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CAINE FUR FARMS LIMITED and JOHN T. CAINE (*Defendants*) — APPELLANTS;

*Jan. 25
**June 10

AND

JOHN KOKOLSKY, carrying on business as Capitol Mink Farm, (*Plaintiff*) ..... — RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Animals—Defendant farmer allowing dog to run at large during whelping season—Dog straying on to neighbouring farm and entering mink compound—Resulting loss of mink—Negligence—Liability of defendant—The Game Act, R.S.A. 1955, c. 126, s. 44—By-law No. 205 of The Municipal District of Strathcona.

The plaintiff and the defendants were mink farm operators whose respective farms were situated close together. Both operations were enclosed by substantial wire fences. During the whelping season (a time when female mink are easily agitated and if thus upset have a proclivity to destroy their young), the defendants' dog, by climbing or leaping over the plaintiff's fence, got into the compound and when found was on top of the mink cages. The mink were in a state of panic as a result of which 67 kits and two adult mink were killed. The dog had been allowed to roam at large in contravention of a municipal by-law and s. 44 of *The Game Act*, R.S.A. 1955, c. 126. The trial judge found that there was negligence on the part of the defendants and awarded damages to the plaintiff. This judgment was sustained by the Court of Appeal; by leave, an appeal was brought to this Court.

There was no evidence that the defendants had any knowledge or suspicion that their dog had any propensity to disturb mink or the inclination or ability to leap over a high wire fence. Relying on the law relating to the liability of the owner of a domestic animal for damage done by a domestic animal while at large, defendants' counsel argued that liability could not be found against the defendants in the absence of *scienter*.

Held: The appeal should be dismissed.

Per Abbott, Martland and Ritchie JJ.: In the light of the circumstances of this case, there was a duty of care imposed upon the defendants to take reasonable steps to prevent their dog from straying on to the plaintiff's premises. There was sufficient evidence to warrant the conclusion reached by both of the Courts below that, in the light of all the circumstances, there was negligence on the part of the defendants.

Fardon v. Harcourt-Rivington (1932), 146 L.T. 391; *Fleming v. Atkinson*, [1959] S.C.R. 513, referred to. *Buckle v. Holmes*, [1926] 2 K.B. 125; *Tallents v. Bell & Goddard*, [1944] 2 All E.R. 474; *Toogood v. Wright*, [1940] 2 All E.R. 306, distinguished.

*PRESENT: Kerwin C.J. and Abbott, Martland, Ritchie and Hall JJ.
**Kerwin C.J. died before the delivery of judgment.

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Per Abbott, Ritchie and Hall JJ.: The defendants were entitled to succeed unless there were present in this case circumstances which were special in the sense that they created a duty on the part of the defendants toward the plaintiff and that there had been a breach of that duty. To allow this dog which was strange to plaintiff's mink to run at large in this area in the whelping season with knowledge that there is a hostile reaction between mink and strange dogs was negligence. The defendants owed a duty to the plaintiff not to frighten the female mink at that particular time and were in breach of that duty in allowing the dog to run at large. Recognition of such a duty was implied in ss. 44, 112(*b*) and 121 of *The Game Act,* R.S.A. 1955, c. 126, and By-law No. 205 of the Municipal District of Strathcona.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Milvain J. Appeal dismissed.

A. O. Ackroyd and *A. R. Thompson,* for the defendants, appellants.

J. W. McClung and *J. T. Joyce,* for the plaintiffs, respondents.

The judgment of Abbott, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—The facts of this case have been fully stated in the reasons of my brother Hall, with which I agree.

The case involves the question of liability for damage caused by a dog. At common law the dog has been placed in a favoured position, as compared with that of most of the other domestic animals. Like them, the dog did not involve its owner under the strict liability imposed in respect of the keeping of dangerous animals. Liability in respect of a dog, under that strict rule, would only arise if *scienter* were proved. But, in addition to this, the dog was not an animal whose trespass would involve its owner under the strict liability imposed for cattle trespass.

