of opinion that the tenant will suffer by reason that damage or injury will be done to him in respect that the land taken for new holdings forms part of the whole of the subject which he holds under a current lease —that is to say, if part of his farm is taken and he is left with the remainder, reduced in value by such taking, or if the whole of his farm is taken from him, in either case in the course of his lease. These first two items are concerned with the question from the point of view, the first of the landlord, the second of the tenant, confining attention to the area taken for new holdings as distinguished from the rest of the estate of which it forms a part. But the third item regards the question of injury from the point of view of the landowner's whole estate, and provides for compensation where the Court or arbiter are of opinion that damage or injury will be done to any landlord "in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." One asks first of all at what point of time is that depreciation to be ascertained, and I think the necessary answer is that it is to be ascertained as at the date at which the land is taken for the constitution of new holdings. What, then, is the meaning of depreciation at any given point of time in the value of an estate? It can, as I conceive it, be nothing other than the depreciation, if any, in the selling value of the estate as at that date. The learned Lord Ordinary appears to think that the depreciation contemplated by the statute can have nothing to do with selling value in the present case, because *de facto* the estate was not at the point of time in question and indeed is not now for sale. That is a chain of reasoning which I really cannot follow. Even although the landholder has not placed his estate on the market, it may depreciate in value just as much as if he had done so, and I should have thought that even in the end of October 1914, when he pronounced his judgment, the Lord Ordinary might have learned from current events that property was capable of depreciating in value although the owner of it had made no attempt in the previous couple of months to sell it. Depreciation in the value of an estate cannot be looked upon purely from the point of view of sale. An estate has always a potential value as a security, and no landowner knows when he may not require it as a fund of credit. A proposing purchaser would look at it from the same point of view. There has been, under this statute, imposed upon this estate a drastic change in the relation between its owner and the tenants of a substantial part of it. It is conceivable that that change, although it may not touch, for the present at any rate, the gross rental of the estate, may affect materially the abstract selling value, and therefore the security value, of the estate in the general market. That is not avoided by the fact that the owner has no immediate intention of either selling or of borrowing. It may be a fact all the same. It has been held, and I think on reasonable grounds, by the experienced arbiter here, that circumstances have occurred by reason of the changes introduced by the Act and by the Board of Agriculture taking advantage of its provisions to acquire part of the estate, which have affected its value in the market, and this is precisely what the statute intended to provide for. To interfere with the arbiter's discretion on this matter, unless he has acted *ultra vires*, is impossible. That he has done so was hardly seriously contended, and at any rate may be negatived without hesitation.

In these circumstances there can be no question that the arbiter's award must be given effect to.

I desire to add that I entirely concur with your Lordship's view as to the meaning and object of the last passage of the section with which we are dealing. This is clear to anyone who knows anything about Scottish practice under the Lands Clauses Acts. That practice may not be defensible on the intention of these statutes. But it had the sanction of sixty years, and it was prudent to provide against a similar practice growing up under this Act.

LORD GUTHRIE, who was present at the advising, delivered no opinion, not having heard the case.

LORD SALVESEN was sitting in the First Division.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defenders for payment to the pursuer of the sum of £3850 sterling with interest as concluded for.

Counsel for the Pursuer and Reclaimer—Constable, K.C.—J. A. Christie. Agents—Mylne & Campbell, W.S.

Counsel for the Defenders and Respondents—Solicitor-General (Morison, K.C.)—T. G. Robertson. Agent—Sir Henry Cook, W.S.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

MILLIGAN *v.* HENDERSON.

Reparation—Negligence—Dangerous Animal—Dangerous Propensity—"Scientia"—Liability of Owner.

An action of damages for personal injury was raised on the ground that a dog belonging to the defender, or for which he was responsible, having come suddenly from behind a wagonette of the defender's which it was accompanying, passed in front of the pursuer, who was cycling past the wagonette, causing her to swerve, to hit the front wheel of the wagonette, and to fall, receiving injury. The pursuer failed to prove that the dog was vicious, but there was evidence that it was frolicsome, being about ten months old, though it had

not thereby ever before caused any trouble.

Held that there being no *scientia* of evil propensity the defender was not liable; *diss.* Lord Johnston on the ground that the defender had, by himself or his servants, such knowledge as precluded his being excused from taking precautions.

Authorities examined.

Louisa Ann Milligan, Glasgow, *pursuer*, brought an action in the Sheriff Court of Kirkcudbright against James Henderson, King's Arms Hotel, Dalbeattie, *defender*, for loss and damages for personal injury sustained by the pursuer, caused through the conduct of a dog belonging to the defender.

