MITCHELL v ALLESTRY (1676)

(a) The bill: KB 27/1973, m. 1283.[5]

Middlesex. James Mitchell and Mary his wife, by Henry Wynne their attorney, complain of William Allestry, esquire, and Thomas Scrivener, in the custody of the marshal of the marshalsea of the lord king before the king himself, for that on the first day of June [1673] in the twenty-fifth year of the reign of the lord Charles II now King of England etc., in the parish of St Clement Danes in the aforesaid county in a certain public and open place there called Little Lincoln's Inn Fields,[6] where all day and every day various subjects of the lord king have constantly walked about and gone (and been accustomed to go) in and about their necessary business, the same William and Thomas,[7] improvidently, rashly and without due consideration of the unsuitability of the place for the purpose, drove and exercised two wild and untamed mares pulling a coach, in order to break and tame the same mares for pulling coaches, the aforesaid place being inapt and unsuitable for that purpose by reason of the throng of many subjects then and there walking about; and the mares, because of their wild nature (inasmuch as the same mares could not be ruled or governed in this wise), then and there ran upon her the said Mary and there threw her to the ground with great force and ran over her with the aforesaid coach, so that the same Mary was so seriously crushed and broken in her body and limbs that by reason thereof she became lame and mutilated and cannot now be restored to perfect health. Whereupon the same James and Mary say that they are the worse and have damage to the extent of £200. And thereof they bring suit.

This action was commenced in Michaelmas term 1675. In Hilary term 1676 the defendants pleaded Not guilty, and on 5 May 1676 at *nisi prius* in Westminster Hall (before Raynsford C.J.) the jury found for the plaintiff with damages of 40 marks.

(b) 3 Keb. 650, pl. 2 (untr.).[8]

Simpson excepted in arrest of judgment, in action upon the case for bringing horses wild to tame in Little Lincoln's Inn Fields, being an open public place where people are all the day passing and repassing, because it is not said to be any highway, nor said that the

6 A public square to the south-east of Lincoln's Inn Fields, including what is now New Square and part of Portugal Street.

7 The reports reveal that Scrivener was Allestry's servant—his coachman—and that Allestry was not present when the accident occurred.

8 Also reported in 2 Lev. 172.

defendant knew them to be wild, nor was there negligence in the coachman (who was thrown out and hurt).

But, by *Saunders*, an action upon the case well lay. As, by Smith of Westminster, for not penning an ox but setting a dog on him, whereby he ran into Palace Yard and hurt him. So where a monkey escaped and did hurt by default of the owner.[9]

And, *per curiam*, it is at the peril of the owner to take strength enough to order them. And the master is as liable as the servant, if he gave order for it.[10] And the action is generally for bringing them thither, which is intended personal.

And judgment for the plaintiff.

The record confirms that judgment was given for the plaintiff, with £12. 6s. 8d. costs.

(c) 1 Vent. 295 (untr.).

... Upon Not guilty pleaded, and a verdict for the plaintiff, it was moved by *Simpson* in arrest of judgment that here is no cause of action. For it appears by the declaration that the mischief which happened was against the defendant's will, and so *damnum absque injuria*. And then not shown what right the king's subjects had to walk there: and if a man digs a pit in a common, into which one that has no right to come there falls in, no action lies in such case.[11]

Curia contra. It was the defendant's fault to bring a wild horse into such a place where mischief might probably be done by reason of the concourse of people. Lately in this court an action was brought against a butcher who had made an ox run from his stall and gored the plaintiff, and this was alleged in the declaration to be in default of penning of him.[12]

WILDE J. said: if a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief, an action lies against the master.

TWISDEN J. If one hath kept a tame fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him and he hath resumed his wild nature...[13]

Judgment for the plaintiff.

9 Perhaps 'Andrew Baker's case, whose child was bit by a monkey that broke his chain and got loose': M. Hale, *History of the Pleas of the Crown* (1736), vol. I, p. 430.

10 Cf. 2 Lev. 'and it shall be intended the master sent the servant to train the horses there'.

11 *Blyth v Topham* (1608); see p. 570, above.

12 *Smith's Case*, cited by Saunders (above).

13 The reporter cites *Weaver v Ward* (1616); see p. 351, above.

(d) ECO MS. 178, p. 183 (untr.).

