KeyCite treatment
Most Negative Treatment: Distinguished
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1957 CarswellOnt 157
Ontario County Court

R. v. Corliss

1957 CarswellOnt 157, 120 C.C.C. 341

Regina ex rel. Mino v. Corliss

Kinnear, Co. Ct. J.

Judgment: December 23, 1957
Docket: None given.

Counsel: W.E.C. Colter, Q.C., for appellant
Thomas Jacob, for respondent

Subject: Criminal
Related Abridgment Classifications
Criminal law
XVI Wilful and forbidden acts in respect of certain property
XVI.2 Cruelty to animals
Criminal law
XVI Wilful and forbidden acts in respect of certain property
XVI.3 Mischief
XVI.3.a Elements
Criminal law
XVI Wilful and forbidden acts in respect of certain property
XVI.3 Mischief
XVI.3.b Lawful excuse
Criminal law
XXXIII Appeals
XXXIII.1 Appeal from conviction or acquittal
XXXIII.1.l Procedure
XXXIII.1.l.xiii Amending indictment or information
Personal property
I Animals
I.1 Injury to animals
I.1.a Stray animals
Headnote
Criminal law

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***Kinnear Co. Ct. J.*:**

1 This is an appeal by Cecil Corliss from his conviction by His Worship Magistrate Street at Cayuga on September 12, 1957, for that he did "unlawfully and without lawful excuse shoot and kill a black and tan dog belonging to Earl Mino contrary to section 386(a) of the Criminal Code of Canada".

2 The appeal came before me on November 20th, by way of trial de novo. There were no preliminary objections but I raised the question myself as to the effect of the omission of the word "wilfully" from the conviction. A perusal of the information on which the trial before the learned Magistrate and the conviction was based showed that the word "wilfully" did not appear in it. Counsel for the respondent thereupon moved that the information be amended to include that word. I gave him two weeks' time and subsequently extended that time for another week to prepare written argument (1) as to whether I had power to amend the information in this manner after conviction and (2) as to why the conviction should not be quashed as not showing any offence known to the criminal law.

3 Counsel for the respondent asked me to note (1) that the Court raised this question, not counsel for the appellant, and (2) that counsel for the appellant had no objection to making the amendment at this stage. I so noted. If the omission of the word "wilfully" does mean that an essential ingredient of the charge is lacking, it would appear to me immaterial whether or not counsel for the appellant was willing to consent to the amendment or whether or not he objected to the conviction on the ground of its omission.

4 Pending argument on this point, I permitted the trial to continue on the merits as if the information were good since it appeared to me wise to hear and deal with the evidence in the event either of a successful argument by counsel for the respondent on his motion or of appeal.

5 I have now had written argument by counsel for the respondent on this question. Before considering it, I set out the pertinent wording of the section under which the original charge was laid:

6 "386. Every one who wilful]y and without lawful excuse

7 "(a) kills, maims, wounds, poisons or injures dogs .... is guilty of an offence punishable on summary conviction."

8 Section 371(1) defines the word "wilfully" as follows: "Every one who causes the occurrence of an event by doing an act or omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event."

9 It is fundamental that an information should contain a concise description of the offence charged and should particularly contain every ingredient required by the statute to constitute an offence. An information which does not disclose an offence known to the law will not support a conviction. See *McEachern v. The King* (1946), 19 M.P.R. 150, 152. Where an information is defective it should be amended prior to conviction. Section 704(3)(b) Cr. Code permits the Magistrate to amend where the information states defectively anything that is requisite to constitute the offence "at any stage of the trial". That means that when the trial is ended by conviction, the right ceases. See *R. v. Kozak*, 88 Can. C.C. 350, [1947] 2 D.L.R. 858which holds that where an essential element of the crime is omitted in the information and no application to amend it was made before conviction was entered, the conviction must be quashed. The count as framed alleged no offence in law and the omission of an essential element is not cured by the verdict. See also *R. v. Romo* (1953), 108 Can. C.C. 189; *R. v. Jazewsky* (1944), 85 Can. C.C. 175at p. 176; *R. v. Brooks*, 100 Can. C.C. 164, [1951] O.W.N. 513.

10 Counsel for the respondent agreed with this basic proposition. His submission was, however, that the omission of the word "wilful" in the information in the present case is not fatal because that word is defined in s. 371(1) and relates to the offence set out in s. 386(a), inter alia. He cited two cases, *R. v. Fusell* (1920), 34 Can. C.C. 57, 13 S.L.R. 154, to which I shall refer later, and *R. v. Schwanbeck*, *R. v. De La Gorgendierre* (1931), 55 Can. C.C. 396.

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11 In the latter case, an application was made to Maclean J. for a writ of habeas corpus on the ground that the conviction was bad since the information disclosed no offence. The charge had been laid under s. 33(1) of the Juvenile Delinquents Act, 1929 (Can.), c. 46, now R.S.C. 1952, c. 160, which reads in part "Any person .... who, knowingly or wilfully, does any act ...."

