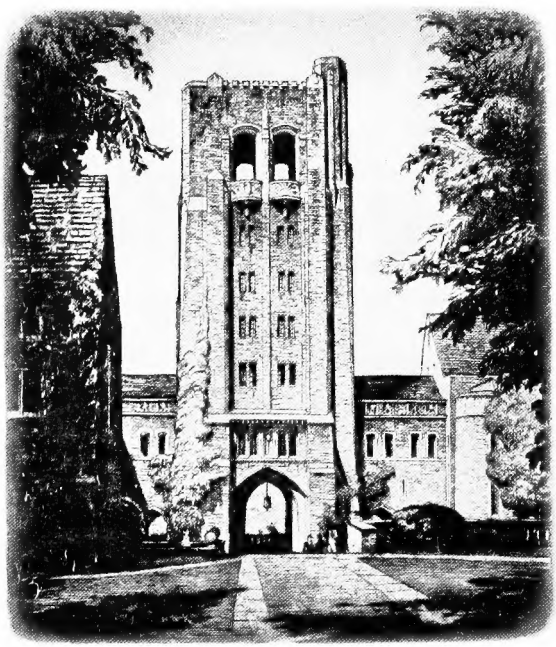

THE

LAW OF ANIMALS

A TREATISE

ON

PROPERTY IN ANIMALS

WILD AND DOMESTIC

AND THE

RIGHTS AND RESPONSIBILITIES ARISING THEREFROM

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PHILADELPHIA
T. & J. W. JOHNSON & CO.
1900

PREFACE.

There is, in the author's opinion, natural cause for wonder why, at a time when of making many law-books there is no end, the large and important subject exploited in the present volume has been almost wholly disregarded. For just as the law of real property differs from that of personal property as dealing with what is immovable and indestructible, so the law of animate differs from that of inanimate property as dealing with powers of consciousness, volition and reproduction, and liability to suffering and death,—a distinction far more significant in science and philosophy, however it may be in jurisprudence, than that existing in the former case. As a matter of fact, these powers and liabilities in animal life form the basis of an elaborate system of rights and responsibilities which may be termed with perfect propriety the Law of Animals. The elements of this law have, hitherto, lain more or less concealed in numberless statutes, reports, digests and text-books. Hardly an index of any scope can be found in which the title "Animals" does not occur, accompanied by various cross-references. And yet, so far as the present writer has been able to ascertain, no effort has ever been made to work these scattered elements into an organic structure. It is hoped, therefore, that this treatise may serve to the accomplishment of such an end.

It must be premised that, animals being personal property, the whole law governing such property is applicable, of course, to them, but it is only such particular portions of that law as relate distinctly to their peculiar qualities that can be called, with any technical accuracy, the Law of Animals. Matters unconnected with their natures, dispositions and

habits, their liability to injure and be injured,—which concern them and all other subjects of property alike, are not discussed here. For the same reason, where the animal is simply a mechanical factor in the circumstances of a case, the decision belongs under some other category than the present one. This is true, for example, of the numerous cases arising under what is called the Law of the Road, in its wider sense, which involve merely questions of personal negligence on the part of riders, drivers or pedestrians. Where, however, the animal becomes an active factor in the result, as through its fright or viciousness or liability to injury, the principle of exclusion above stated does not apply and the case falls naturally within the scope of the present treatise. Otherwise it should be looked for in works dealing with the Law of Highways or of Negligence. The general subject of Fisheries has also been omitted as belonging properly to the domain of Maritime and International Law and the Law of Watercourses. But this has not precluded a full statement of the rules governing property in fish, whales and seals.

With regard to the method of treatment adopted, it has been the object of the author to let the cases speak as much as possible for themselves,—in other words, to give, as far as is consistent with reasonable brevity, the facts and grounds of decision in all the more important cases rather than to furnish long lists of cases to support general legal propositions. No attempt has been made to compile and digest the statutory law on the subjects treated of, except in so far as it is laid down and interpreted in the decisions themselves. Where there are so many independent jurisdictions, any other plan would be confusing, even if it were practicable.

Of especial importance in the discussion of such a new subject have been found to be the information derived from and conclusions deduced in essays and articles in leading reviews, notes by learned commentators and other unofficial documents. These, as will be seen, have been carefully examined and largely quoted, wherever that seemed desirable.

For the benefit of such of his readers as may be desirous of investigating matters of antiquarian and literary interest connected with animals, such as their ancient trials in court for various penal offences, the author has, in the note below, prepared a list of sources of information on these points that will, he thinks, be found sufficient for their needs.

If the technical text-book writer might hope to encroach somewhat on the province of the poet and the naturalist and awake in his readers a deeper interest in our rights and responsibilities with regard to the great world of our dumb, though not silent, fellow-beings and their correlative right to proper protection and kindness at our hands, such an outcome of the time and labor spent on the present work would be, in itself, no mean reward.

NOTE.

The reader is referred to the following articles:

Prosecutions Against Animals: 1 Amer. Jurist 223; 14 Crim. L. Mag. 709.

Legal Prosecutions of Animals: 17 Pop. Sci. My. 619.

Bugs and Beasts Before the Law: 54 Atl. My. 235; 10 Green Bag 540; 11 id. 33.

Cats: 3 Green Bag 350.

A Legal Aviary: 7 Green Bag 182.

Legal Entomology: 7 Green Bag 323.

Animals as Offenders and as Victims: 21 Alb. L. Jour. 265.

Animals Tried in Court: 45 Alb. L. Jour. 31.

Animal Defamation [*i. e.*, Actions for calling persons by the names of animals]: 9 Green Bag 135; 11 id. 43.

See also, with regard to insects, "Législation et Jurisprudence concernant les Insectes Utiles et Nuisibles à l'Agriculture et les Oiseaux Insectivoires," par Georges Viret [Paris, 1896].

TABLE OF CONTENTS.

TITLE I.

PROPERTY IN ANIMALS.

CHAPTER I.

WILD ANIMALS.

	PAGE
1. General nature of this property,	1
2. Character of confinement,	4
3. Pursuit,	5
4. *Animus revertendi,*	6
5. When wild animals are the subjects of larceny,	8
6. Property in game.	10
7. The increase of wild animals,	15
8. Particular animals considsidered. Bees,	16
9. Pigeons, doves, pheasants partridges, swans,	20
10. Whales, seals,	23
11. Fish, oysters,	28
12. Cats,	33
13. Miscellaneous beasts,	35
14. Miscellaneous birds,	37
15. Inheritance in wild animals,	40

CHAPTER II.

DOMESTIC ANIMALS.

Part I. Domestic animals and their increase. Branding.

16. Nature of this property, 42
17. The increase of animals, 43
18. Brands as evidence of ownership, 47

Part II. Taxation of domestic animals.

19. Taxation of domestic animals, 50

Part III. Property in dogs.

20. The dog as the subject of a civil action, 57
21. The dog as the subject of larceny; dogs as a source of evidence in criminal actions, 59
22. Taxation and license, 64

TITLE II.

TRANSFER OF PROPERTY.

CHAPTER I.

SALE AND MORTGAGE.

	PAGE
23. What may be sold,	69
24. Change of possession,	70
25. Animals running on the range,	72
26. Validity; damages,	74
27. General nature of a warranty; patent defects, etc.,	76
28. Animals bought for a special purpose, as breeding, etc.,	80
29. Sale for food,	82
30. Warranty by a servant or agent,	84
31 What amounts to a warranty,	86
32. What does not amount to a warranty,	88
33. What constitutes unsoundness, etc.,	89
34. Specific forms of unsoundness,	93
35. Return on breach of warranty,	96
36. Damages on breach,	98
37. Mortgage of animals and their increase,	101
38. Priority of the mortgage lien,	109

CHAPTER II.

ESTRAYS.

39. What is an estray,	114
40. Rights and liabilities of the taker-up of an estray,	116

TITLE III.

RIGHTS OF OWNERS OF ANIMALS.

CHAPTER I.

INJURING AND KILLING ANIMALS.

	PAGE
41. General liability,	119
42. Proximate cause and probable consequence,	121
43. Dogs attacking persons or animals,	127
44. Other attacking animals,	132
45. Injuries inflicted on trespassing animals,	135
46. Unlicensed and dangerous animals; police power,	141
47. Accidental injuries to animals trespassing or running at large,	147
48. Injuries from barbed-wire fences,	153
49. Insurance on live-stock,	158
50. Measure of damages; evidence of value,	163

CHAPTER II.

THEFT AND REMOVAL OF ANIMALS.

51. The felonious intent,	167
52. The taking,	171
53. Asportation, killing, removal to another county or State,	173
54. Ownership; want of consent,	176
55. The description in the indictment,	178
56. Horse, mare, gelding, etc.,	179
57. Cattle, sheep, hog, deer,	181
58. Living and dead animals; evidence,	183
59. Driving animals from the range,	185
60. Altering brands and marks,	186
61. Civil remedies; measure of damages,	187

CHAPTER III.

INJURIES TO ANIMALS ON HIGHWAYS.

PAGE

62. Injuries resulting from accidental fright and a defect in the highway; the Massachusetts rule, 192
63. Exceptions to the above rule where the lack of control is but momentary, 202
64. The rule that the municipality is liable in such cases, 203
65. Where fright is caused by the defect, 214
66. Character of objects causing fright, 229
67. Injury from other causes, 240
68. Contributory negligence, 246
69. Evidence; damages, 254

TITLE IV.

LIABILITIES OF OWNERS OF ANIMALS.

CHAPTER I.

ANIMALS TRESPASSING AND RUNNING AT LARGE.

70. The common-law rule with regard to restraining animals, 258
71. Abrogation of the common-law rule, 265
72. Division fences, 269
73. Sufficiency of the fence, 274
74. Nature and results of the trespass, 276
75. Animals straying from the highway, 279
76. General rules affecting liability; *scienter;* intention; recovery, 284
77. When animals are "running at large"; pasturing in the highway, 290
78. Statutes and ordinances regulating running at large, 298
79. Distress, 301
80. Other remedies against trespassing animals, 306

CHAPTER II.

IMPOUNDING. INJURIES ON HIGHWAYS. DISEASED ANIMALS. NUISANCES. RACING.

PAGE

81. Nature of a pound, 310
82. The right to impound, 312
83. Manner of impounding; remedies of the owner, 314
84. Damages; sale, 320
85. Horses left unguarded in the highway, 323
86. Liability in case of horses running away, 328
87. Damage done in highways by passing animals, 338
88. Diseased animals; sale, 340
89. Diseased animals; transportation and liability in general, 343
90. Nuisances; diseased and dead animals, 350
91. Racing and betting, 361

CHAPTER III.

VICIOUS AND FEROCIOUS ANIMALS.

92. Wild and dangerous animals, 372
93. Negligence and contributory negligence, 379
94. *Scienter*, 391
95. Evidence, 402
96. Liability of owner or keeper; joint and several liability, 405
97. Action; pleading; damages, 414

TITLE V.

BAILMENT AND CARRIAGE.

CHAPTER I.

BAILMENT.

98. Nature of bailment, 419
99. Rights of the bailee, 422
100. Duties and liabilities of the bailee, 424
101. Negligence of servants, 428
102. Driving or riding beyond the agreed point; Sunday driving, 430

PAGE

103. Action; damages, 432
104. Agistment, 434
105. Lien of agistors and trainers, 439
106. Breeding, 444
107. Livery-stable keepers, 446
108. Lien of livery-stable keepers, 449
109. Innkeepers, 453

CHAPTER II.

CARRIERS OF ANIMALS.

110. Nature of the contract of carriage, 460
111. Restriction of liability, 469
112. Receiving; loading; unloading; delivery, 479
113. Mode of transportation, 488
114. Food and water, 495
115. Delay and accident, 498
116. Injuries due to the nature and condition of animals, 505
117. Notice, 508
118. Evidence, 511
119. Damages, 516

TITLE VI.

CRUELTY—GAME LAWS.

CHAPTER I.

CRUELTY AND MALICIOUS MISCHIEF.

120. Cruelty to animals in general, 523
121. What animals are protected, 526
122. What acts are prohibited, 529
123. Injuring for sport; dishorning and spaying, 537
124. Societies for the prevention of cruelty; charitable bequests, 541
125. Indictment for cruelty, 543
126. Malicious mischief to animals, 545
127. Proof of malice; indictment, 552

CHAPTER II.

GAME LAWS.

	PAGE
128. Power to enact game laws,	557
129. Capture, sale or possession of game in the close season,	562
130. Right to shoot in private lands,	568

TITLE VII.

INJURIES TO ANIMALS BY RAILWAYS.

CHAPTER I.

LIABILITY IRRESPECTIVE OF FENCING LAWS.

131. General liability; negligence; cause of injury,	576
132. Duties of trainmen; rate of speed; signals,	585
133. Liability for frightening animals,	597
134. Animals running at large; contributory negligence,	607
135. Notice; action; parties; pleading,	629
136. Evidence,	637
137. Damages,	645

CHAPTER II.

LIABILITY UNDER THE STATUTES REGULATING FENCES.

138. General liability for failure to fence,	652
139. To what owners the company is liable.	663
140. Crossings; gates,	668
141. Cattle-guards,	675
142. Where fences are necessary; station grounds,	681
143. Action; parties; pleading,	686
144. Evidence; damages,	692

TITLE I.

PROPERTY IN ANIMALS.

CHAPTER I.

WILD ANIMALS.

1. General nature of this property.
2. Character of confinement.
3. Pursuit.
4. *Animus revertendi.*
5. When wild animals are the subjects of larceny.
6. Property in game.
7. The increase of wild animals.
8. Particular animals considered. Bees.
9. Pigeons, doves, pheasants, partridges, swans.
10. Whales, seals.
11. Fish, oysters.
12. Cats.
13. Miscellaneous beasts.
14. Miscellaneous birds.
15. Inheritance in wild animals.

1. General Nature of This Property.—The distinction between wild and domestic animals as subjects of property is one that exists both in the common and the civil law. Without discussing the question whether all animals were originally *feræ naturæ* until tamed by man, it may be said in the words of Blackstone that "our law apprehends the most obvious distinction to be between such animals as we generally see tame and are therefore seldom, if ever, found wandering at large, which it calls *domitæ naturæ*, and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man." [1]

[1] 2 Bl. Com. 391.

In animals of the latter kind a qualified property may exist at the common law in three ways: *per industriam hominis*, where a man reclaims and tames them, or confines them so that they cannot enjoy their natural liberty; *per impotentiam*, where the young of wild animals are too weak to escape from the control of the land-owner; and *propter privilegium*, where one has an exclusive privilege of hunting and killing animals within his liberty.[2] This property was held to cease when the animals pass out of the control of their owner, subject to certain exceptions to be hereafter considered.

So in the civil law, the title termed "*occupatio*," or the acquisition of ownership by taking possession of things formerly without an owner, exists with regard to wild animals. Gaius says: "If we have caught a wild beast or a bird or fish, the moment this animal has been caught it becomes ours, and it is regarded as ours so long as it is under the restraint of our safekeeping, but when it has escaped from our keeping and regained its natural liberty, it becomes the property of the first taker, because it ceases to be ours. Now, it is considered to regain its natural liberty when either it has escaped out of our sight or, though still in our sight, the pursuit is difficult."[3]

In the Report of the Royal Commissioners on the Criminal Code it is said: "As to living animals *feræ naturæ* in captivity we think they ought to be capable of being stolen. When such an animal escapes from captivity, a distinction appears to arise which deserves recognition. If the animal is one which is commonly found in a wild state in this country, it seems reasonable that on its escape it should cease to be property. A person seeing such an animal in a field may have no reasonable ground for supposing that it had just escaped from captivity. If, however, a man were to fall in with an animal imported as a curiosity at great expense from the interior of Africa, he would hardly fail to know that it

[2] 2 Bl. Com. 391.

[3] Gai. II § 67, quoted in Salkowski's Roman Private Law (Whitfield's ed.) § 83.

had escaped from some person to whom it would probably have a considerable money value. We think that a wild animal should, on escaping from confinement, still be the subject of larceny, unless it be one commonly found wild in this country." [4]

And in a Georgia case the court remarked: "To say that if one has a canary bird, mocking bird, parrot, or any other bird so kept, and it should accidentally escape from its cage to the street, or to a neighboring house, the first person who caught it would be its owner, is wholly at variance with our views of right and justice. To hold of the travelling organist with his attendant monkey, if it should slip its collar and go at will out of his immediate possession and control and be captured by another person, that he would be the true owner and the organist lose all claim to it, is hardly to be expected; or that the wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion." [5]

In an article comparing the cases of Mullett *v.* Bradley [6] and Ulery *v.* Jones [7] it is said: "Of course in the Illinois case there was the element that the wild nature had apparently been overcome, and that the animal was substantially domesticated. Is there, however, any essential difference between such a case and that, for instance, of a dancing bear or other wild animal that, although not qualified to mingle on terms of social equality with ordinary domestic beasts, is still substantially redeemed from barbarism as well as liberally educated? If an animal of the latter class should make his escape, it seems to us that ordinary justice and the usual analogies of the law would require that the original owner be permitted to reclaim him as ordinary property. The opinion in Mullett *v.* Bradley expressly holds that escape to a native place or a natural environment is not necessary in

[4] 17 Ir. L. T. 10. [6] Manning *v.* Mitcherson, 69 Ga. 447, 450.
[5] 24 Misc. (N. Y.) 695, cited in § 10, infra.
[7] 81 Ill. 403, cited in § 13, infra.

order to divest the qualified owner's title. Therefore we do not see why the rule laid down in this New York case would not apply if a menagerie train were wrecked and such of the animals, no matter how valuable, as were uninjured had escaped. Large amounts of capital and much industry are now invested in menageries and in tamed animals for various kinds of 'shows,' and such business enterprises are sanctioned by law. It, therefore, seems to us that the universal application of the rule laid down in Mullett *v.* Bradley might lead to very grave injustice. . . . It certainly would seem that Blackstone's rule above quoted should not be extended, but at least very strictly construed." [8]

2. Character of Confinement.—The examples usually cited by the English jurisconsults of animals subject to this kind of qualified property are deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, fish in a private pond or in a trunk, swans marked, even if turned loose in a river, or unmarked in a private river or pond, and bees hived and reclaimed. Otherwise of deer, hares and conies in a forest or chase, fish in an open river or pond, or wild fowls at their natural liberty.[9] "Encompassing and securing such animals with nets and toils, or otherwise intercepting them, so as to deprive them of their natural lib-

[8] N. Y. Law Jour., quoted in 47 Cent. L. Jour. 439.

In 58 Alb. L. Jour. 327, it is said: "As has been pointed out by the New York Law Journal, this rule would apply with harshness, if not with positive injustice, to the case of a wreck of a menagerie train and the escape of the wild animals constituting the menagerie. The modern development of the 'show' business, in which large amounts of capital are invested, would seem to require a more rigid application of the rule as to what constitutes a return to the normal state of nature of an animal *ferœ naturæ*."

[9] 2 Bl. Com. 392; 4 id. 235; 1 Hale P. C. 510.

A beast due to the lord of the manor by heriot custom may be seized without the manor, although it has never been within it: Western *v.* Bailey, [1897] 1 Q. B. 86.

erty and render escape impossible, may justly be deemed to give possession of them to those persons who by their industry and labor have used such means of apprehending them." [10]

But if any of these animals not subject to property are killed, they are reduced into possession, and larceny may be committed of their flesh and skin.[11] "The very circumstance of cutting the animal up makes it property." [12]

Specific instances of confinement will be discussed in the later sections of the present chapter.

3. Pursuit.—Mere pursuit of a wild animal is not sufficient to confer property. Where the defendant killed a fox in view of the person who started, chased and was on the point of seizing it with his hounds on waste land, the property was held to be in the former.[13] The pursuer must have wounded the animal or brought it within his power and control.[14] If, after wounding it, the hunter continues his pursuit till evening, then abandons it, he acquires no property, although his dogs continue the chase.[15]

In the civil law "the question has been raised whether a wild beast which is so wounded that it can be captured is to be regarded as our immediate property. Trebatius concluded that it was ours at once, and that it would seem to be ours as long as we pursue it, but that if we desist from its pursuit, it ceases to be ours and again becomes the property of the first taker. . . . The opinion of most has been that it is not ours unless we have captured it, because much may happen to prevent our capturing it; which is the better opinion." [16] Chancellor Kent appears to consider that this principle of the civil law is the one adopted in the two cases

[10] Pierson *v.* Post, 3 Cai. (N. Y.) 175, 178.
[11] 1 Hale P. C. 510; 2 Bish. New Crim. L., §§ 772, 775.
[12] Reg. *v.* Gallears, 3 New Sess. Cas. 704.
[13] Pierson *v.* Post, supra. [14] Ibid.
[15] Buster *v.* Newkirk, 20 Johns. (N. Y.) 75.
[16] Gai. II § 67; Salkowski's Rom. Priv. Law § 83.

cited above,[17] but in the opinion in Pierson *v.* Post it is said: "To a certain extent and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to or possession of wild beasts; but that, on the contrary, the mortal wounding of such beasts by one not abandoning his pursuit may with the utmost propriety be deemed possession of him; since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty and brought him within his certain control. . . . Barbeyrac seems to have adopted and had in view in his notes the more accurate opinion of Grotius with respect to occupancy."[18] And in a Canadian case it was held that one who has chased a wild animal and wounded it is to be regarded as the first occupant so long as he remains in pursuit, and to be the owner as against another who catches or kills it.[19] Some further cases are considered below in treating of property in particular kinds of animals.[20]

4. Animus Revertendi.—It has been already said that this property in wild animals is qualified only and ceases when they escape from the control of their owner. If, however, they have what is called the *animus revertendi*, which is only to be known by their usual habit of returning whence they have escaped, the rule is otherwise and they remain the property of the original owner during their absence.[21] "The law therefore," as Blackstone says, "extends this possession further than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property;

[17] 2 Kent Com. 349, citing Inst. 2, 1, 13; Dig. 41, 1, 5, 2.
[18] 3 Cai. (N. Y.) 178.
[19] Charlebois *v.* Raymond, 12 Low. Can. Jour. 55.
[20] See §§ 8-14, infra.
[21] 2 Kent. Com. 348; 2 Bl. Com. 391; 13 Vin. Abr. 207; Brooke's Abr., "Propertie," 37.

for he hath *animum revertendi*. So are my pigeons that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for anyone else to take him; but otherwise if the deer has been long absent without returning, or the swan leaves the neighborhood." [22]

So, in the civil law, Gaius says: "In respect of such animals as are in the habit of going and returning, as pigeons and bees and deer, which are accustomed to go into the woods and come again, we have this traditional rule that if they cease to have the intention of returning, they also cease to be ours and become the property of the first taker; now they appear to cease to have the *animus revertendi* when they have discontinued their habit of returning." [23]

Before the Behring Sea arbitrators Sir Charles Russell argued that the *animus revertendi* conferred the right of property in animals at common law only when it was induced by artificial means, such as taming them or offering them food, and that this principle did not apply to the case of seals which migrated and returned from natural causes, and the decision of the arbitrators seems to sustain this view.[24] This theory may be compared with that with regard to bees referred to by Blackstone, viz.: That the only ownership in them is *ratione soli*. He considers that the fact that the char-

[22] 2 Bl. Com. 392.
[23] Gai. II § 67; Salkowski's Rom. Priv. Law § 83.
[24] See § 10, infra.

ter of the forest allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine that a qualified property may be had in bees in consideration of the property of the soil whereon they are found.[25] The application of this rule of the *animus revertendi* to the cases of particular animals is treated below.[26]

5. When Wild Animals are the Subjects of Larceny.—In order to assert property in wild animals in a civil action, like trespass, the plaintiff must show that they were already captured or domesticated and of some value, or that they were dead, or that the defendant killed or took them on the plaintiff's ground, or that the game was started there and killed or captured elsewhere, the plaintiff asserting his possession by joining in the pursuit.[27] But in a criminal action, in order to convict the defendant of larceny it was necessary at the common law, except in one or two special cases, to show another fact besides that the animal was dead, reclaimed or confined—viz.: that it was of a species fit for food.[28] Animals kept for pleasure, curiosity or whim, such as dogs, bears, cats, apes, parrots, singing-birds, ferrets, foxes, etc., were held not to be the subjects of larceny by reason of the baseness of their nature.[29] These exceptions arose at a time when larceny was punishable with death, and the principle was no doubt a sounder one for this reason than appears at sight.[30] In the report of the

[25] 2 Bl. Com. 393. And see Mr. Justice Harlan's opinion in the Behring Sea Arbitration, p. 158; Rexroth *v.* Coon, 15 R. I. 35; Gillet *v.* Mason, 7 Johns. (N. Y.) 16; Idol *v.* Jones, 2 Dev. L. (N. C.), 162.

[26] See §§ 8-14, infra.

[27] 2 Greenl. Ev., § 620, citing Ireland *v.* Higgins, Cro. Eliz. 125; Grymes *v.* Shack, Cro. Jac. 262; Churchward *v.* Studdy, 14 East 249; Com. Dig. Trespass A (1); Sutton *v.* Moody, 2 Salk. 556; Pierson *v.* Post, 3 Cai. (N. Y.) 175.

[28] 4 Bl. Com. 235.

See on the general subject of Larceny, Title III, Ch. II, infra.

[29] 4 Bl. Com. 235.

[30] See the article on the Criminal Code quoted in 17 Ir. L. T. 10, and the opinion in Whittingham *v.* Ideson, 8 Upper Can. L. Jour. 14.

Royal Commissioners on the Criminal Code it is said: "One rule of the existing law is founded on the principle that to steal animals used for food or labor is a crime worthy of death, but that to steal animals kept for pleasure or curiosity is only a civil wrong. The principle has long since been practically abandoned. Sheep-stealing is no longer a capital crime, and dog-stealing is a statutory offense; but the distinction still gives its form to the law and occasionally produces results of a very undesirable kind. It has been lately held, for instance, that, as a dog is not the subject of larceny, it is not a crime to obtain by false pretences two valuable pointers: Reg. *v.* Robinson, Bell. 34. It seems to us that this rule is quite unreasonable, and that all animals which are the subject of property should also be the subject of larceny." [31]

It is necessary, however, to constitute larceny, that he who steals the animal should know it to be reclaimed or confined.[32]

The exceptions to the rule that an animal must be fit for food in order to be the subject of larceny were confined to the cases of swans, because they were royal birds,[33] hawks, on account of their generous nature and in the interests of noble sportsmen,[34] and a stock of bees, which, although not food themselves, produced honey, which was.[35]

These distinctions have been almost entirely abolished by statute both here and in England, and, as a rule, animals that are the subjects of property are now also the subjects of theft. As was said in a North Carolina case: "All of the distinctions as to animals *ferœ naturæ* and as to their generous or base natures which we find in the English books, will not hold good in this country. The English system of game laws seems to have been established more for princely diversion

[31] 17 Ir. L. T. 10.

[32] 1 Hale P. C. 510; 2 Bish. New Crim. L., § 779; Hammond on Larc., parl. ed., p. 36, pl. 70.

[33] Dalt. Just. 156. And see § 9, infra.

[34] 1 Hale P. C. 511; Haywood *v.* State, 41 Ark. 479, 482.

[35] 2 East P. C., c. 16, § 41; Haywood *v.* State, supra. See 45 J. P. 475.

than for use or profit, and is not at all suited to the wants of our enterprising trappers. We take the true criterion to be the *value* of the animal, whether for the food of man, for its fur, or otherwise. We know that the otter is an animal very valuable for its fur, and we know also that the fur trade is an important one in America and even in some parts of North Carolina. If we are to be bound absolutely by the English authorities without regard to their adaptation to this country, we should be obliged to hold that most of the animals so valuable for their fur are not the subjects of larceny on account of the baseness of their nature, while at the same time we should be bound to hold that hawks and falcons, when reclaimed, are the subjects of larceny in respect of their generous nature and courage." [36]

The fact that the animal is dead, reclaimed or confined should be set out in the indictment.[37]

6. Property in Game.—In the case of Sutton *v.* Moody[38] it was held that a man has property *ratione loci* in animals which are *feræ naturæ* on his land, but that this property ceases when they quit or are hunted off the land. Lord Holt laid down the following propositions: "If a man keeps conies in his close (as he may) he has a possessory property in them so long as they abide there; but if they run into the land of his neighbor, he may kill them, for then he has the possessory property. If A. starts a hare in the ground of B. and hunts it and kills it there, the property continues all the while in B. But if A. starts a hare in the ground of B. and hunts it into the ground of C. and kills it there, the property is in A., the hunter; but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C.[39] But if A. starts a hare, etc., in a forest or warren of B., and

[36] State *v.* House, 65 N. C. 315. And see the opinion in Haywood *v.* State, quoted in § 14, infra.

[37] Rex *v.* Rough, 2 East P. C., c. 16, § 41.

[38] 1 Ld. Raym. 250. [39] So in the civil law. See Gai. II, § 67.

hunts it into the ground of C. and there kills it, the property remains all the while in B., the proprietor of the warren, because the privilege continues." So in the later case of Blades *v.* Higgs[40] it was held that game chased and killed on A.'s land is his property, and his servants are justified in taking it away from the trespasser, on the ground that title to property created merely by the act of reducing it into possession necessarily implies that this reduction is effected by an act not in any way of a wrongful nature, and that such an act effected by one who is at the moment a trespasser is not sufficient. Lord Holt's proposition that if A. starts a hare in the ground of B. and hunts it into the ground of C. and kills it there, the property is in A., was thus commented on by Lord Chelmsford: "It would appear to me to be more in accordance with principle to hold that if the trespasser deprived the owner of the land where the game was started of his right to claim the property by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner and not for himself."

It was also held in Churchward *v.* Studdy[41] that where the plaintiff's dogs hunted and caught on the defendant's land a hare started on the land of a third person, the property was thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking the hare away; and so it would be though the hare being quite spent had been caught up by a laborer of the defendant's for the benefit of the hunters. In a carefully considered article[42] the writer took issue with a dictum in Reg. *v.* Roe,[43] where it was held that an indictment charging a prisoner with stealing "one dead partridge," was not sustained by proof that the partridge was wounded but was picked up while alive, though in a dying state. Willes, J., said: "I wish to state for myself that I am not satisfied that if the partridge had been dead when picked up by the prisoner it would have been sufficiently reduced

[40] 11 H. L. Cas. 621. [41] 14 East 249. [42] 46 J. P. 3.
[43] 11 Cox C. C. 554.

into possession so as to sustain the charge of larceny." On the authority of Blades *v.* Higgs, supra, and of other cases cited in this section, the author of the article concludes: "1. When game is killed and falls upon the land of A. it becomes at once his absolute property. 2. This is so, whether A. has himself killed the game or whether it has been killed by others, trespassers or otherwise. 3. This is so, whether the fact that the game is dead and lying upon his land is or is not within A.'s knowledge. 4. Under such circumstances the game is at 'once reduced into the possession' of A., and he may bring an action against any one who converts it. 5. Under such circumstances any person who picks up and dishonestly appropriates the game is guilty of larceny, except in cases where the killing and carrying away are one continuous act, as defined in Reg. *v.* Townley." (Cited infra.)

The exception referred to is thus explained by Bovill, C. J., in Reg. *v.* Townley:[44] "Before there can be a conviction for larceny for taking anything not capable in its original state of being the subject of larceny, as for instance things fixed to the soil, it is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel and so is brought within the law of larceny. This doctrine has been applied to stripping lead from the roof of a church, and in other cases of things affixed to the soil. And the present case must be governed by the same principle." In that case, poachers, of whom the prisoner was one, wrongfully killed some rabbits on crown land. They placed the rabbits in a ditch on the same land, some of them in bags and some strapped together, —not having any intention of abandoning their wrongful possession but placing the rabbits in the ditch as a place of deposit till they could conveniently remove them. About three hours afterward the prisoner came back and began to remove the rabbits. It was held that the taking and removal of the

[44] L. R. 1 C. C. 315.

rabbits were one continuous act, and that such removal was not larceny. So where a gamekeeper, not authorized to take or kill rabbits for his own use, took and killed wild rabbits upon his master's land and sold them, and the taking, killing, removing and selling were parts of one continuous action, it was held that such gamekeeper could not be convicted of embezzlement.[45] And the same rule would apply if the servant of the receiver, a dealer in game, with knowledge of the circumstances came and took away game killed by poachers and designedly left for him upon the land.[46] In the article already quoted[47] it is said: "In the case of the gamekeeper it is clear (since the taking and carrying away are *ex hypothesi* one continuous act), that he has neither been guilty of larceny, nor of embezzlement, which is only a species of larceny: Reg. *v.* Read. If, however, the game had been killed by his master or any other person not acting in concert with the keeper, then since the game becomes the absolute property of the land-owner and 'in his possession' so soon as it falls dead upon his land, the keeper, if he dishonestly appropriated it, would, we apprehend, be guilty of larceny."

The following comments were made by the Law Times on the case of Reg. *v.* Read, supra: "The effect of this decision is undoubtedly that a gamekeeper may help himself to his master's game *ad libitum*, provided he takes care to make his killing and carrying away one continuous act, without rendering himself liable to be punished criminally. Now there may be many reasons why the law never intended that poachers should be put upon the same footing as felons, but, whatever they may be, they clearly ought not to apply to gamekeepers. The moral difference between a killing and taking away of game by an ordinary poacher and a killing and taking away by a man who is paid to see that no game is killed and taken away is so great that it would be monstrous

[45] Reg. *v.* Read, 3 Q. B. D. 131.
[46] Per Blackburn, J., in Reg. *v.* Townley, supra.
[47] 46 J. P. 3.

to put the offenses on the same footing. Now that the state of the law has by this case been brought to light, it is to be hoped that it will not be long before it receives a necessary amendment, so that the protection which the criminal law now affords masters from the depredations of their servants may be extended to such cases as these, where the servants are gamekeepers and the subjects of their depredations their masters' game." [48]

In another case the defendant was employed to trap wild rabbits, and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty, he from time to time trapped rabbits and took them to another part of the land and placed them in a bag, intending to appropriate them to his own use. Another keeper observing this, took some of the rabbits out of the bag during the defendant's absence and nicked them, in order that he might know them again, and restored them to the bag. The defendant afterwards took away the bag and the rabbits. It was held that the act of the keeper in nicking the rabbits was no reduction of them into the master's possession so as to make the defendant guilty of larceny.[49]

If one, not qualified to kill game, kills it accidentally, he cannot take it away without subjecting himself to a penalty.[50]

No absolute right of private property exists in game birds even when they are killed at a lawful time. The ownership is in the people of the State and a private person can have only such an interest as the legislature dictates, and may be restricted from selling them or shipping them for purposes of sale.[51] And the possession of an animal arising from an illegal capture is no ground for an action against one releas-

[48] 64 L. T. 222.
[49] Reg. *v.* Petch, 14 Cox C. C. 116.
[50] Molton *v.* Cheeseley, 1 Esp. 123.
[51] Amer. Expr. Co. *v.* People, 133 Ill. 649. And see Garcia *v.* Gunn, 119 Cal. 315.

ing the animal, though without legal authority. But the burden is on the defendant to show that the capture was illegal.[52]

The general subject of game laws will be treated of in another part of this work.[53]

7. The Increase of Wild Animals.—It has been already said that a qualified property may exist in animals *ratione impotentiæ*, on account of their own inability.[54] "As when hawks, herons or other birds build in my trees or conies or other creatures make their nests or burrows in my land and have young ones there, I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires; but till then, it is in some cases trespass, and in others felony, for a stranger to take them away. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined; for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him." [55]

Larceny may be committed of the young of those animals that are reclaimed and serve for food, but of the young of those animals that are still untamed, though in a park, and though the owner has in them the kind of property we have spoken of, *propter impotentiam*, larceny cannot be committed—as of young fawns in a park, young conies in a warren. So of the young of wild or unmarked swans, and of those animals esteemed base. Otherwise, of young pigeons in a dove-cote, young fish in a net or trunk, young hawks in a nest.[56]

Where the lessee of islands sued a fisherman for damages for taking a sea-gull's egg, it was held that a man had a possessory right to any wild bird which was on or over his land,

[52] James *v.* Wood, 82 Me. 173.
[53] See Title VI, Ch. II, infra.
[54] See § 1, supra.
[55] 2 Bl. Com. 394. [56] 1 Hale P. C. 510, 511.

and that this also applied to eggs.[57] But in another case it was held that a boy could not be charged with the larceny of gulls' eggs taken from near a private artificial loch, strictly preserved and surrounded by warning notices, as there is no property in wild birds or their eggs without specific appropriation.[58] Larceny cannot be committed of swans' or hawks' eggs.[59]

On an indictment for stealing three eggs, an acquittal was directed on the ground that, for aught that appeared in the indictment, the eggs might have been the eggs of adders, or some other species of eggs which could not be the subject of larceny.[60] But in a later case where an indictment for stealing a ham was sustained against an objection that there was nothing to show that the ham was fit for food, Pollock, C. B., said: "I think that the case of Reg. *v.* Cox would not now be considered as law." [61]

8. Particular Animals Considered. Bees.—Having laid down the general rules that govern property in wild animals, we shall now consider their application to the cases of particular kinds of animals. With regard to bees, Blackstone says: "Bees also are *feræ naturæ*, but, when hived and reclaimed, a man may have a qualified property in them by the law of nature as well as by the civil law. And to the same purpose, not to say in the same words with the civil law, speaks Bracton: Occupation, that is hiving or including them, gives the property in bees; for though a swarm lights upon my tree, I have no more property in them till I have hived them than I have in the birds which make their nests thereon, and therefore if another hives them, he shall be their proprietor; but a swarm which fly from and out of my hive are mine so long as I can keep them in sight and have power to pursue

[57] County court case cited in 22 Ir. L. T. 438.
[58] County court case cited in 1 Scots L. T. 6.
[59] 2 East P. C. 607; 1 Hale P. C. 511. [60] Reg. *v.* Cox, Car. & Kir. 494.
[61] Reg. *v.* Gallears, 3 New Sess. Cas. 704.

them; and in these circumstances no one else is entitled to take them." [62] He then speaks of the theory that ownership in bees is *ratione soli*, referred to in § 4, supra. So in the civil law, if a swarm of bees had flown from A.'s hive they were reputed his so long as they remained in sight and might easily be pursued, but they do not become private property until they are actually hived.[63]

If a person finds a tree containing a hive on another's land and marks it with his initials, he does not reclaim the bees and vest the exclusive property in himself, especially as against one of the heirs, nor does he acquire the right to bring an action of trespass for cutting down the tree and carrying away the bees and honey.[64] Nor is the interest of one who finds bees on the land of another and hives them, but is not the owner of the hive, the subject of larceny.[65] And although one who discovers bees obtains a license from the owner of the soil to take them and mark the tree with his own initials, he gains no property till he takes possession, nor can he maintain trespass against a third person who takes possession of them on a subsequent license from the owner of the soil. The two licensees stand on an equal footing and he who first takes possession becomes the owner.[66] But one who has obtained a tacit consent from the owner of the soil to cut down the tree and get the honey has, while in the act of cutting down the tree, a superior right over a third person to whom the owner has given subsequent consent, but without revoking the former's authority. "These parties stand, as between themselves and as respects the legal principles applicable to the case, in precisely the same position as though

[62] 2 Bl. Com. 392. See also Idol *v.* Jones, 2 Dev. L. (N. C.) 162; 40 L. R. A. 687 n.

[63] Justin. Inst. 2, 1, 14, cited in 2 Kent Com. 349.

[64] Gillet *v.* Mason, 7 Johns (N. Y.) 16. And see Merrils *v.* Goodwin, 1 Root (Conn.) 209; Fisher *v.* Steward, Smith (N. H.) 60.

[65] State *v.* Repp, 104 Ia. 305.

[66] Ferguson *v.* Miller, 1 Cow. (N. Y.) 243. And see the comments on this case in Goff *v.* Kilts, quoted infra.

neither had any authority from the owner of the tree, and both were trespassers upon his rights, or as though there was no individual owner of the tree. How then would the case stand? No principle is better settled than that a person in possession of property can maintain trespass against anyone that interferes with such possession who cannot show a better right or title." [67]

In a Rhode Island case it was held that trover for the value of bees and honey will not lie against a stranger who appropriated a hive in a box placed by the plaintiff on another's land.[68] The following comments have been made on this case: "While the rights to animals *ferœ naturæ* as between the owner of the soil and others have been fairly settled by a considerable series of cases, the relative rights of parties, both of whom acknowledge the superior right of the owner of the soil, seem never to have been precisely described. In a recent Rhode Island case . . . the plaintiff without permission placed a hive upon the land of a third person. The defendant, also a trespasser, removed the bees and honey which had collected in the hive. The court find no cause of action, holding that neither title nor right to possession is shown either to the bees or to the honey. The discussion, especially in a case where the precise point is clearly new, is unfortunately general and largely irrelevant. . . . It scarcely need follow [*i. e.*, from Blades *v.* Higgs, cited in § 6, supra] that a trespasser cannot maintain on the basis of mere possession an action against a later trespasser. There may have been a possible doubt as to plaintiff's having reduced the animals to possession by collecting them in his hive, but in the preceding cases that would seem to give him actual physical possession enough for this action. About the honey there would seem to be even less doubt; but, strange to say, neither in this case nor elsewhere does the question seem to have been discussed—how far the law about animals *ferœ naturæ* applies

[67] Adams *v.* Burton, 43 Vt. 36. [68] Rexroth *v.* Coon, 15 R. I. 35.

to their produce as eggs or honey. The reason on which the law about animals is founded is wholly inapplicable to the honey, but this case tacitly assumes that no distinction is to be drawn." [69]

If bees have been reclaimed and hived they remain property, notwithstanding a temporary escape, the owner keeping them in sight and marking the tree into which they entered, and, if he can identify them, they belong to him, not to the owner of the soil. The property draws after it possession sufficient to enable the owner of the bees to maintain trespass against a third person who cuts down the tree, destroys the bees, and takes the honey, though such owner himself is liable to trespass for entering on the land of another. "It is said the *owner of the soil* is entitled to the tree, and all within it. This may be true so far as respects an unreclaimed swarm. . . . But if animals *feræ naturæ* that have been *reclaimed*, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he cannot pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty. . . . This case is distinguishable from the cases of Gillet *v.* Mason. . . and Ferguson *v.* Miller [cited supra]. . . . The first presented a question between the finder and a person interested in the soil, the other between two persons, each claiming as the first finder. The plaintiff in the last case, though the first finder, had not acquired a qualified property in the owner according to the law of prior occupancy. The defendant had. Besides, the swarm being unreclaimed from their natural liberty while in the tree, belonged to the owner of the soil *ratione soli*." [70]

[69] 5 Harv. L. Rev. 404. [70] Goff *v.* Kilts, 15 Wend. (N. Y.) 550.

But it was held in a Scotch case that reclaimed bees remain the property of the owner only so long as he is pursuing them where he is entitled to go and that, if they come upon another person's land, that person is entitled to prevent pursuit on his land and becomes the owner of the bees if he hives them.[71]

Bees in the possession of the owner are the subjects of larceny.[72] And so is honey whether made by wild or reclaimed bees.[73] Otherwise of wild bees that have not been hived, though they are confined in the tree by the owner of the land.[74] And it does not slander a person to charge him with having stolen a "bee tree," that phrase having reference to the wild, unreclaimed insect and a standing tree, neither of which is the subject of larceny.[75] But where the defendant said "Thou hast stole our bees and thou art a thief," it was held that the latter words showed that the stealing was of bees of which felony may be committed, and were, therefore, actionable.[76]

9. Pigeons, Doves, Pheasants, Partridges, Swans.—Larceny cannot be committed of old pigeons out of the house; otherwise of young pigeons in a nest, or of old ones confined.[77] Where they are kept in an ordinary dove-cote, having liberty of ingress and egress at all times by means of holes at the top, they are the subjects of larceny.[78] But in a later case it was said: "There has been considerable doubt upon the question whether a pigeon living in a dove-cote when flying about

[71] Harris *v.* Elder, 57 J. P. 553.

[72] 2 East P. C. 16, § 41; State *v.* Murphy, 8 Blackf. (Ind.) 498.

As to the interest of one who finds bees on another's land, see State *v.* Repp, 104 Ia. 305, cited supra.

[73] Harvey *v.* Com., 23 Gratt. (Va.) 941.

[74] Wallis *v.* Mease, 3 Binn. (Pa.) 546.

[75] Cock *v.* Weatherby, 5 Smedes & M. (Miss.) 333.

[76] Tibbs *v.* Smith, T. Raym. 33.

[77] 2 East P. C. 607; 1 Curw. Hawk. 149.

[78] Reg. *v.* Cheafor, 2 Den. C. C. 361.

is property and the subject of larceny, and the decision in Reg. *v.* Cheafor, . . . is that it is larceny to steal pigeons if reclaimed, although unconfined. It was not so clear on prior authority and the matter may still be arguable, though the better opinion of the judges in Dewell *v.* Sanders, Cro. Jac. 490, 492, was that there was no property in such pigeons." [79]

It has been said that "doves in a dove-house descend together with the house to the heir, but the young ones that are not able to fly out belong to the executor; however, it seems that this rule could hardly apply to boxes merely hung on the outside of another building. Probably such of the doves as would descend to the heir would not be considered the subject of larceny, upon the same principle that the stealing of charters and even the box that contained them was no larceny at common law." [80] As illustrating what is here said about the boxes, it has been held that if pigeons are so far tame that they come home every night to roost in wooden boxes hung on the outside of their owner's house, and one steals them out of the boxes, this is larceny.[81]

It has been held that doves are not the subjects of larceny unless in the owner's actual custody—*e. g.*, in a dove-house or when in the nest before they are able to fly. "The reason of this principle is that it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons and are free tenants of the air except when, impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps when feeding on the grounds of the proprietor or resting on his barn or other buildings, if killed by a stranger, the owner may have trespass, and if the purpose be to consume them as food and they are killed or caught or carried away from the enclosure of the owner, the act would be larceny. But

[79] Taylor *v.* Newman, 4 B. & S. 89, per Blackburn, J.
[80] Bac. Abr., "Executor," H. 3. [81] Rex *v.* Brooks, 4 C. & P. 131.

in this case there is no evidence of the situation they were in when killed, whether on the flight a mile from the grounds of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence the act of killing them, though for the purpose of using them as food, is not felonious." [82]

There can be little doubt, however, that a civil action would lie in all these cases, as the birds remain property by reason of the *animus revertendi* which Blackstone considers a characteristic of "my pigeons, that are flying at a distance from their home (especially of the carrier kind)." [83] It has been held, accordingly, that the owner of carrier pigeons does not abandon his reclamation of them by taking them for purposes of training to a distance from home and letting them fly, and that one who shoots such a pigeon in its flight is liable for its value.[84] The Law Times thus criticises this case: "The decision seems to involve considerations of even greater import than the mere protection of pigeons, viz.: the relative rights and liabilities of land-owners and pigeon fanciers. . . . The learned judge found as a fact that the pigeon had *animum revertendi* and that the fancier had done no act to determine the reclamation. And here, we think, a somewhat dangerous principle is admitted. A pigeon is *prima facie feræ naturæ* till reclaimed. The period within which the reclamation continues is evidenced by certain acts on the part of the proprietor, confinement in a dove-cote, with liberty to fly within a reasonable distance therefrom, being the chief. The rights of the neighboring—or, as it may be, as in this case, the distant—owners of land are equally well ascertained. *Cujus est solum, ejus est usque ad cœlum;* and *feræ naturæ* being no man's property and coming on to land of another may be reduced into possession by shooting or otherwise. The whole question depends therefore on the legal construction to be

[82] Com. *v.* Chace, 9 Pick. (Mass.) 15. [83] 2 Bl. Com. 392.

[84] County court case reported in 71 L. T. 65. See the opinion in this case for a review of the authorities.

attached to the apparent act of abandonment of the plaintiff. It may be unsportsmanlike for a land-owner to shoot a pigeon under such circumstances, but the question is, is such a shooting in contravention of the law? The question may be of vital importance to pigeon fanciers, but it is of still more moment to owners of land, whose rights seem to depend on a very slender thread if this ruling, *i. e.*, that the owner of the land is liable, is correct." [85]

Pheasants that have been reared under hens and have never become wild are the subjects of larceny.[86] And so are young pheasants hatched by a hen and under her care in a coop in a field at a distance from the dwelling-house.[87] So, also, partridges about three weeks old and able to fly a little, which had been hatched and reared by a common hen, placed under a coop, and, after its removal, remaining with the hen as her brood, though allowed to wander.[88]

"Of wild swans, nor of their young, larceny cannot be committed, but if they be made tame and domestic, or if they be marked or pinioned, it is felony to take them or their young. But it seems that if they be marked, and yet flying swans that range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, because they cannot be known to belong to any." [89] Blackstone says that it is felony to steal them, if lawfully marked, though at large in a public river; and likewise, though they are unmarked, if in a private river or pond; otherwise it is only a trespass.[90]

10. Whales, Seals.—The rule laid down in the English and Scotch cases is that where a whale is struck and afterwards gets loose, it continues the property of the first striker who

[85] 71 L. T. 65. [86] Reg. *v.* Head, 1 F. & F. 350

But they are, nevertheless, game, and one who deals in them without a license is subject to a penalty: Harnett *v.* Miles, 48 J. P. 455.

[87] Reg. *v.* Cory, 10 Cox C. C. 23. S. P. Reg. *v.* Garnham, 1 id. 451.

[88] Reg. *v.* Shickle, L. R. 1 C. C. 158. [89] 1 Hale P. C. 511.

[90] 4 Bl. Com. 235. See also §§ 4, 5, supra, as to swans.

continues fast till it is killed. So where it appeared that the whale, when struck by the harpoon of the appellants' ship, had got free from the respondent's harpoon, though it remained sticking in her, she was held to belong to the appellants.[91] And, in general, if the first harpoon or line breaks or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish and will become the property of any other person who strikes and obtains it.[92] But it was held a more reasonable usage than this, that a fish is to be considered a fast fish which is attached by any means (such as the entanglement of the line round it, etc.) to the boat of the first striker, though the harpoon does not continue in the whale's body.[93]

In a United States case where a crew struck a whale with a harpoon which with the line remained fast to the whale but not to the boat, and another crew continued the pursuit and captured the whale, it was held that a usage that the whale should belong to the first crew was valid. "It is not disputed that the whalemen of this State [*i. e.*, Massachusetts], who have for many years past formed, I suppose, a very large proportion of all those who follow this dangerous trade in the Arctic seas, and perhaps all other Americans, have for a very long time recognized a custom by which the iron holds the whale, as they express it. The converse of the proposition is that a whale found adrift though with an iron in it belongs to the finder, if it can be cut in before demand made. The usage of the English and Scotch whalemen in the Northern fishery, as shown by the cases, is that the iron holds the whale only while the line remains fast to the boat; and the result is that every loose whale, dead or alive, belongs to the finder

[91] Addison *v.* Row, 3 Paton App. Cas. (Sc.) 334. And see Aberdeen Arctic Co. *v.* Sutter, 4 MacQueen (Sc.) 355.

