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Emil Ebeling Case.

Rudolph Ebeling Case.

TESTIMONY.

For Plaintiff:

Notice of Appeal—Emil Ebeling Case.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The court refused to non-suit the plaintiff although a non-suit should have been granted.

2. The court refused to direct a verdict for the defendant although such verdict should have been directed.

FRED'K. K. HOPKINS,
Attorney of Appellant.

To:

Harlan Besson, Esq.,
Attorney of Plaintiff.

Summons.

THE STATE OF NEW JERSEY to MARIUS MUTILLOD:

(L. S.) You are summoned to answer the annexed complaint of EMIL EBELING, by RUDOLPH EBELING, his next friend, in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Hudson County Circuit Court, at

Jersey City, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HONORABLE LUTHER A. CAMPBELL, Judge of the Hudson County Circuit Court, at Jersey City, this 10th day of October, Nineteen hundred and fifteen.

JOHN J. McGOVERN,
Clerk.

HARLAN BESSON,
Attorney,
Savings Bank Building,
Hoboken, New Jersey.

Complaint.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend,
Plaintiff,
vs.
MARIUS MUTILLOD,
Defendant.
Action at Law.

The plaintiff, who resides at 766 Fourth Street, in the Borough of Secaucus, County of Hudson and State of New Jersey, says:

FIRST COUNT.

1. At and for a long time before the time herein stated, defendant wrongfully kept upon his premises at Cedar Lane, in the Borough of Secaucus, a dog of fierce and mischievous nature, well knowing that said dog was of such nature and accustomed to bite mankind.

2. That the defendant wrongfully and negli-

gently suffered such dog to be at large without being properly guarded or confined.

3. That on or about March 13, 1915, defendant suffered said dog to be at large upon his premises at Cedar Lane, in the Borough aforesaid, and that said dog attacked and bit the plaintiff and wounded him about the right hip, that solely by reason of defendant's negligence as aforesaid, plaintiff was injured, bruised and wounded so that he became sick, sore and disabled and so remains and has ever since been and will so remain for a long time to come.

Wherefore plaintiff demands the sum of $1500.00.

SECOND COUNT.

1. That on or about the 13th day of March, 1915, at the Borough of Secaucus, defendant kept a dog on his premises, well knowing him to be of fierce and mischievous nature, and accustomed to bite mankind.

2. That defendant wrongfully and negligently suffered such dog to go at large without being properly guarded or confined.

3. That on or about March 13th, 1915, plaintiff was engaged in delivering newspapers to various customers, in the Borough of Secaucus, aforesaid, one of whom was the defendant.

4. That on or about March 13th, 1915, plaintiff while lawfully on defendant's premises delivering newspapers to defendant and one of defendant's tenants, in the Borough aforesaid, the said dog attacked and bit the plaintiff and wounded him about the right hip, so that he became sick, sore and disabled and so remains and has ever since been and will for a long time to come suffer from said injuries.

Wherefore plaintiff demands the sum of $1500.00.

HARLAN BESSON,
Attorney of Plaintiff.

Answer.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend,
Plaintiff,
vs.
MARIUS MUTILLOD,
Defendant.

Action at Law.

Defendant, residing in the Borough of Secaucus, in the County of Hudson and State of New Jersey, says that:

1. He denies the truth of the matters contained in the complaint.

DEFENSES.

Defendant alleges that the plaintiff was guilty of contributory negligence in entering the place where the dog was confined.

FRED'K. K. HOPKINS,
Attorney for Defendant.

Reply.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend,
Plaintiff,
vs.
MARIUS MUTILLOD,
Defendant.
Action at Law.

Plaintiff denies that he was guilty of contributory negligence as alleged in defendant's answer.

HARLAN BESSON,
Attorney for Plaintiff.

Rule for Judgment.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend,
Plaintiff,
vs.
MARIUS MUTILLOD,
Defendant.
Action at Law.

This action having been tried before Judge Luther A. Campbell, with a jury, in the presence of the respective parties on January 27, 1916, and the jury having returned a verdict in favor of the plaintiff for $400 damages, it is ordered that judgment final be entered in favor of the plaintiff and against the defendant for the sum of $400 and plaintiff's costs to be taxed.

Rule actually entered January 28, 1916.

On Motion of

HARLAN BESSON,
Attorney of Plaintiff.

Rule to Show Cause.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend,

Plaintiff,

vs.

MARIUS MUTILLOD,

Defendant.

Action at Law.

The verdict having been entered in favor of the defendant in the above matter and application having been made within the time for a rule to show cause:

It is on this 1st day of February, A. D., 1916, on motion of Frederick K. Hopkins, attorney of the defendant, ordered that the plaintiff show cause before me at the Court House in the City of Jersey City on Friday, the 25th day of February, A. D., 1916, at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard thereon, why the verdict rendered herein should not be set aside and a new trial ordered.

AND it is further ORDERED that the objections and exceptions made or allowed herein upon motions to non-suit and direct a verdict are expressly reserved, and that copies of this order, which may be certified by the attorney of the defendant as true copies be served upon the attorney of the plaintiff within three days.

LUTHER A. CAMPBELL,
Judge.

Reasons for a New Trial.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

The following are the causes upon which the defendant rests the motion for a new trial of the above-stated cause.

1. The Court refused to non-suit the plaintiff, although a non-suit should have been granted.

2. The Court refused to direct a verdict for the defendant on the ground of contributory negligence on the part of the plaintiff.

3. The verdict of the jury was contrary to the weight of the evidence.

4. The jury found for the plaintiff, whereas, in fact, they should have found a verdict for the defendant, since it appeared from the evidence that the plaintiff was guilty of contributory negligence, and that the defendant exercised due care.

5. The verdict of the jury was contrary to the charge of the Court.

6. The charge of the Court was erroneous in law.

7. The Court admitted illegal evidence for the plaintiff.

8. The damages awarded by the verdict are excessive.

Dated February, A. D., 1916.

FRED'K K. HOPKINS,
Attorney of Defendant.

Notice of Appeal—Rudolph Ebeling Case.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING,
Plaintiff,
vs.
MARIUS MUTILLOD,
Defendant.

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Court refused to non-suit the plaintiff, although a non-suit should have been granted.

2. The Court refused to direct a verdict for the defendant, although such verdict should have been directed.

FRED'K K. HOPKINS,
Attorney of Appellant.

To:
HARLAN BESSON, Esq.,
Attorney of Plaintiff.

Summons.

THE STATE OF NEW JERSEY, TO MARIUS MUTILLOD:

(L. S.)

You are summoned to answer the annexed complaint of RUDOLPH EBELING, in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Hudson County Circuit Court, at Jersey City, within twenty days after

service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HONORABLE LUTHER A. CAMPBELL, Judge of the Hudson County Circuit Court, at Jersey City, this 10th day of October, Nineteen Hundred and Fifteen.

JOHN J. McGOVERN,
Clerk.

HARLAN BESSON,
Attorney,
Savings Bank Building,
Hoboken, New Jersey.

Complaint.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

The plaintiff, residing at 766 Fourth Street, in the Borough of Secaucus and State of New Jersey, says:

1. That at the times hereinafter mentioned, one Emil Ebeling was the son and servant of the plaintiff.

2. That on or about March 13, 1915, the said Emil Ebeling who is a minor of the age of fifteen years and six months, was engaged in delivering newspapers to various customers in the Borough of Secaucus, one of whom was the defendant.

3. That the said defendant on said day, kept upon his premises in the Borough of Secaucus, a dog, well knowing said dog to be of vicious and mischievous nature and accustomed to bite mankind.

4. That defendant wrongfully and negligently suffered such dog to be at large without being properly guarded or confined.

5. That by reason of the said defendant's negligence on the day aforesaid, said dog attacked and bit the said Emil Ebeling on the right hip while he was lawfully on defendant's premises, delivering newspapers to defendant.

6. Wherefore, by reason of the premises, the said Emil Ebeling, servant and son of the plaintiff, sustained injuries to his right hip, from which injuries he became sick, sore and disabled and so remains and has ever since been and will so remain for a long time to come, and by reason thereof the plaintiff was deprived of his services and has been obliged to expend a large sum of money in caring for him for his said injury and in nursing him and for doctor's fees for attendance and treatment.

Wherefore, plaintiff demands as his damages $600.00.

HARLAN BESSON,
Attorney of Plaintiff.

Answer.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

Defendant residing in the Borough of Secaucus in the County of Hudson and State of New Jersey says that:

1. He denies the truth of the matters contained in the complaint.

DEFENSES.

Defendant alleges that the said Emil Ebeling mentioned in plaintiff's complaint was guilty of contributory negligence in entering the place where the dog was confined.

FRED'K. K. HOPKINS,
Attorney for Defendant.

Reply.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

Plaintiff denies that the said Emil Ebeling was guilty of contributory negligence as alleged in defendant's answer.

HARLAN BESSON,
Attorney for Plaintiff.

Rule for Judgment.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

This action having been tried before Judge Luther A. Campbell with a jury in the presence of the respective parties on January 27, 1916 and the jury having returned a verdict in favor of the plaintiff for $23.50 damages, it is ordered that judgment final be entered in favor of the plaintiff and against the defendant for the sum of $23.50 and costs to be taxed.

Rule actually entered January 28, 1916.

On Motion of

HARLAN BESSON,
Attorney for Plaintiff.

Rule to Show Cause.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

The verdict having been entered in favor of the defendant in the above matter and application having been made within time for a rule to show cause:

It is on this 1st day of February A. D., 1916, on motion of Frederick K. Hopkins, attorney of the defendant, ordered that the plaintiff show cause before me at the Court House in the city of Jersey City on Friday the 25th day of February, A. D. 1916, at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard thereon, why the verdict rendered herein should not be set aside and a new trial ordered.

And it is further ordered that the objections and exceptions made or allowed herein upon motions to non-suit and direct a verdict are expressly reserved, and that copies of this order, which may be certified by the attorney of the defendant as true copies be served upon the attorney of the plaintiff within three days.

LUTHER A. CAMPBELL,
Judge.

Reasons for a New Trial.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

The following are the causes upon which the defendant rests the motion for a new trial of the above-stated cause:

1. The court refused to non-suit the plaintiff, although a non-siut should have been granted.

2. The court refused to direct a verdict for the defendant on the ground of contributory negligence on the part of the said Emil Ebeling.

3. The verdict of the jury was contrary to the weight of evidence.

4. The jury found for the plaintiff, whereas, in fact they should have found a verdict for the defendant, since it appeared from the evidence that the said Emil Ebeling was guilty of contributory negligence, and that the defendant exercised due care.

5. The verdict of the jury was contrary to the charge of the court.

6. The charge of the court was erroneous in law.

7. The court admitted illegal evidence for the plaintiff.

8. The damages awarded by the verdict are excessive.

Dated, February, A. D. 1916.

FRED'K. K. HOPKINS,
Attorney for Defendant.

Conclusions.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by next friend,

vs.

MARIUS MUTILLOD.

RUDOLPH EBELING

vs.

MARIUS MUTILLOD.

On Rule.

HARLAN BESSON, ESQ., Attorney for Plaintiffs.
FRED'K. K. HOPKINS, ESQ., Attorney for Defendant.

CONCLUSIONS.

CAMPBELL, J.:

While the testimony produced to establish scienter is not convincing, yet I cannot say that the verdict should be set aside on that account.

In *Emmons vs. Stevani* (E. & A.), 77 N. J. L., 570, it is held: "Where the proof to establish viciousness consists of instances tending, more or less, clearly to indicate such a disposition and such a knowledge a jury question at once arises, whether under the adduced proof the animal has displayed vicious propensities to the knowledge of the owner sufficient to rebut the presumption raised by the law in favor of domestic animals, and sufficient to charge the owner with scienter," and again, in the same case it is held—

> "Scienter need not be precisely similar but that it is substantially so will suffice."

The more important question is whether or not the defendant is liable, conceding that the scienter is established.

Conclusions.

The plaintiff Emil Ebeling, if he were in a place where he had a legal right to be, scienter having been established, was entitled to recover, and under the same circumstances the plaintiff Rudolph Ebeling, the boy's father, was entitled to recover. Upon this all authorities are in accord.

But the contention of the defendant is that the proofs show that the boy, Emil, was where he had no right to be and therefore there is no liability on the part of the defendant, unless the injury was the result of a wilful act of the defendant.

Under the facts of the case the plaintiff was, at the most, a licensee, and had exceeded the bounds of his license in reaching the point in defendant's grounds where he was at the time he was bitten, and, in fact, upon the proofs I am more inclined to the conclusion that he was a trespasser.

The case was submitted to the jury upon the theory that if scienter was established, defendant was liable even though the plaintiff was a trespasser.

Whether or not this is the correct rule I am not able to satisfactorily determine.

In *Sarch vs. Blackburn,* 4 Carrington & Payne's Nisi Prius Reports, 297, 19 English Common Law Reports, 394, referred to and cited Am. & Eng. Enc. Law, Vol. 2, p. 374, it is held:

> "The test seems to be that a person cannot recover damages for an injury received from the bite of a dog placed in a yard for protection, unless he has such reasonable and justifiable cause for being in the place where the dog was as might be pleaded in answer to an action for trespass."

In *Emmons vs. Stevani,* 77 N. J. L., 570, at page 572, Justice Voorhees, writing the opinion of the Court of Errors and Appeals, says:

Conclusions.

"At common law the keeper of animals of the class *ferae naturae* was presumed to have knowledge of their vicious propensities and was liable as an insurer. *May vs. Burdett,* 9 Ad. & E. (N. S.), 101; *Smith vs. Pelah,* 2 St., 1264; Hale, Q. C., 430, part 1, Chap. 33."

"But in the case of animals which had been domesticated the presumption arose that they were not of a vicious nature, and hence their keeper was liable only in case the animal was vicious and he had knowledge of its vicious propensities. The action against the harborer did not proceed upon negligence, *but if he had knowledge of the vicious nature of the animal he was liable as an insurer,* the *gravamen* of the injury being the *wrong of keeping* the animal with knowledge of its viciousness, and hence it was essential that the master's knowledge be averred and proved. *May vs. Burdett,* supra; Thomp. Com. Negl., Secs. 839-844; *Wolf vs. Chalker,* 31 Comm., 121; *Smith vs. Donohue,* 20 Va., 548."

Thompson's Com. Neg., Sec., 889:

"The liability of a keeper of a vicious dog, who knows the vicious habits of the animal, extends even to the protection of persons trespassing upon his premises, at least in the day time. This question involves the principle which has often been applied in relation to the use of spring guns, mantraps and such devices for keeping off trespassers. That principle is that a person is not permitted, for the protection of his property, in his absence, as against a mere trespasser, to use means endangering the life of a human being, whatever he may do where the entry upon his premises is to commit a felony, or breach of the peace; and that where such means are used, the nature and value of the property sought to be protected must be such as to justify such an extraordinary measure of protection. Full notice of the mischief to be encountered must be given to prevent trespass and the principles of humanity must not be violated; otherwise the

landowner will be subjected to damages for any injury which ensues; but where he gives such notice, he will clearly not be liable."

This doctrine was applied and followed in *Loomis vs. Terry,* 17 Wend. (N. Y.), 496.

I am of the opinion, however, that the better and greater weight of authority is in favor of the principle that scienter being established, the owner is liable as an insurer, even though the person injured be a trespasser.

I conclude, therefore, that the Rule to Show Cause should be dismissed.

Dated, Sept. 30, 1916.

LUTHER A. CAMPBELL,
Judge.

Order Discharging Rule to Show Cause —Emil Ebeling Case.

HUDSON COUNTY CIRCUIT COURT.

EMIL EBELING, by RUDOLPH EBELING, his next friend,

Plaintiff,

vs.

MARIUS MUTILLOD,

Defendant.

Action at Law.

The rule to show cause heretofore allowed in the above named action, why the verdict found against the defendant at the trial thereof, should not be set aside, having been argued on March 17th, 1916, by Frederick K. Hopkins, Esq., of counsel with the defendant, and Harlan Besson, Esq., of counsel with the plaintiff, before Hon. Luther A. Campbell, Judge of the Hudson County Circuit Court, and

the Court having considered the matter presented, and having concluded that the said rule should be discharged:

It is on this day of October, A. D. 1916, ORDERED that the said rule to show cause be discharged with costs.

LUTHER A. CAMPBELL,
Circuit Court Judge.

Order Discharging Rule to Show Cause —Rudolph Ebeling Case.

HUDSON COUNTY CIRCUIT COURT.

RUDOLPH EBELING, *Plaintiff,* *vs.* MARIUS MUTILLOD, *Defendant.*	Action at Law.

The rule to show cause heretofore allowed in the above named action, why the verdict found against the defendant at the trial thereof, should not be set aside, having been argued on March 17th, 1916, by Frederick K. Hopkins, Esq., of counsel with the defendant, and Harlan Besson, Esq., of counsel with the plaintiff, before Hon. Luther A. Campbell, Judge of the Hudson County Circuit Court, and the Court having considered the matter presented, and having concluded that the said rule should be discharged:

It is on this day of October, A. D. 1916, ORDERED that the said rule to show cause be discharged with costs.

LUTHER A. CAMPBELL,
Circuit Court Judge.

Colloquy.

APPEARANCES:

HARLAN BESSON, ESQ., for the Plaintiff.
FRED'K. K. HOPKINS, ESQ., for the Defendant.

MR. BESSON: May it please the Court, Rudolph Ebeling the father of the boy, was hurt in an accident and cannot be in court to-day and Mr. Hopkins has been kind enough to agree to admit on the record that Rudolph Ebeling is the father of Emil Ebeling, that he was admitted to prosecute this suit as the next friend of Emil Ebeling, and that he has receive a doctor's bill from Dr. Brandenberg, of Secaucus, the amount of which will be proved by Dr. Brandenberg.

MR. HOPKINS: And the boy has not been emancipated.

MR. BESSON: And that the boy has not been emancipated.

MR. HOPKINS: And there is no loss of wages?

MR. BESSON: Well, the father did not get any wages from the boy on this occasion; afterwards he did.

MR. HOPKINS: All right, if that is the fact.

MR. BESSON: We won't attempt to prove loss of wages.

THE COURT: All you attempt to prove on the part of the father is the physician's bill.

MR. BESSON: I am not in position to bring the father here to prove loss of wages. I can simply prove how long the boy was laid up. I will prove how long the boy was laid up.

THE COURT: Well, what will you attempt to recover on the part of the father, then?

MR. BESSON: I will attempt to recover the physician's bill.

THE COURT: That is what I say, is there anything else in the present exigency that you will be able to recover? The exigency I speak of is the father's inability to be present.

MR. BESSON: I won't attempt to prove anything further than that.

THE COURT: Very well. Then the damages attempted to be recovered for on the part of the father will only be as to the physician's bill; is that correct?

MR. BESSON: Yes.

THE COURT: Of course the other stipulation is that the boy was not emancipated at this time?

MR. BESSON: Yes, sir.

EMIL EBELING, sworn.

DIRECT EXAMINATION BY MR. BESSON:

Q. Emil, how old are you? A. Sixteen years of age.

Q. Where were you on March 13, 1915? A. Delivering papers on Mr. Muttilod's lawn.

Q. What time of day? A. About half past three Saturday afternoon.

Q. How long had you been in the newspaper business? A. About a year.

Q. How long had you been accustomed to deliver papers on Mr. Muttilod's place? A. About a year.

Q. Well, to whom did you deliver them? A. To Mr. Muttilod and his tenants, and around the Borough Hall.

THE COURT: Talk a little louder.

Q. Speak up so the jury can hear you, so all these jurymen can hear you. (Answer repeated.)

Q. What route did you take through the property on the 13th of March? A. Sir?

Q. What way were you going through the property? A. I was cutting across the lawn.

Q. Where did you enter the property? Did you climb a wall or go through a gate, or what? A. Go through a gate.

Q. Which end of the property was the gate? A. Northern part.

Q. Was the gate open or closed? A. Open.

Q. How wide a gate was that? A. About three feet.

Q. As wide as this place in front of you? Indicate on that. A. About like that. (Indicating.)

Q. You went right through this gate and then you went across the lawn to where? A. To one of Mr. Muttilod's tenants.

Q. What was the name of that tenant? A. One of the tenants was Mr. Carson.

Q. Was it Mr. Carson's house you were going to that day? A. Mr. Carson lives in that house.

Q. What happened? A. Well, I was just about to get by the—about ten feet away from the stoop when the dog come and jumped at me and bit me.

Q. What kind of a dog was it? A. Big St. Bernard dog.

Q. Where did he bite you? A. On the hip.

Q. Just indicate with your hand? A. Here (indicating).

Q. How many bites were there? A. Two.

Q. Did he do anything else to your clothes? A. Yes, he tore them.

Q. What do you mean by tore? A. Put a rip in.

Q. Were there holes in it? A. Yes.

Q. How many? A. Two.

Q. Where did you go after you were bitten? A.

I went right along my paper route and about seven o'clock I came home and I told my mother and father about it and they hollered at me and told me to go right down to the doctor.

Q. To what doctor did you go? A. Dr. Brandenberg.

Q. Did you suffer any pain from this bite? A. Yes, sir.

Q. When did you first begin to feel that pain? A. Well, I felt the pain from the beginning of the bite until about three or four weeks after.

Q. How long did you keep going to Dr. Brandenberg? A. About three weeks.

Q. How often? A. For the first two weeks I went every day straight and for the last week I went every other day.

Q. Now you had gone through this same way on Mutillod's property before? A. Yes, sir.

Q. How often? A. Every day.

Q. Did any one stop you? A. No, sir.

Q. You ever remember anybody stopping you? A. No, sir.

Q. Who was there the day that the dog bit you? A. Mrs. Mutillod.

Q. What did she do? A. She wanted to fiix it, but I says—I says, "Never mind," and I went right along.

THE COURT: What do you mean by fix it?