The parties averred, *inter alia*—"(Cond. 1) Pursuer is an M.A. of Glasgow University, and resides c/o Miss Burnette, 5 Great George Street, Glasgow. The defender is an hotel proprietor, and is the owner of public conveyances at the King's Arms Hotel, Dalbeattie. (Cond. 2) On or about Wednesday, 27th August 1913, pursuer and a friend named John Hendrie, residing at 37 Airlie Gardens, Hyndland, Glasgow, cycled from Dalbeattie to Kippford, Colvend, and returned in the afternoon of that day. (Cond. 3) At about six o'clock in the afternoon of said 27th August 1913, pursuer and the said John Hendrie, when about one mile from Dalbeattie, saw a wagonette containing five persons and the driver coming towards them, and in the direction from Dalbeattie to Kippford. Said wagonette belongs to the defender, and was in the care of a driver the name of whom is to the pursuer unknown. (Ans. 1, 2, and 3) Admitted. (Cond. 4) When pursuer and the said John Hendrie came near to said wagonette they proceeded in single file on the same side of the road to pass the wagonette, and when on the point of passing it a large retriever dog belonging to the defender ran suddenly out from behind the said wagonette and rushed at the said John Hendrie. He swerved and passed the dog, and the dog then rushed at the pursuer. In order to avoid the dog pursuer swerved, and while doing so came in contact with the said wagonette and was knocked over. The wagonette passed over part of pursuer's left foot and over pursuer's left arm between the wrist and the elbow. The defender's explanation in answer is denied. Assuming, but not admitting, that the said dog did not belong to defender, pursuer avers that the said dog was in the custody of defender and was kept at his hotel, of which hotel he is either proprietor or tenant, and that the said dog was known to the public generally as being the defender's dog. The defender is called upon to state the name of the nephew to whom he alleges the dog belongs. (Ans. 4) Admitted that Mr Hendrie and pursuer proceeded in single file to pass the wagonette on their left-hand side of the road. *Quoad ultra* denied. Explained that before approaching the horse's head Mr Hendrie was about 12 yards ahead of the lady when a young dog or puppy which, unknown to the defender, had followed said conveyance passed between the said Mr Hendrie's bicycle and pursuer's. Mr Hendrie's passage past the conveyance was not interfered with and neither was pursuer's, but the pursuer apparently became agitated and lost control of her cycle, and collided with the outside of the front wheel of the defender's conveyance, as a consequence of which she fell off her bicycle and injured her left arm and left foot. Defender was in no way to blame for pursuer losing control of her bicycle. The dog did not 'attack' either Mr Hendrie or the pursuer or touch either of them. Explained further that the said conveyance did not run over her or injure her in any way, and that her injuries were due to her own fault and negligence. Defender's horses and conveyance were at the time as near to the bank on their own side of the road as possible, and left a clear space of at least 9 feet for pursuer and the said Mr Hendrie to pass them. . . . (Cond. 8) The said dog belonging to the defender was of a vicious or dangerous nature, and had a habit of rushing at and attacking cyclists, and should not have been allowed to follow conveyances. This was known or should have been known to the defender. On several occasions his drivers have attempted to turn the dog away from following the conveyance they were respectively driving. The habit of rushing at and attacking cyclists was known to the servants of defender, who had the care, control, or charge of the dog. In particular, on said 27th August 1913 defender helped to change the horse of the wagonette which knocked over pursuer at the King's Arms Hotel, Dalbeattie, and he was present when the wagonette left that hotel for Kippford under the care, control, and charge of a driver, the name of whom is to the pursuer unknown. He knew or should have known that said dog followed the wagonette on that date. After the dog left the hotel following the wagonette, and before pursuer received her injuries, the dog attacked at least one cyclist whose name is to the pursuer unknown, and also rushed at people on the street. The attack and rushes were known to the driver of said wagonette, who was a servant of defender, having, as pursuer believes and avers, been in defender's employment since the beginning of the year 1913 and still is, and who had the care, control, and charge of the said dog. The driver still allowed the dog to follow the wagonette, knowing that it had attacked a cyclist and was rushing at people. The said dog was allowed to go at large behind said wagonette and was not chained or fastened thereto, and this was a contravention of the Roads and Bridges (Scotland) Act 1878, Sched. C, sec. 97. The defender's explanations in answer are denied. Since the date of the injury the said dog has been disposed of or removed from said hotel. (Ans. 8) Admitted that the defender helped to change the horse of the wagonette in question at the King's Arms Hotel, Dalbeattie, and that he was present when the wagonette left that hotel for Kippford. Denied that the dog

belonged to the defender, and was of a vicious and dangerous nature. *Quoad ultra* denied and irrelevant."

The defender pleaded, *inter alia*—"(6) The pursuer not having been injured through the fault or negligence of the defender, and the dog in question not being of a vicious or dangerous nature, or known to him as such, the defender is entitled to absolvitor with expenses."

On 7th July 1914 the Sheriff-Substitute (NAPIER), after a proof, on the ground that the defender having allowed the dog to follow the wagonette was responsible for its conduct and the result of its conduct, found the defender liable in damages, which he assessed at £30.

The defender appealed to the Sheriff (ANDERSON), who on 29th December 1914 pronounced this interlocutor—"The Sheriff having heard parties' procurators and considered the cause, sustains the appeal: Recals the interlocutor of the Sheriff-Substitute of 7th July 1914: *Finds in fact* (1) that on 27th August 1913 the defender had the custody and control of a retriever dog, aged about ten months; (2) that it was allowed to follow a wagonette belonging to the defender, which was, about 5 p.m. on said date, being driven from Dalbeattie towards Kippford; (3) that on said date the pursuer was cycling from Kippford to Dalbeattie; (4) that when the pursuer was passing the wagonette, and was on her left side of the road, the dog ran in front of her or jumped at her, causing her to swerve, lose control of her cycle, and fall on the road, whereby she was injured; (5) that the dog was not vicious; (6) that the dog was not known to have any tendency to rush at cyclists or people: *Finds in law* that the defender is not liable in damages for the injuries received by the pursuer: Therefore sustains the sixth plea-in-law for the defender, and assoilzies him from the conclusions of the action: Finds the pursuer liable to the defender in expenses of the cause and of the appeal."

