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W. M. BOYD, Respondent, v. JACQUES ODDOUS, Appellant

No. 19024

Supreme Court of California, Department One

97 Cal. 510; 32 P. 569; 1893 Cal. LEXIS 580

March 10, 1893

SUBSEQUENT HISTORY: Hearing In Bank negligence on the part of the plaintiff.
Denied.

PRIOR-HISTORY: Appeal from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.

COUNSEL: *M. V. Biscailuz*, and *Gould & Stanford*, for Appellant.

Burnett & Gibbon, for Respondent.

JUDGES: Vanclief, C. Belcher, C., and Haynes, C., concurred. Paterson, J., Garoutte, J., Harrison, J.

OPINION BY: VANCLIEF

OPINION

Action for damages alleged to have been suffered by plaintiff from the bite of a dog owned and kept by defendant, it being alleged that the dog was vicious, and accustomed to bite mankind, of which defendant had notice, and that plaintiff was bitten in consequence of the negligent manner in which defendant kept the dog.

The answer admits that defendant owned and kept the dog, but denies all other material averments of the complaint, and, as an affirmative defense, alleges "that if the plaintiff had used ordinary caution," he could have avoided coming in contact with the dog. This seems to have been intended as an averment of contributory

The verdict of the jury was in favor of the plaintiff, assessing the damages at \$ 450, according to which judgment was rendered.

Defendant appeals from the judgment, and from an order denying his motion for new trial.

1. The first and principal point urged here by counsel for appellant is, that the complaint fails to state a cause of action, because it does not negative contributory negligence on the part of the plaintiff, and therefore that defendant's demurrer to the complaint and his motion for nonsuit should have been sustained.

No authorities are cited which tend to support this point; but the contrary doctrine seems to be firmly established in this state. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409; *Yik Hon v. Spring Valley Water Works*, 65 Cal. 619; *Magee v. North Pac. Coast R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69.)

2. There is no foundation in the record for the point that the court permitted evidence of special damages not pleaded, as no such evidence appears. Nor does it appear that any evidence of damage was objected to on the ground that the damage was not specially pleaded.

3. It is contended that the evidence does not justify a verdict of negligence on the part of the defendant; and if it does, that the jury should have found contributory

negligence of the plaintiff.

Upon both of these issues the evidence was conflicting, and therefore the verdict as to neither should be disturbed.

4. Some very indefinite objections are made to the instructions given to the jury.

Counsel for defendant requested the giving of seven distinct instructions, which appear in the record. The plaintiff also asked instructions which do not appear. As to the instructions asked, the court said: "I have been requested by both plaintiff and defendant to give certain instructions, and have concluded to give the instructions entire by the court, covering the points that are made in these instructions, as far as possible; you can save your exceptions on both sides to the refusal of the instructions asked for, and I will charge the jury orally."

The instructions orally given cover about four and a

half pages of the transcript; and, as often happens in cases of oral instructions, they are not so perspicuous as they probably would have been had they been deliberately written; but, considering them together, they seem to be free from error prejudicial to the defendant. As to the refusal of the court to give the seven instructions requested by defendant, counsel for appellant only say: "Here it will be seen, we think, that instructions asked by appellant were proper, and that they were not covered by the court's charge to the jury." This is too general. The proper instructions said to have been asked, and not substantially given, should have been specified by counsel. Upon an ordinarily careful reading, I have discovered none such.

I think the judgment and order should be affirmed.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.