HIGH COURT OF JUSTICIARY.

Monday, June 20.

(Before Lord Justice-Clerk.)

H.M. ADVOCATE *v.* GRANT, M'KILLOP, MUNRO, FRASER, M'DONALD, AND CHISHOLM.

Justiciary Cases — Evidence — Separation of Trials.

Six persons were charged with assault, as also with rape. In the charge of rape the act was alleged to have been committed by one of the accused, while the others were charged with aiding and abetting him by assisting to overpower the resistance of the woman said to have been ravished, or by preventing a person who was anxious to assist her from doing so, and by themselves neither giving her assistance nor attempting to procure it. A motion, on behalf of two of the panels so charged with aiding and abetting in the commission of the crime, to have the trials separated that the other accused might be called as witnesses on their behalf, *refused.*

Donald Grant, Angus Paul M'Killop, Donald Munro, John Fraser, Duncan M'Donald, and Simon Chisholm were charged with assault, as also with rape, or assault with intent to ravish. The indictment set forth a charge against all the panels of having on a day in April 1881 assaulted at Craig Phadrig near Inverness David Nairne to the effusion of blood and injury of his person. It also charged the panels with (2) an assault upon Jessie Oman Colville to the serious injury of her person, and (3) the crime of rape committed at the same place and time with the assaults previously libelled. As regards the third charge, the actual perpetration of the crime was charged against the panel Grant, and the indictment then proceeded to aver against the other prisoners that they were all and each "or one or more of you then and there present aiding and abetting the said Donald Grant by assisting him to overpower the resistance of the said Jessie Oman Colville or by preventing the said David Nairne, who was endeavouring to protect the said Jessie Oman Colville, from rendering her assistance, and by yourselves interfering or calling for or procuring assistance on her behalf while the said Jessie Oman Colville was being ravished by the said Donald Grant as aforesaid." Then followed, as alternative to the third charge, a charge of assult with intent to ravish.

The panels having pleaded not guilty, counsel for John Fraser moved for a separation of the trials that he might examine one or more of the other panels in exculpation at the trial of Fraser. He stated that he thought the trial of the whole of the panels simultaneously would be prejudicial to the panel Fraser, inasmuch as he offered to prove by the testimony of the other panels that Fraser, who was charged with aiding and abetting in the commission of the crime, was really only an unwilling spectator of it.

Authority—*H. M. Advocate* v. *Turner & Others*, 27th April 1881, *supra* 491.

Counsel for M'Donald made a similar application on his behalf.

The Advocate-Depute opposed the motion.

The Lord Justice-Clerk refused the motion, observing that the granting of such a motion was always a question of circumstances for the discretion of the Court, and that the reason alleged for the motion was not sufficient to justify a departure from the ordinary rule.

Counsel for Crown — Brand — Æneas D. Mackay, A.-D. Agent—Crown.

Counsel for Grant—Kennedy. Agent—Traill, S.S.C.

Counsel for Fraser—Macdonald, Q.C.—Brown Douglas. Agents—Auld & Macdonald, W.S.

Counsel for M'Donald—Dickson. Agent—R. H. Christie, S.S.C.

Counsel for M'Killop, Munro, and Chisholm—Sym. Agent—Traill, S.S.C.

COURT OF SESSION.

Friday, July 1.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

BURTON *v.* MOORHEAD.

Reparation—Bite of a Dog—Culpa—*Reasonable Precaution ultimately Failing.*

M. owned a watch-dog, which on account of its known ferocity he kept chained up at the back of his house. It broke its chain and bit B., who was lawfully passing the house. *Held* that M. in keeping a dog which he knew to be ferocious must take all the risk of doing so, and therefore that the fact that he took reasonable precautions to restrain it which ultimately by unforeseen accident turned out to be insufficient did not protect him from liability for the injuries sustained by B., who was lawfully on the premises.