The pursuer appealed, and argued—(1) It was proved that the dog had the dangerous propensity of rushing at people. There was negligence in permitting the dog to go at large without someone in charge of it—*Howieson* v. *White*, August 5, 1892, 8 S. L. Rev. 318, *per* Sheriff Jameson at 322. The defender as its owner or custodier was liable for its misdeeds whether he was aware of its propensity or not. It was not necessary to prove *scientia* on the part of the owner or custodier to infer liability—*M'Ewan* v. *Cuthill*, November 16, 1897, 25 R. 57, 35 S.L.R. 58. *Fleeming* v. *Orr*, March 5, 1853, 15 D. 486, *revd.* April 3, 1855, 2 Macq. 14, was decided on a technical ground, and in no way overruled the earlier Court of Session decisions on the point. In *Todridge* v. *Androw*, January 1678, 3 Brown's Supplement 223, and *Turnbull* v. *Brownfield*, December 6, 1735, 2 Elchies 406, *scientia* was not regarded as a necessary element in fixing liability. The passage in Stair, i, 9, 5 did not say that without *scientia* there could be no liability. In the Scots cases subsequent to *Fleeming* v. *Orr*, *cit.*, it was assumed that *scientia* was necessary, but that assumption proceeded upon an erroneous interpretation of that decision. *Lowery* v. *Walker*, [1911] A.C. 10; *Sanders* v. *Teape & Swan*, (1884) 51 L.T. 263; *Corby* v. *Hill*, (1858) 4 C.B. (N.S.) 556; and *Hadwell* v. *Rightson*, *Times* newspaper, 15th May 1907, were also referred to. (2) In any event *scientia* had been proved, and accordingly the defenders were liable—*M'Donald* v. *Smellie*, June 20, 1903, 5 F. 955, 40 S.L.R. 702; *M'Intosh* v. *Waddell*, October 31, 1896, 24 R. 80, 34 S.L.R. 53. It was enough to render the defender liable that his servants knew of the dog's propensity, for a servant's knowledge was the knowledge of his master—*Baldwin* v. *Casella*, (1872) L.R., 7 Ex. 325; *Cowan* v. *Dalziels, &c.*, November 23, 1877, 5 R. 241, *per* Lord Justice-Clerk (Moncreiff) at 244, 15 S.L.R. 151, at 154. (3) The defender was liable in respect of a breach of the provisions of the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), Sched. C, sec. 97.

Argued for the respondent—(1) In the general case it was not in itself unlawful to have a dog running with a carriage, and there was no evidence to show that there were any special circumstances in the present case to make it unlawful. The evidence showed that the defender was unaware of any dangerous propensity on the part of the dog, and by the law of Scotland as well as by the law of England a person was not liable for the acts of an animal *mansuetæ naturæ* unless he had knowledge of vice or dangerous propensity on the part of the animal—*Gordon* v. *Mackenzie*, 1913 S.C. 109, 50 S.L.R. 64; *M'Donald* v. *Smellie*, *cit.*; *Fraser* v. *Bell*, June 14, 1887, 14 R. 811, 24 S.L.R. 583; *Smillies* v. *Boyd*, December 2, 1886, 14 R. 150, 24 S.L.R. 148; *Burton* v. *Moorhead*, July 1, 1881, 8 R. 892, 18 S.L.R. 640; *Cowan* v. *Dalziels, &c.*, *cit.*; *Renwick* v. *Von Rotberg*, July 2, 1875, 2 R. 855; *Clark* v. *Armstrong*, July 11, 1862, 24 D. 1315, *per* Lord Justice-Clerk (Inglis), at 1320; *Todridge* v. *Androw*, *cit.*; *Turnbull* v. *Brownfield*, *cit.*; *Baker* v. *Snell*, [1908] 2 K.B. 825; *Osborne* v. *Chocqueel*, [1896] 2 Q.B. 109; *Filburn* v. *People's Palace and Aquarium Company*, (1890) 25 Q.B.D. 258, *per* Lord Esher at 260, and Bowen, L.J., at 261; *Sanders* v. *Teape & Swan*, *cit.*; *Read* v. *Edwards*, (1864) 34 L.J. (C.P.) 31; *Cox* v. *Burbidge*, (1863) 13 C.B. (N.S.) 430; *Card* v. *Case*, (1848) 5 C.B. 622; *Mason* v. *Keeling*, 12 Mod. Rep. 332; Beven, Negligence in Law, 3rd ed., vol. i, p. 534. A mere habit of bounding upon people was not proof of a dangerous propensity—*Line* v. *Taylor*, (1862) 3 F. & F. 731. The Dogs Act 1906 (6 Edw. VII, cap. 32), sec. 1, subsec. 1, showed that at common law proof of *scientia* was unnecessary. (2) The Roads and Bridges (Scotland) Act 1878, Sched. C, sec. 97, did not apply to the present case. It only applied to carts and waggons or similar vehicles.

At advising—

LORD JUSTICE-CLERK—This is an appeal from an interlocutor of the Sheriff of Kirkcudbright in an action brought at the

instance of the appellant against the respondent for injury caused to her by a dog belonging to the respondent, or for which he accepts responsibility, having run in front of her bicycle, in consequence of which she fell or came into collision with the defender's wagonette and suffered injuries.

The Sheriff-Substitute and the Sheriff are practically agreed upon the facts. On 27th August 1913 the dog in question was allowed to follow the wagonette, which was being driven from Dalbeattie towards Kippford. The pursuer was cycling from Kippford to Dalbeattie, and when she was about to pass the wagonette the dog jumped out from behind it and got immediately in front of her bicycle, with the result that she became frightened, lost control of her bicycle, fell, and was injured. Both Sheriffs found that the dog was not vicious, and had no tendency to rush at cycles or people, and the only question raised is whether in those circumstances any liability attaches to the respondent as being responsible for the dog.

We had an interesting discussion as to what the law is concerning the term which in legal phraseology is known as *scientia*, starting with the passage in Stair about the pushing ox and coming down to the case of *Fleeming* v. *Orr*, 15 D. 486, 2 Macq. 14. The judgment in that case in the Court of Session I think sufficiently established that at that time at anyrate the law of Scotland in this matter had not been settled, because not only was there a strong difference of opinion in the Court of Session, but the Lord Chancellor (Cranworth) in the House of Lords dealt with the question of whether there was any difference between the law of England and the law of Scotland on that subject. I think in the result, so far as the judgment itself was concerned, *Fleeming* v. *Orr* left the matter in some doubt, but as the judgment there was interpreted by the Courts here that case was held to imply that the law of Scotland was the same as the law of England in such cases, and that *scientia* was necessary.