. . . *Simpson*. This is a case, I think, *primae impressionis*; and, they not having laid (1) that the place *in quo* is a public highway, (2) that the defendants did know them to be untamed mares, (3) nor that the defendants did negligently suffer them to run upon her—nay indeed the plaintiff by his own declaration has excused them from that, for he says that on account of their ferocity they could not govern them, but that they did run upon her—[we pray judgment for the defendants].

Saunders to the contrary. As to (1), we say 'in a public place, where every day the king's people continually [pass] etc.' And suppose the defendants had brought his coach and mares into Westminster Hall . . . that is no highway, yet sure if the mares did any hurt an action would lie. And he remembered the court of a late case against a butcher for not pinioning his ox. As to the second, we say that the defendants brought their mares into the place *in quo* to tame them, and then they must needs know that they were not tamed before.

Jeffreys on the same side. As to the third, we had formerly brought an action in this case, and then we had laid it that the defendants 'did negligently permit etc.'; but, coming to trial before my lord Hale [C.B.], the evidence as to the negligence seeming against us, we were non-suit. And my lord Hale did in a manner direct this action, and [said] that it would lie without laying it to be done negligently.

WILDE J. Suppose I have a wild horse, and I put him in my stable, and do not lock the door, and he gets loose and does mischief, an action will lie.

TWISDEN J. I am of another opinion, for when I put him in my stable I do a lawful action, and I am not bound to put a lock upon my door if I will venture my goods without one.

RAYNSFORD C.J. The law does preserve places frequented, and punishes more severely anything done to disturb them. And if one throws a stone into a market and kills one, it is murder.

WILDE and TWISDEN JJ. remembered a case where one was sued for that his monkey broke loose and hurt some children, but it was referred.[14]

THE COURT. Let the plaintiff have his judgment *nisi*.

The defendant brought a writ of error in 1677: IND 1/6062, citing Trin. 28 Car. II, m. 857 (recognisance). No further proceedings have been noticed.

14 I.e. to arbitration. See p. 573, fn. 9, above.

BROWNE v DAVIS (1705)

Queen's Bench bill in Lilly, *Entries* (3rd ed.), p. 38; collated with W. Bohun, *Declarations and Pleadings* (1733), p. 211.[15]

Middlesex. William Browne complains of John Davis, in the custody of the marshal etc., for this: namely that, whereas the said William, on the sixth day of March [1705] in the fourth year of the reign of the lady Anne now queen of England etc., in the parish of Chelsea in the county aforesaid, was lawfully possessed of a certain flat-bottomed boat then laden with dung, and riding at anchor in the River Thames within the parish aforesaid, as of his own proper boat; and whereas the said John Davis was then and there master and pilot of a certain barge then sailing in the River Thames aforesaid, within the parish aforesaid, towards the city of London: the said John Davis then and there so negligently, carelessly and unskilfully steered and governed his said barge that for want of good and sufficient care and steerage thereof the said barge then and there fouled the selfsame William's said boat, so laden as aforesaid, and broke and sank the said boat; by reason whereof the said William not only wholly lost his aforesaid dung, which was loaded in the said boat, but likewise lost the whole use, profit and benefit of his said boat for the space of six[16] days then next following, and also expended and laid out large sums of money in and about the raising, recovering and repairing of his said boat. And thereby the said William says he is the worse, and has damage to the amount of £30.[17] And thereof he produces suit etc.

The availability of such an action against the master of a ship seems to have been recognised for at least 40 years previously: see *Martin v Green* (1664) 1 Keb. 730; *Mustard v Harnden* (1680) T. Raym. 390; and p. 375, above.

SCARBORROW v HAMBLETON (1732)

J. Mallory, *Modern Entries* (1734), vol. I, p. 158 (an English translation from the Latin record).

Middlesex. James Hambleton, late of the parish of St Andrew's, Holborn, coachman, was attached to answer to John Scarborrow of a plea of trespass upon the case. And [thereupon] the said John, by Robert Martin his attorney, declares that, whereas on the first

15 These are two different English translations from the Latin. The present text is slightly reworded from both.

16 Reads 'fourteen' in Bohun, *Declaration and Pleadings* (1733).

17 Reads '£40' in Bohun, *Declaration and Pleadings* (1733).