilty of contributory negligence in patting the dog. Even quiet dogs were apt by reason of timidity to snap at strangers when interfered with. The patting of the dog by the pursuer was the proximate cause of the accident, and therefore the defender was not liable—*Harris* v. *Mobbs*, 1878, L.R., 3 Ex. Div. 268. (3) The Sheriff was right in rejecting the evidence of vicious conduct of the dog after the date of the raising of the action. Such evidence was irrelevant because the defender's knowledge of the dog's character at the time when the accident happened could not be affected by events which subsequently happened.

At advising—

LORD JUSTICE-CLERK—This case divides itself into two parts, as all cases necessarily

do where there is an allegation that the pursuer has contributed by his own negligence to the accident that happened. As regards the second part of the case—namely, the question of contributory negligence—it was not in the end contended on behalf of the defender that there was such negligence on the part of the pursuer, and in any case I am very decidedly of opinion that the Sheriff-Substitute erred in holding that there was anything of the kind.

This dog apparently was in the habit of being outside the door of the defender's house and of wandering about the street. Now if the dog was dangerous—and that is the assumption we must proceed on on the question of contributory negligence—it was wrong to allow it to go about the streets alone. All that can be maintained against the pursuer on the evidence upon that matter is that he had stretched out his hand to pat the dog or had actually patted it. That is said to be a thing that nobody should do to an unknown dog on the street. I cannot assent to that for a moment. The public are entitled to expect that a dog that is allowed to wander about the street unattended is not a dangerous dog, and I cannot hold that a person who when a dog approaches him pats it or puts out his hand to pat it, either from friendliness or it may be in order to conciliate it, is guilty of contributory negligence.

The pursuer being free from blame, the only other question is whether the defender is at fault in allowing such a dog to wander about the street. [*His Lordship reviewed the evidence and found that the dog bit the pursuer, and was, to the knowledge of the defender, dangerous.*] I think I have gone over all the points in the case that may be held to be difficult. I should like to say, however, before closing, that I think the Sheriff-Substitute erred in not allowing the evidence of the witness which was objected to because the incident on which her evidence was based happened after this action was raised. I think that in order to prove that a dog is a vicious dog it is perfectly competent to show that it not only committed the act complained of, but that it did similar things to other people and put them in danger, the tendency of this evidence being to indicate that the act complained of was not an isolated incident, such as may happen once in the lifetime of a well-behaved dog, but that the dog was disposed to be vicious. I hold that that is evidence that the Sheriff-Substitute should have allowed. But I think there is enough in the evidence to enable us to decide the case without getting the evidence of this lady. I therefore move your Lordships to alter the judgment of the Sheriff-Substitute.

LORD DUNDAS—I am of the same opinion, and on the same grounds. I agree with your Lordship in holding that it is sufficiently proved by trustworthy evidence that the defender's dog was a dangerous dog, and that that was known to him. Now, if that is so, it is well settled that a man who chooses to keep a dog of that character keeps it at his own peril, and that if it bites anyone he will probably be liable for the consequences. Therefore I quite agree with the learned Sheriff-Substitute so far as his first and second findings are concerned.

In the Court below the defender set up a case of contributory negligence. When a defender does this, I apprehend the burden of proof is upon him, and that that burden is exactly similar to the original burden which rested on the pursuer at the beginning of the case. This being so, I think that, on the facts, the defender has entirely failed to discharge the burden. The alleged fault of the young man is that he patted this dog. The Sheriff-Substitute lays it down that "no prudent person will touch another's dog in the street unless he knows that it is of an amiable character." If that be intended as a statement of personal opinion, or as a practical rule of wise conduct with regard to dogs, I should be disposed to agree with it; but if it is put forward as a doctrine affecting the law of civil liability for negligence upon which we are to proceed, then I demur to accepting the doctrine. It is obviously a matter on which opinions may differ; but the Sheriff-Substitute seems to have reached his conclusion on the ground that there is a legal rule to the effect stated in the sentence I have quoted, for just before it he says that the pursuer was patting the dog and that "in so acting towards a dog to which he was a stranger I think he was doing a rash thing, and was in fault." I am unaware of any case, and none was cited, where contributory negligence was held to have been established upon so slender a basis as that which is here suggested. The point was quite properly maintained by junior counsel at our bar, but his senior frankly admitted that the Sheriff-Substitute's decision on this point was untenable. Accordingly I disagree with the fourth finding of the Sheriff-Substitute. Instead of that, we should find that the defender has failed to prove that the pursuer's actings materially contributed to the occurrence, and award damages. I agree in thinking that £35 is a fair sum to award.

LORD SALVESEN — I concur with your Lordships on the same grounds.

LORD GUTHRIE—I also agree.

The Court pronounced this interlocutor—

". . . Sustain the appeal and recal the said interlocutor appealed against: Find in fact in terms of the first three findings in fact in the said interlocutor appealed against: And find in fact (4) that the defender has failed to prove that the pursuer materially contributed to the injury sustained by him: Find in law that the defender is liable to the pursuer in damages: Therefore assess the same at the sum of £35. . . ."

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