I notice, for example, that in the case of *M'Intyre* v. *Carmichael*, 1870, 8 Macph. 570, at p. 574, 7 S.L.R. 318, Lord President Inglis says —"The next question is whether the Act 26 and 27 Vict. cap. 100, introduced any change in the common law with regard to the liability of the owner of the dog in a case of this kind. I must say that I do not think the statute deals very intelligibly with the matter. I have no doubt that the intention of the Legislature was to abrogate the law laid down by the House of Lords in the case of *Fleeming* v. *Orr*, and to make the owner of the dog liable on proof of its being the cause of the mischief, whether there be proof of fault on his part or not, but certainly that is not very satisfactorily declared by the statute." Accordingly I take that passage as indicating that at that time *Fleeming* v. *Orr* was regarded—and I think rightly regarded — as having decided that the law of Scotland and the law of England were the same in this matter, and that *scientia* was necessary. In the case of *Clark* v. *Armstrong*, 24 D. 1315, at p. 1320, which was the case not of a dog but of a farmer's bull, the same learned Judge, then Lord Justice-Clerk, says — "I hold that the owner of a bull is only bound to use a reasonable discretion, and is not bound to confine it, unless when it has shown some more than ordinary vicious propensity; but there is nothing whatever of that kind in the evidence. On the general question of the legal obligation on owners of such animals I think it right to state what I hold that legal obligation to be. I do not apprehend that there is any substantial difference between the laws of Scotland and England on the point. There may perhaps be some difference in the form of pleading applicable to such cases; and in English practice a more specific averment of *scientia* on the part of the owner, or knowledge of the vicious propensities and habits of the animal, may be required than is necessary in Scotch pleading. But the law of Scotland will not, any more than that of England, make a master responsible for injury done by a domestic animal unless it be an animal of unusually vicious habits and propensities, and known to the owner to be so. I see no reason for departing from what I have always held to be the leading authority on this question." Then his Lordship quotes Stair.

Lord Cowan said — "Your Lordship has expressed my opinion. I cannot think that an accidental occurrence of the kind in question can infer liability, unless it shall be established (1) that the animal was more vicious or fierce than was usual with animals of its kind, and (2) that the master knew of its character."

It is quite true that in that case Lord Benholme put his judgment on a rather different ground, namely, that the case was to be considered as one in which the injured person was a servant, and that the Court were entitled to assume that she knew as much about the habits and propensities of the animal as the owner himself.

There are several other Scottish cases, in all of which undoubtedly the knowledge of the owner is founded upon in the judgments and in the interlocutors following thereon. In the case of *Fraser* v. *Bell*, 14 R. 811, Lord Craighill says — "I think the pursuer will not succeed in this action unless he proves knowledge of the dog's vicious or mischievous character. If that is not proved the action will fail." Lord Rutherfurd Clark says—"I think it is relevantly stated that the dog was ferocious, and that the defender knew it. That being so, the action is relevant. If the pursuer requires to prove ferocity, and the defender's knowledge of it, I think he had better consider whether he should go further—whether, in fact, he can possibly succeed." That of course was a question of relevancy, but I think that circumstance probably makes the judgments of the two learned Judges I have referred to more pointed in this case.

In the most recent case of *Gordon* v. *Mackenzie*, 1913 S.C. 109, the Lord Justice-Clerk says—"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.] Lord Dundas says—"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." The first finding was—"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;" and the second—"That the defender was in fault in allowing the dog to be at large."

In the course of the argument in the present case it was suggested that there was a difference between cases where the accident arose from the bite of a dog and cases of this kind, but to my mind there is no sufficient reason for drawing any such distinction. The law must be the same from whatever cause the ground of action is said to have arisen, and that is reflected in the statute which has been passed in regard to injury done to cattle. The phrase used is "mischievous propensity," which is wide enough to cover every such propensity—a propensity to bite or a propensity to rush at cyclists or people.

Therefore in my opinion, according to Scots law (apart from statutory exemption in the case of injury done to cattle), a person suing the owner of a dog, or the person responsible for the dog, for injury caused by it cannot succeed unless there is proof of the defender's previous knowledge of the propensity which led to the cause of action.

In this case the averments which are made by the pursuer are as follows:—". . . [*His Lordship quoted cond.* 4 *and cond.* 8.] . . ."

On the evidence I think there is nothing to show that the dog was given to attacking cyclists or rushing at other people. While it is proved that it did jump about people, there was no evidence at all to show that these people were not well known to the dog, and that it was not merely gambolling or frisking about them. [*His Lordship then suggested the varying of the Sheriff's interlocutors.*]

LORD JOHNSTON — The pursuer claims damages from the defender for personal injury and loss sustained by a fall when bicycling through the misconduct of the defender's dog. That is a general statement of the question at issue, but the pursuer has averred in support of her claim that she was riding with a companion, John Hendrie, on the afternoon of 27th August 1913, from Kippford, at the mouth of the Urr, to Dalbeattie, when about 6 p.m. they met a wagonette belonging to the defender, who is an hotel-keeper and carriage-hirer at Dalbeattie, being driven with a party of ladies in the opposite direction; that when pursuer and her companion were on the point of passing the wagonette a retriever dog belonging to the defender suddenly ran out from behind the wagonette and rushed at Hendrie, who swerved and passed it; that the dog then rushed at the pursuer, who in order to avoid it also swerved, and while doing so came in contact with the wagonette and was knocked down and injured. Unfortunately in support of her action the defender pitches her case too high and beyond anything she can prove. Thus she avers in cond. 8 that the dog was of a vicious or dangerous nature and had a habit of rushing at and attacking cyclists; that this was known or should have been known to the defender, and the dog should not have been allowed to follow conveyances; that the defender was present at the yoking of the horse and when the wagonette left his hotel door, and knew or ought to have known that the dog was following the carriage; and that neither he nor his driver took any steps to stop or turn back the dog.

I say that it is unfortunate that the pursuer has put her case so high, because within its four walls she has, I think, proved circumstances which, though far short of the extreme case alleged, raise a question requiring consideration.

Shortly stated, the pursuer has not proved that the dog was the least vicious or dangerous from vice in the proper sense. But she has proved that the dog was untrained and of a habit which made him without ill intent a source of possible danger to passengers—that the dog was allowed uncontrolled freedom, and that though he had never before caused hurt to anyone he was in fact the cause of the accident to the pursuer on the occasion in question. That is so far the import of the evidence as I read it. More may be required to render the defender liable, and that I shall afterwards consider.

