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court has thus removed one of the restrictions found in every deed in that particular real estate development.

Since more specific or definite language in the deeds[25] and the use of certain legal devices[26] can do much to clear up any doubt as to the real or personal nature of a restrictive building covenant, it is possible that in the future the careful draftsman can obviate the necessity for the court's having to designate such a covenant as personal.

WILLIAM P. SKINNER, JR.

Torts—Animals—Liability of Owner for Trespass of Dogs While Hunting

In a recent North Carolina decision,[1] the court held that the owner of dogs which had damaged crops, fences, and cattle of plaintiff in the course of fox hunts, was liable in trespass for damage done, although the hunter himself did not enter the plaintiff's property.

Plaintiff and defendant owned adjoining farms in Guilford County. The defendant, during a period of three years preceding the action, kept a pack of seven to ten foxhounds that he hunted across plaintiff's land at frequent intervals, in spite of plaintiff's repeated protests. Plaintiff's pasture lay between two creeks. The fox was wont to dash between the creeks during the hunt, and when fatigued by this exercise would dash in among the herd of cattle with the yelping pack in hot pursuit. Whereupon, the cattle would stampede, tearing down partition fences, cutting themselves on the barbed wire, and generally working themselves into whatever is the bovine equivalent of advanced neurosis.

Generally, the owner of domestic animals which stray onto property of another is liable in damages for their trespass.[2]

[25] It is suggested that the following might be sufficient: ". . . shall have been approved by the grantor *or his successors in interest,* or by an architect selected by him *or his successors in interest.*" Also, the subjective nature of the restriction could be made objective by listing architectural types not desired, *i.e.,* ranch, modern, colonial, etc.

[26] See Huntington Palisades P. O. Corp. v. Metropolitan Finance Corp., 180 F. 2d 132 (9th Cir. 1950), wherein the covenant read: "No building or other structure shall be erected or the erection thereof begun on said premises until the plans and specifications thereof shall have been first presented to and approved in writing by the Seller or by the property owners corporation, herein referred to, as to outward appearance and design." The result desired by the grantor in the principal case was accomplished here by means of the property owners' corporation which each grantee joined by acceptance of the deed.

[1] Pegg v. Gray, 240 N. C. 548, 82 S. E. 2d, 757 (1954).

[2] *E.g.,* Fox v. Koehnig, 190 Wis. 528, 209 N. W. 708 (1926); RESTATEMENT, TORTS § 504 (1934); HALSBURY'S LAWS, *Animals* § 935 (2d ed. 1931); 3 C. J. S., *Animals* § 185 (1936); Accordingly, owners have been held strictly liable for the trespasses of their turkeys: McPherson v. James, 69 Ill. App. 337 (1896); Tate v. Ogg, 170 Va. 95, 195 S. E. 496 (1938). And their chickens: Adams Bros. v. Clark, 189 Ky. 279, 224 S. W. 1046 (1920). Trespassing cattle, sheep, goats, horses, mules, oxen, and swine are governed in practically all jurisdictions by detailed statutes, which determine "legal fences," liability for trespass, local option as to

The dog however is *sui generis* at law.[3] And often "dog law is as hard to define as dog latin."[4] At early common law it was said: "there is a difference between a dog and other animals: if a dog comes on your land, you have no action."[5] This has evolved into the doctrine at common law that the owner is not liable for his dog's trespass of its own "volition."[6] This seems to have developed in recognition of: (1) the fact that the dog is generally well disposed toward man; (2) the unlikelihood of a dog's causing serious damage to another's property as would, for example, cows or sheep; and (3) the status of the dog at common law as a base animal in which the owner had only a qualified, or according to some commentators, no property right.[7]

This rule of non-liability for trespasses of the dog's own volition has been criticized,[8] and modified by statute in some jurisdictions.[9] But in North Carolina and the majority of American jurisdictions the rule still largely obtains.[10]

The dog owner may be held liable, however, if: (1) the dog has a propensity toward committing the trespass complained of; *and*, (2) the dog owner has or should have knowledge of that propensity. This requirement of "scienter" is rather general in Anglo-American jurisdictions at common law,[11] but has been modified or abolished by statute in

"stock laws," etc.: *e.g.*, GA. CODE § 62-5 (1949); N. C. GEN. STAT. § 68-1 *et seq.* (1950); UTAH CODE ANN. §3-5-79 (1949); VA. CODE § 8-874 (1950).

[3] Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180 (1915); Meekin v. Simpson, 176 N. C. 130, 96 S. E. 894 (1918); Dog Owner's Ass'n, Inc. v. Hilleboe, 124 N. Y. S. 2d 835, 839 (Sup. Ct. 1953); 2 AM. JUR., *Animals* § 105 (1936).