12 Neither knowingly or wilfully appeared in the information. His Lordship, in denying the motion, stated at p. 398: "In my opinion the offence is sufficiently described by the words and the reference to the section, and in that respect is not different to the question that was decided in *Rex v. Gallagher* (1925), 36 B.C.R. 246."

13 With respect, I am of the opinion that *R. v. Gallagher*, 36 B.C.R. 246 falls far short of warranting such a conclusion. In that case, the prisoner was charged before a Magistrate that he "unlawfully did bring into the Province of British Columbia, a gasoline launch, known as the 'George B.' said launch having been obtained by theft in or near Hyder, Alaska, United States of America, contrary to section 398 of the Criminal Code of Canada".

14 Section 398 made anyone guilty of an indictable offence "who, having obtained elsewhere than in Canada any property by any act which if done in Canada would have amounted to theft, brings such property into, or has the same in Canada".

15 Accused was committed for trial by the Magistrate and an application was made to Gregory J. on his behalf on the ground that no offence was disclosed in the information. In denying the motion His Lordship said: "The reference to section 398 of the Criminal Code covers any defect in the description, or rather it makes perfectly plain to the accused the offence for which he has been committed for trial."

16 I interpret that statement in the same sense as expressed by Wurtele J. in *Ex p. O'Shaughnessy* (1904), 8 Can. C.C. 136 at p. 138, 13 Que. K.B. 178: "Every indictment and every information must contain in substance a statement showing that the accused has committed some offence in criminal law, therein specified, and such statement may be in the words of the enactment or in synonymous words."

17 A reading of the section of the Criminal Code quoted above and the information based on it reveals that every element necessary under the section is embodied in the information.

18 In view of the above analysis and of authorities I shall quote below, the decision in *R. v. Schwanbeck appears to be of doubtful weight*.

19 Most of the sections of Part IX of the Criminal Code require that an act, to constitute an offence, must be done wilfully, which term must, of course, be understood in the broad meaning given to it by s. 371(1). It is a general rule that where the definition of an offence includes wilfulness as an element, it must be alleged in the charge that accused acted wilfully. See Stroud's Judicial Dictionary, 2nd ed., vol. 3, p. 2248: "Where a statutory offence is for something 'wilfully' done or omitted, that word should always be employed in the Indictment.

20 In *Ex p. O'Shaughnessy*, cited above, the accused pleaded guilty to unlawfully committing an indecent act, contrary to s. 177 of the Cr. Code. The word "unlawfully" did not appear in the section but the word "wilfully" did. An application for a writ of habeas corpus was granted on the ground that no offence was disclosed. In his admirable judgment, Wurtele J. pointed out that the word "wilful" implies evil intent and is not the synonym of the word "unlawful," See also, *R. v. Tupper* (1906), 11 Can. C.C. 199where the word "unlawful" was used instead of "wilful" and it was held that the information was bad and the prisoner was discharged. And the same point is dealt with in the same way in *R. v. Bridges* (1907), 12 Can. C.C. 548, 13 B.C.R. 67.

21 *R. v. Fusell*, 34 Can. C.C. 57, cited by counsel for the respondent, requires consideration. In that case, accused was convicted for killing a dog contrary to s. 537 of the Cr. Code (now s. 386). The information did not contain the word "wilfully" and the Magistrate announced his conclusion and made a minute "I find the accused guilty and fine her $5.00 and costs, and I award damages of $15.00 for loss of the dog." The formal conviction which came before Taylor J. on certiorari included the words "wilfully, without legal justification or excuse and without colour of right did kill ...."

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22 The first objection dealt with was that the information did not disclose a crime since the word "wilfully" was omitted therefrom. His Lordship dealt with numerous authorities cited and concluded from them at p. 61, as follows:

23 "In my opinion it follows that where the facts stated in the information fall short of an allegation of criminal offence, and the justice proceeds to enquire into the merits of the allegations so made he cannot without amendment and full opportunity to make answer thereto, infer or find from the evidence a further fact necessary to constitute the criminal offence and convict therefor. That would be convicting the accused of an offence with which he had never been legally charged.

24 "Therefore I think that if the information in this case does omit an essential ingredient of the criminal offence, as it appears that at no time during the progress of the trial was the omission rectified, that the finding of guilt would fall short of a finding of criminal guilt; and the conviction would have to be quashed."

25 So far his conclusions followed the authorities I have cited. He then referred to the definition of wilful as set out in s. 509, now s. 371(1) and, because it did not specifically include evil intent but did cover reckless acts or omissions, he concluded that it would not be a crime to do the act with evil intent but would be a crime to do it recklessly. Having reached that conclusion, and finding difficulty in relating it to his previous pronouncement above quoted, he stated that since, on the merits, he would conclude in any event to quash the conviction, he would not come to a conclusion on the point of law. With respect, I view the definition in s. 371(1) not as restricting the meaning of the word "wilful" but as extending it to include reckless acts as well as acts done with a bad motive and I fail to see how a section of the Code interpreting a word can affect the necessity for including in an information every ingredient required to constitute the charge.