[92] Littledale *v.* Scaith, 3 Taunt. 243 n—this custom being that of the Greenland fishery. But, by the custom in the Gallipagos Islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it: Fennings *v.* Granville, 1 Taunt. 241.

[93] Hogarth *v.* Jackson, 2 C. & P. 595.

or taker, if there be but one such. . . . If it were proved that one vessel had become fully possessed of a whale and had afterwards lost or left it with a reasonable hope of recovery, it would seem unreasonable that the finder should acquire the title merely because he is able to cut in the animal before it is reclaimed. And, on the other hand, it would be difficult to admit that the mere presence of an iron should be full evidence of property, no matter when or under what circumstances it may have been affixed. But the usage being divisible in its nature, it seems to me that, so far as it relates to the conduct of the men of different vessels in actual pursuit of a whale, and prescribes that he who first strikes it so effectually that the iron remains fast should have the better right, the pursuit still continuing, it is reasonable, though merely conventional, and ought to be upheld." [94]

In Ghen *v.* Rich [95] it is said: "It is by no means clear that without regard to usage the common law would not reach the same results. That seems to be the effect of the decisions in Taber *v.* Jenny [96] and Bartlett *v.* Budd.[97] If the fisherman does all that is possible to do to make the animal his own, that would seem to be sufficient."

The cases referred to hold that if a whale is killed, anchored and left with marks of appropriation, it is by law and custom the property of the captors even if it should drift to another place.

In Ghen *v.* Rich, supra, it was shown that the whales when shot with bomb-lances sink at once to the bottom and rise in from one to three days, the finder claiming salvage. It was held that a custom that each boat's crew had its peculiar mark or device on its lances, by which it could be known who had killed the whale and was thus its owner—was a reasonable and valid one. It was also held that the measure of damages for the conversion was the market value of the oil obtained

[94] Swift *v.* Gifford, 2 Low (U. S.), 110.
[95] 8 Fed. Rep. 159. [96] 1 Sprague (U. S.) 315.
[97] 1 Low (U. S.) 223.

from the whale, less the cost of trying it out and preparing it for market, with interest from the date of the conversion. And this is also the rule in Bourne *v.* Ashley [98] and Bartlett *v.* Budd, supra. In Taber *v.* Jenny, supra, the cost of cutting up and boiling down the whale, etc., was not allowed to be deducted.

A custom in Shetland that the owners of lands on which whales were driven should share in the proceeds with the captors was held in a Scotch case not to be just or reasonable, and was therefore denied judicial sanction.[99]

With regard to seals, the most important decision is that of the Behring Sea Arbitration. The result of this arbitration has thus been summed up: "The decision of the arbitrators practically adopts the rules of the English common law as to the ownership of wild animals by individuals and makes them part of international law as regards such ownership by nations. Since no wild animals at all similar to the fur-seal ever figured before in an international dispute, it became necessary for our government, in the absence of precedents of this character, to turn to the common law for some principle which would sustain our claim to ownership in the seal herds. Accordingly it was argued in our behalf that seals in international law were analogous to such animals as bees or carrier pigeons at the common law, which, as Blackstone said, continued to be the property of their custodian even when flying at a great distance from home, because of their having a fixed intention to return (*animus revertendi*). On the other hand, it was asserted in behalf of Great Britain by Sir Charles Russell, that this *animus revertendi* only conferred the right of property in wild animals at the common law when it was induced by artificial means, such as taming them or offering them food. Hence, he argued, it involved a confusion of ideas to claim that the seals were American property because they migrated at certain periods to a particular place, since

[98] 1 Low (U. S.) 27. [99] Bruce *v.* Smith, 17 Rettie (Sc. Ct. Sess.) 1000.

they were led to do this not by artificial, but by natural causes. As they resembled in this respect many other wild animals, there was no reason, he contended, why the same rule of law should not apply to them, and according to that rule of law such animals remain the property of the owner so long as they continue on his domain. The arbitrators appear to have been convinced by this reasoning, since they have decided that the United States has no right of property in the fur-seals when they are found outside of our territorial waters. The rules and distinctions of the common law on this subject have thus been transplanted into the domain of international law, and the decision of the arbitrators supports the further inference that there is no such thing in international law as a national right of property in a herd or body of wild animals as a whole, apart from the ordinary right of property in each individual animal inherent in its custodian during the time that his possession of it lasts. The decision of the arbitrators establishes the further proposition of international law that beyond the limits at which its property right in a wild animal ceases, a nation has no authority to enforce any measures for its protection, even though such measures are necessary to preserve the species. . . . If the right of national protection to wild animals and other marine products does not extend for any purpose beyond a nation's territorial waters, then it follows that all the fishery legislation of the world, so far as it relates in any degree to fisheries which are more than three miles from land, is, as regards nations not parties to such legislation, illegal and void." [100]

In a Newfoundland case it was held that where the crews of vessels, distributing themselves over large areas of the ice-fields, indiscriminately slaughter seals as they go, leaving them around, taking no heed to collect or mark or pan them, no right of property is acquired in the seals. The Chief Justice said: "I hold that the killing must be accompanied by

[100] Russell Duane, Esq., in 32 Am. Law Reg. 901.

possession, and that when the next comer finds the body of a seal or the bodies of seals on the ice without any accompanying *indicia* of property, the man who claims as of right against him must be in a position then and there to assert his right of property, to point to the specific seals as his own or those of his fellows, and to exercise corporal control over them, unless he is resisted by force or deterred by threats of violence. Except under such circumstances I am of opinion that the killer must be held to have left or abandoned the dead sound seals to the next finder who shall possess himself of them." [101]

Where a sea lion escaped from its captor's control on Long Island Sound and disappeared until about two weeks afterwards, when it was recaptured by a fisherman in the ocean more than seventy miles from the sound, it was held that its original captor lost his right to it, since it had regained its liberty without having the *animus revertendi,* and it was further held that the contention that there can be no return of such an animal to its natural liberty until it has reached its native place on the coast of California or, at least, a place (not found on the American coast) where the physical conditions are favorable to its existence, was untenable.[102]

11. Fish, Oysters.—The owner of a several fishery has a privileged property in the fish therein, and trespass will lie for taking them.[103] But fish are not the subject of larceny unless reclaimed, confined or dead and valuable for food or otherwise. "All the books agree that if fish are confined in a tank or otherwise so that they may be taken at the pleasure of him who has thus appropriated them, then they are the subject of larceny. 'Fish confined in a net or tank are sufficiently se-

[101] Power *v.* Kennedy, Morris's Newfoundland Decis. (1884-1896) 34. See North Amer. Comml. Co. *v.* U. S., 171 U. S. 110, as to rental and taxation.

[102] Mullett *v.* Bradley, 24 Misc. (N. Y.) 695. See the comments on this case quoted in § 1, supra.

[103] Child *v.* Greenhill, 3 Cro. 553.

cured; but how in a pond is a question of doubt, which seems to admit of different answers, as the circumstances of particular cases differ' [citing 2 Bish. Crim. L., § 685; 1 Hale P. C. 511; Foster's Crown Law, 366]. An English statute, 5 Geo. III, Ch. 14, made it indictable to steal fish from a river in any enclosed park. In a case under this statute 'where the defendant had taken fish in a river that ran through an enclosed park, but it appeared that no means had been taken to keep the fish within that part of the river that ran through the park, but that they could pass down or up the river beyond the limits of the park at their pleasure—the judges held that this was not a case within the statute:' Rex *v.* Corrodice, 2 Russell 1199. This is sufficient for our case." [104]

Where the plaintiff, while engaged in fishing, cast a seine around a shoal of mackerel, leaving a small opening which the seine did not quite fill up and through which, in the opinion of experts, the fish could not escape, and the defendant pushed his boat through the opening and took fish, it was held that the plaintiff's possession was not so complete as to enable him to maintain trespass.[105] And where fish have been caught and placed in a cove within the ebb and flow of the tide, being confined therein by a wire fence extending across its mouth, there is no such right of property in them as will support an action of trespass against one who caught them and appropriated them to his own use.[106]

With regard to fish in a pond, a learned writer says: "It has been doubted whether at common law larceny can be committed of fish in a pond. It is admitted that it may be, if they be confined in a trunk or net; because they are then

[104] State *v.* Krider, 78 N. C. 481.

[105] Young *v.* Hichens, 1 Dav. & Meriv. 592, 6 Q. B. 606.

[106] Sollers *v.* Sollers, 77 Md. 148. And, in general, if after fish have been taken, they are restored to their native element so that they can be regained only in a similar manner to that by which they were originally taken, the right of the property is lost: Ibid.

restrained of their natural liberty. And it seems difficult not to extend the application of the same reason to the case of fish in a pond; the pond being private enclosed property and the fish liable to be taken at any time according to the pleasure of the owner. Lambert says 'fishes in streams and rivers are *nullius bona, et occupanti conceduntur;*' but he and others agree that it may be felony to take them in a trunk, stew or pond: 'for a man hath such a possession of them that by their restraint they cannot without help use their nature and forsake him.' So by Lord Coke: Larceny may be committed of fish in a trunk or pond, because they are not at their natural liberty, but as it were in a pound. The case of Grey and Bartholomew [Owen, 20 Goldsb. 129] was a question between the heir and executor, which of them should have fish out of a pond. There it was adjudged that the heir was entitled to them, upon the same principle that he should have deer in a park. Hawkins considers it as clear that the taking fish out of a pond is felony." [107]

In an Indian case fish in irrigation tanks were held not to be in possession.[108]

Oysters, artificially planted in a bed clearly separated and marked out for the purpose of retaining them, are property, and one who takes them without the owner's leave is liable in trespass. "They have been reclaimed and are as entirely within his possession and control as his swans or other water fowl that may float habitually in the bay. They were distinctly designated according to usage; and besides the defendants had actual information of the ownership and they can set up no greater right to take them because found in their native element than tame pigeons in the air or a domesticated deer upon the mountain." [109]

[107] 2 East P. C. 610.

[108] Reg. *v.* Revu Pothadu, Ind. L. R. 5 Madras 390, cited in "Behring Sea Arbitration," No. 4, p. 32.

[109] Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42. And see the cases cited infra.

In a New Jersey case it is said: "Oysters, though usually included in that description of animals [*i. e., feræ naturæ*] do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals they continue perpetually in his occupation and will not stray from his house or person. Unlike animals *feræ naturæ* they do not require to be reclaimed and made tame by art, industry or education; nor to be confined in order to be within the immediate power of the owner. If at liberty they have neither the inclination nor the power to escape. For the purpose of the present inquiry they are obviously more nearly assimilated to tame animals than to wild ones, and perhaps more nearly to inanimate objects than to animals of either description. . . . If then the oysters interfered in any way with the defendant's right of fishing or with the right of navigation or any other right of the public in the waters, it is not claimed that the defendant had not a right to remove or destroy them. . . . But admitting, as may be done, that the planting of the oysters in the public waters was a clear case of nuisance and encroachment upon the public right, it could give the defendant no right to steal them or appropriate them to his own use." [110]

But it has been held in England that though oysters are so placed in a channel as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel negligently against them if he has room to pass without so doing; as an individual cannot abate a nuisance if he is not injured by it otherwise than as one of the public.[111]

And the fact that the planting of oyster shells is a public nuisance is no justification for converting the property to one's own use, was reasserted in a later New Jersey case. It

[110] State *v.* Taylor, 27 N. J. L. 117, 119.
[111] Mayor of Colchester *v.* Brooke, 7 Q. B. 339.

was there held that where to a boat-load of oyster shells deposited in a river germs of oysters floating in the water attached themselves and in about two years developed into marketable oysters, they were the property of him who deposited the shells.[112]

Where oysters were planted in navigable waters opposite the defendant's land, but the buoys marking the bed were carried away and not replaced for several years, it was held that there were not sufficient *indicia* of ownership and control by the person who planted them, to maintain his qualified property or enable him to maintain an action against the defendant for taking them. "Although we consider the case of Fleet *v.* Hegeman [supra] as an authority which we are bound to follow, still it seems to us that the court overlooked the idea that the principle established by them, if carried out, will in effect authorize an exclusive appropriation of public navigable waters for fishing purposes; for there is no limit fixed to the extent to which an individual can make his oyster beds and so long as he has oysters there no other person can lawfully plant his in the same bed; so that the result might be the exclusive appropriation by a few individuals of all the navigable waters capable of being thus appropriated. In the case of Arnold *v.* Mundy [6 N. J. L. 1], which arose in a neighboring State, the court felt the full force of this difficulty and they held an individual could not acquire an exclusive right to any oyster bed, even by a grant from the State; and that the only way in which he could acquire even a temporary enjoyment must be by a lease from the sovereign power for a reasonable toll or rent; and that, too, as an exercise of the *jus regium* for the common benefit of every individual citizen." [113]

But mingling oysters with others of natural growth or owned by other persons is not sufficient to vest property. It

[112] Grace *v.* Willets, 50 N. J. L. 414.
[113] Brinckerhoff *v.* Starkins, 11 Barb. (N. Y.) 248, 253.

is said in one case: "If oysters had previously existed in their native state on this ground, the plaintiffs could not have deprived others of the right to take them by depositing others in the same place. . . . The defendants could not impair the plaintiffs' title to the oysters by depositing a few others in the same place, knowing that the plaintiffs had at the time similar property there and with an intent to mingle the two together that neither could be identified, and thus enable them to appropriate the property of others to their own use [citing 2 Kent Com. 365]." [114] And in a later case the same court say: "It is indispensable to the existence of the right of property in oysters thus planted, that the bed shall not interfere with the exercise of the common right of fishing; for if the oysters were mingled with and undistinguishable from others of natural growth in the public waters, the interest of the person planting them would be subservient to the public use." [115]

In a contract not to engage in the sale of "fish," oysters were held to fall within that denomination.[116]

12. Cats.—Blackstone says: "Among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value, and the killing or stealing one was a grievous crime and subjected the offender to a fine; especially if it belonged to the king's household and was the *custos horrei regii*, for which there was a very peculiar forfeiture." [117]

But in the English common law, as has already been said,

[114] Decker *v.* Fisher, 4 Barb. (N. Y.) 592.

[115] Lowndes *v.* Dickerson, 34 Barb. (N. Y.) 586, 589.

[116] Caswell *v.* Johnson, 58 Me. 164.

[117] 2 Bl. Com. 394. The law was: "If anyone shall steal or kill a cat being the guardian of the king's granary, let the cat be hung up by the tip of its tail with its head touching the floor, and let grains of wheat be poured upon it until the extremity of its tail be covered with the wheat." The amount of wheat required was the measure of the forfeiture. See the opinion in Whittingham *v.* Ideson, 8 Upper Can. L. Jour. 14.

cats were not the subject of larceny by reason of their base nature.[118]

They are, however, the subject of civil remedies, and in a Canadian case it was held that where one is killed the measure of damages is above the market value if there are circumstances of aggravation.[119] The question of property in cats is there elaborately discussed. The court said, *inter alia:* "Whether *feræ naturæ* or, as other authorities consider them, *domitæ naturæ*, the point to be decided is whether cats being, as well as dogs and certain other animals, what the law terms of a base nature by reason of their not being fit for the food of man, are or are not the subject of property. For if they are, there is no doubt that trespass will lie for killing them, since damages may be recovered in that form of action for any injury of a forcible kind done to anything whatever in which a man has property. . . . What say the authorities on the point? So far as I know it has never been the subject of a judicial decision in any of the courts at Westminster. The only sources, therefore, to which we can have recourse for information are the text-writers of authority; and the only one who supports the view urged for the defendant at the trial is Mr. Chitty in his work on the Practice at Law. He there lays it down that 'Trespass in general lies for taking any animal or bird out of the actual possession of a person who has secured the same; but no action lies for enticing from the premises of the owner and afterwards killing or injuring a cat, which is not considered of any value in law.' He quotes no authority for this statement, and, so far as I have been able to ascertain, it is wholly unsupported by any [citing as authorities for the proposition that civil remedies exist even when the animal is not the subject of larceny, Bl. Com., Bac. Abr., Toller Exrs. and the Report of the Criminal Law

[118] 2 East P. C. 614. So held also in one of the lower courts of Maryland. See 40 Cent. L. Jour. 41.

[119] Whittingham *v.* Ideson, supra.

See Harris *v.* Slater, 42 Sol. Jour. 711, for an example of a partnership in a cat and in the prizes it took.

Commrs.]. . . . With this great weight of authority against Mr. Chitty's single *dictum*, I have no hesitation in giving it as my opinion that a person may have a property in a cat and, therefore, that an action will lie to recover damages for killing it. There may be circumstances under which it would be justifiable to kill a cat; but it is not justifiable to do so merely because it is a trespasser, even though after game. These facts alone were not sufficient, in my opinion, to justify the defendant in killing it."

13. Miscellaneous Beasts.—Deer in a park are the subject of property, as has already been said. Deer in an enclosed ground have consequently been held distrainable for rent. Willes, L. C. J., said: "The reason given for this opinion in the books why they are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general. . . . The nature of things is now very much altered and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases or such parks as were parks either by grant or prescription and were considered rather as things of pleasure than of profit; but now they are frequently kept in enclosed grounds which are not properly parks and are kept principally for the sake of profit and therefore must be considered as other cattle. . . . As to their not being chattels but hereditaments and incident to the park, and so not distrainable, several cases were cited: Co. Litt. 47 b. and 7 Co. 17 b.; where it is said that if the owner of a park die the deer shall go to his heir and not to his executors. . . . I do admit the rule that hereditaments or things annexed to the freehold are not distrainable; and possibly in the case of a park, properly so called, which must be either by grant or prescription, the deer may in some measure be said to be incident to the park; but it does not appear that this is such a park, nay, it must be taken not to be so." [120]

[120] Davies *v.* Powell, Willes 46, 48.
See § 15, infra, as to inheritance in deer.

Where the defendant killed on his own land which adjoined that of the plaintiffs and was unfenced, a deer, one of the progeny of some imported by the plaintiffs and defendant, and allowed to run at large upon the land, it was held that the deer was *ferœ naturœ* and belonged to the defendant, having been shot by him on his own land.[121]

A buffalo, captured when a calf and so domesticated as to take food from its master's hand and be easily driven, is the subject of property; its owner is liable for its trespassing and may recover for injuries done to it.[122]

Trover will lie for musk-cats and monkeys without alleging that they are reclaimed.[123]

A coon has been held not to be the subject of larceny, though the right of the owner would be protected by a civil action.[124] But this decision has been criticised.[125]

So a sable caught in a trap has been held not to be the subject of larceny on the ground that it is of too base a nature.[126]

But, on the other hand, an otter in a trap has been held to be the subject of larceny.[127]

Ferrets, though tame and salable, have been held not to be the subjects of larceny.[128]

A grant of land in fee by the crown and also a license to depasture cattle on crown lands (in substance a lease) carries with it the right to capture and appropriate all wild animals found on such land. And where the Emigration Commision-

[121] Re Long Point Co. *v.* Anderson, 19 Ont. 487.

As to the possession of deer in a park that will justify shooting in close season, see State *v.* Parker, 89 Me. 81, cited in § 129, infra.

[122] Ulery *v.* Jones, 81 Ill. 403. See the comments on this case quoted in § 1, supra.

[123] Grymes *v.* Shack, Cro. Jac. 262.

[124] Warren *v.* State, 1 C. Greene (Ia.) 106.

[125] See the opinion in Haywood *v.* State, 41 Ark. 479, quoted in § 14, infra.

[126] Norton *v.* Ladd, 5 N. H. 203.

[127] State *v.* House, 65 N. C. 315. And see extracts from the opinion in this case in § 5, supra.

[128] Rex *v.* Searing, Russ. & Ry. C. C. 350.

ers agreed with the Islands Company that wild cattle should be treated as animals *feræ naturæ*, in which no property could be acquired till they were killed or taken, it was held that such cattle (which had originally been introduced into the island and had escaped) must be so treated, whether apart from such agreement they were *feræ naturæ* or not.[129]

The position of the dog at common law is treated of in the next chapter.

14. Miscellaneous Birds.—Though at common law singing-birds were not the subjects of larceny, it has been held in this country that the theft of a tamed mocking-bird is a criminal offense. The court in this case said: "The English courts made exceptions to the rule that reclaimed animals to be the subjects of larceny must be fit for food. Thus the tamed hawk was held to be the subject of larceny though unfit for food, because it served to amuse the English gentlemen in their fowling sports. So reclaimed honey bees were made an exception because, though not fit for food themselves, their honey is. Under decisions of English and American courts made upon the common law definition of larceny, Mr. Bishop classes the following animals when reclaimed as the subjects of the offense: Pigeons, doves, hares, conies, deer, swans, wild boars, cranes, pheasants, partridges and fish suitable for food, including oysters. To which might be safely added wild turkeys, geese, ducks, etc., when reclaimed. Of those animals of which there can be no larceny, though reclaimed, he puts down the following: Dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing-birds, martins and coons. In the South, squirrels are in common use as food animals, and the hunters of all climates regard bears as good food. Iowa is credited with the decision[130] . . . that coons are unfit for food and therefore by

[129] Falkland Islands Company *v.* Reg., 2 Moore P. C. C. N. S. 266.
[130] Warren *v.* State, 1 C. Greene (Ia.), 106, cited in § 13, supra.

the common law not the subject of larceny, when reclaimed. Among the colored people of the South the coon when fat in the fall and winter is regarded as a luxury, and the Iowa decision would not be regarded by them as sound law or good taste. . . . Every species of personal property was not the subject of larceny at common law. . . . The provisions of the larceny statute of this State are very broad and comprehensive. The first section defines the crime thus: 'Larceny is the felonious stealing, taking and carrying, riding or driving away the personal property of another.' This, perhaps, is not more comprehensive than the common law idea. . . . The reclaimed mocking-bird in question was no doubt personal property. . . . To hold that larceny might be committed of the cage but not of the bird would be neither good law nor common sense." [131]

In an article on the Report of the Royal Commissioners on the Criminal Code, after considering the various reforms needed, it is said: "This subject illustrates the importance and necessity of a speedy codification of the criminal law, which some ignorant persons still hold to be quite unnecessary. There could then be no doubt that canaries could be the subject of theft; now we think there is little doubt they cannot." [132] But a tame canary bird is, of course, the subject of property.[133]

Trover will lie for a parrot without saying it is reclaimed.[134] With regard to certain parrots alleged to be cruelly treated the court said: "I do not think these birds were domestic animals within the statutes cited. I do not say that a parrot might not become a domesticated animal when thoroughly tamed and accustomed to the society of human beings, but these were young, unacclimatized birds freshly imported into England. They are clearly different from fowls and other

[131] Haywood *v.* State, 41 Ark. 479, 482. [132] See 17 Ir. L. T. 10.

[133] Manning *v.* Mitcherson, 69 Ga. 447. And see extracts from the opinion in § 1, supra.

[134] Grymes *v.* Shack, Cro. Jac. 262.

poultry, and the evidence goes to prove that they were not tamed and domesticated." [135]

A pea-fowl in the possession of its owner is the subject of larceny.[136]

A turkey is a domestic animal, and it is not necessary that the indictment should state it to be a tame turkey.[137] And in an Hawaiian case it was held that turkeys brought to the island and afterwards allowed to go wild were not *feræ naturæ*, so as not to be the subjects of larceny, the court saying: "These turkeys, although 'wild,' are not, properly speaking, 'wild animals.' Where the phrase 'wild animals' is used the word 'wild' is used as a generic term to indicate that they are of a species not usually domesticated, and does not refer to their comparative docility or familiarity with men. We consider that these turkeys are not, properly speaking, animals *feræ naturæ*, though partaking of their habits." [138]

The property in wild geese which have been tamed continues though they stray away, if they have not regained their natural liberty.[139] And in the civil law it is said: "Fowls and geese are not by nature wild, for it is manifest that wild fowls are different and wild geese are different. Therefore if my geese and fowls being in anywise frightened, have flown away so far that one does not know where they are, they remain nevertheless in our ownership." [140]

It has been held that no action lies for disturbing a rookery. "They [rooks] clearly answer the description of birds which are *feræ naturæ* and, according to this act of parliament, are destructive to the neighborhood where they resort. There is no act of parliament with which we are acquainted which gives them any protection; but, on the contrary, those

[135] Swan *v.* Saunders, 44 L. T. N. S. 424.
[136] Com. *v.* Beaman, 8 Gray (Mass.) 497.
[137] State *v.* Turner, 66 N. C. 618.
[138] Rex *v.* Mann, cited in 23 Alb. L. Jour. 444.
[139] Amory *v.* Flyn, 10 Johns. (N. Y.) 102.
[140] Gai. II, § 68, quoted in Salkowski's Roman Private Law (Whitfield) § 83.

statutes to which I have alluded mention them in terms of condemnation. That being the case, can a party claim a right to have them come to his premises, and is he at liberty to say that a person is a wrongdoer who protects the neighborhood from the mischiefs which they are likely to produce, by driving them away? We are of opinion that these questions must be answered in the negative. No authority has been cited to show that a party has any right of property in animals of this description. The authorities which have been cited relate to animals which are perfectly innocent and which are articles of food and stand upon a different foundation." [141]

15. Inheritance in Wild Animals.—The ancient rule appears to have been that wild animals in an enclosure passed at the death of their owner to the heir, as incident to the freehold, and not to the executor—the reason being that without them the inheritance would be incomplete and also that the owner had no transmissible personal right of property in them. If the deceased had only a term of years in the land, the animals were said to go to the executor for use, but not for waste, as accessory chattels, following the estate of the principal, though it has been suggested that this would be true only if the executor caught them before the lease expired.[142] But in the later cases it has been held that deer in a park when reclaimed become personal chattels and cease to be parcel of the inheritance and consequently pass to the executors.[143] As to doves in a dove-house see § 9, supra; and as to fish in a pond, see § 11, supra.

Wild animals, when reclaimed, being personal property,

[141] Hannam *v.* Mockett, 4 Dowl. & Ryl. 518, 537.

[142] 1 Schoul. Pers. Prop. § 97, citing 7 Co. 17 b.; Went. Off. Ex. 127, 14th ed.; Com. Dig. Biens, B., 1 Wms. Exrs. 666; Co. Litt. 53 a.

[143] Ford *v.* Tynte, 2 Johns. & H. 150; Morgan *v.* Abergavenny (Earl), 8 C. B. 768. And see the opinion in Davies *v.* Powell, Willes 46, quoted in § 13, supra.

would probably now be universally held to pass to the personal representative and not to the heir.[144]

[144] See Schoul. Pers. Prop. § 97.

That stuffed birds in cages are to be treated as movable personal chattels and not as annexed to the freehold, see Hill (Viscount) *v.* Bullock, [1897] 2 Ch. 482.

TITLE I.

PROPERTY IN ANIMALS.

CHAPTER II.

DOMESTIC ANIMALS.

Part. I. Domestic animals and their increase. Branding.
16. Nature of this property.
17. The increase of animals.
18. Brands as evidence of ownership.
Part II. Taxation of domestic animals.
19. Taxation of domestic animals.
Part III. Property in dogs.
20. The dog as the subject of a civil action.
21. The dog as the subject of larceny; dogs as a source of evidence in criminal actions.
22. Taxation and license.

PART I. DOMESTIC ANIMALS AND THEIR INCREASE. BRANDING.

16. Nature of this Property.—It is not necessary to define here what is meant by "domestic animals" or "animals *domitæ naturæ*" further than to repeat the words of Blackstone already quoted that they are "such animals as we generally see tame and are therefore seldom, if ever, found wandering at large."[1] The meaning of the expression as used in statutes punishing cruelty will be treated hereafter.[2]

The right of property in these animals is absolute, and, except in the case of the dog, the distinction noted in the last chapter between animals that are and are not the subjects of larceny does not here exist. "Of all valuable domes-

[1] See § 1, supra. [2] See § 121, infra.

tic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ* which serve for food, as neat or other cattle, swine, poultry and the like, and of their fruit or produce taken from them while living, as milk or wool, larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed." [3] So of eggs.[4] But "there is not known in practice and cannot be in law such a union of interest or title or partnership in animals as that one party shall own the carcass, the other the wool, the hair or the feathers." [5] And with reference to the taking of milk, wool, etc., it has been said that to make the act felony it must be "done fraudulently and feloniously and not merely from wantonness or frolic; which must be collected from concurrent circumstances, such as the quantity taken, the use to which it is applied, the behavior of the party, etc." [6]

17. The Increase of Animals.—The increase of live stock belongs to the owner of the dam except where it is hired; in the latter case the offspring belongs to the usufructuary.[7] The

[3] 4Bl. Com. 235. And see Rex *v.* Martin, 1 Leach C. C. 171. And it has been held that dead pigs, buried three feet below the surface, are the subjects of larceny though there was no intention of digging them up again or of making any use of them: Reg. *v.* Edwards, 13 Cox C. C. 384.

[4] 2 East P. C. 614. [5] Hasbrouck *v.* Bouton, 60 Barb. (N. Y.) 413.

[6] 2 East P. C. 617.

[7] Hazelbaker *v.* Goodfellow, 64 Ill. 338; Stewart *v.* Ball, 33 Mo. 154; White *v.* Storms, 21 Mo. App. 288; Leavitt *v.* Jones, 54 Vt. 423; Ark. Val. Land & Cattle Co. *v.* Mann, 130 U. S. 69; Wood *v.* Ash, 1 Owen 139.

Paying taxes on a mare and service fees and expenses of rearing colts, with the owner's consent, does not give a title to the colts: Morse *v.* Patterson, 1 Kan. App. 577.

See 47 Cent. L. Jour. 351, 371, 411, 432, 489; 48 id. 39, for a discussion of the following question: "A., desiring six beef cattle, employed a drover to purchase the same for him. The drover sent out his buyer to purchase these six and also to purchase six other beef cattle for the drover himself. The buyer purchased the twelve cattle, according to instructions, but by mistake delivered five of them to A. and seven of them to the drover, his employer. Before A. discovered the error, one of the seven cows delivered to the drover gave birth to a calf. What are the respective rights of the drover and A. in the calf?"

increase of the increase *ad infinitum* belongs to the owner of the original stock.[8] Where cattle are a part of a married woman's separate estate, their increase also belongs to the estate.[9] In the Roman law, also, the brood belongs to the owner of the mother, and Puffendorf gives as the reason not only the fact that the male is frequently unknown, but also that the dam during the time of her pregnancy is almost useless to the owner and must be maintained with great expense and care, so that he, being the loser by her pregnancy, ought to be the gainer by her brood.[10] But cygnets belong equally to the owners of the cock and the hen, the reason already given not holding here.[11]

The owner of a limited estate in live stock as for life or during widowhood, is entitled to the increase thereof during the continuance of the estate.[12] But a tenant for life with remainder over is bound to keep up the number of the original stock.[13] And in a South Carolina case it is said: "Although some of the articles may be consumable in the use and

[8] Tyson *v.* Simpson, 2 Hayw. (N. C.) 147.

[9] Gans *v.* Williams, 62 Ala. 41; Ellis *v.* State, 76 id. 90; Hanson *v.* Millett, 55 Me. 184.

[10] 2 Bl. Com. 390.

[11] The Case of Swans, 7 Rep. 17. "And the law thereof is founded on a reason in nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is, to die so joyfully that he sings sweetly when he dies; upon which the poet saith:

Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui, etc.

And therefore this case of the swan doth differ from the case of kine, or other brute beasts."

[12] Lewis *v.* Davis, 3 Mo. 133; Major *v.* Herndon, 78 Ky. 123; Poindexter *v.* Blackburn, 36 N. C. 286; Leonard *v.* Owen, 93 Ga. 678.

See Flowers *v.* Franklin, 5 Watts (Pa.) 265, where under the terms of a will the increase was held to go after the widow's death to the remainderman, not to the personal representative.

[13] 1 Schoul. Pers. Prop. § 142; Dunbar *v.* Woodcock, 10 Leigh (Va.) 628.

others are wearing out by the attrition of time, yet, when taken altogether, being reproductive, the estate must be made to keep up its own repairs."[14] However, when the animals are such as cannot produce young ones as a set of horses or mules, or a single beast, the owner of the life interest is not bound to supply the place of one dying without any fault of his.[15] Under a lease that gave the lessee the increase of a flock, but required the flock to be grown to a certain number which were to be delivered to the lessor at the end of the term, it was held that a delivery of the specified number was required and not merely a delivery of such a number as the lessee was able to raise by the exercise of reasonable care and prudent husbandry.[16]

It has been already stated that where an animal is hired its increase belongs to the bailee. But in the case of a gratuitous loan the offspring belongs to the lender and must be returned at the determination of the loan and is not subject to seizure under an execution against the borrower.[17] And putting a mare to pasture in consideration of her services does not create a temporary ownership so as to entitle the bailee to the increase: it is a naked bailment.[18] But in a New York case it was held that where there was a promise to re-deliver the animals borrowed with their increase the hiring was for a valuable consideration, because on general principles such increase belongs to the temporary owner of the animal; and that, therefore, the lender could not bring trespass against one who took such animals from the possession of the borrower, as the lender had not actual or constructive possession.[19] It is difficult, however, to reconcile this decision with

[14] Patterson *v.* Devlin, 1 McMull Eq. (S. C.) 459.

[15] 1 Schoul. Pers. Prop. § 142, citing 2 Kent. Com. 353 n.; 1 Dom. Civ. Law §§ 986-988; Horry *v.* Glover, 2 Hill Ch. (S. C.) 521.

[16] In re More's Estate, 121 Cal. 609.

[17] Dillaree *v.* Doyle, 43 U. C. Q. B. 442. And see Orser *v.* Storms, 9 Cow. (N. Y.) 687.

[18] Allen *v.* Allen, 2 P. & W. (Pa.) 166.

[19] Putnam *v.* Wyley, 8 Johns. (N. Y.) 432.

the authorities holding that a naked bailee of animals is not entitled to their increase.

A contract that all the colts to be foaled by mares sold by A. to B. and kept in A.'s stables under B.'s care are to belong to B. is valid and not void as against creditors for want of delivery.[20] So an agreement for a valuable consideration to deliver to plaintiff the first female colt that defendant's mare might produce vests a property in the colt when born, by reason of which trover may be maintained.[21] A mare with foal having been sold on condition that the title was to remain in the seller till the price was paid, the title of the colt when foaled remains in the seller till the performance of the condition.[22] And the same is true as to colts subsequently bred from a mare.[23] Where a dam is sold, reserving an unborn foal, the latter when born may be recovered by the seller in replevin from one who before its birth bought the dam from the purchaser without notice of the reservation.[24] And where A. agreed with B. that his horse should go to B.'s mare *gratis* provided the produce should belong to C., it was held that the property in such produce was thereby vested in C. and that he could recover from a purchaser from B.[25] But, in a Michigan case, where the mare was bred to the plaintiff's stallion in shares and several months afterwards was sold to the defendant, who knew of the breeding but not of an arrangement by which the plaintiff was to have a half-interest in the colt, it was held that the contract was executory and

[20] Hull *v.* Hull, 48 Conn. 250. And see Wolcott *v.* Hamilton, 61 Vt. 79.

[21] Fonville *v.* Casey, 1 Murph. (N. C.) 389.

[22] Allen *v.* Delano, 55 Me. 113.

[23] Elmore *v.* Fitzpatrick, 56 Ala. 400; Buckmaster *v.* Smith, 22 Vt. 203. And see Nicholson *v.* Temple, 20 N. B. 248.

A deed reserving as security for the purchase money "all the crops produced and products raised or grown hereafter on said premises," was held not to cover the increase of stock kept on the premises: Desany *v.* Thorp (Vt.), 39 Atl. Rep. 309.

[24] Andrews *v.* Cox, 42 Ark. 473.

[25] M'Carty *v.* Blevins, 5 Yerg. (Tenn.) 195. And see Maize *v.* Bowman, 93 Ky. 205, cited in § 106, infra.

that the plaintiff acquired no title to the colt, his only remedy being an action for breach of contract.[26] The notice of the breeding was held not sufficient to put the purchaser upon inquiry as to any rights the owner of the stallion might have. The court's statement that "there was nothing in existence which could be the subject of sale," is however, opposed to most of the authorities.

When animals have been sold under an execution in trover against A. to one who does not take possession of them, the latter cannot afterwards claim to be the owner of animals subsequently bred from the others, as against B., who had possession of them when trover was brought.[27]

In the case of a pledge of animals, their young, subsequently born, are also covered by the pledge as an accessory thereto.[28]

The question how far a mortgage on animals covers their increase will be discussed hereafter.[29]

18. Brands as Evidence of Ownership.—Where a brand is made by statute *prima facie* proof of "the ownership of the person whose brand it may be," the ownership may be proved to be in a person other than the one in whose name the brand is recorded. "A brand is personal property and may be sold and transferred as other personal property; and the law does not prohibit proof of the true ownership of a recorded brand where the brand has been sold and become the property of another than the person in whose name it was recorded." [30] A statute authorizing an inspector to seize and condemn un-

[26] Bates *v.* Smith, 83 Mich. 347.

[27] Scott *v.* McAlpine, 6 U. C. C. P. 302.

[28] Story Bailm. § 292, citing I Domat, B. 3, tit. 1 § 1, art. 7 to 10; Dig. Lib. 20, tit. 1, l. 13, 29; Ayliffe, Pand. B. 4, tit. 18, p. 530.

[29] See § 37, infra.

[30] Chavez *v.* Ty., 6 N. M. 455.

Proof of the purchase may be made by parol; it is not essential that a bill of sale should be introduced in evidence: Ledbetter *v.* State, 35 Tex. Cr. 195.

branded animals about to be sold and shipped out of the county and to sell them and keep the proceeds for the unknown owner, makes the brand rather than possession the chief *prima facie* evidence of title and is not unconstitutional.[31] Where the statute declares that only recorded brands are admissible as evidence of ownership, it must be strictly complied with.[32] But this does not prohibit the introduction of evidence of flesh-marks or other proof of ownership, including unrecorded brands, where the object is to identify the animal.[33] And the fact that the owner of a stolen animal failed to brand it according to statute is no defence where the animal is otherwise sufficiently identified.[34] Where the law requires marks to be recorded, but does not state that they shall not be evidence of ownership unless recorded, as in the case of brands, an unrecorded mark is admissible as proof of ownership.[35]

The record of a brand is constructive notice that the animal so branded belongs to the owner of the brand.[36] But the brand on a stolen horse is not evidence to prove ownership in one claiming as a purchaser from the original owner.[37] Evidence of the brand of the alleged owner of a stolen calf is

[31] Beyman *v.* Black, 47 Tex. 558.

[32] Allen *v.* State, 42 Tex. 517; McKenzie *v.* State, 32 Tex. Cr. 568.

[33] Hutto *v.* State, 7 Tex. App. 44; Tittle *v.* State, 30 id. 597; Gregory *v.* Munn (Tex. Civ. App.), 25 S. W. Rep. 1083; Lockwood *v.* State, 32 Tex. Cr. 137; Poage *v.* State, 43 Tex. 454; State *v.* Cardelli, 19 Nev. 319; Brooke *v.* Peo., 23 Colo. 375.

"The brand law does not require that the ownership of an animal must be proved by the brand itself. Ownership may be proved by flesh marks or any other proper evidence, in the same way as if no brand law was in existence. Proof by brand under our statute is only an additional method of proving ownership, and is especially applicable in the case of range animals:" Chavez *v.* Ty., supra.

[34] Bazell *v.* State, 89 Ala. 14. And see Byrd *v.* State, 26 Tex. App. 374.

[35] Wyers *v.* State, 22 Tex. App. 258. And see Peo. *v.* Bolanger, 71 Cal. 17; State *v.* King, 84 N. C. 737.

[36] Stewart *v.* Hunter, 16 Oreg. 62. And see Brooks *v.* State (Tex. Cr.), 31 S. W. Rep. 410.

[37] Horn *v.* State, 30 Tex. App. 541. Cf. Chavez *v.* Ty., supra.

admissible where there is evidence that its mother bore such brand, though the calf did not.[38]

The presumption that animals belonging to one person but branded in the recorded brand of another shall, as to creditors, be deemed the property of the latter, is not conclusive but may be rebutted by proof.[39] One who places his brand on another's cattle and mingles them with his own has the burden of identifying those cattle; otherwise he should be subjected to the loss.[40] If the brand is not recorded till after the theft of the animal, it is admissible in evidence but is not sufficient to prove ownership.[41] Though the statute provides that a person shall have but one brand for his cattle, yet if they are removed from the county where the brand is recorded and for any reason he has a different brand recorded in the new county, the new brand does not invalidate the old one nor deprive the owner of any benefit accruing from its registration.[42]

A "road brand," as distinguished from a "range brand," is one required to be placed upon cattle before they are removed to a market outside of the State, and it must be recorded in the county from which they are to be driven, before their removal. If recorded after they are driven out, it is inadmissible in evidence to prove ownership.[43]

The recorded brand must correspond and be identical with the brand found on the animal, and the latter must appear on

[38] Black *v.* State (Tex. Cr.), 41 S. W. Rep. 606; Thurmond *v.* State, 37 Tex. Cr. 422.

[39] Rankin *v.* Bell, 85 Tex. 28.

[40] Johnson *v.* Hocker (Tex. Civ. App.), 39 S. W. Rep. 406.

[41] Crowell *v.* State, 24 Tex. App. 404; Unsell *v.* State (Tex. Cr.), 45 S. W. Rep. 1022; Turner *v.* State (Tex. Cr.), Ibid. 1020; Chesnut *v.* Peo., 21 Colo. 512. But see Harvey *v.* State, 21 Tex. App. 178.

As to evidence of the date of the registration of a brand, see Dickson *v.* Ty. (Ariz.) 56 Pac. Rep. 971.

[42] McClure *v.* Sheek's Heirs, 68 Tex. 426.

That the record of a second brand while the first remains unabandoned is not admissible to prove ownership, see Unsell *v.* State, supra.

[43] Crowell *v.* State, supra.

the part of the animal indicated in the record, or the discrepancy must be explained.[44] The variance does not affect the admissibility of the record in evidence but only its probative force.[45] But where the record is uncertain as to the part of the animal, as directed by the statute, it is inadmissible in evidence.[46] A record stating that the brand should be on the left or right side is sufficient;[47] or that it is on "hip, thigh and flank." [48]

Where the brand is mistakable, a verdict of guilty of driving the cattle from their range will not be supported.[49]

When, by reason of their obscurity, a question arises as to the brands on animals alleged to have been stolen, the testimony of experts in deciphering brands is admissible to show what they are.[50]

The offence of unlawfully altering brands and marks will be treated of in another part of this work.[51]

PART II. TAXATION OF DOMESTIC ANIMALS.

19. Taxation of Domestic Animals.—Domestic animals are taxable like other personal property, and it is not necessary to treat here of the general principles of the law of taxation. Some questions as to *situs* have arisen, however, which concern animals *as such*, owing to their power to roam and the necessity of their being fed and sheltered.

The general rule that the domicile of the owner is the place where by a legal fiction his personal property is considered to have its *situs* for purposes of taxation, applies to the case

[44] Myers *v.* State, 24 Tex. App. 334.
[45] Harwell *v.* State, 22 Tex. App. 251.
[46] Massey *v.* State (Tex.), 19 S. W. Rep. 908.
[47] Hayes *v.* State, 30 Tex. App. 404.
[48] Thompson *v.* State, 25 Tex. App. 161. And see McGrew *v.* State, 31 Tex. Cr. 336.
[49] Yoakum *v.* State, 21 Tex. App. 260.
[50] Askew *v.* Peo., 23 Colo. 446.
[51] See § 60, infra.

of animals.[52] So one who winters or pastures temporarily his cattle in another township or county than that in which he resides should have them assessed in the latter township or county though they happen to be in the former at the time of the year when personal property is assessed.[53] This depends, however, in some of the States, on whether the home of the owner is also the home of the cattle, as personal property is made by statute taxable where it is situated. Where the owners of a herd of cattle resided in a certain county and had there a ranch with house, stable and corrals, which their herders made their headquarters and from which they started out on the round-ups, and near which some of the stock ranged, and where some of the young cattle were branded, and this ranch was separated from an Indian reservation only by a fordable stream, this was held to be the home of the cattle, though the greater part of them roamed on the reservation, upon which the owners had no station house or corrals.[54]

But where cattle are bred, born, branded and raised in a certain county, that is their home though they occasionally wander or are driven into other counties and though the home ranch of the owner from which they are managed and controlled is in another county.[55] The court distinguished Barnes *v.* Woodbury, supra, saying of it: "That [*i. e.*, Eureka County] was their home and if they were found in White Pine County it was only because, in the search for food, they had temporarily wandered away from that home. . . . Here the

[52] 1 Desty Taxation, 322.

Where cattle are sold under an unrecorded bill of sale, but not delivered, the seller is liable for taxes regularly assessed against him before delivery: Edwards *v.* Irvin (Tex. Civ. App.), 45 S. W. Rep. 1026.

[53] Rhyno *v.* Madison Co., 43 Ia. 632; Smith *v.* Mason, 48 Kan. 586 (distinguishing Graham *v.* Chautauqua Co. Commrs., 31 id. 473); Barnes *v.* Woodbury, 17 Nev. 383; Ford *v.* McGregor, 20 id. 446; Peo. *v.* Caldwell, 142 Ill. 434; Knapp *v.* Charles Mix Co., 7 S. D. 399. But see State *v.* Falkinburge, 15 N. J. L. 320.

[54] Holcomb *v.* Keliher, 5 S. D. 438, following Barnes *v.* Woodbury, supra; State *v.* Shaw, infra.

[55] State *v.* Shaw, 21 Nev. 222.

evidence shows that the great bulk of the cattle have never been within Eureka County, and in no sense of the word did they belong there. Their home, their *habitat*, the place where they belonged and where one would expect to find them was in Nye County. The usual meaning of the words 'home ranch,' as used in the range country, is that it is the headquarters of the range. It is the place from which the riders start upon their rounds to rodeo and brand the stock, and to which they return when through; for the time being it is their home. But this does not necessarily make it the home of the cattle. If gathered and herded and cared for there regularly each year, it would doubtless become such; and it was in connection with these circumstances that this home ranch was held to cut some figure in Barnes *v.* Woodbury. . . . We do not understand this *situs* to be determined by the residence of the owner, nor by the fact that he does or does not own real estate in one county or the other, although, under some circumstances, these facts may have an important bearing upon the question of where they belong and tend to its elucidation." And in Oklahoma it was held that where it was shown that cattle owned in another State or Territory actually ranged and grazed in a certain county during the entire year, such cattle were properly taxable in that county, even if this might result in double taxation.[56]

But a statute providing that personal property shall be taxed where it is situated is not intended to impose impossibilities or work injustice, and where one whose pasture lies partly in the county of his residence and partly in an adjoining county, so that it is difficult to tell at any given time just where the cattle are, pays taxes in the former county on the cattle feeding in the latter, he complies substantially with the statute.[57]

A statute requiring that stock on a farm where the owner does not reside shall be assessed there, does not apply where

[56] Prairie Cattle Co. *v.* Williamson, 5 Okla. 488.
[57] Court *v.* O'Connor, 65 Tex. 334.

the farm lies in several districts or two counties, in one of which the owner resides, and the stock passes from one part of it to another. "A farm is, both by the standards and in common acceptation, defined to be a body of land, usually under one ownership, devoted to agriculture, either to the raising of crops or pasture or both. It is not understood to have any necessary relation to, or to be circumscribed by, political or congressional subdivisions. A 'farm' may consist of any number of acres, of one quarter section or less, or many quarter sections, of one field or many fields, may lie in one township and county or in more than one." [58]

But in Massachusetts, under a statute providing that "horses kept throughout the year in places other than those where the owners reside . . . shall be assessed to the owners in the places where they are kept," it was held that horses housed, fed and watered in a barn upon a farm partly in each of two towns were taxable in the town where the barn was situated, though the residence of the owner was on the same farm but in the other town, and the horses were used for all the farm work and there was no other barn upon the farm. "A horse is kept where he is habitually housed, fed and watered, where he lives and has his home, provided there is any such place. The fact of using him more or less across the boundary line of the town does not alter the fact that the place where he is kept is the barn where he lives." [59]

A Territorial legislature may impose a tax on cattle belonging to others than Indians, which are grazing on an Indian reservation within the Territory, pursuant to a lease for that purpose made by the Indians with the approval of the Federal authorities.[60]

In Colorado where cattle are assessable on May 1, it was held that the resident owners of cattle and horses purchased outside of the State and driven into the State for the purpose

[58] Peo. *v.* Caldwell, 142 Ill. 434.
[59] Pierce *v.* Eddy, 152 Mass. 594.
[60] Wagoner *v.* Evans, 170 U. S. 588.

of pasture in October and remaining there till January, were not liable for the taxes of that year.[61]

In Washington it was held that an act providing that live stock driven into the State for the purpose of grazing after the first Monday in April in any year should be assessed for taxes as if it had been in the county at the time of the annual assessment, was not unconstitutional as discriminating between live stock and other property.[62] And in Wyoming a law regulating the assessment of live stock on the open range was held not unconstitutional as an arbitrary and unreasonable attempt to create two classes of live stock for purposes of taxation.[63]

Under the Texas statutes a corporation having pasture land in each of two counties is to be taxed for its cattle in each county in the proportion which the land in that county bears to the whole pasture, though the management is located only in one county and taxes on all the cattle have been paid there.[64] Where cattle were owned and kept in one county, but moved to another and pastured upon lands leased for that purpose from November 2, 1893, till about April 1, 1894, with the owner's intention at the time they were moved of keeping them in the second county until the expiration of the lease, on May 1, 1894, unless the pasturage should before that time become sufficient in the first county, they were held to be situated in the second county on January 1, 1894, and there subject to taxation for the year 1894.[65] Where cattle are in an unorganized county the assessment must be made and the taxes collected in the county to which it is attached for judicial purposes.[66] Where a statute provided that the county inspector of hides and animals should inspect all ani-

[61] Pueblo Co. Commrs. *v.* Wilson, 15 Colo. 90. Cf. Hardesty *v.* Fleming, 57 Tex. 395; Clampitt *v.* Johnson (Tex. Civ. App.), 42 S. W. Rep. 866.

