



# THE DOG ANDREW

## PART 2

*Arthur Train*

In our Spring issue we published the first half-or-so of one of Arthur Train's classic stories about the fictional law firm of Tutt and Mr. Tutt. The story opened with a quotation . . .

“Every dog is entitled to one bite”

– *Unreported opinion of the Appellate Division  
of the New York Supreme Court.*

. . . that neatly signalled the gist of the case that the firm was to take on: representation of Mr. Appleboy in a prosecution triggered by the molestation of Mr. Tunnygate by Andrew, a dog owned (or at least possessed) by the Appelboy family. Readers will not fully appreciate what follows below unless they have all the details of the molestation, and of the amusing events that preceded and followed it. So, if you have not taken in the first part of this story already, please go now to page 197 of the Spring 2017 *Green Bag* and start reading there. And then, when you are done, turn this page and let the trial begin!

– *The Editors*

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*Arthur Train was in private practice in New York City when he wrote “The Dog Andrew.” His stories about Mr. Tutt and Tutt were so successful that he gave up practice in 1922 to devote himself full-time to writing.*

**M**R. APPLEBOY SAT STOLIDLY at the bar of justice, pale but resolute. Beside him sat Mrs. Appleboy, also pale but even more resolute. A jury had been selected without much manifest attention by Tutt, who had nevertheless managed to slip in an Abyssinian brother on the back row, and an ex-dog fancier for Number Six. Also among those present were a delicatessen man from East Houston Street, a dealer in rubber novelties, a plumber and the editor of *Baby's World*. The foreman was almost as fat as Mr. Appleboy, but Tutt regarded this as an even break on account of the size of Tunnygate. As Tutt confidently whispered to Mrs. Appleboy, it was as rotten a jury as he could get.

Mrs. Appleboy didn't understand why Tutt should want a rotten jury, but she nevertheless imbibed some vicarious confidence from this statement and squeezed Appleboy's hand encouragingly. For Appleboy, in spite of his apparent calm, was a very much frightened man, and under the creases of his floppy waistcoat his heart was beating like a tom-tom. The penalty for assault in the second degree was ten years in state's prison, and life with Bashemath, even in the vicinity of the Tunnygates, seemed sweet. The thought of breaking stones under the summer sun – it was a peculiarly hot summer – was awful. Ten years! He could never live through it! And yet as his glance fell upon the Tunnygates, arrayed in their best finery and sitting with an air of importance upon the front bench of the court room, he told himself that he would do the whole thing all over again – yes, he would! He had only stood up for his rights, and Tunnygate's blood was upon his own head – or wherever it was. So he squeezed Bashemath's hand tenderly in response.

Upon the bench Judge Witherspoon, assigned from somewhere upstate to help keep down the ever-lengthening criminal calendar of the Metropolitan District, finished the letter he was writing to his wife in Genesee County, sealed it and settled back in his chair. An old war horse of the country bar, he had in his time been mixed up in almost every kind of litigation, but as he looked over the indictment he with difficulty repressed a smile. Thirty years ago he'd had a dog case himself; also of the form, style and breed known as bull.

"You may proceed, Mister District Attorney!" he announced, and little Pepperrill, the youngest of the D.A.'s staff, just out of the law school, be-

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goggled and with his hair plastered evenly down on either side of his small round head, rose with serious mien, and with a high piping voice opened the prosecution.

It was, he told them, a most unusual and hence most important case. The defendant Appleboy had maliciously procured a savage dog of the most vicious sort and loosed it upon the innocent complainant as he was on his way to work, with the result that the latter had nearly been torn to shreds. It was a horrible, dastardly, incredible, fiendish crime, he would expect them to do their full duty in the premises, and they should hear Mr. Tunnygate's story from his own lips.

Mr. Tunnygate limped with difficulty to the stand, and having been sworn gingerly sat down – partially. Then turning his broadside to the gaping jury he recounted his woes with indignant gasps.

“Have you the trousers which you wore upon that occasion?” inquired Pepperill.

Mr. Tunnygate bowed solemnly and lifted from the floor a paper parcel which he untied and from which he drew what remained of that now historic garment.

“These are they,” he announced dramatically.

“I offer them in evidence,” exclaimed Pepperill, “and I ask the jury to examine them with great care.”

They did so.

Tutt waited until the trousers had been passed from hand to hand and returned to their owner; then, rotund, chipper and birdlike as ever, began his cross-examination much like a woodpecker attacking a stout stump. The witness had been an old friend of Mr. Appleboy's, had he not? Tunnygate admitted it, and Tutt pecked him again. Never had done him any wrong, had he? Nothing in particular. Well, any wrong? Tunnygate hesitated. Why, yes, Appleboy had tried to fence in the public beach that belonged to everybody. Well, did that do the witness any harm? The witness declared that it did; compelled him to go round when he had a right to go across. Oh! Tutt put his head on one side and glanced at the jury. How many feet? About twenty feet. Then Tutt pecked a little harder.

