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JACOBS *v.* PERERA.

D. C., Colombo, 67,619.

Before ANDERSON, C.J., and STEWART and CLARENCE, J.J.
December 19, 1876.

Brute animal—Injury done by a dog of mischievous habits—Liability of owner.

Where a person quietly going along a public road is attacked and bitten by a dog, its owner is liable to pay him the damage so sustained, if it be proved that the animal is one of mischievous habits, that is, of so vicious and savage a disposition that it was improper for the owner to allow it to go at large in a public place.

THE facts of the case and the points of law therein raised appear in the following judgment of Berwick, D.J. :—

"The plaintiff, who is a locomotive foreman, was attacked and bitten by the defendant's dog near its master's house, when quietly going along a public road to his daily avocations, and without his or any one else having given the dog any provocation. He was laid up in consequence for a month and sustained damage thereby to the extent of £26, viz., £15 in his ordinary earnings and £10 in consequence of delayed promotion in his Department, and £1 in medicines. He received medical attendance gratuitously from his departmental surgeon.

"There is no doubt of the liability of the owner of the dog to make some redress to the plaintiff, but the question has been raised as to the nature and amount of the redress due in point of law.

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"Another question, which is one of fact, has been raised, namely, whether the animal was one of "mischievous habits"—an expression which in the present case must be taken as meaning of so vicious and savage a disposition that it was improper for the defendant to allow it to go at large in a public place. If it was so, there can be no doubt that the owner was guilty of, and responsible for, fault or negligence in allowing the animal to be loose on the public road, and must pay the whole value of the damage occasioned; and he cannot evade this liability by either giving up the animal or its mere value; our Roman-Dutch Law having preserved, with only a few modifications, the spirit of the Roman Law on the subject as contained in the titles noted below;* and this has been expressly recognized by our Supreme Court in the case of *Folkard v. Anderson, C. R., Jaffna, 25,869, Leg. Misc. for 1860, p. 49.*

"I am satisfied on the evidence that the dog is not one of such mischievous habits as are above referred to, or at least has not been proved to be so.

"The animal has been produced in Court: seems an honest dog, one not to be trifled with, perhaps, in the execution of its duty, and one which suspicious lurkers and trespassers would be shy of, but well intentioned and trusty, and looks as if it merited the high character given of it by its master, viz., an excellent watch dog, fierce in the execution of its duty of protecting its owner's property, but otherwise harmless, gentle, and easily led by women and children. It would be very illogical and manifestly unjust to judge of the "habits" of either man or dog from a single isolated act either of misconduct or mistake, and that the very act which gives rise to the question (though there can be no doubt that in this particular case the dog did misjudge the plaintiff very erroneously and took some very fanciful offence at his appearance), and I do not think that any adequate evidence has been given to entitle one to judge unfavourably of its general "habits" from the other instance alleged of supposed savageness. Two witnesses —coolies—have been called to prove similar previous attacks. One has proved that once when he was passing the defendant's gate (which he is in the habit of doing every day) the dog "rushed at him," witness adds, "to bite" him, but the defendant called the dog off and no harm was done. I do not think much of this, for many dogs—and certainly a vast number

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* *De Lege Aquilia* (as to which *see Voet ad Pand. lib. 9, tit. 2*, particularly *s. 11 et seq.*), and *De Aedilito edicto* (as to which *see Voet ad Pand. lib. 21, tit. 1, s. 12*; and *Just. Inst., lib. 4, tit. 9. See* also *Voet lib. 9, tit. 1, s. 6*, and end of *s. 9*).

of those we see at native huts—have a way of feigning to run after and barking at persons passing their doors, without really meaning mischief; and the cooly's own cowardice may very likely have exaggerated the dog's intentions and his own danger (as we see every day at our own houses), and may even have aggravated the dog's humour to give him a fright. Had it really meant mischief, it would not have left him at once on being called off.

"The other witness, Nalle Cannoo, does speak of having been actually bitten by it; but that was when the witness was inside its master's premises, and when the dog probably thought he had no business to be there. He is a bill collector, who had gone to get payment of some money, and passed close to where the dog (which is a dog of intelligence) was chained; and it sprang at him. That was three years ago. He has been there fifty or sixty times since then, but has never been bitten since. He has learned the maxim *Cave canem*. And we have not heard of any one else having been bitten or attacked by it. If we had distinct or repeated instances of the dog, when off duty and on the public road, attacking innocent wayfarers from mere surliness or vice of disposition, it would then unquestionably be characterised as of mischievous "habits," and the owner would be guilty of grave negligence in allowing it to go at large or to accompany him on his walks without its being muzzled or chained and led; but I do not think I have evidence before me to justify me in giving this dog so bad a name. In fact, the present case of the plaintiff seems the only instance worth being seriously considered, and therefore no evidence of "habits" as distinguished from the very act which is the ground of the claim—the amount of which claim, or rather the nature of the redress due from its owner, the law makes to depend, not on the special delict in question, but on the animal's *previous* and confirmed disposition.

"It does not, however, in my opinion follow from this finding of fact that the plaintiff should have judgment for less than the full amount of damage and loss sustained by him. It has been urged for defendant that where neither mischievous "habits" on the part of the dog are proved, nor any fault or negligence is imputable to the defendant, the liability is limited to the *value of the* animal which did the injury; and an opinion to this effect was certainly expressed in the judgment of the Supreme Court in the case of *Folkard v. Anderson*.