This was an action of damages for £150, raised by Thomas Burton, a dancing master in Glasgow, against Robert Moorhead, a merchant and commission agent there, from injuries sustained from the bite of a dog belonging to the latter. The circumstances which gave rise to the action were as follows: — On 29th May 1880 the pursuer was proceeding with his wife to pay a visit to a Mr Quin, the contractor of the Paisley Waterworks at Gleniffer. Just before they arrived at the defender's house at Craigielinn, Paisley, the pursuer alighted from the carriage in which they were driving, and as he was walking near the carriage a large dog, kept by the defender as a watch-dog, and which was tied up at the back of his house by a chain attached to a swivel in the ground, leapt forward and bit him severely on the left leg near the ankle. The pursuer averred that in consequence of the injuries which he thus sustained he had been confined for eight weeks to the house and had suffered a severe shock to his system, and

permanent injury. He pleaded—"(1) The defender's dog having bitten pursuer, the defender is liable in reparation, in respect that there was no fault on the part of the pursuer, and said dog was vicious, ferocious, and dangerous. (2) There being *culpa* on the part of defender, or those for whom he is responsible, in not having the said dog sufficiently attended or secured, the defender is liable to pursuer for the injuries sustained."

The defender, on the other hand, averred that the pursuer had no right or title to be in the neighbourhood of the dog's kennel, for he was not coming to the defender's house or premises, and had no occasion to pass by the back of defender's house. He was in fact a trespasser on the defender's grounds. He further averred that the dog was quietly disposed and affectionate, and when off the chain would bite no one. He pleaded—"(1) The pursuer having been trespassing when he suffered the injuries complained of, he has no right of action. (2) The pursuer having provoked the defender's watch-dog, he is not entitled to recover damages."

The import of the proof which was led before the Sheriff-Substitute will appear sufficiently from his interlocutor and from the opinions of the Judges.

The Sheriff-Substitute (LEES) found "That on 29th May 1880 the pursuer was passing along a private road leading past the defender's house to the waterworks in course of construction for the burgh of Paisley, and that said road led near a kennel, at which there was chained a retriever dog belonging to the defender, and kept by him there as a watch-dog: That the said dog was of a most savage character, and that it had bitten several people, and that the defender had been put on his guard as to its propensity to attack people: That in these circumstances it was incumbent on him to take all proper precautions for the safety of people having occasion to pass along said road: That the precautions adopted by the defender were, that the dog was secured by a chain attached at one end to its collar, and at the other to a ring passing through a staple driven into the ground: That on the occasion in question the dog sprang so violently towards the pursuer that one of the links of its chain snapped, whereon it rushed on the pursuer and bit him severely: That the said chain had been in use for two years, had been bought as a new chain and as being of sufficient strength to restrain the dog, that apparently to the eye it was sufficient for this purpose, and that it had never before nor since 29th May given way: That therefore the precautions taken by the defender were reasonably sufficient: And in these circumstances, as matter of law, that the defender was not responsible to the pursuer for the injuries he had sustained through the unexpected fracture of the dog's chain; therefore assoilzied the defender from the conclusions of the action."

On appeal the Sheriff-Principal (CLARK) found "That the defender was the owner of a powerful and ferocious dog, kept for the purpose of watching his premises, and that he was well aware of its ferocity and dangerous character: That on the occasion libelled, which was during the day, the said watch-dog broke loose from its chain by the snapping thereof, and attacked and seriously injured by biting the pursuer: That the said occurrence took place through the failure of the defender, or of those for whom he is responsible, to provide a chain sufficiently strong for the purpose intended, and that he is in consequence liable in damages to the pursuer: Assessed the said damages at £50, and decerned against the defender therefor."