“Didn't you tear a hole in the hedge and stamp down the grass when by taking a few extra steps you could have reached the beach without difficulty?”

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"I – I simply tried to remove an illegal obstruction!" declared Tunnygate indignantly.

"Didn't Mr. Appleboy ask you to keep off?"

"Sure – yes!"

"Didn't you obstinately refuse to do so?"

Mr. Pepperill objected to "obstinately" and it was stricken out.

"I wasn't going to stay off where I had a right to go," asserted the witness.

"And didn't you have warning that the dog was there?"

"Look here!" suddenly burst out Tunnygate. "You can't hector me into anything. Appleboy never had a dog before. He got a dog just to sic him on me! He put up a sign 'Beware of the dog,' but he knew that I'd think it was just a bluff. It was a plant, that's what it was! And just as soon as I got inside the hedge that dog went for me and nearly tore me to bits. It was a rotten thing to do and you know it!"

He subsided, panting.

Tutt bowed complacently.

"I move that the witness' remarks be stricken out on the grounds first, that they are unresponsive; second, that they are irrelevant, incompetent and immaterial; third, that they contain expressions of opinion and hearsay; and fourth, that they are abusive and generally improper."

"Strike them out!" directed Judge Witherspoon. Then he turned to Tunnygate. "The essence of your testimony is that the defendant set a dog on you, is it not? You had quarreled with the defendant, with whom you had formerly been on friendly terms. You entered on premises claimed to be owned by him, though a sign warned you to beware of a dog. The dog attacked and bit you? That's the case, isn't it?"

"Yes, Your Honor."

"Had you ever seen that dog before?"

"No, sir."

"Do you know where he got it?"

"My wife told me –"

"Never mind what your wife told you. Do you –"

"He don't know where the dog came from, judge!" suddenly called out Mrs. Tunnygate in strident tones from where she was sitting. "But I know!" she added venomously. "That woman of his got it from –"

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Judge Witherspoon fixed her coldly with an impassive and judicial eye.

“Will you kindly be silent, madam? You will no doubt be given an opportunity to testify as fully as you wish. That is all, sir, unless Mr. Tutt has some more questions.”

Tutt waved the witness from the stand contemptuously.

“Well, I’d like a chance to testify!” shrilled Mrs. Tunnygate, rising in full panoply.

“This way, madam,” said the clerk, motioning her round the back of the jury box. And she swept ponderously into the offing like a full-rigged bark and came to anchor in the witness chair, her chin rising and falling upon her heaving bosom like the figurehead of a vessel upon a heavy harbor swell.

Now it has never been satisfactorily explained just why the character of an individual should be in any way deducible from such irrelevant attributes as facial anatomy, bodily structure or the shape of the cranium. Perhaps it is not, and in reality we discern disposition from something far more subtle – the tone of the voice, the expression of the eyes, the lines of the face or even from an aura unperceived by the senses. However that may be, the wisdom of the Constitutional safeguard guaranteeing that every person charged with crime shall be confronted by the witnesses against him was instantly made apparent when Mrs. Tunnygate took the stand, for without hearing a word from her firmly compressed lips the jury simultaneously swept her with one comprehensive glance and turned away. Students of women, experienced adventurers in matrimony, these plumbers, bird merchants, “delicatessens” and the rest looked, perceived and comprehended that here was the very devil of a woman – a virago, a shrew, a termagant, a natural-born trouble-maker; and they shivered and thanked God that she was Tunnygate’s and not theirs; their unformulated sentiment best expressed in Pope’s immortal couplet:

Oh woman, woman! when to ill thy mind  
Is bent, all hell contains no fouler fiend.

She had said no word. Between the judge and jury nothing had passed, and yet through the alpha rays of that mysterious medium of communication by which all men as men are united where woman is concerned, the thought was directly transmitted and unanimously acknowledged that here for sure was a hell cat!

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It was as naught to them that she testified to the outrageous illegality of the Appleboys' territorial ambitions, the irascibility of the wife, the violent threats of the husband; or that Mrs. Appleboy had been observed to mail a suspicious letter shortly before the date of the canine assault. They disregarded her. Yet when Tutt upon cross-examination sought to attack her credibility by asking her various pertinent questions they unhesitatingly accepted his implied accusations as true, though under the rules of evidence he was bound by her denials.

Peck 1: "Did you not knock Mrs. Appleboy's flower pots off the piazza?" he demanded significantly.

"Never! I never did!" she declared passionately.

