## HUTCHINS *v.* MAUGHAN.

HERRING C.J. OCTOBER 9, 23, 1946.

*Trespass—Defendant laying poisonous baits—Baits picked up by complainant's dogs—Injury consequential, not direct—No action in trespass.*

The defendant laid poisonous baits on unfenced land, and the baits were subsequently picked up by complainant's dogs, which died as a result. On a claim for damages by the complainant laid in trespass,

*Held,* that the injury suffered by the complainant was consequential upon and not directly or immediately occasioned by the act of the defendant and that trespass did not lie.

ORDER TO REVIEW.

Henry Hutchins issued a complaint in a Court of Petty Sessions at Camberwell against William Robert Maughan, claiming damages in respect of the loss of two sheep dogs owned by him, which had died as a result of picking up poisonous baits laid by the defendant. Further facts are set out in the judgment. The claim was laid alternatively in negligence, nuisance or trespass. The complaint was heard by a police magistrate on the 22nd August 1946, the defences raised including a defence of contributory negligence. The police magistrate upheld the defences taken to the claims of negligence and nuisance, but found for the complainant on the claim for trespass and made an order in his favour for 50*l.* damages. The defendant obtained an order *nisi* to review this decision on the ground that there was no evidence to justify the police magistrate in holding that the defendant committed trespass to the complainant's dogs.

*Smithers,* for the defendant, to move the order absolute.

*Wilson,* for the complainant, to show cause.

[Counsel referred to *Bird* v. *Holbrook* (*a*); *Ilott* v. *Wilkes* (*b*); *Scott* v. *Shepherd* (*c*); *Stanley* v. *Powell* (*d*); *Deane* v. *Clayton* (*e*); *Jordin* v. *Crump* (*f*); *Sadler* v. *South Staffordshire & Birmingham District Steam Tramways Co.* (*g*); *Ogle* v. *Barnes* (*h*); *Holmes* v. *Mather* (*i*); *Hurdman* v. *The North Eastern Railway Co.* (*j*); *Courtney* v. *Collet* (*k*).]

*Cur. adv. vult.*

(*a*) [1828] 4 Bing. 628.
(*b*) [1820] 3 B. & Ald. 304.
(*c*) [1773] 2 Wm. Bl. 892.
(*d*) [1891] 1 Q.B. 86.
(*e*) [1817] 7 Taunt. 489.
(*f*) [1841] 8 M. & W. 782.
(*g*) [1889] 23 Q.B.D. 17.
(*h*) [1799] 8 Term. Rep. 188.
(*i*) [1875] L.R. 10 Ex. 261.
(*j*) [1878] 3 C.P.D. 168.
(*k*) [1697] 1 Ld. Raym. 272.

HERRING C.J. read the following judgment: This is an order to review a decision of a police magistrate in which, on a special complaint, he awarded the complainant the sum of 50*l*. The claim arose out of the loss by the complainant of two sheep dogs. They both died as a result of picking up poisonous baits laid by the defendant. The baits were laid on unfenced land at Balwyn. On this land the defendant was accustomed to graze his horses.

The complainant is a drover and on Easter Saturday 1944 he was droving in the vicinity 2,000 ewes. On his way to some unfenced land north of the land where the baits were picked up he met the defendant, and was told by him that the paddock north of the Sanctuary in the vicinity was poisoned. With regard to the land where the baits were picked up he was also warned that there were baits all along the creek. The complainant apparently thought the defendant was bluffing about the poison along the creek, and a day or so later rode down along the creek with his dogs. He saw no sign of baits and two days later moved his sheep in and brought his dogs with him. Shortly after the dogs picked up baits and died.

The complainant's claim was laid alternatively in negligence, nuisance or trespass. The police magistrate upheld the defences taken so far as negligence and nuisance were concerned, but gave judgment for the complainant on his trespass claim. Before me it was conceded that the police magistrate was right in his decision as to negligence and nuisance. And the only question argued before me was whether on the facts of the case the police magistrate could properly enter judgment as he did for the complainant on his trespass claim. The laying of the baits was admittedly an unlawful act, and consequently it was not disputed that the complainant had a cause of action for the injuries he suffered as a consequence thereof. But it was contended for the defendant that such cause of action sounded only in case and not in trespass, and that the complainant having failed in his claims in case, viz., those for nuisance and negligence, is now without remedy.