THE WITNESS: She wanted—I don't know—she says, "You want me to fix it for you?"

Q. Did she have anything—any bandages or anything? A. No, sir.

Q. Who called off the dog? A. Mrs. Mutillod called the dog after he bit me.

Q. Did you do anything to the dog to excite it or anything? A. No, sir.

Q. You were taking the regular route that you had always taken? A. Yes, sir.

Emil Ebeling—Cross.

Q. Now how is Mutillod's property fenced in; is there a big fence around it? A. Partly.

Q. Partly? A. Yes, sir.

Q. Is part of it open? A. Yes.

Q. Which part is open? A. After you leave the —after you leave the house which is his tenant's you go—from there you go right out into an open road and it is not fenced in all around.

Q. Are there gates around the property? A. Yes.

Q. How many gates, if you can remember? A. I can remember three.

Q. Three gates? A. Yes.

Q. Did you go out through a gate when you went off the property that day? A. No, sir.

Q. How did you get out of the property? A. I went into a road.

Q. Didn't you cross—was there a gateway over the road? A. No, sir; it was open road.

Q. Weren't there gates which closed on this road? A. No, sir.

Q. Sure about that? A. There was willow trees.

Q. It was open and you could pass right off the property through this open road? A. Yes, sir.

Q. You are sure? A. Yes, sir.

Q. That was the same route that you always took? A. Yes, sir.

Q. You went in through the one end, went to the house and out through the other end? A. Yes, sir.

Cross Examination by Mr. Hopkins:

Q. (Maps placed on easel.) Now then, Emil, just suppose you step over here a minute. You have lived in Secaucus for quite a long while, haven't you? A. Yes, sir.

Q. Born there? A. No, sir.

Q. How long have you lived in Secaucus? A. About eight or nine years.

Q. You have known this property for a long time, haven't you? A. Ever since I had the paper route.

Q. As long as you can remember anything, pretty near? A. Yes, sir.

Q. Since you were a small boy? A. Yes, sir.

Q. Now, I call your attention to these two parallel lines on the bottom of this diagram, where the words "Main road", are, that is the road that is known as Cedar Road, isn't it? A. No, sir.

Q. Cedar Lane? A. No, sir.

Q. What do you call it? A. I don't know what I call it. I didn't call it anything.

Q. You didn't call it anything? A. No, sir.

Q. Now, running along the north side of that road that on that diagram is marked "Main Road", there is an iron fence, isn't there? A. Yes.

Q. And that iron fence extends from a point here in the left hand corner of this diagram right along the whole diagram until it reaches the point in the right hand corner of the diagram where the main road intersects with the road marked Cedar Lane? A. Yes, sir.

Q. Then the fence extends northerly along the westerly side of the Cedar Lane down to a point near the square marked "Frame dwelling" in the middle of the diagram, isn't that so? A. Yes, sir.

Q. How high is that fence? A. About six or seven feet.

Q. It surmounts a concrete wall, doesn't it? A. This is a cement—concrete wall on the bottom and iron fence on the top.

Q. And in this fence as it is built along the

northerly side of this main road there are several openings for gateways, aren't there? A. Yes.

Q. Now there is one gateway over near this building in the left hand corner there, marked "Concrete Building", isn't there? A. Yes.

Q. And that is the gate which is about three feet wide which you spoke of on your direct examination? A. Yes, sir.

Q. Then there is another large double gate, opposite the two parallel lines marked "Private Road" in the middle of the diagram, isn't there? A. Yes.

Q. Through which horses and wagons can go? A. Yes.

Q. And besides that private road there is a concrete walk, isn't there? A. Yes, there is one.

Q. Well, gate, right here. Now then, besides those two gates I called your attention to there is also another gate just over the word "Main", in the lower left hand corner of this diagram; isn't that so? A. Yes.

Q. And that last gate is the gate you went through, isn't it? A. Yes, sir.

Q. Now, I show you a photograph marked—

THE COURT: Not marked anything yet.

MR. HOPKINS: Shall I mark it for identification.

THE COURT: Let him identify it first.

Q. I show you a photograph. Does that represent this road marked "Main Road" on this property? A. Yes, sir.

MR. HOPKINS: Now we will mark it.

(Photograph marked D-1 for identification.)

Q. And this iron fence and concrete wall I call your attention to on this photograph D-1

for identification, is that concrete wall and iron fence that you have spoken about that runs along the northerly side of this road marked main road on the diagram? A. Yes.

Q. Is that right? A. Yes, sir.

Q. I call your attention to a building in the left hand side of this photograph. That is the building marked concrete building on the diagram, isn't it? A. Yes, sir.

THE COURT: Suppose that which you are referring to be marked on the photograph A.

MR. HOPKINS: Now marked on the photograph A.

Q. Now I call your attention to a small frame building in the right side of this photograph. That is the frame building marked on the right side of the diagram—on the lower right hand corner of the diagram "Frame Building", isn't it? A. Yes, sir.

THE COURT: That may be marked B in the photograph.

MR. HOPKINS: We will mark that B.

Q. So that one going down the main road for any business purpose and expecting to come back to the frame building in the center mark of the diagram would have to go a long way around to cover the place they wanted to get to, wouldn't they? A. Yes, sir.

Q. Now I will call your attention to a third photograph. Do you recognize that? A. Yes.

Q. That is the large gateway for horses and wagons that I have spoken of on the north side, marked "Private Road", isn't it? A. Yes, sir.

MR. HOPKINS: I will have that marked for identification.

(Photograph marked D-3 for identification.)

Q. Then looking directly ahead on this photograph you can see the roadway which is marked private road on the diagram, and you can also see the sidewalk marked concrete sidewalk on the diagram, can you? A. Yes, sir.

Q. Now I call your attention to part of a frame building in the right hand side of this photograph D-3 for identification, and ask you whether that is part of the building in the center of this diagram marked frame building? A. Yes, sir.

Q. Now the day you were injured you were going from the building which on the diagram is marked concrete building— A. Yes, sir.

Q. —across the diagram towards this—

MR. BESSON: Let him show.

Q. You show me just the way you were going? A. I was coming this way. I threw my papers in here—

Q. Indicating concrete dwelling. A. —and went along to a gate which was open and went across the lawn right to this stoop here, and I threw my papers in, and I went around, and there is a porch here and a box underneath. The paper box is Mr. Mutillod's box and some other tenants down below.

Q. Just a moment. A. And I threw the papers —

Q. Just a moment. Finish the answer and I will move to strike it out, as I want a responsive answer. A. And I threw my papers up on the porch and I went along, and there is a house down here—

THE COURT: Went along what?

A. Cedar Lane, and I came—and there is a house here, and I threw papers there and I went right straight on.

Q. I show you a fourth photograph, and ask you whether that is the front part of the building in the middle of the diagram, marked frame building? A. This part here.

Q. Indicating the front?

THE COURT: That would be the east front, wouldn't it?

MR. HOPKINS: Yes. I will have that marked for identification.

(Photograph marked D-4 for identification.)

Q. In the lower part of this photograph there is a small box, is there? A. Yes.

Q. That is the box in which you put papers that belong to the tenants of this house, was it not? A. Not to that house.

Q. Now you can take the stand again. (Witness resumed his seat.) Now at the time that this accident happened, who was the tenant of that house marked frame building in the center of the diagram? A. Who was the tenant?

Q. Yes. A. One of them was Mr. Carson.

Q. Another was a Mrs. Erhart? A. I couldn't tell you.

Q. Or Mrs. Hermann? A. I couldn't tell you.

Q. Do you know Mrs. Hermann? A. No, sir.

Q. And how long have you been delivering papers on this property, inside of this iron fence? A. About a year.

Q. About a year? And the accident happened in March of 1913, did it? A. Yes, sir.

MR. BESSON: 1914—or 13.

A. 1915.

Q. 1915. The part on the diagram which is left of the roadway marked private roadway had been laid out in a lawn just before this accident happened, had it not? A. Yes, sir.

Q. How long before? A. Ever since I was there.

Q. Well, had not this roadway marked private roadway, been curbed and had not this part on the left side of this roadway as shown on the diagram, been levelled off and smoothed off and graded just before—just a short while before this accident happened?

Objected to as immaterial. Question permitted.

Question repeated.

A. I don't understand your question.

Q. I call your attention to the space west of the part on the diagram marked private road to greenhouses, on the diagram colored in green. Had not that part been levelled off, graded, and a lawn made there within a few months before you were there? A. I wouldn't call it a lawn.

Q. There was grass on it, wasn't there? A. Yes.

Q. But you would not call it a lawn? A. No, sir.

Q. Wasn't your idea of a lawn? A. No, sir.

Q. Now indicate on this diagram just where it was the dog bit you. You can mark with a pencil, if you will.

THE COURT: Use the letter C.

MR. HOPKINS: Mark it with the letter C.

Witness indicates with the letter C.

Q. At the time you were bitten you were on your way across from the concrete building to the other one? A. Yes, sir.

Q. Was anybody with this dog at the time you were bitten? A. Miss Mutillod.

Emil Ebeling—Cross.

Q. And there was another small dog there, wasn't there? A. Yes.

Q. These two dogs were playing, were they not? A. I don't know about that.

Q. You had a clear, unobstructed view of these two dogs from the time you left the open gateway and while you were crossing this lawn, did you not? A. I did not see him until I was about five feet away from him.

Q. And were you walking directly towards him? A. Yes—I wasn't walking directly for them, I was walking directly for the stoop.

Q. And going from this open gate which you say you entered on the north side of the main road there toward the place where you say you delivered the papers in this frame building in the center of the diagram—they were directly in your path, were they not, the dogs and Mrs. Mutillod? A. Yes.

Q. And that is a distance from this open gate to this house of several hundred feet, isn't it? A. Yes, sir.

Q. Why is it you could not see the dogs and Mrs. Mutillod all the time you were crossing over this lawn? A. I was reading a paper.

Q. Now how long had you known this dog before the accident happened? A. I saw him once.

Q. Ever have any talk with anybody about him? A. Somebody told me that he bites, but then the tenants of the house said you shouldn't be scared of him, he won't bite or anything like that.

Q. Who told you that? A. I don't know who told me.

Q. When did you find out that he bit? A. That I couldn't tell you.

Q. Was it a month or a year before this accident? A. Say a month.

Q. Eh? A. Say a month or two.

Q. Which tenant in the house told you he did not bite? Which tenant in the house told you not to be scared of him? A. I don't know her name.

Q. Mr. Mutillod never told you not to be scared of him, did he? A. No, sir.

Q. Did you know Mr. Mutillod at this time? A. No, sir.

Q. And Mrs. Mutillod never told you not to be scared of him did she? A. No, sir.

Q. Did you know her? A. No, sir. I saw her, but I did not know her.

Q. Now you said on your direct examination that when you were asked where you delivered papers in this property of Mr. Mutillod's, that you delivered papers around the Borough Hall? A. Yes.

Q. The Borough Hall is not in this property, is it? A. No, sir.

Q. And you do not deliver papers to Mr. Mutillod's house inside of this iron gate, do you? A. No, sir.

Q. And the only place where you deliver papers inside of this enclosure we have been speaking of is at the house in the center of the diagram, isn't that so? A. Yes, sir.

Q. And if those roads were at right angles, or if the distance was as short to go from the concrete building to this building in the center of the diagram, you would not take this short cut across the lawn, would you? A. What do you mean, from that cement house, the road going right over —the same as I always went?

Q. Yes. Repeat the question.

MR. BESSON: I object. That calls for a conclusion of the witness, a state of mind, what his plan would be if a certain state of

facts existed. I do not see how that is relevant in the case. It don't add anything to the case.

Question repeated.

MR. BESSON: The fact is he did cross the lawn and did it every day, he says, for a year. What difference does it make what he would have done if something else existed?

MR. HOPKINS: I think I have a right to find out why he did it.

THE COURT: Yes.

MR. BESSON: I think that is for a jury to determine, why he did it.

THE COURT: I think I will allow the question. Do you understand the question?

THE WITNESS: Not quite. What I think he means is from that gate right there to the stoop—is that what he means—a straight road—(goes to the map)—straight road across from here to there? Is that what he means?

THE COURT: No; he does not mean that, I take it. Suppose you re-state your question, Mr. Hopkins?

Q. You went across the lawn from the concrete building to the frame building because it was a short cut? A. Yes, sir.

Q. And less trouble to go around that way than it was to go around by the road? A. Yes, sir.

Q. Sure.

MR. BESSON: That is obvious.

THE COURT: All right.

Witness resumes his seat.

Q. Now you remember several weeks before this accident Mr. Mutillod talking to you when he saw you crossing this lawn—the part on the dia-

gram marked west of the private road? A. No, sir; he never said anything to me.

Q. Did you ever see him inside of this enclosure to talk with? A. No, sir; I saw his wife, but not him.

Q. Will you say that about three weeks before this accident happened he did not find you crossing this part which I have described as the lawn between this gate on the main road and this other house, and tell you to keep off the lawn and keep out of there?

MR. BESSON: I object.

A. No, sir; he never said anything like that.

MR. BESSON: I object, and ask that the question and answer be stricken out, because it is not relevant or material to the case, whether he was warned about that or not. The keeping of a vicious dog is a wanton wrong.

MR. HOPKINS: That is another question of law.

THE COURT: That goes back to the same question, whether a person who is an actual trespasser may have relief, doesn't it?

MR. BESSON: Yes.

THE COURT: I suppose the question is whether he was a trespasser or not.

MR. BESSON: The question is not relevant to the case.

THE COURT: So far I am not satisfied it is not. I am going to leave it stand for the present, the same as I did a previous question. If your contention is correct, then of course it has no relevancy to the issue at all, and if it has relevancy it will be only for my own information and assistance when I come to that question of law.

Q. After the accident, Emil, you continued on your newspaper route? A. Yes.

Q. And the next day was a Sunday, wasn't it? A. Yes.

Q. Sunday you did not deliver any papers, did you? A. Yes, sir.

Q. Did you? A. Yes, sir.

Q. The same as before? A. Not the same as before.

Q. Why not? A. Because they had another boy helping me.

Q. Monday you delivered papers again? A. Yes, sir.

Q. Tuesday? A. Yes, sir.

Q. So that there wasn't any time that you lost, except that on Sunday you had that other boy helping you? A. Yes.

Q. Why did you have the other boy help you? A. Because the bundles was too heavy for my side.

Q. You usually had a boy to help you to carry the Sunday papers, anyway, didn't you? A. No, sir.

Q. Now then you say that after you delivered the papers at the frame building you passed all through the open road. The open road you refer to is the road marked Cedar Lane on the diagram, isn't it? A. Yes.

Q. And that road leads out to the Paterson Plankroad in Secaucus? A. Yes, sir.

MR. HOPKINS: I think that is all. I offer in evidence the four photographs marked.

MR. BESSON: I will consent they go in evidence.

THE COURT: Let them be marked.

Photographs marked D-1, D-2, D-3 and D-4.

MR. HOPKINS: And likewise the map.

Map marked Exhibit D-5

RE-DIRECT EXAMINATION BY MR. BESSON:

Q. Now there was no gate or anything else that kept the dog from running around out through Cedar Lane, was there? A. No, sir.

Q. He could run as he pleased? A. Yes.

Q. Were there any gates back here—fences—that you know of?

THE COURT: That is to the north end of the tract?

Q. Up that way, the north end. A. I never was through there.

Q. Were these gates open on the day that you went in there? A. The one I went through was open.

Q. Was this gate open? A. Yes.

Q. Both of those gates? A. There is only one gate here.

Q. There is marked here a big gate and a little gate; which gate did you go through? A. Through the little one.

Q. Was the other gate open? A. I couldn't tell you.

Q. Was this gate open? A. I didn't notice.

THE COURT: Is that a private road?

MR. BESSON: Yes, sir.

THE WITNESS: No, sir.

THE COURT: This gate and that gate does not mean anything to the stenographer, unless he happens to know.

Q. The gate on the private road to the greenhouses, was that open or shut.

MR. HOPKINS: I object to that as immaterial.

THE COURT: Well, what is the materiality of that, Mr. Besson?

MR. BESSON: I just wanted to show.

THE COURT: I suppose it would have no bearing if the boy had a right in there whether the gate was open or whether he opened it and went in himself.

MR. BESSON: I want to show there was no effort whatsoever made to restrain this dog. The dog had a free run of the place.

THE COURT: This thing did not happen on the public highway; it happened on the premises of the defendant, didn't it?

MR. BESSON: Yes.

MR. HOPKINS: That is the turning point.

MR. BESSON: We do not deny that.

Q. When you say you heard that the dog had bitten some one else, or had bitten people, you did not hear who it had bitten, did you? A. No, sir.

Q. You heard that in conversations between some other people? A. Yes, sir.

Q. That is all. Oh, by the way, do you remember who told you that the dog would not bite?

MR. HOPKINS: I object.

THE COURT: He has already said as to that, that it was some tenant, I think, he did not know who.

MR. BESSON: That is all.

FRED MONTIGEL, sworn.

DIRECT EXAMINATION BY MR. BESSON:

Q. Mr. Montigel, where do you live? A. 411 Ogden Avenue, Jersey City.

Q. What is your occupation? A. Storekeeper.

Q. Do you know Mr. Mutillod, the defendant in this case? A. Yes, I do.

Q. Do you know his dog, the St. Bernard dog that he has? A. Know him well.

Q. When did you make his acquaintance? A. When he got hold of my trousers.

Q. When did this happen? A. Well, about two and a half years ago, on a Sunday morning, between ten and eleven o'clock. I was coming along the Paterson Plankroad when Mr. Mutillod was on the road observing something on a structure there, I didn't know what it was, and the dog was about ten feet from him and I walked along and after I passed about ten foot from the dog something got hold of me in the rear and naturally I reeled, and I turned around and the dog had hold of my trousers, and it happened I carried a bundle of handkerchiefs in that rear pocket, otherwise I suppose it would have got to the flesh. So I turned to Mr. Mutillod, and told him what he had done, and I told him, "I suppose you know what that means?" And he said he would reimburse me for the trouble—or what the dog had done—and at the same time he said the dog did not mean to bite me, only wanted to play with me. Well, so, about a week or so after I approached Mr. Mutillod in regard to the trousers, and he seemed to be somewhat embarrassed, and he said that I tried to blackmail him, that the suit was spoiled—

MR. HOPKINS: I object.

THE COURT: I don't see that that is of any consequence.

A. So I said that the suit was spoiled, and he said he wouldn't buy me a new suit, so I said, "I only asked you for the trousers," so then he said, "The trousers are only worth three or four dollars," so in order to avoid further complications I decided on taking four dollars, and which Mr. Mutillod gave me a check for the same amount and then I didn't do anything more about it.

Q. Was any one else present when the dog bit you, that you know of? A. No, sir; only Mr. Mutillod.

CROSS EXAMINATION BY MR. HOPKINS:

Q. Did not bite you in your body? A. Couldn't get through the handkerchiefs I had there.

Q. How many handkerchiefs did you keep? A. I had about six that morning.

Q. What were you doing with six handkerchiefs that morning? A. I am troubled with catarrh.

Q. How long ago was this? A. I should judge about two and a half years now.

Q. And this thing happened on the plankroad, didn't it? A. Public highway, front of the Secaucus Hotel—near the Secaucus Hotel.

Q. The dog was with Mr. Mutillod at the time? A. About ten feet away from Mr. Mutillod.

Q. And you were simply passing along the street? A. Right ahead, yes.

Q. Had you ever seen the dog before? A. Certainly.

Q. How many times? A. Well, occasions when I had to—Oh, I couldn't say how many times. I had occasion to go to the garage and have engine parts repaired for my boats which I have—that brings me in that Cedar Lane.

Q. Then it was on Cedar Lane this thing happened? A. No, sir, Paterson Plankroad where it happened.

Q. Are you sure about the time, two and a half years ago, when this thing happened? A. No, sir; I am not positive. I know it was a Sunday morning.

Q. Was it more or less than two and a half years ago? A. Well, I couldn't enter into details as far as that because I didn't pay any attention to it after Mr. Mutillod had settled with me and I concluded it was ended.

Q. Now, after the dog grabbed your handkerchiefs he didn't make any further effort to bite you elsewhere? A. No, sir; Mr. Mutillod called him off.

Q. At the time this thing happened don't you know this dog was nothing but a big pup and simply playing with you? A. Did I know that he was a pup only playing? I didn't know anything about the dog.

Q. He didn't bite you at that time? A. He bit my trousers.

Q. He is big enough to chew you up if he wanted to? A. Yes, sir.

Q. He is a monstrous thing? A. I should say about three feet high.

Q. So that didn't you know that at that time that you were bitten on your pocket or on your pocket handkerchiefs that he was simply playing with you? A. No, sir; I didn't know.

Q. Didn't Mr. Mutillod tell you that he was playing with you? A. Yes, Mr. Mutillod told me he only wanted to play with me, he didn't mean to bite me.

Q. Mr. Mutillod was sorry he played so rough, and gave you four dollars for the trousers, didn't he? A. I supposed that was the end of it.

Fred Montigel—Re-Direct.
Michael Colombo—Direct.

RE-DIRECT EXAMINATION BY MR. BESSON:

Q. You didn't think it was play, did you? A. No, sir, I did not.

MR. HOPKINS: I object to it as immaterial.

Q. How many handkerchiefs are you carrying to-day? A. Oh, I don't know; I guess I have got about ten or twelve probably. (Producing handkerchiefs from pockets.)

Q. Well, never mind showing any more. That is your habit? A. That is only in this pocket.

BY MR. HOPKINS:

Q. Didn't carry those handkerchiefs as a protection against this dog, did you? A. No, sir.

MICHAEL COLOMBO, sworn.