But they knew in their hearts that she had.

Peck 2: "Didn't you steal her milk bottles?"

"What a lie! It's absolutely false!"

Yet they knew that she did.

Peck 3: "Didn't you tangle up their fish lines and take their thole-pins?"

"Well, I never! You ought to be ashamed to ask a lady such questions!"

They found her guilty.

"I move to dismiss, Your Honor," chirped Tutt blithely at the conclusion of her testimony.

Judge Witherspoon shook his head.

"I want to hear the other side," he remarked. "The mere fact that the defendant put up a sign warning the public against the dog may be taken as some evidence that he had knowledge of the animal's vicious propensities. I shall let the case go to the jury unless this evidence is contradicted or explained. Reserve your motion."

"Very well, Your Honor," agreed Tutt, patting himself upon the abdomen. "I will follow your suggestions and call the defendant. Mr. Appleboy, take the stand."

Mr. Appleboy heavily rose and the heart of every fat man upon the jury, and particularly that of the Abyssinian brother upon the back row, went out to him. For just as they had known without being told that the new Mrs. Tunnygate was a vixen, they realized that Appleboy was a kind, good-natured man – a little soft, perhaps, like his clams, but no more dangerous. Moreover, it was plain that he had suffered and was, indeed, still suffering, and they had pity for him. Appleboy's voice shook and so did

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the rest of his person as he recounted his ancient friendship for Tunnygate and their piscatorial association, their common matrimonial experiences, the sudden change in the temperature of the society of Throggs Neck, the malicious destruction of their property and the unexplained aggressions of Tunnygate upon the lawn. And the jury, believing, understood.

Then like the sword of Damocles the bessemer voice of Pepperill severed the general atmosphere of amiability: "Where did you get that dog?"

Mr. Appleboy looked round helplessly, distress pictured in every feature.

"My wife's aunt lent it to us."

"How did she come to lend it to you?"

"Bashemath wrote and asked for it."

"Oh! Did you know anything about the dog before you sent for it?"

"Of your own knowledge?" interjected Tutt sharply.

"Oh, no!" returned Appleboy.

"Didn't you know it was a vicious beast?" sharply challenged Pepperill.

"Of your own knowledge?" again warned Tutt.

"I'd never seen the dog."

"Didn't your wife tell you about it?"

Tutt sprang to his feet, wildly waving his arms:

"I object; on the ground that what passed between husband and wife upon this subject must be regarded as confidential."

"I will so rule," said Judge Witherspoon, smiling. "Excluded."

"I would like to ask a question," interpolated the editor of *Baby's World*.

"Do!" exclaimed Tutt eagerly.

The editor, who was a fat editor, rose in an embarrassed manner.

"Mr. Appleboy!" he began.

"Yes, sir!" responded Appleboy.

"I want to get this straight. You and your wife had a row with the Tunnygates. He tried to tear up your front lawn. You warned him off. He kept on doing it. You got a dog and put up a sign and when he disregarded it you sicked the dog on him. Is that right?"

He was manifestly friendly, merely a bit cloudy in the cerebellum. The Abyssinian brother pulled him sharply by the coat tails.

"Sit down," he whispered hoarsely. "You're gumming it all up."

"I didn't sic Andrew on him!" protested Appleboy.

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“But I say, why shouldn’t he have?” demanded the baby’s editor. “That’s what anybody would do!”

Pepperill sprang frantically to his feet.

“Oh, I object! This juryman is showing bias. This is entirely improper.”

“I am, am I?” sputtered the fat editor angrily. “I’ll show you —”

“You want to be fair, don’t you?” whined Pepperill. “I’ve proved that the Appleboys had no right to hedge in the beach!”

“Oh, pooh!” sneered the Abyssinian, now also getting to his feet. “Supposing they hadn’t? Who cares a damn? This man Tunnygate deserved all he’s got!”

“Gentlemen! Gentlemen!” expostulated the judge firmly. “Take your seats or I shall declare a mistrial. Go on, Mr. Tutt. Call your next witness.”

“Mrs. Appleboy,” called out Tutt, “will you kindly take the chair?” And that good lady, looking as if all her adipose existence had been devoted to the production of the sort of pies that mother used to make, placidly made her way to the witness stand.

“Did you know that Andrew was a vicious dog?” inquired Tutt.

“No!” answered Mrs. Appleboy firmly. “I didn’t.”

O woman!

“That is all,” declared Tutt with a triumphant smile.

“Then,” snapped Pepperill, “why did you send for him?”

“I was lonely,” answered Bashemath unblushingly.

“Do you mean to tell this jury that you didn’t know that that dog was one of the worst biters in Livornia?”