[62] Wright *v.* Stinson, 16 Wash. 368.

[63] Standard Cattle Co. *v.* Baird (Wyo.), 56 Pac. Rep. 598.

[64] Nolan *v.* San Antonio Ranch Co., 81 Tex. 315.

[65] Clampitt *v.* Johnson, supra, citing Hardesty *v.* Fleming, supra.

[66] Llano Cattle Co. *v.* Faught, 69 Tex. 402.

mals known and reported to him as sold for slaughter, and another statute provided that persons removing cattle from one county to another should be protected from the payment of inspection fees in the latter county by the inspection certificate from the former, it was held that one who bought for slaughter cattle that had been brought from another county was not exempt from the tax under the former statute, although the cattle were accompanied by the certificate of inspection provided by the latter one.[67] Where cattle were shipped into the State under a bill of lading which allowed their being fed there for an indefinite time and then being shipped to a point in another State at a through rate from the original point of shipment, the balance of the freight not to be paid unless they were so re-shipped, it was held that they were taxable in the State while being fattened there at the owner's pens.[68]

In California the assessor of taxes must demand a statement from the owner of migratory cattle whether the stock will be removed from the county during the year; and unless such a demand is made, the duty of making the statement is not imposed upon the owner.[69] Whether persons who drive flocks of sheep across a county do it to pasture and graze them there, so as to charge them under an ordinance licensing persons engaged in the business of grazing sheep, is a question of fact in each particular case.[70]

A horse and wagon, owned by a non-resident of the State and used in mercantile business, are not taxable at the place

[67] Limburger *v.* Barker (Tex. Civ. App.), 43 S. W. Rep. 616.

[68] Waggoner *v.* Whaley (Tex. Civ. App.), 50 S. W. Rep. 153.

[69] Peo. *v.* Shippee, 53 Cal. 675.

And, in Utah, the certificate of assessment in one county, upon delivery, exempts from further taxation for that year in another county: Taylor *v.* Robertson, 16 Utah 330.

[70] Inyo County *v.* Erro, 119 Cal. 119, citing El Dorado County *v.* Meiss, 100 id. 268, where one who took sheep temporarily into the county, for the purpose of shearing them, without procuring a license, was held not to be violating the ordinance.

of business, except under a special statute.[71] So, a travelling circus and menagerie, owned by a non-resident and brought in to be exhibited at different places through the State and other States, is not taxable in the first State.[72]

One who purchases and slaughters hogs, to convert them into bacon, lard and cured meats, is liable to taxation as a "manufacturer."[73] But a corporation whose principal business was purchasing sheep and lambs, slaughtering them, pulling wool from the hides, converting the offal into fertilizer, reducing the carcasses to a temperature that would retard decomposition and shipping them to places of delivery in refrigerator cars, was held not to be "carrying on manufacture," within the meaning of a statute relating to the taxation of corporations.[74]

A statute providing that non-residents keeping and herding animals for grazing purposes shall pay a specified sum for each animal, in lieu of all taxes upon them such as are paid by resident owners, infringes a constitutional requirement of uniform taxation upon the same class of subjects.[75] Where dealers in cattle held them but a day before exporting or selling them, it was held that the average weekly shipment constituted their taxable stock in trade and that the cattle exported were not "exports" within the meaning of the constitutional provision against laying taxes on exports.[76] But, under a statute providing for the taxation of live stock brought within the State to be grazed, it was held that an in-

[71] Shaw *v.* Hartford, 56 Conn. 351.

[72] Robinson *v.* Longley, 18 Nev. 71.

[73] Engle *v.* Sohn, 41 O. St. 691, commenting on Jackson *v.* State, 15 O. 652. See also Com. *v.* Hiller, 1 Dauph. Co. Rep. (Pa.) 188.

[74] Peo. *v.* Roberts, 155 N. Y. 408.

[75] Kiowa County *v.* Dunn, 21 Colo. 185.

[76] Myers *v.* Baltimore Co. Commrs., 83 Md. 385.

As to the admission of animals free of duty under the tariff acts, see Morrill *v.* Jones, 106 U. S. 466; U. S. *v.* Cloete, 52 U. S. App. 265; U. S. *v.* Magnon, 35 id. 828; Reiche *v.* Smythe, 13 Wall. (U. S.) 162; Sandow *v.* U. S., 84 Fed. Rep. 146; Beck *v.* U. S., Ibid. 150; U. S. *v.* Eleven Horses, 30 id. 916.

tent that such stock should remain in the State permanently was not necessary, and that, where they were driven slowly through the State with the intention of shipping them into another State, such exportation did not begin, so as to exempt them from taxation, until they were started on their final journey from the State by rail.[77]

The subject of a license tax on dogs is discussed in § 22, infra.

PART III. PROPERTY IN DOGS.

20. The Dog as the Subject of a Civil Action.—It might be said with much truth that a man's two best friends, his wife and his dog, were singularly disregarded by the common law. The various disqualifications to which the former was subjected do not concern us here. With reference to the most intelligent and affectionate of animals, the theory of the law was that property in such animals was of an inferior description and not of a kind to render the person who stole them guilty of larceny. In a leading case on the subject it is said: "At common law property in a dog, though recognized, has always been held to be 'base,' inferior and entitled to less regard and protection than property in other domestic animals. Three reasons may be assigned for this. First, 'dogs do not serve for food,' and for that reason 'the law held that they had no intrinsic value,' and 'therefore,' says Blackstone (Vol. 4th, 236), 'though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny.' Although since protected by express statutes from theft, the common law estimate of property in them has never been changed. Second, because the dog in common with the class of wild animals to which he originally belonged, is subject to the most distressing and incurable disease known, which he is inclined to communicate and frequently, if not destroyed, does communicate by his bite, to animals and

[77] Kelley *v.* Rhoads (Wyo.), 51 Pac. Rep. 593.

mankind. For that reason any person without regard to any right of property in the owner may kill a mad dog, or one that is justly suspected of being mad and stand justified at common law. . . . So, according to modern decisions, he may be killed by any person, if known to have been bitten by a mad dog, although the same rule would not be applied to other more useful and less dangerous animals: Putnam *v.* Payne, 13 Johns. 312. And the third reason is, that the dog is chiefly propagated, kept and used for purposes (viz., hunting and the protection of the family, person and property of his owner), which require that he should retain in some degree the natural ferocity and inclination to mischief which characterize him." [78]

A dog is "property" within the meaning of the constitutional provision against taking property without due process of law.[79]

And at the common law an action of trespass or trover might be sustained for an injury to or the conversion of a dog; [80] though it has been held that case will not lie for its unintentional, though negligent, destruction.[81] "There be four kind of dogs which the law regards, viz.: a mastiff, a hound which comprehends a greyhound, a spaniel and tumbler." [82] And in trover for a greyhound it need not be averred that he was tame.[83] Nor in an action for an injury to a dog need it be shown that he had pecuniary value.[84]

The subject of actions for damages for killing or wounding dogs will be treated of later.[85]

[78] Woolf *v.* Chalker, 31 Conn. 121. And see Blair *v.* Forehand, 100 Mass. 136. See, as to property rights in dogs, in general, 40 L. R. A. 503 n., and, as to dog-owners' rights and liabilities, 3 Sc. L. T. 61, 65, 81, etc.

[79] Jenkins *v.* Ballantyne, 8 Utah 245.

[80] Chambers *v.* Warkhouse, 3 Salk. 140; Wright *v.* Ramscot, 1 Saund. 84; Binstead *v.* Buck, 2 W. Bl. 1117; Graham *v.* Smith, 100 Ga. 434; Wheatley *v.* Harris, 4 Sneed (Tenn.), 468. And see 40 L. R. A. 507 n.

[81] Jemison *v.* Southwestern R. Co., 75 Ga. 444.

[82] Ireland *v.* Higgins, Cro. Eliz. 125. [83] Ibid.

[84] Parker *v.* Mise, 27 Ala. 480. But see U. S. *v.* Gideon, 1 Minn. 292.

[85] See §§ 43, etc., infra.

21. The Dog as the Subject of Larceny; Dogs as a Source of Evidence in Criminal Actions.—As has been stated, the dog was not the subject of larceny at the common law. *A fortiori* one cannot be convicted of obtaining a dog by false pretences.[86] Whether under the changed views of modern times a dog is now the subject of larceny apart from statute or under general words in a statute, is a question which has been much discussed.[87] In a New York case where it was held that a dog came within the term "personal property" in a statute punishing larceny, it is said: "The reason generally assigned by common law writers for this rule as to stealing dogs is the baseness of their nature and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history (2 Motley's Dutch Republic, 398), and the faithful St. Bernards which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travellers, the claim that the nature of a dog is essentially base and that he should be left a prey to every vagabond who chooses to steal him will not now receive ready assent. In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, a source of solace after serious labor, exercising a refining and elevating influence, and yet they are as much under the protection of the law as chattels purely useful and absolutely essential. This common law rule was extremely technical and can scarcely be said to have had a sound basis to rest on. . . . The artificial reasonings upon which these rules were based are wholly inapplicable to modern society. *Tempora mutantur et leges mutantur in illis.* Large amounts of money are now invested in dogs,

[86] Reg. *v.* Robinson, 28 L. J. M. C. 58.

See also, on the subject of this section, 40 L. R. A. 514 n.

[87] See Straker's essay on Larceny of Dogs (Detroit, 1893), in which the author concludes that dogs are not the subject of larceny unaided by statute. See § 22, infra.

and they are largely the subjects of trade and traffic. In many ways they are put to useful service and, so far as pertains to their ownership as personal property, they possess all the attributes of other personal property." [88]

So in another New York case it is said: "In the year 1857 a law was passed in this State providing for the 'incorporation of associations for improving the breed of domestic animals.' It declares that any corporation formed under it shall have power to raise, import, purchase, keep, breed and sell all kinds of domestic animals. Why are not dogs within the purview of this statute? Although not ranked among domestic animals in the time of or by Lord Hale, yet the estimation in which they have been since held by society shows that they are no longer considered to be so base as not, on that account, at least, to be the subject of larceny. If by 'domestic' is meant 'belonging to the house,' who can deny this attribute to the dog? What animal more domestic? What one appreciates a home more, shows stronger attachments to it, or, if it strays from it, is more certain to return to it? In some of its species it serves as a pet or a companion. In others, it assists and takes part in manly sports and recreations. In others again, it is the faithful custodian and guardian of property. In none, it may be said, is it entirely divested of usefulness. When the benefits it confers are reflected upon, why is there not a perfect propriety in improving the breed of such an animal? If it comes within the description of domestic animals under this act of 1857, it is certainly property, the subject of larceny." [89]

But in Maine under a statute making it an offense to kill or wound a domestic animal, it was held that a dog was not

[88] Mullaly *v.* Peo., 86 N. Y. 365.

In Mississippi a dog is "property:" Jones *v.* Ill. Cent. R. Co. (Miss.), 23 South. Rep. 358.

[89] Peo. *v.* Campbell, 4 Park Cr. (N. Y.) 386, 394. And in Peo. *v.* Tighe, 9 Misc. (N. Y.) 607, after stating the common law doctrine as to property in dogs, the court says: "But the world moves and these conditions no longer exist, and in this State a dog is property."

a "domestic animal"—a decision that to the lay mind must seem curious.[90]

Where the statute defined larceny as the "felonious taking the personal property of another" and defined "personal property" as "goods, chattels, effects, etc.," the court said, in a case where the defendant was indicted for stealing a dog, "There is no term broader than chattel. Bouvier in his Law Dictionary says a 'chattel is a term including all kinds of property except the freehold and things which are parcel of it.' If these statutes, therefore, do not clearly abrogate the common law rule, they raise so grave a question as to render it improper for me on *habeas corpus* to discharge the prisoner." [91]

So where a statute conferred power upon a magistrate to order the delivery of goods unlawfully detained to their owner, it was held that the term "goods" included a dog, the court saying: "Surely under a bequest of 'all my worldly goods' a dog would pass to the legatee." [92]

But where a statute imposed a penalty on the larceny of "goods or chattels" and, in another section, on that of bonds, bills, etc., it was held that a dog was not included in the term "goods and chattels." "There is no reason for supposing that it was intended by this act to extend the crime of larceny beyond its ancient limits. That would be a singular construction of a law, the object of which was to mitigate the penal code. By the words *any goods or chattels* we are to understand any such goods or chattels as have been esteemed subjects of larceny. . . . Bonds, bills, etc., are goods or chattels; and yet it was thought necessary to declare them subjects of felony by a special provision; which shows that the words *goods or chattels* before mentioned were to be taken, not

[90] State *v.* Harriman, 75 Me. 562.

[91] Peo. *v.* Maloney, 1 Park Cr. (N. Y.) 593. And in Iowa and South Carolina a dog is the subject of larceny as a "chattel:" Hamby *v.* Samson, 105 Ia. 112; State *v.* Langford (S. C.), 33 S. E. Rep. 370.

[92] Reg. *v.* Slade, 21 Q. B. D. 433.

in their most extensive signification, but according to their usual import in the criminal law." [93]

And in Alabama it has been held that a dog does not come within the words "personal property," as there is no statute changing the common law.[94] And in a later case it was held that a statute making it larceny to steal a registered dog for a reward, without a provision making dogs property or giving them some value or stating whether the punishment of grand or petit larceny should be imposed, was void for uncertainty. "Dogs are not property. There is no presumption that any dog is valuable. Not being property, the *prima facie* presumption in any case is that the animal has no value. It is, of course, competent for the legislature to make dogs property, and a *status* thus given them would, we may concede, without deciding, carry with it a presumption of value." [95] And it was held that the mere fact of registry did not imply either the attributes of property or the incident of value.

In a Tennessee case holding, like Peo. *v.* Maloney, supra, that, where a statute defined "personal property" as "goods and chattels," a dog was included, the court said, referring to Ward *v.* State, supra: "That court we suppose had no statutory definition of 'personal goods' or 'personal property,' and referred to the common law definition." [96]

In Indiana dogs have been held not to be subjects of larceny as "personal goods." [97]

In an Ohio case, referring to State *v.* Lymus, supra, it is said: "Since that decision our larceny act has been revised and re-enacted and the words now used to describe property that may be stolen are 'any thing of value.' These words,

[93] Tilghman, C. J., in Findlay *v.* Bear, 8 S. & R. (Pa.) 571. And see to the same effect State *v.* Lymus, 26 O. St. 400. See, also, State *v.* Yates, infra.

But now, in Pennsylvania, dogs have been declared to be personal property and the subject of larceny: Com. *v.* Depuy, 148 Pa. St. 201.

[94] Ward *v.* State, 48 Ala. 161. And see State *v.* Holder, 81 N. C. 527.

[95] Johnston *v.* State, 100 Ala. 32.

[96] State *v.* Brown, 9 Baxt. (Tenn.) 53. [97] State *v.* Doe, 79 Ind. 9.

unlike the words 'goods and chattels,' have no settled and well-defined meaning at the common law. We are left to find their meaning, if there is any question, by the legitimate aids in that behalf." The court accordingly held that a dog was a "thing of value." [98]

And in Kansas a dog was held to be included in the term "other personal property or valuable thing whatever" in a larceny statute.[99]

In England the larceny of a dog is now punishable under Stat. 7 and 8 Geo. IV ch. 29 § 25, and 8 and 9 Vict. ch. 47.

Where a registered dog is made by statute the subject of larceny, one not registered is not the subject of larceny.[100]

The dog as the subject of a prosecution for malicious mischief will be discussed hereafter.[101]

Evidence that a trained bloodhound has tracked one accused of committing a crime is competent to go to the jury as a circumstance tending to connect the defendant with the crime.[102] But the visits tracked must have some connection with the offence charged and tend to show a system of crime.[103] In a Kentucky case it was held that evidence as to trailing by a bloodhound is admissible where it is established by the testimony of some one who has personal knowledge of the fact that the particular dog has acuteness of scent and power of discrimination, and has been trained or tested in the tracking of human beings, and it appears that the dog, so trained and tested, was laid on the trail, whether visible or not, at a point where the circumstances tended clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him.[104]

[98] State *v.* Yates (O. Com. Pl.), 10 Crim. L. Mag. 439.

[99] Harrington *v.* Miles, 11 Kan. 480.

[100] State *v.* Butler (Del.), 43 Atl. Rep. 480. [101] See § 126, infra.

[102] Hodge *v.* State, 98 Ala. 10; State *v.* Hall, 3 Ohio N. P. 125.

[103] Spillman *v.* State (Tex. Cr.), 44 S. W. Rep. 150.

[104] Pedigo *v.* Com. (Ky.), 44 S. W. Rep. 143. Guffy, J., dissented, and his opinion is favorably commented on in 57 Alb. L. Jour. 131 and 34 Can. L. Jour. 286.

Evidence that bloodhounds of the same breed, trained by the same man, as those used to track the defendant, at one time, after having been put upon the track of a human being, left the trail to trail a sheep, is inadmissible.[105]

The effect of taxation in determining the *status* of a dog at law is considered in the next section.

22. Taxation and License.—The common law doctrine that dogs are not the subjects of larceny has been held to be abrogated by a statute imposing a tax, that being a recognition of property in them, the tax in this case being for the common school fund and not to be expended in payment for sheep killed by the dogs.[106] And where dogs were held not to be the subjects of statutory larceny, the court said: "If dogs were taxed in Indiana as other property for revenue purposes, it would be a strong circumstance to show an intent on the part of the legislature to abrogate the common law rule and make them the subjects of larceny like any other personal property. But, so far as we are advised, dogs have never been thus taxed. A specific tax has been, from time to time, levied upon dogs, and, when collected, applied generally, if not always, to payment for sheep killed by them. . . . These specific taxes upon dogs can be upheld only on the ground that they are not revenue measures, but police regulations." [107]

License taxes on dogs to be paid over to a fund to compensate sheep owners for their losses caused by the dogs, are not unconstitutional as creating a fund to the advantage of

[105] Simpson *v.* State, 111 Ala. 6,—the court saying: "The test by comparison was not sufficiently certain to determine the reliability of the dogs employed here by reference to the qualities of other dogs."

[106] Com. *v.* Hazelwood, 84 Ky. 681.

See, in general, as to license and tax laws, 40 L. R. A. 520 n.

[107] State *v.* Doe, 79 Ind. 9. To the same effect see Van Horn *v.* Peo., 46 Mich. 183, and the cases cited in n. 114 infra. And as to the Indiana statute, see Shelby *v.* Randles, 57 Ind. 390.

one portion of the community as against another.[108] In an Indiana case it is said: "The plain purpose and intent of this act is not to provide a revenue for public uses, but to discourage the keeping of dogs, and indicating it to be the policy of the State to protect one species of valuable property from destruction by another species, which is in terms declared useless. . . . It is a matter of no consequence how the sum charged to the owner of a dog may be collected. If it be deemed more convenient to place it upon the tax duplicate, it does not therefore make it a tax and subject to the constitutional objection." [109]

In a similar case it is said: "We cannot assent to the position taken by the appellant that if the sum required for a license exceeds the expense of issuing it, the act transcends the licensing power and imposes a tax. By such a theory the police power would be shorn of all its efficiency. The exercise of that power is based upon the idea that the business licensed or kind of property regulated is likely to work mischief and therefore needs restraints which shall operate as a protection to the public. For this purpose the license money is required to be paid." [110]

The fact that a man applied for a license to keep a dog is competent evidence that he was owner or keeper of the dog, where a complaint was brought against him for not having a license.[111] The owner of a dog does not escape the penalty imposed in the act by procuring a license after the statutory period has elapsed.[112] The complaint may be made by any

[108] Longyear *v.* Buck, 83 Mich. 236.

[109] Mitchell *v.* Williams, 27 Ind. 62. And see Cole *v.* Hall, 103 Ill. 30; Holst *v.* Roe, 39 O. St. 340.

Refusing to take out a dog license is not an "offense of a trifling nature," within the meaning of a statute regulating appeals from summary convictions before justices: Phillips *v.* Evans, [1896] 1 Q. B. 305.

[110] Tenney *v.* Lenz, 16 Wis. 566.

[111] Com. *v.* Gorman, 82 Mass. 601. For the description in a license, see Com. *v.* Brahany, 123 id. 245.

[112] State *v.* Colby (N. H.), 36 Atl. Rep. 252.

person—not merely by the police officers and constables on whom the duty is specifically imposed by statute.[113]

In a case where a dog was held not to be "property" so as to be liable to be taxed *ad valorem* as other property, it was held also that an act making dogs subject to a "tax" of one dollar per annum, to be paid by their owners or harborers under penalty of five dollars and costs, was not technically a tax but a legitimate police regulation, and the court said, quoting Cooley on Taxation, 601: "'Though a tax is sometimes levied for revenue upon the keepers of dogs, it is more usual to require the keeping to be licensed, the principal object being to have some person responsible for every animal of the kind that is protected by the law.' . . . It is to be noted that the act we are considering is in harmony with this view, and is 'An act to levy a tax on the privilege of keeping or harboring dogs.'"[114] On the other hand it was said in a case in the District of Columbia: "The law recognizes property in and to dogs, and the owner thereof is entitled to his remedies for an invasion of his rights of property. This is too well settled in England and in the States of this Union to be now questioned. The right of property in animals cannot be declared unlawful unless a license is first obtained. We do not undertake to say that a given or particular mode of using any kind of property might not be prohibited, but for the general possession of that in which the right of property exists, which is not a mere franchise, how can it be declared unlawful and a license demanded before the person is authorized to own or keep? If dogs are property they may be taxed and the tax assessed to the owner. But would it be claimed that for the non-payment of the tax the owner could be arrested, fined and imprisoned? . . . We do not say that the owner may not be

[113] State *v.* Howard (N. H.), 43 Atl. Rep. 592.

[114] Ex parte Cooper, 3 Tex. App. 489. And see Kidd *v.* Reynolds (Tex. Civ. App.), 50 S. W. Rep. 600; Mowery *v.* Salisbury, 82 N. C. 175; Carthage *v.* Rhodes, 101 Mo. 175; Griggs *v.* Macon, 103 Ga. 602; Com. *v.* Markham, 7 Bush (Ky.) 486; Hendrie *v.* Kalthoff, 48 Mich. 306.

required at certain seasons to muzzle his dog, and for suffering him to run at large without it he may be subjected to a fine. This power would exist, to make some police regulation in a proper way for the safety of a community. But here was an ordinance declaring the owner a criminal and subjecting him to arrest, imprisonment and fine for keeping his property at home, unless he first obtained a license." The act in question was therefore held unconstitutional.[115]

But this case was criticised adversely in a late case in the Supreme Court of the United States, where it was held that a State statute providing that no dogs should be entitled to the protection of the law unless placed upon the assessment rolls, and that no recovery for its value could be had for more than the amount fixed by the owner in the last assessment, was a constitutional exercise of the police power. Mr. Justice Brown said: "As it is practically impossible by statute to distinguish between the different breeds or between the valuable and the worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature and properly falling within the police powers of the several States." [116]

Although good logical and philosophical reasons might be given for regarding the common law as a present, as well as a past growth, and therefore holding that it recognizes a change

[115] Mayor *v.* Meigs, 1 McArth. (D. C.) 53.
See the panegyric on the dog in this opinion.
[116] Sentell *v.* New Orleans & C. R. Co., 166 U. S. 698.

or development in the common consensus of mankind as to the value of certain kinds of property, formerly little esteemed, and that dogs, bonds, etc., would now be considered the subjects of larceny apart from any statute—although this view seems a thoroughly rational one, the question would hardly arise, as there are larceny statutes in all of the States and the general tendency certainly is to include under the general terms of these statutes such as "property," "goods," "chattels," "things of value," all those kinds of property that were formerly, for technical reasons, held not to be embraced by them. The value of the dog is too well known at the present day to be made a subject of dispute either in courts or in legislative assemblies, and as to the older law we can only repeat what was said in Mullaly *v.* Peo., supra, that "the artificial reasonings upon which these rules were based are wholly inapplicable to modern society."

TITLE II.

TRANSFER OF PROPERTY.

CHAPTER I.

SALE AND MORTGAGE.

23. What may be sold.
24. Change of possession.
25. Animals running on the range.
26. Validity; damages.
27. General nature of a warranty; patent defects, etc.
28. Animals bought for a special purpose, as breeding, etc.
29. Sale for food.
30. Warranty by a servant or agent.
31. What amounts to a warranty.
32. What does not amount to a warranty.
33. What constitutes unsoundness, etc.
34. Specific forms of unsoundness.
35. Return on breach of warranty.
36. Damages on breach.
37. Mortgage of animals and their increase.
38. Priority of the mortgage lien.

23. What may be Sold.—It is not proposed here to enter into an exhaustive investigation of the principles of the law of Sale and Mortgage. Animals are personal property and subject to all the laws governing such property. A great majority of the cases that would fall naturally under the present head relate not to animals *as such* but to property in general. These accordingly will not be considered here, but our attention will be confined to those cases where some feature peculiar to property in animals is made the very ground of decision.

All animals that are subjects of property may be bought and sold like other kinds of property, and the same is true of their increase and produce. The subject of the sale of the increase of

animals has been already treated.[1] The sale of an animal includes its natural produce, such as wool, milk, etc., and in an action against the seller of sheep shorn before delivery to recover the value of the wool, it was held that evidence could not be given of a custom that wool sold under such circumstances did not go to the buyer.[2] A man may sell the milk that his cow will yield during the coming month or year, or the cheese to be made from the same, or the wool to be clipped from his sheep at a future time, but he can make only a valid agreement to sell the wool or milk of animals that he is afterwards to acquire.[3] So a sale of fish hereafter to be caught in the sea will not pass title to the fish when they are caught.[4] The sale of animals running at large is considered below.[5]

24. Change of Possession.—The sale must be completed by delivery in order to make it valid as against the rights of third parties. Therefore where the purchaser of a team of horses arranged with the seller for the use of the stable till he should be ready to move them, and with the keeper, who had the key of the stable, to remain in charge of them, but there was no visible change in the possession of the team, the sale was held to be fraudulent as to an execution creditor.[6] On the other hand, where the seller gave the stable-key to the purchaser, who immediately took possession and put a man in charge and employed the former drivers as his own employees and

[1] See § 17, supra. [2] Groat *v.* Gile, 51 N. Y. 431.

[3] Benj. Sales § 78; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9, 13; Jones *v.* Richardson, 10 Metc. (Mass.) 481, 488.

[4] Low *v.* Pew, 108 Mass. 347. [5] See § 25, infra.

[6] Stephens *v.* Gifford, 137 Pa. St. 219.

The title to cattle passes upon their delivery in payment of a debt and the marking of them by the creditor, although they are left in the debtor's possession, and the *onus* of showing fraud is on the party attacking the transaction: Kennedy *v.* Whittie, 27 Nov. Sco. 460.

As between the parties, delivery is not necessary to complete the sale, unless it is made so by contract: Downey *v.* Taylor (Tex. Civ. App.), 48 S. W. Rep. 541.

they collected bills for him, made out in his name, and the execution creditor of the seller and others also had notice of the sale and change of possession, the sale was held to be valid as against the execution creditor.[7] But where the cattle, after the sale, were driven to another place under the charge of the seller, who purchased fodder for them in his own name but for the purchaser's benefit, this was not a change of actual possession as against the seller's creditor.[8] And where the purchaser's agent went among the herd, cutting out a certain number and saying that the rest were as called for in the contract, this was not a sufficient delivery.[9]

The sale of a given number of cattle running in a herd is an executory contract and does not apply to any particular cattle until the number sold have been separated. The bill of sale giving the purchaser the right to select and take immediately gives him the right, after demand and refusal, to recover possession of the entire herd in an action at law and then to select the number purchased and return the residue to the seller.[10]

An agreement that one of the sellers should be hired by the purchaser "to drive the team and have possession and control until they were paid for, and as long thereafter as they could agree," was held to give possession to the seller as a driver only, and not as owner.[11] So where A. agreed to buy all of B.'s spring lamb, B. to pasture them till they were called for, it was held that a loss, not B.'s fault, while the lambs were being pastured, fell on A.[12] But where one agrees to buy a horse for cash and to take him within a fixed time, and rides the horse and gives directions as to his treatment, but leaves him in the seller's possession for a still further period with the

[7] Janney *v.* Howard, 150 Pa. St. 339.
[8] Harris *v.* Pence, 93 Ia. 481. And see Henderson *v.* Hart, 122 Cal. 332.
[9] Slaughter *v.* Moore (Tex. Civ. App.), 42 S. W. Rep. 372.
[10] McLaughlin *v.* Piatti, 27 Cal. 451.
[11] Barnhill *v.* Howard, 104 Ala. 412.
[12] Bertelson *v.* Bower, 81 Ind. 512. And see Morgan *v.* Miller, 62 Cal. 492.

latter's consent, and the horse dies, there is no acceptance within the meaning of the Statute of Frauds, and the buyer is not liable for the price.[13]

In the sale of oxen a delivery of the brass knobs which had been worn upon their heads is not a symbolical or constructive delivery of the oxen, unless by special agreement.[14]

A contract for the delivery of a certain number of cattle is severable and, if the purchaser accepts and appropriates some of them, he must pay the price, less the damages sustained by reason of the failure to complete the delivery.[15]

25. Animals Running on the Range.—Cattle on a range which is common pasturage, though actually in the possession of no one, are constructively in that of their owner, and upon the sale thereof a warranty of title will be implied.[16] Though there can be no delivery, the general property vests in the purchaser, and he can claim nothing by way of recoupment if he fails to reduce the estimated number into his possession, where there has been no fraud or misrepresentation and he knew the number and quality of the stock purchased.[17] The parties are entitled to a reasonable time after the sale to prepare for and give proper notices of a rodeo, in order that they may separate the cattle purchased and mark and brand them. When they are thus collected and marked with the purchaser's brand, and then allowed to pasture on their

[13] Tempest *v.* Fitzgerald, 3 B. & Ald. 680. And see Carter *v.* Toussaint, 5 B. & Ald. 855; Branigan *v.* Hendrickson, 17 Ind. App. 198. Where possession has passed and an additional price is to be paid in the event of a successful test within a definite time, the purchaser is not relieved of such liability, if the sickness of the animal prevents the test, it being shown otherwise that it would have been successful: Deyo *v.* Hammond, 102 Mich. 122. A promise to sell a colt at a certain sum, if sound at five months old, does not require a sale and delivery on the last day of the five months, but within a reasonable time thereafter: Dawley *v.* Potter, 19 R. I. 372.

[14] Clark *v.* Draper, 19 N. H. 419.

[15] Saunders *v.* Short, 86 Fed. Rep. 225. [16] Budd *v.* Power, 9 Mont. 99.

[17] Cockrell *v.* Warner, 14 Ark. 345.

accustomed range, these acts constitute a good delivery and change of possession.[18]

A statute providing that stock animals running on the range may be sold by the sale and delivery of the brand, and that the purchaser shall record the bill of sale, refers only to what is known as a "sale of a mark and brand," *i. e.*, where the animals run at large and are identified exclusively by the owner's mark and brand and he sells his entire stock in a particular mark and brand.[19] It does not, however, admit of the construction that a number less than all in any brand may be sold by an unrecorded sale.[20] But it does not apply to a sale of cattle which the seller has placed in a pasture and designates in the bill of sale as a certain number bearing a certain brand;[21] nor to a sale of the stock only and not of the brand, where there has been actual delivery and change of possession, and the cattle are described by the brand in the unrecorded bill of sale only as a matter of identity.[22] And one who has once had actual possession under a verbal contract of sale does not lose his title by subsequently turning the cattle upon the range.[23] Where the transaction is tainted with fraud, the fact that the seller caused the county clerk to record the marks and brands of horses as having been transferred to the purchaser is not alone a compliance with the statute.[24]

An estimate as to the number of stock running loose on a range, not all of which had been rounded up, may be given by one familiar with the stock and their range; and testimony is admissible as to this number, based on the rule in general use

[18] Walden *v.* Murdock, 23 Cal. 540.

[19] Nance *v.* Barber, 7 Tex. Civ. App. 111. See Black *v.* Vaughan, 70 Tex. 47; Wells *v.* Littlefield, 59 id. 556.

[20] Rankin *v.* Bell, 85 Tex. 28.

[21] Nance *v.* Barber, supra.

[22] Rainwater-Boogher Hat Co. *v.* O'Neal, 7 Tex. Civ. App. 242. And see First Nat. Bk. *v.* Brown, 85 Tex. 80.

[23] Davis *v.* Dallas Nat. Bk., 7 Tex. Civ. App. 41.

[24] Hickman *v.* Hickman, 5 Tex. Civ. App. 99.

by stockmen that the number of calves branded be multiplied by four to get the number of cattle in the brand.[25]

26. Validity; Damages.—The rule of "*caveat emptor*" applies to sales of animals, where there is no fraud, concealment or warranty. Therefore, the mere fact of selling knowingly a glandered horse is not an illegal act at the common law.[26] And a statute imposing a penalty on the sale of a diseased animal does not make the trade of a glandered horse so absolutely void that the person defrauded can replevy the horse he exchanged without prior demand and tender back of the boot-money.[27] The general subject of the sale of animals afflicted with contagious or infectious diseases will be treated of hereafter.[28]

In England a horse dealer cannot maintain an action upon a private contract for the sale and warranty of a horse made on a Sunday.[29] Otherwise, of the sale of a horse not made in the exercise of an ordinary calling.[30]

A verbal agreement to pay for a colt after it was weaned was held to be within the Statute of Frauds, the performance requiring eleven months for gestation and four months more for weaning.[31]

[25] Cabaness *v.* Holland (Tex. Civ. App.), 47 S. W. Rep. 379.

[26] Hill *v.* Ball, 2 H. & N. 299. And see Ward *v.* Hobbs, 4 App. Cas. 13; Court *v.* Snyder, 2 Ind. App. 440. Cf. Bodger *v.* Nicholls, 28 L. T. N. S. 441.

That where a horse is for any purpose worthless there is total failure of consideration, irrespective of warranty, see Danforth & Co. *v.* Crookshanks, 68 Mo. App. 311.

[27] Havey *v.* Petrie, 100 Mich. 190.

[28] See § 88, infra. [29] Fennell *v.* Ridler, 8 D. & R. 204.

As to whether a private individual can maintain an action against a dog-dealer upon the warranty of a dog sold on a Sunday, see Tronghear *v.* Dewhirst (Co. Ct. case), criticised in 94 L. T. 2.

Where a Sunday exchange is invalid, a party may nevertheless maintain replevin if the horse is retaken from his possession by the other party: Kinney *v.* McDermot, 55 Ia. 674.

[30] Drury *v.* Defontaine, 1 Taunt. 131.

[31] Lockwood *v.* Barnes, 3 Hill (N. Y.) 28. That a contract entirely

A rule of a live-stock exchange that members shall not recognize any yard trader who is not also a member of the exchange was held not to be in restraint of trade nor a combination to monopolize or attempt to monopolize such trade within the prohibition of a statute.[32]

Where the purchaser of cattle refuses to accept them and the seller re-sells them in open market, his measure of damages is the contract price less the amount realized from the sale in excess of the necessary and proper expense of sale and keep.[33] But he cannot recover for the expense of keeping animals either during the whole time of litigation or that part of it in which they might have been sold by him as agent of the purchaser.[34] Where the seller is put to additional expense in moving cattle which are not called for by the purchaser in accordance with his contract, such additional expense may be recovered.[35] Where the price and charges for delivery are paid and no delivery is made, the purchaser may recover the money paid, and the death of the animal after the time arranged for delivery is no defence.[36]

executed on one side within a year is not within the statute, see Trimble *v.* Lanktree, 25 Ont. 109.

[32] Anderson *v.* U. S., 171 U. S. 604.

[33] Slaughter *v.* Marlow (Ariz.), 31 Pac. Rep. 547. And see McCracken *v.* Webb, 36 Ia. 551.

The same measure of damages exists for failure to deliver a telegraphic message in due time, in consequence of which the sale was not completed: Herron *v.* West. Un. Tel. Co., 90 Ia. 129. In such a case, without regard to re-sale, the measure of damages for failure to deliver the message is the difference between the market value where the cattle were at the time and the contract price at the place of delivery, less the cost of transportation to the latter place: West. Un. Tel. Co. *v.* Williford, 2 Tex. Civ. App. 574.

As to damages where the defendant was to pay a certain price per pound for the dressed carcasses of cattle, see Fletcher *v.* Jacob Dold Packing Co., 58 N. Y. Suppt. 612.

[34] Putnam *v.* Glidden, 159 Mass. 47. If the animal dies or is lost before re-sale, this does not relieve the original purchaser from liability for the contract price: Weathered *v.* Golden (Tex. Civ App.), 34 S. W. Rep. 761.

[35] Gleckler *v.* Slavens, 5 S. D. 364. And see Holtz *v.* Peterson (Ia.), 62 N. W. Rep. 19.

[36] Winn *v.* Morris, 94 Ga. 52. The expense of furnishing and holding

The measure of damages for the breach of a contract to deliver a certain kind of cattle is the difference between the value of the cattle actually delivered and those contracted for.[37]

Where the purchase of a stallion for breeding purposes has been induced by false representations, the expense of keeping it for a reasonable time in order to test it, may be recovered.[38] But where a certain interest in a stallion is sold for a share of the net profits to be derived from standing him, the sellers not to be responsible for expenses or damages, and there being no fraud or warranty of soundness, the purchaser cannot recover any part of the expense, though the horse is in fact worthless.[39] Where the purchaser has accepted a horse and keeps it for a year with no attempt to rescind on account of the seller's failure to furnish a certificate of pedigree as agreed upon, the fulfilment of such agreement is not a condition precedent to recovery on the purchase-money notes.[40] Where the seller of a horse rescinds his contract, he is liable to the purchaser for the expense of the keep of the horse from the time it came into his possession.[41]

The subject of the measure of damages in an action on a warranty is discussed below.[42]

27. General Nature of a Warranty, Patent Defects, Etc.—A discussion of the general law of Warranty does not fall within the scope of the present treatise. Such parts of this law, however, as apply to animals *as such* will be here considered.

Although a general warranty of health or soundness will not cover patent defects, the seller may warrant against such a defect, as, for example, against footrot in sheep.[43] Where

cars for transportation may be recovered: Hockersmith *v.* Hanley, 29 Oreg. 27. As to evidence of the market value, see Graham *v.* Frazier (Neb.), 68 N. W. Rep 367.

[37] Harris *v.* First Nat. Bk. (Tex. Civ. App.), 45 S. W. Rep. 311.

[38] Peak *v.* Frost, 162 Mass. 298.

[39] Hays *v.* Richie (Tex. Civ. App.), 34 S. W. Rep. 150.

[40] Brown *v.* Ellis (Ky.), 45 S. W. Rep. 94. [41] King *v.* Price, 2 Chit. 416.

[42] See § 36, infra. [43] Pinney *v.* Andrus, 41 Vt. 631.

the purchaser can see only the effects of a disease which is explained away by the seller as an insignificant or temporary one, but is, in reality, of a more serious nature, such a disease is not obvious so as to be excluded from the operation of a general warranty.[44] Thus, an express warranty against all unsoundness in a horse covers all defects arising from a disease of the kidneys or spine, where they are not apparent to the eye, though symptoms of the disease are apparent but not known as such to the purchaser.[45] As some splints cause lameness and others do not, a splint is not one of those patent defects against which a warranty is inoperative.[46] As instances of other patent defects not covered by a warranty may be cited the fact that a horse is deaf or moon-eyed or spavined,[47] or a crib-biter.[48] But if a defect is discoverable only by the exercise of skill it is not so patent as to be excluded from the operation of the warranty.[49] And where the buyer suspects a defect and wishes to make an examination, but the

[44] Chadsey *v.* Greene, 24 Conn. 562; Perdue *v.* Harwell, 80 Ga. 150. The knowledge of the seller seems to have been a factor in each of these cases. See also Connell *v.* McNett, 109 Mich. 329; Nauman *v.* Ullman (Wis.), 78 N. W. Rep. 159.

[45] Storrs *v.* Emerson, 72 Ia. 390. And see Shewalter *v.* Ford, 34 Miss. 417, cited in § 33, infra.

[46] Pollock, C. B., in Smith *v.* O'Bryan, 11 L. T. N. S. 346, following Margetson *v.* Wright, 1 M. & Scott, 622; 8 Bing. 454, in which latter case the jury had found that the horse, which afterwards became lame, had the seeds of unsoundness upon him arising from the splint at the time of the sale. See also the earlier decision in Margetson *v.* Wright, reported in 5 M. & P. 606.

[47] Hoffman *v.* Oates, 77 Ga. 701. But see as to spavin, Watson *v.* Denton, 7 C. & P. 85, cited in § 34, infra.

[48] Margetson *v.* Wright, 5 M. & P. 606. And see Dean *v.* Morey, 33 Ia. 120; Walker *v.* Hoisington, 43 Vt. 608; Paul *v.* Hardwick, 1 Chit. Contr., 11th Am. ed. 655; Oliph. Horses (5th ed.) 75; Broennenburgh *v.* Haycock, Holt 630; Scholefield *v.* Robb, 2 M. & Rob. 210.

Cf. Washburn *v.* Cuddihy, 8 Gray (Mass.) 430. See § 34, infra.

[49] House *v.* Fort, 4 Blackf. (Ind.) 293, where the horse wanted the sight of one eye. And see Butterfield *v.* Burroughs, 1 Salk. 211.

"The meaning of a horse being sold 'with all his faults' is, that the purchaser shall make use of his eyes and understanding to discover what

seller objects and says, "I will warrant," the latter is liable for the defect.[50] Where the seller informed the buyer that one of the two horses sold had a cold, but agreed to deliver both at the end of a fortnight "sound and free from blemish," and delivered them at that time, the cough still continuing and the other horse having a swollen leg from a kick received in the stable, and the seller brought an action to recover the price, which he failed in—the court refused to grant a new trial on the ground that the defects were patent, since the warranty did not apply to the time of sale only, but was a continuing one to the end of the fortnight.[51]

A warranty may be prospective in its operation, as that a horse will be sound after a certain time.[52] And if an animal is warranted sound for a day or a month, the duration of the warranty is limited and complaint must be made or the animal returned within the time fixed,[53] and it is immaterial that the seller may have known of the unsoundness at the time of the sale.[54] And, in general, the seller's knowledge of the defect will not defeat a warranty where there is no misrepresentation or concealment.[55] On the other hand, any fraud at the time

faults there are; and the seller is not answerable for them if he does not make use of any fraud or practice to conceal them:" Oliph. Horses (5th ed.) 152.

[50] Oliph. Horses (5th ed.) 132, citing Dorrington *v.* Edwards, 2 Rol. 188.

[51] Liddard *v.* Kain, 9 Moo. 356.

[52] 2 Schoul. Pers. Prop. (2d ed.) § 332, controverting Blackstone's statement to the contrary.

[53] Chapman *v.* Gwyther, L. R. 1 Q. B. 463. So, if the animal *on trial* is found to have defects. *Trial* means a *reasonable* trial. Unless such trial has been prolonged by subsequent misrepresentations of the seller, the animal should be returned as soon as the defects are discovered: Adam *v.* Richards, 2 H. Bl. 573.

[54] Bywater *v.* Richardson, 3 N. & M. 748.

[55] Anon. Lofft 146.

And the seller need not know of the unsoundness to be liable on an express warranty: Norris *v.* Parker (Tex. Civ. App.), 38 S. W. Rep. 259; Carter *v.* Cole (Tex. Civ. App.), 42 id. 369; Sanders *v.* Britton (Tex. Civ. App.), 47 id. 550.

of the sale will avoid it, though it does not amount to a breach of the warranty.[56]

Where a horse answers a warranty at the time it is sold and its subsequent bad conduct is due to the plaintiff's unskilful driving, he cannot recover for breach of warranty.[57] And if the purchaser has failed to return a horse and by the application of medicines or otherwise has lessened his value, he cannot allege the breach of warranty as a defence in an action for the price.[58] But where a warranty that horses were "all right" was a conditional one, involving the necessity of the purchaser's treating a defect in a certain way, it was held in an action for the breach of the warranty that he was bound to use such treatment, and that this was a good excuse for his refusing to try another treatment which might hazard the effect of the warranty.[59]

The evidence to show a breach of warranty must not relate to a time too remote; therefore proof that a horse balked seven weeks after he was sold was held not sufficient to show a breach of warranty that he was true to harness.[60] And where a bull-calf at the time of sale was but three months old, free from apparent defect, and seen by the purchaser, it was held that there was no legal presumption that his sterility which appeared two years later existed at the time of the sale and that there was no implied warranty that he would possess the power of procreation at maturity.[61] The right of action for the breach of a warranty of a horse in a conditional sale arises at once as in the case of an absolute sale, as where

[56] Steward *v.* Coesvelt, 1 C. & P. 23; Croyle *v.* Moses, 91 Pa. St. 250.

Though the seller of a stock of cattle refuses to warrant the number of them, he may be liable for fraudulent representations as to their number: Cabaness *v.* Holland (Tex. Civ. App.), 47 S. W. Rep. 379.

[57] Geddes *v.* Remington, 5 Dow. 159, where the warranty was that the horse was "thorough broke for a gig."

[58] Curtis *v.* Hannay, 3 Esp. 82.

[59] Smith *v.* Borst, 63 Barb. (N. Y.) 57.

[60] Smith *v.* Swarthout, 15 Wis. 550.

[61] White *v.* Stelloh, 74 Wis. 435.

the property is not to pass till the payment of a note, and before its maturity the horse dies.[62]

Infancy is a good defence to an action on a warranty of a horse.[63]

No indictment will lie for a deceitful representation and warranty of the soundness of a horse.[64]

28. Animals Bought for a Special Purpose, as Breeding, Etc.— "If a man sells a horse generally he warrants no more than that it is a horse; the buyer puts no question and perhaps gets the animal the cheaper. But if he asks for a carriage horse or a horse to carry a female or a timid and infirm rider, he who knows the qualities of the animal and sells, undertakes on every principle of honesty that it is fit for the purpose indicated. The selling upon a demand for a horse with particular qualities, is an affirmation that he possesses those qualities." [65]

So where a horse is bought for a particular purpose known to the seller, a representation that he is "all right," relied on by the purchaser, is a warranty not only of soundness, but of fitness for the use intended.[66] But one selling a horse as safe and kind and a good family horse was held not to be liable to the purchaser's wife for injuries received in driving where there was evidence that he supposed the horse was to be used exclusively by the husband in his business, and none to show

[62] Copeland *v.* Hamilton, 9 Ma. 143.

[63] Howlett *v.* Haswell, 4 Camp. 118.

[64] Rex *v.* Pywell, 1 Stark. 325.

[65] Best, C. J., in Jones *v.* Bright, 5 Bing. 533, 544 (*obiter dictum*); Oliph. Horses (5th ed.) 115.

A sale and warranty to one who the seller knows is purchasing for another are in effect a sale and warranty to the latter: Darden *v.* Oneal (Tenn.), 35 S. W. Rep. 1095. As to a sale of an unborn foal "with all its racing engagements," see Corrigan *v.* Coney Island Jockey Club, 61 N. Y. Super. Ct. 393.

[66] Smith *v.* Justice, 13 Wis. 600. And see McClintock *v.* Emick, 87 Ky. 160; Ingram *v.* Sumter Music House, 51 S. C. 281; Danforth *v.* Crookshanks, 68 Mo. App. 311.

that he expected the wife to rely upon his representations to the husband.[67]

A warranty on the sale of a horse of a certain breed is to be interpreted with reference to that breed, and if the horse has the capacity of a good foal-getter of that breed, the warranty is fulfilled, though the potency of that breed is much less than that of other breeds.[68] So where a horse warranted to be an "imported Clydesdale" is sold for breeding purposes, there is no implied warranty of fitness for such purposes.[69] And where a bull is purchased for breeding purposes to the seller's knowledge, both parties being alike destitute of the means of forming an intelligent judgment as to the ability to generate, and there is no misrepresentation or fraud or express warranty, no warranty can be implied.[70]

On the other hand, it has been held that where producers of and dealers in horses for breeding purposes sell one to a person who, to their knowledge, wishes him for such purposes, there is an implied warranty that the horse is reasonably fit for such purposes;[71] and that he is not prevented through illness, weakness or other infirmities from being able to exercise his breeding qualities.[72] And a warranty that a stallion is "sound and healthy and, with proper handling, a foal-getter," was held to be a warranty that he could do

[67] Carter *v.* Harden, 78 Me. 528. And see Adams *v.* Snyder (Kan. App.), 55 Pac. Rep. 498.

[68] Glidden *v.* Pooler, 50 Ill. App. 36.

A bill of sale merely guaranteeing a stallion to be a breeder excludes a guarantee of his being pure-bred: First Nat. Bk. *v.* Hughes (Cal.), 46 Pac. Rep. 272.

[69] Taylor *v.* Gardiner, 8 Ma. 310. And see Scott *v.* Renick, 1 B. Mon. (Ky.) 63.

[70] McQuaid *v.* Ross, 85 Wis. 492. And see White *v.* Stelloh, 74 id. 435, cited in § 27, supra.

But where the seller knew the bull to be without power of propagation and did not disclose that fact, he is liable in an action of deceit: Maynard *v.* Maynard, 49 Vt. 297.

[71] Merch. & Mech.'s Sav. Bk. *v.* Fraze, 9 Ind. App. 161.

[72] Budd *v.* McLaughlin, 10 Ma. 75.

reasonable service as a foal-getter and not to be satisfied where eight mares out of fifty-five served were gotten with foal.[73]

29. Sale for Food.—If one who sells an animal, knowing that the purchaser buys it for immediate slaughter and consumption, is aware or has reason to suspect that it is in a diseased and unwholesome condition, though the disease is not visible externally, he is bound to disclose the fact to the purchaser.[74] So in the sale of a quarter of beef from an animal slaughtered for fear she would die, the fact that this was concealed from the purchaser was held equivalent to a false suggestion that she was sound, and the seller was liable for the deceit.[75] But the seller of unwholesome beef is not liable in deceit unless he knew of the unsoundness.[76] And where a farmer bought at a market a dead pig for consumption and left it hanging up and another person bought it from him without any warranty and it did not appear that any secret defect was known to the parties, it was held that no warranty of soundness was implied.[77] "The vendor was *not a dealer* in meat, did not know that it was unfit for food, and the case was not that of a person to whom an order is sent and who is bound to supply a good and merchantable article." [78]

But there is an implied warranty in the sale of hogs purchased for market that they are fit for that purpose, when the purchaser has no opportunity of inspection and trusts to the judgment of the seller to select them, both parties under-

[73] McCorkell *v.* Karhoff, 90 Ia. 545. And see Brown *v.* Doyle, 69 Minn. 543. Where a stallion is warranted to be a "sure foal-getter," evidence may be given of what is the reasonable or usual percentage of mares that a good or sure foal-getter will get with foal: Ibid.