The latter proposition is established in *Buckle v. Holmes*[2], which, although it involved the owner of a cat, stated the law respecting dogs and applied the same rule also to cats. The reason for the special position of the dog was stated by Bankes L.J., at p. 129, as follows:

> Trespass by a dog is very different; a dog following its natural propensity to stray is not likely to do substantial damage in ordinary circumstances, although it might do so by rushing about in a carefully tended

[1] (1962), 37 W.W.R. 123, 31 D.L.R. (2d) 556.
[2] [1926] 2 K.B. 125.

garden; but those who administered the law in the course of its development had regard not to exceptional instances but to the ordinary experience of a dog's habits, and they also took into account that the dog, a useful domestic animal, must be used if at all according to its nature; that it cannot ordinarily be kept shut up, and that the general interest of the country demands that dogs should be kept and that a reasonable amount of liberty should be allowed them. Therefore dogs are placed by the common law in a class of animals which do not by their trespasses render their owners liable.

It may be noted at the outset that the Municipal District of Strathcona No. 83, within the area of which the damage in question here occurred, did not share this kindly attitude toward the position of the dog, for it had enacted, on February 9, 1953, Bylaw No. 205, which provided, in part, as follows:

1. For the purpose of this bylaw, the term "running at large" shall refer to any dog not under the immediate and effective control of its owner whether on the premises of its owner or otherwise.

2. No person shall, after the passing of this bylaw, suffer or permit any dog of which he is the owner to run at large within the Municipal District.

The liability of a dog owner for damage caused by his dog did not necessarily have to be founded on the rule of strict liability relating to the keeping of dangerous animals. It might be established in negligence if, in the circumstances, a duty to take care in relation to the dog existed and there had been a breach of it. This proposition was recognized by the House of Lords in *Fardon v. Harcourt-Rivington*[1], and it is stated by Lord Atkin in that case, at p. 392, as follows:

But it is also true that, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence.

It should also be noted that in this Court, in the case of *Fleming v. Atkinson*[2], Judson J., who delivered the reasons of three out of the five majority judges in that case, applied the ordinary rules of negligence in a case involving the straying of cattle on to a highway.

In my opinion, the question in issue here is as to whether or not the respondent is entitled to succeed against the appellants on a claim under the ordinary rules of negligence.

[1] (1932), 146 L.T. 391. [2] [1959] S.C.R. 513, 18 D.L.R. (2d) 81.

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Martland J.

Was there a duty on the part of the appellants, in the circumstances of this case, to take reasonable care that their dog would not be free to stray on to the respondent's premises, thereby involving the likelihood of injury to his mink? Both of the Courts below have held that there was such a duty and that the appellants were in breach of it.

In the first place, it should be noted that the appellants did not have a right to let their dog run at large. This was expressly forbidden by the provisions of the bylaw previously quoted. Counsel for the respondent relied upon that bylaw and also upon s. 44 of *The Game Act*, R.S.A. 1955, c. 126, as establishing a statutory duty, the breach of which gave to the respondent a cause of action. Section 44 of *The Game Act* provides:

> 44. No person having the custody or control of a retriever dog, setter dog or pointer dog or any other dog used for the hunting of game birds shall allow any such dog to run at large at any time between the first day of May and the first day of August in any year, unless he is expressly authorized to do so by this Act or the regulations.

I do not find it necessary to determine whether or not an absolute statutory liability was imposed upon the appellants by either or both of these provisions, so as to entitle the respondent, on establishing a breach thereof and damage to himself, to succeed in a claim for damages. Put at their lowest, however, these provisions are of significance in establishing that the appellants did not have any legal right to permit their dog to run at large. It seems to me that they serve as a complete answer to the contention made by the appellants, based on the English decisions of *Buckle v. Holmes, supra, Tallents v. Bell and Goddard*[1], and *Toogood v. Wright*[2], that a dog owner is not to be found liable in negligence because he suffers his dog to be at large, knowing of the natural propensities of dogs and that harm may possibly result when these propensities are manifested. In none of these cases did there exist a statutory provision which forbade the dog owner from permitting his animal to run at large.