DIRECT EXAMINATION BY MR. BESSON:

Q. Where do you live, Mr. Colombo? A. Cedar Lane, Secaucus.

Q. What is your occupation? A. Machinist.

Q. Where do you carry on your business? A. Right there, right on Cedar Lane.

Q. On Cedar Lane? Do you know Mr. Mutillod? A. I certainly do.

Q. You have been on his premises? A. Oh, yes.

Q. Have you ever done any work for him? A. Oh, yes; lots of it.

Q. Do you know the big St. Bernard dog we have been speaking of? A. I certainly do.

Q. How big a dog is it? A. Well, I should say pretty big dog, about a hundred and seventy pounds or eighty.

Q. What color? A. St. Bernard—Oh, red—reddish brown, a few white spots on it.

Q. Have you ever been on these premises when the dog was there? A. Many a time, yes.

Q. Did you ever have any difficulty with the dog? A. Well, he bit me once right in this place.

Q. Where? A. Going to his greenhouse.

Q. What part of your body were you bitten? A. In the left hip.

Q. What were you doing at the time? A. I was working for him, driving his car.

Q. Driving his automobile? A. Yes, sir.

Q. Can you indicate on the map here where these greenhouses were? A. Well, they are not pretty well on there.

Q. They are not on the map? A. No.

MR. HOPKINS: They are further back.

Q. Do you know anything about the fencing on this place? A. Well, part of it is fenced and part of it is not fenced.

Q. Know the fence only runs part way around it? A. That is all.

Q. And part of it is open? A. Down as far as my place.

Q. There was plenty of space for the dog to run in and out? A. Oh yes, sure was—lots of room. Lots of it there now yet.

Q. How long ago was it this thing happened that you speak of? A. I think it was about three or three and a half years, I am not sure.

Q. There is no special reason why you should remember the date? A. I didn't remember the date, I have no time.

Q. Was Mr. Muttilod there when it happened? A. No, he was in New York.

Q. Did you say anything to him about it?

MR. HOPKINS: I object.

A. No, I let it go.

MR. HOPKINS: I object.

THE COURT: The answer is—

A. The only thing I did was—

THE COURT: No, no.

Q. Well, did you ever mention it to Mr. Muttilod? A. Not then, but way after.

MR. HOPKINS: I object.

Q. When? A. About a year and a half ago.

THE COURT: What is the objection?

MR. HOPKINS: It is leading.

THE COURT: I do not understand that it is. How else can the question be asked?

MR. HOPKINS: Well, I will withdraw my objection.

A. About a year and one half ago.

Q. What did you say to him? A. Oh, well, now, that is a different case when that happened.

Q. What did you say to him? A. I didn't tell him nothing at all. I met him about a year and a half ago, and then a friend of mine happened to come down there, and he wanted to stop him from coming down our way there, so I said, "Don't stop anybody coming down this lane, and another thing, tie your dog, because your dog bit me."

Q. What did he say to you? A. "Oh," he says, "no, he only plays."

Q. Did you think it was play when the dog—

MR. HOPKINS: I object.

A. I have kept away from him.

MR. HOPKINS: I object to it as immaterial.

MR. BESSON: Mr. Hopkins is trying to inject that it was play.

THE COURT: There was no objection made to that. The thing is to have the witness tell what did happen, and if it is necessary to be

passed on by the jury let them determine whether or not it showed viciousness.

Q. Have you ever been on the property since when the dog was there and other people were there? A. You mean after I got done with the job?

Q. Yes. A. Never was on his place. I never go.

CROSS EXAMINATION BY MR. HOPKINS:

Q. You are an automobile mechanic, aren't you? A. Yes.

Q. You have a little shop— A. I certainly do.

Q. Just a minute, please. You have a little shop— A. There it is.

Q. —which on the right side of this diagram is at the intersection of two roads and is marked "Frank Dolan"? A. Yes.

MR. BESSON: I object, because that is not his shop. His shop is way down here.

A. Oh yes, way down there.

Q. Where is your shop with reference to anything that you— A. Right there. Put your pencil there.

Q. You made a poke with your pencil there. This is Cedar Lane? A. Yes.

Q. Don't put marks on this diagram. A. This is the other lane that runs to the southwards, way back here. I am one hundred feet from here—two hundred and twenty-five, that is my place.

Q. Was that the place you now indicate? A. Sure, the place I just showed you is where my place is.

Q. Just a minute. Let me finish the question.

Q. So that the place you indicate where your

shop is is the place where the words "frame building" are on the right side of this diagram at the intersection of these two roads? A. My place is just there where your pencil is now.

Q. Yes, I will mark that D.

THE COURT: Mark it D.

Q. How long have you had this shop there? A. Oh, about eleven or twelve years.

Q. Mutillod's property— A. Across the way.

Q. —comes up to the road—adjacent to the road marked "Private road" to the greenhouses? A. What? The green houses?

(Question repeated.)

A. No private road there. I don't rent their greenhouses.

Q. And Mr. Mutillod's property comes up to this road which on the diagram is marked private road to the greenhouses? A. Where is the private road to the greenhouses?

Q. Look at it, won't you? A. Well, that should be about my property.

THE COURT: Never mind. Is this the private road?

A. I don't stop over there.

Q. There is a dispute between you and Mr. Mutillod— A. How do you make that out?

THE COURT: Mr. Witness, it is not for you to argue with counsel, it is only for you to answer the questions as they are put to you. Now if you do not understand the question, then say you do not understand it and it will be made plain to you before answering it. You are not to enter into a dispute with counsel. Now what is the question?

(Question repeated.)

THE COURT: I will say to you that it doesn't make any difference whether in your estimation it is a private road or a public road, or what it is, it is marked private road on this diegram.

A. Oh, I see. I've got you.

Q. Does ths property come up to the road marked "Private Road"? A. It does.

Q. You and he have had a number of discussions as to the character of that road, as to whether it is a public or private road.

MR. BESSON: I object. That has no part in this case. It is immaterial and irrelevant to the issues here.

THE COURT: I am assuming it is for the purpose of showing bias?

MR. HOPKINS: Yes.

(Question repeated)

A. Whenever he stops somebody from coming down and getting a job to be done at my place, and that is only once—

Q. You are in the habit of putting your automobiles that are being— A. Here is where these are, up here. Right there. That is Cedar Lane, isn't it?

THE COURT: Mr. Witness, take the chair. I wish you would listen. (Question repeated.)

Q. —that are being repaired out on the roadway marked private road on the diagram, and he is in the habit of telling you you must not keep it there, isn't he? A. Nobody ever told me, and I never put them in the way. I put them on the one side, and I don't own automobiles.

Q. You have had a great many acrimonious discussions, you and Mutillod, about those automobiles? A. No—

MR. BESSON: I ask that counsel be required to use a plainer word than "acrimonious."

THE COURT: Apparently the witness understood it, because he distinctly and definitely says "No."

MR. BESSON: The witness is very impetuous.

Q. How long had you known this dog? A. About four years—three and a half—about four years.

Q. He is just about four years old, isn't he? A. I couldn't tell you how old he is.

Q. How long has Mr. Mutillod had him? A. About three and a half to four years.

Q. This accident that you had with the dog about three and a half years ago— A. About three or three and a half.

Q. —he was just a pup at that time? A. Yes, he was a pup about that high (indicating) That is the kind of a pup he was.

Q. Didn't tell Mr. Mutillod he had bitten you? A. No; until he held me up once. I was going to let it all go.

Q. Now won't you please—don't take this—won't you please refrain from answering until I get through. It doesn't mean anything when you answer like that. You didn't tell Mr. Mutillod he had bitten you until you and he had some discussion about some repairing of automobiles, did you? A. Not I—somebody else.

Q. You did have a discussion with Mutillod about some repairs of automobiles? A. One fellow came down and I said—he was trying to go through the road—his name is Axell, so I said, "Don't start these people"—came down to get a job to my place,—"*and another thing, tie your dog.*"

Q. Didn't you do some work for Mr. Mutillod on the automobile? A. Maybe I did, when I was driving for him.

THE COURT: Wait a minute. Wait until the question is finished. I am telling you for your own protection, wait until counsel has fully put the question, and then answer it.

Q. You and he did have some discussion about some automobile work that you done for him? A. That I done for him?

Q. Yes. A. Not the work I done for him. Mine was all right.

Q. You were employed by Mr. Mutillod sometimes as a driver, weren't you? A. Yes, now and then.

Q. A chauffeur? A. Now and then.

Q. Then you were finally discharged? A. I never was discharged.

Q. You didn't work there anymore? A. No; I had no time to do it anyway.

Q. This talk that you had with Mutillod about the dog, was that the time when you ceased to be employed there any more? A. No, no; a year after —a year and a half after.

Q. How did you come to tell him that the dog had bitten you, a year or more after the thing happened? A. I told you why, because he was going to stop that man that comes down the road there—he was going to bite his son, that is another thing.

Q. You thought as long as you were going to tell him that he must not stop the man from coming down the lane— A. Well, tried to.

Q. And also get the dog business off your system? A. Because the dog was biting, that is all.

Q. All the time you were employed there the dog ran at large on this— A. Yes.

Q. —these premises? A. Yes, and I was careful to keep out of his way.

Q. I ask that the last part of the answer be stricken out.

THE COURT: Oh, it may be.

Q. And these premises of Mutillod's covered a number of acres, didn't it, ten or fifteen acres? A. I don't know how many.

Q. They covered the equivalent of several city blocks, didn't it? A. About two.

Q. The dog was never tied during any time that you were there, was he? A. Well, now and then he was, sometimes,— otherwise I wouldn't go in, unless he was tied.

Q. That is all. A. That be all?

MR. BESSON: That is all.

DR. LEO W. BRANDENBERG, sworn.

DIRECT EXAMINATION BY MR. BESSON:

Q. Doctor, are you a practising physician in the Borough of Secaucus? A. I am.

Q. How long have you been engaged in practice in that city?

MR. HOPKINS: We will admit the Doctor's qualifications.

Q. Do you know Emil Ebeling? A. I do.

Q. Have you attended him for a dog bite or any wound in the hip? A. I did.

Q. When? Was it in March, 1914 or 1915? A. March 3—it was sometime in March of 1915.

Q. Have you got any card or memorandum with you that indicates the day when he came? A. I have.

Q. When did you make that card, at the time? A. At the time that the thing occurred.

Q. You know from that that was the time when you treated him? A. Yes, sir.

MR. BESSON: Well, I ask that the witness be permitted to refresh his memory from the card.

MR. HOPKINS: I have no objection to that.

THE COURT: Go ahead. I understood it was a memorandum made at the time.

A. My card index which is kept—it was the 13th of March, 1915.

Q. How often did you treat him? A. I treated him nineteen times at the office.

Q. What was the first treatment that you gave him? A. The first treatment was in removing the portion of flesh and particles of skin from the laceration on the right hip, and cauterizing the same.

Q. What was the condition of the wound—do you remember the size of it? A. Well, judging by the applicator that I used in cauterizing, it was about three inches deep or thereabouts, and the cotton on the applicator was about a half an inch or a little over in diameter, which contained a solution for the cauterization.

Q. What solution did you use? A. Different ones at the different times. The first one I used was pure phenol.

Q. How many holes or apertures were there? A. There was one large one and there were several small abrasions below.

Q. Were they abrasions or bruises? A. They were more bruises which had also removed the upper area of skin.

Q. Was there any laceration besides the large lacerations? A. Two slight ones—two small ones below it.

Q. What treatment did you give him besides

the original cauterization? A. Why, two subsequent cauterizations later on, which were in between, which I used an antiseptic dressing.

Q. Did any condition develop there that made necessary additional treatment? A. Yes; it became infected after a few days.

Q. What treatment did you use for that? A. Why, I used antiseptic dressings made up of bichloride of mercury, and at different times iodine applications with the applicator—cauterizing.

Q. What bill did you render the boy's father? A. A bill for twenty-three dollars and fifty cents.

Q. Has that been paid? A. No, it is not.

Q. Is that a reasonable charge for the service? A. Yes.

Q. During what period of time did this treatment cover, these nineteen visits—what was the last visit or the last treatment? A. The last visit was April 2nd.

Q. Is this cauterization a very painful process? A. It is.

Q. No anaesthetics are given during that? A. No.

Cross Examination by Mr. Hopkins:

Q. Doctor, it is the common method of curing a dog bite, isn't it, cauterization? A. It is the treatment I usually—

Q. And as far as you know this particular dog bite was not any more painful in cauterization than any other dog bite would be? A. Well, it was on account of the depth of it.

Q. Dog bites are common enough things to be treated in Secaucus, aren't they? A. Very much.

Q. Everybody has a dog? A. Very common.

Q. And nearly every dog bites in Secaucus? A. At times.

Mrs. Corinne Ebeling—Direct.

MRS. CORINNE EBELING, sworn.

DIRECT EXAMINATION BY MR. BESSON:

Q. Mrs. Ebeling, you are the mother of Emil? A. Yes; just the step-mother.

Q. Do you recall on the evening of March 13, 1915, when he came home after being bitten by this dog? A. Yes.

Q. Did he make any complaint that night? A. Yes.

Q. What was he doing? A. Well, we scold him and then he said—because he came home so late —well, he said all right, he was bitten from a dog, and then his father say, "Well, let's see it," so we went in another room and we take his clothes down and his undershirt and showed two marks bitten from a dog.

Q. What did he do? A. Well, he was crying that night.

MR. HOPKINS: How is that material?

THE COURT: If it is to the question of what the injuries were it would be all right, if she saw him, if he did that which indicated he was in pain.

MR. BESSON: Yes.

Q. Well, did he do anything to indicate his pain, that it hurt him? Did he act as if it hurt him? A. Yes, he cry every day.

NO CROSS EXAMINATION.

PLAINTIFF RESTS.

MOTION TO NONSUIT.

MR. HOPKINS: If your Honor please, we ask for a nonsuit. We ask for a nonsuit on several grounds— and like most dog cases this case involves the negligence questions more than the ordinary ones. First, on the ground that the evidence shows the boy was guilty of contributory negligence. His own testimony is that—

THE COURT: Let me have all your grounds first.

MR. HOPKINS: Yes, I think I have them in a memorandum seriatim. The first thing we propose to argue is that the boy was guilty of contributory negligence.

THE COURT: You are referring to a memorandum you handed up to me in which they appear? "The dog was not vicious." I suppose you mean by that scienter has not been proven. Second, "If he was"—the two are combined—scienter.

MR. HOPKINS: Yes.

MR. BESSON: Are you going to argue the scienter has not happened?

MR. HOPKINS: Yes, I am going to argue that. Then comes the contributory negligence.

THE COURT: Yes.

MR. HOPKINS: Fourth, that the plaintiff was a trespasser.

Fifth, that the defendant was not guilty of any negligence, in other words, there was no duty upon him.

Now, taking those in their order, I think that it is clear now from the boy's own testimony, and that is the only testimony there is, that when he went in this place he knew the dog had bitten other people,—so he says, —whether that was true or not he at least was warned. He approached from this concrete

building toward the building he was about to deliver these papers to by this short cut across the lawn, and for several hundred feet at least this dog and the other dog and this lady were in plain view.

His excuse for it is that he was reading the paper, but that does not let him out. Here is a boy, an intelligent boy of thirteen or fourteen or fifteen years of age, going inside this place which the testimony shows was enclosed with this large fence, across this lawn, with the knowledge in his mind that the dog, according to what he knew, was a vicious dog, right directly in his path, and he was bitten. I think, clearly, without a citation of any authorities, it is squarely within the rule that precludes recovery.

Now I insist also that the proof as it stands now does not show scienter. There is some proof by the witness—the pocket handkerchief man, I have forgotten his name,—Mr. Montigel, that the dog jumped on him and bit his handkerchiefs which he had in his pocket and tore his trousers, but there is no evidence that it was not done in play.

Now the foundation, as I understand, of the right to recover for injuries committed by animals domestic in their nature, is that they are taken out of the class in which by nature it belongs, will be proof that it was vicious. Mere proof that the dog jumped, even assuming he did something which would cause some in jury, would not be proof he was a vicious dog. There must be something, as I understand the cases, from which it must be shown that the dog would commit the injury that he is charged with if he had a chance to do it, but the mere fact that a dog jumped

about in play, even if injury was caused, would not be sufficient to prove that he would commit a vicious act if the opportunity presented itself. Now the only testimony here is the testimony of this man who says that he jumped on him on this Plankroad, and that Mr. Mutillod paid him four dollars for those trousers that he tore in jumping on him or biting him, whatever it was, but that is not evidence that the dog in a vicious mood at that time, or that he had a vicious propensity.

Now there is not any evidence other than that except the evidence of this Colombo, who says that on some occasion a year or so after he told Mutillod th dog had bitten him.

THE COURT: That occurrence had taken place three and a half years ago, while Mr. Montigel's took place two and a half years ago.

MR. HOPKINS: The only proof as to the age —Colombo says he doesn't know, three or four years perhaps, but at the time he bit Colombo he was a mere pup—he describes him as a big pup, but he was a pup any how.

THE COURT: Even assuming, gentlemen, that scienter has been properly proven, what duty does the law then cast upon the owner of such a dog? What is the degree of care that he must exercise? To establish the dog is a vicious dog and that he would be inclined to do things which are vicious,—is it only to use reasonable care?

MR. HOPKINS: That is all, the duty to use care according to the circumstances.

THE COURT: Is there any contest over that being the rule?

MR. BESSON: I think there is, your Honor.

THE COURT: All right.

Motion to Non-Suit.

MR. HOPKINS: Now then, that brings me down to what that duty is, and we have a case on all fours with this case right in our own court. That is *De Gray vs. Murray,* and I have extracted a large part of that case, because I think it bears directly on this very question in this very question in this very case. That was a case in which a carpenter kept a dog, concerning whom there was no doubt about his being vecious, and he was in a building, secured safely, according to the circumstances. He gnawed his way out and got on the public highway and there attacked the plaintiff, and the court held that there could be no recovery, because the defendant had used care according to the circumstances in confining him.

Now the rule that applies in some states, that unless a dog is shown to be vicious the defendant keeps him at his peril, is not the law in New Jersey. An owner may keep a vicious dog in New Jersey. The only thing he has to do is to use care according to his vices, that is all.

THE COURT: In the case to which you refer me, the court says: "The right of a man to keep a vicious dog for the protection of his home and property is conceded in the case of *Roehers vs. Remhoff,* 26 Vroom, 475. He is, of course, bound to exercise a degree of care commensurate with the danger to others, which will follow the dog's escape from his control, to so secure it that it will not injure any one who does not unlawfully provoke or intermeddle with it." Citing *Worthen vs. Love,* 60 Vermont, 285.

"But if the owner does use such care, and the dog nevertheless escapes and inflicts injury, he is not liable."

That seems to lay down the rule of care which must be taken where it is established the dog is vicious and is known to be by the owner.

MR. HOPKINS: Yes. Assuming the vice to be proven, and scienter to be proven in this case, you must measure the circumstances by that rule, and there is not any proof but what, considering the nature of this animal, the defendant has used care with respect to it. He did not go on the highway and bite this man.

THE COURT: In the case of *De Gray vs. Murray,* to which you have called my attention, there the thing complained of did not happen on the premises of the defendant, but happened on the highway after the dog had escaped from the owner's premises.

The case we have before us is where the happening occurred on the premises. Now then, what do you say is the rule, even admitting, for the purposes of the argument, that scienter has been fully proved? Let us admit that for the present.

MR. HOPKINS: Yes.

THE COURT: What is the duty under such cases or under such circumstances of the owner of such a dog to one in the position that this plaintiff was in?

MR. HOPKINS: He hasn't any duty. I have got the cases on that.

THE COURT: Because, after all, it will come down to that question. We have had it hinted at during the progress of the trial.

MR. HOPKINS: He hasn't any duty. This boy is a mere—let us admit, as counsel will argue perhaps, that he is a licensee—I won't even argue the question of being a trespasser

for the purposes of this argument. He hasn't any duty towards a licensee.

THE COURT: I think if you take that position I would ask you to go to that position at once.

MR. HOPKINS: I will be perfectly frank and generous about it and say we do not urge it at all at this stage of the case. I say we will admit he is a licensee. There is no duty to a licensee. I think that question is settled by the case of *Fitzpatrick vs. The Glass Company.* I do not know whether your Honor recalls that case. That is a case where a boy was in the habit of going with his father's dinner pail to a glass factory, and the defendant knew about it—this glass company knew he was going there—a person who was the proper person to be charged with knowledge that he was coming, knew the boy was bringing the father's dinner in this establishment every day at dinner time, and while he was there he was injured by something falling—I have forgotten—

THE COURT: A gate fell on him.

MR. HOPKINS: This is what Justice Gummere says: "This is an action brought to recover damages for personal injuries, received by the plaintiff at the defendant company's glass works, under the following circumstances: The plaintiff's father was an employee of the defendant company, and plaintiff, (who was a boy twelve years of age) was accustomed to carry his father's dinner to him at the company's works. The evidence justifies the conclusion that this was done, not only with the knowledge of, but by the permission of the company.

"On the day upon which the plaintiff re-

ceived his injury, he carried his father's dinner to the works, as usual, and, as he passed through the main gateway, one of the gates, which had been allowed by the company to get out of repair, fell upon him, crushing his leg.

"The chief question presented by this rule is whether the defendant, at the time of the injury, owed the plaintiff any duty with regard to keeping the entrance to its works safe for his ingress and egress. If, it did, the jury properly found in favor of the plaintiff, but if it did not the verdict must be set aside, for, unless the plaintiff's injuries were the result of the neglect of duty on the part of the defendant, which it owed to him, no legal responsibility rests upon the defendant to compensate him for those injuries.