[74] Divine *v.* McCormick, 50 Barb. (N. Y.) 116.

[75] Van Bracklin *v.* Fonda, 12 Johns (N. Y.) 468.

[76] Emerson *v.* Brigham, 10 Mass. 197.

[77] Burnby *v.* Bollett, 16 M. & W. 644. And see Emmerton *v.* Matthews, 7 H. & N. 586, where the seller *was* a general dealer; Benj. Sales § 663.

[78] Benj. Sales § 662.

standing for what they are intended.[79] And one selling the carcass of a hog at the highest market price for pork, impliedly warrants that it is not a boar, if the buyer did not know the fact.[80]

But an implied warranty that meat is fit for food "does not extend beyond the case of a dealer who sells provisions directly to the consumers for domestic use," so would not apply to the case of a farmer who sells a cow to retail butchers, though he knows they buy her for the purpose of cutting her up into beef for immediate domestic use.[81]

After a butcher had given notice to a market-man that "the weather was bad for killing and he should kill no hogs in that weather unless ordered," but, "if ordered, would kill and send one to the market the next morning," the market-man ordered of him a good hog to be killed that night and delivered the next morning. It was held that, if he executed the order with due care, he could recover the value of the pork as if sound, although it spoiled during the night by reason of the weather.[82]

The offense of selling unwholesome provisions is made out by proof of the sale of the flesh of an animal which the seller knew to have a disease, the tendency of which is to affect the flesh in any degree, though the taint is imperceptible to the senses and eating the meat produces no apparent injury.[83]

[79] Best *v.* Flint, 58 Vt. 543. See Warren *v.* Buck, cited infra.

[80] Burch *v.* Spencer, 15 Hun (N. Y.) 504.

[81] Howard *v.* Emerson, 110 Mass. 320. And see to the same effect Giroux *v.* Stedman, 145 id. 439; Goldrich *v.* Ryan, 3 E. D. Sm. (N. Y.) 324; Cotton *v.* Reed, 25 Misc. (N. Y.) 380; Needham *v.* Dial, 4 Tex. Civ. App. 141; Hanson *v.* Hartse, 70 Minn. 282; Wiedeman *v.* Keller, 171 Ill. 93; Warren *v.* Buck (Vt.), 42 Atl. Rep. 979. Contra, Hoover *v.* Peters, 18 Mich. 51, where the warranty is held to extend to a case of sale "by a retail dealer or any other person."

[82] Mattoon *v.* Rice, 102 Mass. 236. [83] Goodrich *v.* Peo., 19 N. Y. 574.

As to an indictment for selling diseased animals for food, see Moeschke *v.* State (Ind. App.), 42 N. E. Rep. 1029.

A city has authority to pass ordinances requiring an *ante-mortem* inspection of animals intended to be slaughtered for food as well as those

30. Warranty by a Servant or Agent.—A servant of a private owner of an animal who is authorized to sell it, has no implied authority to give a warranty, nor, if he do so, will the master be bound.[84] It is otherwise if the owner is a dealer in such animals; in that case he is bound by his servant's warranty, though contrary to his own directions,[85] except where the servant is employed simply to deliver the animal sold.[86] The reason of this rule is thus stated by Ashhurst, J., in Fenn *v.* Harrison:[87] "If a person keeping livery stables and having a horse to sell, directed his servant not to warrant him and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of horses were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment."

The owner of a riding school who was in the habit of buying and selling horses was held to be bound by the warranty of a servant entrusted with the selling of a horse.[88] Huddleton, B., said: "It is necessary to look at the position occupied by the defendant. He kept a large riding school, owned a

which require a *post-mortem* inspection of the meal to be sold: New Orleans *v.* Lozes (La.), 25 South. Rep. 979.

[84] Brady *v.* Todd, 9 C. B. N. S. 592; Bank of Scotland *v.* Watson, 1 Dow. 45.

[85] Ibid.; Howard *v.* Sheward, L. R. 2 C. P. 148.

The agent of a horse-dealer with authority to sell a breeding stallion has implied authority to warrant him to be a "sure foal-getter:" First Nat. Bk. *v.* Robinson, 105 Ia. 463.

[86] Woodin *v.* Burford, 2 Cr. & Mee, 391.

[87] 3 Term 757, 760. See, also, as to warranty by a livery-stable keeper or his agent, § 107, infra.

[88] Baldry *v.* Bates, 52 L. T. N. S. 620.

number of horses and would consequently be buying and selling horses from time to time, and this fact would be known to the public. It seems to me that although he may not be said to have carried on the regular business of a horse dealer, yet still, from the very routine of the business which he did carry on, he must be taken to have been a person who dealt in horses, and so a person within the meaning of the rule laid down in Howard *v.* Sheward. I should be almost inclined to hold, if it were necessary to do so, that a private gentleman, known to have very extensive stables and who was continually buying and selling horses, would come within the rule."

Where the owner puts his horse in the hands of a horse dealer to sell and the latter warrants without authority, the owner is bound, as he clothed the dealer with apparent ownership.[89] Where a livery stable keeper is authorized to sell, as the owner's agent, a horse left in the stable, and, after making a void sale to himself, sells it to another as its owner and not as agent, the purchaser takes no title as against the original owner, the keeper not having attempted to execute his agency.[90]

It was said in Brady *v.* Todd,[91] "When the facts raise the question it will be time enough to decide the liability created by such a servant as a foreman alleged to be a general agent, or such a special agent as a person entrusted with the sale of a horse in a fair or other public mart, where stranger meets stranger, and the usual course of business is for the person in possession of the horse and appearing to be the owner, to have all the power of an owner in respect of the sale. The authority may under such circumstances as are last referred to be implied, though the circumstances of the present case do not create the same inference." And, in a later case, it was accordingly held that a servant entrusted by a master with

[89] Taylor *v.* Gardiner, 8 Ma. 310.
[90] Witkowski *v.* Stubbs, 91 Ga. 440.
[91] 9 C. B. N. S. 592, 606, cited supra.

the sale of a horse at a fair may have an implied authority to warrant.[92]

Where the master is unwilling to stand to the servant's warranty, he is bound to take the horse back and return the money paid.[93]

31. What Amounts to a Warranty.—Where horses are described in a bill of sale as "sound and kind," this amounts to an express warranty, especially where the purchaser has not the peculiar means of knowing the facts which the seller possessed.[94] A representation made during the negotiation of a sale of mules that they were "all right" is a warranty of soundness. "No valid reason can be given why if A., in selling his horse to B., says, 'I warrant him sound,' it should be held a warranty, but not if he says 'he is sound.'" [95] So, where the representation was that a horse was sound, straight and all right, just such a horse as the buyer wanted, this was held to be a warranty.[96] And likewise, where it was represented that the buyer "may depend upon it the horse is perfectly quiet and free from vice;" [97] and where representations as to the age and soundness of a horse were made privately by an administrator to one who subsequently bought the horse from him at an auction.[98] If the seller says at the time of sale, "I never warrant, but he is sound as far as I know," this is a qualified warranty and the purchaser may maintain

[92] Brooks *v.* Hassall, 49 L. T. N. S. 569, commented on in 18 Ir. L. T. 15, where it is said, "We assume that, as of course, such authority is limited to where its exercise would be 'required to complete the sale,' in the words of Erle, C. J.," citing Woodin *v.* Burford, supra. And see Alexander *v.* Gibson, 2 Camp. 555, where the sale was at a fair.

[93] Oliph. Horses (5th ed.) 126.

[94] Hobart *v.* Young, 63 Vt. 363. Cf. Wason *v.* Rowe, 16 id. 525, cited in § 32, infra.

[95] McClintock *v.* Emick, 87 Ky. 160. And see Money *v.* Fisher, 92 Hun (N. Y.) 347; Riddle *v.* Webb, 110 Ala. 599; Zimmerman *v.* Brannon, 103 Ia. 144.

[96] Murphy *v.* McGraw, 74 Mich. 318.

[97] Cave *v.* Coleman, 3 M. & R. 2. [98] Crossman *v.* Johnson, 63 Vt. 333.

an action, if he can show that the horse was unsound to the seller's knowledge.[99] So an affirmation that the horse was not lame, accompanied by the owner's declaration that he would not be afraid to warrant him, was held to be a warranty.[100] Where mares were described in a catalogue as "in foal to," "stinted to" or "served by" certain horses, these expressions were held to amount to a warranty.[101] A public statement by a seller of horses at auction that all those that were not kind and safe to drive single would be specified at the time of sale, is a warranty as to a horse sold without any specification, the buyer relying on the statement.[102] The buyer of horses under a written bill of sale simply reciting the transfer with warranty of title may recover damages for false oral representations of the seller as to their trotting qualities and pedigree.[103]

A warranty that a horse partly blind "was all right, except he would sometimes shy," was held to be substantially a warranty that he was "sound."[104] The seller's statement that a horse was "all right" was held, under the circumstances to amount to a warranty that his eyes were sound.[105] And a representation that a horse was fourteen years old was held to be a warranty that he was no older.[106]

"It may perhaps be true that proof of a warranty that a horse was 'well broke' might include a warranty that he was 'gentle,' as the greater includes the less. But a declaration that a horse was warranted gentle and that he proved to be otherwise, is not supported by proof that he was not so trained as to be suited to a particular kind of work. The word 'gentle' does not, in its ordinary or legal sense, import

[99] Wood *v.* Smith, 4 C. & P. 45.
[100] Cook *v.* Moseley, 13 Wend. (N. Y.) 277.
[101] Gee *v.* Lucas, 16 L. T. N. S. 357.
[102] Ingraham *v.* Union R. Co., 19 R. I. 356.
[103] McFarland *v.* McGill (Tex. Civ. App.), 41 S. W. Rep. 402.
[104] Kingsley *v.* Johnson, 49 Conn. 462.
[105] Little *v.* Woodworth, 8 Neb. 281.
[106] Burge *v.* Stroberg, 42 Ga. 88.

that the horse has received any particular training or teaching, but only that he is docile, tractable and quiet." [107]

The testimony by a purchaser of hogs at an auction that he had made up his mind while looking at them before the sale to buy some if they went cheap enough, is not conclusive that the sale was without conditions as to health and soundness, so as to prevent his recovering on an implied warranty of their health.[108]

32. What Does Not Amount to a Warranty.—The statement in a bill of sale that a horse is "considered sound" does not amount to a warranty.[109] Nor is a statement in a circular that a young stallion will "make his mark as a foal-getter" a warranty that he will prove an ordinarily sure one, but is merely an expression of belief as to what may be expected of him in the future.[110] And a statement in a handbill advertising the sale of stock that certain shoats are "in good health and condition" is not a warranty that they are in such condition at the time of the sale three weeks after the posting of the bill, as it "could, at most, only amount to an antecedent representation of the quality and condition of the shoats as they were when the bills were circulated; and this statement could not be construed as any part of the contract subsequently entered into between plaintiff and defendant, unless expressly made so at the time of sale." [111]

And where a horse was to be sold at auction without a warranty, and the seller on the day before the auction said to the purchaser who was looking at the animal's legs, "You have nothing to look for; I assure you he is perfectly sound in every respect," and the purchaser replied, "If you say so, I am perfectly satisfied," and on the faith of this representation bought the horse, it was held that there was no warranty.[112]

[107] Bodurtha *v.* Phelon, 2 Allen (Mass.) 347.
[108] Powell *v.* Chittick, 89 Ia. 513. [109] Wason *v.* Rowe, 16 Vt. 525.
[110] Roberts *v.* Applegate, 153 Ill. 210, affirming 48 Ill. App. 176.
[111] Ransberger *v.* Ing, 55 Mo. App. 621.
[112] Hopkins *v.* Tanqueray, 15 C. B. 130. So as to the statement of a

A bare affirmation of soundness, etc. not amounting to a warranty unless it is intended to have that effect, there is no warranty where an auctioneer says, "Here is a nice lot of young, sound sheep;"[113] nor where it is stated of diseased sheep, "They appear to be healthy and are doing well;"[114] nor where the seller asserts that he is sure the mare is safe and kind and gentle in harness;[115] nor where one sells a horse as of the age stated in a written pedigree, declaring that he knows nothing of the horse but what he has learned from the pedigree;[116] nor where the seller states that the horse's eyes are as good as any horse's eyes in the world.[117]

Where on an exchange of horses the defendant delivered one to the plaintiff, saying, "If it don't suit you, bring it back," and the horse was returned as a "kicker" and the defendant showed another, saying, "This is your horse; exactly the horse you want. . . . If you are satisfied, take the horse home," there was held to be no warranty against the horse's taking fright at an electric street car.[118] Where a horse is described as a "gray four year old colt, warranted sound," the warranty is confined to the soundness, the age being merely matter of description.[119]

33. What Constitutes Unsoundness, Etc.—It was held by Lord Coleridge, in Bolden *v.* Brogden,[120] that a slight disorder in

horse's age in a supplemental catalogue of sale, where the catalogue proper stated that the ages were approximate but not warranted: Henry *v.* Salisbury, 14 N. Y. App. Div. 526.

[113] McGrew *v.* Forsythe, 31 Ia. 179.

[114] Tewkesbury *v.* Bennett, 31 Ia. 83.

[115] Jackson *v.* Wetherill, 7 S. & R. (Pa.) 480. And see McFarland *v.* Newman, 9 Watts (Pa.) 55; Holmes *v.* Tyson, 147 Pa. St. 305; Hardy *v.* Anderson, 7 Kulp (Pa.) 396; Wilson *v.* Turnbull, 23 Rettie (Sc. Ct. Sess.) 714.

[116] Dunlop *v.* Waugh, Peake, 123.

[117] House *v.* Fort, 4 Blackf. (Ind.) 293.

[118] Meyer *v.* Krauter, 56 N. J. L. 696.

[119] Budd *v.* Fairmaner, 8 Bing. 48. And see Richardson *v.* Brown, 1 id. 344; Willard *v.* Stevens, 24 N. H. 271.

[120] 2 M. & Rob. 113. And see Garment *v.* Barrs, 2 Esp. 673, where it

a horse at the sale not calculated to diminish permanently his usefulness, and from which he ultimately recovers, is not an unsoundness. The horse in that case had influenza but recovered before the trial. This opinion, however, is opposed to that universally held at present. Lord Ellenborough said in Elton *v.* Jordan: "To constitute unsoundness, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal for the time unfit for service, as, for instance, a cough, which for the present renders it less useful, and may ultimately prove fatal. Any infirmity which renders a horse less fit for present use and convenience is an unsoundness." [121]

So in Coates *v.* Stephens,[122] Parke, B., said: "I have always considered that a man who buys a horse warranted sound, must be taken as buying for immediate use and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is that, if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such a horse is unsound." And he said in Kiddell *v.* Burnard,[123] "I think the word 'sound' means what it expresses, namely, that the animal is sound and free from disease at the time he is warranted to be sound. If, indeed, the disease were not of a nature to impede the natural usefulness of

was held that a horse is not unsound because he labors under temporary injury from an accident, as here from lameness in one leg.

[121] 1 Stark. 102. And he spoke to the same effect in Elton *v.* Brogden, 4 Camp. 281. See also Kornegay *v.* White, 10 Ala. 255 (the case of a slave).

[122] 2 M. & Rob. 157. And see Scholefield *v.* Robb, Ibid. 210.

[123] 9 M. & W. 668.

the animal for the purpose for which he is used, as, for instance, if a horse had a slight pimple on his skin, it would not amount to an unsoundness; but even if such a thing as a pimple were on some part of the body where it might have that effect, as, for instance, on a part which would prevent the putting of a saddle or bridle on the animal, it would be different. An argument has, however, been adduced from the slightness of the disease and facility of cure; but if we once let in considerations of that kind, where are we to draw the line? A horse may have a cold which may be cured in a day, or a fever which may be cured in a week or month; and it would be difficult to say where to stop. Of course, if the disease be slight, the unsoundness is proportionably so, and so also ought to be the damages."

And in an American case it is said: "Any disease, infirmity or defect which renders the horse less fit for present use and convenience and not openly and palpably visible, and which is discoverable only by persons of skill and judgment in regard to the qualities of horses, constitutes an unsoundness." [124]

. But a temporary injury which does not affect a horse's fitness for present service is not an unsoundness.[125]

In the case of a slave it was said that "unsoundness consists in some organic disease in a formed state, evidenced by symptoms, or some clearly contagious disease, such as measles or small-pox, the infection of which existed in the system at the time of the sale," and it was therefore held that the question was correctly put to the jury whether he had typhoid fever at the time of the sale and that the inquiry proposed to be made of the doctors as to how long the disease had existed in its incipient state, was properly overruled.[126] But in a later case this rule that "the disease must be in a formed state,

[124] Burton *v.* Young, 5 Harr. (Del.) 233.

[125] Roberts *v.* Jenkins, 21 N. H. 116; Springsteed *v.* Lawson, 14 Abb. Pr. (N. Y.) 328.

[126] Stephens *v.* Chappell, 3 Strobh. (S. C.) 80.

evidenced by symptoms," was said to apply only to cases of fever having no fixed law for their commencement, and it was held that where the disease is a chronic one, like rheumatism, it is not necessary to show that the symptoms existed at the time of the sale, as subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed.[127] And it is an unsoundness where, though the purchaser is aware of the disease, yet its precise character not being obvious to the senses, its extent is uncertain and unknown.[128]

If a habit is decidedly injurious to an animal's health and tends to impair his usefulness, it comes within the definition of a "vice."[129]

A declaration for breach of warranty in which it is not alleged wherein the unsoundness consists is bad on demurrer but cured by verdict.[130] Where the plaintiff alleged that the animals were totally worthless on account of glanders, mentioning no other disease, it was held that proof of any other disease would not warrant a recovery.[131]

The plaintiff must positively prove that the animal was unsound,[132] and that it was so at the time of the sale.[133] But

[127] Crouch *v.* Culbreath, 11 Rich. L. (S. C.) 9. And see Fondren *v.* Durfee, 39 Miss. 324, following Shewalter *v.* Ford, infra. So, where an hereditary disease exists in sheep which is incapable of discovery till its appearance: Joliff *v.* Bendell, Ry. & Mo. 136; and where a horse has the seeds of glanders, though the disease does not develop till some time after the sale: Woodbury *v.* Robbins, 10 Cush. (Mass.) 520. And see Bristol *v.* Galway, infra.

[128] Shewalter *v.* Ford, 34 Miss. 417. And see Chadsey *v.* Greene, 24 Conn. 562; Perdue *v.* Harwell, 80 Ga. 150; Storrs *v.* Emerson, 72 Ia. 390, cited in § 27, supra.

[129] Scholefield *v.* Robb, 2 M. & Rob. 210.

[130] Martin *v.* Blodget, 1 Aik. (Vt.) 375.

[131] Snowden *v.* Waterman, 100 Ga. 588.

[132] Eaves *v.* Dixon, 2 Taunt. 343.

[133] Miller *v.* McDonald, 13 Wis. 673. Expert testimony is admissible some months after the sale to show that the alleged unsoundness was of a nature to indicate its existence at the time of sale: Bristol *v.* Galway, 68 Conn. 248.

the question of unsoundness is one peculiarly fit for the jury and the court will not set aside a verdict on account of a preponderance of contrary evidence.[134]

34. Specific Forms of Unsoundness.—Mere badness of shape though rendering a horse incapable of work is not unsoundness. "As long as he was uninjured, he must be considered sound. When the injury is produced by the badness of his action, that injury constitutes an unsoundness."[135] Therefore, a defective formation which has not produced lameness at the time of the sale, though it may render the horse more liable to become lame at some future time (as, for example, "curby-hocks" or thin soles) is not an unsoundness.[136] But a malformation of a less obvious kind existing from birth and rendering the horse less fit for reasonable use at the time of sale, such as an extraordinary convexity of the cornea of the eye, producing short-sightedness, as a result of which the animal is liable to shy, has been held an unsoundness.[137] So is the want of an eye,[138] and a cataract,[139] and glaucoma.[140] And the plaintiff has been held not guilty of contributory negligence so as to defeat recovery where he uses the animal so as to increase the injury to the eye.[141]

Temporary lameness rendering a horse less fit for present service is an unsoundness.[142] So a horse is unsound when one of its legs is weaker than the others.[143] It is said, however, in a Massachusetts case: "Lameness may or may not

[134] Lewis *v.* Peake, 7 Taunt. 153.
[135] Dickinson *v.* Follett, 1 M. & Rob. 299.
[136] Brown *v.* Elkington, 8 M. & W. 132; Bailey *v.* Forrest, 2 C. & K. 131.
[137] Holliday *v.* Morgan, 1 El. & El. 1.
[138] Butterfield *v.* Burroughs, 1 Salk. 211; House *v.* Fort, 4 Blackf. (Ind.) 293.
[139] Higgs *v.* Thrale, Oliph. Horses (5th ed.) 67.
[140] Settle *v.* Garner, Oliph. Horses 81.
[141] Riddle *v.* Webb, 110 Ala. 599.
[142] Elton *v.* Brogden, 4 Camp. 281, per Lord Ellenborough.
[143] Elton *v.* Jordan, 1 Stark. 102. And see the extract from Lord Ellenborough's charge in § 33, supra.

make a horse unsound. If it was only accidental and temporary, it would not be a breach of warranty; but if it was chronic and permanent, arising from causes which were beyond the reach of immediate remedies, it would be clearly a case of unsoundness."[144] Lord Ellenborough's rule is, doubtless, the better one.

Crib-biting has been held not to be an unsoundness, the court saying: "It is a curable vice in its first stages, and this horse was only proved to be an incipient crib-biter. It is a mere accident arising from bad management in the training of a horse, and is no more connected with unsoundness than starting and shying."[145] Where it has not yet produced disease or alteration of structure, though not an unsoundness, it is a vice.[146] But in an American case it was held that where it affected the health and condition of a horse so far as to render him less able to perform service and of less value, it was an unsoundness.[147]

A cough at the time of the sale, if it renders the horse less useful, is an unsoundness;[148] otherwise, of a cold that does not affect his general health.[149]

Roaring was held not to be an unsoundness in a horse unless it were shown to proceed from some disease or organic defect.[150] But in a later case Lord Ellenborough held roar-

[144] Brown *v.* Bigelow, 10 Allen (Mass.) 242.

[145] Broennenburgh *v.* Haycock, Holt, 630. Kicking is also a vice: Oliph. Horses (5th ed.) 83.

[146] Scholefield *v.* Robb, 2 M. & Rob. 210, cited also in § 33 supra, q. v.; Paul *v.* Hardwick, 1 Chit. Contr. 11th Am. ed. 655; Oliph. Horses 76.

[147] Washburn *v.* Cuddihy, 8 Gray (Mass.) 430. See Walker *v.* Hoisington, 43 Vt. 608, where the point is left undecided.

In Hunt *v.* Gray, 35 N. J. L. 227, 234, it is said: "In some of the English decisions it is held that this is a vice, and not an unsoundness. It would appear that the learned on this subject are not entirely agreed."

[148] Lord Ellenborough in Elton *v.* Jordan, 1 Stark. 102, quoted in § 33, supra, q. v.; Coates *v.* Stephens, 2 M. & Rob. 157. And see Shillitoe *v.* Claridge, 2 Chit. 427.

[149] Springsteed *v.* Lawson, 14 Abb. Pr. (N. Y.) 328. And see Bolden *v.* Brogden, 2 M. & Rob. 113.

[150] Bassett *v.* Collis, 2 Camp. 523, per Lord Ellenborough.

ing to be an unsoundness, saying: "If a horse be affected by any malady which renders him less serviceable for a permanency, I have no doubt that it is an unsoundness; I do not go by the noise, but by the disorder." [151] And whistling has been held to constitute a breach of a warranty that a horse is a "good hunter," though it does not actually interfere with his peace and endurance.[152]

Bone spavin in the hock is an unsoundness whether it produces lameness apparent at the time of the warranty or not, and though it may not produce lameness for years afterward.[153]

The want of castration in a male mule is not an unsoundness;[154] nor is the pregnancy of a mare.[155]

A nerved horse (nerving consisting in the division of a nerve leading from the foot up the leg to relieve the animal from the pain caused by a foot-disease) is unsound.[156]

A warranty that a horse is "sound and kind in every respect" is broken if it is in the habit of making sudden plunges without cause.[157] And a warranty that a horse is "sound and right" means that he is right in conduct as to all matters materially affecting his value as well as in physical condition.[158] Proof that a horse is "a good drawer" only will not satisfy a warranty that he is "a good drawer and pulls quietly in harness." "The word 'good' must mean 'good in all particulars.'" [159]

[151] Onslow *v.* Eames, 2 Stark. 72.

[152] King *v.* Cave, Co. Ct. case, cited in 18 Ir. L. T. 91.

[153] Watson *v.* Denton, 7 C. & P. 85. Cf. Hoffman *v.* Oates, 77 Ga. 701, cited in § 27, supra.

[154] Duckworth *v.* Walker, 1 Jones L. (N. C.) 507.

[155] Whitney *v.* Taylor, 54 Barb. (N. Y.) 536.

[156] Best *v.* Osborne, Ry. & Mo. 290.

[157] Hall *v.* Colyer, 8 N. Y. Suppt. 801.

See as to the meaning of "quiet to drive," Wilson *v.* Turnbull, 23 Rettie (Sc. Ct. Sess.) 714. As to evidence that a pony is not "gentle," see Hafner *v.* McCaffrey, 43 N. Y. Suppt. 279.

[158] Walker *v.* Hoisington, 43 Vt. 608.

[159] Coltherd *v.* Puncheon, 2 D. & R. 10.

A horse whose stumbling requires the constant remedy of a certain method of shoeing not disclosed by the seller or discoverable by the purchaser using reasonable skill, is not "sure-footed" within the meaning of a warranty.[160]

Among the disorders held to amount to unsoundness may be mentioned diseases of the lungs;[161] thick wind, proceeding from inflammation;[162] rot or tick;[163] broken wind;[164] the "navicular disease;"[165] ossification of the cartilages;[166] laminitis or alteration of the structure of the feet.[167]

35. Return on Breach of Warranty.—On the breach of a warranty of soundness, the seller is liable to an action without either the animal being returned or notice given of the unsoundness;[168] even where the horse was kept and used for nine months and was medically treated during that time.[169] But the seller is not bound to take the animal back again unless there has been an express agreement to that effect or the contract is tainted with fraud or has been mutually rescinded, and, except in such cases, the purchaser cannot resist an action for the price otherwise than by setting up the breach

[160] Morse *v.* Pitman, 64 N. H. 11.

Occasional stumbling is not an unsoundness: Lenoir *v.* Mandeville, 12 Rev. Leg. (Can.) 369.

[161] Hyde *v.* Davis, Oliph. Horses (5th ed.) 85. [162] Oliph. Horses 98.

[163] Drolet *v.* Laferrière, 12 Rev. Leg. (Can.) 359.

[164] Willan *v.* Carter, cited in Oliph. Horses (5th ed.) 70.

[165] Huston *v.* Plato, 3 Colo. 402; Matthews *v.* Parker, Oliph. Horses 86.

[166] Simpson *v.* Potts, Oliph. Horses 87.

[167] Hall *v.* Rogerson, Oliph. Horses 85; Smart *v.* Allison, Ibid.

As to corns, see Alexander *v.* Dutton, 58 N. H. 282.

As to a horse being chest-foundered, see Atterbury *v.* Fairmanner, 8 Moo. 32.

See the list of disorders held to constitute unsoundness in the sale of a horse in Oliph. Horses (5th ed.) Part I, Ch. IV.

[168] Fielder *v.* Starkin, 1 H. Bl. 17; Oliph. Horses 157; Nauman *v.* Ullman (Wis.) 78 N. W. Rep. 159.

[169] Patteshall *v.* Tranter, 4 N. & M. 649. And see Humbert *v.* Larson, 99 Ia. 275.

of warranty in reduction of damages.[170] But where the defendant had agreed to buy a pair of horses if they were passed as sound by a veterinary surgeon, and the latter had, without the defendant's knowledge, been promised a commission by the owner if a sale was effected, after which he certified the horses to be sound, it was held, in an action for the price—the defendant having rejected the horses and stopped the payment of his check, that it was immaterial to consider whether the surgeon had or had not been influenced by the promise of a commission, and that the plaintiff could not recover the amount of the check.[171] Where the purchaser has the right to return an animal, that right is unaffected by an accident having happened to it while in his possession, without neglect or default on his part.[172] The return is not necessary, however, where a horse has been so far injured as to have lost all use as a horse.[173] And if the horse dies before the time fixed

[170] Oliph. Horses 157. And see Trumbull *v.* O'Hara (Conn.), 41 Atl. Rep. 546.

[171] Shipway *v.* Broadwood, 80 L. T. N. S. 11.

[172] Head *v.* Tattersall, L. R. 7 Ex. 7, where it was also held that a casual conversation with the seller's groom before the buyer took away the horse, in which the latter was informed of the breach of warranty, did not deprive him of his right under the contract to return the horse.

[173] Chapman *v.* Withers, 20 Q. B. D. 824.

In 32 Solic. Journ. 520, commenting on this case, it is said: "It had already been decided in Head *v.* Tattersall . that horses were so far an exception to ordinary goods that a condition for return did not require them to be returned in the same condition as when taken away, but could be satisfied although they had been damaged by an accident not arising from the purchaser's default. The present case goes further and says that the return itself is not necessary, if the animal has been so far injured as to have lost all use as a horse. Perhaps the result of the decision is better than the reasoning. This latter implies that if the horse is at all capable of being removed without fatal injury, the actual return within the time appointed must be made. In other words, in any case of serious injury the purchaser must inflict on the horse the cruelty of travelling or must run the risk of losing his action on the warranty. Surely it would have been better to interpret the condition as being for a return within two days, or as soon thereafter as possible, rather than to have excused the return altogether on the ground that the horse was practically dead."

for his return, that fact will not prevent recovery in an action for breach of warranty.[174] So where the purchaser has an option to rescind in a certain time, he may rescind on the death of the horse within that time and need not return the carcass.[175]

Where the contract is to supply a horse fit for a certain purpose and he does not answer that purpose, the buyer may rescind the contract, if he has not kept the horse longer than necessary for a reasonable trial, or acted as its owner, as by selling it.[176] And where one purchased a horse warranted sound, sold it again and then repurchased it, he cannot, on discovering its original unsoundness, compel the seller to take it back.[177] But where the horse has been offered to the seller and refused, the buyer's right to recover is not affected by his having sold it after the offer.[178] The seller is entitled in all such cases to notice of the failure of the conditions of warranty and the burden is on the purchaser to show such failure.[179]

The sale of a horse under warranty with a provision that the purchaser "can return it" and receive another in exchange was held to entitle the purchaser, upon breach, either to retain the horse and recover damages or return him and receive another horse in exchange.[180]

36. Damages on Breach.—The measure of damages for the breach of warranty of an animal is the difference between its actual market value at the time of sale and its value if it had

[174] Moore *v.* Emerson, 63 Mo. App. 137.

[175] Lyons *v.* Stills, 97 Tenn. 514. [176] Oliph. Horses (5th ed.) 157.

[177] Street *v.* Blay, 2 B. & Ad. 456.

[178] Buchanan *v.* Parnshaw, 2 Term 745, where it was held that, where a horse was warranted to be sound and six years old and a condition of sale was that it should be deemed sound unless returned within two days, the latter provision applied only to the warranty of soundness, not to that of age.

[179] Beckett *v.* Gridley, 67 Minn. 37.

[180] Love *v.* Ross, 89 Ia. 400. And see Eyers *v.* Haddem, 70 Fed. Rep. 648.

been as represented, including the keep and other reasonable expense, such as medical attendance, etc.[181] And this rule is not affected by proof that the purchaser subsequently resold it at an increased price;[182] or that it was worth the price paid for it.[183] But the purchaser cannot recover for expenditures made after he ought as a man of reasonable judgment to have become satisfied that the animal was worthless and that its disease was incurable.[184] On the breach of warranty of a stallion as a "sure colt-getter," it was held that the purchaser could recover for the reasonable expense of advertising, keeping and standing the horse during the season and prior to discovering his condition.[185] But where a horse had been bought in the country and brought to London and, after discovery of the breach of warranty, tendered to the seller and sold at auction, it was held that the buyer could not recover for the expense of obtaining a certificate of unsoundness from a veterinary college or of counsel's opinion, as they were no part of the necessary expenses, but were merely for the plaintiff's own comfort and to convince him he could bring an action in safety, but that he could recover for the expense of bringing the horse up to London and of its keep.[186] Where the plaintiff was compelled to purchase cattle in place of those lost by the defendant's deceit, and expenses of delay were involved, those matters were legal items of damage.[187]

[181] Caswell *v.* Coare, 1 Taunt. 566; Murry *v.* Meredith, 25 Ark. 164; Miller *v.* Law, 44 Ill. App. 630; Love *v.* Ross, 89 Ia. 400; Schee *v.* Shore, 6 Kan. App. 136; Williamson *v.* Brandenberg, 133 Ind. 594; Sharpe *v.* Bettis (Ky.), 32 S. W. Rep. 395; Hobbs *v.* Bland (N. C.), 32 S. E. Rep. 683; Snyder *v.* Baker (Tex. Civ. App.), 34 S. W. Rep. 981.

[182] Brown *v.* Bigelow, 10 Allen (Mass.) 242; Berry *v.* Shannon (Ga.), 25 S. E. Rep. 514.

[183] Douglass *v.* Moses (Ia.), 65 N. W. Rep. 1004.

[184] Murphy *v.* McGraw, 74 Mich. 318.

[185] Short *v.* Matteson, 81 Ia. 638. And see Suttle *v.* Hutchinson (Tex. Civ. App), 31 S. W. Rep. 211; National Horse Importing Co. *v.* Novak, 95 Ia. 596.

[186] Clare *v.* Maynard, 7 C & P. 741.

[187] Sellar *v.* Clelland, 2 Colo. 532, where it was also held that where the cattle were lost by disease in an uninhabited country, evidence might be

If the animal is not tendered back to the seller, the purchaser cannot recover for the expense of its keep.[188] This expense should cover only a reasonable time before resale.[189] Where the animal is returned the measure of damages is the price paid for it.[190] And there may be cases where the purchaser, without a return, may recover the cost, as where a horse, warranted to be sound and just the kind of animal the purchaser wanted for a driving horse, proved to have an incurable disease of the feet which rendered him worthless for that purpose.[191]

Where the horse was warranted to be kind, it was held in a Massachusetts case that the purchaser could not recover in tort for damages to a wagon and harness in consequence of the breach.[192] But in a New York case this case was commented on as "not being easy to understand," and it was held that where a horse, warranted to be gentle and kind and suitable to drive in a light wagon, runs away while being so driven, the warrantor is liable for the loss of the wagon and the buyer's injuries, though the warranty was not fraudulently made.[193] On the other hand, it was held in an Alabama case that, on the breach of a warranty of gentleness, damages could not be recovered for injuries received by the horse's running away where it was not shown that the seller knew or had reason to believe that he was vicious or unsafe,

given of their market value in several markets nearest the place where they were lost.

[188] Caswell *v.* Coare, 1 Taunt. 566. And see Ford *v.* Oliphant (Tex. Civ. App.), 32 S. W. Rep. 437; Elwood *v.* McDill, 105 Ia. 437.

[189] Ellis *v.* Chinnock, 7 C. & P. 169; Chesterman *v.* Lamb, 4 N. & M. 195; McKenzie *v.* Hancock, Ry. & Moo. 436; Huston *v.* Plato, 3 Colo. 402.

[190] Caswell *v.* Coare, 1 Taunt. 566.

[191] Murphy *v.* McGraw, 74 Mich. 318.

[192] Case *v.* Stevens, 137 Mass. 551.

[193] Bruce *v.* Fiss, Doer & Carroll Horse Co., 26 Misc. (N. Y.) 472,—on the ground that damages to person and property from the horses running away must have been in the minds of the parties as likely to occur if the warranty proved untrue. See, also, Allen *v.* Truesdell, 135 Mass. 75.

or that the affirmation of gentleness was of such a reckless character as to amount to bad faith.[194] An expert may testify to the effect of the unsoundness in diminishing the value of an animal of given characteristics.[195]

Damages based on profits that would have been made if the animal had been as warranted are too remote and speculative to be recovered.[196] Thus, the prospective gains from the services of a horse warranted as a sure foal-getter cannot be recovered unless there were outstanding contracts for such services at the time of sale, known to the seller, and the purchase was made with reference thereto.[197] And the purchaser cannot recover for the loss of a bargain for the resale of the animal, though the contract of resale at a profit had been actually completed before the unsoundness was discovered.[198] But where a bull bought for breeding purposes was known by the seller to be without power of procreation, the purchaser may recover in an action of deceit for the diminution in value of his dairy and may testify that his cows produced less butter than customarily.[199]

In an action for the breach of a warranty it was held that the court had no power to order that the defendant have the privilege of sending a veterinary surgeon into the plaintiff's stable to examine the horse.[200]

37. Mortgage of Animals and Their Increase.—The law relating to Chattel Mortgages is, of coure, applicable to property in animals, but, as was said before, we shall discuss here only such parts of it as are peculiar to this kind of property.

A description in the mortgage which will enable a third person, aided by inquiries which the instrument itself sug-

[194] Jones *v.* Ross, 98 Ala. 448.
[195] Miller *v.* Smith, 112 Mass. 470.
[196] Love *v.* Ross, 89 Ia. 400; Williamson *v.* Brandenberg, 133 Ind. 594.
[197] Glidden *v.* Pooler, 50 Ill. App. 36.
[198] Clare *v.* Maynard, 6 A. & E. 519.
[199] Maynard *v.* Maynard, 49 Vt. 297.
[200] Martin *v.* Elliott, 106 Mich. 130.

gests, to identify the animal or animals is, in general, sufficient.[201] Thus, a description embracing all a mortgagor's stock, or all in a certain place, may be in other respects vague and uncertain.[202] And a description of a number of sheep "now in" a certain county is sufficient, where sheep are often driven from one county to another.[203] But a description of "sixty head of two and three-year-old steers and forty head of yearling steers" was held too indefinite to give notice of a lien on any particular steers. "There is no suggestion that the steers were all the steers of that age which the mortgagor owned in that township and, if he had others, the mortgage would apply equally to all." [204]

Where a horse is accurately described, the mere fact that it was not found at the place where the mortgage recited it was, will not vitiate the instrument.[205] But in a mortgage of cattle and their increase in which they were described separately, the color, age and name being given, but no statement as to the present or past ownership of the property, nor of the place where it was then or had been kept, the description was held insufficient.[206]

A mortgage of "two cows" where the mortgagor had six was held void for indefiniteness, the description not indicating

[201] Jones Chat. Mort. (4th ed.) 62; Scrafford *v.* Gibbons, 44 Kan. 533; Waggoner *v.* Oursler, 54 id. 141; Rhutasel *v.* Stephens, 68 Ia. 627; Buck *v.* Young, 1 Ind. App. 558; Schneider *v.* Anderson (Minn.), 79 N. W. Rep. 603; Jennings *v.* Sparkman, 39 Mo. App. 663; Bozeman *v.* Fields, 44 id. 432; Buck *v.* Davenport Savings Bk., 29 Neb. 407.

A fortiori is this true where third parties are not involved: Ranck *v.* Howard-Sansom Co., 3 Tex. Civ. App. 507.

[202] Evans-Snyder-Buell Co. *v.* Turner, 143 Mo. 638; Desany *v.* Thorp (Vt.), 39 Atl. Rep. 309; Crisfield *v.* Neal, 36 Kan. 278; Fisher *v.* Porter (S. D.), 77 N. W. Rep. 112.

[203] Alferitz *v.* Ingalls, 83 Fed. Rep. 964.

[204] Caldwell *v.* Trowbridge, 68 Ia. 150. And see, to the same effect, Huse *v.* Estabrooks, 67 Vt. 223, where, though it was not found that the mortgagor owned more heifers of the ages mentioned, the contrary did not appear.

[205] Jones *v.* Workman, 65 Wis. 269. [206] Warner *v.* Wilson, 73 Ia. 719. See as to a description by the names in a Herd Book, Taylor *v.* Gilbert, 92 id. 587; Boone City Bank *v.* Ratkey, 79 id. 215.

the line of inquiry and furnishing a basis for identification.[207] On the other hand, a description of "a brindle cow about three years old," was held sufficient to put a party intending to purchase it on inquiry, although the mortgagor had two cows answering to such description.[208] And it was held by the Supreme Court of the United States that a mortgage covering a specified number of sheep out of a larger number owned by the mortgagor, there being no means of identification, was valid as against a subsequent mortgagee having knowledge of the facts, though not as against third persons with acquired interests.[209] So, where there is a description of a herd from which by the terms of the mortgage the mortgagee is to make a selection, it was held in Texas that this is sufficient as against a purchaser with notice.[210] A later Texas case goes still further and holds that where a mortgage conveyed fifty mares with a certain brand, the mortgagor owning three hundred such mares and there being no way of determining which of the three hundred were intended to be mortgaged, it was not void for uncertainty and the mortgagee had the implied power to elect as to which ones should be deemed to be included in the mortgage. The court said: "In order to give effect to such intent, there must be found in the instrument either (1) some descriptive matter which, when applied to the herd, will enable one to ascertain the very animals intended to be conveyed; or (2) an express or implied power of selection, or, in legal terminology, 'election.' "[211]

[207] Parker *v.* Chase, 62 Vt. 206. And see Jacobson *v.* Christensen (Utah), 55 Pac. Rep. 562.

[208] Harkey *v.* Jones, 54 Ark. 158.

[209] Northwestern Bank *v.* Freeman, 171 U. S. 620.

[210] Lay *v.* Cardwell (Tex. Civ. App.), 33 S. W. Rep. 595.

[211] Oxsheer *v.* Watt (Tex.), 41 S. W. Rep. 466. Heyward's Case, 2 Coke, 34 b., 37 a., is quoted: "If I give you one of my horses, in my stable, there you shall have election, for you shall be the first agent by taking or seizure of one of them." See, also, Same *v.* Same (Tex. Civ. App.), 42 S. W. Rep. 121.

This case was followed in John S. Brittain Dry-Goods Co. *v.* Blanchard (Kan.), 56 Pac. Rep. 474.

It was held also in this case that the purchaser of the three hundred mares, having full knowledge of the mortgagee's right to select fifty, was not prejudiced by a foreclosure of fifty average head of the whole number. In a similar case it was held that the creditor of the mortgagor purchasing at his own execution sale was charged with notice of the mortgagee's right to designate which animals should be subject to his lien, and that a designation to the agent of the mortgagee identified the property with sufficient certainty to sustain the mortgage as against such creditor.[212] In the Appellate Court it was held that such a mortgage ceases to be a lien on the offspring unless the mortgagee made his selection before it became impossible to identify the young by reason of their being separated from their mothers.[213]

A defect in a mortgage for a lack of separation may sometimes be cured by the subsequent act of the parties, removing all doubt as to the identity of the animals mortgaged.[214]

Where the mortgage is duly executed and recorded according to the law of the State where the cattle then are, and the mortgagor afterwards drives them into another State and sells them there to a *bona fide* purchaser, the latter takes them subject to the mortgage, though he has had no actual notice of it.[215] This depends, however, on principles of comity between the States, as to which there has been some conflict of opinion.[216]

A mortgagee may maintain an action for damages for the

[212] Avery *v.* Popper (Tex. Civ. App.), 45 S. W. Rep. 951, distinguishing Same *v.* Same (Tex. Civ. App.), 34 id. 325.

[213] Avery *v.* Popper (Tex.), 48 S. W. Rep. 572, modifying 45 id. 951, supra.

[214] Inter-State Galloway Cattle Co. *v.* McLain, 42 Kan. 680.

See, in general, on the sufficiency of descriptions in chattel mortgages, Jones Chat. Mort. (4th ed.) §§ 53-78, and the cases of mortgages of animals there cited. For additional cases, see Pingrey Chat. Mort. § 161; 3 Gen. Dig. N. S., 983-984.

[215] Nat. Bk. of Commerce *v.* Morris, 114 Mo. 255, and cases cited. And see Edgerly *v.* Bush, 81 N. Y. 199; Riddle *v.* Hudgins, 58 Fed. Rep. 490.

[216] See Jones Chat. Mort. (4th ed.) §§ 299-307; 37 Cent. L. Journ. 375.

negligent killing of an animal in possession of the mortgagor after condition broken.[217]

Where animals are mortgaged their natural increase is also subject to the mortgage though not mentioned in the instrument.[218] It is immaterial whether the young were conceived prior to or subsequent to the date of the mortgage. In an Iowa case the court had instructed the jury as follows: "To entitle the plaintiffs to recover the possession of such of said stock as were the increase or young of the stock covered by the mortgage, they must establish the fact that such young was conceived by their dams or mothers prior to the date of said mortgage or else that after said mortgage the said mothers and their increase were in the open possession and control of plaintiffs [mortgagees]." The Appellate Court said: "No exception was taken or objection made by either party to this instruction. It must be regarded as presenting the law of this case." [219] But in a later Tennessee case it was held that the mortgagee is the owner of the increase though the animal remains in the mortgagor's possession and was bred by him after the execution of the mortgage and without notice to the mortgagee.[220] The court said: "None of the cases cited make any distinction between the case in which the animal was bred before the execution of the mortgage and that in which it was bred subsequently. In most of them, it is true, the females were in fact pregnant at the time the mortgage was made; but in none of them do the courts attach

[217] Wylie *v.* Ohio R. & C. R. Co., 48 S. C. 405.

[218] Northwestern Bank *v.* Freeman, 171 U. S. 620; Pyeatt *v.* Powell, 51 Fed. Rep. 551; Dyer *v.* State, 88 Ala. 225; Meyer *v.* Cook, 85 id. 417; Gundy *v.* Biteler, 6 Ill. App. 510; Forman *v.* Proctor, 9 B. Mon. (Ky.) 124; Cleveland *v.* Koch, 108 Mich. 514; Kellogg *v.* Lovely, 46 id. 131; Cumberland Bank *v.* Baker (N. J. Ch.), 41 Atl. Rep. 704; First Nat. Bk. *v.* Western Mort. & Inv. Co., 86 Tex. 636.

But see Boggs *v.* Stanky, 13 Neb. 400; Shoobert *v.* De Motta, 112 Cal. 215.

[219] Thorpe *v.* Cowles, 55 Ia. 408. See Thompson *v.* Anderson, 94 id. 554.

[220] Ellis *v.* Reaves, 94 Tenn. 210, citing Latta *v.* Fowlkes (Tenn.), 29 S. W. Rep. 124.

any importance to that circumstance. On the contrary, the decision in each of those cases was based upon the legal proposition that the title of the offspring follows the title of the dam or mother—'*partus sequitur ventrem.*' The only case we have been able to find in which the time of conception has been treated as of any moment in determining the ownership of young animals born of mortgaged females is that of Thorpe *v.* Cowles. . . . Whether it [*i. e.*, the instruction in that case] would have been so 'regarded' if challenged does not appear. No reason is given nor authority cited in its support. Cobbey incorporates the substance of that instruction into his text as an independent proposition, and cites that case but none other to support it: Cobbey Chat. Mort. § 367. Not only does that case stand alone, but it seems to us to be without any sound reason to sustain it."

In California, however, where by statute the chattel mortgagor is not divested of his title, it was held that the mortgagee is not entitled to a lien on the increase of animals begotten after the execution of the mortgage.[221]

After the period of nurture of the young has passed, the mortgage can be no longer enforced as against *bona fide* purchasers and incumbrancers without notice whose titles are subsequent to the date of weaning.[222] "As to them the period of nurture being passed and the young being entirely separated from the mother and not being mentioned in the mortgage, nor any longer connected with the mother covered by the mortgage, they have neither actual nor constructive no-

[221] Shoobert *v.* De Motta, 112 Cal. 215, refusing to follow First Nat. Bk. *v.* West. Mort. & Inv. Co., 86 Tex. 636, cited supra and infra, where the statute was similar. The court did not decide whether, if the lambs had been in gestation at the date of the mortgage, the mortgagee would have had a lien. But in First Nat. Bk. *v.* Erreca, 116 Cal. 81, it was held that a mortgage of sheep does not extend the lien thereof to wool thereafter grown or lambs in gestation at its date.

[222] Winter *v.* Landphere, 42 Ia. 471; Darling *v.* Wilson, 60 N. H. 59; Enright *v.* Dodge, 64 Vt. 502; Desany *v.* Thorp (Vt.), 39 Atl. Rep. 309; Cox *v.* Beck, 83 Fed. Rep. 269. Otherwise, in Maryland: Cahoon *v.* Miers, 67 Md. 573.

tice of the mortgagor's rights and interests nor anything to put them upon inquiry." [223]

Thus, as against an attaching creditor of the mortgagor, a mortgage of a mare covers her colt at least until it is weaned or should be weaned according to the course of nature or the usual custom of horse raisers.[224] And a mortgage upon a "mare in foal" covers the colt as against one who purchases it within the usual period of nurture.[225]

It was said in Darling *v.* Wilson:[226] "If the mortgage covers the increase of the particular animals mortgaged, so that they cannot be sold to an innocent purchaser or attached by an innocent creditor, it would, for the same reason, cover the increase of the increase to an indefinite period, and no person would be safe in purchasing live animals of one who had at any time made a mortgage upon his live stock, without examining into the pedigree of the animal and ascertaining whether some of its ancestors were among those mortgaged, however great the inconvenience or expense in so doing. This is not the law."

In the same case it is said: "There being nothing in the mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien existing only as an incident to the mortgage would, as between the parties, continue so long only as is necessary for the suitable nurture of the increase. This view is supported upon sound principles." But, commenting on this latter statement, it is said in Funk *v.* Paul, cited supra: "To our minds this view cannot be sustained upon sound principles. The lien was created by the mortgage and, so far as the mortgage is concerned, was entirely independent of the nurture. The mortgage was a valid lien upon the increase as against the mortgagor in possession, and he necessarily knew when the mortgage was given, the young dropped and the period of gestation, and hence there would seem to be no valid reason for terminating the lien as

[223] Funk *v.* Paul, 64 Wis. 35. [224] Rogers *v.* Highland, 69 Ia. 504.
[225] Edmonston *v.* Wilson, 49 Mo. App. 491. [226] 60 N. H. 59, cited supra.

against the mortgagor merely because the period of 'suitable nurture' had passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mortgagor, the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage."