But as the pursuer has pitched her case too high, so the defender has equally unfortunately denied either property or custody or control of the dog. The Sheriff has rightly held that whether or not the legal property of the dog was in the defender he was as responsible for the custody and control as if he had been legally owner. But that the facts in this connection bear upon the defender's conduct nothing more need be said. These facts are that defender owned in 1912-13 a retriever bitch, which was kept for him by a man M'William. Defender had also a nephew, Robert Kirkpatrick, ten years of age, who, with his mother and younger brothers lived with him as their home. In 1912 M'William took a litter of pups off the bitch, and with defender's full knowledge gave one of them in the end of 1912 to the defender's nephew Robert. It had the run of defender's stables and hotel yard. For the custody and control of the dog the defender was clearly responsible. In August 1913 the dog was ten months old.

I shall deal now with the actual occur-

rence. [*His Lordship then reviewed the evidence in detail.*]

I therefore agree with the Sheriff-Substitute, who says the evidence "is really not contradictory. It, I think, proves conclusively that it was the dog, and the dog alone, that caused the accident." I also agree with him in finding that the pursuer was not guilty of any contributory negligence.

But then the Sheriff on appeal has sustained this plea for the defender—"The pursuer not having been injured through the fault or negligence of the defender, and the dog in question not being of a vicious or dangerous nature, or known to him as such, the defender is entitled to absolvitor with expenses"; and from his note the Sheriff appears to think that so long as a dog is clear of vice in its proper sense it is free to follow its own sweet will on the roads, *sauve qui peut*, and that nobody is responsible for the consequences of its conduct. For he expresses himself thus—"I do not think it can be laid down that the owner of a dog which is not vicious and has shown no propensity to attack people cannot allow it to be at large on the road without inferring liability, even though it is in the habit, like most dogs, of running about and frisking on the road. Cyclists know quite well that dogs are an annoyance to them upon the thoroughfare because their movements are so quick and unrestrained, but this is one of the ordinary incidents of road traffic which a cyclist takes account of, and if he is nervous or unskilful he has the remedy in his own hands. He can adopt some other mode of progression. There is no rule that the owner of a well-behaved dog must always have it on a leash or exercise some other kind of control over its movements." In the first place this begs the question, for in what consists a "well-behaved" dog. Apparently in the eye of the Sheriff simply one which it is not to be expected will make a *vicious*, in the full sense of the word, attack on human beings. If this be the case the dog who is not ferocious, and so dangerous, has therefore absolute licence to go where and do what he pleases. For him there is no rule of the road and no responsibility on his master. But I give the Sheriff the benefit of doubting whether he really had any proper conception of what he meant by "well-behaved." I think he used the expression as a colourless one to save himself the trouble of arriving at anything more exact. For anything less well-behaved, untrained, and uncared for, in the ordinary sense, than the dog in question, is not common. I therefore turn to what were the known habits of this untrained and uncontrolled dog.

There is no doubt that it had no viciousness of temper in the sense that there was any reasonable risk of it intentionally biting any person, or attacking them in such a way as to put them in danger from its teeth, but it was a retriever dog of ten months old, and so at a clumsy age, but at the same time apparently quite fit to follow a carriage from Dalbeattie to Kippford, a distance of four miles, and back. It must be assumed, therefore, to have been a fairly heavy and strong young dog, and no longer to be classed as a mere puppy.

I find from the evidence that it was quite untrained and unrestrained in its movements and decidedly frolicsome. Such a dog, though not vicious in the dangerous sense, may by such unrestrained habits, which incidentally may amuse its owner, be a nuisance, and under some circumstances a dangerous nuisance, to other people, and of this we have an example in the habit of this dog in its gambols jumping upon people. [*His Lordship quoted several passages from the evidence bearing upon the habits of this particular dog.*]

From the above I conclude that the defender knew or ought to have known that there were reasons why the dog for which he was responsible should not be allowed to follow his conveyances, and that he knew or ought to have known that he was just one of those dogs liable to be a nuisance to passers-by. And I think he was bound to anticipate that some day he might be the cause of trouble, not intentionally, quite innocently, but productive of injury. I conclude further that probably his servants knew more than he did; that his orders to them, though he may or may not have known the details of its troublesome habits, betoken that he knew that the dog ought not to be allowed at large following a carriage; and that thereafter he being identified with them—*Baldwin*, 1872, L.R., 7 Ex. 325—cannot ride off on the idea that his duty to the public was performed by the mere issue of such orders without seeing them carried out. If there was more in the necessity for such orders than he was aware of, he must be judged as if he were his own driver. I do not think that he was entitled to wait until he learned that the dog actually had upset someone, or was free of all liability until that event happened and was brought to his notice.

The law on this subject is by no means so easy as the Sheriff has assumed it. So far as I am aware, there is no reported case bearing on the liability of the owner for damage occasioned by his dog except where the dog is proved to have been of a savage disposition, and where injury has resulted from some exhibition of its savage propensities. But I cannot think that because the question is new the liability does not exist. I cannot see why, if the defender himself comes out from behind a carriage, crosses over to the wrong side of the road, and in doing so collides with a cyclist who suddenly comes upon him, and thereby incurs liability, he is to be free from such liability if his dog does the same thing, merely because the dog is good tempered, and not ferocious or vicious in the full and ordinary sense. The Sheriff's idea that the unruly dog at large is just one of the ordinary incidents of road traffic which the cyclist must take as it comes or stay at home, appears to me to be quite indefensible. And the case of the cyclist is not peculiar. A horse might easily be brought down, and even the innocent pedestrian be laid low, by exactly the

same thing as happened here. Mr Cooper's comparison of the dead dog and the living is instructive. I see no reason why the defender should be liable if he leave the body of his dead dog on the road and thereby cause an accident (I do not refer to the statutory liability), and be free of all responsibility if he equally negligently leave his live dog to cause similar risk to passengers. I fully realise that extreme indulgence is given both by popular consent and by law in this country to the dog, as the cherished companion of man, and therefore to its owner, but I think that that consideration stops short of complete licence, and that the indulgence accorded to the dog at large, as well as in his owner's company, is always subject to some reasonable attention to the safety and comfort of others.

