JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No.72/75

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

SYDNEY SMITH - - Appellant

vs.

HECTOR GAYNOR - - Respondent

Mr. D. McFarlane for the appellant.

Mr. R. King for the respondent.

November 11, 1975, February 13, 1976
and April 7, 1976

WATKINS, J.A.(Ag.):

This appeal is from the judgment of His Honour Mr. Donald Bingham a resident magistrate for the parish of St. James wherein he rejected the appellant's claim for the recovery of the value of a pig killed by a dog alleged to have been the respondent's.

The defence raised at the trial was that it was not the respondent's dog that had killed the appellant's pig, and in respect to the appellant's claim, the learned resident magistrate expressed himself thus in his reasons for judgment: "I .... came to the conclusion that the accounts given by the plaintiff and his daughter consisted of half-truths, was not frank, having contained certain concoctions and I was left in grave doubt as to whether they had in fact seen the defendant's dog attacking the plaintiff's two pigs. I therefore rejected the plaintiff's case." By way of clarification it may be interpolated that whilst the statement of claim alleged the loss of only one pig evidence was in fact allowed to be adduced by the appellant and his witness with respect to another pig which had on the same occasion sustained injuries at the instance of another dog alleged to have belonged to the respondent also.

Before us two questions of law were agitated, one raised by the appellant, the other by the respondent. Counsel for the appellant levelled some severe strictures on the reasons for judgment of the learned

resident magistrate which, "though long," he described as "quite inadequate" and as "going off on many tangents". Asserting that the court below had failed to appreciate the corroborative effect of the testimony of the appellant and his witness, he urged that we were in no less advantageous a position than the seeing and hearing court to weigh the evidence upon which a finding in the appellant's favour would be inevitable.

The appellant had testified of his and his family's acquaintance with the dog which they alleged had killed the pig and which belonged to the respondent. From time to time the dog had passed his home with the respondent's children. He, the appellant, had often seen the animal in the respondent's home, and had often seen the respondent's children carrying it to the river to bathe. The appellant's daughter was also familiar with the dog. Despite this apparently thorough and confident knowledge of and familiarity with the dog, both appellant and daughter however trailed the dog, after the pig had been killed, because, in the words of the daughter "I wanted to see whose dog it was". Further the appellant's daughter testified that she had seen blood on the dog after it had killed the pig, yet she did not bring this cogent piece of evidence to the attention of the respondent's wife when she reported the incident to her that day. Other peculiarities in the conduct of the plaintiff and his witness were adverted to by the resident magistrate in his reasons for judgment and although there were flaws as well in the evidence for the respondent in the end the resident magistrate said that he felt constrained to find in favour of the defendant having regard to the state of evidence presented in the plaintiff's case "as I found that it was impossible to reconcile the evidence given by the plaintiff with that of his daughter". It is quite clear therefore that the court below entertained grave doubts concerning the veracity of the plaintiff and his witness as regards the most important issue in the case, namely the identity and ownership of the dog. In Gross v. Lewis Hillman Ltd. et al (1969) 3 All ER 1476 Lord Justice Cross observed "A Court of Appeal is not entitled to disturb findings of fact made by the trial judge which depend to any appreciable extent on the view that he took as to the truthfulness or untruthfulness of a witness whom he has seen and heard and the Court of Appeal has not, unless it is completely satisfied that the judge was wrong. It is not

enough that it has doubts - even grave doubts - as to the correctness of the judge's findings. It must be convinced that he was wrong".
We of course are not at all convinced that the learned resident magistrate was wrong in taking the view that he did of the evidence led on behalf of the plaintiff and so the appellant's argument on this ground must fail.

On his part counsel for the respondent submitted inter alia that irrespective of any view that the court may entertain on the argument above urged by the appellant, the appeal must nevertheless fail for the reason that, despite section 2 of the Dogs (Liability for injuries by) Act, proof of scienter was essential to the success of the claim and such proof was absent. This submission raises the very interesting and important question: "Are pigs cattle?" But before proceeding to an examination of it, it would be advantageous to deal at this stage with an issue incidentally arising therefrom. It was objected on behalf of the appellant that inasmuch as the issue of scienter had not been raised in the court below it was not permissible to us to entertain same; and Fletcher v. Wright et al 5 JLR 77 was cited. It is enough merely to observe that this case does not support the objection in the instant circumstances. The principle of law is that a court of appeal will not entertain a submission on a point of law which was not raised in the court below if it is satisfied that all the evidence out of which the issue of law arises had not been adduced before the court of trial. In the present case the only relevant and necessary evidence was that the appellant's pig had been killed by a dog owned, or at least, alleged to be owned by the respondent and this evidence, irrespective of its truthfulness or otherwise was tendered before the court below. In our view this objection is unsustainable.

Turning now to the question: "Are pigs cattle"? Counsel for the respondent first referred to the early English Dogs Act of 1865 section 1 of which is in all relevant and material respects identical with section 2 of the local statute which reads as follows:

> "The owner of every dog shall be liable in damages for injury done to any person or any cattle or sheep by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog or the owner's knowledge of such previous

propensity or that the injury was attributable to neglect on the part of such owner ....."

He contended that the use of the word "sheep" in the expression "cattle or sheep" indicates legislative intention to give, and gave in fact, to the word "cattle" a narrow circumscribed meaning. If in legal intendment "cattle" did not include "sheep", then a fortiori it did not include "goats" and most certainly did not and could not include "pigs". Halsbury's Laws of England 3rd ed. Vol 1 para. 1316 was next referred to and in support of his arguments counsel cited Tallents v. Bell et al (1944) 2 All ER 470 a case in which a plaintiff lost his claim for damages in respect of rabbits destroyed through canine depredations. This case however fell to be considered, not under the English Act of 1865, but under the repealing and consolidating Dogs Act of 1906 in which by section 7 thereof "cattle" was defined "to include horses, mules, asses, sheep, goats and swine". Findlay J. found no difficulty in rejecting the plaintiff's claim. Said he "Some things, which normally would not be cattle are expressly included. If the legislature had intended to include a thing so remote from the ordinary definition of "cattle" as rabbits it most certainly would have included them in the section about horses, mules, asses, sheep, goats and swine". Finally counsel for the respondent drew our attention to the English Dogs (Amendment) Act whereby the protection of the Act was expressly extended to "poultry".