[4] Citizen's Rapid-Transit Co. v. Dew, 100 Tenn. 317, 324, 45 S. W. 790, 791 (1890).

[5] Littleton, J., in Mitten v. Faudrye, 1 Poph. 161, 79 Eng. Rep. 1259 (1626), *"et est un difference inter unchien et auters avers: si un chien vaer en votre terre navares action."* *Accord,* Anon. 1 Dyer 29a, 73 Eng. Rep. 64 (1537).

[6] Mitten v. Faudrye, *supra* note 5; *See* Pegg v. Gray, 240 N. C. 548, 82 S. E. 2d 757 (1954); Baker v. Howard County Hunt, 171 Md. 159, 188 Atl. 223 (1936); Manton v. Brocklebank, [1921] 2 K. B. 212 (C. A.); see HALSBURY'S LAWS, *Animals* § 1313 (1931); *cf.* Buckle v. Holmes, [1926] 2 K. B. 125, 54 A. L. R. 89 (cats).

[7] "Base" animals are those in which a right of property can be acquired by reclaiming them from wildness. Once so "reclaimed," the common law recognized them as possible subjects of larceny. O'Connell v. Jarvis, 13 App. Div. 3, 43 N. Y. Supp. 129 (Sup. Ct. 1897); Pegg v. Gray, 240 N. C. 548, 82 S. E. 2d 757 (1954); Bruch v. Rissmiller, 18 Pa. Dist. 732 (1909); Mason v. Keeling, 12 Mod. 332, 1 Ld. Raym. 606 (1691).

[8] *E.g.*, McClain v. Lewiston Interstate Fair and Racing Ass'n, 17 Idaho 63, 104 Pac. 1015 (1909).

[9] MASS. ANN. LAWS c. 140, § 155 (1949); OHIO GEN. CODE ANN. § 5838 (1945); See Note, 142 A.L.R. 436 (1943).

[10] *E.g.*, Pegg v. Gray, *supra* note 7; Banks v. Maxwell, 205 N. C. 233, 171 S. E. 70 (1933); *cf.* State v. Smith, 156 N. C. 628, 72 S. E. 321 (1911). *But cf.* N. C. GEN. STAT. § 67-12 (1950) (liability of owner for dogs running free at nighttime).

[11] See, *e.g.*, Owen v. Hampson, 258 Ala. 228, 62 So. 2d 245 (1952); Hagen v. Laursen, 263 P. 2d 489 (Calif. Dist. Ct. App., 3d Dist. 1953); True v. Shelton, 314 Ky. 446, 235 S. W. 2d 1009 (1951); Perkins v. Drury, 57 N. M. 269, 258 P. 2d 379 (1953); Hill v. Palms, 237 S. W. 2d 455 (Tex. Civ. App. 1950); See Note, 107 A. L. R. 1323 (1936).

England[12] and in some states.[13]

So also may the owner of the dog be held liable if he himself is a trespasser at the time of the dog's depredations.[14]

The instant case however poses problems in some respects unique in this jurisdiction, and possibly in the body of the law. The owner of the dogs did not himself trespass on plaintiff's land, as in some cases cited by the court in its decision.[15] However, the owner did have knowledge of his dogs' trespasses and was advertent to their tendency to follow the fox, and the fox's tendency to lead the pack across plaintiff's land. This fact would have fulfilled the general rule of liability-if-there-is-scienter (*i.e.*, that the owner is liable if he has foreknowledge, actual or imputed, of his dog's tendency toward a particular depredation), had the court chosen to base its decision thereon.[16]

But the court in this case declared that the rule is different where

[12] Dogs Act 1906, 6 EDW. VII, c. 32, § 1; Dogs Act Amendment 1928, 18 AND 19 GEO. V, c. 21, § 1. (1).

[13] *E.g.*, CONN. GEN. STAT. § 3404 (1949); FLA. STAT. ANN. § 767.01 (1943); MINN. STAT. ANN. § 347.22 (West 1947); N. J. STAT. ANN. § 4:19-7 (1939); OHIO GEN. CODE ANN. § 5838 (1945); PA. STAT. ANN. tit. 3 §§ 478, 481, 484, 485-491 (1930); WIS. STAT. § 174.02 (1949). See dissent by Ryan, C. J., in Chunot v. Larson, 43 Wis. 536 (1878). See Notes, 1 A. L. R. 1113 (1919) and 142 A. L. R. 436 (1943). Compare N. C. GEN. STAT. § 67-1 (1950) (Liability of dog owner for injury to livestock or fowl. Although enacted in 1911, this statute has not yet come before the North Carolina Supreme Court.); N. C. GEN. STAT. § 67-12 (1950) (liability for dogs running free at night).