26 While there appear to be no cases on the omission of the word "wilfully" since the enactment of the new Code, the principle involved, namely, the power of the Appeal Judge to amend an information where a vital particular is omitted or wrong and the Magistrate has not amended the information before conviction, has been dealt with in *R. v. King*, 116 Can. C.C. 284, [1956] O.W.N. 810. This was an appeal from a conviction of a Magistrate to a County Judge and from the County Judge to the Court of Appeal. The information stated that the offence was committed on December 17, 1955. The Magistrate convicted on the charge as stated, that is, for an offence on the 17th, although the evidence showed that the offence took place on the 16th. On the trial de novo at the outset, Crown counsel asked the County Judge to amend the information to read the "16th". The learned Judge did so, and, at the close of the trial de novo, he affirmed the conviction. The Magistrate's conviction was for an offence committed on the 17th.

27 On appeal to the Court of Appeal, Laidlaw J.A., in delivering the judgment of the Court, pointed out that what the County Judge was doing in fact was permitting an amendment to be made that charged an offence on a different day. I quote from the judgment at pp. 285-6 Can. C.C.:

28 "In the opinion of this Court, the amendment permitted by the County Judge was a nullity. He had no authority to permit that amendment. He purported to proceed with an appeal from the conviction made for an offence alleged to have been committed on December 17th. By the order issued by him he purported to affirm that conviction. There is on the record no amendment in fact to the information and that information charges an offence on December 17th. There was no evidence adduced by the Crown in the proceedings before the Magistrate to support the charge of this offence on December 17th. Therefore, the learned Judge ought, as a matter of law, to have held that there was no evidence to support the charge in the information and therefore he ought to have allowed the appeal. This Court can make the order that the learned County Judge ought to have made and the order of this Court is that the conviction be quashed and a judgment of acquittal entered."

29 It appears clear to me, in the light of the authorities I have cited, that it is my duty to note the omission of the word "wilfully" from the information, to find that I have no power to amend the information by adding that word because it is an essential ingredient of the offence and was not included in the information by amendment before conviction, and to find that the conviction was a nullity. On this ground I quash the conviction and allow the appeal.

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30 I deem it wise, however, since this matter may be taken to the Court of Appeal on this point of law, to deal with the evidence heard by me as if the information had contained all essential ingredients so that the Court of Appeal will be in a position to make final disposition of the matter in the event that it finds that I am wrong in quashing the conviction on this ground.

31 This is a trial de novo, a criminal trial in which the appellant begins with a presumption of innocence in his favour with the onus on the respondent to prove his guilt. That onus continues to the very end of the trial no matter what offence is set up or what special burden of proof is placed by statute on the appellant. If, at the end of and on the whole of the evidence, there remains any reasonable doubt in the mind of the Court that the appellant did commit the offence charged, he is entitled to have his appeal allowed and to be acquitted.

32 The offence charged is one falling under the provisions of s. 371(2) of the Cr. Code, which reads as follows: "No person shall be convicted of an offence under sections 372 to 387 where he proves that he acted with legal justification or excuse and with colour of right."

33 The continuing burden is on the respondent to prove the wilful shooting beyond reasonable doubt and, in that event, the appellant, if he wishes to be acquitted, must prove that he acted with legal justification or excuse and with colour of right. I have already set out the meaning I adopt of the word "wilfully". It covers not only reckless acts but acts done with a bad motive.

34 I adopt the meaning of the words "with legal justification or excuse and with colour of right" as approved by Boyd C. in *R. v. Johnson* (1904), 8 Can. C.C. 123at p. 128, 7 O.L.R. 525. He is quoting from a New Zealand case, *R. v. Fetzner* (1900), 19 N.Z.L.R. 438. Boyd C. states:

35 "I find a further and a judicial exposition of this subsection in a New Zealand case, where the Criminal Code is in much the same lines and words as the Canadian Code. The discussion is on the meaning of the phrase 'colour of right', and Mr. Justice Edwards says: 'The context of the words shews the sense in which they are used in this section. Legal justification or excuse is an answer to a criminal charge under this part of the Act as it would be in a civil action. Then follow the words "and without colour of right." This means, I think, an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would not be an answer to a civil action, but it is properly made an answer to a criminal charge, because it takes away from the act its criminal character. Less than this, in my opinion, cannot be held to be "colour of right:"' p. 443.

36 "And to like tenour Mr. Justice Williams, who says at p. 442: 'The act was done wilfully; and, being done without legal justification or excuse, the accused would be properly convicted unless he acted under some colour of right.... To do an act in ignorance that is prohibited by law is not to do it with colour of right. There must be at least an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done.'"