"The question of the liability of the owner of lands for injuries received by a person entering thereon, by reason of the unsafe condition of the premises, came before the Court of Errors and Appeals for determination in the late case of *Phillips vs. Library Company,* 26 Vroom, 307. Mr. Justice Depue, who delivered the opinion of the court, after considering and discussing the cases on the subject, declares the rule to be this. 'That the owner or occupier of lands, who, by invitation, express or implied, induces persons to come upon the premises for any purpose is under a duty to exercise ordinary care to render the premises reasonably safe for such purpose, or at least to abstain from any act that will make the entry upon or use of the premises dangerous:' but that 'mere permission to pass over dangerous land, or acquiesce in such passing for the benefit or con-

venience of the licensee, creates no duty on the part of the owner except to refrain from acts wilfully injurious.'

"The same rule had previously been enunciated by this court in the case of *Vanderbeck vs. Hendry,* 5 Vroom, 467, and Chief Justice Beasley, in the case of *Matthews vs. Bensel,* 22 Vroom, 30, declares, that there is no legal principle that imposes upon the owner of property, with respect to a mere licensee, the duty of keeping it in a safe condition.

"Applying the rule established by these cases to the case in hand, it will at once be perceived that the defendant company was under no obligation to keep its premises safe for the use of the plaintiff. He was not there by the invitation of the company, express or implied. He was there about a matter in which the company had no concern, namely, the bringing of his father's dinner, and was saved from being a mere trespasser only by the fact that the company permitted him to come upon the premises for that purpose. He was a mere licensee.

"His presence on the company's land being merely permissive, and not by invitation, the only duty which the company owed him was to abstain from acts wilfully injurious.

"Now the same doctrine is enunciated in a number of cases in our own courts.

THE COURT: Mr. Besson, what have you to say—you stand upon the same proposition I made to Mr. Hopkins, that is, scienter has been proved—first, what do you say as to the position this boy occupied, this plaintiff; is it anything more than a licensee? (Mr. Besson replies.)

RECESS.

Motion to Non-Suit.

(During the recess the stenographer read the testimony of the plaintiff to the court.)

THE COURT: Well, gentlemen, the jury is not here yet. The point that we arrived at at the time of recess to-day was one which left uppermost, I think, was the question as to whether or not the plaintiff in this action was a licensee or whether he was an invitee of the defendant. The rule with regard to the licensee was that there was no legal responsibility which the owner in the case in question owed to a mere licensee. It would seem that that is what the cases hold, Mr. Besson.

MR. BESSON: As I understand, the cases hold that he must abstain from doing a wilful wrong.

THE COURT: Yes.

MR. BESSON: And I lay down as a proposition that keeping a dog which is known to be vicious, known to the owner to be vicious, and permitting that dog to run at large on these premses is a wilful wrong.

THE COURT: I do not agree with you. I do not think that the holding in this state is that.

MR. BESSON: Why, I think that that proposition of law is entirely consistent with the rule that is laid down in *De Gray vs. Murray*. The rule there says that where a man knows that the dog is vicious he must exercise that degree of care which is commensurate with the viciousness of the dog in restraining him.

THE COURT: From running at large, yes.

MR. BESSON: Not only at large, but on his premises.

THE COURT: That opinion does not go that far because that was not a question raised

there. In fact, none of the cases I have had presented to me is a case in which the occurrence was upon the premises of the owner,—not a single one.

MR. BESSON: I showed your Honor this morning—

THE COURT: They are all cases outside of New Jersey.

MR. BESSON: Is there anything to indicate that that law in these cases is unsound or in any way different from New Jersey? It seems to me a proposition of common sense, that here in this situation there were open gates, it was only a portion of this property that was enclosed by a fence; the dog was out on this property running where it pleased, playing about, as they say, with another dog. Now the owner knew that people were going and coming in—to that place; there were tradesmen coming in there to deliver groceries; there were people coming in—

THE COURT: They would be invitees, would they not?

MR. BESSON: I think this person was an invitee.

THE COURT: Does the testimony show that?

MR. BESSON: Assuming he was a trespasser—

THE COURT: I do not agree with you, no.

MR. BESSON: Does your Honor think the proposition of law in Cyc is unsound?

THE COURT: I would not say the one you cited is unsound, but I do not think it is applicable to this case.

MR. BESSON: Where is there any decision in this state that says it is not?

THE COURT: Why, in all these other cases, where otherwise negligence might be imputable

to the defendant, does it say with such great certainty that where a person is a mere licensee he has no cause of action for the dangers existing in a place he is permitted to enter.

MR. BESSON: Because there, if you go into those cases further you will find that the duty is to abstain from wilful wrong or wilful injury.

THE COURT: True.

MR. BESSON: Now to go a step further, I think the proposition is correct and entirely sound that the keeping of a vicious dog, the keeping of a spring gun, the keeping of any dangerous agency in a position where it could do harm is a wilful wrong, and that the probable consequence of keeping a dog at large on a place of this kind is that the dog is going to bite some one that is there. It is different from a passive agency, a passive danger; it is an active agency, and an active danger, and it is probable that it will bite, that it has bitten, and that it will bite in the future.

THE COURT: Let us settle, before we go along on that—the whole thing can be narrowed down,—let us decide first whether the evidence so far shows this person was a licensee or whether he was an invitee. I have had the stenographer read the testimony to me, as far as he has been able to pick it out, and it would seem, as I understand it, that the plaintiff was not in these premises at this time this day for any purpose which was a mutual one as between himself and the defendant. He was there delivering papers. He was not there for the purpose of delivering papers to the defendant, or expecting to de-

liver papers to the defendant; but he was there for the purpose of delivering papers to a tenant by the name of Carson.

MR. BESSON: If the boy was delivering—I thought it appeared from the testimony he was delivering papers to Mutillod?

THE COURT: No, it does not so appear.

MR. BESSON: May I have the boy put on the stand?

THE COURT: If there is any doubt about it, because it seems to me, that is the controlling thing, whether he was in the position of a licensee or an invitee.

MR. HOPKINS: The cross examination shows—

THE COURT: I will permit the boy to go on the stand if there is any doubt about it.

EMIL EBELING, recalled.

BY THE COURT:

Q. Now, Emil, going back to this day when you were hurt, what brought you to this property of Mr. Mutillod's? A. To deliver papers for him and for his tenants.

Q. Did you deliver a paper or papers to him? A. Not exactly right to his house, but I put it in his box.

Q. And where was the box? A. Mr. Carson's house.

Q. That is the house in the center of this diagram? A. Yes, sir.

Q. Mr. Mutillod live there? A. No, sir.

Q. Where did he live? A. He lives down a little further.

Q. Why did you deliver the paper there then to him? A. Well, the paper man told me to leave

it there, and there was a box and all for it, so I put it there.

Q. Is that the only time that you had delivered a paper there for him? A. That is the only place I did deliver papers.

Q. Is that the only time that you had left a paper there for him? A. No, sir.

THE COURT: Do you want to cross examine?

MR. BESSON: Yes.

DIRECT EXAMINATION BY MR. BESSON:

Q. Had you been in the habit of delivering papers there to him regularly? A. Yes, sir.

MR. HOPKINS: That is a very unfair question.

BY THE COURT:

Q. How often and when before this afternoon did you deliver papers there for him? A. Every day.

Q. Every day? A. Yes.

Q. Do you mean by that every afternoon or every morning? A. Every afternoon.

Q. And for how long had you been doing that? A. For about a year.

Q. Delivered them every afternoon a paper at this same box for Mr. Mutillod? A. Yes.

CLERK CRAIG: Your Honor, the jury is not here.

THE COURT: Well, it is more for my purposes than it is for them.

The jury take their seats in the jury box.

THE COURT: Now, gentlemen, I will have the testimony read to you as far as it has gone.

The stenographer reads testimony.

CROSS EXAMINATION BY MR. HOPKINS:

Q. What paper man told you to put the paper there for Mr. Mutillod? A. Mr. Lowry.

Q. You were working for him, were you? A. Yes.

Q. What paper did you deliver in this box for Mr. Mutillod? A. The Telegram.

Q. How do you know that the Telegram was for Mr. Mutillod? A. Because it had on the book.

Q. What book? A. Paper book.

Q. Have you got the book here? A. No, sir.

Q. What name was on the book? A. Box, and then it says, Mr. Mutillod, and a few others.

Q. Didn't it say the same thing on the book for all these tenants on Mr. Mutillod's property? A. No, sir.

Q. Do you know Groby? A. Yes, sir.

Q. Where does he live? A. Down along Mr. Mutillod's place.

Q. He lives in the back, right in back of Mr. Mutillod's house? A. Yes.

Q. That is much further north than these buildings you have shown on this diagram? A. Yes, sir.

Q. Isn't that true? A. Yes, sir.

Q. Isn't it a fact that that Telegram was left there for Groby? A. No, sir.

Q. Do you know that? A. Yes, sir.

Q. Did Mr. Mutillod ever tell you to deliver the papers in this box? A. No, sir.

Q. And did he ever tell you to deliver the Telegram? A. Who?

Q. Mr. Mutillod? A. No, sir.

Q. Mrs. Mutillod? A. No, sir.

Q. You had never spoken to him, had you? A. No, sir.

Emil Ebeling—Cross.

Q. What paper did you deliver to Mrs. Hermann? A. I don't know.

Q. What paper to Mr. Carson? A. Some German paper.

Q. What name did you have on the book for Carson's? A. Just up the veranda.

Q. What name did you have on the book for the name of the paper that you delivered to Carson? A. None at all. Just throw it up on the veranda.

Q. (Question repeated.) A. I think it was a New York Herald.

Q. You say you had Mutillod's name in the book for the paper that went back to him? A. Yes, sir.

Q. What name did you have in the book for the paper that you delivered to Carson? A. None at all.

Q. What name did you have on the book for the paper you delivered to Mrs. Hermann? A. I don't know Mrs. Hermann.

Q. Do you know Mr. Meyer to live in this house in the middle of this diagram? A. No, sir.

Q. Didn't you ever know Mr. Meyer? A. No, sir.

Q. Do you know a Mr. Meyer who lived on this Mutillod property anywhere? A. No, sir.

Q. Why didn't you have something marked in your book about a paper that you delivered to Carson? A. Didn't have no names, just says, "Throw it up on the veranda."

Q. Why didn't you have something marked on the book? You told me a few minutes ago, when I asked you about Mutillod, that it was marked on the book? A. Yes, sir.

Q. Why is not Mr. Carson's name on the book? A. I don't know.

Q. Isn't it a fact that all these papers that went on this Mutillod property were put in this one box together? A. No, sir; some were thrown up on the stoop and some on the veranda and some in the box.

Q. How do you know that the papers delivered in this box were for Mutillod? A. From the book.

Q. Mr. Mutillod never told you? A. No, sir.

Q. And Mr. Meyer never told you, did he? A. Yes, sir—no, he didn't tell me. It was in the book.

Q. The only way, and the only reason you can tell us that the Telegram was Mutillod was because Mutillod's name was in this book that you have, isn't that so? A. Yes.

Q. Was anybody's else's name in the book for a paper that you delivered on this Mutillod's property? A. No, sir.

Q. So there was just one name, Mutillod, in this book? A. Yes.

Q. And under that name you delivered the Telegram, to, as you think, to Mr. Mutillod, and a German paper to Mr. Carson, and what other papers? A. The Journal.

Q. A Journal, to whom? A. Groby.

THE COURT: I think under the present proofs, then, Mr. Hopkins, I am going to decline the motion for non-suit.

MR. HOPKINS: Your Honor will allow me whatever exception I may need?

THE COURT: You may have it.

Defendant's Testimony.

MRS. LUCY MUTILLOD sworn.

DIRECT EXAMINATION BY MR. HOPKINS:

Q. Mrs. Mutillod, you are the wife of the defendant? A. Yes.

Q. You live at Secaucus with your husband, do you? A. Yes, sir.

Q. On this property that has been described this morning? A. Yes, sir.

Q. How long have you lived there? A. Five years.

Q. That property consists—and this property of yours at Secaucus consist of a large tract of land, does it? A. Yes, sir.

Q. A number of acres? A. It is a number of acres.

Q. And there are several houses, dwelling houses, on that property, and a large number of green houses, are there? A. Yes, sir.

Q. You heard the testimony this morning of the witness with respect to the iron fence that is built along the north line of this street marked on the diagram as Main Street? A. Yes, sir.

Q. And that was substantially correct, was it? You heard what the witness said this morning about the iron fence? A. Yes.

Q. That was right, was it? Do you understand me? A. I don't understand.

Q. Repeat it.

MR. BESSON: I object to that question. I object to the form of the question. It is too general and not sufficiently specific.

THE COURT: What is the purpose, to show the existence of the iron fence?

MR. HOPKINS: Sure.

THE COURT: Is that contested?

MR. BESSON: We admit that an iron fence runs partly around the property.

THE COURT: As shown by the plaintiff's diagram?

MR. BESSON: I think it was.

THE COURT: Is that what you want to substantiate, about this fence?

MR. HOPKINS: Yes.

THE COURT: Then it is admitted as testified by the plaintiff this morning.

Q. You heard that testimony? A. Yes. There is a few things I didn't quite catch on to, but I think I heard it. I know that.

Q. I call your attention to some parallel lines in the middle of this diagram Exhibit P-5, marked "Frame dwelling." What is that? A. It as a dwelling.

Q. Dwellings? I call your attention to another —some more parallel lines on the south—on the lower left hand corner of this diagram P-5, marked "Concrete Dwelling." What is that? A. That is also a dwelling.

Q. Now then, I call your attention to a plot marked green, between parallel lines and west of the words, "Private Road to Green Houses," on this diagram. What is this place? A. This is a lawn.

Q. And in between and just east of this place is a driveway, is it, with a cement sidewalk on the side? A. On one side, yes, sir.

Q. Now, then do you recall the 13th of March, 1915, anything happening in the neighborhood of this property? A. Yes, sir. I was taking a walk—

THE COURT: I can't hear. Talk louder.

A. I was taking a walk with a young lady. I had with me our dog and she also had her dog, which is a St. Bernard, but younger than our dog, and as they were going to play on the lawn; I and that young lady talked, standing on the middle of the road. I just happened to turn when I saw the young man come. He was then just between the two dogs and our dog was nearer him than the other. They had been jumping together, one by the other, this way (illustrating) and I saw the boy between the two, and then, of course, he hold his hip, and I said, "I am sorry; can I do anything for you? How dare you come on that lawn?" He says nothing, and he went. That is all I remember, Mr. Hopkins.

Q. I wish you would indicate on the map just where you were walking with this other lady. A. About here.

Q. Just mark it. A. (Witness complies.)

Q. Marked with an E. Did you notice from which direction this boy had come? A. I had my back turned.

Q. So that you did not see him until after? A. I saw him when he was between the two dogs; didn't see him before.

Q. Was that before he had been bitten or afterwards? A. It was just then—he must have been bitten as I turned, because he was holding his hip as I turned; he was between the two dogs.

Q. This lady that was with you walking on this road, is she here? A. She is not in Secaucus any more.

Q. Was this other dog that was with you her dog or your dog? A. Her dog.

Q. After you asked the boy, "How dare you go on the lawn," what did he say? A. Well, I don't think he answered very much.

Q. And then in which direction did he go? A. He then went down to put his paper in the box.

Q. Where? A. Down to the other side of the house where there is a box where—

Q. Indicate on the map, if you will, which way he went? A. He went right across; I could see him when he was right here between these two dogs, and then he went here, so, to the box, which is under the balcony right there.

Q. Now, at the time he was bitten was he on the lawn or on the roadway? A. Oh, on the lawn. He was here (indicating) where the dogs were playing.

Q. Now, had you seen this boy pass—take your seat, please—had you ever seen this boy pass this lawn before? A. I very seldom find myself there, Mr. Hopkins.

Q. (Question repeated.) A. I say I very seldom find myself there, Mr. Hopkins.

Q. Well, had you ever seen him? A. No, I don't think I have seen him before.

Q. Do you know what papers are delivered to your house in Secaucus? A. In the morning we receive the Times.

Q. Did you receive any afternoon paper? A. No, sir. No.

Q. Do you receive the Evening Telegram? A. No, sir, we do not.

Q. How long have you had this dog, Mrs. Mutillod? A. Three and a half years.

Q. How old is he now, do you know? A. Three and a half and three months. We got him when he was three months old.

Q. You got him when he was a three months old pup, did you? A. Yes, sir.

Q. Has he ever bitten anybody that you know of? A. Except that young man.

Q. Did you ever see him bite anybody before? A. No, sir.

Q. Did you ever see him jump at anybody before? A. No, sir.

Q. Do you ever keep him confined, tied up with a chain or rope? A. Very seldom.

Q. And he is usually about the premises, is he, loose? A. Yes, sir.

Q. Has he ever done anything which would make you think—he would bite anybody? A. He bite your finger, and I think he is very playful. He will jump, he will grab you, he will be so happy, but I don't think—

Q. He is a very large dog, isn't he? A. Yes, pretty large.

Q. How many tenants are on this property of yours in Secaucus, north of this iron fence? A. Three in one dwelling and four in the other, in the large dwelling.

Q. Have those people any children, any of them? A. Yes.

Q. Have you ever seen this dog in company with the children and these people? A. Oh, yes, often.

Q. What does he do when he is in the company of the children? A. He plays with them.

Q. And the children play with him too, do they? A. Yes.

Q. Has he ever manifested any ugliness or viciousness toward any of the children on this property? A. Not that I have seen.

CROSS EXAMINATION BY MR. BESSON:

Q. You are of French descent, aren't you? A. Yes.

Q. You were born in France? A. Yes.

Q. You say you read the Times? A. I read the Times, yes.

Q. The New York Times? A. Yes, sir.

Q. And you never read the Telegram? A. Very seldom. Mr. Richelin brings the afternoon paper, sometimes it is the Times and sometimes it is the Sun—the Sun almost all the time, but I very seldom read the Telegram, very seldom. The Sun is the paper I read the most.

Q. Do you ever go over or walk around that house frequently—this house? A. Not frequently, no, sir.

Q. You stayed over on your own house? A. Very often, yes.

Q. Do you know the scale on this map? A. Yes.

Q. What is the scale? A. What do you mean, the scale?

Q. Well, do you know how many inches on this map— A. Oh, how many inches? No, I don't know.

Q. Well now, how many feet from the walk here was the boy when you saw him? A. Well, I should say about—well, I will say about twelve feet.

Q. So that, since one foot is one-eighth of an inch, he would be about an inch and a half inside of the line, instead of being way over there —he would be over there? A. Then I am mistaken. I did not measure the feet that way. When I sad twelve feet I was measuring your size and I thought maybe you would be five or six.

Q. The first that you saw the boy was after he had been bitten? You didn't see the actual biting? A. No, but he hold his hip.

Q. That is the first you saw of him? A. Yes. I was turn my back.

MARIUS MUTILLOD sworn.

DIRECT EXAMINATION BY MR. HOPKINS:

Q. Mr. Mutillod, you are the defendant? A. Yes, sir.

Q. You live at Secaucus, do you? A. Yes.

Q. What is your occupation? A. Florist.

Q. How long have you been in that business? A. Twenty years in New York, twelve years in Secaucus.

Q. You are the owner of this property that has been described here over at Secaucus? A. Yes, sir.

Q. That is near the Sunnyside Hotel? A. Right back of it. I am also the owner of Sunnyside.

Q. Now, then along the southerly line of this property there is erected a high iron fence, isn't there? A. Yes.

Q. And that fence extends along the westerly side of Cedar Lane? A. Yes, sir.

Q. As far north as that little house which is marked on the diagram "Frame Dwelling?" A. Yes.

Q. And this part of the diagram indicated west of the part marked "Private Dwelling and Green House," what is that? A. It is a lawn.

Q. How long has that been laid out as a lawn? A. I should think about a year that it is entirely a lawn; maybe a little longer. Before it was a plain piece of land, and now it is a lawn.

Q. There are a number of houses inside of this iron fence, are there? A. There is three at present.

Q. And the green houses are also north of this iron fence? A. Yes, sir.

Q. Do you know this plaintiff Emil? A. Yes, I do.

Q. When did you first see him? A. I saw him about three weeks before the accident.

Q. Where? A. Right as he was attempting to cross that lawn.

Q. Where were you when you saw him? A. I was just passing on that road that you describe as a private road, where there is a cement side-
10 walk.

Q. Just indicate where you were at this time when you saw him? A. I was coming through that road.

Q. Where was Emil? A. Emil was making a dash to come through here.

Q. What was he doing? A. First he coming with his newspaper by what we call Churchill's Lane—my property is next to Mr. Churchill, former mayor—the boy came through that prop-
20 erty right here, the boy came around through that lane that comes out from the Paterson Plank-road, facing right alongside Mr. Churchill's property; the boy walked down the street here, threw his paper inside about of that house, and then walked over here and opened that gate and then across the lawn.

Q. When you saw him crossing the lawn, what, if anything, did you say to him? A. I told him
30 that if I ever catch him again to cross that lawn that I will either stop his boss from bringing the paper to my property or do something. I told him surely that I would never see him again cross that lawn.

Q. Why did you tell him that? A. Because I didn't want anybody to pass on that lawn, to make a path on that lawn that I spent so much money to fix it up.

Q. Now, then this roadway that is marked on
40 this may, "Main Road," has anything been done

with that recently, or only about this time you fixed this lawn up? A. I fixed over the road in there and there is no better road in the country that people can pass without wetting their feet or anything; I went to the expense of spending the thousand dollars to put cement sidewalk and curb so people can pass without wetting their feet.