In addition to the statutory provisions, however there are also, in this case, the following circumstances:

1. The appellants were aware of the existence of the respondent's mink farm adjacent to their own premises.

[1] [1944] 2 All E.R. 474. [2] [1940] 2 All E.R. 306.

2. They were aware that their dog had been accustomed to frequent the area near the respondent's land.

3. They should have known that the presence of a strange dog in the respondent's mink enclosure during the whelping season would terrify the whelping females who, in such circumstances, have a proclivity to destroy their young.

4. The appellants took no precautions to confine or restrain the dog during the whelping season.

In the light of all these circumstances, in my opinion, there did exist a duty of care imposed upon the appellants to take reasonable steps to prevent their dog from straying on to the respondent's premises. Both of the Courts below have found that there was negligence on the part of the appellants in the light of all the circumstances and, in my opinion, there was sufficient evidence to warrant that conclusion being reached.

I am, therefore, of the opinion that this appeal should be dismissed with costs.

The judgment of Abbott, Ritchie and Hall JJ. was delivered by

HALL J.:—For some 17 years prior to May 15, 1959, both parties to this action carried on the business of mink farming in the Municipal District of Strathcona immediately adjacent to the south boundary of the City of Edmonton. The two mink farms were close together, being separated only by an extension of 109th Street at one point and being contiguous at another point. Both operations were enclosed by substantial wire fences, the Caine fence being about 4-5 feet in height and the Kokolsky fence being 6 feet.

In 1958 the appellant Caine had acquired a Chesapeake retriever, a young dog, which by May 1959 had grown to full size and was described in the evidence as a large Chesapeake retriever which had received training as a mink dog and was used as such by the employees of Caine Fur Farms Limited. It had also been trained as a bird dog. The dog was normaly kept within the mink compounds or enclosure of the Caine farm and permitted to roam amongst the mink pens. The dog was also allowed to roam at large and to leave the mink farm area. The evidence also established that the dog was free to roam in the wooded area adjacent

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Hall J.

to these mink farms and that the dog went into the wooded area, and, on occasion, put up pheasants and perhaps other birds and game there.

This period of the year is known in the mink farming business as the whelping season. Both the respondent and Mr. Caine and the Caine Fur Farms Limited foreman, Mr. Phillips, knew that whelping was in progress on the respondent's mink farm. It was established that during the whelping season the female mink are easily agitated and that a strange dog in a mink compound was likely to upset the female mink and cause them to destroy their young. The dog had not shown any propensity or inclination to behave in an unusual or aggressive manner toward mink nor had he shown any inclination to leap over high fences.

On the evening of May 15, 1959, the respondent found this Chesapeake retriever in his mink compound. The learned trial judge found that the dog got into the compound by leaping or climbing over the fence which surrounded the compound. The dog was on top of the mink cages or runs. The respondent went to the Caine mink ranch and returned with the foreman Phillips who led the dog away. When the respondent first saw the dog in the compound, the mink were in a state of panic and some had kits in their mouths. Four pens were upset and the nest boxes from these pens were a considerable distance away. Early the next morning the respondent checked and found 67 dead kits and two dead adult mink. Two other adult female mink were missing and never found.

The respondent brought action in the Supreme Court of Alberta for damages. The action was tried by Milvain J. who gave judgment for the respondent in the sum of $3,726 and costs. The appellants appealed to the Appellate Division of the Supreme Court of Alberta and the Court of Appeal[1] sustained the judgment of Milvain J. An appeal was then taken to this Court by leave granted May 7, 1962.

Milvain J. found both the appellant John T. Caine and Caine Fur Farms Limited negligent, and his judgment on that branch of the case reads in part as follows:

> Now, in my view there was negligence on the part of the defendants and I say so for these reasons. In the first place, the defendants were in the mink raising business, as was the plaintiff, and therefore fully aware of the danger of dogs or anything else disturbing female mink during the

[1] (1962), 37 W.W.R. 123, 31 D.L.R. (2d) 556.

whelping season. They are also all aware of the law as laid down in The Game Act . . . that a mink owner finding a dog in his mink enclosure disturbing his mink is authorized by the statute to shoot the dog forthwith, which is an indication of how serious the invasion of a dog—a strange dog—into the mink enclosure is regarded by the mink industry and by the governmental authorities that control it; and with that knowledge, and with the knowledge that any person must have of a proclivity of a healthy, intelligent dog to roam when at large, and that while roaming he might very easily upset the female mink in nearby premises, and that it was negligent not to take precautions to keep the dog restrained, at least during the whelping season.