It is, I think, this indulgence which has led to the basis of responsibility for a dog's actions being apparently in law rested not on property, as would be more rational, but on negligence, and that not very logically or consistently, for the liability for an animal *feræ naturæ* is I opine rested solely on property, and only that for the domesticated animal on negligence.

The earliest authority quoted to us was Stair, i, 9, 5, where the author, writing in 1681, significantly treats the matter under the head of Accession in Delinquence or Art and Part. The owner may thus be art and part with his dog or other domestic animal in its delinquence. Stair says, under this branch of his subject, that accession to the delinquence may be anterior, as "by connivance, in foreknowing and not hindering those whom they might and ought to have stopped, and that either specially in relation to one singular delinquence, or generally in knowing and not restraining the common and known inclination of the actors towards delinquencies of that kind." Now because, as his illustration, Stair gives the case of the master who "keeps outrageous and pernicious servants or beasts," I cannot think that his doctrine as referable to dogs is confined to the case where the dog is "outrageous or pernicious" in the sense of being vicious and so dangerous to the lieges. Then Stair proceeds, "and therefore in many cases, even by natural equity, the master is liable for the damage done by his beast," and referring to the Mosaic law, Exodus xxi, 28, 29, he makes the equitable liability depend upon what in law language is termed the *scienter*, and adds, "so the like may be said of mastives and other dogs, if they be accustomed to assault men, their goods and cattle, and be not destroyed or restrained, the owner is liable." As Stair has in mind and draws his illustration solely from the savage dog, so the cases which are to be found in the books all relate to dogs which, though kept as domesticated, were not thoroughly so, but were really of a vicious or savage nature. What, then, is the ground of this doctrine of "foreknowing and not hindering," and what is its limitations. Reference is always made to the case of *Fleeming* v. *Orr*, 15 D. 486, and 2 Macq. 14, a case of sheep-worrying at common law prior to the statutes. The case must be read with discrimination, because in the House of Lords the judgment proceeded on the limitation imposed on the House of Lords by the Judicature Act, section 40. The House was bound to take the case on the facts found, and these were ambiguous, for they were compatible either with liability or freedom of liability of the owner of the dog. Hence the judgment could not be supported. Undoubtedly it had been pleaded, both in the Court below and to the House, on the one hand, that by the law of Scotland, differing from that of England, knowledge on the part of the owner of the vicious propensity of his dog was not necessary to make him liable for the damage which it might occasion, and that it was sufficient to show that in fact the dog occasioned the damage, or at all events did so in consequence of want of due care on the part of the owner, and on the other, that in order to make the owner responsible for damage done by his dog, it must be averred and proved that the owner was aware of his dangerous propensities. Now, to support the particular judgment on the limited facts proved, Lord Cranworth showed that it was necessary to affirm that by the law of Scotland liability attached to the owner in all cases, even where a dog of gentle habits and properly secured was let loose by a third party and urged on to the attack, which latter would be an untenable position. His Lordship then adds that the Court of Session were bound to find sufficient facts to support their judgment. "If," he said, "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." As neither knowledge of vice nor want of care in securing was held proved, the House had no alternative but to reverse the Court below, which, as Lord Cranworth showed, had proceeded on the ground of negligence—a ground to which the House was by the express enactment of the Legislature, in view of the findings of the Court below, 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."

This, then, is a reversal on technical grounds only, and is clearly not a determination that by the law of Scotland the *scienter* is the sole ground of liability, and that negligence *aliunde*, as was the opinion of the majority of the Court below, may

not be sufficient, nor does it limit liability to the case of recrudescence of the animal's original savage nature.

In comparing the law of England and the law of Scotland Lord Cranworth shows that *culpa* or negligence is at the foundation of liability in the law of both countries; that in England the presumption is that where the animal is *mansuetæ naturæ* no harm will arise from leaving him at large; and that from this presumption it follows that unless the owner is aware of the propensities of his dog and takes no adequate precautions to protect the public, *culpa* or negligence cannot be attributed to him. Hence the *scienter* is essential to the success of the action, though negligence all the same be its ground. Whether the law of Scotland goes so far, or 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*, his Lordship does not determine. But he adds, the supposition is one "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"—a view which is confirmed by Lord Russell of Killowen, C.J., in *Osborne's* case, [1896] 2 Q.B. at p. 110. It also appears to have the support of common sense, as is shown by the result of such a case as *Fleeming* v. *Orr*, where, on the English doctrine, the owner of a flock of sheep must suffer the loss of a score without redress merely because the owner of a dog was not proved to have known that his dog had any propensity for sheep-worrying—a fact which in the case in question it was impossible to prove, as the dog, being only six months old, had had no opportunity of developing his tendencies, and was only led away by an unknown collie. I do not see how the doctrine can be sustained without affirming the dog's right to his "one worry," for until he has had it the owner can plead his ignorance without possibility of contradiction. In fact the doctrine of the *scienter* develops into what was really pleaded by the defender here, viz., that the dog must have on a previous occasion or occasions shown his tendency, and that the owner must have been made aware of the fact else no liability attaches.