Q. When you told him he musn't use the lawn and if you caught him you wouldn't let his boss deliver the paper, what did he say? A. He didn't say anything. He walked back, that is all.

Q. Walked back which way? A. He walked back through the road. He walked back through the gate and then he follow—here is the main road, and there is the way to deliver the paper, right there, he can come in that way, two different ways he goes to Paterson Plankroad, he goes alongside of the Sunnyside Hotel, and if he comes that way through Churchill Lane, he comes that way—he turns that way and comes right down that way and deliver his papers there and goes right back that way (indicating on map).

Q. Do you have any papers delivered to you in the afternoon? A. No, never.

Q. Do you have the New York Telegram delivered? A. No, sir. When I come back from New York I generally bring the Sun or the mail with me from New York.

Q. Are there any papers delivered for you in the box that has been described on this building, which is about the center of the diagram, the frame building? A. Never saw any by the boy.

Q. Are any papers delivered for you there in the afternoon? A. Never any papers there for me in the afternoon.

Q. Was anybody present when you had this

conversation with this boy with respect to crossing the lawn? A. Yes. I think I told him twice, but at one time I am positive Mrs. Ernham was living—will I describe where she was living?

Q. Yes. A. Mrs. Ernham was living in this property right there, and from her window she could see when I stopped the boy from crossing the lawn.

Q. She is in court? A. Yes, she is in court.

Q. Now, then was that the occasion that you told us about a few minutes ago when you said you told him not to cross the lawn? A. Oh, yes.

Q. Was there any other time that you spoke to this boy about crossing the lawn? A. I spoke to him twice.

Q. When was the other time? A. It was—followed—ahead of that—it was before that time when I told him.

Q. How much before? A. Oh, I should think in about another month before.

Q. Now, you know this dog, of course, that has been testified to; how long have you had him? A. Over three and a half years.

Q. How old is he? A. He is three and a half years, I think. When I got him he was about two or three months old; he was about that big when I brought him to my house.

Q. St. Bernard? A. St. Bernard, yes.

Q. Do you recall his jumping on somebody on the Paterson Plankroad, a Mr. Montigel? A. Yes, I do. Might I explain that. That dog, I never got him tied up—

THE COURT: No, no. Wait a minute.

THE WITNESS: Oh, well, that has nothing to do with the case? All right.

THE COURT: Let counsel ask the questions.

Q. How long ago was that? A. When he bite that man?

Q. Yes. A. I should think it was about a year and a half or two years, of course, I don't remember exactly the date. Now I was—

Q. So the dog at that time was a year and a half or so old, was he? A. Oh, I think it is two years—the dog was hardly a year I think at that time.

Q. Hardly a year? A. Yes.

Q. Where did that happen? A. I was on the Paterson Plankroad, on the sidewalk, inspecting some work that we were doing there, and the dog —when I am on the place the dog is all the time right close to me, and the dog was standing right alongside of me, I thought lying down or something like that, and that man passed right close to me, and the dog in a playful way jumped up and I think he snapped right here on the back of his pants, in a playful way.

Q. Did the man make any outcry? A. No, the man didn't say nothing—he said here—just explained to me how he catch him, and after this we had an argument, he wanted me to buy his pants, and I thought it was nothing but right to buy the pants, that is all.

Q. Did you ever see the dog bite anybody? A. No, sir.

Q. Did you ever hear of his biting anybody? A. No, sir.

Q. Did Colombo ever tell you that he bit him? A. No, sir, he never did.

Q. How many tenants have you on this property at Secaucus? A. Altogether?

Q. Yes. A. About twenty-eight or thirty, I think.

Q. Have they children, these different people? A. Why, every one, the children and every one, all the children play with the dog.

Q. Have you seen them play with the dog? A. Oh, why, certainly.

Q. Have you ever been accustomed to having him tied? A. No, sir.

Q. Why not? A. Because, just for the simple reason that I want the dog to be mild, as he has been, playing all the time with the workingmen—there is twenty-eight workingmen on the dike, and the dog is playing with them all the time up to now—he doesn't play quite as much as he used to, and he did play with Colombo, just the same as he did with any of the employees when he was driving my car.

Q. Have you had other dogs on this property at Secaucus? A. Yes, sir, we got a little Pomeranian, although I had a man by the name of Mr.—

Q. Just a minute. Do you know what effect tying a dog would have on him?

Objected to as irrelevant. Question withdrawn.

CROSS EXAMINATION BY MR. BESSON:

Q. Mr. Mutillod, you are a Frenchman? A. Yes.

MR. HOPKINS: What if he is a Frenchman? Go ahead.

Q. Don't you read the Telegram?

MR. HOPKINS: I object. All right. That is all right; go ahead.

A. May I answer it?

THE COURT: Yes.

A. Very seldom. If I do it is during the day in New York.

Q. You have not read the Telegram lately? A. No, sir.

Q. Now, do these tenants that live in this house here pay rent?

MR. HOPKINS: I object. How is it material?

Q. They pay rent, don't they?

MR. HOPKINS: I object.

THE COURT: Well, what is the relevancy of it, Mr. Besson?

MR. BESSON: I want to show the relation between him and those people.

MR. HOPKINS: I do not think the relation between this defendant and these people has anything to do with it.

MR. BESSON: I think it fortifies the position—

THE COURT: Are you disputing the fact they are actually tenants of his? They have been spoken of as tenants all along.

MR. HOPKINS: No. I do not want it to appear that this man delivered papers to these tenants, and that that raised any relation between us and this boy.

THE COURT: Well, I do not know that it will any more than it has been suggested. You have been treating of them as tenants all the way through. I assumed that they were. I will permit it.

Q. (Question repeated.) A. Yes, sir, they do.

Q. Monthly rent? A. Yes.

Q. Who were the tenants in there in March, when this accident happened, when this bite took

place? A. There was a tenant by the name—upstairs, by the name of Mrs. Ade, and on the east side of the building is the tenant by the name of Mr. Carson, and on the west side is a tenant by the name of Mrs. Salmon, at the time of the accident.

Q. Well, you permitted these tenants to have newspapers delivered to them, didn't you? A. In the boxes through the road, yes.

Q. The only thing you objected to was the coming across the lawn? A. Why certainly.

Q. If they came along through the road and delivered them and put them in the boxes, that was all right? A. I suppose it was.

Q. Was it? If you knew about it you wouldn't stop it, would you? A. No.

Q. Did not tradesmen come in there and carry goods to those tenants? A. I suppose they do.

Q. You knew about it, didn't you? A. Yes.

Q. Now, can you fix the day when you told this boy to stay off the property? A. I could not fix the day exactly, no, because it didn't went deep enough in my mind.

Q. When did you first find out the dog had bitten the boy? A. When did I first find out?

Q. Yes. A. I think the next day or same night when I came back from New York.

Q. Who told you? A. Mrs. Mutillod did.

Q. That is the first you knew about it? A. That is the first I knew about it.

Q. Where were you standing the day that you saw the boy cross the lawn? A. As I explained, right in the middle of that road there.

Q. The middle of this road? How far up the road? A. I was coming from that way, I was about in the center.

Q. You came from the north? A. I was coming from the north, yes.

Q. Going out? A. Yes.

Q. You were about there (indicating)? A. I was about there, I presume, yes.

Q. How far away was the boy from you? A. He was just a hundred feet away from me, because the lawn is just a hundred feet.

Q. He was just on the edge of the lawn? A. Just on the edge.

Q. About to cross? A. Yes.

Q. He was a hundred feet away? A. Yes.

Q. Are you sure it was that boy? A. I am positive.

Q. How was he dressed at the time? A. It is one thing that it would be pretty hard for me to do.

Q. Did he have a cap on? A. I couldn't say exactly if he had a cap on.

Q. Did you call him by name? A. No, I did not.

Q. You didn't know his name? A. I didn't know his name no.

Q. Did you ever warn any other boy off of there? A. Every one of them.

Q. Were there other boys that delivered papers there? A. No, no other boy that I seen delivering papers there.

Q. Sure? A. I am positive—as far as I am concerned.

Q. Had you ever seen children playing on that lawn? A. I did—if I did I made them go back right away. I don't think I ever did, because every body was warned not to pass there.

Q. Did you have any sign up of warning? A. No, I did not, because the gate was enough indication for anything.

Q. And the only time you ever saw this boy was this one occasion? A. Oh, I saw him once before.

Q. How long before? A. About—I should think it was about two or three weeks before, as I said.

Q. Where was he standing then? A. He was doing the same thing, making attempt to cross the lawn.

Q. Just about to cross the lawn? A. Yes, the same thing as he was doing then.

Q. Was there any one with you when that happened? A. No, not the first time, but there was the second time. There was that lady who sat right at her house and heard me scolding the boy for doing that.

Q. Quite sure about it? A. I am positive.

Q. You were hollering so he could hear you over that hundred feet? A. Oh, easily.

Q. You had to yell pretty loud? A. I don't know if I do. A hundred feet it not a distance.

Q. The measurements on this map are correct, aren't they?

THE COURT: That is presumed.

A. Yes; I measured the whole thing.

Q. Which distance across this lawn is a hundred feet.

Q. Straight across? A. Yes.

Q. A line drawn perpendicularly from those two parallel lines would be a hundred feet? A. Yes.

Q. He was coming in there, was he? A. Yes, sir.

Q. You were here? A. Yes.

Q. So it was more than a hundred feet? A. That was maybe one hundred and twenty-five.

Q. Are there any trees or shrubbery there? A. Yes, there is trees in all the walk I laying up there for people to walk on the walk—every hundred feet there is a road.

Q. At the time of the year, in March, was the

grass green or was it rough? A. It is never rough, because it has been smoothed off.

Q. In March, the grass was not green? A. I don't suppose—it would begin to turn green.

Q. It had not begun yet, had it? A. It ought to, yes, I think so.

Q. Did you have any covering over it of any kind? A. No, I had no cover.

Q. You paid Mr. Montigel some money for his bite, didn't you? A. Yes—not for his bite, but for his—

MR. HOPKINS: I object to it as misleading.

Q. You paid him for his trousers, didn't you? A. Yes, I did.

Q. You were going to pay this boy something, weren't you?

MR. HOPKINS: I object.

MR. BESSON: An admission against interest.

THE COURT: But every offer of settlement, if it is not accepted, or is not brought to a consummation, is not evidential of anything, Mr. Besson.

MR. BESSON: I thought that that was only so when the offer was made without prejudice.

THE COURT: Oh, no. You may show if there was anything said at the time which would be a statement against interest. Of course that may be shown, but mere offer of settlement, not consummated, is not evidence.

Q. Did you talk to this boy's father about the dog bite? A. Yes, I did.

Q. Did you at the time offer to pay him for the—

MR. HOPKINS: I object.

Q. That is all. I will withdraw the question.

James William Laurie—Direct.

JAMES WILLIAM LAURIE, sworn.

DIRECT EXAMINATION BY MR. HOPKINS:

Q. Mr. Laurie, where do you live? A. Secaucus.

Q. What is your business? A. Newsdealer.

Q. How long have you been in the newspaper business? A. Four years.

Q. Been in Secaucus all that time? A. Yes, sir.

Q. Do you know Mr. Mutillod, the defendant here? A. I know him very well.

Q. Do you know this boy Emil, the plaintiff? A. Yes, know him very well.

Q. He was formerly employed by you? A. Yes, sir.

Q. Do you remember the time he was bitten by this dog? A. Well, I know it was in the spring, last year. I don't remember exactly the date.

Q. Do you deliever papers to Mr. Mutillod, in Secaucus? A. Yes.

Q. Do you know whether any one else delivers papers to him? A. Know nobody, yes.

Q. Do you deliver or cause to be delivered any afternoon papers to Mr. Mutillod? A. No, I never delivered, not personally, to Mr. Mutillod.

Q. I mean Mr. Mutillod, what papers do you deliver there? A. Where? To Mr. Mutillod?

Q. Yes. A. Only morning and Sunday Times—the New York Times.

Q. You do deliver papers to other tenants on the premises? A. Oh, yes.

Q. Deliver the Evening Telegram to anybody? A. I used to.

Q. Who gets it? A. Used to give it to Mr. Meyer, who used to be foreman of the place.

Q. Where did he live? A. He lived upstairs in Mr. Mutillod's house.

James William Laurie—Cross.

Q. Where did you deliver this Telegram for Mr. Meyer? A. We used—I ordered delivery of that paper in a certain box located in the house on Cedar Lane.

Q. That is this house that is on the middle of the diagram, is it? A. Middle of the diagram, right there.

Q. Anybody else on Mutillod's property get the New York Telegram? A. No, sir.

Q. March, 1915? A. No, nobody else but Meyer.

Q. Did you furnish this boy Emil with any book showing the names of customers? A. In the beginning, yes.

Q. Did he have any book indicating that he was to deliver any afternoon papers to Mr. Mutillod? A. No; there was no name mentioned at all, especially where the papers was going in the box; it was called box—please throw papers in the box, but there was no indication for whom they were.

Q. In other words, you put "Mutillod", didn't you, that meant— A. No, positively not—there was no names at all by the box.

CROSS EXAMINATION BY MR. BESSON:

Q. Was there a book—was there such a book as you have described? A. Well, there was—there was anything he described in the book, but he had a book when he started to deliver papers on that route.

Q. Where is that book? A. I guess it is destroyed.

Q. Who destroyed it? A. Either me or Emil.

Q. Did you destroy it? A. Maybe I did.

Q. Why did you destroy it? A. Because it was useless, you know.

Q. Why was it useless? A. I had no other service—I made out the book for him to learn what kind of papers he left.

Q. When you went and did deliver papers to this place where did you go, in the mornings? A. In the mornings?

Q. Yes. A. I started my papers on Paterson Plankroad; I go up Cedar Lane up to the box here, right here, and then go right here around that house into this road and go over this and go this way, up here, and up to Paterson Plankroad again.

Q. You have been delivering them there how long? A. Four years and five and a half months.

Q. Are you a Frenchman? A. No.

Q. Did you deliver papers in that—or had you been delivering papers in March there? A. In March, certainly I did.

Q. You always followed that route? A. That route.

Q. How long had the boy been in your employ? A. He used to work for another firm—altogether he was working for me a little over three years.

Q. Pay him? A. Yes.

Q. A salary? A. Yes.

Q. How much? A. He was getting three dollars a week for delivering evening papers.

Q. Did he quit delivering papers after this dog bite? A. Well, he was working until June.

Q. Did you send him to Mutillod's after that? A. Beg pardon?

Q. Did you send him to Mutillod's after the dog bit him? A. Certainly. He was delivering papers in the same house as before.

Q. Who paid you for these papers? Where did you make your collections? A. I have a collection book and I know the people.

Q. Was that the book that the boy had? A. No; that was a delivery book.

Q. What would you do with the delivery book and the collection book? A. Beg pardon?

Q. What would you do with the delivery book

and the collection book; did you keep the accounts together? A. No, separate, two separate books.

Q. What was the purpose of keeping a delivery book? A. Because the boy when he started didn't know anybody, what papers they get—so many different papers and different people get different papers, and he didn't know what is to be delivered at houses. Now for a sample, this very house, there is three papers in the box and about four papers in the house, and each paper is a separate one.

Q. Did you ever talk to Mr. Mutillod about coming on the property to deliver the papers? A. No, I never asked him.

Q. He paid you, didn't he? A. He paid me for his papers, yes.

Q. Did he ever say anything to you about going on the property? A. I remember once Mr. Mutillod stopped me and told me I should tell the boy not to walk across the property—the property was finished there.

Q. But he never spoke to you about it yourself, did he? A. Because he never saw him, and he told me I should—

Q. You had walked across there yourself, didn't you? A. Not before it was laid out.

Q. Yes, you did. Didn't you walk across that lawn? A. After it was laid out?

Q. When was it laid out? A. I think since this house, or since Churchill Lane was built, two years ago, wasn't it?

Q. You did walk across it before it was nothing else but a farm?

THE COURT: Is it of any consequence? There might have been a thousand people walk across there, Mr. Besson, and nine hundred and ninety-nine were not stopped and one may have been stopped. If the matter has not been

raised at all in the case it is of no consequence.

MR. BESSON: I will withdraw the question. I think that is all.

BY THE COURT:

Q. I want to ask one question. Who did you say this Telegram was delivered for? A. For a man by the name of Meyer.

Q. Who did you say he was? A. He was a foreman or manager in Mr. Mutillod's greenhouses.

MRS. FANNY HERMANN, sworn.

DIRECT EXAMINATION BY MR. HOPKINS:

Q. Mrs. Hermann, where do you live? A. In Secaucus.

Q. How long have you lived in Secaucus? A. Sixteen months.

Q. Married? A. Yes, sir.

Q. Are you French? A. No, I am Danish.

Q. Where did you live in Secaucus in March, 1913? A. I was living out in that little house on the west side.

Q. That is the little house in the center of this diagram marked "Frame Dwelling", is it? A. Yes.

Q. Was there more than one tenant in that house at that time? A. Three tenants.

Q. You lived there with your husband and family? A. Yes, sir.

Q. And do you live there now? A. No, sir.

Q. Do you know Mr. Mutillod, the defendant here? A. Yes, sir.

Q. How long have you known him? A. For sixteen months.

Q. Do you know this boy Emil, the plaintiff? A. Yes, sir.

Q. How long have you known him? A. For sixteen months, since I came here.

Q. Do you remember seeing Mr. Mutillod talking to Emil about three or four weeks before the 13th of March, 1915? A. Yes, sir.

Q. Where were you at the time of this conversation? A. I was standing by my window.

Q. Where was Mr. Mutillod? A. Mr. Mutillod was right in the middle—not far from my house in the main road, a private road.

Q. He was on the main road, was he, marked "Private road" on this diagram? A. Yes, sir.

Q. Where was the boy, Emil? A. He was just going across the lawn from that—

Q. Just indicate on the map where the boy was? A. About here (indicating).

Q. Just inside of the gate, was he? A. Yes, sir.

Q. What did Mr. Mutillod say to him? A. Mr. Mutillod said, "If you do that again I am going to break your neck."

Q. If you do what again? A. Cross that lawn once more. "If I see you cross that lawn once more I will break your neck."

Q. Anything else? A. "And I will tell your boss about you."

Q. What else did he say? A. I don't think Mr. Mutillod—not that I remember.

Q. What did Emil say? A. He didn't say anything. Just turned around and walked through the gate and around the road, down to private road.

Q. Went out of the gate again? A. He went out of the gate.

Q. And along the road? A. Yes.

Q. What was he doing when he was in there this time, when Mr. Mutillod spoke to you? A. He was delivering the paper.

Q. And what was it that attracted your attention to the conversation? A. Because Mr. Mutillod speaks kind of loud, and Mr. Mutillod give anybody—

Q. I didn't hear you? A. Mr. Mutillod speaks very loud, and Mr. Mutillod give anybody a reprimand.

Q. You think he was real mad this day? A. I am positively sure.

CROSS EXAMINATION BY MR. BESSON:

Q. Mrs. Hermann, how far was Emil from the edge of the lawn when you saw him? A. About three foot.

Q. Just right on the edge of it? A. Yes.

Q. Could you see him quite distinctly? A. Yes.

Q. Do you know how far it is from there to that point? A. Well, I suppose about a hundred eighty feet, I should think.

Q. You could see him quite distinctly? A. Yes.

Q. Did you ever know of any other boy delivering papers there besides Emil? A. No, sir.

Q. Emil was the only one? A. Yes, sir.

Q. How was he dressed? A. That I don't know.

Q. Don't you know how Emil dressed? A. Like other boys, I suppose.

Q. Wasn't there any particular way that he dressed that you could identify him? A. Not that paid my attention.

Q. Don't you know what kind of a hat he had on? A. No, sir.

Q. All you know it was Emil? A. Yes.

Q. That was the only time that you saw Emil crossing there? A. I have seen a few times before.

Q. Did he deliver papers to you, Mrs. Hermann? A. Yes.

Q. You asked him to come there and deliver papers, didn't you? A. Yes.

Mrs. Fanny Hermann—Re-Direct.
Gustave Carstens—Direct.

RE-DIRECT EXAMINATION BY MR. HOPKINS:

Q. How long have you known this big dog? A. Since I came out there.

Q. And have you seen him bite anybody? A. No, sir; I have seen him playing with the children.

Q. Playing with the children? A. Yes; they was riding on his back to use him for a horse, little children.

Q. Never heard of his biting anybody, did you? A. No, sir.

Q. Did you ever ask this boy to cross this lawn to deliver papers to you? A. Yes, sir.

Q. Did you ask him to cross it? A. Oh, no, sir.

GUSTAVE CARSTENS, sworn.

DIRECT EXAMINATION BY MR. HOPKINS:

Q. Mr. Carstens, you live in Secaucus, do you? A. Yes.

Q. How long have you lived there? A. About eight years.

Q. What is your occupation? A. Salesman.

Q. By whom are you employed? A. Mr. Mutillod.

Q. How long have you been with him? A. About three and a half years.

Q. Do you live on this property of Mr. Mutillod at Secaucus? A. Yes, sir.

Q. Do you live in any of the buildings shown on this diagram, Exhibit P-5? A. Yes, sir, I do.

Q. Which one? A. Can I show?

Q. Yes. A. (Witness indicates on map.)

Q. How long have you been in that one? A. About almost four years.

Q. Do you know this big Jumbo that has been testified to in this suit? A. Yes, I do.

Q. How long has Mr. Mutillod had him? A. Well, he get him about, I should judge, two and a half years.

Q. Do you know how old the dog is? A. Well, he cannot be much older, because he was a very small dog when he bought him, a pup.