The basis of the defendant's contention was that the injury suffered by the complainant in the present case was not occasioned by but was merely consequential upon the defendant's act complained of, viz., the laying of the baits, and so was not a trespass. The principle was thus stated in 1725 in *Reynolds* v. *Clarke* (*l*): "The distinction in law is, where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, etc., and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, etc. In the first case trespass *vi et armis* will lie; in the last it will not, but the plaintiff's proper remedy is by an action on the case."

(*l*) [1725] 2 Ld. Raym. 1399, at p. 1402.

In 1773 in the famous case of *Scott* v. *Shepherd* (*m*), Blackstone J. said he "took the settled distinction to be that where the injury is *immediate,* an action of *trespass* will lie; where it is only *consequential,* it must be an action on the *case.*" And he cited the example of a man's throwing a log into the highway; an example later made use of by Le Blanc J. in 1803 in *Leame* v. *Bray* (*n*) where the learned Judge said: "But in all the books the invariable principle to be collected is that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, there the remedy is in case. And the distinction is well instanced by the example put of a man's throwing a log into the highway; if at the time of its being thrown it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case . . . trespass is the proper remedy for an immediate injury done by one to another; but where the injury is only consequential from the act done, there it is case."

And that the question whether the injury is immediate or consequential is still vital, in spite of procedural reforms, and that the old rule still applies that injury that is consequential is not a trespass, is made clear in an article by Professors Goodhart and Winfield in the *Law Quarterly Review* for 1933, vol. 49, p. 359, at p. 366. See, too, *Salmond on Torts* (7th ed., 1928), p. 230, where the learned author says: "To constitute a trespass, however, it is not enough that the injury should be forcible; it must be also direct and not merely consequential. An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act; it is consequential on the other hand, when, by reason of some obvious and visible intervening cause, it is regarded, not as part of the defendant's act, but merely as a consequence of it. In direct injuries the defendant is charged in an action of trespass with having done the act complained of; in consequential injuries he is charged in an action of case with having done something else, by reason of which (*per quod*) the thing complained of has come about." The learned author in a footnote to p. 231 points out that the distinction does not seem to possess any logical basis. And he adds—"The distinction between an act and its consequences—between doing a mischief and causing one—seems to be nothing more than an indeterminable difference in degree."

Each case must, of course, be determined on its own facts and in the present case the question is whether on its facts the injury the complainant suffered in the loss of his dogs was immediate or consequential, that is to say, whether it was directly occasioned by the defendant's act in laying the baits or was merely consequential upon that act. Now

(*m*) [1773] 2 Wm. Bl. 892, at p. 894. (*n*) [1803] 3 East. 593, at pp. 602-3.

the baits were laid by the defendant before the complainant took his dogs on to the land in question. They may even have been laid before he arrived in the vicinity. And had he not chosen to come into the vicinity and bring his dogs with him he would have suffered no injury from the defendant's act. Nor indeed would he have done so, had he not taken his dogs on to the land where the baits were laid. The doing of the act therefore of itself did him no mischief. Before he could suffer an injury, he had himself to intervene by coming to the land and bringing his dogs thereon.

In these circumstances the injury he suffered cannot, in my opinion, be said to have followed so immediately in point of causation upon the act of the defendant as to be termed part of that act. It should rather be regarded merely as consequential upon it and not as directly or immediately occasioned by it. And so trespass does not lie in respect of defendant's act in laying the baits. Had the baits been thrown by the defendant to the complainant's dogs, then no doubt the injury could properly have been regarded as directly occasioned by the act of the defendant, so that trespass would lie. As it was, it was necessary for the complainant himself to bring his dogs with him to the baits in order that the injurious consequences, of which he complains, should result from the defendant's act. His position is like that of the man who, going along the road upon which a log has been thrown, receives an injury by falling over it. In such a case the man who threw the log upon the road has, of course, caused the mischief, but trespass does not lie, as the injury is consequential upon his act and not immediately or directly occasioned thereby. Had the man who fell over the log not passed that way, he would have suffered no injury from the other's act.

For the complainant Mr. Wilson sought to distinguish the case of the log thrown into the highway. He urged that the baits in this case were, unlike the log, inherently dangerous wherever laid, being possessed of a faculty for mischief by reason of the poison contained in them, a faculty with which the defendant had himself invested them. The injury complained of resulted from this faculty, and so should be regarded, according to his contention, as directly and immediately flowing from the defendant's act and not merely as a consequence therefrom.