37 Bearing these requirements in mind, I consider the evidence. The evidence adduced by the respondent showed that the appellant admitted shooting a dog in appellant's swamp in appellant's bush in which the appellant had a herd of cows pasturing. The dog was a black and tan hound belonging to the respondent, Earl Mino. It was mild tempered, trained to hunt coon, and, judging by its previous good reputation regarding cattle, it appeared to be completely stock broken. The dog was shot past midnight of May 23rd, at approximately 12.25 A.M. on May 24th, in the southerly part of the swamp. The appellant's bush extended north, south and east of the swamp. To the west of the swamp was a fence dividing appellant's bush from an open field and that fence extended north past Edric Davis' house to the Third Line Road. According to the Crown evidence, the night was pitch dark. This was disputed by the defence. However, since the Crown evidence was that there was a visibility in the open of about 15 ft. and in the swamp of about half that, if a person were looking down into the low bushes, the word "pitch dark" would appear to be too strong a word. Harrison said there was no moon that night.

38 The dog happened to be in the swamp because its owner, the respondent, together with Leslie Harrison, Bruce Currie and Robert Davidge, were exercising it and two other dogs and giving them experience in coon hunting. One of these dogs, called Red, a red bone hound, owned by Currie, was a trained coon dog and, judging by its previous reputation, it appeared to be completely stock broken. The other of these two dogs, called Slim, a blue tick hound, owned by respondent, was a three-year old. It was not trained to hunt coon. Up to that time it had not been known to attack cattle. Since it lacked experience in hunting

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coon, what it might do if cattle interfered with its activities when it was with dogs trailing or treeing coon was not known. None of these dogs had collars on at any time while they were on respondent's premises.

39 The bush was completely fenced and at least one of the four men, Harrison, who was a neighbour of the appellant, knew that appellant had cattle pasturing in it. It was from Harrison's house that the four men had started out. The three dogs, having been trailing a coon for an hour or more, approached the swamp zig-zagging from the south east. Each dog had its distinctive voice. One might bark on the trail and howl at the tree. Another might do the opposite. The method of barking or howling of each might differ but the four men knew by the individual barking or howling of the dogs that they had ceased to trail the coon and had treed it. The four men estimated that the dogs had the coon treed from 5 to 10 minutes before they heard the shot. There was a great disparity in the evidence of the four men as to how far distant they were when they heard the shot. I have concluded that they were 800 ft. or more away at the time. They were so far distant that they had lost control of the dogs and, even if they had been closer, they said they could not have called the two coon trained dogs back because of their training. Expert evidence was given to the effect that trained coon dogs will remain at the base of the tree in which the coon has taken refuge until their trainers or masters go and get them.

40 According to the Crown evidence, and it is a point in dispute, it took the four men only five or ten minutes to reach the spot to which the accused had gone after the dog was shot. Currie had a carbide light on his cap and the three others carried flash lights. Appellant could not have seen these lights until he went round to the south side of the swamp, from which side it appears that he entered it. Davidge thought that he should have seen their lights before he went into the swamp but there was no Crown evidence that he did. At that time, the men were 800 ft. or more distant, the land between them and the appellant was wooded and Davidge said that they were doing nothing that would indicate that they were following the dogs. He thought accused should have known the noise dogs make when treeing a coon. There was no Crown evidence that would show that he did know.

41 The men were running their dogs without current licences for themselves or the dogs. They were running their dogs after the hunting season had closed and they and their dogs were clearly trespassing on the appellant's lands even though those lands were not posted against trespassers.

42 Following the shooting, appellant told the four men that he had shot the dog, first, because the dogs were bothering his cattle, and secondly, because the dog he shot was attacking him. After he said that the dogs were bothering his cattle, Davidge went among the cows that were then standing nearby near the north west corner of appellant's pasture field and not far from Davis' house with his flash light to examine them. From the conflicting evidence of the four men, I estimate that he looked at them 25 minutes or more after the dog was shot. He was the only Crown witness who did go among the cows for the specific purpose of examining them. I accept his evidence, which is in conflict with that of his three companions, because of his better opportunity for observation. The others passed near the cows on their way to where the appellant stood but had no reason then for taking any special interest in them. They said a couple of the cows were lying down. Davidge's evidence, which I accept, is that they were all standing, that they were quiet and that their feet and legs were wet.

43 The swamp where the dog was shot was fairly large with open areas immediately north and south of it. It was quite wet and covered fairly thickly with tag alders. There were only two or three tall trees in it and they ranged from 20 to 30 ft. in height. It was at the base of one of these trees, a tree with a diameter at the base of about 6 ins., that the dead dog was found, its head pointing north west, on a bog on which the tree stood, and its hind legs in the water. In the immediate vicinity of the tree there were places where the water was as much as 18 ins. deep. The dog had been shot in the right side just in front of the hind leg. The coon was in the tree above. It was not visible when, later, flash lights were played on it, but its eyes showed up as shining. No one at any relevant time drew appellant's attention to the coon in the tree. It would be approximately an hour after the shooting that Harrison went into the swamp with the appellant to find the dog. At that time Harrison saw no cattle in the swamp. Appellant had 16 cows pasturing in the woods that night but none of the four men estimated that there were that many standing in the group they saw in the corner when they arrived. Their estimates ranged from 8 to 15.