Q. Have you any children yourself? A. No, no children.

Q. How many tenants on this property of Mr. Mutillod? A. Altogether?

Q. Yes. A. You mean on this fenced in property?

Q. Yes. A. There is seven.

Q. Each tenant has a family? A. Eight—well, yes; there is, let's see, five have families.

Q. Have you ever known this dog to bite anybody? A. No, sir.

Q. Have you heard of him biting anybody? A. No.

Q. Have you ever seen children in company with this dog? A. Yes, sir, I have.

Q. There are a number of children of these tenants? A. There are, yes,

Q. Have you seen him playing with the children elsewhere about Secaucus and in that neighborhod? A. Well, on our premises, I have. I have seen him on the premises playing with the children.

Q. Has he ever done anything when you have seen him that would indicate that he would bite anybody? A. Not that I know of.

No Cross Examination.

Defendant Rests.

Plaintiff's Testimony in Rebuttal.

EMIL EBERLING, recalled.

DIRECT EXAMINATION BY MR. BESSON:

Q. Emil, at any time before this dog bit you did Mr. Mutillod tell you to keep off of that grass plot? A. No, sir.

Q. Do you remember an occasion when Mr. Mutillod told you that he would break your neck? A. No, sir; he told another big boy, but not me.

Q. You are quite sure of that? A. Yes, I can prove it.

Q. Then he never told you to stay off? A. No, sir.

NO CROSS EXAMINATION.

BOTH SIDES REST.

Motion to Direct a Verdict.

MR. HOPKINS: If your Honor please, I now ask that the jury be directed to return a verdict for the defendant. It clearly now appears that the boy was no licensee. I think that even in the state in which the cross examination was left before we resumed taking testimony this afternoon, there wasn't any proof, but there might have been sufficient for the jury to take a different view of the situation, but now as it is, by the oaths of three of these witnesses, this boy had no relation here which would make him anything but a mere licensee. The fact is now the testimony shows he was a trespasser, but I just wanted to stick to that one thing that we started to argue upon before recess, and my

notion was that unless he was brought out of the licensee class, and placed in the invitee class, of course there had to be something to show wilful negligence on the part of the defendant.

THE COURT: I think I am not going to take that restricted stand, Mr. Hopkins. As I have thought over this matter since the argument upon the motion to non-suit, I am more inclined to the belief than I was, that it is immaterial what position this plaintiff was in. The real question, in my mind, seems to be this, as to whether or not it has been established that this dog was either mischievous or vicious? If he was not, there cannot be any recovery. If he was, then under the rule laid down in *De Gray vs. Murray,* the defendant used that degree of care which was commensurate with the danger to others which would follow the dog's escape. I decline to direct a verdict, and I need not go any further in my reasons for it than that. I am going to take the broader view as it may apply to the plaintiff than the more restricted view as it applies to the defendant in the action. I decline to direct a verdict.

MR. HOPKINS: Your Honor will give me an exception?

THE COURT: Yes.

Court's Charge to Jury.

GENTLEMEN OF THE JURY:

You are really trying two cases at the same time. They are so closely connected, however, and growing out of the same occurrence, and they are so dependent one upon the other that it is quite proper that you should try them together.

The one is upon the part of Rudolph Ebeling against the defendant Mutillod, and the other is a suit by the father as the next friend for the son, Emil Ebeling, against the same defendant. The case is brought by the father as next friend for the benefit of the son because of the fact that the son is a minor, that is, a boy under the age of twenty-one years. It seems from the testimony that his age either was at the time of the happening of the occurrence or is now sixteen; it can't make much difference, because the happening was in March of the year 1915.

It is not necessary for me to recall or bring to your attention the purposes for which the action is brought more than to say that the father is seeking to recover such damage as he incurred as the proximate result of the happening to the son, and the son upon his part, through his father as next friend, is seeking to recover the damages he actually sustained.

Since I am speaking of that matter I will tell you what the things are for which each may recover, provided, of course, that you find they are entitled to recover.

As it appears in this case there is only one thing that the father can recover for, and that is the physician's bill, which is an expense which it is admitted was borne by the father and for which he is chargeable, and which expense was brought about in and about effecting a cure of the

injuries of the son. I do not recall any testimony which permits the father to recover anything further than that, in fact, at the opening of the case it was stipulated that the item for which the father could recover is twenty-three dollars and fifty cents. So that if you find from the evidence, by the application of such rules as I will presently give you, that the son is entitled to recover, then the father is also entitled to recover and in the sum of twenty-three dollars and fifty cents. As this case is before you and as the testimony will permit, the son, if he is entitled to recover, is entitled to recover only for pain and suffering. I do not understand from the case as it has progressed, that there is any contention that the son is suffering pain or inconvenience or disability of any character at this time. If that is a true narration of the testimony, gentlemen of the jury, then he is entitled to compensation for the pain and suffering, mental and physical, which he has endured as the proximate result of this happening. Now it is true, gentlemen of the jury, that that is a matter which is much in your hands to determine as far as the question of amount is concerned. By that I mean that I cannot give you any mathematical rule by which you can measure, but you are bounded by at least two things, first, by what the plaintiff may have satisfied you by a fair preponderance of the evidence was the pain and suffering which he did endure or has endured as a proximate result of the injury which he says he suffered. The burden is upon him to satisfy you, first, that he had pain and suffering, mental and physical, and secondly, the length of time it would endure, as well as the degree of intensity. Now as he has or may have shown you that, then you are to apply to that the rule of reasonableness, what it is reasonably right he should have to compensate him for that pain and suffering. That

is the only rule which I can give you, gentlemen of the jury, by which you may measure your verdict upon that score, if you get to that point, and that is the only element of damages which you may consider in this case, if there are to be damages and a verdict accordingly.

I may say at this time, in speaking of the question of verdicts, so that I need not again refer to it, that if there is a recovery in this case, then there is a recovery for both father and son—and as I have said to you before, if it has not been shown to you that the son can recover, that is, if he has not shown, as I will indicate to you hereafter he must show—if he has not shown to you that he is entitled to recover against the defendant, then the father cannot recover; but if he is, and there is to be a verdict for both father and son, then you will express your verdict separately, that is, you will say that you find in favor of the plaintiff Rudolph Ebeling and against the defendant in the sum of so much money, whatever you find, and that you find in favor of the plaintiff Emil Ebeling against the defendant in the sum of so much money.

Now this class of case, gentlemen of the jury, is quite dissimilar from the ordinary case which comes before you. It is not the same kind of a case nor is the same kind or character of proof required as in the ordinary negligence case which you have had more or less opportunity to deal with even in your present short service here. The courts have said this:

> "The owner of a vicious dog is liable for an injury committed by the dog, if the owner had previous knowledge of its vicious propensities."

And again:

Charge.

"An action can be maintained against the owner by a party injured upon evidence that a dog, with the knowledge of the owner, had a mischievous propensity to bite mankind, whether in anger or not. In either case the person bitten would suffer injury. A mischievous propensity is a propensity from which an injury is the natural result."

Now there are two things which must be established before there can under any circumstances be a recovery in a case of this character. And by the way, let me say to you in prefacing this, the mere fact of this particular occurrence is not sufficient—the mere fact that it happened is not sufficient to entitle the plaintiff to a recovery, and the burden of satisfying you of these two matters which I am just about to call your attention to is upon the plaintiff. He, through himself, or such witnesses as he produces, must must satisfy you by a fair preponderance of the evidence of these two things, and those two things I am referring to are these: first, that the dog had a mischievous propensity to bite, or that the dog was a vicious dog. If that has been shown by the degree of testimony which I have just indicated, then there is this other thing yet that he must establish in the same manner and to the same degree, and that is, that the owner of the dog had that knowledge. Now if the plaintiffs fail in either one or the other, gentlemen of the jury, then he cannot recover, and mind you, I said the burden is upon the plaintiff to establish that. He must establish first that the dog was a dog with a mischievous propensity to bite or was a vicious dog. If he has failed in that he cannot recover. Having established that, if he has, by that degree of proof which I have just indicated, he must then proceed by the same class and degree of proof to satisfy you that the owner of the dog had knowl-

edge of those propensities. If he fails in the latter, even though he succeeds in the first, he cannot recover. So you see he has those two things which he must establish, both of which he must establish before he can recover.

Now to proceed a little further and give to you what our courts have said, going back somewhat in history:

> "At common law the keeper of animals of the class wild by nature was presumed to have knowledge of their vicious propensities, and was liable as an insurer, but in the case of animals which had been domesticated a presumption arose that they were not of a vicious nature and hence their keeper was liable only in case the animal was vicious, and he had knowledge of its vicious propensities."

Now I need go no distance, gentlemen, in saying to you that that is a matter of common knowledge, that a dog is a domesticated animal. The action against the harborer, that is, either the owner or the one who harbors or keeps, did not proceed upon negligence, but if he had a knowledge of the vicious nature of the animal he was liable as an insurer. The gravamen of the injury being the wrong of keeping the animal with the knowledge of its viciousness, and hence it was essential that the master's knowledge should be averred and proved.

You see, gentlemen, I am reading that more particularly to make if possible stronger what I have said to you upon the two things that are essential to be proved in this case: first, the presumption is that a domesticated animal, such as a dog, is not vicious, but that is rebuttable—that can be and must be overcome by proof either of his mischievous propensity to bite or that he is vicious,—and secondly, that that knowledge must be shown to have been brought home to the owner or harborer.

Of like import are the decisions in this state, speaking of the State of New Jersey, except perhaps as modified by what was said in *De Gray vs. Murray,* which I will read to you later, but which is here unnecessary to consider as the direct point in that case is not raised in the case under consideration:

> "The dog is classed amongst the domestic animals. This presumption, however, which arises in their favor is rebuttable. It is not necessary that the same injury should have been actually committed by the animal, to the knowledge of its owner, but knowledge by the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient to maintain the action."

Scienter—that is, the previous knowledge, tha is, the bringing home, by the class of proof that I have stated, that the dog was vicious and bringing home to the knowledge of the owner the fact that he was vicious need not be precisely similar, but that it is substantially so will suffice.

Where, therefore, the proof touching viciousness and scienter are brought home to the owner of the dog—such a disposition on the—such a disposition on the part of the dog, and such knowledge —knowledge on the part of the owner—a jury question at once arises whether under the adduced proof the animal has displayed vicious propensities to the knowledge of the owner sufficient to rebut the presumption raised by law in favor of domestic animals and sufficient to charge the owner with scienter.

Now the case of *De Gray vs. Murray,* which is referred to in that portion of that opinion which I have read to you, and that which is pertinent to the case at hand is this. The court there says:

Charge.

> "The right of a man to keep a vicious dog for the protection of his home and property is conceded. He is, of course, bound to exercise a degree of care commensurate with the danger to others which will follow the dog's escape from his control, to so secure it that it will not injure any one who does not unlawfully provoke or intermeddle with it."

Now, gentlemen of the jury, upon the score of those two important things in a case of this character, there is nothing more that I can say to you. I can in no way, or by any language that I can employ, make the rule more simple or more understandable. I have tried to give to you in my own language and then have given the language of our courts so that you could see the application of the rule that I have tried to give you as it has been applied by our courts.

In connection with those two points, gentlemen, you have a right to and should take into consideration the testimony given by the two witnesses of the plaintiff, one Colombo and the other Montigel, I believe, whose testimony is produced for the purpose of showing either the mischievous propensities of the dog or its viciousness, and you may take into consideration what they have said, giving full faith and credit to their testimony as you may find it to be entitled to, having in mind, however, that in the one case of Mr. Montigel he testified to an occurrence of some two or two and a half years ago, and as to the testimony of Mr. Colombo it was as to an occurrence three or three and a half years ago, and you may likewise take into consideration such testimony, whatever it may be, that the defendant has placed before you tending to show what the disposition of this dog was, and after giving to each particle and all of that testimony all the credence, all the effect and all the weight which you in your good judg-

ment may find each part is entitled to, then draw your conclusion as to whether or not the plaintiff has established by a fair preponderance of the evidence those two points which I am speaking about, the viciousness of the dog and the knowledge of the owner as to its viciousness, if it has been shown.

There is one other question which I wish to bring to your attention, and which probably ordinarily would not come in a case of this kind, and that is upon such of the testimony as there may be upon the point as to whether or not this boy had knowledge of the viciousness or mischievous propensities of this dog. The first question for you to decide, if you decide in relation thereto, is has it been shown that he did have that knowledge. Then, secondly, you must take into consideration the fact that the boy is a boy of sixteen or seventeen years of age, sixteen, I think it is; you are to take into consideration his ability to discern—you have seen him upon the stand and you have heard him, you know what his ability is, you know what his brightness or otherwise of mind may be, and even if he be a boy of only sixteen years of age, you may find that he is nevertheless chargeable with any such notice as you may find it has been shown he had.

Now, I think it cannot be argued, gentlemen, that if one has knowledge of that which is dangerous, and it is brought home to him, so that a reasonable person—considering the person's age, his ability to discern, his ability to know, his ability to appreciate danger—is such that a reasonable person would take warning, and in the face of that warning he still proceeds to put himself in that position where the danger will come to him which he has been warned of and the danger does become certain and he is injured

thereby, it cannot be said that that person has acted the part of a reasonable, prudent person. Now, gentlemen of the jury, it is for you to determine, first, whether or not the testimony is such that you can conclude and should conclude from it that this boy did have knowledge of the propensities and disposition of this dog and was able to appreciate them and should have appreciated them, and if he did have them and you find he was a boy of that ability, mentally and otherwise, where he should be charged with an appreciation of the notice that came to him, and yet in the face of it he put himself in the way of the danger against which he had been warned, and that was the proximate cause of the injury, then he cannot recover, even if he has shown all the things which I have indicated to you he must before he can recover.

Now, gentlemen of the jury, I do not know of any other matter that I can bring to your attention. You have heard me say repeatedly in your service before me, in the conclusion of every charge to you, this which I am going to say, and of course it is necessary that I should say to you in a case of this character, if there is a verdict warranted by the evidence under the rules of law which I have given you, you are to understand that plaintiffs are not entitled to such a sum as will amount to a punishment of the defendant. You are not here to punish defendants. You are here to simply do justice as between the plaintiff and the defendant as the facts and as the law will permit you. The plaintiffs in this case are entitled to have, if they are entitled to have anything, only just that which will compensate them. They are entitled to nothing more, nothing less. You are to determine what the testimony is from your recollection of it. If counsel in summing up or during the progress of the case have drawn

your attention to that which purports to be testimony, or if I have during the progress of the case or during my charge, suggested to you what the testimony is, and in any of these cases it does not match up with your recollection of it, you will disregard what any of us may have said and go back to your recollection. You are to determine from all the evidence where the facts are in position to each other, where each set of facts seem to oppose each other, you are to determine what facts and which of the facts are entitled to the greater weight; and having weighed them up, found what the facts are, which way the weight is, then you are to apply the principles of law which I have given you and find your verdict accordingly. With that, gentlemen, you may take the case.

JURY RETIRED.

THE COURT: Now, Mr. Hopkins, if you will let me see what you have—without a promise—I will look at it. Of course you have come in too late.

MR. HOPKINS: I think you have dealt with most of them. (Hands paper to the court.)

THE COURT: For safety keep this, Mr. Kelley. I decline to charge it or refuse it at this time, and I will reserve to myself the determination as to whether or not I will recognize the request first, and if I do, why then I will put counsel offering it, counsel for the defendant, in the position where he may have the benefit of my declination to charge it. I will give it to you for safe keeping at present.

Defendant's Requests.

Actionable negligence exists only when the party whose negligence occasions the loss, owes a duty arising from contract or otherwise to the person sustaining such loss.

If you find that defendant provided a suitable walk for pedestrians to approach the house in question, and that plaintiff did not use this walk but went on other parts of the premises he cannot recover.

"A person on private grounds by invitation of the owner, going of his own volition into other parts of the premises, exceeds the bounds of his invitation, and if he does not thereby become a trespasser, goes out of the way to create a risk for himself. *Sullivan vs. Waters,* 14 Ir. C. L., 460; *Ivay vs. Hedges,* 9 Q. B. Div., 80; *Batchelor vs. Fortescue,* ii Id., 474; *Zosbisch vs. Tarbell,* 10 Allen, 385; *Victory vs. Baker,* 67 N. Y., 366; *Diebald vs. P. R. R.,* 21 Vroom, 478"; *Phillips vs. Library Co.,* 55 N. J. L., 307, at p. 315.

"Where a railroad company provides offices for the transaction of its business, accessible from the public streets, the presence in the freight-yard of the company of a person having business with such offices is not a necessary incident of his business with the company. He is at best a licensee, towards whom the company owes no special duty." 50 N. J. L., 478.

New Jersey Court of Errors and Appeals

EMIL EBELING, by Rudolph Ebeling, his next friend, Plaintiff-Respondent, vs. MARIUS MUTILLOD, Defendant-Appellant.	On Appeal from Hudson County Circuit Court.
RUDOLPH EBELING, Plaintiff-Respondent, vs. MARIUS MUTILLOD, Defendant-Appellant.	

BRIEF FOR RESPONDENTS.

Introduction.

Two judgments were rendered for $400 in one instance and $23.50 in the other against the appellant Marius Mutillod in the Hudson County Circuit Court in two actions at law arising out of the same transaction which were tried together by agreement of counsel, before Honorable Luther A. Campbell, Circuit Court Judge, and a jury. The defendant has appealed directly to this Court. In

the one action, the plaintiff, Emil Ebeling, a minor, sued by his father as next friend and in the other action, the father was plaintiff.

Statement.

The plaintiff, Emil Ebeling, is a newsboy living in the Borough of Secaucus (C. B., 21 and 75). He lived with his father from whom he had not been emancipated (C. B., 20). The defendant, Marius Mutillod, is a prosperous florist, owning a large estate in the Borough of Secaucus, Hudson County, New Jersey (C. B., 75). The defendant was the owner of a large and ferocious St. Bernard dog (C. B., 22) which he permitted to run at large on his property (C. B., 36). It was established that this dog had bitten a man named Fred Montigel (C. B., 38) and that the defendant had paid him damages. There is also testimony by Michael Colombo, another witness for the plaintiff, that the dog had bitten him. It appeared from the testimony that it was the custom of the newsboy plaintiff to enter the gate in the northern part of Mr. Mutillod's property and cross the lawn to one of the houses situate on his estate (C. B., 22 and C. B., 24 to line 32 incl.). On March 13, 1915, while delivering papers to Mr. Mutillod and his tenants (C. B., 21) the boy, who was at that time about sixteen years of age, was attacked by the defendant's dog which was roaming at large upon the defendant's estate (C. B., 36). The dog bit him several times in the hip (C. B., 22). The bites were so severe that he was under the care of a doctor for three weeks after (C. B., 23). Dr. Leo W. Brandenburg, who treated the boy, said that the large bite was about three inches deep (C. B., 50, line 20, &c.). It is important to note from the tes-

timony that defendant's land was only partially enclosed by a fence (C. B., 24) and that there were large gates in this fence which were open most of the time (C. B., 24) and that in this condition of things, the defendant's vicious dog was permitted by him to run at large on the premises.

Defendant's counsel moved to non-suit at the end of plaintiff's case and moved for a direction of a verdict at the close of the testimony.

POINT I.

Scienter was clearly established.

In actions to recover damages for injuries sustained by reason of a biting of a vicious dog, it has been essential to predicate the action either upon "viciousness and scienter" or "negligence."

The text writer in 3 Corpus Juris in the Topic "Animals" at page 92, Section 321, says:

> "As to when the necessity for proving viciousness and scienter exists there is some confusion in the cases. It may be laid down as a general rule that the decision of the question depends upon whether the animal is rightfully or wrongfully in the place where it inflicts the injury complained of. It is not true in all cases, however, that scienter is necessary where the injury is inflicted by an animal in a place where it had a right to be. If the owner or keeper is guilty of negligence in handling the animal he is liable regardless of scienter. Nor is it true in all cases that the owner is liable without proof of scienter if the animal commits the mischief in a place where it has no right to be. It may be neces-

sary further to take into consideration the question whether the act complained of is one which the owner could or could not have anticipated."

In the same work and same topic at page 93, it is said:

"It is not necessary that an animal should be vicious to make the owner responsible for injury done by it through the owner's negligence. The vice of the animal is an essential fact only when, but for it, the conduct of the owner would be free from fault."

In the action at bar, the plaintiff established "viciousness and scienter," it is contended, under the prevailing rules of evidence.

The text writer in 3 Corpus Juris at page 104, says:

"Under the common law it is incumbent on one complaining of the savage act of a dog to prove its vicious propensity, and that defendant had knowledge thereof, in accordance with the general rule applicable to domestic animals elsewhere stated."

Dealing with the same subject, the textwriter in R. C. L., Vol. 1, page 1117, section 60, says:

"While the owner of a dog is not liable, in the absence of statutory provision, for any injury it may inflict on others, unless he has notice of its inclination to commit such an injury, the modern and more reasonable doctrine is that he need not have had actual notice thereof to make him chargeable. * * *

> Knowledge of one attack by a dog is generally held sufficient to charge the owner with all its subsequent acts, but there need be no notice of injury actually committed, and therefore it is unnecessary to prove that a dog had ever before bitten any person if the owner had seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit injuries of the class complained of."

The subject has been discussed in New Jersey in the case of Evans vs. McDermott (N. J. Sup. Ct.), 1886, 49 N. J. L., 163, at page 166; Mr. Justice Parker said:

> "There is no doubt that in cases of animals not naturally inclined to do mischief, a previous mischievous propensity must be shown, and the scienter clearly established. The gist of the action is, not the keeping of the animal, but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not. The conclusion is that the plaintiff below, having shown by his proof that on several previous occasions the dog in question had bitten various persons on the hand, with the knowledge of the defendant, he was entitled to recover, even if the habit did not proceed from a ferocious nature, but was the result of a mischievous propensity. In this instance (whatever may have been the circumstances attending the previous bitings of the dog), the bite was accompanied by a growl, while McDermott was in a place where he had a right to be, and when he was doing nothing except to motion the animal out of the passage-way, which he was obstructing."