The arguments of counsel are confessedly most persuasive. The decision in Tallents case would suggest and suggests strongly indeed that (a) the word "cattle" in the Act of 1865 was limited in meaning to animals of the bovine class and (b) that creatures such as horses, mules, asses, goats, swine and the like "would normally not be called "cattle" ". If, however, this court differs from learned counsel for the respondent, and we do, this is no reflection whatever upon the extent of his research, nor upon his industry and advocacy in respect of all of which the court acknowledges its indebtedness.

Among authorities which give to the word "cattle" a wider meaning than that contended for by the respondent is Wright v. Pearson (1868-9) 4 LR QB 582, and there the issue was as to whether horses were cattle within the meaning of the Dogs Act of 1865. The reasoning

underlying the affirmative answer of Lush J. is both informative and instructive. "In its primary sense, there is no doubt that cattle does include horses. I see nothing to exclude its application to horses, except that it is followed by the word "sheep"; cattle would include sheep, and this perhaps might imply that cattle is intended to be used in a limited sense. I am however of opinion that it includes horses and is not intended to be confined to cows and oxen. It is a remedial Act and horses are likely to be bitten by dogs." In concurring Hayes J. saw no reason to make an exception to the wide signification of the word "cattle". It may not be without significance that Wright's case arose but three years after enactment of the first English Dogs Act. This wider meaning of the word "cattle" has also been attributed to it in other statutes, embracing pigs in some instances. Under the Black Act of England (9 Geo. I. C.22) it was extended to include a mare R. v. Paty (1770) 2 Wm. Bd. 721, a pig R. v. Chapple (1804) Russ and Ry 77, an ass R. v. Whitney (1824) 1 Mood. C.C.3. In Child v. Hearn (1874-5) 9-10 LR Exch. 176 the Railway Clauses Consolidation Act 1845 S.68, imposing an obligation to fence against the straying of cattle, fell to be construed. It was held that the word cattle extended to include straying pigs. In deciding that cattle in Schedule D to the Income Tax Act of 1918 included pigs Atkinson J. in Phillips v. Bourne (1947) 1 All E.R.374 at p.377 said "In interpreting the word "cattle" in an Act, one has to look at what is the evil aimed at - what it is that the section wishes to deal with. If one finds that the word "cattle" must have been used in the wider sense, one must give effect to it. The conclusion to which I have come is that the word "cattle" in this section does include pigs."

Turning now to local authorities our Court of Appeal, as it then was, in Anderson v. Ledgister (1955) 6 JLR 358 expressed a preference for the wider meaning of "cattle" in our local Dogs Act and reversed the decision of Shelley Resident Magistrate for St. Elizabeth who apparently persuaded by the "narrow principle" argument had decided that cattle did not include goats. It is interesting to note that before the Court of Appeal in Anderson v. Ledgister the argument for the respondent proceeded along lines not substantially dissimilar to those of the respondent in the instant case. Relying upon Wright v. Pearson and Phillips v. Bourne,

Rennie J. expressing the unanimous decision of the Court said "The Law in our view was designed to protect such animals as are reared for profit and are capable of coming within a definition of cattle". For the same reasons we can see no valid reason why the word "cattle" as used in Jamaica in our local Dogs Act should not be construed in the wider sense to include pigs. These creatures have been known in the Caribbean from earliest times. Buccaneers for whom Port Royal was a haven in the 17th and early 18th centuries derived their name from the word "boucan" by which the manner of curing the flesh of pigs was described. That these animals grew and increased in numbers over the succeeding years is witnessed by the legislative attention the subject attracted, as for example 21 V.C.8 (1857), an Act to prevent hogs, dogs and goats from being at large in any town and for other purposes; 22 VC 17 (1858), an Act to repeal and amend 21 VC 8 relative to hogs, dogs and goats found at large in towns and for other purposes and 36 VC 16 (1872), a Law to amend VC 17 and to make better provisions respecting stray pigs and other animals. This latter law, it must be noticed, antedated by only five years the parent statute to our present Dogs (Liabilities for injuries by) Act, namely Law 2 of 1877, a Law defining liabilities for injuries done by dogs. It seems to us repugnant to reason and to history that the Legislature of 1877 in providing a better remedy against canine ravages of "cattle" could have meant to exclude from this protection swine which no less than goats were then obviously reared for profit and existed in such numbers as to call for legislative control. We are therefore of opinion that the word "cattle" in the Dogs (Liabilities for injuries by) Act include pigs and accordingly the respondent's argument on this ground fails.

Finally counsel for the respondent drew our attention to the evidence of the appellant that the pig, the subject of the claim, belonged to his grandson, and he faintly urged that having regard to this fact the suit was wrongly initiated in the appellant's name. Having regard to the age of the grandson - three years - the court took the view - and counsel agreed - that the substance of the matter was that the appellant intended that such benefits as should derive from the pig would be

appropriated to the grandson's interest but that the legal title would not be disturbed.

In the result therefore whilst rejecting the argument of the respondent as to "scienter" we are of the view that no valid ground exists for disturbing the judgment of the learned resident magistrate. Accordingly the appeal is dismissed and the respondent will have his cost of appeal fixed at $50.