44 Harrison, who is a farmer, said that cows will not lie down if disturbed, that they usually run all together if disturbed though they may stand in groups. He said that sometimes they will run from anyone approaching them. Bruce King, reeve of Dunn Township, a farmer and a highly credible witness, said that it takes more than half an hour for cattle that have been

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disturbed to settle down but that they will settle down within the hour. He spoke as an expert on cattle not as one familiar with the facts of this case.

45 The respondent was quite angry when he found that it was the black and tan dog that was shot. Appellant said more than once that night that he was sorry he shot it but he did not go so far at any time as to say that he did not feel justified in shooting it.

46 I summarize the salient points in the Crown evidence briefly as follows: Appellant shot the dog past midnight, in the early hours of May 24th last, a dark night, in the swamp in the bush in which his cows were pasturing when that dog and two other dogs were treeing a coon. There is no evidence to show that he knew they were treeing a coon. Following the shooting, he said he shot it because the dogs were bothering his cattle and because that particular dog attacked him. When he said that the dogs were bothering his cattle, part of his herd of cows stood quietly in a group nearby and their legs and feet were wet. The dog shot and one of the two others were trained coon dogs with good reputations as to cattle. The third dog was not trained to hunt but had been harmless up to that time so far as cattle were concerned. Considerable reliance was placed by the four chief Crown witnesses on the reputation of the dogs, the mild temper of the dog shot and expert evidence as to what cows would do if disturbed to offset the statement of the accused that the dogs were bothering his cattle and to show that the shooting was wilful.

47 That is the Crown evidence. It places on the appellant the burden of proving that in shooting the dog he acted with legal justification and with colour of right.

48 The appellant is a farmer who has resided on his present farm for 24 years and there was no adverse evidence tendered as to his character. Edric Davis, a neighbour, living a quarter of a mile distant, is a truck driver. He owns his home and 8 acres of land and there was no adverse evidence tendered as to his character.

49 The defence evidence showed that the appellant had 16 cows pasturing in his bush in which the swamp was including three heifers heavy in calf and three yearlings. Davis' house is north of and abuts appellant's bush and is by measurement 761/2 ft. north of the swamp. He and Mrs. Davis had retired on the night of May 23rd. About 11.45 P.M., Mrs. Davis was awakened by the barking and howling of dogs. She got up, looked out and could see no dogs. She went back to bed. The barking and howling continued. She got up, looked out again and saw appellant's cattle milling about between the house and the swamp but a little to the east of it. She went back to bed. Then she heard what she described as "awful splashing in water". She said she was used to hearing the cattle in the swamp and was certain it was the cattle and that three dogs could not possibly make that much noise. By this time her husband had awakened. He could hear the noise of splashing and barking. He got up, put on his clothes and looked out the window in the back door. There was an electric light on the corner of his house which he kept lit and it threw its beams to the swamp. He saw two or three cows coming out of the swamp and walking easterly at a good speed and he heard the dogs howling from the south side of the swamp. He telephoned appellant who had likewise retired and was awakened by the ringing of the telephone. Davis told him there were dogs in his swamp and he thought they were in his cattle. As quickly as he could, the appellant dressed, putting on rubber boots, picked up his gun and drove to Davis' place. He thought he was there in 10 minutes after he received the message. He parked his car in the driveway to the east of Davis' house and about a half car length further south at a point about 75 ft. from the swamp. His lights faced the swamp and were on high beam. He had also the benefit of Davis' outdoor light. He carried no flash light. The swamp covered an area of about 270 ft. from east to west and 204 ft. from north to south and was about 3 ft. lower than where the car stood.

50 When he arrived he heard the dogs howling and a calf bawling before he got out of the car. He did not then see any cattle. As he was climbing the fence between Davis' place and the bush he heard the cattle splashing and could still hear the calf and the dogs. Davis came out of his house and told him the barking was coming from the swamp and the appellant drew his attention to the calf bawling. The appellant said in evidence that he had been perturbed enough to come over and investigate but was not looking for trouble and that he took his gun with him because he did not want to go empty handed. He tried first to enter the swamp from the north side, then turned and went around the east end when he disappeared from Davis' view. The appellant entered the swamp from the south side carrying with him his gun and a stick that he had picked up as he circled the swamp. He went about 6 ft. through the wet marshy ground when he saw a calf about 6 ft. farther on between two trees, a white calf with two or three black markings. Three dogs were to the west of the calf and barking at it and one of them, he cannot say which, was biting at it. This part of the swamp was on the far side from the lights but he said the shrubs were quite low there