Kane J.A. who wrote the judgment of the Court of Appeal also held that the appellants were guilty of negligence. He said, in part:

A reasonable man in the position of the defendants knowing, as the defendants did, that the plaintiff's ranch was situate across the road from the defendant company's ranch, and that during the whelping season female mink have a well-known proclivity to destroy their young, would have foreseen the damage which might result from allowing the dog to run at large on May 15th, 1959. Their failure to do so constituted a breach of duty owing by them to the plaintiff. In the circumstances, therefore, the defendants were negligent.

Both the learned trial judge, Milvain J., and Kane J.A. in the Court of Appeal, referred to the provisions of *The Game Act* of Alberta, R.S.A. 1955, c. 126, and to By-law No. 205 of the Municipal District of Strathcona. The relevant sections of *The Game Act* read:

44. No person having the custody or control of a retriever dog, setter dog or pointer dog or any other dog used for the hunting of game birds shall allow any such dog to run at large at any time between the first day of May and the first day of August in any year, unless he is expressly authorized to do so by this Act or the regulations.

* * *

112. No person shall operate a fur farm except where

* * *

(*b*) the fur-bearing animals at the farm are kept in pens and such pens are enclosed by a fence that will adequately prevent all other animals from having access thereto.

* * *

121. An owner or caretaker of fur-bearing animals kept on a fur farm for any purpose pursuant to a licence or permit obtained under this Act may kill any dog found on the premises near the enclosure in which the fur-bearing animals are kept if the dog is terrifying the fur-bearing animals by giving tongue, barking or otherwise.

By-law No. 205 is as follows:

A By-law of the Municipal District of Strathcona No. 83 to provide for the governing and destruction of dogs running at large.

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Under authority of Section 230 of the Municipal District Act, being Chapter 151 R.S.A., 1942 and amendments thereto, the Council of the Municipal District of Strathcona No. 83 enacts as follows:

1. For the purpose of this bylaw, the term "running at large" shall refer to any dog not under the immediate and effective control of its owner whether on the premises of its owner or otherwise.

2. No person shall, after the passing of this bylaw, suffer or permit any dog of which he is the owner to run at large within the Municipal District.

3. Any person or persons duly authorized or appointed by the Council for such purpose, shall immediately destroy all dogs found running at large.

4. This bylaw shall come into force immediately upon the passing thereof.

Counsel for the appellants relied strongly on the fact that there was no evidence at all that the appellants had any knowledge or suspicion that the dog in question had any propensity to disturb mink or the inclination or ability to leap over a high wire fence, and, relying on the law relating to the liability of the owner of a domestic animal for damage done by a domestic animal while at large, argued that liability could not be found against the appellants in the instant case in the absence of *scienter*.

It is not necessary, in my view, to review all the relevant authorities dealing with the liability of an owner of a domestic animal dealt with by both counsel in their full and helpful arguments before us. The appellants are entitled to succeed unless there are present in this case circumstances which were special in the sense that they created a duty on the part of the appellants towards the respondent and that there has been a breach of that duty.

To allow this dog which was strange to respondent's mink to run at large in this area in the whelping season with knowledge that there is a hostile reaction between mink and strange dogs was negligence. The appellants owed a duty to the respondent not to frighten the female mink at that particular time and were in breach of that duty in allowing the dog to run at large. Recognition of such a duty is implied in the provisions of *The Game Act* and the by-law to which I have referred.

For these reasons I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Liden, Ackroyd, Bradley & Philion, Edmonton.

Solicitor for the plaintiff, respondent: J. W. McClung, Edmonton.