In the case of Mayer vs. Kloepfer (Ct. Er. & Ap.), March 4, 1908, the Court rendered a per curiam opinion which is reported at 69 Atl., 182 and which in its entirety is as follows:

"This was an action brought by Mayer for injuries inflicted upon him by the bite of a dog owned by Kloepfer. The proofs submitted on behalf of Mayer fairly supported his contention that he had been bitten by a brindled bull bitch, and that Kloepfer was her owner. They further justified the conclusion that Kloepfer's bitch had bitten two other persons some five years before the time of the biting of Mayer, and that each of these two persons had, shortly after the event, communicated to Kloepfer the fact of their having been bitten by his dog. Notwithstanding this condition of the proofs, the trial court directed a nonsuit, on the ground of insufficiency of proof as to the vicious propensity of the dog. In this we think there was error. The fact that the dog had bitten two persons previous to its attack upon Mayer was evidence of its viciousness; and, supplemented, as it was, by proof of scienter upon the part of its owner, entitled Mayer to have the question of Kloepfer's liability submitted to the jury.

The judgment must be reversed, and a venire de novo awarded."

The question of scienter has also been discussed in the leading case of Emmons vs. Stevane (Ct. Er. & Ap.), June 28, 1909, 77 N. J. L., 570, also 18 Ann. Cases 812, 24 L. R. A. (N. S.), 458. The case of Emmons vs. Stevane is accompanied by copious notes in the report in 24 L. R. A. (N. S.), page 458.

In the case at bar, it appears from the testimony that the dog had bitten two persons prior to the time when it bit the plaintiff, Emil Ebeling. Directing the Court's attention to the testimony of Fred Montigel, it appears (C. B., 38 and 39) that the dog bit him and that he received damage for injuries from the defendant, Mutillod (C. B., 38 and 39). Turning to the testimony of Mutillod, we find that Mutillod himself admits somewhat reluctantly that he paid Montigel (C. B., 85, line 10). The biting of Montigel occurred in the presence of Mutillod (C. B., 38). Turning to the testimony of Michael Colombo, it appears that he was bitten by the same dog (C. B., 42). He drew this fact to the attention of Mutillod some time afterwards (C. B., 45, lines 20 to 30).

With these facts before the Court as well as a manifest viciousness shown by the dog toward the plaintiff, Emil Ebeling, there can be no doubt that there was sufficient evidence of scienter in this case to put that issue before the jury under the law of New Jersey. It is contended that the vicious propensities of the defendant's dog were known to him prior to the time that the plaintiff, Emil Ebeling, was bitten.

POINT II.

There was no element of contributory negligence in this case.

In actions to recover damages for injuries sustained by reason of dog bites where viciousness and scienter are established, the question of negligence is not ordinarily an element. See Emmons vs. Stevane (Ct. Er. & Ap.), 77 N. J. L., 570.

In the case at bar, defendant-appellant insists that the plaintiff was guilty of contributory negli-

gence. See defendant's brief, page 3. In dealing with this question, the textwriter in 1 R. C. L., page 1122, section 65, says:

> "As negligence, in the ordinary sense, is not the ground of liability in an action for injuries occasioned by a ferocious dog, so contributory negligence, in its ordinary meaning, is not a defense. Therefore, these terms, when employed in this class of actions, may be deemed to be used, not in a strictly legal sense, but for convenience. Thus, slight negligence, or the want of ordinary care, as the unintentional treading on the toes of a vicious dog, will not relieve its owner from injuries thereby occasioned; and even where warnings to beware of the dog are posted about the owner's premises, it seems that he will not be exempted from liability to one who is rightfully there, or to one who is unable to read. But if a person, with full knowledge of the evil propensities of a dog, wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he will be adjudged to have brought the injury on himself, and so ought not to be entitled to recover. The correct rule of liability therefore seems to be that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences.

The textwriter in 3 Corpus Juris, at page 108, dealing with the same subject, says:

> "Where the foundation of liability for injuries by animals is deemed to be negligence,

the ordinary doctrine of contributory negligence as a defense applies. *Where, however, negligence in the ordinary sense is not the ground of liability, contributory negligence, in the sense in which the term, is ordinarily used, is not a good defense,* but acts must be proved, with notice of the character of the animal, which will establish that the injured person voluntarily brought the injury upon himself."

In the case at bar, the theory of the plaintiff's action was viciousness and scienter. The defendant, Mutillod, kept a large and ferocious dog and was acquainted with its vicious propensities. With this knowledge he permitted the dog to roam at large on his premises.

The evidence was that the boy, Ebeling, had been in the custom for a year past to cross the defendant's lawn daily to deliver the newspapers to the defendant and the tenants on his property. He had no personal knowledge of the vicious character of the dog and had a right to assume that it was an ordinary domesticated animal free from vice. He admitted in his testimony having some time before heard a rumor that the dog had bitten some one, but of this fact he had no personal knowledge, but the Court is also requested to observe that the boy testified that the tenants on the property had assured him that the dog was not dangerous and did not bite and that he should not be afraid of him. (C. B., 31, line 30, &c.) It cannot be said from his testimony that the boy voluntarily caused himself to be injured because he was only doing that which he was accustomed to do daily for over a year. If this were the law, no tradesman, United States letter carrier or any other persons lawfully on a man's premises would be safe from the attack of ferocious beasts, because he would be bound to

presume from the fact of the mere presence of the animal and take flight to avoid the possible consequences of his ferocity. There is no basis in law for such a conclusion and the authorities on the question which are above cited are to the contrary.

Because of the jury verdict for the plaintiff, questions of fact may be resolved against the defendant. The question of contributory negligence is ordinarily one for the jury, if such a question enters into the case. The testimony in this case did not justify the Court in granting a non-suit for that reason. The attention of the Court is directed to the text in Bigelow on Torts, pages 249, 250, in which the writer says:

> "It must, at the same time, be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and cannot recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example, the defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such dog is there, trespasses in the day time upon the premises, and the dog rushes upon him and bites him. The defendant is liable since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that he should be attacked by a savage dog."

This text is quoted with approval in the case of Conway vs. Grant, which was decided Nov. 10,

1891 (Georgia Supreme Court), 14 L. R. A., 196. In that case, the plaintiff, a carpenter, seeking employment, entered the defendant's premises where he was attacked by ferocious dogs running loose in the yard. Chief Justice Bleckley, said in part:

"Though the gate was open, and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises to bite him or others that might so intrude. Such dangerous means of defense against mere trespassers the law will not countenance. As general authorities on the subject, see Brock vs. Copeland, 1 Esp., 203; Sarch vs. Blackburg, 4 Car. & P., 297; Curtis vs. Mills, 5 Car. and page 489; Loomis vs. Terry, 17 Wend., 496, 31 Am. Dec., 306; Pierret vs. Moller, 3 E. D. Smith, 574; Kelly vs. Tilton, 3 Keyes, 263; Sherfey vs. Bartley, 4 Sneed, 58, 67 Am. Dec., 597; Woolf vs. Chalker, 31 Conn., 121, 81 Am. Dec., 175; Laverone vs. Mangianti, 41 Cal., 138, 10 Am. Rep., 269; Knowles vs. Mulder, 74 Mich., 202; Cooley, Torts, 345; Bishop, Non-Cont. Law, 1235, et seq.; 1 Thomp. Neg., page 220, Sec. 34; Muller vs. McKesson, 73 N. Y., 195, 29 Am. Rep., 123; Rider vs. White, 65 N. Y., 54, 22 Am. Rep., 600. It will be observed that the most that could possibly be said against the plaintiff is that he trespassed by going upon the premises. This is a milder fault than going there to commit a trespass. If his purpose had been to commit a crime, the dogs would have been properly employed in resisting him. But he seems to have had a virtuous and worthy object although his mode of executing it was doubtless injudicious. It was not lawful to bite him by the instru-

mentality of dogs or other dangerous animals. The court erred in dismissing the action."

In his brief, appellant's counsel has quoted from the testimony of Mr. Mutillod concerning a warning alleged to have been given by Mutillod to the newsboy plaintiff concerning the use of the lawn as a thoroughfare. The Court is directed to examine the testimony of young Ebeling concerning the alleged warning (C. B., page 38, line 8).

The Court is requested to examine the text and the notes in Volume 1, Sherman & Redfield on Contributory Negligence (5th Ed.), Section 97, page 147. There the text writers say:

> "The mere fact that the plaintiff, when he suffered the injury, was technically trespassing on the defendant's premises, and would not have been injured if he had not so trespassed, is not conclusive evidence of contributory negligence."

In the foot-note to this case, in support of this view and along with an abundance of other authority it is said:

> "The keeper of ferocious dogs is liable to a technical trespasser who, without warning, approaches the premises and is attacked by them."

Loomis vs. Terry, 17 Wend., 496.
Marble vs. Ross, 124 Mass., 44.
Woolf vs. Chalker, 31 Conn., 121.
Smith vs. Pelah, 2 Strange, 1264.

It is contended that there was no element of contributory negligence in this case and that the ruling of the trial Court denying defendant's motion for non-suit was correct.

POINT III.

Having proved viciousness, scienter and the biting, defendant's liability was clearly established.

Throughout the trial of this cause defendant's counsel in addition to attempting to inject the question of contributory negligence into the case, also insisted that the plaintiff was a trespasser upon the defendant's premises, defendant owed no duty to plaintiff except to abstain from wilful wrong, relying on the doctrine of the following cases:

Marshall vs. Wellwood, 38 N. J. L., 339.
Philips vs. Library Co., 55 N. J. L., 307.
Vanderbeck vs. Hendry, 43 N. J. L., 467.

It is contended that this argument advanced by the defendant's counsel is without merit. One of the earliest American cases on this question is Loomis vs. Terry, N. Y. Sup. Ct. (1837), 17 Wendell's Reports, 494, where it appeared that the plaintiff's son, sixteen, and a number of other boys, were hunting in the woods of the defendant on Sunday, where the plaintiff's son was attacked by a dog (a hound) who sprang upon him and brought him to the ground, and when down another dog, a slut, also came upon him, and he was severely bitten by the dogs and held down five or six minutes, until the other boys came to his rescue. The slut had puppies, and a day or two previous to the injury, the plaintiff's son had been cautioned not to go where they were, as the slut was cross and might bite him. The puppies were in a hollow log in the woods, about twenty five rods from the place where the boy was attacked. He did not go near the place where they were. On being informed

of the injury done to the boy, the plaintiff observed, he wished his dogs had eaten him up. Previous to this occurrence the hound attacked a man on horse back, caught him by the foot, and left the print of his teeth in the boot which he had seized upon, of which the defendant had notice. The defendant proved that he had sold the slut to a person of the name of Monro, upwards of a year previous to the injury but it also appeared that she had returned to the premises of the defendant and had been harbored by him. The jury found a verdict for the plaintiff, on which judgment was rendered and which judgment was affirmed in the C. P. on certiorari.

Upon these facts, the Court held:

"A man may keep a dog for the necessary defense of his house, his garden or his fields, and may cautiously use them for that purpose in the night time; but if he permit a mischievous dog to be at large on his premises, and a person is bitten by him in the day time, the owner is liable in damages, though the person injured be at the time trespassing on the ground of the owner, by hunting in his woods without license.

It seems that a person is not permitted, for the protection, in his absence, of property against a mere trespasser, to use means endangering the life or safety of a human being whatever he may do where the entry upon his premises is to commit a felony or breach of the peace; and where such means are used, the nature and value of the property sought to be protected must be such as to justify the proceeding; full notice of the mischief to be encountered must be given; and the principles of humanity must not be violated; or the

owner will be subjected to damages for any injury which ensues."

It is contended that to permit a large and ferocious dog to roam at large upon one's premises, is a wilful wrong against persons who may use such premises, even though they be technical trespassers and the wrong is even greater as against persons who are there by invitation to make deliveries of groceries, newspapers or mail or commodities which the course of business warrants.

The Court is requested to examine the text in Sherman & Redfield on Negligence (5th Ed.), Vol. 2, Sec. 628, page 1097, where it is said:

"The responsibility, for example, of the owner of a ferocious dog, does not depend upon a question of negligence; the permitting of such an animal to go at large is a wilful wrong."

In the case of Woolf vs. Chalker, 31 Conn., 121, where a peddler entered without permission into the house of the owner of a ferocious dog and was set upon and bitten by it, although guilty of a technical trespass, it was held that this was no defense to an action against the owner of the dog. Citing Woolf vs. Chalker, 31 Conn., 121. See also Conway vs. Grant, 14 L. R. A., 196. The Court is requested to examine the case of Smith vs. Pelah, 2 Strange, 1264, in which it was ruled that if the owner of a dog has notice that it has once bitten a person and lets it go at large or lie at his door an action will lie against him at the suit of a stranger bitten by it, although the latter stepped on the dog's toe for the damage was owing to the owner's not hanging the dog at the first notice.

Appellant's counsel has urged the view that since statutes have been passed in various states dispensing with the necessity of proving scienter in cases involving injuries by dogs, that the rule laid down and followed in many of these cases has no relation to the situation in the case at bar. We have no such statute in New Jersey, but at the time when the opinion of Loomis vs. Terry, 17 Wendell's Reports, 496, was written, there was no such statute in New York. The effect of these statutes is discussed in the foot note to the reported case of Emmons vs. Stevane, 24 L. R. A. (N. S.) at 464. The effect of these statutes is merely to dispense with the necessity of proving scienter, otherwise the law remains unchanged. But in the case at bar, we have proved the scienter on the part of the defendant, Mutillod, and having established scienter, there is an abundance of authority to sustain the view adopted by the trial Court that there was testimony in the case which warranted submitting it to the jury. The Court's attention is directed to the following authorities which support the contentions of the plaintiff:

> "So where the dog was chained near the path between the yard gate and the stable, and plaintiff was bitten by him while carrying some planks along the path, the jury were instructed that plaintiff was entitled to recover notwithstanding he had previously been cautioned to beware of the dog, unless he had run himself into the mischief by his own carelessness and want of caution." Curtis vs. Mills, 5 Car. & P., 489.
>
> "In Lynch vs. McNally, 7 Daly, 126, Daly, J., after a very full review of the cases, concludes that the cause of action for injuries inflicted by an animal does not depend upon the

negligence of either plaintiff or defendant but upon the fact that defendant with a knowledge of the vicious propensities of the animal which he kept or harbored suffered it to go at large and that it inflicted the injury for which the action was brought."

"So where the injured person was passing through a yard used in common by the owner of the dog and a family which occupied an adjoining house with a view to call at such adjoining house, and was bitten, the owner of the dog was held liable." Buckley vs. Leonard, 4 Denio, 500.

"So where a junk dealer was called upon defendant's premises to examine and make a bid for some old iron, and a ferocious dog which was kept chained on the premises broke loose and attacked and injured him, the owner was held liable." Kelly vs. Tilton, 3 Keyes, 268.

"So where plaintiff was going into defendant's house on lawful business and a ferocious dog was chained under the steps, one of which gave way and let plaintiff's foot and leg through the opening, when it was seized and bitten by the dog, the owner was held liable." Laverone vs. Mangianti, 41 Cal., 138, 10 Am. Rep., 269.

"Where defendant kept a ferocious dog chained in a private alley easy of access and frequented more or less by the public, and a policeman in pursuit of a suspicious character entered the alley and without seeing the dog approached it and was seriously bitten, the owner was held liable." Melscheimer vs. Sullivan (Colo.), June 23, 1891.

"The fact that the injured person was trespassing at the time the injury was received is

immaterial." Pierret vs. Moller, 3 E. D. Smith, 576.

"The keeping of a ferocious dog to protect against trespassers is unlawful upon the same principle that spring guns, concealed spears, or placing poisoned food is unlawful." Johnson vs. Patterson, 14 Conn., 1, 35 Am. Dec., 96.

"So where plaintiff was gathering berries without permission upon defendant's land, and was thus guilty of a trespass, it was held that notwithstanding this defendant, who was the owner of a vicious dog, was liable for injuries inflicted by it." Sherfey vs. Bartley, 4 Sneed, 58, 67 Am. Dec., 597.

"The law holds the keeper of an animal known to be dangerous, which injures another, to the same degree of responsibility as in cases of wanton injury, and the fact that the person injured is trespassing does not exonerate such owner from the consequences of his negligence." Marble vs. Ross, 24 Mass., 44.

"If a man keep a watch dog which is fierce and dangerous and a trespasser is injured, the latter may recover against the owner of the dog." Carroll vs. Staten Island R. Co., 58 N. Y., 136, 17 Am. Rep., 221.

"So where a man left a ferocious dog to guard his sleigh, which was left standing in a village street, he was held liable for the injuries inflicted by it upon a child who meddled with a whip lying therein." Meibus vs. Dodge, 38 Wis., 306, 20 Am. Rep., 6.

Appellant's counsel cites the case of DeGray vs. Murray, 69 N. J. L., 458, as authority. This is an opinion of the New Jersey Supreme Court ren-

dered at the June term, 1903. Chief Justice Gummere who wrote the opinion said:

> "The right of a man to keep a vicious dog for the protection of his home and property is conceded in the case of Roehers vs. Remhoff, 26 Vroom, 475. He is, of course, bound to exercise a degree of care, commensurate with the danger to others which will follow the dog's escape from his control, to so secure it that it will not injure anyone who does not unlawfully provoke or intermeddle with it. Worthen vs. Love, 60 Vt., 285. But if the owner does use such care, and the dog nevertheless escapes and inflicts injury, he is not liable."

In the above case the dog was actually locked up and escaped from the place in which it had been confined by gnawing away the wooden door around the metal door lock detaching the lock and permitting the dog to escape. The biting here took place in the early morning between half past six and seven o'clock. The Court in its opinion said concerning this situation:

> "That a reasonably prudent man would not have anticipated any such occurrence must be admitted."

DeGray vs. Murray, supra, 461.

In the case at bar, the facts are entirely dissimilar and it is ridiculous to attempt to say DeGray vs. Murray, supra, is a controlling authority. Mutillod, the defendant, permitted his dog to roam at large on his premises. He did not attempt to show at the trial that he used any effort whatsoever to restrain the dog. As a matter of fact, at the time the plaintiff was bitten, the dog was running at large

on his lawn and was free to leave the property as the gates were open and a large portion of the estate was entirely unfenced. (C. B., 24, lines 1 to 33.)

It must also be noted that no exception was taken to the Court's charge to the jury nor was the Court apparently requested to charge the jury in any way on the question as to the degree of care to be used by the defendant in restraining his dog. And in fact such instruction was unnecessary because it is very apparent that no care whatsoever was used.

The Court's attention is directed to the opinion of Mr. Justice Voorhees, delivered for the Court of Errors and Appeals in the case of Emmons vs. Stevane, 77 N. J. L., 570:

> "But in the case of animals which had been domesticated the presumption arose that they were not of a vicious nature, and hence their keeper was liable only in case the animal was vicious and he had knowledge of its vicious propensities. The action against the harborer did not proceed upon negligence, but if he had knowledge of the vicious nature of the animal he was liable as an insurer, the gravamen of the injury being the wrong of keeping the animal with knowledge of its viciousness, and hence it was essential that the master's knowledge be averred and proved. May vs. Burdett, supra; Thomp. Com. Negl., Secs. 839-844; Woolf vs. Chalker, 31 Conn., 121; Smith vs. Donohue, 20 Va., 548."

In the case at bar, the only objections which are on the record and before this Court for consideration are the refusal to grant the non-suit and to direct a verdict. To have done either of these things, it is submitted, would have been grossly erroneous and none of the authorities cited by the

defendant's counsel justified in any way the granting of a non-suit or the direction of a verdict. By the farthest stretch of imagination, DeGray vs. Murray, does not in any way sustain such view. If defendant's counsel was dissatisfied with the charge of the Court, timely objection could have been made. If he desired further and different instructions he had a right to object to the Court before the argument of counsel to the jury and before the charge of the Court, such requests as he deemed necessary.

An examination of the evidence in this case will demonstrate clearly that it was established for the plaintiff:

(1) Defendant's dog was vicious and had a propensity to bite and attack mankind.

(2) The defendant, Mutillod had knowledge of the evil propensities of the dog.

(3) The plaintiff while delivering newspapers on defendant's premises and to defendant and defendant's tenants a course of conduct which had been habitual and daily for a year, was attacked by this dog and badly bitten.

(4) That there is no evidence in the case of any care whatsoever used by the defendant to restrain the dog during the day time.

(5) That the dog attacked the defendant between three and four o'clock in the afternoon and in broad day light.

With these facts before the Trial Court, it is submitted that any action other than submitting the case to the jury would have been wholly improper.

Defendant's counsel endeavors to criticize the opinion of the Trial Court in discharging the rule to show cause allowed in the action. He points out the alleged repudiation of the insurer doctrine, but it is contended that the reasoning of the Trial Court in discharging the rule to show cause does not add one jot or one tittle to the testimony which after all is the only thing that should be considered by this Court in determining the correctness of the refusal to grant a non-suit or direct a verdict. It is to the result obtained in the Trial Court to which this Court must look rather than to the reasoning used to arrive at it.

It is contended that the verdict in this case was justified and that the case was properly submitted to the jury and that there is nothing before this Court which warrants a reversal.

POINT IV.

The judgment of the Hudson County Circuit Court should be affirmed in both cases.

Respectfully submitted,

HARLAN BESSON,
of Counsel with the Plaintiffs-Respondents.