In the note which he appended to his interlocutor he said:—"I agree in substance with all the findings and views of the Sheriff-Substitute, with the single but important exception that the precautions taken by the defender were sufficient to exonerate him from liability, and that he is not responsible in law for the injuries sustained through the unexpected fracture of the dog's chain. It is no doubt quite true that a man is entitled to keep a ferocious dog for the protection of his premises, and even to turn it loose during the night. But it does not seem to be law that he is entitled to let it run loose during the day, or that he can escape liability if he fails so to secure it during the day that it shall not break loose and injure those who are where they are lawfully entitled to be. A man is only entitled to keep such a dog on condition that he effectually provide against contingencies of this kind. Now, in the present case, the dog broke loose from his chain by the snapping of a part thereof. That of itself is *prima facie* evidence that the chain was insufficient. It is no answer to this that the blacksmith who provided the chain seems to have thought it sufficient. It is obvious from the deposition of that individual that he entertained the most erroneous notions as to what was a sufficient chain. He seems to think that a chain to hold a watch-dog is quite sufficient for that purpose though it might not be able to resist the strain of sudden jerks or bounds. Such a notion seems to amount to a manifest absurdity. If the chain of a watch-dog cannot resist the strain of jerks and bounds, it is utterly worthless for its purpose, as everyone knows who has seen a dog rushing at an object which his chain prevents him from reaching. There is no doubt that chains may be forged of sufficient strength to restrain the most powerful watch-dogs. Were it not so, indeed, the keeping of watch-dogs would long since have been prohibited by law. In the present case it seems clearly established that the chain was defective in strength, and that by making proper inquiries the defender might have satisfied himself of this fact. Upon these grounds it seems to me that he is liable in reparation to the pursuer. As to the amount of damages, it will be seen, I think, from the medical evidence that the injuries received were of the most serious kind, and must have caused the pursuer much suffering. When these and the costs of treatment, together with the loss of time and business profits, are considered, £50 appears a moderate sum at which to assess the pursuer's claim."

The defender appealed, and argued—To entitle the pursuer to succeed he must prove blame attachable to the defender in not having taken reasonable precautions to restrain the dog.—*Moffatt* v. *Bateman*, 14th Dec. 1869, 3 Privy Council Cases, L.R. 115; *Fleeming* v. *Orr*, 3d April 1855, 18 D. 21, H. of L.; *Renwick* v. *Rotberg*, 2d July 1875, 2 R. 855; *Cowan* v. *Dalziels*, 23d Nov. 1877, 5 R. 241. And more

than this, he must prove negligence of the very grossest kind, inasmuch as he was not in the position of a visitor coming to the defender's house, but of a mere licensee on the premises.—Shearman and Redfield on Negligence, p. 582; *Gentrel* v. *Egerton*, 21st Feb. 1867, L.R. 2 C.P. 371 (Mr Justice Wills' remarks); *Fletcher* v. *Rylands and Another*, 14th May 1866, 1 L.R. Exch. 287 (Mr Justice Blackburn's remarks). The defender had in point of fact done all he could in chaining up the dog.

The pursuer replied that in point of law it was not incumbent on him to show that the defender was guilty of negligence and default in securing the dog. It was enough to show that he was aware of the dog's mischievous propensities, and further the fact that he had taken reasonable precautions, which however ultimately failed, was no answer to the action. In keeping the dog at all the defender did so at his own risk—Hale's Pleas of the Crown, i. 430; *May* v. *Burdett*, June 2, 1846, L.R. 9 Q.B. 101; Addison on Torts, 113.

At advising—

Lord Justice-Clerk—The two points on which the Sheriff's judgment is assailed are (1) that the pursuer had no right to be where he was, and therefore the obligation incumbent on the owner of the ferocious dog was different from what it would have been had he had such right; and (2) that the owner took reasonable precautions to restrain the animal, and that the chain broke from unsuspected causes for which he was not liable.

In regard to the first point, I do not think the evidence can bear such a construction at all. Mr Quin, the foreman of the waterworks, had invited the pursuer to use the road, he himself having permission to use it as being the shortest way to the waterworks, and therefore he made use of this privilege without any interposition on behalf of the owner. I do not understand the discrepancies in the evidence between Mr Moorhead and Mr Quin here, for Mr Moorhead denies that he accorded this privilege to Mr Quin. However, I am inclined, for my own part, to think on the balance of evidence that surrounding circumstances corroborate the evidence given by Mr Quin.