So in Meyer *v.* Cook,[227] it is said on the same point: "We are at a loss to conjecture on what principle such a distinction can be maintained. We apprehend, however, that all such seeming rulings rest on an entirely different principle. The exception has been allowed only in favor of *bona fide* purchasers who, finding such offspring in the possession of the mother, arbiter of its own movements and not following the dam, purchased and paid for the same, without notice of the mortgage lien."

The words "increase of the sheep," in a mortgage of a certain number of branded sheep, were held to mean the natural increase of the original sheep mortgaged and not to include additions made to the flock by purchase, though in substitution of those specified in the original mortgage.[228] A deed of trust on a flock of sheep including "increase and all appendages thereto" conveys the wool afterwards sheared from the sheep.[229] A mortgage lien on sheep and their wool is subject to the necessary expense of shearing, storing and marketing the wool.[230] A mortgage of a horse and "all earnings

[227] 85 Ala. 417, cited supra.

[228] Webster *v.* Power, L. R. 2 P. C. 69.

A mortgage of cows and calves "that may be raised during the season" covers calves that are carried at the time the mortgage is given: Cleveland *v.* Koch, 108 Mich. 514.

A mortgage of mares "and all increase of said mares and the increase of the increase" covers colts foaled after the mortgage was executed: Hopkins Fine Stock Co. *v.* Reid, 106 Ia. 78.

[229] Hobbs *v.* First Nat. Bk. (Tex. Civ. App.), 39 S. W. Rep. 331. And see Alferitz *v.* Ingalls, 83 Fed. Rep. 964; Cox *v.* Beck, Ibid. 269.

[230] Cox *v.* Beck, supra.

whether by premium or otherwise," was held not to cover future earnings.[231]

A mortgage of cattle described as "my herd of 1,500 cattle . . . all of such cattle being marked and branded . . . and consisting of bulls and breeding and grazing cattle of one year old and upwards," was held not to embrace calves less than one year old when the mortgage was executed, or their increase, the court saying: "It is . . . reasonable to conclude that the addition of words which describe the property by the several classes of which the herd consisted, and which omitted one class, namely, those less than one year old, was intended by the parties to exclude the latter from the operation of the mortgage. . . . There is nothing except the general words 'my herd' which tends at all to show that it was the purpose to embrace the calves. The other descriptive clauses lead to a contrary conclusion." [232]

The owner of a mare served by a stallion agreed in writing with the owner of the latter to pay him twenty dollars twelve months after date if his mare proved with foal, "colt holden for payment." It was held that the agreement created a contract lien in the nature of a mortgage.[233]

38. Priority of the Mortgage Lien.—It appears to be generally held that the lien of a mortgage is superior to that of an agistor, livery stable keeper or breeder, subsequently created by the mortgagor without the mortgagee's consent,[234] but

[231] McArthur *v.* Garman, 71 Ia. 34.

[232] First Nat. Bk. *v.* West. Mort. & Inv. Co., 86 Tex. 636, reversing 6 Tex. Civ. App. 59.

[233] Sawyer *v.* Gerrish, 70 Me. 254.

[234] Sargent *v.* Usher, 55 N. H. 287; Charles *v.* Neigelsen, 15 Ill. App. 17; Reynolds *v.* Case, 60 Mich. 76; Petzenka *v.* Dallimore, 64 Minn. 472; Sullivan *v.* Clifton, 55 N. J. L. 324; Easter *v.* Goyne, 51 Ark. 222; State Bk. *v.* Lowe, 22 Neb. 68; Hanch *v.* Ripley, 127 Ind. 151; McGhee *v.* Edwards, 87 Tenn. 506; Bissell *v.* Pearce, 28 N. Y. 252; Jackson *v.* Kasseall, 30 Hun (N. Y.) 231; Monypenny *v.* Sells, 28 Ohio L. Journ. 112; Chapman *v.* First Nat. Bk., 98 Ala. 528; Mayfield *v.* Spiva, 100 id. 223; Baskin *v.* Wayne, 62 Mo. App. 515; Pickett *v.* McCord, Ibid. 467; Lazarus *v.* Moran,

there is some question as to what constitutes such consent. Thus, it has been held that the mere fact that the mortgagor was allowed to retain possession of the mortgaged animals, does not show the mortgagee's consent to have them kept or fed by another;[235] nor does the knowledge that the property had been subsequently placed in the hands of such third person.[236] But if the mortgagee may be presumed from the express contract and the circumstances of the case to have understood that the mortgagor would place the animal with a stable-keeper to be boarded, and makes no objection, his consent will be implied and the keeper's lien will have priority.[237]

On the other hand, the question of priority has been settled in favor of the agistor or keeper by reason of the wording of the statute giving the latter his lien, and it has been held that where the intent of the statute was to give a lien as against all persons, that intent will prevail as against a prior mortgagee.[238] Thus, where a statute gives a lien for the care and keeping of horses, provided notice be given to the owner of the intention to claim such a lien, and notice is given to the

64 id. 239; Miller *v.* Crabbe, 2 Mo. App. Repr. 1371; First Nat. Bk. *v.* Scott, 7 N. D. 312.

And see Lee *v.* Vanmeter, 98 Ky. 1; Bean *v.* Johnson (Ky.), 32 S. W. Rep. 175; Howard *v.* Burns, 44 Kan. 543; Vining *v.* Millar, 109 Mich. 205. Contra, Case *v.* Allen, 21 Kan. 217, expressly disapproved of in Sullivan *v.* Clifton, McGhee *v.* Edwards, supra; Willard *v.* Whinfield, 2 Kan. App. 53.

[235] Wright *v.* Sherman (S. D.), 52 N. W. Rep. 1093, 53 id. 425; Howes *v.* Newcomb, 146 Mass. 76; Cleveland *v.* Koch, 108 Mich. 514.

A mortgagor of cattle cannot recover for grain fed or stabling given to the cattle, nor for the services of his minor child, living in his family, and not then emancipated, in caring for such cattle; nor can he, by subsequently emancipating the child, give him a cause of action which he did not have when he rendered the services: Kreider *v.* Fanning, 74 Ill. App. 237.

[236] Ingalls *v.* Vance, 61 Vt. 582. See Ingalls *v.* Green, 62 id. 436.

[237] Lynde *v.* Parker, 155 Mass. 481. And see Woodard *v.* Myers, 15 Ind. App. 42; Bowden *v.* Dugan, 91 Me. 141; Farney *v.* Kerr (Tenn. Ch. App.). 48 S. W. Rep. 103.

[238] Jones Chat. Mort. § 474.

mortgagee as well as to the mortgagor in possession, it has been held that the lien may be enforced, as it was created, not by the agreement of the mortgagor, but by the statute which, being in force when the mortgage was executed, entered into it.[239] So where a statute provided that the keeping of animals at the request of the "owner or lawful possessor" should create a lien, this was held to apply to a request made by a mortgagor in possession and to give priority to such lien.[240] And where a mortgagee must by law take possession immediately after the maturity of the mortgage, it has been held that an agistor's lien on mortgaged horses remaining in the mortgagor's hands has priority over the claim of the assignee of the past-due notes secured by the mortgage.[241] But where the lien of a feeder of stock is prior to a chattel mortgage taken with knowledge that the stock was on the feeder's ranch, the former lien prevails.[242] The court held in the case last cited that it was not necessary to decide whether a subsequent agistor's lien was in that State paramount to a mort-

[239] Corning *v.* Ashley, 51 Hun (N. Y.) 483, 121 N. Y. 700, distinguishing Bissell *v.* Pearce, 28 N. Y. 252, supra, on the ground that there the mortgagor was not allowed to create a lien by his own agreement, whereas here the statute charged the mortgagee with knowledge of the lien.

[240] Smith *v.* Stevens, 36 Minn. 303. In a later case,—Meyer *v.* Berlandi, 39 id. 438, 444,—this decision is said to rest "upon the doctrine of agency,—authority, implied from the circumstances, from the mortgagee to the mortgagor to create a lien for such a purpose."

In Hanch *v.* Ripley, 127 Ind. 151, commenting on the same case, it is said that the court held "that the mortgagee took his mortgage with a full knowledge that under the law the mortgagor might create an agister's lien against it superior to his mortgage and hence was bound thereby."

And in Sullivan *v.* Clifton, 55 N. J. L. 324, it is said: "Under that statute, no other view could reasonably be taken."

But Smith *v.* Stevens is expressly disapproved of in McGhee *v.* Edwards, 87 Tenn. 506, and several of the other cases cited supra.

See also Case *v.* Allen, 21 Kan. 217; Aylmore *v.* Kahn, 11 Ohio Circ. Ct. 392; Vose *v.* Whitney, 7 Mont. 385; Colquitt *v.* Kirkman, 47 Ga. 555; Auld *v.* Travis, 5 Colo. App. 535.

[241] Blain *v.* Manning, 36 Ill. App. 214. And see Shannon *v.* Wolf, 173 Ill. 253.

[242] Tabor *v.* Salisbury 3 Colo. App. 335.

gage, and remarked: "Strong and very persuasive arguments have been adduced by able judges in support of their conclusion that the lien of him who feeds the cattle ought to prevail as against the mortgagee, since the mortgagee has left the property in the possession of the one executing the security, who is thereby apparently clothed with authority to contract with reference to the stock, and his bargain in such a case has resulted in the preservation and betterment of the security which the mortgagee claims. Other judges contend, with much learning, that the agistor has notice of the existence of the security and must be presumed to have contracted with reference to its probable enforcement. These controversies, however, have arisen where the security antedated the placing of the stock with the ranchman. It does not seem ever to have been held that where the lien of the feeder has had its inception prior to the giving of the security, which is taken with knowledge of the situation of the stock, such subsequent mortgage is superior to its equities."

In a Massachusetts case, however, it was held that a lien for the keeping of a horse, created by agreement, will not hold against a mortgage subsequently executed and recorded, if the owner is afterwards permitted to use the horse at his pleasure, as the relinquishment of possession is an abandonment of the lien.[243]

The delivery of an instrument in writing, purporting to deliver possession of cattle forty-five miles away, is not such a taking of possession by a mortgagee holding under an unrecorded mortgage as will defeat an attachment lien secured before the actual possession is obtained.[244]

Where the trainer of a race-horse accepts a bill of sale in place of his former lien he takes it subject to a chattel mortgage given to a third person while he was in possession.[245]

One who takes a mortgage on a flock of sheep, with knowl-

[243] Perkins *v.* Boardman, 14 Gray (Mass.) 481.
[244] Blanchard *v.* Ingram (Ind. Ty.), 48 S. W. Rep. 1066.
[245] Murray *v.* Guse, 10 Wash. 25.

edge of prior mortgages on a part of them, is estopped from denying the validity of such mortgages by reason of uncertainty in the description of the sheep mortgaged.[246]

Where the mortgagor is given the right to dispose of the stock from time to time as the cattle become fit for beef and the horses unproductive and useless and to apply the proceeds to his own use and benefit, the mortgage is void as against attaching creditors.[247] And where, with the mortgagee's consent, some of the mortgaged animals are exchanged for others, the mortgagee's right to the latter is equitable only and does not affect attaching creditors.[248]

The lien of a mortgage on animals is not transferred to the purchase price therefor in the hands of one to whom the mortgagor sells them under authority of the mortgagee to sell and turn over the proceeds to the latter. The lien is lost and extinguished by such sale and the unpaid purchase money may be attached by the mortgagor's creditors.[249]

[246] Cox *v.* Beck, 83 Fed. Rep. 269.
[247] Roberts *v.* Johnson, 5 Colo. App. 406.
[248] Alferitz *v.* Perkins, 122 Cal. 391. [249] Maier *v.* Freeman, 112 Cal. 8.

TITLE II.

TRANSFER OF PROPERTY.

CHAPTER II.

ESTRAYS.

39. What is an estray.

40. Rights and liabilities of the taker-up of an estray.

39. What Is an Estray.—Another mode by which property in animals is transferred is by the act of the animal itself, so to speak, or of a third person, *i. e.*, involuntarily so far as the owner is concerned. An animal found wandering may be taken up by the finder, advertised and sold, in accordance with statutory provisions, the proceeds, deducting expenses, being returned to the owner if he is ascertained. This whole subject is one regulated by statute and, therefore, requires but brief discussion here.

An estray is usually defined to be a wandering beast whose owner is unknown at the time to the person who takes it up.[1] And an animal is not an estray where the person distraining it knew who had charge of it and where it was kept, though he did not know who the owner was.[2] But the word has been held to have a wider significance under the Texas statute. "The qualification of the owner being unknown is not at-

[1] Roberts *v.* Barnes, 27 Wis. 422; Lyman *v.* Gipson, 18 Pick. (Mass.) 422, 426; Walters *v.* Glats, 29 Ia. 437.

For the meaning of "stray beast in a suffering condition," see Sturges *v.* Raymond, 27 Conn. 473.

[2] Lyons *v.* Van Gorder, 77 Ia. 600.

tached by all the authors who attempt the definition. . . . In common acceptation it is believed that the term estray in our statute has not been restricted to an animal *ignoto domino*, and we think that the law might very properly apply to cases where the owner, although known, might be remote or where he would not follow and reclaim his animals that had wandered off, with reasonable diligence. A citizen who would take up such wandering animals when found on his plantation or adjacent lands would, as we conceive, be exercising a right conferred by statute and be not trespassing upon the property of others." [3]

An animal turned on a range by its owner is not an estray, though he does not know its immediate whereabouts, unless it wanders from the range and becomes lost.[4]

It was held in Pennsylvania that a stolen horse may be sold under the stray laws. "The proceeding against a stray is *in rem* and not against the title of any particular owner. Its object is not to inflict a penalty for letting the animal go at large, but to compensate the injury done by it and secure the residue of the value to the owner of it." [5] And there is a similar decision in Iowa, where it is said: "It is plainly immaterial how the animal escaped from the owner—whether by his voluntary act, by the act of a trespasser upon his premises, or by a thief. It is true that a thief can confer no title to the stolen property. But the same may be said of a bailee; and if a bailee were to abandon an animal, surely it would be subject to the estray laws. So, if a trespasser should open a gate or a stable door and a horse should escape, it would be subject to be dealt with as an estray. And in all these supposed

[3] State *v.* Apel, 14 Tex. 428, where it was held that in an indictment for taking and using an estray the name of the owner should be stated, if known. And see Worthington *v.* Brent, 69 Mo. 205, where a similar definition is given. The indictment should also allege the value of the estray where proof of value is essential under the statute to determine the penalty: State *v.* McCormack, 22 Tex. 297.

[4] Shepherd *v.* Hawley, 4 Oreg. 206; Stewart *v.* Hunter, 16 id. 62.

[5] Patterson *v.* McVay, 7 Watts (Pa.) 482.

cases the negligence of the owner, or his act in abandoning the property, is no more involved than in the case where property is stolen. The true test and the only test is that the animal should be wandering and that the owner be unknown to the person who takes it up as an estray." [6] But in New Jersey it was held that a stolen horse left by a thief tied to a post in a public road was not an estray, the court saying: "A stolen horse abandoned by the thief in his flight is a waif; but such a waif will become an estray so as to be the subject of sale if it be found straying upon improved land. But no one but the owner of such land can make the statutory seizure and sale." [7]

40. Rights and Liabilities of the Taker-up of an Estray.—The use or abuse of an estray is such a conversion as will support trover or trespass: the law will not permit the working an estray. "It is not lawful for any to use it in any manner unless in case of necessity and for the benefit of the owner, as to milk milch-kine, because otherwise they would be spoiled, . . . but to use a stray horse by riding or drawing is tortious." [8] One finding an animal and using it for his own benefit, whether he knew the owner or not, is liable for the consequences.[9] But riding a stray horse in order to discover the owner is not conversion.[10] If the finder does not use the animal, or refuse to deliver it on demand, he incurs no liability.[11]

[6] Kinney *v.* Roe, 70 Ia. 509.

[7] Hall *v.* Gildersleeve, 36 N. J. L. 235. Dalrimple, J., dissented, citing Patterson *v.* McVay, supra. And see as to the necessity of the animal being taken up in an enclosed and improved field, Irwin *v.* Mattox, 138 Pa. St. 466.

[8] Oxley *v.* Watts, 1 Term 12: Bagshawe *v.* Goward, Cro. Jac. 147; Weber *v.* Hartman, 7 Colo. 13; Barrett *v.* Lightfoot, 1 Monroe (Ky.) 241.

[9] Murgoo *v.* Cogswell, 1 E. D. Smith (N. Y.) 359; Watts *v.* Ward, 1 Oreg. 86.

An indictment that alleges that the animal used was an estray, sufficiently avers that the ownership was unknown: State *v.* Anderson, 34 Tex. 611. And see State *v.* Fletcher, 35 id. 740.

[10] Henry *v.* Richardson, 7 Watts (Pa.) 557.

[11] Henry *v.* Richardson, supra; Nelson *v.* Merriam, 4 Pick. (Mass.)

The possession that must be kept of an estray is the same that a prudent man is accustomed to take of his own animals, and is not relinquished by letting the animal run upon a range with cattle of like kind belonging to the taker-up.[12]

As a general rule the statutes with regard to the advertisement and sale of estrays must be strictly complied with.[13] Such statutes are constitutional;[14] and one who has not given the notice they require cannot acquire property in the estray by possession or lapse of time,[15] though in Texas it has been held that one may become the owner by continued and exclusive control over the estray, though he has not complied with the statute.[16] Where one took up an estray which he kept in possession for a year without proceeding under the statute he was held to be a trespasser *ab initio* and unable to recover possession of the animal from one into whose possession it had come again as an estray.[17] But where one has attempted in good faith to comply with the estray law, though he has not done so, he may maintain an action against a wrongdoer for an injury to the estray.[18] Where there is no authority whatever for taking up an estray, the principle that mere non-feasance will not make a trespasser *ab initio* does not apply, and a demand is not necessary to enable the owner to sue for conversion.[19]

249,—whether or not he has complied with the statute. And see Thompson *v.* State, 37 Tex. Cr. 654.

[12] Parker *v.* Evans, 23 Mo. 67.

[13] Chaffee *v.* Harrington, 60 Vt. 718; Harryman *v.* Titus, 3 Mo. 302; Crook *v.* Peebly, 8 id. 344; Duncan *v.* Starr, 9 Lea (Tenn.) 238; McCrossin *v.* Davis, 100 Ala. 631.

The proceeding to sell an estray is a special proceeding, not an action: *In re* Rafferty, 14 N. Y. App. Div. 55.

[14] Stewart *v.* Hunter, 16 Oreg. 62. [15] Hyde *v.* Pryor, 13 Ill. 64.

[16] Moore *v.* State, 8 Tex. App. 496, citing Blackburn *v.* State, 44 Tex. 463.

[17] Bayless *v.* Lefaivre, 37 Mo. 119.

[18] Chic. & N. R. Co. *v.* Shultz, 55 Ill. 421. See Hawkins *v.* State (Tex. Cr.), 20 S. W. Rep. 830, for evidence of possession held insufficient.

[19] Ray *v.* Davison, 24 Mo. 280. That it must be proved that the estray has broken through a lawful fence, see Storms *v.* White, 23 Mo. App. 31.

An advertisement which does not state the name of the taker-up of the estray or the locality, with sufficient accuracy to enable the owner to find the property, is defective and the finder can acquire no title under it.[20] The failure to advertise is not excused because the owner has claimed the estray and promised to bring proofs.[21]

The taker-up has a lien on the estray for his charges and fees and cannot be dispossessed until they are paid.[22] But they include only necessary expenses actually incurred.[23] Where the ownership was known, the owner may replevy without tendering costs and expenses.[24] The owner's failure to pay the costs and legal expenses before one year does not forfeit his right of property, if such failure is caused by the absence or other act of the taker or there is any other legal excuse.[25]

Mandamus will not lie to compel the secretary of the State Board of Live Stock Commissioners to pay the proceeds of a sale of estrays to a claimant, unless the secretary abuses his discretion and refuses to consider proofs presented to him; but he may require further proof than that provided for in the statute.[26]

The subject of the impounding and sale of trespassing animals is discussed in another part of this work.[27]

[20] McMillan *v.* Andrews, 50 Ill. 282.

[21] Wright *v.* Richmond, 21 Mo. App. 76.

[22] Garabrant *v.* Vaugh, 2 B. Mon. (Ky.) 327; Ford *v.* Ford, 3 Wis. 399; Mahler *v.* Holden, 20 Ill. 363; Rice *v.* Underwood, 27 Mo. 551.

[23] Amory *v.* Flyn, 19 Johns. (N. Y.) 102. "A person who takes up an estray cannot levy a tax upon it but by way of amends or indemnity."

[24] Walters *v.* Glats, 29 Ia. 437.

[25] Stephenson *v.* Brunson, 82 Ala. 455.

[26] State *v.* Live Stock Commrs., 4 Wyo. 126. [27] See §§ 81-84, infra.

TITLE III.

RIGHTS OF OWNERS OF ANIMALS.

CHAPTER I.

INJURING AND KILLING ANIMALS.

41. General liability.
42. Proximate cause and probable consequence.
43. Dogs attacking persons or animals.
44. Other attacking animals.
45. Injuries inflicted on trespassing animals.
46. Unlicensed and dangerous animals; police power.
47. Accidental injuries to animals trespassing or running at large.
48. Injuries from barbed-wire fences.
49. Insurance on live-stock.
50. Measure of damages; evidence of value.

41. General Liability.—It is proposed under the present title to treat of the various rights of owners of animals to the possession and use of their property. In this chapter we shall consider the civil remedies against those who injure or kill animals. The criminal liabilities arising under statutes punising cruelty and malicious mischief will be discussed hereafter.[1]

To ground an action it is not necessary that an animal should be actually injured. Thus, an action lies for frightening wild fowl from a decoy by firing a gun.[2] At the same time one whose game is enticed away from his land by a neighbor is also liable to an action for exploding combusti-

[1] See Title VI, Ch. I, infra.

[2] Carrington *v.* Taylor, 11 East. 571; Keeble *v.* Hickeringill, Ibid. 574 n.

bles so as to be a nuisance to the neighbor, in order to frighten the game away from the latter's land and prevent his killing them or enticing others.[3] The general liabilities arising in consequence of the frightening of animals will be dealt with under various heads.[4]

A liability may arise from accident or negligence as well as from intention. Thus the owner of a race track is liable in damages for the collision of horses caused by his fault.[6] And where a person under a mistake kills a dog for a wolf, he will be liable though acting in good faith.[7] But where plaintiff's carrier pigeon was killed by defendant's cat without evidence of *culpa* on the part of the defendant, both animals being trespassers, the plaintiff could not recover.[8] So the owner of a cat was held not liable to the owner of a canary bird killed by it, the court considering that cats to some extent "may be regarded as still undomesticated and their predatory habits as but a remnant of their wild nature." [9]

It was held at the common law that "if pigeons come upon my land I may kill them, and the owner hath not any remedy; but the owner of the land is to take heed that he take them not by any means prohibited by the statutes." [10] And in a later case where the defendant warned the plaintiff to cause the latter's pigeons to be destroyed or prevent their injuring his crops, and afterwards fired at them on his land, and when they rose fired again and killed one, this was held not to be "unlawful killing." [11]

[3] Ibottson *v.* Peat, 3 H. & C. 644.

[4] See Tit. III, Ch. III; Tit. IV, Ch. II; Tit. VII, infra.

[6] North Manchester Tri-County Agric. Assn. *v.* Wilcox, 4 Ind. App. 141.

[7] Ranson *v.* Kitner, 31 Ill. App. 241. So where a dog is accidentally killed, in firing at a fox: Wright *v.* Clark, 50 Vt. 130.

[8] Webb *v.* McFeat, 22 Jour. Jurisp. (Sc.) 669.

[9] McDonald *v.* Jodrey, 8 Pa. Co. Ct. 142.

[10] Dewell *v.* Sanders, Cro. Jac. 492, per Doderidge, Croke and Houghton, JJ. This was said to be the better opinion, though Montague, J., thought that on account of the *animus revertendi* an action lay. See Tit. I, Ch. I, supra.

[11] Taylor *v.* Newman, 4 B. & S. 89.

A person may justify trespass in following a fox with hounds over the grounds of another if he does no more than is necessary to kill the fox.[12] One who wilfully kills a dog is liable in trespass to the owner for its value.[13] Where the injury is done by a servant not acting within the scope of his employment the master is not liable. "Employment as a gamekeeper does not imply authority to shoot dogs, or do any other illegal act." [14] A person who finds a horse and uses and injures it is liable to the owner for the injury. "One who finds any species of personal property is under no obligation to take care of it. . . . The same rule applies to a lost animal; but if the finder takes possession of such animal and shuts him up he would be bound to provide necessary sustenance for it. And if he goes further and uses such animal in a way that injures him, there can be no doubt that he is bound to make compensation for the injury." [15]

The principles suggested in the above cases will be found more fully developed in the following sections.

42. Proximate Cause and Probable Consequence.—To make the defendant liable his act must have been the proximate cause of the injury or the latter must have been a natural and probable consequence of the negligent or wilful act. This rule applies to all case of injuries to animals. The following cases are examples of its application.

The owner of a pasture bound to maintain a division fence was held not liable for the death of a colt, belonging to the

[12] Gundry *v.* Feltham, 1 Term 334. And see the opinion of Doderidge, J., in Millen *v.* Fandrye, Poph. 161, 162. See Tit. I, Ch. I, supra, and § 130, infra.

[13] Wheatley *v.* Harris, 4 Sneed (Tenn.) 468; Jacquay *v.* Hartzell, 1 Ind. App. 500.

[14] Wardrope *v.* Duke of Hamilton, 3 Rettie (Sc. Ct. Sess.) 876.

[15] Murgoo *v.* Cogswell, 1 E. D. Smith (N. Y.) 359. See on this subject § 40, supra. Where a horse distrained for a tax is injured and the collector explains the circumstances, the burden of proof is on the owner: Buswell *v.* Fuller, 89 Me. 600.

adjoining land-owner, which strayed into the pasture by reason of the insufficient fence and, falling into a narrow hole, was unable to get up and died. The insufficiency of the fence was held not to be the proximate cause of the death and the hollow was held not to be a dangerous place: therefore the resulting injury was "something extraordinary and not to be expected." [16] But where one negligently left a fence open and the plaintiff's mare escaped and was injured on a barbed-wire fence, it was held error to direct a verdict for the defendant on the ground that his negligence was not the proximate cause of the injury.[17] So where the evidence tended to show that the plaintiff's sheep escaped from a pasture through the defendant's negligence and wandered away and were killed by bears, it was held to be for the jury to say whether the defendant's negligence was the proximate cause, and that this would depend on whether it was natural or reasonable to expect that, if the sheep escaped, they would be destroyed in this way.[18]

Where one leaving a gate open is made liable by statute for the killing of cattle by a train, he is not liable where another's cattle are killed if the latter had been negligent in permitting his cattle to escape from his own premises to those on which the crossing was.[19] But, under the same facts, it was held that, where both parties are alike bound to keep up a division fence, the defendant cannot set up the plaintiff's contributory negligence.[20]

Where the owner of uninclosed land forming a part of the public common dug a pit near a street, leaving it insufficiently covered, and animals were accustomed to graze in the common, he was held liable for the value of a gelding that fell in and was killed. The court said: "Whether it [*i. e.*, the

[16] Fales *v.* Cole, 153 Mass. 322.

[17] West *v.* Ward, 77 Ia. 323.

[18] Gilman *v.* Noyes, 57 N. H. 627.

[19] Pitzner *v.* Shinnick, 39 Wis. 129. And see Oeflein *v.* Zautcke, 92 id. 176.

[20] Pitzner *v.* Shinnick, 41 Wis. 676.

suit] can be [maintained] or not depends upon the degree of probability there was that such accident might happen from thus leaving exposed the partially dug well, considered, perhaps, in connection with the usefulness of the act or thing causing the danger. . . . If the probability was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard that community from the danger to which the pit exposed its members in person and property, he is liable to an action for loss occurring through his neglect to perform that duty. We think any reasonable man of ordinary understanding and extent of observation of the ways of life would say that the probability of injury to others, under the circumstances, from leaving the well in question in the condition it was in, was not only strong but that it amounted almost to certainty—a probability as strong as would arise from an unguarded cellar or a street in the city." [21]

On the other hand, cutting a tree till it was nearly ready to fall and then setting it on fire was held not to make the defendant liable for its falling on the plaintiff's mare and colt running at large, as they had a right to do, on the defendant's uninclosed land. "When the act is lawful, the liability of the actor for an injury occasioned by it depends in the first place on the question whether the injury is the natural or probable consequence of the act, or is merely accidental." [22]

And where the plaintiff's hogs, lawfully running at large, were accustomed to sleep in the defendant's barn and, while they were there, the floor broke down, the defendant having overloaded it, and the hogs were killed, the defendant was held not liable. "It devolves on the plaintiff to show that there was such connection between the negligent act and the injury as to bring it within reasonable contemplation of the actor that such injury would naturally and probably result

[21] Young *v.* Harvey, 16 Ind. 314.
[22] Durham *v.* Musselman, 2 Blackf. (Ind.) 96.

from such act, and such as ought to have been foreseen by the defendant as likely to flow from his act." [23]

So where the defendant negligently placed a barrel of brine on a public street, by drinking of which a cow was killed, he was held liable to the owner though the brine was poured into the street by a third person, if the latter act was " a natural and probable consequence of the negligent act." [24]

The unlawful confinement of another's cattle does not make one liable for an injury caused by the malicious act of a third person, not connected with the confinement.[25] But where the defendant, an innkeeper, contracted for the use of his stable for the plaintiff's horses and they were driven therefrom by a third person to whom the defendant, in breach of his contract, let the stable, and some of them caught cold from the exposure, which reduced their market value, this damage was held the probable consequence of the breach of contract and not too remote to entitle the plaintiff to recover.[26]

In an article referring to the decision in Firth *v.* Bowling Iron Co.,[27] where the defendants were held liable for the death of a cow, caused by swallowing a piece of wire-strand, it is said: "Suppose that the negligence would not have led to the injurious result without something altogether odd and exceptional on the part of the animal, how then? It seems to us that the question whether the damage in Firth *v.* Bowling Iron Co. was recoverable depends on the question whether, as a matter of experience, cattle grazing would ordinarily be likely to swallow pieces of wire lying in the grass. If such an

[23] Christy *v.* Hughes, 24 Mo. App. 275.

[24] Henry *v.* Dennis, 93 Ind. 452. See Hess *v.* Lupton, 7 O. 216, cited in § 47, infra.

[25] Booth *v.* Sanford, 52 Conn. 481.

[26] McMahon *v.* Field, 7 Q. B. D. 591.

Where an injunction prevented the erection of a stable and the plaintiff's cows thereby suffered from exposure and their milk was diminished, it was held that he could recover: Lange *v.* Wagner, 52 Md. 310.

[27] 3 C. P. D. 254, cited in § 47, infra.

accident were an exceptional or extraordinary occurrence we should be disposed to think that the damage would be too remote. Speaking without any special knowledge of the subject, we must confess to some surprise that cattle should be ordinarily given to swallow such substances as large pieces of wire; but it is to be observed that the facts of the case in Firth *v.* Bowling Iron Co. furnished evidence that such is the case. . . . But it seems to us that the true principle which ought to govern such cases was hardly sufficiently stated in the arguments or judgments." [28]

Where horses on a ferry-boat are frightened by a whistle on another boat and a horse jumps against and breaks a defective rail and is drowned, the defective rail, and not the whistle, is the proximate cause of the loss as the owner of the boat ought to have taken precautions against horses being frightened in such a way.[29] Where animals are drowned in consequence of there being no barrier on a ferry-boat, evidence is admissible that just such a boat had been used for thirty years daily without an accident occurring.[30]

Where the proprietors of a fair ground charging admission had set aside a part of the grounds for target shooting without giving notice thereof, they were held liable for the shooting of a horse, hitched where others were.[31]

The owner of a colt killed by falling upon a post placed in the fence about the pasture cannot recover damages of any kind from the owner of another colt running at large, which the former one was running to meet when the accident occurred.[32]

In playing foot-ball, E. trespassed on a grass-field and the justices convicted him of unlawfully and maliciously doing

[28] 22 Sol. Jour. 719. [29] Sturgis *v.* Kountz, 165 Pa. St. 358.

[30] Lewis *v.* Smith, 107 Mass. 334.

As to what is sufficient evidence of animals having been lost in a flood caused by the defendant's negligence, see Hopkins *v.* Butte & M. Comml. Co., 16 Mont. 356.

[31] Conradt *v.* Clauve, 93 Ind. 476.

[32] Johanson *v.* Howells, 55 Minn. 61.

damage with the intent to destroy grass for the food of beasts, but the conviction was held wrong as the statute did not apply to damage which was only nominal and not done with intent to damage.[33]

The mere act of shooting a dog, though tortious, is not the proximate cause of an injury to one in delicate health, whose fright produces a serious illness.[34] But where the defendant, knowing himself to be a poor shot, maliciously shot at and wounded the plaintiff's dog that was lying peaceably near the latter's house, and the dog rushed into the house and ran against the plaintiff, knocking her down and injuring her, it was held that the defendant was liable, since his acts were the proximate cause of the injury, without an intervening force, and that it was immaterial whether the injury was or could have been foreseen.[35]

Where a sheep-wash sold by defendant to a farmer and used according to the former's directions killed the sheep, they dying from the absorption of arsenic contained in it, although there was evidence that the same wash had been sold and used with impunity for many years, the jury were directed that they might find for the plaintiff, which they did, and their verdict was sustained.[36]

But where seed-crushers sold their refuse oil-cake to graziers without describing it or selling it as fit for cattle food or knowing that it was bought for that purpose, they were held not liable on an implied warranty that it was so fit.[37]

[33] Eley *v.* Lytle, 50 J. P. 308.

[34] Renner *v.* Canfield, 36 Minn. 90.

[35] Isham *v.* Dow (Vt.), 41 Atl. Rep. 585.

[36] Black *v.* Elliot, 1 F. & F. 595.

So where poison had been spilled on cow's food, if the seller knew of it, though he used every effort to remove it: French *v.* Vining, 102 Mass. 132.

[37] Jackson *v.* Harrison, 2 F. & F. 782. So where bran, not manufactured especially for the plaintiff, contained copper clasps that killed a cow, it was held that the seller was not liable without express warranty, as the rule as to food sold for human use did not apply: Lukens *v.* Freiund, 27 Kan. 664.

Where a dealer in feed sold oats to a liveryman, knowing they were intended for the food of horses, and the purchaser did not examine them, it was held that there was an implied warranty that they were reasonably fit for feed, which was broken if they contained castor beans, and also that where the purchaser by agreement returned the unused portion of the oats, receiving the same price per bushel as he had paid, this did not rescind the contract nor deprive him of his action on the breach of warranty. Where some of the horses were killed, others made sick and others permanently injured, the measure of damages was the value of the horses killed, the difference in value of the injured ones before and after the injury, the loss of the use of the sick horses and the expense of medicine and medical treatment.[38]

The owner of a barn containing another man's horse is liable for carelessly setting fire to a straw stack near by and causing the burning of the barn and horse.[39]

Where a telegram requesting that a veterinary surgeon should be brought for a valuable horse was not delivered promptly, the telegraph company was held liable for the death of the horse.[40]

43. Dogs Attacking Persons or Animals.—The law with regard to killing dogs in active mischief was thus stated in a North Carolina case: "The law authorizes the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. . . . The law is different where the dog is chasing animals *ferœ naturæ*, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the kill-

[38] Coyle *v.* Baum, 3 Okla. 695.
[39] McCornack *v.* Sornberger, 56 Ill. App. 496.
[40] Hendershott *v.* West. Un. Tel. Co., 106 Ia. 529.

ing will not be justified." [41] And in a leading Connecticut case it is said: "Whether before mischievous or not, or whether, if so, the owner has knowledge of his disposition or not, if actually found doing mischief or attempting to do it alone, out of the possession of his owner or the charge of a keeper, he may be killed and the act justified at common law. . . . And so he may be destroyed under any circumstances where it is absolutely *necessary* for the preservation of *property*. . . . Other animals may become vicious and injure persons or property, and the injured person may have his action but may not kill them; and the discrimination against dogs results legitimately from their proneness to mischief, their uselessness and liability to hydrophobia, and the consequent base character of property in them, and the necessity for that protection, inasmuch as the right to an action *quare clausum* is limited to one or two cases only, and no action at all can be had at common law for the first mischief, or without proving a *scienter*." [42]

Where a dog was pursuing deer in a park or conies in a warren or fowl in a poultry-yard, it was held a sufficient justification of the shooting to state that fact, without adding that it was necessary to shoot to prevent his doing the injury;[43] but that the latter statement must be made where the dog was running after hares in a close of which the defendant was the gamekeeper,[44] or where he was pursuing a fowl not

[41] Parrott *v.* Hartsfield, 4 Dev. & B. L. (N. C.) 110. And see 40 L. R. A. 510 n.

[42] Woolf *v.* Chalker, 31 Conn. 121.

That it is not necessary to show the plaintiff's *scienter* where the defence is that the dog was ferocious and in the habit of attacking persons, see Maxwell *v.* Palmerton, 21 Wend. (N. Y.) 407.

[43] Wadhurst *v.* Damme, Cro. Jac. 45; Barrington *v.* Turner, 3 Lev. 28; Protheroe *v.* Mathews, 5 C. & P. 581; note to Janson *v.* Brown, 1 Camp. 41.

See also Bennett *v.* Blezard (Co. Ct. case), 103 L. T. 370.

[44] Vere *v.* Lord Cawdor, 11 East 568, where the above cases were distinguished. Lord Ellenborough said: "The question is whether the plain-

in an enclosure.[45] And where the chasing and shooting are all one and the same transaction the dog may not have been actually chasing the deer at the moment he was shot.[46] So a dog killed, as allowed by statute, because he is "worrying" chickens need not be in the act at the very instant he is shot, provided his conduct could excite reasonable apprehension; and "to worry" has been held to mean "to run after, to chase, to bark at." [47]

The general rule is that where a dog chases and bites an animal, in order to justify killing him it must be shown that the animals could not otherwise be separated.[48] Thus, where a muzzled dog is attacked by another dog the latter may be killed by the owner of the former if it is necessary to save him from serious injury.[49] But reasonable cause to believe that a dog was going to kill hens was held not a sufficient justification for killing him, unless there were reasonable cause to believe that this was necessary to prevent his killing the hens.[50] And to kill a dog simply because he is suspected of having done injury upon the premises previously is a trespass: no one but the master, as a rule, has the right to kill a dog.[51] And the disposition of a dog to drive off stock trespassing on his master's premises is not a vicious propensity which will justify the owner of the stock in killing him, unless he is a

tiff's dog incurred the penalty of death for running after a hare in another's ground. And if there be any precedent of that sort which outrages all reason and sense, it is of no authority to govern other cases."

[45] Janson *v.* Brown, 1 Camp. 41, and note.

[46] Protheroe *v.* Mathews, 5 C. & P. 581.

[47] Marshall *v.* Blackshire, 44 Ia. 475.

[48] Wright *v.* Ramscot, 1 Saund. 84; Hinckley *v.* Emerson, 4 Cow. (N. Y.) 351.

[49] Boecker *v.* Lutz, 13 Daly (N. Y.) 28, where it is said, "Acts of ferocity done at any time may be shown, but they will not make out a defence if it should appear that for a long time the dog had ceased to be dangerous."

[50] Livermore *v.* Batchelder, 141 Mass. 179. And see Anderson *v.* Smith, 7 Ill. App. 354; Leonard *v.* Wilkins, 9 Johns. (N. Y.) 233.

[51] Brent *v.* Kimball, 60 Ill. 211. And see Gibbons *v.* Van Alstyne, 9 N. Y. Suppt. 156.

common nuisance.[52] Under the California statute it has been held that a dog killed for chasing sheep must be actually doing the act when found and immediately followed up; he cannot be killed to prevent his return.[53] A similar rule exists in Iowa.[54] And at the common law it was held that where the owner of sheep shoots a dog in a field some distance off, this is not justifiable.[55] So, in a Scotch case, when a master issued a general order to destroy all dogs found on his grounds and his servant accordingly killed two dogs that were trespassing in one of the master's fields and near a valuable flock of sheep, it was held that both the master and the servant were liable in damages. The Lord Chief Commissioner said: "If a dog is known to be a sheep-killer and is found on the property of a gentleman having sheep, I do not say it is necessary to wait till he is near his prey, annoying or worrying the sheep, before he is killed. But the case is very different when this is not the character of the dog. It is always a question of degree what entitles the person to prevent the apprehended injury." [56]

But there are many statutory exceptions to this rule, especially in the case of sheep-killing dogs. Thus in Missouri a dog that has killed or maimed a sheep or other domestic animal must be killed by the owner and may be killed by any one: it is not necessary that he should be on the premises, or in the act of killing, or that *scienter* on the part of his owner should be shown.[57] So also in Delaware.[58] And in North Carolina it was held that the owner of sheep is justified in killing a

[52] Spray *v.* Ammerman, 66 Ill. 309.

[53] Johnson *v.* McConnell, 80 Cal. 545.

[54] Marshall *v.* Blackshire, supra. [55] Wells *v.* Head, 4 C. & P. 568.

[56] Grant *v.* Barclay, 5 Murray (Sc.) 130.

That a dog actually worrying sheep may be killed, see Turner *v.* McLaren, 3 Sc. L. Rev. (Sher. Ct. Rep.) 57.

[57] Carpenter *v.* Lippitt, 77 Mo. 242.

That the right of property in dogs exists there and an action lies for wounding a dog, see Woolsey *v.* Haas, 65 Mo. App. 198. But the killing of a dog is not a criminal offense: State *v.* Mease, 69 id. 581.

[58] Milman *v.* Shockley, 1 Houst. (Del.) 444.

dog which had destroyed some of his sheep and returned to his premises apparently for the purpose of destroying others, though he was not at the time in the very act of destroying or worrying the sheep, nor was it shown that the owner knew of his bad qualities or that the injury could not have been otherwise prevented.[59] The subject of sheep-killing dogs will be further considered hereafter.[60]

Where a person is attacked by a dog on the highway it is justifiable for him to kill the dog.[61] But where the defendant was riding a bicycle near the plaintiff's residence and the latter's dog rushed at him and tried to seize his leg and the defendant shot him, the defendant was held liable in damages.[62]

Where a dog bit a man who, after some minutes seeing him again, shot him, the killing was held justifiable, though it would not have been if the dog had been set to guard property and killed by a person interfering.[63] On the other hand, where a fierce dog attacked a person in his owner's yard and was called off and while going away was shot by the person, the shooting was held not justifiable.[64] So where the dog bit the defendant's gaiter, and on his raising his gun the dog ran away and the defendant shot him, this was not justifiable.[65]

Where a person "suddenly assaulted" by a dog may, by statute, kill him, it is not necessary that he should kill the dog instantly, but one bitten while separating two fighting dogs

[59] Parrott *v.* Hartsfield, 4 Dev. & B. L. (N. C.) 110, and see the extract from the opinion quoted supra.

[60] See § 94, infra.

[61] Reynolds *v.* Phillips, 13 Ill. App. 557; Credit *v.* Brown, 10 Johns. (N. Y.) 365.

So where his horse is repeatedly attacked by a dog in a dangerous place: Quigley *v.* Pudsey, 26 Nov. Sco. 240.

[62] West *v.* Costello (Co. Ct. case), 20 Ir. L. T. 166.

[63] Bowers *v.* Fitzrandolph, Addison (Pa.) 215.

[64] Perry *v.* Phipps, 10 Ired. L. (N. C.) 259.

[65] Morris *v.* Nugent, 7 C. & P. 572. See the article in 54 J. P. 452, quoted in § 46, infra.

is not "suddenly assaulted" within the meaning of the statute.[66]

Where a hawker knocked out a dog's eye, it was held to be for the jury to say whether it was in his own preservation or wilful.[67]

The killing of trespassing, unlicensed, dangerous and mad dogs will be considered later.[68]

44. Other Attacking Animals.—The subject of the killing of animals attacking others was thus spoken of in an Illinois case: "If a man should find his neighbor's cat in his poultry yard killing his chickens, it might be reasonable that he should for the preservation of his fowls, if the necessity was apparent, shoot the cat, while if a valuable horse of the same neighbor was found in the yard, crushing the life out of the chickens, it might not be reasonable to shoot the horse, even if he could not protect his fowls otherwise. But if the same horse should be found in a yard where there were other horses and, while wrongfully there, should attack another equally valuable, and it was apparent that the horse attacked would be killed, would it be unreasonable for the owner of the latter horse to protect his own property upon his own premises, even if the life of his neighbor's horse should be sacrificed to preserve that of his own? The law regards the right of the slayer to his horse, in the case supposed, as sacred as the right of his neighbor to his property, and his horse being where he had a lawful right to be, his owner must have the power to protect him, so long at least as the consequences of the necessary acts of defence are more disastrous to his neighbor than the consequences of not acting would be to himself. It appears to me that in cases of the character of the one at bar [where a dog killed chickens], the jury must in a great measure be left to judge from all the facts and circumstances in the case, not only of

[66] Spaight *v.* McGovern, 16 R. I. 658.
[67] Hanway *v.* Boultbee, 4 C. & P. 350.
[68] See §§ 45, 46, infra.

the necessity of any defence, but of the reasonable necessity of the particular defence made." [69]

Cases have been already cited where no recovery was allowed for the killing of a carrier pigeon and of a canary bird by cats.[70] Where a hog had killed one chicken and attempted to kill another, and, when seventy-five yards away from where chickens usually ran, was killed, it was held error to leave to the jury whether the hog was of a predatory character and to instruct them that if so, any one had a right to destroy it as a public nuisance. The court said: "The position that such a hog is a public nuisance and may be killed by *any one* is not supported on principle or authority, and if recognized would lead to monstrous consequences. . . . This court is of opinion that the owner of the chickens, much less a stranger, could not justify killing the hog, although it afterwards comes upon his premises." They then proceeded to quote Popham, J., in Wadhurst *v.* Damme,[71] that "The common use of England is to kill dogs and cats in all warrens as well as any vermin," and to distinguish between a dog—"which is roving in his habits and no fence can stop it—it is of no use, if constantly confined and its service is rather for amusement than profit to man," and a hog—which "roves but little, is easily restrained by fences; confinement does not destroy its usefulness, but is necessary in order to fatten and make it fit for food, and it is one of the most valuable of domesticated animals." [72] On the other hand, where the owner of an ass, which he knew had the habit of pursuing and injuring stock, permitted him to run at large and he attacked a cow, threw her down and stamped on her, it was held that the cow's owner was justified in killing the ass to save his property.[73]

[69] Anderson *v.* Smith, 7 Ill. App. 354, 359.

[70] Webb *v.* McFeat, 22 Jour. Jurisp. (Sc.) 669; McDonald *v.* Jodrey, 8 Pa. Co. Ct. 142, cited in § 41, supra.

[71] Cro. Jac. 45. [72] Morse *v.* Nixon, 6 Jones L. (N. C.) 293.

[73] Williams *v.* Dixon, 65 N. C. 416.

The killing of wild vermin in defence of property is not governed by the tests of imminent danger and of the duty of retreating to the wall that are applied in cases of homicidal defence. This was held, where the defendant killed four minks that were pursuing his geese, and a statute prohibiting the destruction of certain fur-bearing animals between certain months was considered not to be applicable where such destruction is an exercise of the constitutional right of protecting property. The court said: "It was for the jury to say, considering the defendant's valuable property in the geese, the absence of absolute property in the minks, their character whether harmless or dangerous, the probability of their renewing their pursuit if he had gone about his usual business and left the geese to their fate, the sufficiency and practicability of other kinds of defence—considering all the material elements of the question, it was for the jury to say whether the danger was so imminent as to make the defendant's shot reasonably necessary in point of time. If, but for the shot, some of the geese continuing to resort as usual to the pond apparently would have been killed by these minks within a period quite indefinite, and if other precautionary measures of a reasonable kind, as measured by consequences, would have been ineffectual, the danger was imminent enough to justify the destruction of the minks for the protection of property. . . . To hold, in this case, that the geese should have been driven away from their home would be equivalent to holding that they should have been killed. The doctrine of retreat would leave them a right to nothing but life in some place inaccessible to minks, where life might be unremunerative and burdensome. . . . As against the minks, they had a right not only to live, but to live where the defendant chose, on his soil and pond, and to enjoy such food, drink and sanitary privileges as they found there, unmolested by these vermin, in a state of tranquillity conducive to their profitable nurture." [74]

[74] Aldrich *v.* Wright, 53 N. H. 398. In Taylor *v.* Newman, 4 B. & S.

45. Injuries Inflicted on Trespassing Animals.—There is no inherent right to kill an animal simply because it is found trespassing on another's property. Thus the owner of crops has no right to kill turkeys trespassing on his premises. He "would not be justified in killing a valuable animal found destroying property of little value." [75] The same rule has been applied in the case of hens,[76] geese,[77] cats,[78] cattle,[79] and horses.[80] And where the defendant, whose fence was not a lawful one, shot the plaintiff's hogs which were rooting up potatoes in the former's patch, and the latter got the hogs and used them, it was held that he did not waive his right to demand damages for the trespass, but merely his claim for the value of the hogs.[81] On the other hand, it has been held that if one cannot otherwise protect his property from the depredations of a dog, he will be justified in killing it when discovered in the act within his garden.[82] So it was held that one finding a dog coming out of his meat-house at night, and having no means of knowing its owner, had a right to shoot it, and it was no answer to say that he should have constructed the building so that the dog could not get in.[83]

89, cited in § 41, supra, it was argued that shooting the pigeon when rising was unnecessary for the protection of the crops, but Mellor, J., said: "It would have been on the ground again after the firing of the gun was over." This remark was quoted in the opinion in Aldrich *v.* Wright, and the court said: "That was the objection to frightening the minks: they would have been on the ground again after the frightening was over."

[75] Reis *v.* Stratton, 23 Ill. App. 314. See also § 122, infra.

[76] Clark *v.* Keliher, 107 Mass. 406.

[77] Matthews *v.* Fiestel, 2 E. D. Sm. (N. Y.) 90.

[78] Whittingham *v.* Ideson, 8 Upp. Can. L. Jour. 14, cited in § 12, supra.

[79] Ford *v.* Taggart, 4 Tex. 492; Crawford *v.* Crawford, 88 Ga. 234.

[80] Snap *v.* Peo., 19 Ill. 80.

[81] Champion *v.* Vincent, 20 Tex. 811. And see Bost *v.* Mingues, 64 N. C. 44.