[14] Green v. Doyle, 21 Ill. App. 205 (1886); Beckwith v. Shordike, 4 Burr. 2092, 98 Eng. Rep. 91 (1767); Regina v. Pratt, 4 E. & B. 860, 119 Eng. Rep. 319 (1855) (Where owner sent dog into cover, himself remaining on highway. Lord Campbell, C. J., found owner a trespasser with his dog and therefore liable since "the soil and freehold of the highway must be considered to be in the owner of the adjoining land. The public have only an easement over it—a right to use it as a highway—but the grass which grows on it is his."). WILLIAMS, LIABILITY FOR ANIMALS 135 (Cambridge, 1939).

[15] Baker v. Howard County Hunt, 171 Md. 159, 188 Atl. 223 (1936). From the facts here the court would have been warranted in finding that the horses and riders as well as the dogs trespassed. The theory of the Baker case also differs from the instant case. The Baker case was an injunction proceeding on a nuisance theory. Paul v. Summerhayes, 4 Q. B. D. 9, 39 L. T. 574 (1878). Here, defendants in hot pursuit of fox *rode onto* plaintiff's land. Plaintiff in trying to put them off was assaulted by defendants. The presence of dogs had no bearing on the outcome of this case. Earl of Essex v. Capel, CHITTY ON GAME LAWS, 31 n. (2nd ed. 1826). In this case, reported at Hertford Summer Assizes, 1809, defendant admitted breaking and entering the close with other hunters, but stated that this was the only way to kill the fox. As authority for the right to enter the close in hot pursuit, he posited Gundry v. Felton, 1 T. R. 334, Y. B. 12 Hen. VIII, pl. 9 (1521). Lord Ellenborough stated, "Even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have, therefore, a right to follow the dogs and trespass on other people's lands. . . ." (Do these words indicate that he assumed that dogs *may* trespass in the course of a hunt?) Beckwith v. Shordike, 4 Burr. 2092, 98 Eng. Rep. 91 (1767). Here defendant trespassed with his dogs on plaintiff's close. In spite of defendant's efforts to restrain them, the dogs killed plaintiff's deer. Defendant was found liable since he himself trespassed.

[16] The evidence disclosed that on one occasion when plaintiff protested that the dogs were disturbing and injuring his cattle, the defendant replied, "They (the dogs) are not damaging your cattle. If they kill one of them, I'll pay for it." Pegg v. Gray, 240 N. C. 548, 550, 82 S. E. 2d 757, 758 (1954).

the owner or keeper releases a dog or dogs for the purpose of sport, knowing that they are likely to go on lands of others in pursuit of game. The court's rule is stated thus: "In such cases . . . the owner or keeper, in the absence of permission to hunt previously obtained, is liable for trespass, and this is so although the master does not himself go upon the lands, but instead sends or *allows* his dog or dogs to go thereon in pursuit of game" (italics added).[17] Although this rule is often stated, there seem to be no direct holdings to that effect.[18]

This case, then, seems to be the first in which the question of an owner's liability for the trespass of dogs in the course of a hunt unaccompanied by their owner is presented squarely to a court.

There can hardly be any dispute over the essential justice of the North Carolina court's decision in this case, succinctly stated by Johnson, J., that: "fox hunting as ordinarily pursued . . . is pure sport to be followed in subordination to established property rights and subject to the principles governing the law of trespass."[19]

Sed quaere whether this same end might have been reached with better authority[20] by deciding that, the requirement of scienter of the dogs' depredations having been fulfilled,[21] the owner was liable for their

[17] *Id.* at 551, 82 S. E. 2d at 759.

[18] See HALSBURY'S LAWS, *Game* § 800 (1934), which states, "The entry need not be personal in order to be actionable . . . the sending of a dog onto . . . land in pursuit of game [is actionable]," and cites the following cases: Read v. Edwards, 17 C. B. N. S. 245, 144 Eng. Rep. 99 (1864), (where the court decided on basis of owner's *scienter* of dog's propensity to chase and destroy game, and specifically refused to decide question of owner's liability for *every* trespass); Regina v. Pratt, 4 E. & B. 860, 119 Eng. Rep. 319 (1855) (see statement of facts in note 14 *supra*); Brown v. Giles, 1 Car. & P. 118, 171 Eng. Rep. 1127 (1823) (Defendant's dog jumped voluntarily into plaintiff's field. Court found this not only not a wilful trespass, but no trespass at all. Damages of one farthing awarded against defendant because of subsequent *personal* trespass.); Dimmock v. Allenby, 2 Marsh. 852 (1810) (where defendant had permission to hunt on righthand side of the road, but his dog crossed over onto lefthand side; court directed jury to find for defendant if the dog escaped against his will, and defendant had no intention of hunting on the other side; WILLIAMS, LIABILITY FOR ANIMALS 340 (Cambridge 1939), which states, "it is a trespass to land to send a dog into a cover to drive out game," and cites as authority Regina v. Pratt, 4 E. & B. 860, 119 Eng. Rep. 319 (1855), where in fact the owner as well as his dog was trespassing—see note 14 *supra*.

