Saskatchewan Supreme Court

POLICE COURT

Citation: R. v. Kokatt
Date: 1944-01-04

Animals — Wilful Maiming of Dog — S. 537 (a) Cr. Code — Dog Emasculated — Defence That Dog a Trespasser — What Necessary to "Colour of Right" Under S. 541.

In order for an accused charged under sec. 537 (*a*) of the *Criminal Code*, R.S.C., 1927, ch. 36, as amended by 1930, ch. 11, sec. 10, and 1931, ch. 28, sec. 12, with the wilful maiming of a dog, etc. to escape liability under the saving section, 541, on the ground that his act was done under "colour of right" his belief in his right to do what he did must have been, if not an accurate one, at least a reasonable one; it must have been founded on some sort of recognized custom. The accused herein was *held* not to have been in that position.

[Note up with 1 C.E.D. (C.S.) *Animals*, sec. 22; 2 C.E.D. (C.S.) *Criminal Law*, sec. 14.]

Council:
Corporal M. B. Sharpe, R.C.M.P., for prosecution.
A. Burnett, K.C., for accused.

January 4, 1944

[1] THOMSON, P.M. — The facts here are pretty clear. Kokatt, the accused, and Jensen, the informant, are farmers and neighbours, their dwelling places being hardly two miles apart. Jensen owns a dog "Sport," which he uses for sheep and which he has hitherto valued as a good reliable working dog. Kokatt has recently gone into the business of trading in dogs as a side line to his farming and ranching. He seems to take this side line seriously, which is more than the other witnesses, both prosecution and defence, do.

[2] In this side line Kokatt has been keeping two bitches in 1943, with possibly an occasional extra one. Needless to say the presence of these females becomes twice a year an attraction to male dogs. We have had the evidence of farmers who are workers of dogs, and it seems that for a distance of as much as two miles a female may lure a male dog while she is in heat. So it is evident that Kokatt in his dog trade will, during three months of each year (and for longer if his business increases, and with it his stud) be subjected to visits from male dogs. He can diminish the nuisance by keeping the females locked up, but he cannot entirely eliminate it.

[3] To meet the situation Kokatt has been importuning his neighbours to tie up their male dogs while his bitches are in heat. One farmer at least has obliged him. The informant has not, though there is no cause to say that the informant has been churlish or unreasonable. It is clear that a farmer with working dogs would be under a serious burden if he were required to tie up his dogs for considerable periods out of each year. Moreover the dogs would be badly affected in their disposition by this.

[4] Kokatt however, although knowing the allure of his female dogs, claims that if a male dog trespasses on his land he is justified in repulsing it, even to the extent of maiming or killing the animal. *The Sheep Protection and Dog Licensing Act*, R.S.S., 1940, ch. 250, gives him a right to do this in so far as he can show that sheep are being threatened by sheep worriers. And only so. (*Wilgress v. Ritchie* [1920] 2 W.W.R. 421, 28 B.C.R. 345, primarily a civil suit, seems to me to apply.) But here I have no evidence to the effect that Sport is a probable sheep worrier. He has been proved a worrier of nothing at

all—except Mr. Kokatt. Sport was a nuisance only, not a danger.

[5] After many preliminary untruths and evasions Kokatt did on his oath admit having emasculated the informant's dog as charged. This seems clearly a case for sec. 537 *(a)* of the *Criminal Code*, R.S.C., 1927, ch. 36, as amended by 1930, ch. 11, sec. 10, and 1931, ch. 28, sec. 12, unless accused can escape under the saving clause, sec. 541.

[6] There is little or nothing to suggest "legal justification or excuse." There is something to suggest "colour of right," if by colour of right one means an impression of a lawful right in the doer's own mind. I take it this phrase would protect a farmer who, e.g., shoots a dog while the farmer is trying to protect his own property, or what he believes to be his property, even if he shoots the wrong dog. I do not take it to protect a man who pursues a definite line of conduct under a mistaken conception of law. A man is not protected in a criminal way in destroying his neighbour's property simply because he gets some crazy notion into his head and lets it stay there.

[7] Here Kokatt has no support from the farmers who gave evidence that could cause him to entertain the notion that he alleges. He claims to have believed that he had an absolute right to do this irreparable act towards any trespassing dog. True, he did not exercise that right just at once; he first tried to reason with the dog's owner; but that was only Kokatt's courtesy! This is seen from the evidence of his own witness Harper Wells, who tied up his dog only to oblige Kokatt. Kokatt expected all his neighbours to comply with his demand that, whenever he proclaimed a state of emergency for his own convenience, the neighbours must put themselves under a state of inconvenience for weeks at a time. He was making a law to benefit himself, and a far reaching law.

[8] Mr. Kokatt is an old man, a farmer of long standing, and takes a great interest in what he thinks is "farmers' law." It is not easy to see that he could have gone wrong here on a colour of right. His belief in order to protect him must have been, not an accurate one, but at least a reasonable one. It must have been founded on some sort of recognized custom. There is no such position here. The evidence of every neighbour is against him. He has the right to pound; he has the right to damages; he has the right to injunction; he has a specially drastic right to protect his sheep. All these statutory rights were at his command; and there is no reason to think that any one of them would have failed in this case to give him adequate protection. His attitude is: "I really think a farmer like me ought to have this extra protection; and I'm going to take it anyhow."

[9] I'm not overlooking the many cases that Mr. Burnett has put before me. But in each such case where the accused escaped it was because of necessity; danger to his animals was actually in progress or was imminent. For example, a woman raising chickens could not arrest a fox in the act of raiding her chicken run. In the present case the only living thing in danger was secure behind stout walls. The dog Sport could be arrested, and was arrested. Actually Sport was so easy to handle that this old man, unaided, carried out this painful operation on him. So the test in all the defence cases is absent here.

[10] It is worth while to refer to *Halsbury*, old ed., vol. 1, sec. 857, and to *Rex ex rel Steel v. Stewart* [1937] 1 W.W.R. 400. Mr. Burnett's detailed and skilful brief contains many other references, and Corporal Sharpe has been at trouble to fish out useful matter.

[11] Because this accused has been stricken by his wife's long illness and death last week I think a nominal fine is all he should be asked to pay, and I believe the informant will agree, the latter being actuated only by the wish to establish the principle. Accused is therefore fined $5 and costs, or 15 days' imprisonment. The costs are rather large because of the several adjournments made at the request of

accused. [The costs, amounting to $41.55, were here itemized.]

[12] The accused was given until January 14 to pay.