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and he had no difficulty seeing the dogs and the calf. He did not then see any of his other cattle but assumed they were in the swamp. He said he threw his stick at the dogs and all three dogs and the calf began to run away. While the others continued to run, one dog turned back towards him, snapped his teeth and growled at him. He shot it. It all happened in an instant and he is confused as to the details. He appeared convinced that he shot it in the left side as it leaped towards him and turned but the Crown evidence is that it was shot in the right side. I am satisfied that he is mistaken on that point. He cannot even remember how he held his gun. He said that, if the dog had continued to run away as the others did, he would not have shot it. He shot it because it turned on him. The dogs stopped barking then. Davis said that he heard the shot about 5 minutes after the appellant disappeared from his view and that, after he heard the shot, he saw one dog headed north east to the north of his house and another dog running to the south of his house. Davis was outside when the appellant returned to his car about 10 minutes after the shooting. At that time Davis noticed some of appellant's cattle standing in the corner of the bush south west of his house. The appellant noticed them there too.

51 When the appellant fired the shot, Davis was the only other person in the immediate vicinity of the swamp and he did not go over to it then or later on nor did he see the white calf with the black markings that night.

52 The appellant did not examine his cattle that night. He said that the cattle did not normally graze in the corner where they stood after the shooting, that they usually grazed south east of the swamp and that normally they would be sleeping at that hour and not be in the swamp. He said that dogs often run at large over his property, that Harrison himself, who has a "bunch" of hounds, had telephoned him a couple of times to see if his dogs were there and that, on this particular night when he got back to his car, it was his intention to go to Harrison's house to see if he could find out through him whose dog he had shot.

53 Neither the appellant nor Davis knew anything at all about coon hunting or what dogs did in coon hunting. Neither saw the coon in the tree and no one mentioned in their presence that night that it was there.

54 The reeve of Seneca Township, Frank Young, gave evidence on behalf of the defence. He is an experienced farmer and a highly credible witness. He said that cattle can be disturbed and settle down rapidly, some much more quickly than others. He disagreed with Bruce King, the reeve of Dunn Township, an expert called by the Crown, who said that cattle will not settle down in half an hour after they are disturbed. Mr. Young said they could settle down in ten or fifteen minutes. He said also that cattle will chase dogs and might easily have been attracted by the dogs in the swamp and gone in to chase them out.

55 Irene Corliss, wife of the appellant, said that the white calf with the black spots did not come up in the morning, as it usually did, with the cows when they came to be milked but that she saw it on the evening of May 24th lying in the laneway near the house as if it were fatigued. It was still lying there on the morning of the 25th and, in the middle of the afternoon, she went to it. It did not get up and she gave it two pails of water. It was still lying down on the 26th. She took water to it twice, tried to get it up and succeeded in doing so. She said that it walked with a "sort of hinch" and its hind legs did not work right. An hour later, she saw it lying down again, this time in the field. It was nearly a week before the calf appeared normal again.

56 The defence produced an alleged copy of By-law 516 for the Township of Seneca. The only acceptable methods of proof in Court of a municipal by-law are set out in s. 269 of the Municipal Act, R.S.O. 1950, c. 243, neither of which methods were followed. I must find therefore that the by-law was not proved. In any event, it does not appear to have been pertinent because of the definition therein of the words "running at large" which covered dogs when found on a highway or other public place. The dogs in the present trial were found on private property.

57 That is the pertinent defence evidence.

58 By their testimony the four chief Crown witnesses were inviting the Court to conclude that accused's evidence as to the circumstances surrounding the shooting of the dog were incredible and unworthy of belief. Not one of them was there to observe what took place and they were setting out the previous good reputation of the three dogs, the habits of trained coon dogs and the alleged unlikelihood of cattle being in the swamp at that hour, all circumstantial evidence at best, against the positive sworn testimony of both the appellant and Davis. Since one of the main reasons why the learned Magistrate found the appellant

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guilty was that he did not accept the appellant and Davis as credible witnesses, I think it wise to consider the principles on which credibility or lack of credibility are determined.

59 I begin with the obvious fact that the appellant is the only person who knows what the circumstances in the swamp were and what actually happened there. He has given positive sworn testimony relating to those facts and circumstances. What power has a Judge to reject that testimony?

60 The proper rule for guidance of the Court is laid down in *R. v. Covert* (1916), 28 Can. C.C. 25at p. 37, 34 D.L.R. 662 at pp. 673-4, 10 A.L.R. 349, by Beck J. who delivered the majority judgment. I quote:

> In my opinion it cannot be said without limitation that a Judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled: —
>
> (1) That the statements of the witness are not in themselves improbable or unreasonable;
>
> (2) That there is no contradiction of them;
>
> (3) That the credibility of the witness has not been attacked by evidence against his character;
>
> (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and
>
> (5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.
>
> To permit a trial Judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily.