[82] King *v.* Kline, 6 Pa. St. 318, where the dog had been found eating fish hung up to dry. A garden was considered protected just as a park and a warren were at common law. And see Bradford *v.* McKibben, 4 Bush. (Ky.) 545, decided under the Kentucky statute.

[83] Dunning *v.* Bird, 24 Ill. App. 270.

Where a dog destroys plants by lying on them this is "mischief" that will by statute justify killing it, and the defendant need not compare its value with that of the plants.[84] But where a dog wandered from the highway and approached an uninclosed lily pond presumably to slake his thirst, the fact that it would, in the opinion of the land-owner, injure the plants, was held not to justify killing it, though such owner had been subjected to the same annoyance from other dogs.[85] So a man was held not justified in killing his neighbor's valuable dog of which he had never complained merely because it barked around his horse in the night, chased cats into trees, left tracks on the painted porch and had been seen in the henhouse.[86] And in Rhode Island it was held that the voluntary killing of a dog is not justified by the fact that it was trespassing and had previously injured property or that the shooting was done merely with the intention of scaring it off the premises.[87]

Where a buffalo bull, a wild and vicious animal, breaks into a close, the owner of the close may kill him, if necessary to preserve his property from destruction, though the close may not have a lawful fence.[88]

Where the defendant kept notices painted on boards outside of a wood that steel-traps, spring-guns and dog-spikes were set in that wood, and the plaintiff's dog chased a hare into the wood and was killed by the iron spikes, the judges were equally divided as to whether damages could be recov-

[84] Simmonds *v.* Holmes, 61 Conn. 1. Cf. Tyner *v.* Cory, 5 Ind. 216, where a plea that the dog was injuring a wheat field of defendant's father and was killed because he could not otherwise be prevented from doing injury was held bad.

[85] Ten Hopen *v.* Walker, 96 Mich. 236. And see Sosat *v.* State, 2 Ind. App. 586.

[86] Bowers *v.* Horen, 93 Mich. 420. And see Trenholm *v.* Mills, 4 Leg. News (Can.) 79. Cf. Brill *v.* Flagler, 23 Wend. (N. Y.) 354, cited in § 46, infra.

[87] Harris *v.* Eaton (R. I.), 37 Atl. Rep. 308. And see Decker *v.* Holgate (Pa.), 5 Lack. Leg. N. 56.

[88] Canefox *v.* Crenshaw, 24 Mo. 199.

ered for the loss of the dog.[89] In another case, dangerous traps baited with flesh were placed in a wood near a highway, and it was held that an action lay for an injury to dogs thereby, Lord Ellenborough saying: "It appears by the evidence reported that the traps were placed so near to the plaintiff's courtyard where his dogs were kept, that they might scent the bait without committing any trespass on the defendant's wood. Every man must be taken to contemplate the probable consequences of the act he does." [90] But in a later case where the facts were very similar to those in Deane *v.* Clayton, supra, a plea that the defendant set the dog-spear for the purpose of preserving his game and disabling dogs, whereof the plaintiff had notice, was held good even if there had been no allegation of notice and the fact that the dog ran off against his master's will was held immaterial.[91] And placing poisoned flesh in an enclosed garden for the purpose of destroying a dog which was in the habit of straying there was held not to come within the words "unlawfully and maliciously kill, maim or wound;" [92] so it is not unlawful to set a trap in a garden to catch cats trespassing there.[93]

But in a Connecticut case the English rule that where the owner of land places spring-guns, etc., on an enclosure, concealed in order to wound and kill any man or animal coming on the place, he is justified, on giving proper notice, in inflicting the injury on trespassers—was disapproved of, and it was held that scattering poison within one's enclosure for the purpose of poisoning another's fowls, if they should come there, was unjustifiable, though notice should be given to the owner, and that the latter might recover for the consequent killing.[94] So one putting poison where he may reasonably anticipate that another's dog will get it is liable for its death, and all the

[89] Deane *v.* Clayton, 7 Taunt. 489.
[90] Townsend *v.* Wathen, 9 East. 277.
[91] Jordin *v.* Crump, 8 M. & W. 782.
[92] Daniel *v.* Janes, 2 C. P. D. 351.
[93] Bryan *v.* Eaton, 40 J. P. 213.
[94] Johnson *v.* Patterson, 14 Conn. 1. See Smith *v.* Williams, infra.

members of his firm are liable if he does this in furtherance of partnership business.[95] And one whose sheep have been killed by dogs and who places poisoned meat on the premises to kill trespassing dogs, is liable for killing a neighbor's dogs which he had reason to believe came upon his land if they had not been engaged in killing his sheep: otherwise, by statute, if the sheep had been killed by them.[96] It has been held that trespass *vi et armis* is the proper remedy where a dog is killed by the direct administration of poison as where it is thrown down to him mixed with food, but that where the poison is placed where the dog is sure to pass along, case is the proper remedy.[97]

A notice of an intent to kill hens when next found trespassing is only a threat to do an illegal act and is no defence to an action for killing them.[98] So, a notice that dogs trespassing on land will be shot, does not justify the shooting.[99] On the other hand, where an occupier of land sown with seed shot domestic fowls trespassing after a previous warning that he would shoot them unless they were kept off his land, it was held that he could not be convicted of unlawfully killing them.[100]

The expression "go and kill him if you want to," made in May by the owner of an animal while having a heated conversation with one who complained of a trespass and threatened to kill it, was held not to be a license to such person to kill the animal in the following September.[101]

Where the owner of domestic animals has a right to past-

[95] Dudley *v.* Love, 60 Mo. App. 420.
[96] Gillum *v.* Sisson, 53 Mo. App. 516.
[97] Dodson *v.* Mock, 4 Dev. & B. L. (N. C.) 146.
[98] Clark *v.* Keliher, 107 Mass. 406.
[99] Corner *v.* Champneys, 2 Marsh. 584; Harris *v.* Eaton (R. I.), 37 Atl. Rep. 308.
[100] Smith *v.* Williams, 56 J. P. 840. And see as to pigeons, Taylor *v.* Newman, 4 B. & S. 89, cited in § 41, supra. Cf. Johnson *v.* Patterson, supra.
[101] Ulery *v.* Jones, 81 Ill. 403.

ure them on the commons of incorporated towns this, though it be dangerous and reprehensible, does not take away his right to recover compensation from those injuring them.[102]

With regard to driving away trespassing animals it is said: "If J. S. chase the beast of J. N. with a little dog out of land in the possesion of J. S., an action of trespass does not lie, inasmuch as J. S. has an election to do this or to distrain the beast. But if J. S. chase the beast of J. N. with a mastiff dog out of land in the possession of J. S., and any hurt be done thereby to the beast, this action does lie, the chasing with such a dog being unlawful." [103] And it has been accordingly held that a person who chases a horse out of his field with a fierce dog is liable for any resulting injury.[104] But there is nothing illegal in driving cattle off of one's premises with a dog if no unnecessary injury is done.[105] "If a master set on his dog to chase sheep out of his land, and the dog pursue them into another's land, and the master recall his dog again *quam cito vidisset*, an action does not lie." [106] But where the defendant's dog killed one of a number of trespassing sheep that were being driven home by their owner, it was held that the latter could recover though the sheep were trespassing on the defendant's land and he had been warned several times before by the defendant.[107]

The rule has been thus stated in a Connecticut case: "There is no doubt that if A. is trespassing on the land of B., the latter when present by himself or his servants may,

[102] Chic., St. L. & N. O. R. Co. *v.* Jones, 59 Miss. 465.

[103] Bac. Abr., Trespass, E.

[104] Amick *v.* O'Hara, 6 Blackf. (Ind.) 258.

And see Richardson *v.* Carr, 1 Harr. (Del.) 142; Totten *v.* Cole, 33 Mo. 138.

[105] Spray *v.* Ammerman, 66 Ill. 309; Clark *v.* Adams, 18 Vt. 425; Davis *v.* Campbell, 23 id. 236. "Unless," as was said in Wood *v.* La Rue, 9 Mich. 158, "there was something in the size, character or habits of the dog, or in the mode of setting him on or pursuing, which would negative the idea of ordinary care or prudence."

[106] 1 Com. Dig. 419, citing Latch. 119.

[107] Grange *v.* Silcock, 77 L. T. N. S. 340.

after notice to depart, use such reasonable force as is necessary for his removal. He may use like force to expel another's beast from his land, or he may seize and impound it. But he has no right by the English law or our own, when present in such a case, to destroy life or inflict permanent injury, or use greater force than is necessary for removal or prevention."[108] So, in an action for shooting and wounding a dog hunting with others in the defendant's wheat field, the court rightly charged that if the defendant used such means to exclude dogs as a reasonable man would, and did no more harm than necessary, the plaintiff could not recover.[109] But where the defendant wilfully set his dogs on the plaintiff's colts in the former's pasture, without taking any precaution to prevent injury and they were driven into a barbed-wire fence, he was held liable for the injury.[110] And where the plaintiff's horse escaped through a fence which he should have repaired into the defendant's field, and the later driving him back caused him to be entangled in the wires of the fence, in consequence of which he died, it was held that there was no contributory negligence on the plaintiff's part to bar his recovery.[111] The agreement to dispense with a partition fence is not equivalent to a legal fence so as to justify, in a proper case, the killing of animals breaking in.[112]

Where the land-owner is not responsible for the trespass, he may turn the animals into the highway without liability for their straying away.[113] And he is not responsible for an injury they may subsequently suffer without his default.[114] So, one who turns cattle out of his enclosure on to public lands whereby some of them die of starvation from want of grass,

[108] Johnson *v.* Patterson, 14 Conn. 1.
[109] Lipe *v.* Blackwelder, 25 Ill. App. 119.
[110] Aspegren *v.* Kotas, 91 Ia. 497.
[111] Bullard *v.* Mulligan, 69 Ia. 416.
[112] Tumlin *v.* Parrott, 82 Ga. 732.
[113] Cory *v.* Little, 6 N. H. 213; Humphrey *v.* Douglass, 10 Vt. 71, 11 id. 22; Knour *v.* Wagoner, 16 Ind. 414.
[114] Palmer *v.* Silverthorn, 32 Pa. St. 65.

is not liable for their loss, where the owner has been notified to take care of them.[115] The rule is otherwise where the landowner is responsible by his negligence for the trespass.[116] And he cannot wantonly drive the animals to a distance. When he does so he becomes a trespasser *ab initio*.[117] Where he has no right to inclose them on his own premises and, in attempting to do so, injures them, he must respond in damages.[118]

46. Unlicensed and Dangerous Animals; Police Power.—The legislature by virtue of its police power may authorize a city ordinance that dangerous animals may be destroyed by city authorities without notice to the owner and no liability for loss is thereby created.[119] And a law is constitutional that authorizes a justice to make an *ex parte* order requiring the owner of a vicious dog to kill it immediately and provides that, on his refusing to do so within forty-eight hours, he shall forfeit a certain sum.[120] Statutes and ordinances regulating the licensing, collaring and muzzling of dogs and the shooting of the animal if they are not conformed to, are very common. In Massachusetts any one *may* kill an unlicensed or an uncollared dog, whenever or wherever found, provided he can do so without a trespass and every police officer and constable *shall* kill such dog;[121] and the constable may peaceably

[115] Story *v.* Robinson, 32 Cal. 205

[116] Roby *v.* Reed, 39 N. H. 461; Morse *v.* Glover (N. H.), 40 Atl. Rep. 396. And see Carruthers *v.* Hollis, 8 A. & E. 113.

[117] Gilson *v.* Fisk, 8 N. H. 404. And see Knott *v.* Digges, 6 Har. & J. (Md.) 230; Knour *v.* Wagoner, supra; Tobin *v.* Deal, 60 Wis. 87, cited in § 79, infra.

As to his liability for the act of his agent see Burnett *v.* Oechsner (Tex.), 50 S. W. Rep. 562.

[118] Harris *v.* Brummell, 74 Mo. App. 433.

[119] Leach *v.* Elwood, 3 Ill. App. 453; Blair *v.* Forehand, 100 Mass. 136; Jenkins *v.* Ballantyne, 8 Utah 245.

But see Lynn *v.* State, 33 Tex. Cr. 153; Peo. *v.* Tighe, 9 Misc. (N. Y.) 607.

[120] Peo. *v.* Gillespie, 25 N. Y. App. Div. 91.

[121] Morewood *v.* Wakefield, 133 Mass. 240.

enter the premises to kill the animal without the owner's consent,[122]—the court in the latter case, after a review of the law of property in dogs, saying, "Dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals." But a private citizen pursuing a dog into the plaintiff's house after the latter's wife has refused to give it up is a trespasser and is not justified in killing the dog.[123] Where the statute authorizes only the killing of dogs "going at large," an officer is liable where he enters a house without the owner's leave.[124] Where a dog may be killed "found and being without a collar," it may be killed when outside of the master's enclosure, though under his immediate care.[125] Such a statute does not, however, authorize converting the dog to one's own use: its object is "not to confer a benefit on an individual, but to rid society of a nuisance by killing the dog." [126]

Where by the statute no person is liable for the killing of a dog not having around his neck a collar of a certain description, actual notice of the ownership of such a dog will not make the person killing him liable, and engraving the initials of the owner's name on the collar was held not to be a sufficient notification.[127]

A city is not liable for the illegal and tortious acts of its police officers. Therefore, where a dog actually wearing a collar was maliciously killed by a person appointed by the city under an ordinance providing for the killing of dogs not

[122] Blair *v.* Forehand, supra.

[123] Kerr *v.* Seaver, 11 Allen (Mass.) 151.

[124] Bishop *v.* Fahay, 15 Gray (Mass.) 61.

So, where he enters the premises and calls away and shoots a dog that was playing with its owner's son, such dog is not "going at large": McAneany *v.* Jewett, 10 Allen (Mass.) 151.

[125] Tower *v.* Tower, 18 Pick. (Mass.) 262.

[126] Cummings *v.* Perham, 1 Metc. (Mass.) 555.

[127] Morey *v.* Brown, 42 N. H. 373.

See as to affirmance on *certiorari* in such cases of the judgment of a lower court, State *v.* Moore (N. J.), 42 Atl. Rep. 1063.

wearing collars, the city was held not liable.[128] So, where the police officer while killing the dogs injured the plaintiff, the city was held not liable for his negligence.[129]

Where, under an ordinance, the owner of a dog was ordered by the mayor to bring it to his office to have it killed and the dog was brought, but the killing was prevented by the order of a competent court, and the mayor thereupon sentenced the owner to imprisonment, the sentence was held to be null and the mayor's action arbitrary and oppressive.[130] And where the mayor directs a marshal to post notices requiring the owners of dogs to muzzle them and directing that all dogs running at large without muzzles shall be killed, but no ordinance of the city has been passed authorizing such a regulation, the marshal has no authority to kill dogs.[131]

A statute authorizing the killing by any one of an unlicensed dog contemplates the exercise of some judgment and does not extend to the case of killing by another animal. Hence where an unlicensed dog was killed by the defendant's dog, the fact of the want of a license was held to be no defence; and it was said that, if by accident a dog's collar is lost, the owner must be allowed a reasonable time to discover the fact and replace the collar.[132]

A statute authorizing an officer or agent of a society for the prevention of cruelty to animals to condemn, appraise and kill an animal, without notice to the owner, is unconstitutional and void as depriving such owner of his property without due process of law.[133]

[128] Moss *v.* Augusta, 93 Ga. 797.

[129] Culver *v.* Streator, 130 Ill. 238. And see Whitfield *v.* Paris, 84 Tex. 431.

The same rule applies where the officer is trying to impound the animal that injures the plaintiff: Givens *v.* Paris, 5 Tex. Civ. App. 705.

[130] State *v.* Vay, 40 La. Ann. 209.

[131] Stebbins *v.* Mayor, 38 Kan. 573.

[132] Heisrodt *v.* Hackett, 34 Mich. 283.

[133] King *v.* Hayes, 80 Me. 206; Loesch *v.* Koehler, 144 Ind. 278. See § 124, infra.

It was said in a Vermont case: "Some animals are common nuisances if suffered to go at large, from their known and uniform instincts and propensities, such as lions and bears, and probably wolves and wild-cats; . . . and domestic animals from their ferocious and dangerous habits becoming known to their keepers thus become common nuisances if not restrained. But such an animal is quite as obviously within the general definition of a common nuisance as a wolf or a wild-cat or a bear and, if allowed to go at large, as really deserves to be destroyed.[134]

And in a North Carolina case it was said that "a dog may be of such ferocious disposition or predatory habits as to render him a nuisance to the community, and such a dog, if permitted to go at large, may be destroyed by any person." [135] But in a later case in the same State it is said: "No authority is cited for this *dictum*. It is certainly erroneous in assuming that any person other than one specially incommoded or aggrieved may abate a common nuisance: 3 Bl. Com. 5; and we imagine that dogs of the kind referred to that behave so badly as to become outlaws have rarely existed except 'mad dogs.' " [136]

There are, however, cases that seem to support the *dictum* in Dodson *v.* Mock. Thus it has been held that a large and furious dog accustomed to bite mankind is a common nuisance and in an action to recover damages for killing him the defendant need not prove that he was obliged to do so in self-defence.[137] This is certainly the rule in New York.[138]

[134] Brown *v.* Carpenter, 26 Vt. 638, 643.

[135] Dodson *v.* Mock, 4 Dev. & B. L. (N. C.) 146, 148.

[136] Morse *v.* Nixon, 6 Jones L. (N. C.) 293, 295. And see Perry *v.* Phipps, 10 Ired. L. (N. C.) 259; Morris *v.* Nugent, 7 C. & P. 572, cited in § 43, supra.

[137] Brown *v.* Carpenter, 26 Vt. 638, where the English cases are reviewed.

[138] See Putnam *v.* Payne, 13 Johns. (N. Y.) 312, where it is said: "The dog was, generally, a dangerous and unruly animal, and his owner knew it; yet he permitted him to run at large, or kept him so negligently that he escaped from his confinement. Such negligence was wanton and

But where one kept for the protection of his family a dog duly licensed and collared, and confined so as not to endanger persons properly on his premises, he may recover its market value as a watch dog from one who killed it there without being attacked by it, although it was a dangerous animal and accustomed to bite those who came near it.[139]

A dog that is mad may certainly be killed by any one.[140] So, it was held, may one that has been lately bitten by a mad dog, though the court said: "We do not mean to say that this would be allowed as a justification in killing more useful and less dangerous animals, as hogs, etc." [141]

The inhabitant of a dwelling-house may lawfully kill another's dog that is in the habit of haunting his house by day and night, and, by barking and howling, of disturbing the peace of the inmates, if the dog cannot otherwise be prevented from annoying him,—though a wanton destruction of the animal may not be justified.[142] And in an action for killing a dog, where there was evidence that a number of dogs disturbed the defendant by barking and howling on his lawn every night and that he at last shot among them without taking aim, it was held that he had a right to protect his family from such a nuisance and that it was a question for the jury whether he used such means as were reasonable and necessary, under the circumstances, to rid himself of it.[143]

cruel, and fully justified the defendant in killing the dog as a nuisance. The public safety demands this rule." So in Maxwell *v.* Palmerton, 21 Wend. 407, it is said: "If the dog be in fact ferocious, at large, and a terror to the neighborhood, the public should be justified in dispatching him at once." And see Dunlap *v.* Snyder, 17 Barb. 561; Peo. *v.* Bd. of Police, 24 How. Pr. 481.

See also Sentell *v.* New Orleans & C. R. Co., 166 U. S. 698, cited in § 22, supra.

[139] Uhlein *v.* Cromack, 109 Mass. 273.

[140] Keck *v.* Halstead, 2 Lutw. 1494.

[141] Putnam *v.* Payne, 13 Johns. (N. Y.) 312.

[142] Brill *v.* Flagler, 23 Wend. (N. Y.) 354. And see Meneley *v.* Carson, 55 Ill. App. 74. Cf. Bowers *v.* Horen, 93 Mich. 420, cited in § 45, supra.

[143] Hubbard *v.* Preston, 90 Mich. 221.

But, as was said in another case, "it would be monstrous to require exemption from all fault as a condition of existence. That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the man who had pursued him *flagrante delicto*—that on another occasion he barked at the doctor's horse and that he was shrewdly suspected in early life to have worried a sheep,—make up a catalogue of offenses not very numerous nor of a very heinous character. If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightfully extirpated.[144]

In an action for killing a dog where the plaintiff knows its good character, the defendant is entitled to show its bad character and addiction to worrying sheep.[145] A witness cannot be asked whether from his knowledge of the dog he did or did not consider it a nuisance.[146]

A statute providing for the payment of bounties, to be raised by taxation, to individuals killing wolves and other wild animals, passed for the protection of stock-raisers, was held to be constitutional in Texas.[147] A similar statute exists in Iowa.[148]

With regard to escaped animals, it is said in an article in the Justice of the Peace: "An interesting point might be raised but so far as we know has never occurred as to the rights of a person meeting an escaped animal of a dangerous nature. Would he be justified in destroying it there and then, or would he be liable to pay damages to the owner to whom it was valuable, unless the act was in absolute self-defence?

[144] Dodson *v.* Mock, 4 Dev. & B. L. (N. C.) 146, 148. And see Jacquay *v.* Hartzell, 1 Ind. App. 500.

[145] Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561; Lentz *v.* Stroh, 6 S. & R. (Pa.) 34.

[146] Parker *v.* Mise, 27 Ala. 480.

[147] Dimmit Co. *v.* Frazier (Tex. Civ. App.), 27 S. W. Rep. 829; Weaver *v.* Scurry Co. (Tex. Civ. App.), 28 id. 836.

[148] Bourrett *v.* Palo Alto County, 104 Ia. 350.

In Morris *v.* Nugent[149] it was decided that to justify shooting a dog it was not sufficient to show that the dog was of a ferocious disposition and at large. To justify shooting him he must be actually attacking the party at the time; therefore, where in that case the dog ran out and bit the defendant and ran away it was held the defendant was not justified in shooting him as he ran away. It need scarcely be said, however, that a dog is not one of those animals that the owner keeps at his peril, until after knowledge of savageness of disposition. But how would it have been had the animal been a monkey, or a wolf escaped from its owner? After escape, does the owner retain a sufficient property to entitle him to maintain an action for loss if the animal is shot without having done any mischief? This seems to be the true test, rather than the dangerousness of the animal's nature. The action would be to recover damages for injury to property and then the case would turn upon whether the animal was *feræ naturæ* in the sense of being a subject of property, and the escape would be material because without possession there could be no property in an animal *feræ naturæ* in this sense. It might be very hard upon the owner of a travelling circus, for instance, if a valuable lion escaped and was shot while trying merely to get out of the way of the party shooting it. But it appears to us that, however morally wrong it might be, in law a man may shoot an escaped lion in England with impunity and, moreover, become thereby the owner of the skin. The trophy might be very discreditable, notwithstanding the rarity of the feat." [150]

47. Accidental Injuries to Animals Trespassing or Running at Large.—The question of liability for accidental injuries to trespassing animals depends on various considerations, such as on whom rests the obligation to fence, whether the injury was

[149] 7 C. & P. 572, cited in § 43, supra.
[150] 54 J. P. 452, quoted in 24 Ir. L. T. 468.

a natural result of the trespass, etc. Some of the cases have been already discussed in § 42, supra.

The owner of a lot on which green sorghum was growing, who left his fence down, was held not liable for the value of a cow killed by eating the sorghum, the court finding as a fact that it is not generally injurious to stock.[151] So, where the plaintiff's ox got into the defendant's cornfield through an insufficient fence and ate corn, from the effects of which it died, the defendant was held not liable.[152]

An action will not lie for carelessly leaving maple syrup in one's unenclosed wood whereby plaintiff's cow, suffered to run at large, drank it and died, the cow being wrongfully in the wood; otherwise, if she had been there by defendant's permission.[153] And where oxen died from eating brine left on uninclosed land, the situation of the place, its proximity to the haunts of cattle, and the risk of injury must be stated clearly in the declaration to make a case of liability for negligence.[154]

A manufacturing company is not liable for the death of animals where they stray upon its unenclosed land and eat a poisonous substance deposited in the ordinary course of manufacture,[155] nor, where it has abandoned its business, leaving some poisonous products on the land sufficiently guarded at the time.[156]

A land-owner who is under no duty to fence against his neighbor's cattle is not liable for the death of the latter's horse from eating the leaves of a yew tree growing upon the former's land but not projecting over the division line between them.[157] But where an adjoining owner was liable by

[151] Fennell *v.* Seguin St. R. Co., 70 Tex. 670.
[152] Herold *v.* Meyers, 20 Ia. 378.
[153] Bush *v.* Brainard, 1 Cow. (N. Y.) 78
[154] Hess *v.* Lupton, 7 O. 216. See Henry *v.* Dennis, 93 Ind. 452, cited in § 42, supra.
[155] Ferguson *v.* Miami Powder Co., 9 O. Circ. Ct. 445.
[156] Morrison *v.* Cornelius, 63 N. C. 346.
[157] Ponting *v.* Noakes, [1894] 2 Q. B. 281. Collins, J., said: "Does it,

prescription to maintain a fence and one to whom he sold fallage of timber cut a tree in such a way as to make a gap in the fence without the owner's knowledge, and the plaintiff's cattle went through and fed on the leaves of a yew tree that had been felled by the owner of the fallage, it was held that the land-owner was liable for the loss of the cattle.[158] And a burial board was held liable for the poisoning of a horse by eating the leaves of a yew tree growing over into the plaintiff's meadow, and it was not material whether they knew that yew leaves were poisonous to cattle or not, as, in either case, they must be held responsible for their own act in originally planting the trees. Nor was the plaintiff bound to examine all the boundaries of his hired field to see that no injurious tree was projecting over them.[159] No warranty, however, can be implied on the part of the lessor of land let for agricultural purposes that there are no plants likely to be injurious to cattle, such as yew trees, growing on the land.[160]

A declaration that the plaintiff's horses were poisoned by yew clippings from the defendant's trees must disclose facts from which the defendant's duty to take care of the clippings could be inferred; otherwise it is bad.[161]

Where the defendants were obliged to fence land for the benefit of the lessor and his tenants (among whom was the plaintiff), and strands from the wire fence fell down, as the result of long exposure, and the plaintiff's cow while grazing swallowed one of the pieces and died, it was held that the defendants were liable in damages.[162]

Where a confectioner placed poisoned cheese behind his

then, make any difference that a yew tree is likely to tempt a horse to trespass? I think not, unless it were proved that it was put or kept there for the purpose of enticing the animal to its destruction."

[158] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

[159] Crowhurst *v.* Amersham Burial Board, 4 Ex. D. 5.

[160] Erskine *v.* Adeane, L. R. 8 Ch. 756.

[161] Wilson *v.* Newberry, L. R. 7 Q. B. 31.

[162] Firth *v.* Bowling Iron Co., 3 C. P. D. 254. And see the article in 22 Sol. Journ. 719, quoted in § 42, supra.

shop counter to destroy rats and mice, and a customer came into the shop with his dog which went to the cheese through an unfenced opening at the end of the counter, ate it and died, it was held that the confectioner was not liable for the dog's death, the poison being placed there for a legitimate purpose, and the dog being a trespasser.[163]

Where the owner of a horse knew that a fence which it was the adjoining owner's duty to repair was down in places, he was held guilty of contributory negligence where his horse went into the adjoining land and was killed by falling into a pit.[164] And where the owner of a mare permitted her to feed in the same field with a bull by which she was gored, he was held guilty of contributory negligence.[165] So, where the plaintiff had reason to believe that the defendant had cut holes in the ice and warned his servant not to let his cattle go unattended, and, the servant disregarding this, the cattle watered in the holes and fell in—this was held contributory negligence on the part of the plaintiff.[166]

But, in Vermont, the owner of cattle was held not guilty of contributory negligence where the division fence was not repaired, and under the statute his knowledge could not be shown.[167] And, in Missouri, where the owner turned his horse into a pasture after he had known for a month of the existence of a hole caused by improper mining and the horse fell in and was killed, the owner was held not as a matter of law guilty of contributory negligence. "There may have been many circumstances or facts connected with the act of

[163] Stansfield *v.* Bolling, 34 J. P. 406.

[164] Krum *v.* Anthony, 115 Pa. St. 431. So, where two agreed to pasture their stock together, and the animal of one fell into an unguarded well on the other's land: McGill *v.* Compton, 66 Ill. 327. But a statute making one who fails to maintain his part of a division fence liable to damages to "crops, fruit trees and shrubbery thereon, and fixtures," does not authorize a recovery for the loss of a colt straying through a defective fence and killed by falling into a pit: Crandall *v.* Eldridge, 46 Hun (N. Y.) 411.

[165] Carpenter *v.* Latta, 29 Kan. 591.

[166] La Riviere *v.* Pemberton, 46 Minn. 5.

[167] Eddy *v.* Kinney, 60 Vt. 554.

turning in, which would tend strongly to relieve the act altogether of negligence, or which would make it a matter of, at least, questionable propriety." [168] So, where A., in occupation of minerals under a field occupied by B., had sunk a shaft for the purpose of getting minerals and, when they ceased to work there, had not covered it over so as to protect properly the horses in the field, and B.'s mare fell down the shaft, without any negligence on B.'s part, and was killed, A. was held liable for the loss, Cockburn, C. J., saying: "I think that it is more reasonable that he who does the work which is the cause of the danger should avert that danger by doing all that is reasonably necessary." [169] And in a similar case, where a bullock fell into an unfenced quarry in the field he was pastured in, the owner of the quarry was held liable, following the principle in Groucott *v.* Williams, supra, that "where an alteration has been made in the normal state of things, calculated to cause injury to a neighbor, an obligation is cast upon the person who makes such an alteration to protect his neighbor from injury—in this case to place a fence so as to prevent cattle from falling into the quarry." [170] So, where cattle lawfully kept in a lot wander into a portion of the lot that has been set on fire by another's negligence, the latter is liable where the injury is the direct and probable result of his wrongdoing.[171]

The rule is different, however, where animals stray without justification on another's land. Thus, even where no action lies for a trespass by cattle pasturing on uninclosed woodland, yet as that is not a matter of right, the owner of the land is not liable for an injury to the cattle from falling into an unfenced hole.[172] In another case, where the plaintiff allowed his horse to run at large and it fell into an old well on the uninclosed

[168] Green *v.* Kan. & T. Coal Co., 53 Mo. App. 606.
[169] Groucott *v.* Williams, 32 L. J. Q. B. 237.
[170] Hawken *v.* Shearer, 56 L. J. Q. B. 284.
[171] Chic., St. L. & P. R. Co. *v.* Barnes, 2 Ind. App. 213.
[172] Knight *v.* Abert, 6 Pa. St. 472. See, to the same effect, Hughes *v.*

land of another and was killed, it was held that he could not recover unless the defendant was guilty of *gross* negligence in leaving the well open.[173] So, where a well is dug upon land without the owner's knowledge or consent and the animal of another falls in and is killed, the former is not liable on the ground of negligence.[174] But where a well is dug in a place where animals are likely to be, as near a highway, and left unguarded, the probability of the accident happening determines the degree of negligence.[175]

The owner of stock has no legal right to rely on the sufficiency of another's fence to restrain his stock, unless it is a partition fence, the defective portion of which it was such person's duty to repair. When his animals escape they are trespassers and the land-owner is not obliged to keep wells, etc., covered to secure their safety.[176] Where the plaintiff's colt escapes from its pasture through a break in the division fence which it was the defendant's duty to repair, the latter's liability for an injury to the animal continues as long as it is away from the pasture, and if another person, not the plaintiff's servant, negligently starts up and drives the colt and it is killed, his negligence is concurrent with that of the defendant and does not relieve the latter.[177] Where, by reason of the defendant's failure to repair a fence the plaintiff's horses went into his close and were killed by the falling of a haystack, the injury was held not to be too remote and the defendant was held liable.[178] But where a horse fell off an unfenced precipice and injured the plaintiff who was working on the

Hannibal and St. J. R. Co., 66 Mo. 325; Turner *v.* Thomas, 71 id. 596; Blyth *v.* Topham, Cro. Jac. 158.

And see the cases cited in § 42, supra.

[173] Caulkins *v.* Mathews, 5 Kan. 191.

[174] Ill. Cent. R. Co. *v.* Carraher, 47 Ill. 333.

[175] Young *v.* Harvey, 16 Ind. 314; Haughey *v.* Hart, 62 Ia. 96.

[176] McNeer *v.* Boone, 52 Ill. App. 181,—the common law rule as to restraining animals having been restored by statute in that State. See § 70, infra.

[177] Wilder *v.* Stanley, 65 Vt. 145.

[178] Powell *v.* Salisbury, 2 Y. & J. 391.

defendants' land, it was held that the latter were not liable, their failure to fence being a matter that concerned only the adjoining land-owner.[179]

The modification to this rule where the common law is departed from and animals allowed by statute to run at large, is thus stated in an Alabama case: "Where the general law of this State prevails, a person's right to the use of his land is, in a measure, affected by the recognized right of others to allow their stock to run at large. This latter right would be practically destroyed if upon the lands not inclosed by a lawful fence erections or excavations could, with impunity, be so made that animals straying thereon would be exposed to injury or destruction. It seems plain, under our law, that the land-owner has no right to expose straying stock to such perils. He may be under no duty to guard them from the dangers to which they may be exposed in consequence of the natural features of the land, such as ditches, holes, decayed trees liable to fall, etc. Nor would he be liable for an injury to an animal caused by a fence built in the usual way. If, however, a fence or other erection is so negligently maintained on the land as to be in effect a trap to passing animals; if the injury to animals is the natural or probable consequence of the act and such as any prudent man may have foreseen, then, in the event of such injury, the land-owner is liable in damages." [180]

48. Injuries from Barbed-Wire Fences.—It was held in a Scotch case that a proprietor of lands bordering on a public road is not entitled to erect a barbed-wire fence along the road, where such fence is dangerous to persons or beasts using the road.[181] But in a Canadian case, where a colt following its dam led by the plaintiff's servant ran against a barbed-wire fence on a country road and received injuries

[179] Ryan *v.* Rochester & S. R. Co., 9 How. Pr. (N. Y.) 453.
[180] Hurd *v.* Lacy, 93 Ala. 427, 429.
[181] Elgin Co. Road Trustees *v.* Innes, 14 Rettie (Sc. Ct. Sess.) 48.

from which it died, the owner of the fence was held not liable. The court said: "They would be a nuisance along the sidewalks of this city or along the sidewalks of most of the towns and villages of the province, but they are not found to be so in the country parts. . . . I am disposed to allow of the barbed-wire fence as a great improvement in fence-making in all places where it can properly be used, as on country highways and perhaps as party fences." In this case there was no board or cap to render the fence visible: it consisted only of wire stretched on posts.[182]

In an Indiana case, where cattle were permitted to run at large, a land-owner negligently constructing and maintaining a barbed-wire fence between his pasture and the adjacent highway so as to be a trap to animals, was held liable for the value of a horse which, while feeding on the highway, was attracted by other horses within the field and by grass therein, and, attempting to enter, was entangled in the wires and killed;[183] and the same rule has been applied in Alabama,[184] and Missouri.[185] Otherwise, where the animals are running at large contrary to law.[186]

In a New Jersey case it was held that a man who led a restive horse along a road within eight feet of a barbed-wire fence and did not hold him close but gave him ten feet of rope was guilty of contributory negligence and could not recover for an injury to his horse by running against the fence. The court said: "The case is not entirely free from the question of contributory negligence; if it were, it would raise the bold question whether the erection and maintenance of a barbed-wire fence along a public highway were negligence plain and

[182] Hillyard *v.* Grand Trunk Ry. Co., 8 Ont. 583. The colt, five weeks old, following its dam was also held to be not "running at large." This case "it is to be hoped will be followed as the leading decision on this question hereafter. . . . This is an extremely well-considered case": 16 N. J. L. Jour. 107.

[183] Sisk *v.* Crump, 112 Ind. 504. [184] Hurd *v.* Lacy, supra.

[185] Foster *v.* Swope, 41 Mo. App. 137; Colvin *v.* Sutherland, 32 id. 77.

[186] Galveston Land & Imp. Co. *v.* Pracker, 3 Tex. Civ. App. 261.

simple and rendered the owner thereof liable for damages occasioned by contact therewith. Such a question can only be decided when it is raised and according to the facts of the particular case. I can conceive of a state of facts where the law would hold the owner of the fence liable." [187]

In another case in the same State it was held that the owner of land who erects a division fence owes it to his neighbor not to incorporate in it anything which in view of the habits of the animals for which the land would naturally be used would tend to injure them,—as in this case, barbed-wires. It was also held that the owner of the horse might recover though he had bailed it to one to pasture who knew of the existence of the wire;[188] whereas in a Pennsylvania county court it was held that the owner could not recover in such a case, if the agistor had consented to the fence.[189] In Missouri also it has been held that the fact of the plaintiff's knowledge of the wire is not essential; he cannot be deprived of the use of his premises by the defendant's violation of duty.[190] So, in Oregon, where the plaintiff turned his stock loose in the highway with the knowledge that a barbed-wire fence along the highway had no board or pole thereon, as required by statute, it was held that he was not guilty of contributory negligence.[191]

Where a railway company fenced off their land from the adjoining lands with a barbed-wire fence, they were held liable for the death of a sheep belonging to an adjacent owner.[192] And where an owner, liable to fence, placed barbed-wire upon his own land, but in such a position as to be dangerous to cattle in the plaintiff's field, he was held liable for an injury

[187] Hoag *v.* Orange Mountain Land Co., 12 N. J. L. Jour. 243.

[188] Polak *v.* Hudson, 10 N. J. L. Jour. 43.

[189] Pim *v.* Griffith, 3 Pa. Co. Ct. 177.

[190] Gooch *v.* Bowyer, 62 Mo. App. 206.

[191] Siglin *v.* Coos Bay, R. & E. R. & N. Co. (Oreg.), 56 Pac. Rep. 1011.

[192] McQuillen *v.* Crommellin Iron Ore Co., 26 Ir. L. T. Rep. 15. And see Shipton *v.* Lucas, 26 Ir. L. T. 148.

That a company must use diligence in running trains under such circumstances, see Atlanta & W. P. R. Co. *v.* Hudson, 62 Ga. 679.

to the plaintiff's mare.[193] In New York it was held not to be negligence as a matter of law for a railway company to maintain a barbed-wire fence by which an animal is injured. It may or may not be dangerous according to circumstances.[194] But a tenant who strung a strand of barbed-wire wholly upon his own side of an existing division fence was held liable to the adjoining owner for the value of a horse which became entangled in the wire and was injured so that it was no longer of any use to the owner.[195]

In Canada, in an action brought for injury to an animal by a barbed-wire fence, it was held that the use of barbed-wire was not unlawful if maintained in accordance with municipal regulations; otherwise its erection or maintenance becomes illegal, if it is so placed or constructed as to be dangerous to others.[196] But in Texas it was held that the building of such a fence without a board between the posts as prescribed by law is not, as a matter of law, negligence so as to render the land-owner liable for an injury to a horse. "The law does not say that it is negligence to construct or erect a fence different from that prescribed by the law. . . . The question of negligence was for the jury." [197]

The law was thus stated in a California case: "The act of the defendants in constructing the fence upon their property

[193] Bennett *v.* Blackmore, 90 L. T. 395.

[194] Guilfoos *v.* N. Y. Cent. & H. R. R. Co., 69 Hun (N. Y.) 593; Rehler *v.* W. N. Y. & P. R. Co., 28 N. Y. St. Repr. 311.

And see Gould *v.* Bangor & P. R. Co., 82 Me. 122, where it was held that a company was liable where the fence had become dilapidated through its neglect. So, where it has left a gate in the fence open: Savage *v.* Chic., M. & St. P. R. Co., 31 Minn. 419.

[195] Buckley *v.* Clark, 21 Misc. (N. Y.) 138.

[196] Augustus *v.* Lynde, 29 Can. L. Jour. 301. And see Bessette *v.* Howard, 8 Leg. News (Can.) 170.

[197] Hester *v.* Windham (Tex. Civ. App.), 27 S. W. Rep. 1078. And see Brown *v.* Cooper, 10 Tex. Civ. App. 512.

That a barbed-wire fence is not *per se* a nuisance, see Robertson *v.* Wooley, 5 Tex. Civ. App. 237; Presnall *v.* Raley (Tex. Civ. App.), 27 S. W. Rep. 200; Worthington *v.* Wade, 82 Tex. 26.

and along the line of the public highway did not of itself render them liable to the plaintiff for the damages sustained; but if the fence was constructed and maintained in such a manner as to constitute negligence, they were properly held liable. . . . . The defendants were not bound to maintain any fence at all, but having undertaken to maintain one, they were bound to see that it was not made a trap for passing animals. It is the duty of the land-owner to take notice of the natural propensity of domestic animals and to exercise reasonable care to prevent his fence from becoming dangerous. The fact that the fence was constructed entirely upon defendant's land is no defence, if negligently constructed or maintained." [198]

So, in Indiana, the erector of such a fence is liable where he lays the wire on the ground without protection; and the owner of animals is not as a matter of law guilty of contributory negligence in permitting them to wander to and become entangled in barbed wires left lying on the ground without protection by an adjoining land-owner who was building a division fence—the owner of the animals not knowing of such fence.[199]

Where there was a barbed-wire fence, though not a lawful one, between two pastures as to the boundaries of which there was some question, and the defendant without the other owner's consent and against his protest and that of the plaintiff, his tenant, moved the fence so that it crossed a path by which the plaintiff's horse was accustomed to go to water, there was held to be a cause of action for an injury received by the horse.[200] And where the owner of land, after allowing the public to drive across his lot for several years, stretched a barbed-wire fence across the track without other notice that he had withdrawn his license, he was held liable for an

[198] Loveland *v.* Gardner, 79 Cal. 317, 319.

[199] Lowe *v.* Guard, 11 Ind. App. 472. And see McFarland *v.* Swihart, Ibid. 175.

[200] Boyd *v.* Burkett (Tex. Civ. App.), 27 S. W. Rep. 223.

injury from the wire to a horse driven across the land after dark.[201]

In Iowa, one fencing his land with barbed-wire is not liable for the horses of an adjoining owner injured thereby.[202]

The law on the subject of these fences has thus been summed up respectively in leading American and Irish law journals:

"It would seem from the cases I have quoted that although in some of the States there may be room for doubt with respect to division fences, it has been generally decided that the mere maintenance of a barbed-wire fence along a highway without proof of negligence is not sufficient to charge the owner with liability for injuries to cattle." [203]

"We concur with our contemporary [viz., the Justice of the Peace] in considering that, as the general result of the decisions, the erecting or maintaining of a barbed-wire fence, while not *per se* an illegal act, becomes illegal if so placed as to be dangerous to others in the exercise of their lawful rights, such as passing along a highway, or turning out cattle into the fields, and involves liability for all the natural and probable consequences, such as tearing the clothes of travellers or injuring cattle." [204]

49. Insurance on Live-Stock.—Live-stock, like other kinds of personal property, may be insured. This insurance is usually against loss by theft, disease or accident and the company,

[201] Carskaddon *v.* Mills, 5 Ind. App. 22, followed in Morrow *v.* Sweeney, 10 id. 626.

[202] Godden *v.* Coonan (Ia.), 77 N. W. Rep. 852.

[203] 16 N. J. L. Jour. 112.

[204] 26 Ir. L. T. 154.

As to injuries from barbed-wire due to negligence in leaving a gate open, see West *v.* Ward, 77 Ia. 323, cited in § 42, supra. As to driving animals against the wire, see Aspegren *v.* Kotas (Ia.), 59 N. W. Rep. 273, cited in § 45, supra. A statute requiring the consent of the adjoining land-owner to the use of barbed-wire in a division fence is constitutional: Buckley *v.* Clark, 21 Misc. (N. Y.) 138.

by the terms of the policy, is relieved from liability where the death of the animal is caused by the negligence or fault of the policy-holder or his employees.[205] Therefore, where an insured animal dies as the result of striking and abuse, or overwork, the amount cannot be recovered.[206] And where a policy insuring one against loss for the death of a horse by "disease or accident" provided that he should use all care for the health and preservation of the horse and in case of sickness promptly summon the best veterinarian accessible or, if none could be had, provide the best attention, and that its benefits should not extend to any fatal injury which occurred through his connivance, sufferance or act, it was held that where the horse about two hours before the policy expired had been intentionally killed not because it was in pain, but because it could not recover and the claim of the assured could not otherwise be presented, the company was not liable, although the killing was by the advice of a veterinarian sent by them to treat the horse, and the president had directed the plaintiff to follow such veterinarian's instruction as to the treatment.[207] A requirement in a policy of written notice within twenty-four hours of the animal's disorder is waived where, upon receipt of a verbal notice, the company sends its surgeon to examine the animal and he eventually orders it to

[205] Beach Ins. § 229.

A law authorizing the formation of companies "for the purpose of insuring the lives of domestic animals, upon the co-operative or assessment plan of insurance," includes loss by fire of animals insured: O'Grady *v.* N. Y. Mut. Live-Stock Ins. Co., 16 N. Y. App. Div. 567.

Where an animal may not be insured for more than half its cash value this is an admission by the company, knowing the property, of the proper ratio between the value and the sum insured: Ill. Live-Stock Ins. Co. *v.* Koehler, 58 Ill. App. 557.

[206] West Horse and Cattle Ins. Co. *v.* O'Neill, 21 Neb. 548; Same *v.* Timm, 23 id. 526.

[207] Tripp *v.* Northwestern Live-Stock Ins. Co., 91 Ia. 278. The observance of such a condition need not be proved in an action on the policy in the first instance: it is matter of defence: Johnston *v.* Northwestern Live-Stock Ins. Co., 94 Wis. 117.

be killed.[208] And notice need not be sent of a short passing sickness which did not recur for many weeks.[209] But where immediate notice by telegram is required, the furnishing of blanks for proof of loss is not a waiver of the condition.[210]

A provision in the constitution of the company that the incumbering of the insured animals by a mortgage without the company's consent shall cause forfeiture of the certificate does not operate *ipso facto* to annul the policy, but confers upon the company the right to elect to declare it void, which right may be waived.[211]

Where a company are authorized by statute to insure live stock, etc., as farm property, but by their by-laws are not allowed to insure village property within one hundred feet of other buildings, they were held not liable for live stock destroyed by fire while in the barn of a village hotel that stood within one hundred feet of other buildings.[212] But where live stock was insured "in the places herein set forth and not elsewhere," and a mare which was at the time in a certain barn had been removed to another two hundred feet distant, where she was killed by lightning, it was held that the words defining the location were descriptive only, and not a stipulation that it should remain unchanged, and that the company were liable.[213] So, a description of a horse in a policy as "contained in assured's barn" is not a promissory contract or warranty that the horse is to be kept all the time in the barn and

[208] Smith *v.* People's Mut. L. S. Ins. Co., 173 Pa. St. 15. But see Ill. Live-Stock Ins. Co. *v.* Kirkpatrick, 61 Ill. App. 74.

A provision requiring fifteen hours' notice is valid: Swain *v.* Security Live-Stock Ins. Co., 165 Mass. 321.

[209] Kells *v.* Northwestern Live-Stock Ins. Co., 64 Minn. 390.

[210] Alston *v.* Northwestern Live-Stock Ins. Co. (Kan. App.), 53 Pac. Rep. 784, where the condition was held to be a material one.

[211] Lobee *v.* Standard Live-Stock Ins. Co., 12 Misc. (N. Y.) 449.

[212] Wildey *v.* Farmers' Mut. Fire Ins. Co., 52 Mich. 446.

[213] De Graff *v.* Queen Ins. Co., 38 Minn. 501.

And see Peterson *v.* Miss. Vall. Ins. Co., 24 Ia. 494; Mills *v.* Farmers' Ins. Co., 37 id. 400.

that the policy shall cease to cover it the moment it leaves the barn, but covers a loss of the horse while in the farm pasture.[214] But where an application was for insurance on live stock "while on the premises only" and the policy referred to it as "on premises" described, and further specified that it was "situated. . . . on and confined to premises actually occupied by the assured," this was held to limit the liability to a loss occurring on the premises.[215]

A provision in a charter that the business of a live-stock insurance company should be confined to certain counties was held, in Pennsylvania, not to prohibit members who have insured horses within those counties from removing them to another county for purposes of sale, and keeping them there a reasonable time, during which time the animals die.[216] And in a later case the court went still further and held that a similar provision will not prevent a person insured from recovering for the death of a horse permanently removed beyond the limit prescribed. This was on the ground that there was a doubt whether the designation of the location was not descriptive rather than a warranty, and "forfeitures are not favorites of the law." [217] Where a policy is not void by reason of the temporary absence of the animals "in ordinary use" by the owner, it is such use to train for speed a stallion of fancy stock at a driving park.[218]

There are cases holding that where a policy embraces different classes of property insured the contract is entire, and when vitiated as to a part the policy is vitiated as to the whole; and therefore, where work horses are insured with

[214] Haws *v.* Fire Assn. of Phila., 114 Pa. St. 431; followed in Amer. Cent. Ins. Co. *v.* Haws (Pa.), 11 Atl. Rep. 107.

[215] Lakings *v.* Phenix Ins. Co., 94 Ia. 476, distinguishing the Iowa cases cited supra.

[216] Coventry Mut. Live Stock Ins. Assn. *v.* Evans, 102 Pa. St. 281.

[217] Reck *v.* Hatboro Mut. Live Stock & P. Ins. Co., 163 Pa. St. 443.

As to the waiver of a condition of non-liability, if the horse should die out of the State, unless written permission given, see Ill. L. S. Ins. Co. *v.* Koehler, 58 Ill. App. 557.

[218] Eddy *v.* Farmers' Mut. Ins. Co., 18 Misc. (N. Y.) 297.

other personal property in a barn in one gross premium, the policy, if vitiated as to one item, is so as to all.[219] On the other hand it has been held that insurance on a cow killed by being blown against a barbed-wire fence is not defeated by the forfeiture of insurance on buildings under the same policy by reason of a mortgage on the premises, the policy providing that it shall be void in case "the property or any part thereof . . . is incumbered by mortgage or otherwise."[220] So, the insurance on a colt killed by lightning is not defeated by the fact that the premises on which it was killed and on which the buildings insured in the same policy also were, had been sold and the insurance on the buildings thereby forfeited.[221]

The fact that an animal was not owned by the assured at the time the policy was issued was held not to avoid the liability of the company where such animal was subsequently acquired by him in exchange for others that were on the premises at the former date.[222] And where there was a policy on merchandise in a warehouse "not specifically insured" and the insured person had a policy on poultry which was constantly changing, it was held that such poultry was specifically insured and did not fall within the terms of the former policy, although no special lots were designated and there was no attempt to distinguish between different kinds of packages of poultry.[223]

A marine policy of insurance on live cattle against all risks, including mortality from any cause whatsoever, renders the insurer liable for the extra cost of fodder supplied to the cattle while the vessel is detained in a port of refuge for necessary repairs due to perils of the sea, there being danger of total

[219] Garver *v.* Hawkeye Ins. Co., 69 Ia. 202; Beach Ins. § 383. And see Phoenix Ins. Co. *v.* Public Park Amusement Co., 63 Ark. 187.