The distinction sought to be drawn is not, in my opinion, a sound one. A log lying in a highway has a faculty for mischief; it is then a source of danger to passers-by. The person who throws it into the highway invests it with its faculty for mischief. The act complained of by a man who falls over it as it lies in the highway, is the throwing of it into the highway. In the present case the act complained of is not the preparing of the baits but the laying of them. Had they been after

preparation retained in the storeroom of the defendant, they would have been as harmless to dogs roaming the land where the complainant's dogs met their death as the log was to passers-by before it was thrown on to the highway.

The view I have taken of this case is supported by such cases as *Townsend* v. *Wathen* (*o*); *Deane* v. *Clayton* (*p*); *Ilott* v. *Wilkes* (*q*); *Bird* v. *Holbrook* (*r*), and *Jordin* v. *Crump* (*s*).

All these actions were declared in case. In *Townsend* v. *Wathen* (*t*) the act complained of was the setting of traps baited with flesh, around which annis seed was trailed, some of the traps being set so near to the plaintiff's house that the baiting and the annis seed might be scented by his dogs, which were kept there. Dogs of the plaintiff were by the scent enticed to the traps, caught therein and thereby injured. After a verdict for the plaintiff a rule *nisi* was granted for setting aside the verdict as against evidence, but the Court held that there was evidence to go to the jury that the traps were placed as they were for the purpose of attracting the plaintiff's dogs as well as others. The rule was discharged. It was never suggested that trespass lay. The injury in this case was wilful, and had it been immediate and not consequential, trespass only would have lain and not case—see *Law Quarterly Review*, vol. 49, at pp. 365-6. It is significant for the present purpose that the plaintiff was only entitled to succeed as he did on the basis that the injury was consequential.

In *Deane* v. *Clayton* (*u*) the defendant had set iron spikes in trees along the course of hare paths at a height from the ground to allow a hare to pass under them without injury, but to wound and kill a dog. The plaintiff's dog, pursuing a hare from a neighbouring wood, ran against one of these spikes and was killed. The Judges of the Court of Common Pleas were divided on the question whether in the circumstances an action lay. There was, however, no suggestion that the action was wrongly declared in case. Indeed the judges would seem to have agreed that the injury complained of was consequential and not immediate. Thus Park J (*v*): "Here the fixing of the spikes in the defendant's own ground could of itself not be a trespass, but it is the consequence of the act of which the plaintiff complains." And Dallas J. (*w*): ". . . if you may not kill a dog by your own immediate act, or order, neither can you by means provided to induce such consequence, when not personally present; for what, it is asked, is the difference between killing with your own hand, with an instrument placed therein at the

(*o*) [1808] 9 East. 277.
(*p*) [1817] 7 Taunt. 489.
(*q*) [1820] 3 B. & Ald. 304.
(*r*) [1828] 4 Bing. 628.
(*s*) [1841] 8 M. & W. 782.
(*t*) [1808] 9 East. 277.
(*u*) [1817] 7 Taunt. 489.
(*v*) [1817] 7 Taunt. 489, at p. 510.
(*w*) [1817] 7 Taunt. 489, at p. 520.

time, or by an instrument placed by that hand on the ground, for the future purpose? That which it is unlawful to do by direct means, it is equally unlawful to do by indirect means;".

*Ilott* v. *Wilkes* (*x*) and *Bird* v. *Holbrook* (*y*) were both cases in which trespassers on the defendant's land were injured by spring guns set for the very purpose of injuring trespassers. Both cases proceeded throughout on the basis that the injuries suffered were consequential and not immediate. Neither action would have been maintainable in case, had the injury been immediate.

*Jordin* v. *Crump* (*z*) was a case in which the plaintiff's dog was injured by running on a dog-spear set by the defendant. It proceeded throughout on the basis that the injury complained of was consequential and not immediate.

In my opinion in the present case the police magistrate was wrong in holding that the complainant's claim in trespass was maintainable. The order *nisi* will be made absolute and the complaint dismissed.

*Order absolute.*

Solicitors for the defendant: *Morrison, Sawers & Teare.*

Solicitors for the complainant: *Mullett & Langford.*

F. R. N.

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(*x*) [1820] 3 B. & Ald. 304.
(*y*) [1828] 4 Bing. 628.
(*z*) [1841] 8 M. & W. 782.