[19] Pegg v. Gray, 240 N. C. 548, 555, 82 S. E. 2d 759, 762 (1954).

[20] *E.g.*, Owen v. Hampson, 258 Ala. 228, 62 So. 2d 245 (1952); Hagen v. Laursen, 263 P. 2d 489 (Calif. Dist. Ct. App., 3d Dist. 1953); True v. Shelton, 314 Ky. 446, 235 S. W. 2d 1009 (1951); Bachman v. Clark, 128 Md. 245, 97 Atl. 440 (1916); Statter v. McArthur, 33 Mo. App. 218 (1888); Banks v. Maxwell, 205 N. C. 233, 171 S. E. 70 (1933); State v. Smith, 156 N. C. 628, 72 S. E. 321, 36 L. R. A. (N. S.) 910 (1911); Bruch v. Rissmiller, 18 Pa. Dist. 732 (1909); Hill v. Palms, 237 S. W. 2d 455 (Tex. Civ. App. 1950); see cases cited Note 14 *supra*; Manton v. Brocklebank, [1923] 2 K. B. 212 (C. A.); Read v. Edwards, 17 C. B. N. S. 245, 14 Eng. Rep. 99 (1864); *see* Saunders v. Teape, 51 L. T. N. S. 263, 264 (1884); PROSSER, TORTS, § 57 at p. 438 (1941). But see 17 TULANE L. REV. 138 (1942) (contrasting development of Louisiana statute with common law doctrine of scienter.).

[21] See Note 16 *supra*.

damages, rather than basing the decision on a trespass theory, which may later prove troublesome.

The court's rule, finally, seems to contemplate the pink-coated, mounted foxhunt of the English squire rather than the nocturnal and sedentary hunt of his North Carolina cousin. It appears, as many of the English decisions, to be based on the probability of the hunter being near enough to his hounds to control their trespasses during the hunt.[22] *Quaere* whether this rule will in effect harness the fox, 'possum, or 'coon hunter to a strict liability for trespasses of dogs, while hunting, which in actuality are quite as beyond his control as when ranging "on their own volition."[23]

HAMILTON C. HORTON, JR.

Torts—Last Clear Chance—Contributory Negligence as a Matter of Law

In a recent wrongful death action[1] plaintiff's intestate was adjudged contributorily negligent as a matter of law when he failed to notice the approach of a detached coal car which he could have seen for a quarter of a mile, had he but looked. The court nonsuited the plaintiff, refusing to submit the issue of last clear chance to the jury. On appeal Justice Parker first pointed out that the doctrine had not been pleaded, nor had any evidence been advanced in support of the doctrine. He then added that "this doctrine [of last clear chance] does not apply when the contributory negligence of the party injured, as a matter of law, bars recovery."[2]

This last statement has begun to make frequent appearances in the North Carolina law of negligence. What then is the legal meaning of this phrase, as used in this context?

The doctrine of last clear chance supposedly sprang from the famous "hobbled ass" case of *Davies v. Mann*.[3] It was a reaction against the

[22] For an excellent introduction to English fox hunting, see 11 ENCY. BRITTANICA, *Hunting* (14th ed., 1932). Here the factor of control is real, being accomplished by horn and "whipper in." In North Carolina, however, in the typical foxhunt, of which the instant case is an example, (see complaint, Record on Appeal, p. 2) the hounds are released at night and generally run at will, the "huntsmen" often seating themselves beside jug and fire, enjoying with liquid conviviality the cry of the hounds. Often the hunt takes all night—until either fox or hounds are too exhausted to continue. Tar Heels still tell of an all night hunt when the first rays of dawn saw five of the hounds walking painfully down the road—with the fox, equally tired, just a few feet ahead—also walking.

[23] The actualities of the average Southern foxhunt seem to have been recognized by Virginia in VA. CODE § 29-213 (1950), which allows permits to be issued to allow foxhounds to run at large and without their master.

[1] Wagoner v. N. C. R. R. and Southern R. R., 238 N. C. 162, 77 S. E. 2d 701 (1953).

[2] *Id.* at 174, 77 S. E. 2d at 710.

[3] 152 Eng. Rep. 588 (1842).