[220] German Ins. Co. *v.* Fairbank, 32 Neb. 750.

[221] Phœnix Ins. Co. *v.* Grimes, 33 Neb. 340; Beach Ins. §§ 225, 226.

[222] Mills *v.* Farmers' Ins. Co., 37 Ia. 400.

[223] Firemen's Fund Ins. Co. *v.* West Refrg. Co., 162 Ill. 322, reversing 55 Ill. App. 329.

loss unless the expense is incurred.[224] And recovery may be had on a policy warranted free from mortality and jettison where the animals are killed by a storm,[225] or, in consequence of one, break down the partitions by which they are separated and injure one another so that they die.[226]

50. Measure of Damages, Evidence of Value.—The measure of damages for an injury resulting in the death or permanent disability of an animal is the value of the animal and the reasonable medical and other expenses, if any, including personal services, incurred in trying to cure it and care for it afterwards, deducting, in a proper case, the value of the carcass.[227] But expenditures incurred where a reasonable man would have known an injury to be incurable cannot be recovered.[228] Nor can damages be given for love and affection.[229] A reasonable compensation for the loss of the use of the animal while under treatment may be recovered.[230] In an action for injuries to a horse it was held that the money expended for the hire of another horse to take its place while under treatment might be considered.[231] But it has been

[224] The Pomeranian, [1895] P. 349.

[225] Lawrence *v.* Aberdein, 5 B. & Ald. 107.

[226] Gabay *v.* Lloyd, 3 B. & C. 793.

[227] Smith *v.* Consumers' Ice Co., 52 N. Y. Super. Ct. 430; Watson *v.* Bridge Co., 14 Me. 201; French *v.* Vining, 102 Mass. 132; Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Sullivan Co. *v.* Arnett, 116 Ind. 438; Ellis *v.* Hilton, 78 Mich. 150.

Damages for hunting for and feeding other animals which the plaintiff feared would be killed also are not recoverable: Harmon *v.* Callahan (Tex. Civ. App.), 35 S. W. Rep. 705. That damages for the trespass are recoverable, even where the plaintiff has waived his claim to the value of the animal, see Champion *v.* Vincent, 20 Tex. 811, cited in § 45, supra.

See also §§ 69, 137, infra.

[228] Murphy *v.* McGraw, 74 Mich. 318.

[229] Crawford *v.* Internat. & G. N. R. Co. (Tex. Civ. App.), 27 S. W. Rep. 263.

[230] Keyes *v.* Minneapolis & St. L. R. Co., 36 Minn. 290. And see § 69, infra.

[231] Hutton *v.* Murphy, 9 Misc. (N. Y.) 151. But see Hughes *v.* Quentin, 8 C. & P. 703.

held that the plaintiff may not recover what the horse would have made for hire from the time of the injury to its death;[232] otherwise, where the animal is only temporarily disabled from service; in the latter case reasonable hire may be recovered.[233] Where a mare is killed, her value may be recovered, but, without alleging injuries to her sucking colt, evidence thereof is inadmissible.[234] And where mares are caused to slink their foals, the measure of damages is the reduced value of the animals, not the value of the unborn colt.[235] If the injury is accompanied by circumstances of aggravation, exemplary damages are sometimes allowed, even if the animal has no pecuniary value.[236] One suing for the killing and wounding of his cows may recover for the loss of milk from the wounded cows while they were recovering but not for the anguish of his wife by reason of her fear of the defendant.[237]

Where stock were killed by a tornado the measure of damages under an insurance policy was held to be ascertained by showing their value immediately before and after the injury and not what they were sold for a considerable time afterwards.[238]

Where a statute gave selectmen the power to estimate damages for the killing of sheep by a dog, it was held to render such estimate binding and, in the absence of fraud or mistake, not to allow any recovery in excess thereof.[239]

In a New York case it was held that the opinions of witnesses as to the value of a dog were admissible.[240] But in a

[232] Atlanta Cotton-Seed Oil Mills *v.* Coffey, 80 Ga. 145

[233] Atlanta & W. P. R. Co. *v.* Hudson, 62 Ga. 679.

[234] Gamble *v.* Mullin, 74 Ia. 99.

[235] Baker *v.* Mims, 14 Tex. Civ. App. 413.

[236] Parker *v.* Mise, 27 Ala. 480; Ten Hopen *v.* Walker, 96 Mich. 236; Lewis *v.* Bulkley, 4 Daly (N. Y.) 156.

[237] Donahoo *v.* Scott (Tex. Civ. App.), 30 S. W. Rep. 385.

[238] Lewis *v.* Burlington Ins. Co., 80 Ia. 259.

[239] Van Hoosear *v.* Town of Wilton, 62 Conn. 106, distinguishing Town of Wilton *v.* Town of Weston, 48 Conn. 325.

[240] Brill *v.* Flagler, 23 Wend. (N. Y.) 354. See, in general, as to evidence of a dog's value, 40 L. R. A. 518 n.

later case this rule was not followed and it was held that "the jury are the competent judges of the value of such property, after hearing the evidence as to the particular qualities and properties of the animal." [241] And in a still more recent case it is said: "Opinions in regard to the value of dogs which have no standard or marketable value are necessarily fanciful, depending upon the fancy or predilection of the witness, and are not competent. In order to render opinions as to the value of a dog competent it should first be shown that the dog in question is a marketable animal, either belonging to some peculiar breed, or possessing some peculiar qualities which make him an animal usually vendible, at some proximately regular price. Nothing of the kind was shown here. It was shown that he was a trained farm dog, and it was offered to be shown that the witness, who was the plaintiff himself, was acquainted with the value of such dogs and had seen them bought and sold. This fell far short of offering to prove that the dog was a marketable animal or had any market value, which the witness was acquainted with. I am of the opinion therefore that the evidence was properly excluded." [242]

But these latter cases were disapproved of in a Michigan case, where it was said: "It is not necessary that personal property must have a market value in order to render such opinions competent. The value of a horse depends upon his qualities for farming or trotting or family use or for many other kinds of work. Clearly, jurors who were not farmers would not be competent to determine the value of a farm horse simply from a description of the horse, statements of the work he will do and the qualities he possesses. No doctrine is better settled than that in such case the evidence of farmers who know the value of horses is competent to aid the jury in determining the value. This principle applies with

[241] Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561.

[242] Brown *v.* Hoburger, 52 Barb. (N. Y.) 525; followed in Smith *v.* Griswold, 15 Hun (N. Y.) 273.

equal force to the case of a shepherd dog, whose value, like that of a horse, depends upon his qualities." [243]

In Texas it was held to be sufficient to show that a dog was useful and of special value to its master, though no market value was shown.[244] The pedigree of a dog may be shown by books kept to register the same.[245] Testimony of a dog's bad character for rushing into the highway and springing at people may be given as going to show his value, though he may not have been actually so engaged when shot.[246]

The testimony of a veterinary surgeon is not privileged as being a professional communication.[247]

The measure of damages for taking, carrying away and destroying game-cocks, kept for an illegal purpose, is their actual value to the plaintiff as articles of merchandise or sale, whether the market for them is in the State or elsewhere.[248]

[243] Bowers *v.* Horen, 93 Mich. 420. See Spray *v.* Ammerman, 66 Ill. 309. As to evidence of the value of horses, see Loesch *v.* Koehler, 144 Ind. 278.

[244] Heiligman *v.* Rose, 81 Tex. 222.

[245] Citizens' Rapid Transit Co. *v.* Dew, 100 Tenn. 317.

[246] Meneley *v.* Carson, 55 Ill. App. 74.

[247] Hendershott *v.* West. Un. Tel. Co., 106 Ia. 529.

[248] Coolidge *v.* Choate, 11 Metc. (Mass.) 79.

TITLE III.

RIGHTS OF OWNERS OF ANIMALS.

CHAPTER II.

THEFT AND REMOVAL OF ANIMALS.

51. The felonious intent.
52. The taking.
53. Asportation, killing, removal to another county or State.
54. Ownership; want of consent.
55. The description in the indictment.
56. Horse, mare, gelding, etc.
57. Cattle, sheep, hog, deer.
58. Living and dead animals; evidence.
59. Driving animals from the range.
60. Altering brands and marks.
61. Civil remedies; measure of damages.

51. The Felonious Intent.—We have already considered the question what animals are the subjects of larceny.[1] Nor is it necessary in the present work to discuss at large the general principles of larceny at common law and by statute. The rules with regard to the felonious intent, the taking and asportation, the distinctions between servants and bailees, etc., apply as well to the larceny of this kind of property as of any other. Notwithstanding this, there are so many peculiarities to be considered arising from the essential nature of animal life that it has been thought expedient to adopt such a systematic order of treatment here as might be followed in a general treatise on the law of larceny. A few words will be said afterwards on the subject of civil remedies for the deprivation of property in animals.

The whole question of guilt depends, as in other cases of

[1] See Title I, supra.

larceny, on the design formed at the time the animal is taken, of depriving the owner of his property therein.[2] If this design is subsequent to the taking, the offense does not amount to larceny. Thus, one who obtains possession of a horse as bailee without any intent at the time to appropriate it, is not guilty of larceny if he subsequently sells it and converts it to his own use.[3] So, where one takes a horse intending to ride and afterwards leave and not return it or make any further use of it, this is trespass, not larceny.[4] This has been held where the taking was to enable the accused to escape punishment,[5] or pursuit,[6] or to catch a train,[7] or to make off with stolen goods.[8] On the other hand, it has been held that, where one inadvertently drove away another's lamb with his own and sold it for his own use and denied knowledge of it, the first act was trespass and the resolution to appropriate made it felony.[9]

Where the hiring was fraudulent and done *animo furandi* the offense is larceny,[10] even if the hirer does not sell or dis-

[2] State *v.* Moore, 101 Mo. 316; Starck *v.* State, 63 Ind. 285; Harrell *v.* State (Tex. Cr.), 40 S. W. Rep. 799; State *v.* McKee (Utah), 53 Pac. Rep. 733.

The stealing of domestic animals is, in Oklahoma, a more serious offense than grand larceny: Hughes *v.* Ty. (Okla.), 56 Pac. Rep. 708.

[3] Smith *v.* Com., 96 Ky. 85; Hill *v.* State, 57 Wis. 377; Morrison *v.* State, 17 Tex. App. 34; Stokely *v.* State, 24 id. 509; Reg. *v.* Carter, 47 J. P. 759; Reg. *v.* Cole, 3 Cox C. C. 212; Rex *v.* Smith, 1 M. C. C. 473.

So, where one kills a cow not intending to steal it, but immediately afterwards steals and appropriates the carcass, he is not guilty of "cattle stealing:" Nightengale *v.* State, 94 Ga. 395. And the mere failure to comply with the estray laws will not make the use and sale of the animal larceny: McCarty *v.* State, 36 Tex. Cr. 135.

[4] Rex *v.* Phillips, 2 East P. C. 662.

A fortiori, where an intention to return is shown: McDaniel *v.* State, 33 Tex. 419; In re Mutchler, 55 Kan. 164. Cf. State *v.* Ward, 19 Nev. 297.

[5] Dove *v.* State, 37 Ark. 261. [6] State *v.* York, 5 Harr. (Del.) 493.

[7] Lucas *v.* State, 33 Tex. Cr. 290.

[8] Rex *v.* Crump, 1 C. & P. 658. [9] Reg. *v.* Riley, 6 Cox C. C. 88.

[10] Rex *v.* Pear, 1 Leach C. C. 212; Rex *v.* Tunnard, Ibid. 214 n.; State *v.* Woodruff, 47 Kan. 151.

Not, however, where the false pretense simply relates to the purpose for which the animal is wanted: Berg *v.* State, 2 Tex. App. 148.

pose of the horse.[11] And where the indictment does not charge such false pretense and the evidence shows the owner's consent, evidence of the false pretext or guilty intent cannot be given.[12] If the borrowing is *animo furandi*, the fact that the accused afterwards changes his mind and returns the horse does not purge the offense.[13] It is otherwise where there has been no conversion at all, only an intent to convert.[14]

A bailee may in many cases be guilty of statutory larceny though the receipt of the property was in good faith, and it has been held that where an animal hired *bona fide* has been subsequently stolen the accused may be convicted on an indictment of larceny as bailee in the common form: the statute need not be especially set out.[15] But where the owner of horses placed them in the defendant's possession under an agreement of sale by which the property was not to vest in the latter till paid for, and the latter refused to pay or to return the horses, it was held that as he was not obliged to return the identical property he was not bailee in such a sense as to be guilty of larceny as bailee.[16] And where a man found two stray heifers and took them into his possession and afterwards, when he found out who the owner was, sent them away to be kept for himself, having had no intention of stealing them when he first found them, it was held that he was guilty neither of larceny nor of larceny as bailee.[17]

The distinction between the cases of a servant and bailee is that, the possession of the former being a continuation of that of the owner, the fact that the intent to steal is formed subsequently to the receipt of the goods does not prevent the offense amounting to larceny, no title having been parted

[11] State *v.* Humphrey, 32 Vt. 569. [12] Marshall *v.* State, 31 Tex. 471.
[13] State *v.* Scott, 64 N. C. 586.
[14] Reg. *v.* Brooks, 8 C. & P. 295; State *v.* Hayes, 111 N. C. 727.
[15] Reg. *v.* Tweedy, 23 U. C. Q. B. 120, following Reg. *v.* Haigh, 7 Cox C. C. 403.
[16] Krause *v.* Com., 93 Pa. St. 418.
[17] Reg. *v.* Matthews, 12 Cox C. C. 489.

with by the owner in the beginning. So, it has been held that where a man hired to drive cattle sells them, it is larceny, he being a servant, though a general drover.[18] But doubt was thrown on this case in a later one, where it was held that a drover of pigs was a bailee and not a servant, and consequently not guilty of larceny where his intent was subsequent to the bailment.[19]

Taking a horse found astray upon the taker's land with the intention of concealing it until the owner should offer a reward and of then returning it for the sake of the reward, or with the intention of inducing the owner to sell it astray for less than its value, has been held to be larceny.[20] The contrary has been held in Texas.[21] But in a later case it was more correctly laid down that if the original intent was to appropriate the animal if no reward was offered, then the taking was larceny; otherwise, if even in that event, the taker intended finally to return the horse.[22]

Where one furtively and fraudulently took a mule and killed it for revenge and not for gain, he was held indictable for larceny.[23] The doctrine of *lucri causa* is one, however, which it is out of place to discuss here on general grounds.[24]

Where the taking of the animal is in good faith, even though wrongful, this is not larceny. Thus, where the seller of a horse recovered possession of it on the failure of the purchaser to pay, title being contingent on payment, and the latter re-took the animal in the night, believing he was entitled to do so, this was held not to be larceny;[25] so, where one openly took an unbranded yearling under claim that the

[18] Rex *v.* McNamee, 1 M. C. C. 368. And see Reg. *v.* Jackson, 2 id. 32.
[19] Reg. *v.* Hey, T. & M. 209.
[20] Com. *v.* Mason, 105 Mass. 163, citing Reg. *v.* O'Donnell, 7 Cox C. C. 337.
[21] Micheaux *v.* State, 30 Tex. App. 660.
[22] Dunn *v.* State, 34 Tex. Cr. 257.
[23] Warden *v.* State, 60 Miss. 638. And see Delk *v.* State, 64 id. 77.
[24] See Whart. Crim. Law §§ 895, etc.
[25] State *v.* Thompson, 95 N. C. 596.

owner had forfeited his title to it;[26] where one led a horse belonging to himself from a livery stable where it had been placed by a constable who had levied upon it under a writ of attachment;[27] where one who had fraudulently exchanged a horse which was not his, afterwards took it from the possession of the one with whom he had made the exchange, without the latter's consent, with the *bona fide* intention of returning it to the true owner;[28] where one drove away and sold stock, believing that he owned it;[29] where a boy took to his mother a horse resembling hers which was used and loaned;[30] where one took possession of a horse which had been running astray for years, without any known owner;[31] where one took and re-marked a sheep believing it to be his own;[32] where one killed hogs under the authority of a person whom he believed to be the owner.[33]

52. The Taking.—The animal must be taken from the possession of the owner into that of the accused in order to constitute larceny. In large grazing countries animals on their accustomed range have been universally held to be in the constructive possession of their owner;[34] so also where they are not on the owner's range, if they are not in the actual possession and control of another.[35] And, in general, an animal astray and at large is yet in the constructive possession of the owner, so that one taking it is guilty of larceny.[36]

[26] Debbs *v.* State, 43 Tex. 650. [27] Clarke *v.* State, 41 Neb. 370.
[28] Gooch *v.* State, 60 Ark. 5. [29] Peo. *v.* Devine, 95 Cal. 227.
[30] Gardiner *v.* State, 33 Tex. App. 692. [31] Johnson *v.* State, 36 Tex. 375.
[32] Barnes *v.* State, 103 Ala. 44.
[33] Lawrence *v.* State (Tex. Cr.), 30 S. W. Rep. 668.
[34] Moore *v.* State, 8 Tex. App. 496; Huffman *v.* State, 28 id. 174; Jones *v.* State, 3 id. 498; Deggs *v.* State, 7 id. 359; McGrew *v.* State, 31 Tex. Cr. 336.
[35] Bennett *v.* State, 34 Tex. Cr. 216.
[36] Burger *v.* State, 83 Ala. 36; Peo. *v.* Kaatz, 3 Park Cr. (N. Y.) 129; State *v.* Martin, 28 Mo. 530; State *v.* Everage, 33 La. Ann. 120; Borer *v.* State (Tex. Cr.), 28 S. W. Rep. 951.
A statute making it an offense to "take up and use" any horse without the owner's consent was held to relate only to a horse running at large,

It is essential that the accused person should have had possession to some extent of the animal. Therefore where a person pointed out an animal in a pound to a pound-keeper as his and received money as the purchase price and the pound-keeper afterwards turned it out on his range where it was found by the owner, it was held that there was no taking possession sufficient to constitute larceny.[37] But in Texas, where no asportation need be shown, it was held that one who pointed out a cow and a calf on a range, saying he owned them, and selling them, was guilty of larceny.[38] And one who sells and delivers an animal to one person and, without re-purchasing, sells and delivers it to another, is guilty of theft.[39]

Where one called up gentle hogs in their range and sold them to another who was present, these acts were held to constitute a taking, as the seller exercised control over the animals by calling them up and had them constructively in his possession and converted them by delivery accompanied by actual possession, but it was said that a mere sale was not equivalent to a taking.[40] Thus, where it was shown that A., falsely claiming an animal running on the range to be his, made a bill of sale of it to W., receiving pay from the latter, but the animal was never in the possession, actual or constructive, of either A. or W., it was held that there was no taking sufficient to constitute theft.[41]

Proof that the defendant shot a hog and pursued it but did not catch it or kill it, and that it was found by the owner, but not in the defendant's possession, is not sufficient to sustain a conviction.[42] And in another case an instruction that the

not to one saddled and bridled and hitched to a tree: Cochran *v.* State, 36 Tex. Cr. 115.

[37] Peo. *v.* Gillis, 6 Utah 84.

[38] Doss *v.* State, 21 Tex. App. 505. Cf. Hardeman *v.* State, infra.

[39] Hooper *v.* State (Tex. Cr.), 25 S. W. Rep. 966.

[40] Madison *v.* State, 16 Tex. App. 435.

[41] Hardeman *v.* State, 12 Tex. App. 207. Cf. Doss *v.* State, supra.

[42] Minter *v.* State, 26 Tex. App. 217.

defendant was guilty of larceny if, after he shot the hog, he was near enough to exercise control over it, with intent to steal it, was held erroneous—actual possession being essential to guilt.[43]

The recapture of stolen hogs after they had escaped from the control of their takers was held to constitute a fresh larceny, the escape being from a pen into a pasture insufficiently fenced, though they did not leave the pasture.[44]

53. Asportation, Killing, Removal to Another County or State. —At common law the property must be carried away to constitute larceny. Thus, merely killing an animal with intent to steal it is not alone sufficient, where there is no removal.[45] An indictment for stealing an animal is not supported by proof that it was shot and skinned,[46] or had its ears cut off.[47] But the degree of asportation may be very slight. Thus, where one shot another's cow in a wood, taking possession of her when shot, handling her carcass so as to progress half way in skinning it and leaving it only when frightened by a dog's barking and the apprehended approach of somebody, this was held a sufficient asportation to constitute larceny.

"The position of the cow must have been changed from that in which her owner left her free to move." [48] So, where the defendant shot a hog and cut its throat, causing death, an instruction was held correct that the "least removal of the hog by the defendant after he shot and killed it would be an *asportavit* in law; and if the jury believe from the evidence beyond a reasonable doubt that the defendant shot and killed the hog and then took hold of it and cut its throat, that would constitute a taking and carrying away in the eyes of the

[43] Molton *v.* State, 105 Ala. 18. [44] Trimble *v.* State, 33 Tex. Cr. 397.

[45] Peo. *v.* Murphy, 47 Cal. 103; State *v.* Seagler, 1 Rich. L. (S. C.) 30; Alexander *v.* State, 60 Miss. 953.

[46] State *v.* Alexander, 74 N. C. 232.

[47] State *v.* Butler, 65 N. C. 309.

[48] Lundy *v.* State, 60 Ga. 143.

law."[49] But where the defendant dragged a hog twenty yards and struck it with an axe and it squealed and he then ran away, leaving it where it was, there was held to be no *asportavit*. "The controlling principle in such cases would seem to be that the possession of the owner must be so far changed as that the *dominion* of the trespasser shall be complete."[50] Thus, it is a sufficient asportation of sheep if they are removed from the flock and even for an instant under the control of the defendant.[51] And if a person takes and leads a horse any distance with felonious intent, the asportation is complete, though the animal is not removed from the enclosure or lot which he was on at the time.[52] And the larceny in such cases is continuous during the removal, and any one participating in it at any stage is guilty of the offense,[53] but it is otherwise of the mere receipt of stolen animals, though with guilty knowledge.[54]

Where by statute asportation need not be shown, there may be a conviction of stealing an animal on proof of killing it with felonious intent, even if it has never actually passed into the possession of the slayer.[55] So, an indictment for the theft of animals would be sustained by proof of fraudulently killing them and selling their hides;[56] or illegally marking and branding them with felonious intent.[57]

[49] Croom *v.* State, 71 Ala. 14. And see Kemp *v.* State, 89 id. 52; Frazier *v.* State, 85 id. 17; State *v.* Gilbert (Vt.), 34 Atl. Rep. 697.

[50] Edmonds *v.* State, 70 Ala. 8. And see Wolf *v.* State, 41 id. 42.

[51] State *v.* Gray, 106 N. C. 734; State *v.* Carr, 13 Vt. 571.

[52] State *v.* Gazell, 30 Mo. 92. And see Delk *v.* State, 64 Miss. 77.

[53] Peo. *v.* Wiley, 20 N. Y. Suppt. 445.

[54] Wheeler *v.* State, 34 Tex. Cr. 350.

[55] Coombes *v.* State, 17 Tex. App. 258, overruling Martin *v.* State, 44 Tex. 172; Hall *v.* State, 41 id. 287.

But under an indictment for theft there cannot be, in Texas, a conviction of unlawfully killing without the owner's consent: Beavers *v.* State, 14 Tex. App. 541.

[56] Musquez *v.* State, 41 Tex. 226, citing Rex *v.* Rawlins, 2 East P. C. 617, where an indictment for stealing lambs was held to be sustained by proof that the carcasses were found on the owner's ground and only the skins taken away. And see McPhail *v.* State, 9 Tex. App. 164.

[57] Coward *v.* State, 24 Tex. App. 590.

A statute reducing theft to a misdemeanor or on the voluntary return of stolen property before prosecution, does not apply where the character of the property has been changed as from live hogs to pork.[58]

Where one was indicted for killing a sheep with intent to steal the whole carcass, proof of the killing with intent to steal a part of the carcass was held sufficient, but it was questioned whether merely removing a live sheep for the purpose of killing it to steal a part of the carcass, was an asportation.[59] And in a Missouri case it was held that a statute punishing the killing of an animal with intent to steal it did not apply to the killing of an animal which the defendant already had on his own premises. "The taking and asportation in this case occurred first, and hence the larceny was complete before the animal was killed." [60]

Cutting off part of a sheep while it is alive with intent to steal that part will support an indictment for killing with intent to steal a part of the carcass, if the injury must occasion the animal's death.[61]

Where an animal is stolen in one county and brought into another, the offense is regarded as continuous and the thief may be indicted in the latter county.[62] It has been held that the same rule applies as between the different States,[63] though there are authorities to the contrary.[64] But this question is beyond the scope of the present treatise, belonging to the general treatment of larceny as a crime.[65] Where two persons indicted for horse-stealing in County A. were found in joint possession of two horses in that county, which they had jointly taken at different times and places in County B., it

[58] Horseman *v.* State, 43 Tex. 353. [59] Rex *v.* Williams, 1 M. C. C. 107.
[60] State *v.* Crow, 107 Mo. 341; on rehearing, 17 S. W. Rep. 748.
[61] Rex *v.* Clay, R. & R. C. C. 387. And see Reg. *v.* Sutton, 8 C. & P. 291.
[62] 1 Whart. Crim. Law § 928.
[63] State *v.* Hill, 19 S. C. 435; State *v.* Ellis, 3 Conn. 185.
[64] Lee *v.* State, 64 Ga. 203; Harrington *v.* State, 31 Tex. Cr. 577.
[65] See 1 Whart. Crim. Law § 930.

was held that as each taking in the latter county was a separate felony the prosecutor's counsel must elect on which to proceed.[66]

A conviction of larceny for carrying one head of cattle into another county was held no bar to a prosecution for another head of cattle carried at the same time to the same place but belonging to a different owner and stolen at another time and place, on the ground that the rule of such driving constituting one theft was a fiction of the common law.[67] The animal when brought into the second county must have been at the time under the control of the thief.[68]

The subject of the killing and removal of animals *feræ naturæ*, in so far as they do or do not constitute one continuous act, has been already considered.[69]

54. Ownership; Want of Consent.—The owner's want of consent to the taking is one of the essential ingredients in the crime of larceny.[70] The "owner" in this sense need not necessarily be the one who has the legal title to the animal. For example, one in actual possession of a horse so as to be responsible to the true owner, is the owner as against one who tries to steal it.[71] So, where an estray is in the possession of one over whose land it ranges, his want of consent must be proved.[72] And, as against the defendant, one who has taken up an estray has property in the horse to his full value and not merely for charges for posting.[73] To render the taking larceny, it is not necessary that the defendant should have known at the time who the owner was: he is guilty where his original intent was felonious and he afterwards appropriates the animal to his own use, knowing it to be an

[66] Rex *v.* Smith, Ry. & Moo. 295. [67] Harrington *v.* State, supra.
[68] Lucas *v.* State, 62 Ala. 26. [69] See § 6, supra.
[70] 1 Whart. Crim. Law § 883. As to wilfully driving or riding an animal without the owner's consent, see Duckett *v.* State, 93 Ga. 415.
[71] Blackburn *v.* State, 44 Tex. 457. And see Wilson *v.* State, 37 Tex. Cr. 373.
[72] Spruill *v.* State, 10 Tex. App. 695. [73] Quinn *v.* Peo, 123 Ill. 333.

estray.[74] So, one who drives away cattle which have wandered from the owner's enclosure is not less guilty of larceny because he is ignorant of the true owner and the latter does not know where they are.[75] But where an agent of cattle-owners, employed by them to catch thieves with their consent and authority, co-operates with suspected thieves in planning and effecting the taking of the cattle, for the purpose of having the thieves arrested while driving the cattle away, this is not larceny, the property having been taken with the owner's consent.[76]

Where one borrowed a horse to go to church and, while there, the horse was stolen, such temporary custodian was held not to be legally in possession of the horse so that his want of consent had to be shown.[77] But it is otherwise where one has been for some time in the actual and exclusive possession and control of the animal, though he is not the real owner.[78] Where a horse got loose from the owner and was taken in the field of a third person and put in the stable, whence he was stolen, it was held that he was in the constructive possession of the owner and the actual possession of the third person, and that the indictment might well allege the possession to be in either.[79] In the case of an estray that has been taken up, it may be alleged that the ownership is in the taker-up, and not that it is unknown.[80] So, an animal may be said to be the property of an agistor.[81]

Though it may not be necessary to allege the ownership in the indictment, if it is alleged it must be proved.[82] The following were held to be fatal variances: Where it was alleged

[74] Lamb *v.* State, 41 Neb. 356; State *v.* White (Mo.), 29 S. W. Rep. 591.
[75] State *v.* Martin, 28 Mo. 530.
[76] State *v.* Hull (Oreg.), 54 Pac. Rep. 159.
[77] Emmerson *v.* State, 33 Tex. Cr. 89.
[78] Von Emons *v.* State (Tex. Cr.), 20 S. W. Rep. 1106.
[79] Owen *v.* State, 6 Humph. (Tenn.) 330.
[80] Swink *v.* State, 32 Tex. Cr. 530; Jinks *v.* State, 5 Tex. App. 68.
[81] Rex *v.* Woodward, 1 Leach C. C. 357 n.
[82] Smith *v.* State, 43 Tex. 433. And see Murray *v.* U. S. (Ind. Ty.), 35 S. W. Rep. 240.

that J. was the owner of a horse and that it was in his possession and the evidence was that he was the owner but not in possession at the time;[83] where the ownership of a cow was alleged to be in B. and possession in A. and W. and the evidence showed that the possession was in B. alone.[84] But it is sometimes provided that where the animal may be otherwise identified, a mistake in the allegation of ownership shall not be material.[85]

55. The Description in the Indictment.—The animal should be sufficiently described in the indictment for the purpose of identification. Where a hog was described as the property of A. this was held sufficient, without further description of the hog.[86] But to call an animal a "yearling," where the kind of animal was not disclosed, was held insufficient.[87] The following descriptions were held sufficient: "Two certain oxen;" [88] "one certain calf of the neat cattle kind;" [89] "one beef cattle." [90] A designation of the species is enough without using the generic term "cattle": hence a "beef steer" is a sufficient description.[91] But where the proof was that the animal so described was a steer but not a beef steer, the variance was held to be fatal, though the description need not have been so full.[92] So, although an indictment need not describe a brand, if that be done, a variance in the proof thereof will be fatal.[93]

An indictment should specify the number of animals

[83] Hall *v.* State, 22 Tex. App. 632. And see Alexander *v.* State, 24 id. 126; Williams *v.* State, 26 id. 131.

[84] Owens *v.* State, 28 Tex. App. 122.

[85] See McBride *v.* Com., 13 Bush. (Ky.) 337.

[86] Peo. *v.* Stanford, 64 Cal. 27.

[87] Stollenwerk *v.* State, 55 Ala. 142.

[88] Henry *v.* State, 45 Tex. 84. [89] Grant *v.* State, 3 Tex. App. 1.

[90] Duval *v.* State, 8 Tex. App. 370.

[91] Robertson *v.* State, 1 Tex. App. 311; State *v.* Lawn, 80 Mo. 241; State *v.* Bowers (Mo.), 1 S. W. Rep. 288.

[92] Cameron *v.* State, 9 Tex. App. 332.

[93] Allen *v.* State, 8 Tex. App. 360. So, of a description of ear-marks: Robertson *v.* State, 97 Ga. 206.

stolen.[94] But under an indictment for stealing two animals, proof of the stealing of one will warrant a verdict of guilty.[95]

An indictment charging the defendant with stealing "three eggs" was held bad for not stating the species of eggs, because it did not show that the eggs stolen might not be such as are not the subject of larceny;[96] but in a later case a doubt was thrown on the correctness of this ruling.[97]

As has already been said, where the animal stolen is *feræ naturæ*, the fact of its being dead, reclaimed or confined must be set out in the indictment.[98]

The older doctrine was that where a statute enumerated several things and the words were so broad in meaning as to overlie one another, the less specific ones would be narrowed in their interpretation to prevent this consequence. But this doctrine has been to a great extent abandoned both in England and in this country.[99] The meanings attached to the statutory nomenclature of animals will be discussed in the following sections.

56. Horse, Mare, Gelding, Etc.—It was held in England that the words "horse, gelding or mare" in a statute punishing larceny included foals and fillies;[100] also, under a later statute, that "horse" would include a mare, a gelding, a colt or a filly.[101] In this country a great diversity of opinion prevails. In California, where the words "horse" and "mare" were both used in the code, it was held that, as at common law the word

[94] Matthews *v.* State (Tex. Cr.), 48 S. W. Rep. 980.

[95] Alderson *v.* State, 2 Tex. App. 10; Lowe *v.* State, 57 Ga. 171; Matthews *v.* State, supra.

[96] Reg. *v.* Cox, 1 C. & K. 494.

[97] Reg. *v.* Gallears, 1 Den. C. C. 501, per Pollock, C. B.

[98] 2 East P. C. 777. See § 5, supra. An indictment for stealing oysters need not cover that they had been gathered or were in the prosecutor's possession: State *v.* Taylor, 27 N. J. L. 117.

[99] Bish. Stat. Cr. §§ 247-8.

[100] Rex *v.* Welland, Russ. & Ry. C. C. 494.

For the meaning of "horse" in exemption laws, see § 61, infra.

[101] Reg. *v.* Aldridge, 4 Cox C. C. 143.

"horse" was used in its generic sense, it would be presumed that the legislature had not intended to modify this interpretation but had inserted the word "mare" possibly for more definiteness, so that where one was indicted for the theft of a "horse," proof that the animal was a mare was no variance.[102] And the word also includes a gelding.[103] And there are similar decisions in Illinois,[104] Missouri,[105] Tennessee,[106] South Carolina,[107] Utah,[108] and Wyoming.[109] But where the statute requires the nature, character and sex of the animal to be stated, it was held in Georgia that the word "horse" was not sufficiently specific.[110] In Alabama, where the statute uses the words "horse, mare, gelding," etc., it was said: "When a generic term employed in a statute is succeeded by one more definite in its meaning, it is necessary in an indictment predicated upon such statute that the latter term should be used"; and it was accordingly held that a gelding could not be shown, under an indictment for stealing a "horse."[111] So in Texas, where the statute was similar, the court said that "horse" was "used as synonymous with the word 'stallion' or at least was not in that connection intended to include 'gelding, mare or colt.'"[112] But under the Revised Penal Code "horse" is used in a generic sense and includes a gelding[113] and a mare.[114]

[102] Peo. *v.* Pico, 62 Cal. 50.
[103] Peo. *v.* Monteith, 73 Cal. 7.
[104] Baldwin *v.* Peo., 2 Ill. (1 Scam.) 304.
[105] State *v.* Donnegan, 34 Mo. 67.
[106] Wiley *v.* State, 3 Coldw. (Tenn.) 362. That a gelding cannot be shown, see Turley *v.* State, 3 Humph. (Tenn.) 323.
[107] State *v.* Dunnavant, 3 Brev. (S. C.) 9.
[108] Peo. *v.* Butler, 2 Utah 504; Peo. *v.* Sensabaugh, Ibid. 473.
[109] Fein *v.* Ty., 1 Wyo. 376.
[110] Taylor *v.* State, 44 Ga. 263; Brown *v.* State, 86 id. 633.
[111] State *v.* Plunket, 2 Stew. (Ala.) 11. And see Shubrick *v.* State, 2 S. C. 21, 23.
[112] Banks *v.* State, 28 Tex. 644. And see Jordt *v.* State, 31 id. 571; Gibbs *v.* State, 34 id. 134; Gholston *v.* State, 33 id. 342.
[113] See Valesco *v.* State, 9 Tex. App. 76.
[114] Davis *v.* State, 23 Tex. App. 210.

In other States also it has been held that the word "horse" in a statute is used in the sense of "stallion," and that, consequently, evidence that the animal was a gelding is a variance.[115] In Montana, where the indictment was for stealing a "gelding," evidence that the animal was a horse or colt was held to be a fatal variance, the court saying: "In the indictment we have the description of one definite well-known object—in the proof a term which may be applied to a half-dozen different objects." [116]

A mule is not a "horse, mare or gelding" in a statute against larceny.[117]

A ridgling (*i. e.*, a half castrated horse) is not a "gelding" but a "horse," and evidence of the animal being a ridgling was held not to support an indictment for stealing a "gelding;" and where the court below instructed the jury that proof which showed that the animal, though but partially castrated, was so castrated as to appear and be considered as a gelding, would sustain the allegation that it was a gelding, this was held erroneous as upon the weight of the evidence.[118]

Under a statute imposing a penalty on receiving and concealing stolen "goods or articles," a horse is included in these terms.[119]

57. Cattle, Sheep, Hog, Deer.—The term "cattle" in an indictment has been held to designate domestic quadrupeds generally, while "neat cattle" includes only cattle of the bovine genus.[120] But where a code made express provision for the punishment of the theft of sheep, goats, horses, etc., it was held that "cattle" meant domesticated animals of the bovine

[115] State *v.* Buckles, 26 Kan. 237; Jordt *v.* State, 4 O. 348. And see State *v.* McDonald, 10 Mont. 21, 23.

[116] State *v.* McDonald, supra. [117] Com. *v.* Edwards, 10 Phila. 215.

[118] Brisco *v.* State, 4 Tex. App. 219.

[119] State *v.* Ward, 49 Conn. 429.

See also as to horse-stealing, Wells *v.* State, 11 Neb. 409; U. S. *v.* Flanakin, Hempst. (U. S.) 30; Davis *v.* State, 10 Lea (Tenn.) 707.

[120] State *v.* Lawn, 80 Mo. 241. See also § 121, infra.

genus and did not include the other animals.[121] And in the same State it was held that "cattle" in an indictment must be thus confined in its application.[122]

Where on an indictment for stealing a cow it was shown that the animal was only two and a half years old and had never had a calf, and that such a female, however old, if she has never had a calf, is called a heifer, it was held that as the English statute particularly mentions both cows and heifers, the variance was a fatal one.[123] But in this country it appears to be held that the word "cow" includes a "heifer." [124]

Upon an indictment for stealing a "cow," one cannot be convicted of stealing a bull.[125] But a steer has been held to be an "animal of the cow kind" within the meaning of a statute.[126] Under an indictment for stealing a steer which is a castrated animal, proof of the beast being a bull is a variance.[127] A "beef" includes a bull, a cow or an ox in their full-grown state.[128]

Although the English statute specifies "ram, ewe, sheep or lamb," it has been held that the word "sheep" includes the others and is a sufficient designation of the animal stolen.[129] And, under the Delaware statute, a "sheep" includes a lamb.[130] One who receives a sheep feloniously stolen alive and killed may be stated to have received "mutton." [131]

A pig may be described as a "hog" in an indictment.[132]

[121] McIntosh *v.* State, 18 Tex. App. 284; Hubotter *v.* State, 32 Tex. 479.
[122] State *v.* Murphy, 39 Tex. 46.
[123] Rex *v.* Cook, 2 East P. C. 616; 1 Leach C. C. 105.
That the species and sex of cattle must be stated in an indictment, see Rex *v.* Chalkley, R. & R. C. C. 258.
[124] Peo. *v.* Soto, 49 Cal. 67; State *v.* Crow, 107 Mo. 341; Parker *v.* State, 39 Ala. 365.
[125] State *v.* McMinn, 34 Ark. 160.
[126] Watson *v.* State, 55 Ala. 150. And see as to "steer" in an indictment, State *v.* Abbott, 20 Vt. 537; State *v.* Lange, 22 Tex. 591.
[127] State *v.* Royster, 65 N. C. 539. [128] Smith *v.* State, 24 Tex. App. 290.
[129] Reg. *v.* McCulley, 2 M. C. C. 34; Reg. *v.* Spicer, 1 C. & K. 699.
[130] State *v.* Tootle, 2 Harr. (Del.) 541.
[131] Rex *v.* Cowell, 2 East P. C. 617.
[132] Washington *v.* State, 58 Ala. 355; Lavender *v.* State, 60 id. 60.

On the other hand, it has been held that where a statute uses the word "hog," an indictment for stealing a "pig" was wrong.[133] A shoat may be shown under an indictment for stealing a "hog." "For animals of this description swine is the original generic term. But the legislature of this State, in legislating on the subject of mismarking, use the term hog as the generic term and consider all animals of that kind as hogs irrespective of their ages." [134]

The word "deer" in a statute includes all kinds of deer of all ages and both sexes—consequently a fawn is a "deer." [135]

58. Living and Dead Animals; Evidence.—An indictment for the larceny of a live animal need not state it to be alive, as that will be presumed. It is otherwise of a dead animal, and evidence that the animal was dead when stolen cannot be given unless that fact is especially alleged in the indictment, even where the animal has the same appellation whether dead or alive.[136] Therefore, under an indictment for stealing "one peahen" and "one turkey," it cannot be shown that they were taken alive in another State and brought dead into the State where the charge was brought.[137] But where A. was indicted for receiving a lamb, and it was dead at the time he received it, the indictment was held sufficient under the circumstances, it being immaterial as to his offense whether it was then alive or dead, the offense and punishment being the same in either case.[138] If an animal *ferœ naturœ* be alleged as dead, but the proof shows it to have been alive when taken, the variance is fatal: there is no larceny.[139]

A statute making it larceny to steal a domestic animal

[133] State *v.* McLain, 2 Brev. (S. C.) 443.

See Shubrick *v.* State, 2 S. C. 21, where it was held that under an indictment for shooting a hog, evidence may be given of shooting a sow.

[134] State *v.* Godet, 7 Ired. L. (N. C.) 210.

[135] Reg. *v.* Strange, 1 Cox C. C. 58.

[136] Rex *v.* Edwards, Russ. & Ry. C. C. 497; Com. *v.* Beaman, 8 Gray (Mass.) 497. See State *v.* Jenkins, 6 Jones L. (N. C.) 19.

[137] Com. *v.* Beaman, supra. [138] Rex *v.* Puckering, 7 M. C. C. 242.

[139] Reg. *v.* Roe, 11 Cox C. C. 554.

means a living one and not a carcass, and where an animal is killed and carried away, the defendant can be convicted only where the killing as well as the carrying away was done with the intent to appropriate the body.[140] In an English case where it was held that "one ham of the value of . . . of the goods and chattels of . . ." was a sufficient description of the article stolen, it was said: "The doctrine respecting the description of animals in an indictment applies only to live animals, not to parts of the carcasses of animals when dead, such as a boar's head. Do you find in works on natural history that there is any living animal called a ham?" [141]

Possession of the animal is not alone *prima facie* evidence of guilt.[142] In a prosecution for stealing a particular horse, it was held that evidence could not be given that the defendant was associated with horse thieves and subsequently conspired to steal horses.[143] So, it was held that the State could not prove the possession by the accused of other cattle than those named in the indictment unless it were shown that they were taken at the same time and by the same persons, and that, if such testimony were admitted, it would be error to exclude evidence that the defendant had been tried for the theft of other cattle and acquitted.[144] Where persons steal two animals from two different herds having different owners, taking one about an hour after the other, the stealing of each animal was a complete and independent offense and an acquittal as to one is not an acquittal as to the other.[145] Evidence as to what became of the stolen animals after the defendant's arrest is inadmissible.[146]

[140] Hunt *v.* State, 55 Ala. 138. And see Peo. *v.* Smith, 112 Cal. 333.

[141] Patteson, J., in Reg. *v.* Gallears, 1 Den. C. C. 501.

[142] Schindler *v.* State, 15 Tex. App. 394; Pettigrew *v.* State, 12 id. 225; Alexander *v.* State, 60 Miss. 953. See Gomez *v.* State, 15 Tex. App. 64.

[143] Cheny *v.* State, 7 O. 222. As to the admissibility of the sayings and doings of an accomplice, see State *v.* Cole, 22 Kan. 474.

[144] Ivey *v.* State, 43 Tex. 425. And see State *v.* Labertew, 55 Kan. 674.

[145] State *v.* English, 14 Mont. 399.

[146] Clay *v.* State (Tex. Cr.), 51 S. W. Rep. 212.

In a trial for the larceny of a cow it was held not error to allow the hide sold by the defendant to be exhibited to the jury and pieces of the ears and dewlap found at the place of killing to be fitted to the hide in the jury's presence, this being done to identify the animal and show that the marks and brands had been mutilated.[147]

It is not necessary to prove by direct evidence that the animal was of some value. This may be shown inferentially.[148] In the absence of a market price for the animals, evidence of their actual value is admissible.[149]

59. Driving Animals from the Range.—Kindred to the crime of larceny is the statutory offense of driving animals from their accustomed range with felonious intent. It was formerly held in Texas that under an indictment for theft the defendant might be convicted of this offense.[150] But this rule was departed from in a later case, on the ground that the offense in question contains other elements than ordinary theft and requires a different character of proof.[151]

One who under the owner's instruction drives out of a pasture cattle owned by a third person that had been turned into the pasture without permission, is not guilty of "wilfully" driving them from their accustomed range, though the owner of the cattle owned acres enclosed by his own consent in the pasture without reserving to himself a right of pasturage.[152] The word "wilfully" in this connection means "with evil intent or without reasonable ground to believe that the act was lawful." [153] Where by one act the cattle of different persons

[147] State *v.* Crow, 107 Mo. 341. And see Ledbetter *v.* State, 35 Tex. Cr. 195.

[148] Houston *v.* State, 13 Ark. 66.

[149] State *v.* Walker (Mo.), 24 S. W. Rep. 1011.

[150] Foster *v.* State, 21 Tex. App. 80; Smith *v.* State, Ibid. 133; Campbell *v.* State, 22 id. 262.

[151] Long *v.* State (Tex. Cr.), 46 S. W. Rep. 821.

[152] Wells *v.* State (Tex. App.), 13 S. W. Rep. 889.

[153] Yoakum *v.* State, 21 Tex. App. 260; Mahle *v.* State (Tex. App.), 13 S. W. Rep. 999.

are driven from their range, the act may be prosecuted in one indictment.[154]

In an indictment for unlawfully driving cattle out of the country without inspection, it must be alleged that they were not the defendant's property and were driven without the owner's authority.[155] Where they are driven from a range it is not necessary to describe the range nor to allege how far they have been driven.[156] "The expression 'range' or 'accustomed range,' as used in the statute, is matter of local description and, unlike a generic term requiring the species to be stated, it admits of proof under the general allegation, without defining by averments the limits of the range." [157]

60. Altering Brands and Marks.—Another statutory offense similar to larceny is the altering of the brands or marks of animals with fraudulent intent. This intent is an essential ingredient:[158] the want of the owner's consent is not alone sufficient.[159] The intent and want of consent should both be alleged in the indictment;[160] and so should the ownership of the animal.[161] And a variance in the proof of ownership is fatal.[162] But an indictment will lie for unlawfully branding a colt whose owner is unknown.[163] And where the mother of the animal branded was milked by the defendant and went with his cattle for four years but the defendant always said she was an estray, a charge that the possession for four years made her the defendant's property was erroneous.[164] Mere

[154] Long *v.* State, 43 Tex. 467. [155] Heard *v.* State, 8 Tex. App. 466.
[156] Darnell *v.* State, 43 Tex. 147.
[157] State *v.* Thompson, 40 Tex. 515; Foster *v.* State, 21 Tex. App. 80.
[158] Morgan *v.* State, 13 Fla. 671; State *v.* Matthews, 20 Mo. 55.
[159] Fossett *v.* State, 11 Tex. App. 40; Montgomery *v.* State (Tex. App.), 13 S. W. Rep. 1000.
[160] State *v.* Hall, 27 Tex. 333.
In State *v.* Stelly, 48 La. Ann. 1478, it was held that an indictment for feloniously marking a hog need not allege the intent to steal nor whose or what the mark was.
[161] State *v.* Faucett, 15 Tex. 584. [162] Mayes *v.* State, 33 Tex. 340.
[163] State *v.* Haws, 41 Tex. 161.
[164] Reed *v.* State (Tex. Cr.), 22 S. W. Rep. 402.

declarations of the owner and others are not sufficient to show want of consent.[165]

In the indictment it is not necessary to set forth the original mark nor in what manner the alteration was made.[166] But where a particular method of alteration is alleged, it must be proved as averred.[167] Putting a different brand on an animal with intent to claim it, though without defacing the former brand, is a violation of the statute.[168] So an alteration may be effected by merely clipping the hair at the original brand so as to change it to a new one. "The questions are, was the act done with a fraudulent intent, and has the brand been changed or altered from what it was to another and different brand? . . . If so, it matters not by what means the alteration was effected; the offense is complete." [169]

Where the only evidence was that the lamb was found in an open wood with the mark of the owner changed to that of the defendant, the conviction was set aside.[170] The evidence must show the identity of the animals marked.[171]

Where the indictment alleged the horse to be the property of an *estate*, this was held bad.[172] So, where it simply charged the offense of *marking* a hog without using the statutory words "wilfully and knowingly." [173]

The subject of brands and marks as evidence of ownership has been already considered.[174]

61. Civil Remedies; Measure of Damages.—The usual civil actions may of course be brought in cases of unlawful deprivation or detention of animals, and the ordinary defences may

[165] West *v.* State, 32 Tex. 651.

[166] State *v.* O'Neal, 7 Ired. L. (N. C.) 251. And see State *v.* Stelly, supra.

[167] Davis *v.* State, 13 Tex. App. 215.

[168] Atzroth *v.* State, 10 Fla. 207; Linney *v.* State, 6 Tex. 1.

[169] Slaughter *v.* State, 7 Tex. App. 123.

[170] Dobson *v.* State, 67 Miss. 330. And see Mizell *v.* State, 38 Fla. 20.

[171] Peo. *v.* Swasey, 6 Utah 93. [172] Peo. *v.* Hall, 19 Cal. 425.

[173] State *v.* Roberts, 3 Brev. (S. C.) 139.