“I do!” she replied. “I only knew Aunt Eliza had a dog. I didn’t know anything about the dog personally.”

“What did you say to your aunt in your letter?”

“I said I was lonely and wanted protection.”

“Didn’t you hope the dog would bite Mr. Tunnygate?”

“Why, no!” she declared. “I didn’t want him to bite anybody.”

At that the delicatessen man poked the plumber in the ribs and they both grinned happily at one another.

Pepperill give her a last disgusted look and sank back in his seat.

“That is all!” he ejaculated feebly.

“One question, if you please, madam,” said Judge Witherspoon. “May I be permitted to” — he coughed as a suppressed snicker ran round the court



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– “that is – may I not – er – Oh, look here! How did you happen to have the idea of getting a dog?”

Mrs. Appleboy turned the full moon of her homely countenance upon the court.

“The potato peel came down that way!” she explained blandly.

“What!” exploded the dealer in rubber novelties.

“The potato peel – it spelled ‘dog,’” she repeated artlessly.

“Lord!” deeply suspirated Pepperill. “What a case! Carry me out!”

“Well, Mr. Tutt,” said the judge, “now I will hear what you may wish to say upon the question of whether this issue should be submitted to the jury. However, I shall rule that the indictment is sufficient.”

Tutt elegantly rose.

“Having due respect to Your Honor’s ruling as to the sufficiency of the indictment I shall address myself simply to the question of *scienter*. I might, of course, dwell upon the impropriety of charging the defendant with criminal responsibility for the act of another free agent even if that agent be an animal – but I will leave that, if necessary, for the Court of Appeals. If anybody were to be indicted in this case I hold it should have been the dog Andrew. Nay, I do not jest! But I can see by Your Honor’s expression that any argument upon that score would be without avail.”

“Entirely,” remarked Witherspoon. “Kindly go on!”

“Well,” continued Tutt, “the law of this matter needs no elucidation. It has been settled since the time of Moses.”

“Of whom?” inquired Witherspoon. “You don’t need to go back farther than Chief Justice Marshall so far as I am concerned.”

Tutt bowed.

“It is an established doctrine of the common law both of England and America that it is wholly proper for one to keep a domestic animal for his use, pleasure or protection, until, as Dykeman, J., says in *Muller vs. McKesson*, 10 Hun., 45, ‘some vicious propensity is developed and brought out to the knowledge of the owner.’ Up to that time the man who keeps a dog or other animal cannot be charged with liability for his acts. This has always been the law.

“In the twenty-first chapter of Exodus at the twenty-eighth verse it is written: ‘If an ox gore a man or a woman, that they die; then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox

shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death.'

"In the old English case of *Smith vs. Pehal*, 2 Strange, 1264, it was said by the court: 'If a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice. And the safety of the king's subjects ought not afterwards to be endangered.' That is sound law; but it is equally good law that 'if a person with full knowledge of the evil propensities of an animal wantonly excites him or voluntarily and unnecessarily puts himself in the way of such an animal he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said in a legal sense that the keeping of the animal, which is the gravamen of the offense, produced the injury.'

"Now in the case at bar, first there is clearly no evidence that this defendant knew or ever suspected that the dog Andrew was otherwise than of a mild and gentle disposition. That is, there is no evidence whatever of *scienter*. In fact, except in this single instance there is no evidence that Andrew ever bit anybody. Thus, in the word of Holy Writ the defendant Appleboy should be quit, and in the language of our own courts he must be held harmless. Secondly, moreover, it appears that the complainant deliberately put himself in the way of the dog Andrew, after full warning. I move that the jury be directed to return a verdict of not guilty."

"Motion granted," nodded Judge Witherspoon, burying his nose in his handkerchief. "I hold that every dog is entitled to one bite."

"Gentlemen of the jury," chanted the clerk: "How say you? Do you find the defendant guilty or not guilty?"

"Not guilty," returned the foreman eagerly, amid audible evidences of satisfaction from the Abyssinian brother, the *Baby's World* editor and the others. Mrs. Appleboy clung to Tutt's hand, overcome by emotion.

"Adjourn court!" ordered the judge. Then he beckoned to Mr. Appleboy. "Come up here!" he directed.

Timidly Mr. Appleboy approached the dais.

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“Don’t do it again!” remarked His Honor shortly.

“Eh? Beg pardon, Your Honor, I mean –”

“I said: ‘Don’t do it again!’” repeated the judge with a twinkle in his eye. Then lowering his voice he whispered: “You see I come from Livornia, and I’ve known Andrew for a long time.”

As Tutt guided the Appleboys out into the corridor the party came face to face with Mr. and Mrs. Tunnygate.

“Huh!” sneered Tunnygate.

“Huh!” retorted Appleboy.