"If there had been a series of decisions to the same effect, or even if the point had been expressly considered and determined by the Supreme Court in a case in which it became necessary to

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decide it, I should feel constrained to follow such decision. But in that case the dogs then in question were expressly found to be of mischievous habits, and consequently the question of limitation of the defendant's liability in that case to the value of the animals could not be, and was not, decided; and the plaintiff had judgment for the full damage claimed on the express ground of their proved savage habits. As that opinion therefore as to the nature of the liability in the case of non-mischievous habits was a mere *obiter dictum*, and given in a solitary case (for there is no other in our reports), I feel myself justified in considering the question of law an open one to be decided in this, the very first case, in which it has become absolutely necessary to determine it.

"Now, I fully agree with the judgment in considering that the liability is limited; but the question is in what way is it limited? Is the limit of liability, the right of the owner of the animal to give it up if he please to the party injured, and on such surrender to be discharged from all further claim? Or is the limit of liability the money value of the animal which did the injury? Now, I do not think that any authority whatever can be produced for the last view, though propounded in the case of *Folkard v. Anderson*.

"The decision in that case rightly proceeded on the principle that the Roman-Dutch Law on the subject was in force, and *Voet* in *lib. 9, tit. 1*, after dealing in section 6 expressly with the case of injuries by dogs, refers in section 9 to a difference between the Roman and Dutch Laws as to the class of injuries for which damage is recoverable, and concludes the whole title with the words: "But according to modern usages these [viz., disfigurement, scar, and pain] are also to be taken into account in estimating the damages [as well as the costs of cure and loss of employment], the rest of the Roman Law however remaining intact among us, even to the extent of the liberty to surrender the delinquent animal (*noxa*) and subsequent discharge from further liability.*

"Without any question, the rule of the Roman Law was to condemn a defendant in the *noxal* action to pay the full damage or surrender the *noxa*, as it was called, and be then absolved from any further liability; and he had his choice which of these he would do. There is not a word in the Roman Law about his paying the value of the animal. There is a manifest difference between surrendering the delinquent brute and being condemned to pay its value; and (speaking with great respect)

* Vinnius questions this in his *Com. ad. Inst. 4, 9, 1.* But Groenwegen expressly corrects him in his Commentary on the same text, and he is opposed by Grotius and Voet.

the Supreme Court seems (naturally enough) to have fallen into a misapprehension and to have overlooked a distinction which was not then immediately before that Court as it is here. I cannot find a single passage in the Roman Law to give colour to the latter view (*i.e.*, condemnation to pay the value of the delinquent animal), and all the texts are explicitly the other way. These will be found most conveniently arranged in *Pothier's Pandects*, in which compare *lib. 9, tit. 1, No. 1*, at the text *Si quadrupes* (where the word *noxa* means the delinquent *corpus* and *noxia* the damage done*); and *Nos. 9* and *10* of same title and *lib. 9, tit. 4, No. 24* (*3 Quæstio est, an is*, &c., at the end)† and *No. 30*. As already shown, the Roman Law is the Dutch Law on this point.

"The judgment will therefore be that the defendant do pay to the plaintiff the full amount of damages proved, namely, Rs. 260, unless he forthwith surrender to the plaintiff the dog in question, in which case he will be discharged from further liability. He is not bound to pay the value of the animal. On the other hand, the plaintiff cannot insist on having the value of the animal, and if he refuse to accept the dog when tendered to him, the defendant will be absolved from further claim.

"As, however, the action for redress is properly brought against the defendant, and he had not tendered the *noxa* before suit, defendant must pay plaintiff the costs of the action."

The plaintiff appealed from that portion of the above judgment which decreed that on the defendant surrendering to him the dog in question he should be discharged from further liability, and prayed that the Supreme Court do enter an absolute decree in his favour for Rs. 265, being the full amount of damage claimed.

In appeal, *Layard*, for plaintiff, appellant.

S. Grenier, for defendant, respondent.

The following judgment of the Supreme Court was delivered on the 19th December, 1876 :—

The plaintiff in this action sues for the recovery of damages laid at Rs. 300 occasioned by his having been bitten by a dog alleged to be of a fierce and mischievous nature.

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* It sometimes means the *delict* or *maleficium*.

† The expression *post acceptum noxale judicium* which occurs throughout Article III. refers to the old Roman procedure, and the acceptance by the litigant parties from the prætor of an issue of fact to be tried on evidence by the judex after the prætor had determined the law applicable to the case and the issue to be determined.

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The defendant in his answer, admitting to be the owner of the animal, denied that the dog was of a fierce and mischievous nature, and further especially pleaded that the plaintiff by his own misconduct provoked an attack from the dog.

On the pleadings the case went to trial, and the learned District Judge, though holding on the evidence that the plaintiff in no way gave the dog any provocation, was of opinion that the dog was not proved to be of mischievous habits.

We agree with the learned District Judge on the first of the above points, but come to a different conclusion as respects the second point. It appears to us that the plaintiff sufficiently established that the dog was of vicious and fierce habits. The dog is not only proved to have savagely and without provocation attacked the plaintiff, but there is in addition distinct and undeniable evidence of his having bitten another man, also unprovokedly, and further having attempted to bite a third under like circumstances—evidence, in our opinion, quite sufficient to support the contention of the plaintiff.

In the view we have taken of the facts it becomes unnecessary to consider either whether it was open to the defendant upon the issues raised in the pleadings to tender the dog to the plaintiff, or whether, according to the Roman-Dutch Law as in operation in Ceylon, the making over of the *noxa* is sufficient under the circumstances stated by the learned District Judge to deprive a person bitten by a dog of compensation in money for the injuries sustained by him, and, whether willing or no, that he must be content with the very brute that attacked and wounded him.

It will be seen that in the case of *Folkard v. Anderson* the Supreme Court in dealing with the legislation of Rome and Holland on the subject as applicable to Ceylon, put the value of the animal in the place of the animal itself.

The damages being proved to amount to Rs. 260, it is adjudged and decreed that the plaintiff do recover from the defendant the sum of Rs. 260 and costs of suit.