61 Let us take these conditions one by one. First, were the statements of the appellant or Davis improbable or unreasonable? The story of how the appellant happened to go to the swamp is logical and reasonable. I see no merit in the argument regarding the unlikelihood of the cattle being in the swamp at that hour under the circumstances. There is no evidence at all as to the whereabouts of the cows before the dogs reached the bush, or whether they were asleep or grazing and it is just as probable that a number of them or all of them were south of the swamp, where the appellant said they often grazed, as that they were any place else in the bush. If they were there, particularly if they were sleeping, and these dogs came from the south east as the Crown evidence indicated, there is nothing more probable than that they would turn tail and run before the dogs went into the swamp. If they were elsewhere when the dogs went into the swamp then, according to expert testimony, it is possible that they were attracted by the dogs in the swamp and went in of their own accord. We must remember too that one of the dogs was not a trained coon dog and there was no way of knowing what its behaviour might be if a calf got in its way in the area of the tree or what effect its conduct might have on the others. True, there was expert evidence as to what might normally be expected of trained dogs treeing but, though the experts pointed out that a trained coon dog would not leave the tree in which a coon had taken refuge until its master appeared to remove it, Currie's dog, Red, a trained coon dog, did leave when the appellant arrived whether or not it is true that he threw a stick at it. It is quite probable that the dog the appellant shot was a better trained coon dog and would not leave the tree without a struggle and that it would therefore turn back and ward off in a menacing manner interference by anyone except his master. The appellant, who knew nothing about coon hunting, would not know what prompted the dog's actions. None of the dogs had collars on. It was a natural assumption that at that hour they were roaming at large or straying. Under such circumstances he would be justified in believing the dog was in the act of attacking him. The first condition appears to be fulfilled.

62 The second condition is also fulfilled. There was no direct evidence to contradict the testimony as to the shooting. The circumstantial evidence, mostly expert testimony, is somewhat shaken, first, by the fact that Currie's dog, supposedly trained, did not do the expected; and secondly, by the conflict in evidence among Crown witnesses as to what the cows were doing at the time Davidge examined them and the doubt as to how long after the shooting the cows were observed; and, third, by the evidence of a Crown witness, Davidge, that all the cows were then standing and their legs and feet were wet.

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63 Likewise, the third condition is fulfilled. Both Davis and the appellant were property owners. Appellant had a considerable herd of cattle. There was no character evidence adduced against their general reputations.

64 Is there any question as to the fourth condition? There was nothing in the evidence tending to throw discredit upon either Davis or the appellant except the implication the Court has been invited to draw from the evidence of expert witnesses, the weight of which is light for reasons already stated and certainly not sufficient to brand these two witnesses as deliberate perjurers. It is suggested that appellant's evidence as to how he shot the dog is incredible. One does not have to be an expert shot to strike a target as large as a hound 6 or 8 ft. away even in the dark. According to the appellant's evidence, the peril was sudden as he viewed it and he acted fast. He is to be excused if he does not remember how he held the gun. The fourth condition appears to me to be fulfilled.

65 I am satisfied also that the fifth and last condition is fulfilled. I found nothing in the demeanour of any of the defence witnesses to suggest that they were untruthful.

66 While, of course, I am considering this matter in the light of the evidence heard in this Court, I do not find myself in agreement with the learned Magistrate on the issue of the credibility of the evidence of these two witnesses, Davis and the appellant. One of the reasons for the different conclusion as to credibility by the learned Magistrate arises from certain evidence, as was brought out in the present trial, in the Court below relating to licences submitted by the informant, Mino, as current. Mino told the Court below that he had a current licence to shoot coon and a current licence for the dog that was shot to run for coon. The learned Magistrate set that down as fact in his reasons for judgment and was obviously affected by that evidence to the extent of accepting the informant as a credible witness and rejecting the appellant as such. It is quite immaterial to the question of proof of the charge whether or not Mino had current licences, but it has become material in this trial on the question of credibility. It now appears that those licences expired on February 1, 1957, while this alleged offence did not occur until May 24th. In addition to that evidence in the Court below contrary to fact, there were numerous conflicts in evidence given by the four chief Crown witnesses in this Court relating to times and distances which raised more concern in my mind regarding their credibility than did any of the evidence of defence witnesses regarding theirs. I took those conflicts into consideration in finding the facts disclosed by the Crown evidence. Credibility covers the powers of observation and judgment of a witness just as much as it does the witness' desire to be truthful and the evidence of some of the Crown witnesses was weak in that respect. I have no hesitation in accepting all the defence witnesses as credible.

67 Has the appellant met the burden of proof required of him to show legal justification and colour of right under s. 371(2) of the Cr. Code? I point out that although the two requirements are joined by the word "and" in the section, that word has been interpreted by the Courts as meaning "or". In other words, the defence is sufficient if either legal justification or colour of right is shown. See *R. v. Johnson*, 8 Can. C.C. 123at p. 128, 7 O.L.R. 525, already cited.