The second point is a more important one. The defence in substance is that this liability for the dog is to depend on his having taken reasonable means to restrain the animal. This I consider is based on an entire misapprehension of the law on this point.

It seems agreed that where the owner of a dog does not know that the animal is ferocious the mere fact of its being so will not render him liable for evil consequences. Now, on the other hand, I am of opinion that when the character of the animal is quite well known, there is an obligation, in the interests of public security, on the owner not to keep the dog at all on his premises unless it is well restrained. The distinctions are of the clearest kind, and therefore the proprietor of such a dog keeps it at his own risk. The passage which was quoted to us from Lord Hale's Pleas of the Crown brings the matter out very clearly, because under the old English law there was a broad distinction made between what made a person liable criminally and civilly—"If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality he is not punishable, but if the owner be acquainted with his quality, and keeps him not up from doing hurt, and the beast kills the man, by the antient Jewish law the owner was to die for it (Exod. xxi. 29); and with this seems to agree the book of 3 E. 3 Coron. 311, Stamf. P.C. 17, as therein these things seem to be agreeable to law—(1) If the owner have notice of the quality of his beast, and it doth hurt anybody, he is chargeable with an action for it. (2) Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey—if he get loose and do harm to any person the owner is liable to an action for the damage; and so I knew it adjudged in *Andrew Baker's* case, whose child was bit by a monkey that broke his chain and got loose. (3) And therefore in case of such a wild beast, or in case of a bull or cow that doth damage where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages."

Now, that brings out clearly the distinction confounded by the defender between the case of a man doing what he thinks is lawful in a negligent manner, and a man doing what is unlawful and taking the risk of the bad consequences of his act.

I am therefore for adhering to the Sheriff's judgment.

Lord Young—I am of the same opinion. The case is in my view a very important one. The Sheriff-Substitute has found that the defender's dog was of a most savage character, and that it had bitten several people, and that the defender had been put on his guard as to its propensity to attack people. The Sheriff Principal has also found that the dog was ferocious, and that the defender was aware of its dangerous character. Now there is no necessity to keep such an animal as this, for it is dangerous to human beings, and if the defender chooses to do so he must do so absolutely at his own risk. This is the law, and Lord Hale has well expressed it. If a man keeps a naturally wild animal, or an ordinary domesticated animal known to him to be dangerous, the obligation which the law imposes on him is not discharged by his using diligence which in point of fact ultimately proves to be inefficient. It is another matter where such a proprietor is sought to be made criminally liable, for in such case the question would be whether he has used the diligence of ordinary care. I therefore concur with the Sheriff Principal when he finds that the accident took place through the failure of the defender to provide a chain sufficiently strong for the purpose intended, and that he is therefore liable in damages to the pursuer. I am not sure that we take the same view as the Sheriff has done in arriving as we both do at the same result, but it is well to make it plain that reasonable if insufficient precaution is no defence to action for injury done to a person, who is where he is lawfully, by the ferocity of an animal known to be so.

Lord Craighill concurred.

The Court adhered.

Counsel for Appellant—Guthrie Smith—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.
Counsel for Respondent—Macdonald, Q.C.—Lang. Agents—Macbrair & Keith, S.S.C.

Tuesday, July 5.

SECOND DIVISION.

[Lord Lee, Ordinary.

CARSWELL *v.* CARSWELL.

Husband and Wife — Divorce for Desertion — Foreign—Domicile for Divorce—24 and 25 Vict. c. 86 (Conjugal Rights Act 1861), sec. 10.

A domiciled Canadian married in Canada, his wife previous to the marriage also being domiciled there. Being deserted by his wife in Canada for more than four years, during which he made several attempts to induce her to return, he came to Scotland and entered into business and established his residence in Scotland. He then raised an action for divorce against his wife in the Scotch Courts, in which he proved to the satisfaction of the Court the fact of wilful desertion, and that he himself had become a domiciled Scotchman. The defender did not appear, but it was not proved that she knew of the action, though efforts had been made to find her. *Held* that in the circumstances he had acquired a domicile for his wife as well as for himself, and therefore that the Conrt had jurisdiction to grant decree of divorce.