In *Clark* v. *Armstrong*, 24 D. 1315, the Lord Justice-Clerk (Inglis), in the case of a young bull running with cows in a field, which had attacked a byrewoman when separating the cows, referred to the passage from Stair which I have quoted, and added—"If the principle there stated be sound, its application to the circumstances of the present case is very clear. There is no proof of knowledge by the owner of this bull that it was an animal of its class of unusually vicious habits and propensities, and there could not have been, because there is no proof that such habits and propensities existed." Now what were the circumstances? Not that the bull was allowed to run at large. It was confined in a field. The pursuer alleging injury was not a member of the public on the highway, but a servant engaged to attend the herd. The allegation was that the bull should have been separated and confined. That is not the general case for liability. In truth the question was whether the risk was one which the woman had taken as incidental to her services, and as nothing was proved against the bull, making it improper in the ordinary management of a farm to allow him to run with cows in an enclosed field, the risk was one which a byrewoman must be held to have taken. I humbly think that the Lord Justice-Clerk, to whose opinion one always refers with the greatest respect, went beside the question before him in his application of the passage from Stair to which he refers. Lord Benholme alone develops the true ground of judgment, and carefully draws the distinction between the responsibility of the owner to his servants when an animal is kept in his own enclosed field, and to the public when it is at large and without sufficient control in the highway.

I desire to repeat that Stair at i, 9, 5, Cranworth, L.C., in *Fleeming* v. *Orr*, and Inglis, L.J.-C., in *Clark* v. *Armstrong*, have all had their attention concentrated on the case of vicious specimens of the class of animals naturally savage but in use to be domesticated, and therefore that anything they say has to be read in that relation; that the case of *Fleeming* v. *Orr*, always referred to as of the highest authority on the subject, does not affirm, as it has been supposed to do, that the owner of such a specimen of such a class of animals is by the law of Scotland freed from liability on merely proving that it has not previously shown its tendency to revert to its type, or that if it has he has been unaware of the fact, which is equivalent to saying that unless *scienter* be proved there can by the law of Scotland be no negligence and no responsibility; and that these authorities do not suggest that the responsibility on the owner for the conduct of a domesticated animal is limited to the case of exhibition of vice properly so called.

But since the case of *Clark* v. *Armstrong* the English doctrine, as explained by Lord Cranworth, L.C., in *Fleeming* v. *Orr*, has been, I think mistakably in a number of cases, all relating to ferocious and therefore dangerous dogs, assumed to represent the law of Scotland. I respectfully doubt whether that is truly the law of Scotland, and think that the question is still left over undecided by *Fleeming* v. *Orr*, whether without the technical *scienter* there may not be such negligence as to infer liability, and that that question may still have some day to be reconsidered, the more so that the doctrine contended for is inconsistent with that applied in the case of horses, *e.g.*, *Smith* v. *Wallace & Company*, 25 R. 761, 35 S.L.R. 583. But I am not concerned to follow out that subject of inquiry. What I am concerned with is that even assuming the doctrine contended for, and assuming also that there is nothing to limit its application to cases of reversion of the assumed domesticated dog to his primeval savage appetites, we have here proof, not only that the dog in question though not savage had tendencies which required control and training

if he was to be allowed the freedom of the road; that the defender knew this directly or through his servants; and that he negligently took no precautions to secure the public against the possible consequences of such tendencies. I cannot think that he is to be excused because these tendencies were not of the savage or *ferœ naturæ* order. I therefore think that the judgment of the Sheriff-Substitute should be restored, though with amended findings.

LORD GUTHRIE—The pursuer admits that she cannot succeed unless she proves fault against the defender; and both the Sheriffs, although they have differed in their conclusions, have dealt with the case on the footing that mere ownership or custody of the dog will not infer liability against the defender for the unfortunate accident to the pursuer.

On record (apart from the case under the statute) fault was relevantly averred, because the pursuer alleged that the dog was of a vicious or dangerous nature, and had a habit of rushing at or attacking cyclists, and that this was known, or should have been known, to the defender. This case failed at the proof, and has been negatived by both Sheriffs.

The Sheriff-Substitute's interlocutor does not disclose any fault against the defender, although it finds him liable in damages. No doubt, in his second finding in fact he finds that the dog "was allowed to follow a wagonette belonging to the defender," and in his 5th finding that it was "playful or frolicsome." But it appears from his opinion that if the dog had been trained to follow a carriage no fault would have been attributable to the defender.

In one part of his opinion the ground of fault which the Sheriff-Substitute finds proved against the defender is thus expressed—"I think, therefore, that owners of dogs are bound, when they allow them to follow a carriage, to see that they are under control, and are responsible for what happens if they do not do so. . . . He knowingly allowed the dog to be in a place where he knew, or must be held to have known, that it might quite likely act as it did." The words "under control," if the Sheriff-Substitute means, as no doubt he does, under effective control, would imply physical attachment to the carriage. But, taking the opinion as a whole, the Sheriff-Substitute did not probably intend to affirm so sweeping a proposition, but had in view, first, that the dog was "a puppy," and frolicsome, and second, that it was not trained to follow a carriage. I scarcely think the term "puppy" applicable to a dog of ten months, and I am not aware of any course of training which will prevent a dog, of any breed or age, except perhaps the special breed of what used to be called "carriage dogs," from making periodic excursions away from the carriage he is following in furtherance of his own private interests, legitimate and illegitimate.