New Jersey Court of Errors and Appeals.

EMIL EBELING, by RUDOLPH EBELING, his next friend,

Plaintiff-Respondent,

vs.

MARIUS MUTILLOD,

Defendant-Appellant.

RUDOLPH EBELING,

Plaintiff-Respondent,

vs.

MARIUS MUTILLOD,

Defendant-Appellant.

On Appeal from the Hudson County Circuit Court.

BRIEF OF APPELLANT.

These cases arose out of injuries resulting from a dog bite.

By agreement of counsel, they were tried and are argued together.

In March, 1915, the plaintiff Emil Ebeling was employed by a man named Laurie, at Secaucus, Hudson County, delivering newspapers afternoons. He was a boy of 16 years.

The defendant is a nurseryman.

The premises of the defendant where the injuries happened, consist of a tract of land of several acres on the north side of the road, which in the testimony and exhibits is described as Main Road, and on the west side of an intersecting road

marked, Cedar Lane. These two roads are not at right angles but at an acute angle—perhaps fifty degrees.

The testimony and exhibits show that running along the north side of Main Road, the west side of Cedar Lane and enclosing both sides of the defendant's property there runs a stone wall surmounted by a high iron fence, in all about eight feet high, and that inside the iron fence there are several buildings. Away to the north of these buildings and iron fence, lie the defendant's greenhouses and dwelling.

The plaintiff on the afternoon in question had just delivered papers at one of these buildings on the north side of Main Road and was intending to deliver papers at the other building on Cedar Road. In place of walking down the Main Road to its intersection with Cedar Lane and then up Cedar Lane to the other building where a box was provided for the delivery of newspapers, he took a short cut across the defendant's lawn, which is no part of the premises leased to or occupied by the persons in possession of either of the buildings, but is separated from both by roadways.

At the time, the defendant's wife, in company with a neighbor, was walking along one of these dividing roads with the dog and upon the plaintiff approaching within a few feet of the dog, he was bitten.

At the close of the plaintiff's case a motion was made for a non-suit on several grounds:

1. That there was no proof that the dog was vicious.

2. That there was no proof of scienter.

3. That the plaintiff was guilty of contributory negligence, and

4. That the defendant owed the plaintiff no duty.

At the conclusion of the defendant's case, motion was made to direct a verdict upon substantially the same grounds. This motion was also denied and to both rulings exceptions were asked and allowed. It is from the effect of these rulings that this appeal is taken.

The jury found in favor of the plaintiff Emil Ebeling (the boy) $400, and in favor of Rudolph Ebeling (the father) $23.50.

POINT I.

Contributory Negligence.

The proof shows that before the day in question the plaintiff had heard the dog had bitten someone, yet, with that knowledge he walked from the concrete house, through the gate, across the first private road and the lawn directly toward him with an unobstructed view all the way for over one hundred feet to where the dog was.

"Emil Ebeling (Cross examination).

"Q. At the time you were bitten were you on your way across from the concrete building to the other one? A. Yes, sir.

"Q. Was anybody with this dog at the time you were bitten? A. Miss Mutillod.

"Q. And there was another small dog there wasn't there? A. Yes.

"Q. These two dogs were playing, were they not? A. I do not know about that.

"Q. You had a clear and unobstructed view of these two dogs from the time you left the open gateway and while you were crossing this lawn, did you not? A. I did not see him until I was about 5 feet away from him.

"Q. And you were walking toward him? A. Yes, I was not walking directly for them; I was walking directly for the stoop.

"Q. And going from this open gate which you say you entered on the north side of the main road toward the place where you was to deliver the papers in this frame building

in the centre of the diagram, they were walking directly in your path, were they not, the dogs and Mrs. Mutillod? A. Yes.

"Q. And that is a distance from this open gate to this house of several hundred feet, isn't it? A. Yes, sir.

"Q. Why is it that you could not see the dogs and Mrs. Mutillod all the time you were crossing over this lawn? A. I was reading a paper.

"Q. How long had you known this dog before the accident had happened? A. I saw him once.

"Q. Ever had any talk with anybody about him? A. *Somebody told me that he bites,* but then the tenants of the house said 'you shouldn't be scared of him, he won't bite or anything like that.'

"Q. Who told you that? A. I do not know who told me.

"Q. *When did you find out that he bit?* A. *That I could not tell you.*

"Q. *Was it a month or a year before this accident?* A. *Say a month.*

"Q. Eh? A. *Say a month or two.*" (Page 32.)

POINT II.

The Plaintiff a Trespasser.

The defendant at great expense had laid out the lawn and twice before the occurrence complained of the defendant had seen him there and each time threatened to punish him if he ever caught him on the lawn again.

MARIUS MUTILLOD (Direct, page 76):

"Q. When you saw him crossing the lawn what if anything did you say to him? A. I told him that if I ever catch him again to cross that lawn that I will either *stop his boss from bringing the paper to my property* or do something. I told him surely that I would never see him again cross that lawn.

"Q. Why did you tell him that? A. Because I did not want anybody to pass on that lawn, to make a path on that lawn that I spent so much money to fix it up.

"Q. Was there any other time that you spoke to this boy about crossing the lawn? A. I spoke to him twice.

"Q. When was the other time? A. It was following ahead of that. It was before that time when I spoke to him.

"Q. How much before? A. Oh I should think in about another month before."

FANNIE HERMANN (Direct, page 91):

"Q. Do you remember seeing Mr. Mutillod talking to Emil about three or four weeks before the 13th of March, 1915? A. Yes, sir.

"Q. Where were you at the time of this conversation? A. I was standing by my window.

"Q. Where was Mr. Mutillod? A. Mr. Mutillod was right in the middle—not far from my house in the main road, a private road.

"Q He was on this main road, was he, marked 'private road' on the diagram? A. Yes, sir.

"Q. Where was the boy Emil? A. He was just going across the lawn from that——.

"Q. Just indicate on the map where the boy was? A. About here (indicating).

"Q. Just inside of the gate, was he? A. Yes, sir.

"Q. What did Mr. Mutillod say to him? A Mr. Mutillod said **'If you do that again, I am going to break your neck'.**

"Q. If you do what again? A. **Cross that lawn once more. 'If I see you once more on that lawn, I will break your neck'.**

"Q. Anything else? A. 'And I will tell your boss about you.'"

* * * *

"Q. And what was it that attracted your attention to the conversation? A. Because Mr. Mutillod speaks a kind of loud, and Mr. Mutillod give anybody——.

"Q. I didn't hear you. A. Mr. Mutillod speaks very loud when Mr. Mutillod give anybody a reprimand.

Q. You think he was real mad this day? A. I am positively sure" (page 92).

POINT III.

Plaintiff not a Licensee.

The plaintiff was not a licensee on these premises, but a mere trespasser, but assuming that it will be urged that he was a licensee, the defendant would have owed him **no duty** except to refrain from **acts "wilfully injurious."**

The house where the plaintiff delivered the first paper (the concrete building) borders directly on the Main Road, and the frame building to which he was going borders directly on Cedar Lane, the latter having a box provided for the papers shown on and referred to in the exhibit, but in place of using the roads, the plaintiff took, as he says a "short cut" across the lawn and two "private roadways."

EMIL EBELING (Direct, page 21):

"Q. Where were you on March 13, 1915? A. **Delivering papers on Mr. Mutillod's lawn.**

"Q. What way were you going through the property? A. **I was going across the lawn.**

"CROSS EXAMINATION (page 30):

"Q. The part on the diagram which is left of the roadway marked 'private road' had been laid out into a lawn before this accident, had it not? A. Yes, sir.

"Q. How long before? A. Ever since I was there.

"Q. Well had not this roadway marked 'private road' been curbed, and had not this part on the left side of this road as shown on the diagram been levelled off, smoothed off and graded just before—just a short while before this accident happened? A. I do not understand the question.

"Q. I call your attention to the space west of the part on the diagram marked 'private road' to green houses on the diagram colored in green. Had not that part been levelled off, graded and the lawn made there within a

few months you were there? A. I would not call it a lawn.

"Q. There was grass on it, wasn't there? A. Yes, sir.

"Q. And at the time you were bitten were you on your way across from the concrete building to the other one? A. Yes, sir.

"Q. And if these roads were at right angles or if the distance was as short to and from the concrete building to this building in the center of the diagram you would not take this short cut across the lawn, would you? A. What do you mean from that cement house, the road going right through—the same as I always went?

"Q. Yes (repeat the question).

"BY THE COURT:

"Q. Do you understand the question?

"WITNESS: Not quite. What I think he means is from that gate right over to the stoop, is that what he means—the straight road? (goes to the map).

"WITNESS: A straight road across from there to there is that what he means?

"COURT: No he does not mean that, I take it. Suppose you restate your question, Mr. Hopkins.

"Q. **You went across the lawn from the concrete building to the frame building because it was a short cut?** A. **Yes, sir.**

"Q. **And less trouble to go that way than by the road?** A. **Yes, sir.**" (Page 33.)

"LUCY MUTILLOD:

"Q. Now at the time he was bitten was he on the lawn or on the driveway? A. *Oh no, on the lawn. He was here* (indicating) *where the dogs were playing* (page 72).

The following decisions are in point.

"A mere permission to pass over dangerous lands or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the party giving such permission, **except to refrain from acts wilfully injurious.**

"One who enjoys such permission is only relieved from being a trespasser and must assume all the ordinary risks attached to the nature of the place or the business carried on."

Vanderbeck v. Hendry, 43 N. J. Law, 467.

"The owner of lands is under no obligation to keep them in a safe condition for the use of a person who comes upon them not by the invitation of the owner, but merely by his permission."

Fitzpatrick v. Glass Mfg. Co., 61 N. J. Law, 378.

"A land owner is ordinarily under no obligation to a mere licensee or to a trespasser to keep his premises in a safe condition and the fact that the licensee or the trespasser is an infant of tender years affords, no reason for modifying the rule, and charging the land owner with the duty which does not otherwise exist."

D. L. & W. Ry. Co. v. Reich, 61 N. J. L., 635;
Mathews v. Bensel, 51 N. J. L. 30;
De Gray v. Murray, 69 N. J. L., 458;
Marshall v. Wellwood, 38 N. J. Law, 339;
Ulshowski vs. Hall, 61 N. J. Law, 375.

POINT IV.

Plaintiff not an invitee.

No Express Invitation.

It will be urged that because this boy was on the defendant's premises about to deliver newspapers to one of his tenants, that he is an invitee and that therefore the defendant owed him a higher duty than if he were licensee.

There is not a particle of testimony to show

that he occupied that character. The public roads mentioned, Main Road and Cedar Road furnished every purpose he required in the delivery of newspapers. He says he crossed the lawn before, but does not show that the defendant ever knew it; in fact the testimony is that when the defendant did see him crossing the lawn he drove him off and threatened to "break his neck" if he found him there again.

No Implied Invitation.

In every one of the cases where it is held that an implied invitation existed, there is something to show what the character of the thing was that took the injured person out of the class of licensee or trespasser and placed him in the class of invitee thus:

In *Philips v. Library Company,* the place where the plaintiff was injured is as described by the witnesses "a beaten path". "A pathway that could be distinguished on the grass" "a foot path showing its marks upon the grass where it had been troden", "a path that could be discerned by any one," "a path used regularly by members of the society whenever they wanted to use it for 20 years."

Philips v. Library Co., 55 N. J. Law, 307.

In *Sommer v. Public Service Railway,* the plaintiff's intestate, was in the employ of a contractor who was engaged by the Public Service to build a cupola upon the roof of said premises and that the decedent necessarily, in the course of such employment, entered upon such house in close proximity to wires and in the course of his work came in contact with one of the wires and was killed thereby. He was where he had a perfect right to be in the course of his employment by the invitation of the defendant.

Sommer v. Public Service Corp., 79 N. J. L., 349.

In *Siggins v. McGill,* the plaintiff was a tenant of the defendant in an apartment house in Jersey City and was injured while descending a stairway used in common by himself and the other tenants, and the court held, that in respect to passageways, stairways and the like, the landlord held out an invitation to others to enter upon and use such places and that he is bound to use reasonable care to have such passageway and stairs reasonably fit and safe for the use to which he has invited others to make of them."

Siggins v. McGill, 72 N. J. L. 263.

In *Selfers v. Vanderbeek & Sons,* the intestate fell from a balcony into a lumber yard, where he had gone to buy lumber. He was there not only on business with the defendant, but the superintendent of the defendant had asked him to go to the particular place on the balcony where the accident, which caused his death happened.

Selfers v. Vanderbeek & Sons, 88 N. J. L. 636.

No Duty Owed to Invitees who Exceed the Bounds of Their Invitation.

It cannot be urged that plaintiff was inside these premises by express invitation, but if it is urged that in going to the frame building where the tenants were, an invitation might be implied to go by the rear of that house, he had no business on the lawn west of the "private roadway". The lawn is no part of the curtilage of the frame building occupied by the tenants. It is separated by the roadway and even if plaintiff were an express invitee inside the premises, he would have no business off the roadway.

"The liability of the owner or occupier of premises, for their condition is only co-extensive with his invitation and a person on private grounds by invitation of the owner, going of his own volition into other parts of the premises, exceeds the bounds of his invitation, and if he does not thereby become a trespasser, goes out of his way to create a risk for himself."

Philips v. Library Company, 55 N. J. L., 307.

"Where a railroad company provides offices for the transaction of its business, accessible from the public streets, the presence in the freight yard of the company of a person having business with such offices, is not a necessary incident of his business with the company. He is at best a licensee towards whom the company owes no special duty."

Disbald v. Penn. R. R. Co., 50 N. J. L., 478;

Tel. Co. v. Speicher, 59 N. J. Law, 23.

"Where the owner or occupier of lands by express invitation induces a person to make use of a portion of the premises for an expressed purpose, his liability is confined within the limits of the invitation, and does not extend to injuries received by the person invited while using the premises for a purpose not expressed and not authorized by the invitation."

Ryerson v. Bathgate, 67 N. J. L., 337.

"Invitation which creates such a relation may be express, as when the owner or occupier of land, by words invites another to come on it or make use of it or something thereon; or it may be implied, *as when such owner or occupier, by acts or conduct leads another to believe that the land or something thereon was intended to be used as he uses*

them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used," this definition originally given in *Sweeny v. Old Colony Railroad Co.,* 10 Allen, 368, was approved and adopted by our Court of Errors.

Philips v. Library Co., ubi, supra.

"It will be observed that, in the case of an implied invitation, the relation is imposed upon the owner or occupier of land *only when he has done something which justifies one who enters upon the land and makes use of it or something upon it in believing that he intended such use to be made; and he who makes such use can claim the relation only when he is justified by the acts or conduct of the owner or occupier in believing that such use was intended,* and entry and use of such invitation are thus distinguished from entry and use by mere permission."

Turess v. N. Y., Susq., West. R. R. Co.,
61 N. J. L., 318 and 319.

POINT V.

No proof of vicious propensity.

The only testimony offered for the purpose of showing a "vicious propensity" or of "scienter" was that of the witness Montigel (page 38) and the witness Colombo (page 42).

The Montigel incident happened in the defendant's presence so that if what did happen shows "vicious propensity" then "scienter" would be proven.

So far as the witness Colombo is concerned, he testified the dog bit him, but the only proof of "scienter" is that two and one-half years afterward, in a quarrel with the defendant about the right to use a road, he concluded the quarrel with

the words, "and another thing tie your dog." Both of these happenings were **two and one-half years before** the accident, when, **according to all the testimony the dog was a pup less than a year old.**

We can find nothing in the cases which defines what a "vicious propensity" constitutes, except that in *Evans v. McDermott,* 49 N. J. Law, 163.

> **"A mischievous propensity is a propensity from which injury is the natural result."**

Is proof that a playful pup less than a year old, taking hold of the trousers of a passerby, sufficient to justify an inference that two and one-half years later he would have a "vicious propensity," or that the happening of such an occurrence as described, would charge his owner with the knowledge of a "vicious propensity?"

We submit that there is nothing in the testimony from which the jury could reasonably conclude from the Montigel incident that the dog was vicious, or that would charge the owner with notice of a "vicious propensity," and that it was error for the Court to permit the jury to pass on the question.

> "The power of a judge to order a non-suit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in favor of which the ruling is made, but the test is whether there is *any testimony from which the jury can reasonably conclude that the facts sought to be proven are established.*"
>
> *Baldwin v. Shannon,* 43 N. J. Law, 596.

POINT VI.

The defendant not an insurer.

This case seems to have been tried throughout by the plaintiff upon the theory, and the Trial Court in its opinion discharging the rule to show cause assumes, that the defendant in this case was an insurer.

On part of the motion to direct a verdict, the following language was used by the defendant's counsel:

> "but I just wanted to speak about that one thing we started to argue before recess. My motion was that unless he (the boy) was brought out of the licensee class and placed in the invitee class, of course there had to be something to show wilful negligence on the part of the defendant."
>
> "THE COURT: I think I am not going to take that restrictive stand, Mr. Hopkins. As I have thought over this matter since argument upon the motion to non-suit, **I am more inclined to the belief than I was that it is immaterial what position this plaintiff was in.**"

In the Court's rule discharging the rule to show cause, the concluding paragraph is:

> "I am of the opinion, however, that the better and greater weight of authority is in favor of the principle that, a scienter being established, *the owner is liable as* **an insurer even though the person injured be a trespasser.**"

With great respect to the learned Trial Judge, **this is NOT the law of New Jersey.**

The nearest approach to anything like a rule making the keeper of a dog an insurer is the language used by Mr. Justice Voorhees in *Emmons v. Stevane,* 77 N. J. L., 570:

> "But in the case of animals which had been domesticated, a presumption arose that they

were not of a vicious nature, and hence their keeper was liable only in case the animal was vicious and he had knowledge of its vicious propensities. The action against the harborer did not proceed upon negligence, but if he had knowledge of the vicious nature of the animal, he was liable as an insurer, the gravamen of the injury being the wrong of keeping the animal with the knowledge of its viciousness, and hence it was essential that the master's knowledge should be averred and proved (*May v. Burdett,* 9 Atl. & E. (N. S.) 101; Thompson's Comm. Neg., pp. 839-844; *Woolf v. Chalker,* 31 Conn., 121; *Smith v. Donohue,* 20 Vr., 548).

"And of like import *are* the decisions in this state (*Gladstone v. Brinkhurst,* 41 Vr., 130) *except perhaps as modified by what was said in De Gray v. Murray,* 40 Id., 458."

In the first place, the rule laid down in *De Gray v. Murray* receives the approval of the Court in the second paragraph cited. But the case of *May v. Burdett,* referred to in the first paragraph as authority for the **insurer doctrine, has been distinctly repudiated at least twice in this state;** first in the case of *Marshall v. Wellwood* (Beasley, C. J.) 38 N. J. L., 339, and, second, in *De Gray v. Murray,* 69 N. J. L., 458 (Gummere, C. J.)

In *Wellwood v. Marshall,* Chief Justice Beasley, after repudiating the insurer doctrine of the English cases to which particular attention is called on page 340, states the rule as follows:

"I cannot agree that, from these indications, the broad doctrine is to be drawn that a man in law is an insurer for the acts which he does, such acts being lawful and done with care shall not injuriously affect others. * * * The common rule, quite institutional in character, is that, in order to sustain an action for tort, the damage complained of must have come from a *wrongful act.*"

And in *De Gray v. Murray,* Chief Justice Gummere uses the following language:

> "In England and in some of our sister states, it is held that the owner of an animal which has a propensity to attack and bite mankind, who keeps it with the knowledge that it has such a propensity, does so at his peril, and that his liability for injuries inflicted by it is absolute." (Citing *May v. Burdett,* supra.)

The Court then refers to the repudiation of this doctrine and continues:

> "The right of a man to keep a vicious dog for the protection of his home and property is conceded in *Roehrs v. Reinhoff,* 26 Vr., 475. He is of course bound to exercise a degree of care, commensurate with the danger to others which will follow the dog's escape from his control to so secure it that it will not injure anyone who does not unlawfully provoke or intermeddle with it. (*Worthen v. Love,* 60 Vr., 285). **But if the owner does use such care and the dog nevertheless escapes and inflicts injury, he is not liable.**"

The other case relied on in Judge Voorhees's opinion in *Emmons v. Stevane* as authority for the insurer doctrine, namely *Woolf v. Chalker,* 31 Conn., 121, is based upon a statute of Connecticut, as an examination of the case itself will disclose. Part of the language of the case is as follows:

> "This is an action of trespass for an injury done to the person of the plaintiff by a dog of the defendant *brought under the statute* (Rev. Stat., Title 1 Sec. 282), which provides that, 'whenever any dog shall do any damage either to the body or property of any person the owner or keeper, etc., shall pay such damage to be recovered in an action of trespass.' "
>
> "The rule that the owner of a vicious dog is an insurer, is undoubtedly the rule of some other states, but an examination of the authorities will disclose that in nearly all of such states it is made so by statute and the cases are based on such statutes."

See:

Woolff v. Chalker, 31 Conn., 121;
Sanders v. O'Callaghan, 111 Iowa. 574; 82 N. W., 696;
Carrol v. Marious, 98 Me., 259; 56 Atl., 848;
Marble v. Ross, 124 Mass., 44;
Peck v. Williams, 24 R. I., 585;
Mass. Pub. Statutes, 102, Par. 95;
Hathaway v. Hinkhom, 148 Mass., 85;
Kentucky Statutes, 68-a;
McGuire v. Ringross, 41 La. Ann., 1029;
Fye v. Chapin, 121 Mich., 675;
Gries v. Zeck, 24 O., 329;
Corpus Juris, Vol. 3, p. 104, sec. 340 and cases cited.

It is respectfully submitted that the judgments under review should be reversed.

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