In August 1866 Robert Carswell, a law bookseller in Toronto, married, in Ontario, Martha Swan. Both parties were born in Canada, and at the date of the marriage were domiciled in Canada. They lived together as husband and wife till 1873, in which year differences on religious matters arose between them, and Mrs Carswell, apparently in consequence of these differences, suddenly left her husband's house, and after residing in lodgings in Toronto for several weeks, during which time she was visited by her husband, went to her father's house in the town of London, about 120 miles from Ontario, taking with her the two children of the marriage. Mr Carswell made several attempts to induce her to return to his home, both while she was thus residing in lodgings and while she was residing in London, and in Rochester in New York State, to which place she went for a time. In December 1874 he raised an action against her in the Court of Common Pleas of Ontario, to obtain the custody of his children, which action she defended. While this suit was pending, the parties, at the suggestion of the Court, met at the house of a friend for the purpose of terminating the suit if possible by a reconciliation. At this meeting a reconciliation was found impossible, as Mrs Carswell refused to return to her home, and the Court therefore pronounced judgment, giving to Mr Carswell the custody of the children. From the date of this meeting (January 1875) Mr Carswell never had any communication from his wife with the exception of a set of verses of a somewhat incoherent character addressed to him in February 1879.

In October 1879, after a preliminary visit in the early part of the same year, Mr Carswell came to Scotland, bringing with him the two children above mentioned and a daughter by a former marriage. He took and furnished a house in Edinburgh, took a lease for five years of a shop in Edinburgh, and purchased with the view of carrying on his business as a law bookseller in that shop a law library and the goodwill of a bookseller's business from which the proprietor was retiring. After thus taking up his residence in Edinburgh, he attempted by a letter to his wife, dated 5th December 1879, which he sent to the care of a person whom he believed to be in correspondence with her, to establish communication with her with the view of ascertaining whether she would join him in Scotland. He also attempted by means of advertisements in various newspapers published in parts of America to which he had ascertained that she had gone, to learn where she was. No answer was received to these inquiries.

On 28th July 1880 he raised this action against her, concluding for divorce on the ground of desertion. The summons was served personally upon the brother and sister of the defender, of whom the former resided in California, the latter in Canada.

The pursuer, after setting forth the facts as detailed above, pleaded—"(1) On the facts stated, and in particular the pursuer having acquired a Scotch domicile, the defender is subject to the jurisdiction of the Court of Session. (3) The defender having been guilty of wilful and malicious non-adherence to and desertion of the pursuer for the space of four years, the pursuer is entitled to decreet of divorce as concluded for."

The defender did not appear.

The pursuer having moved the Lord Ordinary to hold the summons relevant and to allow a proof, his Lordship reported the cause to the Second Division, with this note—"The Lord Ordinary reports this cause because it appears to him that the allegations of the pursuer disclose a case of an unnatural character, and raise questions of importance which in the present state of the authorities ought not to be decided in favour of the pursuer without the sanction of the Court. It was admitted by the pursuer's counsel that no case could be cited in which an action of divorce for desertion had been sustained against a defender who has never been in Scotland, and who, so far as appears, has had no notice of her husband's removal to this country, and of his requirement that she should here give her adherence to him.

"According to the averments in the condescendence, the pursuer and defender were married in Canada in 1866. Neither of the parties appears to have had any connection with Scotland, either at that time or during their cohabitation as married persons. Their residence from the time of the marriage down to 1873 was in Toronto, where the pursuer carried on business as a law bookseller. In 1873 the defender separated herself from her husband, and he states that although he subsequently saw her and cohabited with her in a lodging which she had taken, she declined all proposals that she should return to live with him. In 1875 he sued her in the Courts of Toronto for the custody of two children of the marriage. At that time, therefore, he appears to have recog-