The Sheriff-Substitute's more sweeping proposition was however contended for by Mr Cooper. But his vigorous speech was more an attack on the soundness of the reasoning underlying the numerous decisions, Scotch and English, to the opposite effect, than an exposition of the law applicable to the case. The law of Scotland, in a question of an owner's or custodian's liability for injury by an animal to human beings, distinguishes wild animals, *ferœ naturæ*, from domestic animals, *mansuetæ naturæ*. The former are kept at the owner's or custodian's risk, while for injury to human beings by the latter there is no liability unless the animal was known by its owner or custodian to have previously acted so as to be a source of danger. When I say a source of danger, I do so advisedly, instead of using such expressions as "vicious" or "mischievous." It may well be that an owner who knew that his dog, although neither vicious nor mischievous, was in the habit of rushing at and after carriages and cyclists, would be liable if an accident occurred, directly or indirectly, through the action of a dog with such known habits. Mr Cooper said that Lord Stair (i, 9, 5) makes no mention of the element of knowledge, but if his reference to the pushing ox, taken from the book of Exodus, chapter 21, verses 28 and 29, be read as part of the text, as I think it ought to be, knowledge must have been in his eyes an essential element. Of the series of cases in the Scottish Courts in which this principle has been given effect to, it is enough to refer to the opinion of the Lord Justice-Clerk (Inglis) in *Clark* v. *Armstrong*, 24 D. 1315, and that of Lord Rutherfurd Clark in *Fraser* v. *Bell*, 14 R. 811. It may be, on the one hand, that the Roman Law was otherwise, and that the present law of France is otherwise; and it may be that, as Lord Blackburn suggested in the case of *Smith* v. *Cook*, (1875) 2 B.D. 79, at p. 82, that the rule was fixed when conditions were widely different from those of to-day. On the other hand, the rule appears to have worked satisfactorily in the British Empire; and it would be unfortunate if persons in Scotland keeping domestic animals were liable to an unlimited extent for injury done, directly or indirectly, to human beings by these animals, while across the Border no liability attached unless when the owner knew that the animal had previously been a source of danger. Indeed, if this distinction obtained, it would only be proper that the notices concerning dogs—that they are not admitted unless on leash—hitherto reserved for places like public parks, should be erected in all roads and streets and other public places And if such liability attached in Scotland and not in England, the advantage to the English and the drawback to the Scotch farmer and poultry keeper would be obvious. But it is sufficient that the rule is fixed in the law and practice of Scotland by a series of reported cases in the Supreme Courts, which have been applied in innumerable cases in the Sheriff Courts.

But even assuming this to be the rule, the pursuer maintained that it had been proved that the dog was known to the defender, prior to the accident, to be a source of public danger to human beings. I agree with both the Sheriffs that no such case is established.

It seems to me that the defender had no knowledge of anything in the dog's breed or disposition or previous conduct which would naturally suggest to him that it was in any sense, when following a carriage on a public road, a source of danger to carriages, cyclists, or foot-passengers, except the danger to human beings which necessarily attaches to the presence, loose, on a public road, of any of the lower animals, cattle, sheep, dogs, hens. In particular, even if it were proved, as I do not think it is, that the dog rushed at the pursuer on this occasion, instead of merely running in front of her cycle, it is not proved that the defender knew that it had ever done so before, or had ever been in any other way a source of danger to the public on the public roads or elsewhere, and indeed it is not proved that any such occurrence ever happened, or anything like it, on any previous occasion. The defender's objection to the dog accompanying vehicles is explained by the defender, and is easily intelligible looking to the annoyance from loss of time and otherwise which often results on such occasions. We do not know enough about the circumstances under which the dog was afterwards shot to draw any safe inference. Neither of the Sheriffs notices this point. The statute founded on by the pursuer has no application to the circumstances of the present case.

I am therefore of opinion that the defender is entitled to absolvitor.

LORD DUNDAS and LORD SALVESEN were not present.

The Court pronounced this interlocutor—

"Dismiss the appeal: *Find in fact* (1) that on 27th August 1913 the defender was the owner or had the custody and control of a retriever dog aged about ten months; (2) that it was allowed to follow a wagonette belonging to the defender which was, about six p.m. on said date, being driven from Dalbeattie towards Kippford; (3) that at said time on said date the pursuer was cycling from Kippford to Dalbeattie; (4) that when the pursuer was just about to pass the wagonette, and was on her left-hand side of the road, the dog ran towards and got immediately in front of her cycle, with the result that she got frightened, lost control of her cycle, fell, and was injured; (5) that the dog was not vicious or dangerous; (6) that the dog was not known to have any vicious or dangerous propensity, or any tendency to rush at cyclists or people; (7) that the defender has not been proved to have been guilty of any fault or negligence: *Find in law* that the defender is not liable in damages for the injuries which the pursuer received: Therefore of new sustain the sixth plea-in-law for the defender, assoilzie him from the conclusions of the action, and decern. . . ."

Counsel for the Appellant (Pursuer)—Cooper, K.C.—Duffes. Agents—Warden & Grant, S.S.C.

Counsel for the Respondent (Defender)—M'Clure, K.C.—J. A. Christie. Agents—Scott & Glover, W.S.

Tuesday, July 20.

WHOLE COURT.

[Sheriff Court at Wigtown.

EARL OF GALLOWAY *v.* M'CLELLAND.

Lease—Outgoing—Compensation—Improvements—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 1, *and Schedule I, Part iii,* 26—*Tenant Claiming Compensation for Temporary Pasture which he was Bound by his Lease to Lay Down.*

The Agricultural Holdings (Scotland) Act 1908 enacts—Section 1, sub-section (1)—"Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act, he shall, subject as in this Act mentioned, be entitled, at the termination of a tenancy, on quitting his holding, to obtain from the landlord, as compensation under this Act for the improvement, such sum as fairly represents the value of the improvement to an incoming tenant." Sub-section (2)—"In the ascertainment of the amount of the compensation payable to a tenant under this section there shall be taken into account—(*a*) any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement." The First Schedule to the Act specifies in Part iii—"Improvements in respect of which consent of or notice to landlord is not required. . . . (26) Laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy."

A lease required the tenant to cultivate the lands according to the rules of good husbandry, and in particular to follow a specified rotation according to which a certain proportion would be in temporary pasture sown more than two years before, the area thus laid down being approximately equal to the area in similar pasture which the tenant received at the commencement of the lease. The tenant having claimed compensation for the temporary pasture at his waygoing in respect that it was an improvement in the sense of the Agricultural Holdings (Scotland) Act 1908, *held* (*diss.* Lords Dundas, Johnston, Mackenzie, Skerrington, Cullen, and Dewar) that he was not entitled to compensation in respect that (*per* the Lord President, the Lord Justice-Clerk, Lord Salvesen, Lord Ormidale, Lord Hunter, and Lord Anderson, with opinion *per* Lord Guthrie) he was only fulfilling the contractual obligation which he had undertaken in the lease, and (*per* Lord Guthrie, opinion *per* Lord President) he was only leaving the farm as it was at the beginning of the lease.

Question whether the temporary pasture on the farm at the beginning of the lease which the tenant received with-