68 The vital facts brought out by the defence evidence May be summarized as follows: Shortly after midnight in the early hours of May 24th last, the appellant entered his own swamp in a bush where his cattle were pastured. He carried his gun for a proper reason, namely, in pursuance of a warning that dogs were among his cattle. He found that these dogs had cornered a calf of his in the swamp and were worrying and terrifying it and one of the dogs was biting at it. He dispersed the dogs by throwing a stick at them and that would have been the end of the matter if it had not been that one dog turned back, leaped into the air and growled and snapped at him. He was not versed in coon hunting and it was not a season when coon hunting was permitted. He was completely ignorant as to why those dogs were there in the middle of the night and was completely unaware that their owners were 800 ft., more or less, distant. The dogs had no collars on. He did not know the dog he shot and believed it to be running at large. He believed himself to be in imminent peril at the moment he shot the dog. The calf that was worried was sick for several days after the event.

69 I deal first with the defence of legal justification. The follow-portions of ss. 8 and 9 of the Dog Tax and the Cattle, Sheep and Poultry Protection Act, R.S.O. 1950, c. 107, as re-enacted by 1957, c. 30, s. 4 are pertinent:

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> 8(b) 'injured' in respect of cattle .... means injured by wounding, worrying, terrifying or pursuing, and 'injuring' has a corresponding meaning.
>
> 9. Any person may kill a dog,
>
> > (a) that is found killing or injuring cattle ....
> >
> > (b) that in a township .... is found between sunset and sunrise straying from the premises where the dog is habitually kept;
> >
> > (c) that is found straying at any time, and not under proper control, upon premises where cattle .... are habitually kept.

70 While the dogs must be considered as having been embarked on a common venture in worrying and terrifying the calf, the appellant dispersed the dogs by other means than shooting and having done that, he cannot rely on s-s. (a), the need for protection of the calf having ended. For s. 9(b) or 9(c) to apply, the dog must be found to be straying and the learned Magistrate held that because the dog was trained and was doing the bidding of its master it was not straying. We have, of course, differed in our findings of fact and his emphasis on his findings that the dog was running under proper licences and that the livestock was being bothered have no application in the present trial.

71 Whether a dog is straying is a question of fact depending on the circumstances of the particular case. Under s. 9(c) the word "straying" is coupled with the expression "and not under proper control" and its meaning is coloured by that expression. The dictionary meaning of "proper" in this context is "appropriate, right or fit", that is the control must be sufficient and immediate enough to be effective. This coupling of the two expressions is merely a recognition of the law relating to animals in general as established by jurisprudence. *Thompson v. G.T.R.* (1895), 22 O.A.R. 453, cited by counsel for the appellant, is a case in point. It was a civil action for damages. The facts were that a boy was driving seven cows and a heifer from one part of the plaintiff's farm to another across a highway. A railway crossed the highway about 300 yards south of the gates. The boy opened both gates and drove the cattle on to the road. The heifer separated itself from the others and ran north along the road; the boy left the cows and ran after the heifer, overtook it and brought it back. In the meantime, the cows turned south and when the boy brought the heifer back it started the cows on the run. When they reached the track they stopped and an oncoming train ran into them killing two and injuring a third. The Court of Appeal held that the cattle were running at large. I quote from the judgment of Osler J.A. at p. 460: "How can he be said to have been in charge of the others [and by that he meant all but the heifer], within the meaning of the Act? He had got so far away from them that it was impossible for him to prevent them from reaching the track and loitering upon it or to drive them off it when he saw them there before the train could arrive at the point of intersection."

72 In the present trial it is true that Mino had control of his dog in the sense that it was unlawfully in the swamp as a direct result of his command but the Crown evidence showed plainly that the men were too far distant to control this dog and that the only way, in view of its special training, that it would have been sent away from the place where it was shot was for the appellant to wait until its master arrived to remove it. Mino did not have appropriate control under the circumstances so as to prevent it from acting in a menacing manner towards the appellant when he tried to drive it away in his efforts to protect his cattle, as he had a perfect right to do. The Act was passed for the protection of cattle. While a person relying on s. 9(a) as a defence to a charge under the Cr. Code would have to show at least injury in progress as defined by s. 8(b), there is no such requirement under s. 9(c). The mere presence of the dog on premises where cattle are habitually kept under the circumstances set out in the subsection is sufficient.

73 On the whole case, the respondent has failed to prove beyond reasonable doubt that the shooting was wilful, no bad motive or recklessness having been established and, in addition, the appellant has proved legal justification or excuse and colour of right. The result is that, even if the decision in this trial turned on the merits as if the information were capable of amendment and were amended by the addition of the word "wilful", the appeal would succeed.

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74 I allow the appeal with costs here and below and quash the conviction. I direct that the money paid by the appellant into Court by way of fine, costs and deposit be repaid to him. This trial de novo lasted two days. I take that into consideration in setting the costs.

75 I order that within 15 days from the date hereof the respondent do pay to the clerk of the Court the costs of the Court below as set by the learned Magistrate in the sum of $25 and the costs of the appellant in this Court which I set at $100 plus witness fees to be taxed forthwith, such sum to be paid by the clerk of the Court to the person or persons entitled thereto.

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