[174] See § 18, supra.

be pleaded. Where one drove from his own pasture into the highway another's cow and notified a field-driver to impound it, after the owner had failed to remove it on notice, the former was held not liable for the conversion.[175]

If the owner of a horse, which has been sold without authority by his bailee, forcibly enters the premises of the purchaser and takes the horse, he commits a trespass.[176] But, without a previous demand, he may bring an action against such a purchaser, though a *bona fide* one, for conversion.[177]

Where the plaintiff had only a possessory right to animals and they strayed voluntarily on the defendant's premises and the latter merely permitted them to remain there till they were carried off by soldiers, it was held that he was not liable in trespass for their taking and carrying away.[178]

A stranger's horses tied on the premises are not distrainable for rent, if in actual use at the time of the distress,[179] nor are animals of which no view has been had or which, after view, have gone out of the lord's fee, unless they have been driven out by the tenant.[180] And, under a law exempting certain property from forced sale in order to secure to each family a means of support, it was held that the words "two horses" would include geldings, mares or mules.[181] So the word "horse" in an exemption law has been held to include an ass[182] and an unbroken colt.[183]

The measure of damages where a horse or working animal is unlawfully taken and detained is not merely its value but the value of its use during the time of detention, when that exceeds legal interest.[184]

[175] Bonney *v.* Smith, 121 Mass. 155.

[176] Salisbury *v.* Green, 17 R. I. 758—wrongful taking from the owner's possession and fresh pursuit not being shown.

[177] Gilmore *v.* Newton, 9 Allen (Mass.) 171.

[178] Pope *v.* Cordell, 47 Mo. 251.

[179] Couch *v.* Crawford, 10 U. C. C. P. 491.

[180] Co. Litt. 161 a. [181] Allison *v.* Brookshire, 38 Tex. 199.

[182] Richardson *v.* Duncan, 2 Heisk. (Tenn.) 220.

[183] Hall *v.* Miller (Tex. Civ. App.), 51 S. W. Rep. 36.

[184] Hartley State Bank *v.* McCorkell (Ia.), 60 N. W. Rep. 197, where it

But the general rule that the plaintiff is confined to his legal interest is applicable to working animals where he had received them in pledge under an express contract to sell them and account for the proceeds, and the original owner had ceased to work them, and no longer intended to do so—the plaintiff having no absolute ownership nor any right to work the teams.[185]

Where the owner of horses attached had to hire others to do the work of those taken, in order to perform a previous contract, it was held that this expense might be recovered.[186] But, in an action of trespass for wrongfully carrying away the plaintiff's mule and mare while he was engaged in farming, it was held that damages resulting therefrom to his farming operations were too remote to be recovered.[187] In another case, it was held that the measure of damages for the seizure of exempt horses at a time when others could not be procured to cultivate crops, was the damage to the crop if that exceeded the value of their use, but, if others could have been procured, the measure of damages would be the value of their use during the time of detention, the court adding, "The last measure might not be the correct rule for a long period of detention." [188]

A *bona fide* purchaser of stolen animals sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counter-claim for the cost of

was said: "Cases are cited wherein it is held that the value of the property with interest was the measure of recovery. Such a rule would afford full compensation in instances where the use of which the party was deprived had no value, or its value did not exceed the interest allowed. In many cases, and especially where work animals were the subject of the controversy, a different rule has been applied."

See, also, Hutchinson *v.* Hutchinson, 102 Mich. 635; Allen *v.* Fox, 51 N. Y. 562; Williams *v.* Phelps, 16 Wis. 80; Farrar *v.* Eash, 6 Ind. App. 238.

[185] Johnson *v.* Bailey, 17 Colo. 59.

[186] State *v.* McKeon, 25 Mo. App. 667.

[187] Street *v.* Sinclair, 71 Ala. 110.

[188] Steel *v.* Metcalf, 4 Tex. Civ. App. 313.

their keep while they were in his possession, as they were his property until on the conviction the title revested in the original owner.[189]

Where, under an order of attachment, cattle were taken and removed from their accustomed range and placed in a herder's charge on a new range where there was little and poor grass and water, and, owing to the removal and inferior care, they failed to make the customary growth in weight, it was held that though they did not lose in weight, the failure to make the ordinary increase therein was a gain prevented, for which the owner was entitled to be compensated, if the attachment was wrongfully obtained. The court said: "Of course, absolute certainty is not attainable, as in casting up the figures of an account; but nevertheless there are certain laws of feeding and growth well understood among cattlemen and whose results work out with sufficient certainty for business calculations and judicial investigations. The raising of cattle for market has been an extensive and ofttimes profitable business in this State, and it would be strange if one could wrongfully take from the owner a herd of cattle, remove them to a poorer range, feed them on inferior food and so treat them that during the growing season they do not grow at all, and then at its end return them, saying, as did the unfaithful servant in the parable who returned the single talent without increase, 'Lo! there hast thou that is thine,' and still be under no liability to respond in damages to such owner. We do not think the law so deficient. It seems clear that the owner is damaged, that the damages may be determined to a reasonable certainty, and that the wrongdoer is bound to make good the damages." [190]

The effect of driving away and close herding cattle during the calving season may be testified to by an expert, and evidence is admissible as to the increase that year as compared

[189] Walker *v.* Matthews, 8 Q. B. D. 109.
[190] Hoge *v.* Norton, 22 Kan. 374.

with other years.[191] Where no injury has been done and the land to which animals are removed is superior to the other, the court has refused to reverse a judgment for the defendant.[192]

Under a statute making it unlawful to tear down a division fence except upon six months' notice, it was held that one damaged thereby might recover the value of his cattle that escaped and were not recovered after due diligence, but not of those alleged to have died during the ensuing winter months; and that he might also recover the reasonable expense of gathering and trying to gather the scattered cattle, and damages for the injury to his pasture and the consumption of grass by the defendant's cattle.[193]

[191] Proctor *v.* Irvin (Mont.), 57 Pac. Rep. 183.
[192] Hecht *v.* Harrison, 5 Wyo. 279.
[193] St. Louis Cattle Co. *v.* Gholson (Tex. Civ. App.), 30 S. W. Rep. 269.

TITLE III.

RIGHTS OF OWNERS OF ANIMALS.

CHAPTER III.

INJURIES TO ANIMALS ON HIGHWAYS.

62. Injuries resulting from accidental fright and a defect in the highway; the Massachusetts rule.
63. Exceptions to the above rule where the lack of control is but momentary.
64. The rule that the municipality is liable in such cases.
65. Where fright is caused by the defect.
66. Character of objects causing fright.
67. Injury from other causes.
68. Contributory negligence.
69. Evidence; damages.

62. Injuries Resulting from Accidental Fright and a Defect in the Highway; the Massachusetts Rule.—A very common element in injuries received by or through animals in public places is fright, making them, for a time at least, pass out of the control of those in charge of them and become factors in working their own harm or that of others.[1] Complicated questions of responsibility and of cause and effect naturally arise in such cases, and it is not surprising to find that decided differences of opinion exist as to the persons on whom the final liability rests. We shall consider, in the first place, the position of municipal corporations with respect to injuries sustained by reason of frightened animals coming in contact with a defect in a road, bridge, etc., where the fright is not

[1] For the liability of railway companies for injuries resulting from the fright of animals, see § 133, infra.

caused by such defect. As two distinct and irreconcilable rules have been laid down on this subject, it will be convenient to group together the decisions under each head according to States.

In Massachusetts it was said in an early case that "when the loss is the combined result of an accident and of the defect in the road and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet, if there be no fault or negligence on the part of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the town is liable. This doctrine in no respect conflicts with the well-settled rule requiring the plaintiff to use ordinary care and diligence, and that without showing this he cannot recover, though the road be defective and the damage be occasioned by the combined effect of a defective road and want of care and skill in avoiding the injury." [2] And in a later case it is said that the plaintiff must not only be driving with due care and skill but that he "must be using a proper horse and vehicle, with strong and suitable harness, and that, if there be any defect in any of these particulars, and such defect contributes to the disaster, the town is not liable, although the way be defective. The reason is, because it is impossible to know what proportion of the damage is occasioned by one and what by the other, or whether there would have been any damage at all but for the traveller's own default." [3]

These cases seem to hold that the plaintiff may recover, except where he is in some way negligent.[4] But in Davis *v.*

[2] Palmer *v.* Andover, 2 Cush. (Mass.) 600, 608.

[3] Murdock *v.* Warwick, 4 Gray (Mass.) 178.

[4] See Rowell *v.* Lowell, 7 Gray (Mass.) 102, where it is said: "We think the only exception to the rule that the plaintiff cannot recover unless the defect in the highway was the sole cause of the injury, must be one like that in Palmer *v.* Andover, where the contributing cause was a pure accident and one which common prudence and sagacity could not have foreseen and provided against."

Dudley[5] it was held broadly that where a horse, frightened by an accident, breaks away from his driver and escapes from all control and afterwards is injured by a defect in the highway, the town is not liable in damages unless the final accident would have happened even if the horse had been under control. The court distinguished Palmer *v.* Andover thus: "Here the accident and injury were not coincident, but were separate and produced by separate causes. The effect of the accident as a procuring cause was complete when the horse, frightened by the falling of the crossbar and thills upon his heels, became detached from the sleigh and had escaped from the control of the driver. The blind violence of the animal, acting without guidance or direction, became, in the course and order of incidents which ensued, the supervening and proximate cause of the injury inflicted by his running against the wood-pile, which constituted an unlawful obstruction and defect in the highway. In this succession of events, it happened that the accident placed the owner in a situation where it was out of his power to exercise the care over the horse while this new cause was in operation and until it had contributed to produce the disaster by which his leg was broken." This case has been followed in the later cases and undoubtedly lays down the law as it is at this day: the defect in the highway must have been the sole cause of the injury, in order for the plaintiff to recover.[6] Accordingly towns are not required to fence their roads with a view to prevent a frightened animal from escaping out of them. The essential fact where a railing is required is that there is some dangerous object outside upon which the traveller may come, if not sufficiently

[5] 4 Allen (Mass.) 557.

[6] See Titus *v.* Northbridge, 97 Mass. 258; Horton *v.* Taunton, Ibid. 266 n.; Babson *v.* Rockport, 101 id. 93; Wright *v.* Templeton, 132 id. 49; Fogg *v.* Nahant, 106 id. 278, where it is said: "If, without his fault or negligence on his part, his horses have escaped from his control, . . . and this condition of things is not produced by a defect in the way, the town is not responsible."

warned. The necessity of the railing "must be determined by the character of the place or object between which and the travelled road it is claimed that the barrier should be interposed." [7] And where a horse, driven along a private way toward a street at right angles to it, became uncontrollable so that the driver could not make him turn safely but drove him directly across the street and down an unfenced bank opposite, it was held that the want of a railing, even if it had been useful, was not the sole cause of the injury. "The uncontrollable condition of the horse contributed directly to it, and that condition arose outside of the limits of the highway and at such a distance from the place of the alleged defect that the city is not responsible." [8]

In Maine, a similar rule to that in Massachusetts prevails, and it is well established that where the animal is frightened by a cause for which the town is not responsible, no liability is incurred by his subsequent injury through a defect in the highway, where such injury would not otherwise have occurred.[9]

In Pennsylvania, where a horse was frightened at an object on a highway for the presence of which the township was not responsible and, turning suddenly, broke off a wheel and dragged and overturned the carriage on a stone heap at the roadside at a point where the roadway was not unsafe for ordinary travel, it was held that the township was not liable. The court said: "The township is not an insurer against all possible accidents, nor is it bound to anticipate the danger to which a broken wagon or a frightened horse may expose the driver. . . . It is necessary to inquire further whether the accident was the natural or probable result of any act or omis-

[7] Adams *v.* Natick, 13 Allen (Mass.) 429. And see Scannal *v.* Cambridge, 163 Mass. 91.

[8] Higgins *v.* Boston, 148 Mass. 484.

[9] Moore *v.* Abbot, 32 Me. 46; Farrar *v.* Greene, Ibid. 574; Coombs *v.* Topsham, 38 id. 204; Anderson *v.* Bath, 42 id. 346; Moulton *v.* Sanford, 51 id. 127; Perkins *v.* Fayette, 68 id. 152; Spaulding *v.* Winslow, 74 id. 528. Cf. Verrill *v.* Minot, 31 Me. 299.

sion of the township officers which rendered the highway unsafe for the purposes of travel, conducted in the ordinary means of conveyance. If it was, then the plaintiff ought to recover, and the fright of her horse, the breaking of her wagon, and her inability to guide her frightened animal should not stand in the way of her recovery." [10]

In another case it was held that where an injury was caused in part by the fright of a horse and in part by the negligence of the township supervisors, the township was liable.[11] But in a later case, this decision was overruled and it was held that where a horse fell and, in its struggle to regain its feet, went over a declivity where the city had neglected to erect a barrier, the fall was the proximate cause of the injury and the city was not liable.[12]

But the rule in Massachusetts and Maine was not clearly adopted till it was decided where a horse hitched to a vehicle took fright at a donkey drawing a cart loaded with tin cans and ran away, wrecking one of the wheels, which dragged upon the ground till it came to a hole negligently left upon the highway by the township, and the occupants were thrown out and injured—that the proximate cause of the injury was the horse's fright and, as that was not caused by any neglect of duty on the part of the authorities, the township was not liable. The court said: "The concurrence of that which is ordinary with a party's negligence does not relieve him from responsibility for the resultant injury. Examples of such concurrence may be found in cases where, by reason of causes known to the public authorities, horses are likely to become frightened and in their sudden fright plunge over an unguarded precipice or rush upon some danger within the highway for the existence of which the authorities are responsible.

[10] Jackson Tp. *v.* Wagner, 127 Pa. St. 184. And see Worrilow *v.* Upper Chichester Tp., 149 id. 40; Lehigh Co. *v.* Hoffort, 116 id. 119; Bishop *v.* Schuylkill (Pa.), 8 Atl. Rep. 449; Heister *v.* Fawn Tp., 189 Pa. St. 253.

[11] Wagner *v.* Jackson Tp., 133 Pa. St. 61.

[12] Herr *v.* Lebanon, 149 Pa. St. 222.

In such cases the consequences of the neglect of duty are natural and probable and ought therefore to be foreseen. But when, from extraordinary causes, for the existence of which the supervisors are not responsible and of which they cannot be presumed to have had notice, a driver loses control of his horses and they come in contact with a defect in the highway, there is no more reason for holding the township answerable for a resultant injury than there is for holding any other party responsible for the result of the concurrence of something which he could not foresee with his negligence. . . . The cases must be rare in which an injury can be said to be the result of the negligence of a party when there is another and primary efficient proximate cause, wholly independent of such negligence and for which the party charged with negligence is in no way responsible. In such cases it would be incumbent on the plaintiff to show that the accident would have happened without the concurrence of the primary efficient proximate cause." [13]

With reference to the degree of care that municipal authorities must exercise in order to avoid the consequences of the fright of animals, it was said in Lower Macungie Tp. *v.* Merkhoffer:[14] "It was not a defence to the township to show that by careful driving accident might have been avoided at the place in question. That would fall far short of what is the purpose of a public highway. It must be kept in such repair that even *skittish* animals may be employed without risk of danger on it, by reason of the condition of the road."

So, if a dangerous place is left unfenced and a horse in consequence of sudden fright goes over it, the municipality is liable,[15] and it is no defence that the injury was the combined

[13] Schaeffer *v.* Jackson Tp., 150 Pa. St. 145. See also Chartiers Tp. *v.* Phillips, 122 id. 601.

[14] 71 Pa. St. 276, 280. But see Trexler *v.* Greenwich Tp., 168 id. 214, where this statement is qualified and called "too broad."

[15] Hey *v.* Philadelphia, 81 Pa. St. 44; Newlin Tp. *v.* Davis, 77 id. 317; Pittston *v.* Hart, 89 id. 389; Wellman *v.* Susq. Depot, 167 id. 239; Plymouth Tp. *v.* Graver, 125 id. 24; Kitchen *v.* Union Tp., 171 id. 145;

effect of its own negligence and that of a third person.[16] The question of the municipality's negligence is one for the jury.[17] But where a frightened horse rushed into an unfenced pond it was held that under the circumstances the defendants were not liable, the court saying: "The precise limits of liability where the element of an unruly or frightened horse enters into the causes of an accident on a public highway, have been the subject of controversy and some difficulty. It is conceded that our cases hold the township authorities to a more exacting rule than obtains in some other States, but none of them go so far as to say that they must make the roads safe for runaway horses. . . . Apart from the fright of the horse, there was nothing to show any danger to travel from the existence of the pond and the absence of a fence between it and the road. It is in this respect that the present differs from the line of cases of which Plymouth Tp. *v.* Graver[18] . . . is the exemplar. There, as here, the roadbed was without defect, but it was along and immediately adjacent to the tracks of the railroad, where the passage of trains had a natural tendency to frighten horses. The road, therefore, as it existed, contained the elements of danger to ordinary travel; and this court held that it was the duty of the township to anticipate and provide against such danger. The element of danger to ordinary travel is wanting in the present case; and therefore the jury should have been instructed that there was no sufficient evidence on which to hold the defendants liable." [19]

So a pile of stones on a roadside will not render a borough liable for an injury to a person thrown upon them by the fall of a horse he is riding, where the fright of the horse is caused

Yoders *v.* Amwell Tp., 172 id. 447; Cage *v.* Franklin Tp., 8 Pa. Super. Ct. 89.

[16] Burrell Tp. *v.* Uncapher, 117 Pa. St. 353.

[17] Ewing *v.* Versailles Tp., 146 Pa. St. 309; Bitting *v.* Maxatawny Tp., 180 id. 357.

[18] 125 Pa. St. 24, cited supra.

[19] Horstick *v.* Dunkle, 145 Pa. St. 220, 229. And see Card *v.* Columbia Tp., 191 id. 254.

by the shooting of guns near the road and plenty of room has been left for travel on the highway, which is not shown to be either insufficient or defective. "The shooting was an extraordinary circumstance for which the borough was in no sense responsible and against the consequences of which they were not bound to take precautions." [20]

The decisions in Wisconsin seem to have gone through somewhat the same process of change as those in Massachusetts, which they profess to follow. In Dreher *v.* Fitchburg[21] it was held that an injury due in part to the breaking of an axle and in part to a defect in the highway was one for which a town was liable. The Maine cases are especially disapproved of, and those of Vermont and New Hampshire [to be considered later] followed. In Houfe *v.* Fulton[22] the principle laid down in Palmer *v.* Andover[23] was adopted, and it was held that where the plaintiff's horse suddenly stopped, staggered, fell sideways and went over the side of a bridge where there was no railing, the town was liable, there being no negligence on the plaintiff's part. The court said: "The question thus presented is by no means an easy one and, as naturally might be expected, there is clear conflict of authority upon it. It has undergone most thorough examination in the courts of several States where the statutes are in all material respects like our own, and with directly opposite results. In Maine it has been held in a series of decisions that the town is not liable under such circumstances. . . . In New Hampshire and Vermont a broader construction has been given to the statute in favor of the traveller, and a more extensive liability on the part of towns and cities been held to be created by it. . . . The principle of these decisions has been adopted by this court [citing Dreher *v.* Fitchburg, supra]. . . . In Massachusetts there seems to be some conflict of decision upon the point. . . . The only exception to the principles thus laid down, as yet to be found in the re-

[20] Kieffer *v.* Hummelstown, 151 Pa. St. 304.
[21] 22 Wis. 675. [22] 29 Wis. 296. [23] 2 Cush. (Mass.) 600, cited supra.

ported cases, is that above noted, where horses became unmanageable in the manner and for the cause stated; and in such cases it has been frequently decided that there can be no recovery against the town, although the plaintiff or the driver was in no fault. . . . Some of these cases seem to go upon the principle that the horse being actually uncontrollable, the plaintiff is unable to show the exercise of ordinary care or of any care at the time of the injury in order to avoid it. Others say that the flight or unmanageableness of the horses is the misfortune of the traveller, of which he must bear the loss. A better reason would seem to be, that it is not within the spirit or intent of the statute that the towns shall be bound to provide roads that shall be safe for frightened and runaway horses; that the remedy is presumed to have been given only to those who have their horses and carriages under their control at the time. But, whatever the true ground of such decisions may be, or whether they are sound or not, it is unnecessary to inquire here, since a recognized exception to them is, that a horse is not to be considered uncontrollable that merely shies or starts or is momentarily not controlled by his driver."

The exception last stated, within which the case may properly be considered as falling, is one that will be treated of in the next section. It is extremely doubtful, however, whether the *dictum* of the court as to the doctrine in Palmer *v.* Andover being still in full force in Massachusetts can be sustained, in view of the later cases in that State. It should be observed, however, that the court in Houfe *v.* Fulton refused in terms to decide the point whether the rule as to the nonliability of towns applied where a horse's flight or unmanageableness was not caused by a defect in the highway. This point, however, arose in Jackson *v.* Bellevieu,[24] and it was

[24] 30 Wis. 250. And see Schillinger *v.* Verona, 96 id. 456; Ritger *v.* Milwaukee, 99 id. 190; Johnson *v.* Superior (Wis.), 78 N. W. Rep. 1100.

As to evidence of the condition of a street, see Olson *v.* Luck (Wis.), 79 N. W. Rep. 29.

there held that if the horse was running away and uncontrollable at the time and that condition was not caused by a defect in the highway and the accident would not otherwise have occurred, the plaintiff could not recover. "The town is not liable because the owner or driver was in no situation to exercise ordinary care or prudence to prevent the injury at the time it happened, which proof is in all cases necessary in order to charge the town, unless the situation or disability of the driver in this respect is caused by the same or some other defect in the highway."

This rule was again laid down in Kelley *v.* Fond du Lac [25] where, however, under the circumstances the town was held liable, the plaintiff being obliged to deviate from the travelled part of a highway by reason of an obstruction therein and one of his frightened horses being killed by a defect outside of the travelled part, though it was held that ordinarily a town was not bound to keep its highways in a suitable condition for their entire width. Where a steep bank was left unguarded and a team ordinarily quiet became frightened and backed over it, the city was held liable, the loss of control being but momentary, on the principle announced in Houfe *v.* Fulton, supra.[26]

In West Virginia it was held that a county is liable in damages for an injury which is the combined result of the fright of a horse at a pile of rock beside the roadway and the failure of the county to provide a suitable guard rail along the approach to a bridge. After examining some of the cases above cited, the court say: "From these authorities the proposition is deduced that if sufficient time elapses between the fright of the horse and the accident to permit the driver, being a man of ordinary prudence, to make a proper effort to regain

[25] 31 Wis. 179. And where a buggy ran into a ditch across the highway, making the horses run away, and the plaintiff later was thrown out and injured, the ditch was held to be the proximate cause of the injury: Donohue *v.* Warren, 95 id. 367.

[26] Olson *v.* Chippewa Falls, 71 Wis. 558.

control of the frightened animal, even though he should fail, the county would not be liable for its negligence, as the injury must be attributed to the viciousness of the horse, rather than to the defect in the highway. But if no such time intervenes, but the fright and accident are concurrent events, then the county would be liable, for the very purpose of the law in requiring dangerous approaches to bridges to be protected by a sufficient railing is to guard against just such accidents, rendered unavoidable by reason of their suddenness." [27]

In an earlier case it was held that the frightening of horses by calves coming out of bushes was the proximate cause of an injury resulting to them, and not the narrowness of the road, where the accident might have happened if the road had not been narrow.[28]

The decisions in Maine, Pennsylvania and Wisconsin were approved of in a Colorado case.[29]

63. Exceptions to the Above Rule Where the Lack of Control is but Momentary.—An exception to the rule above given has been already suggested in the quotations from some of the opinions, viz.: that when an animal merely shies and starts and the lack of control is but momentary, it is not considered uncontrollable so as to relieve the municipality from liability if it is immediately injured by a defect in the highway.[30] This is the well-established rule in Massachusetts.[31] So, in Maine, where a well-broken horse shied at a bird in the bushes and jumping from the road fell through a defective part in a

[27] Rohrbough *v.* Barbour Co. Ct., 39 W. Va. 472.

[28] Smith *v.* Kanawha Co., 33 W. Va. 713.

[29] Farmers' High Line Canal & R. Co. *v.* Westlake, 23 Colo. 26.

See, also, the Michigan cases cited in § 64, infra, some of which seem to lean to the Massachusetts doctrine.

[30] See Houfe *v.* Fulton, Olson *v.* Chippewa Falls, Rohrbough *v.* Barbour Co. Ct., cited supra.

[31] Titus *v.* Northbridge, 97 Mass. 258; Horton *v.* Taunton, Ibid. 266 n.; Britton *v.* Cummington, 107 id. 347; Wright *v.* Templeton, 132 id. 49; Hinckley *v.* Somerset, 145 id. 326; Harris *v.* Great Barrington, 169 id. 271.

bridge, it was held that the shying was not the proximate cause of the injury and that the town was liable.[32] And in Wisconsin it was held that where one driving a team along a public street could not keep them from leaving the beaten track and turning into a ditch along the side thereof, the loss of control being but momentary, this was not negligence which would preclude his recovering.[33]

In New York, where the plaintiff drove his horse and cart on a pier belonging to the city which had become unsafe, and the horse was frightened by a rush of water seen through a hole and backed against the string-piece of the pier, which was decayed, and the horse and cart fell into the water and were lost, there being no evidence that the animal was unusually vicious or excitable, it was held that the fact of the fright did not preclude recovery and that the horse was not uncontrollable because it shied or was momentarily not under the driver's control, and, as the cause of the fright was occasioned by the defendant's negligence, the question was one for the jury.[34] Whether the court adopted the principle of Titus *v.* Northbridge was left undecided, but the later cases, to be considered in the next section, would seem to settle that question in the negative, as the Massachusetts case only establishes an exception to a rule which is not itself followed in New York.

64. The Rule that the Municipality is Liable in Such Cases.— The rule considered in the preceding sections is not, however, the one generally prevalent, and we shall now examine, by States, the decisions that lay down a contrary doctrine.

In New Hampshire the rule is that where an injury is caused in part by a defect in a highway and in part by such

[32] Aldrich *v.* Gorham, 77 Me. 287. And see Cleveland *v.* Bangor, 87 id. 259; Morsman *v.* Rockland, 91 id. 264.

[33] Hein *v.* Fairchild, 87 Wis. 258. And see Houfe *v.* Fulton, Olson *v.* Chippewa Falls, cited supra.

[34] Macauley *v.* City of New York, 67 N. Y. 602. And see to the same effect Kennedy *v.* Same, 73 id. 365.

an accident as could not have been prevented by ordinary care and prudence, the town is liable.[35] If the vices of the horse or a defect in the harness contributed, the plaintiff must show both that he did not know of them and also that he was in no fault in not so knowing.[36] He must also have been in the exercise of ordinary care in managing the team, which is such care as mankind in general, not such as persons of the same class as himself, are accustomed to exercise.[37] If, notwithstanding the horse's fright, the accident would not have happened but for the defect in the highway, the plaintiff may recover, if exercising due care: all these questions are for the jury.[38]

The same rule was laid down in an early Vermont case, where it was held that, notwithstanding the primary cause of the injury was the failure of a nut or bolt which was insufficiently or improperly fastened, the plaintiff might recover for the consequences of the defect in the road where he is himself guilty of no negligence. The court said: "In every case of damage occurring on the highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young or restive or too old or too headstrong, or the harness had not been defective or the carriage insufficient, no loss would have intervened. It is to guard against these constantly occurring accidents that towns are required to guard, in building highways. The traveller is not bound to see to it that his carriage and harness is always perfect, and his team of the most manageable character, and in the most perfect training, before he ventures upon the highway. If he could be always sure of all this, he would not require any further guaranty of his safety, unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to

[35] Norris *v.* Litchfield, 35 N. H. 271; Clark *v.* Barrington, 41 id. 44.
[36] Winship *v.* Enfield, 42 N. H. 197.
[37] Tucker *v.* Henniker, 41 N. H. 317.
[38] Stark *v.* Lancaster, 57 N. H. 88.

the insufficiency of the road, combined with some accidental cause, the defendants are liable." [39]

And in a somewhat similar case it is said: "Very good reasons could be given that a traveller who ventures upon the highway with an unsafe horse, a defective carriage or harness, takes *that* risk upon himself; and if he thereby suffers injury, though innocent, it is his *misfortune*, which he cannot cast upon the town. Such is the well-established rule in Massachusetts [citing Murdock *v.* Warwick[40]]. . . . But there has been a long and unbroken line of decisions in this State that 'if the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants are liable,' . . . or, as was comprehensively stated in Kelsey *v.* Glover[41] . . .: 'It has long been considered and repeatedly adjudged that a duty does exist which binds the town or corporation to provide reasonable security in reference to such accidents as may be expected to happen.' " [42]

But where horses became frightened and ran into a hole in ice near the highway, negligently left unguarded, and were drowned, it was held that their owner, though free from negligence, could not recover from one whose duty it was to place a guard around the hole, if the horses' speed was so great that a guard would not have prevented the accident.[43]

In Connecticut, where a horse, frightened by the breaking of a carriage owing to a defect for which the plaintiff was not responsible, ran away and fell over the side of a bridge by reason of a defect in the railing, it was held that the turnpike company was liable, following the Vermont cases and dissenting from those of Maine and Massachusetts.[44] And in a similar case it was held not to be a decisive fact against the right to recover, that the horses at the time they were

[39] Hunt *v.* Pownal, 9 Vt. 411. And see Kelsey *v.* Glover, 15 id. 708; Allen *v.* Hancock, 16 id. 230.

[40] 4 Gray (Mass.) 178, cited in § 62, supra. [41] Cited supra.

[42] Hodge *v.* Bennington, 43 Vt. 450. [43] Sowles *v.* Moore, 65 Vt. 322.

[44] Baldwin *v.* Greenwoods Turnp. Co., 40 Conn. 238.

frightened were hitched outside of the highway upon the owner's premises and broke loose and ran along the highway to the bridge.[45]

In New York it was decided in Ring *v.* Cohoes[46] that, though a municipal corporation is not bound to keep a street in such a condition that damage may not be caused to runaway horses, yet where the injury would not have been sustained but for a defect in the highway and the driver has not been at fault, the fact that the horse was at the time beyond control is no defence. The rule in Massachusetts, Maine, and Wisconsin is expressly dissented from and that in Vermont, New Hampshire and Connecticut followed. In another case it was held that a barricade built while a bridge was being repaired need not serve as a barrier against a runaway horse.[47] And where a road thirty feet wide was in good condition and had a sidewalk ten feet wide, beyond which was an unfenced bank twelve feet deep and no accident had happened in twelve years and the plaintiff's horse, frightened by a bicycle, went over the bank, injuring the plaintiff, it was held that the failure to build a railing was not negligence. "This was one of that class of accidents whose occurrence is so rare, unexpected and unforeseen, that to hold the city responsible for a failure to guard against it, is to hold it to a most extensive liability and to cause it to become substantially an insurer against any accident which human care, skill or foresight could prevent." [48]

The decision in Ring *v.* Cohoes, supra, has been followed in the later cases.[49]

[45] Ward *v.* North Haven, 43 Conn. 148. [46] 77 N. Y. 83.

[47] Lane *v.* Wheeler, 35 Hun (N. Y.) 606. And see Stacy *v.* Phelps, 47 id. 54, where it is said: "The warning required to protect the traveller was not necessarily such as would stop a runaway team of horses and save them from injury."

[48] Hubbell *v.* Yonkers, 104 N. Y. 434.

[49] See Ivory *v.* Deer Park, 116 N. Y. 476; Wood *v.* Gilboa, 76 Hun (N. Y.) 175; Roblee *v.* Indian Lake, 11 N. Y. App. Div. 435.

That a defect in the harness of which the plaintiff was ignorant is no defence, see Putnam *v.* N. Y. Cent. & H. R. R. Co., 47 Hun (N. Y.) 439.

In Georgia the negligent failure to put rails at the side of a street or bridge renders the city liable as against one whose horses are at the time frightened and running away.[50]

In Iowa an action against the city may be maintained for a defect in the highway, though the primary cause is an accident, as the running away of a horse, the breaking of a carriage, harness, etc., if the plaintiff was not at fault.[51] But where the plaintiff securely tied his horse to a post on a street running along a precipitous ravine which was unfenced and the horse, becoming frightened, broke loose, ran along the street and plunged down the precipice, it was held that the city was not liable.[52]

In a later case Moss *v.* Burlington, supra, was thus commented on: "In that case the horse was not being driven by the owner, so that if it were possible he could have controlled it and directed its course. He had left it tied to a post. The city was not liable for the insufficient fastening of the horse, or for its escape through fright from sufficient fastenings. The plaintiff's injury was caused by the escape of the horse. After it escaped it was free to go anywhere. In the case before us, plaintiff was attempting to exercise control of his horse. Had there been no defect in the street, the accident would not have happened." The city was accordingly held liable.[53] So, if a horse backs off of the approach to a bridge where ordinary care required a railing to be placed.[54]

In Indiana it was held in Crawfordsville *v.* Smith,[55] adopt-

[50] Atlanta *v.* Wilson, 59 Ga. 544; Wilson *v.* Atlanta, 60 id. 473; Augusta *v.* Hudson, 94 id. 135, disapproving of Brown *v.* Laurens Co., 38 S. C. 282, cited in § 65, infra.

[51] Manderschid *v.* Dubuque, 25 Ia. 108, expressly disapproving of Davis *v.* Dudley, 4 Allen (Mass.) 557, cited in § 62, supra.

[52] Moss *v.* Burlington, 60 Ia. 438.

[53] Byerly *v.* Anamosa, 79 Ia. 204.

[54] Miller *v.* Boone Co., 95 Ia. 5, distinguishing McClain *v.* Garden Grove, 83 id. 235, where the horse's falling against a rail which gave way was caused by disease or his being improperly harnessed. And see Gould *v.* Schermer, 101 id. 582; Faulk *v.* Iowa County, 103 id. 442.

[55] 79 Ind. 308.

ing the rule in the above cases, that where the driver exercises due care he may recover for an injury received by his frightened horse through a defect in the highway. The rule in Massachusetts and Maine was said to "rest upon peculiar statutory provisions," which proposition, however, it would be difficult to support.

So, one injured by her horse being frightened by a hog under a bridge and backing off where there was no railing is not deprived of her right to recover by the fact that she had opportunity for knowing what the condition of the bridge was and might have avoided it by going out of her way. "As neither party was to blame for the fright of the horse, and as the appellant was alone to blame for the defect in the bridge, it is quite evident that the appellant cannot escape responsibility." [56] And in a similar case it was said: "It is not unusual nor unnatural for horses upon bridges to shy or start. . . . It cannot be overlooked in considering whether in a given case the bridge should be supplied with a railing." [57] Where the plaintiff had safely crossed a bridge and the horse, becoming frightened, backed the buggy on it again and over the side where there was no railing, the county was held liable.[58] The general rule as to the liability of municipalities for injuries resulting from fright and a defect in the road was re-asserted in the late case of Fowler *v.* Linquist.[59]

In Illinois, where the injury was caused by the horses running away and the wheel of the wagon going into a hole, the city was held liable, and it was also said that if a sidewalk is used both by vehicles and foot-passengers, the municipality must keep it safe for both classes of travellers.[60] But a village is not liable where a runaway team strikes a stone placed

[56] Boone Co. Commrs. *v.* Mutchler, 137 Ind. 140.

[57] Sullivan Co. *v.* Sisson, 2 Ind. App. 311.

[58] Parke Co. Commrs. *v.* Sappenfield, 6 Ind. App. 577. And see Eads *v.* Marshall (Tex. Civ. App.), 29 S. W. Rep. 170, cited infra.

[59] 138 Ind. 566. And see Mount Vernon *v.* Hoehn (Ind. App.), 53 N. E. Rep. 654.

[60] Lacon *v.* Page, 48 Ill. 499.

at a street corner to protect a sidewalk, where the stone does not interfere with reasonable travel on the street.[61] In Joliet *v.* Shufeldt [62] the rule in Massachusetts, Maine and Wisconsin was expressly dissented from, and it was held that the city is liable though the accident would not have happened if the harness had not broken and the horse run away. But where a runaway team frightened a horse hitched to a post set up by the city and the horse broke the post and ran against and injured a person in the street, the injury was held too remote to render the city liable. "If there may be supposed to be any duty resting upon the city in regard to the sufficiency of the posts, as arising from having undertaken to set them, there could be no such duty to see that absolutely safe posts were set." [63]

In Kansas the general rule adopted in the above cases was followed and a city was held liable for an injury to a horse running away without the driver's fault.[64]

In Kentucky the exact point does not appear to have arisen. Where a road ran along a steep embankment and the plaintiff's horse shied and fell down the bank, which was unfenced, the turnpike company was held liable, whether or not the plaintiff knew of the condition of the road.[65]

In Maryland the plaintiff's recovery is not affected by the fact that his horses were frightened or running away at the time. "To make a road safe, the track must be wide enough to allow for the possible shying and starting of teams, without danger to those travelling with them of being thrown over embankments or against obstacles in or along the road." [66]

[61] Bureau Junction *v.* Long, 56 Ill. App. 458.

[62] 144 Ill. 403, affirming 42 Ill. App. 208. [63] Rockford *v.* Tripp, 83 Ill. 247.

[64] Union St. R. Co. *v.* Stone, 54 Kan. 83. And see Topeka *v.* Hempstead, 58 id. 328.

[65] Southworth *v.* Owenton & S. G. Turnp. Co., 91 Ky. 485. And see Henderson & C. Gravel-Road Co. *v.* Cosby (Ky.), 44 S. W. Rep. 639; Canton, C. & H. Turnp. Co. *v.* McIntire (Ky.), 48 id. 980.

[66] Balt. & H. Turnp. Co. *v.* Bateman, 68 Md. 389. And see Kennedy *v.* Cecil Co. Commrs., 69 id. 65.

In Michigan, where a horse shied at an object by the road and the wagon struck a log, but there was no evidence that the horse was running away or uncontrolled, the court below charged that if the cause of the injury was not the want of repair in the highway but the fright of the horse, the plaintiff could not recover. This was held to be too favorable to the defendant, as it could not be said as matter of law that the mere shying of the horse and not the obstruction in the highway was the proximate cause of the injury.[67] But where a horse hitched in front of a shop was frightened by the fall of a window-sash and ran down the street and was injured by a pile of iron rails against the curb, the street being one hundred feet wide, it was held that the fright of the horse and not the piling of the rails was the proximate cause of the injury.[68] In a later case the rule is said to be that "if there be no fault on the part of the plaintiff, and the loss be the combined result of accident and the insufficiency of the road, the plaintiff may recover." [69]

Where the backing of a horse off a bridge was not caused by the defective condition of the bridge, it was held immaterial whether the railing of the bridge was sufficiently strong or not.[70]

In Minnesota, where a horse frightened by a street car ran away and the driver was injured by collision with a dangerous

[67] Langworthy *v.* Green Tp., 95 Mich. 93. And see Gage *v.* Pontiac, O. & N. R. Co., 105 id. 335, where the company was held liable though the horse's shying contributed to the accident.

[68] Bleil *v.* Detroit St. R. Co., 98 Mich. 228, approving of some of the cases cited in § 62, supra. And see Lambeck *v.* Grand Rapids & I. R. Co., 106 id. 512; Murphy *v.* Mich. Cent. R. Co., 107 id. 627; Doak *v.* Saginaw Tp. (Mich.), 78 N. W. Rep. 883.

[69] Shaw *v.* Saline Tp., 113 Mich. 342, following Gage *v.* Pontiac, O. & N. R. Co., supra.

[70] St. Clair Mineral Springs Co. *v.* St. Clair, 96 Mich. 463. And see Kingsley *v.* Bloomingdale Tp., 109 id. 340; White *v.* Riley, 113 id. 295; Bratfisch *v.* Mason Tp. (Mich.), 79 N. W. Rep. 576.

The approach to a bridge constitutes a part of such bridge: Shaw *v.* Saline Tp., supra.

obstruction in the street, it was held that the obstruction was the proximate cause of the injury, the court saying: "Where several concurring acts or conditions of things—one of them the wrongful act or omission of the defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission." [71]

In Missouri the rule in New Hampshire is followed and the municipality is liable for an injury produced by a defect in the highway and some accidental cause.[72] This was held to be the case where one, to avoid the kick of a mule, fell into an excavation and was injured.[73] But where a road was wide and good enough for persons in the exercise of ordinary care, it was held that the fact of a gully into which a runaway team falls being outside of the travelled part, would not make the city liable. "It would certainly be a most unreasonable demand to require the corporate authorities of a city not only to provide safe and commodious streets for all ordinary purposes of travel, but to provide thoroughfares of such ample dimensions and such matchless grade that accidents, even from runaway teams, would be absolute impossibilities." [74]

In North Carolina, where a frightened horse ran into an obstruction and the plaintiff was injured, it was held that the obstruction and not the running of the horse was the proximate cause of the injury.[75]

In Texas a plaintiff may recover where his horse, accidentally frightened, backs off a bridge insufficiently fenced,[76]

[71] Campbell *v.* Stillwater, 32 Minn. 308.

[72] Hull *v.* Kansas City, 54 Mo. 598; Vogelgesang *v.* St. Louis, 139 id. 127—where the fright was momentary.

[73] Bassett *v.* St. Joseph, 53 Mo. 290.

[74] Brown *v.* Glasgow, 57 Mo. 156, approving of Titus *v.* Northbridge, 97 Mass. 258, cited in § 62, supra.

[75] Dillon *v.* Raleigh (N. C.), 32 S. E. Rep. 548.

[76] Baldridge & C. Bridge Co. *v.* Cartrett, 75 Tex. 628.

even though it had crossed in safety before becoming frightened.[77]

In Washington, where a horse was frightened at bicycles and backed off of a planking in a street where there was no guard-rail, the city was held liable on the ground that "streets must be so constructed that the ordinary horse with the ordinary disposition, allowing for the ordinary incidents of caprice or fright, can be driven with reasonable safety on them."[78] But where a bridge was in a reasonably safe condition, the fact that a runaway team of horses dashed over the side at a point where there was no guard rail was held not to render the city liable.[79]

In Upper Canada, where a horse shied at new planks in a bridge and backed to the end of it and the hind wheels of the buggy went over an unfenced bank, resulting in injury to the plaintiff's wife, it was held that the want of a fence was the proximate cause of the injury and that the township was liable.[80] And where the plaintiff with a wagon and a load of bricks was coming down hill and his horses ran away and went down a precipice through an opening in a fence, it was held that the mere fact of their running away and becoming unmanageable would not prevent the plaintiff's recovering if he had not been guilty of a want of reasonable care or skill. The rule in New Hampshire was adopted as against that established in Maine and Massachusetts.[81] In a later case it was held that, where runaway horses caused an injury by running into a large stump in the highway, the municipality was not liable, as the road, notwithstanding the stump, was in a reasonable state of repair. "Repair," in the statute, was

[77] Eads *v.* Marshall (Tex. Civ. App.), 29 S. W. Rep. 170. And see Parke Co. Commrs. *v.* Sappenfield, 6 Ind. App. 577, cited supra.

[78] White *v.* Ballard, 19 Wash. 284.

[79] Teater *v.* Seattle, 10 Wash. 327. The court said: "The city is not an insurer of the safety of its streets, but is only required to keep them in a safe condition for ordinary travel."

[80] Toms *v.* Whitby, 35 U. C. Q. B. 195; 37 id. 100.

[81] Sherwood *v.* Hamilton, 37 U. C. Q. B. 410.

said to be a relative term, and it was held that the road need not be kept so as to guard against injuries by runaway horses: it was sufficient if it were kept in a reasonable state of repair for ordinary travel. The court intimated that if it had not been for the case of Sherwood *v.* Hamilton, cited supra, it would have held the running away to have been the proximate cause of the injury, even if the road had not been in a reasonable state of repair.[82] The Court of Appeal, however, reversed this decision and held that a highway in which such a stump stood was out of repair and that, where horses were running away with no fault of the driver, he was entitled to recover damages under such circumstances, nor would the contributory negligence of the driver be an answer in an action brought for injuries to the occupant of a carriage who had in good faith entrusted himself to the driver's care.[83] A telephone pole in the highway has also been held to be an obstruction and, where runaway horses came into contact with it, the city was held liable.[84]

In a Federal case, also, it was held that where a municipality permits the erection of a telephone pole which is a dangerous obstruction in the highway, it, as well as the telephone company, is liable for an injury to one driving a gentle horse which had become unmanageable from fright, but that the company was not liable if a third person unhitched the horse, which ran away and struck the pole.[85] And a street railway company leaving snow in the street in masses, is responsible for resulting injuries to a traveller whose horse became frightened owing to some other cause.[86]

And see Price *v.* Cataraqui Bridge Co., 35 id. 314, where a bridge company was held not liable as the action should have been brought against lessees covenanting to work the drawbridge.

[82] Foley *v.* East Flamborough Tp., 29 Ont. 139.

[83] Same *v.* Same, 35 Can. L. Jour. 167.

[84] Atkinson *v.* Chatham, 29 Ont. 518.

[85] Wolfe *v.* Erie Teleg. & Teleph. Co., 33 Fed. Rep. 320. And see Lundeen *v.* Livingston Elec. Light Co., 17 Mont. 32.

[86] McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. Rep. 104.

The rule considered in the present section would, therefore, appear to have the weight of authority on its side. As a matter of public policy, moreover, it is to the advantage of the community that municipalities should be compelled to provide good and safe roads and bridges rather than escape from such liability for a reason connected with the well-known habits of animals that ought to be taken into account in constructing and repairing highways over which they are to travel. As a question of the law of Negligence, too, it seems reasonable, as was said in Boone Co. Commrs. *v.* Mutchler,[87] that as in these cases neither party is to blame for the animal's fright and the municipality is alone to blame for the defect, the latter should not escape responsibility for the resulting injury.

65. Where Fright is Caused by the Defect.—Whatever doubt there may be as to municipal liability in cases where the fright is purely accidental, there would naturally seem to be none where the fright itself is produced by the defect in the highway. Nevertheless, even here, there is not entire unanimity of opinion.

In Massachusetts, for example, the rule appears to be that the town is no case liable for the consequences of the fright of animals caused by a defect in the highway unless the animal comes into actual contact with the defect, and then only for an injury immediately resulting, without any escape from the driver's control.[88]

In Marble *v.* Worcester,[89] by reason of a defect in the highway, a sleigh was turned over, the driver thrown out, the horse became frightened, broke away from the driver's control, ran through an adjacent street for a distance of fifty rods and there struck and injured a person travelling on the highway and using all due care. It was held that the city was

[87] 137 Ind. 140, cited supra. [88] See 15 L. R. A. 368 n.
[89] 4 Gray (Mass.) 305.

not responsible for the injury because the defect in the way was its remote, not its proximate, cause.

In Keith *v.* Easton[90] a large vehicle used as a daguerreau saloon, standing partly within the limits of the highway but several feet from the travelled path, was held not to be a defect by reason of which a traveller could recover damages for an injury resulting from his horse's fright. The court said: "In no case has it been held that an object existing within the limits of a highway, but leaving the travelled part unobstructed, so that the traveller is safe from all collision with it, is a defect in the way merely because it exposes the traveller's horse to become frightened by the sight of it, either at rest or in motion, or by sounds or smells that may issue from it. . . . The discussion of the present case suggested many other illustrations. Cattle or horses running at large might frighten the traveller's horse; the sight of flags displayed, or a window curtain fluttering in the wind over the street through a raised window; the goods displayed in front of shops; the numberless operations of business and amusement constantly carried on in our cities and villages within the limits of the highway; the gatherings at agricultural fairs, military trainings and other public occasions, may any or all of them tend to frighten many passing horses; yet it would be a novel doctrine to hold that highway surveyors may interfere in such cases under their authority to repair highways, or that the attributes of a way include them because they may frighten horses."

Nor does the fact that the object causing the fright is in the travelled path make the town liable, as, for example, gravel left in a road;[91] or a dead horse;[92] or a bright stone

[90] 2 Allen (Mass.) 552. Judge Redfield says of this case in 8 Am. L. Reg. N. S. 81 n.: "The decision may be sound but we should have deemed it a case of such doubt as to be submitted to a jury, as was done in the principal case [Morse *v.* Richmond, 41 Vt. 435, cited infra]."

[91] Kingsbury *v.* Dedham, 13 Allen (Mass.) 187.

[92] Cook *v.* Charlestown , 13 Allen (Mass.) 190 n.

with which the horse does not come into contact;[93] or a stone against which the wheel scrapes, making a noise.[94] "It is well settled in this Commonwealth that cities and towns are not liable for injuries caused by the fright of horses from objects in the highway, even if the object is one that would be ever so likely to frighten horses. Can it make any difference whether the fright is from sight or sound? In general and on principle, we think the answer should unhesitatingly be, No." The question as to whether the scraping was the proximate cause of the injury was, however, held to be for the jury.[95]

Nor is the fact that the horse would have come into contact with the object if he had not been frightened, a material one. On a second hearing of Cook *v.* Charlestown, supra, it was said: "The bill of exceptions now presented contains but one statement of fact which distinguishes the case from that which was before us upon the exceptions taken at the previous trial. . . . That fact is that when the plaintiff's horse was frightened at the dead horse in the street and ran away, he was going directly upon it, was within a few feet of it and would have gone upon it if he had not sprung to one side. This does not, in our opinion, change the aspect of the case materially. . . . Nor can it make any difference that the object which frightened the horse is one which would have been an obstruction and defect in the way if he had come in contact with it. It is not its quality as an obstruction which causes the injury complained of, but its quality as an object of terror to the horse. There is nothing to show that the horse was more frightened than he would have been if it had lain close beside his path, instead of directly in it." [96]

Where a gentle horse is obliged to step aside by reason of an object in the highway, the town is liable for the resulting injury—not where he shies as the consequence of a vicious

[93] Cook *v.* Montague, 115 Mass. 571.
[94] Bowes *v.* Boston, 155 Mass. 344. [95] Ibid.
[96] 98 Mass. 80.

habit.[97] And where a trough causes a horse to shy and drive a carriage into a defect in the highway, without the driver's fault, the town may be liable. "The jury would be justified in finding that the plaintiff's loss of the control of his horse was momentary or partial." [98] But where a horse, frightened by an object in the highway, sprang aside and was injured by collision with a carriage driven on the proper side, the town was held not liable, although beyond that carriage was a ridge which was a defect in the highway and prevented the carriage from being driven further off—the court saying that as the carriage "could have been driven rightfully where it was driven, it may also be that if the road had been in no degree narrowed by the ridge, the accident would still have occurred."[99] Where a horse was frightened by a defect in a highway and the driver turned him towards a bank and he ran into a post outside of the highway and the plaintiff was injured, it was held correct to charge that, if the horse's vice caused his running away, the plaintiff could not recover, though the vice was unknown to him and he used reasonable care.[100]

In Michigan, where a horse was frightened at a stone dug out of the roadbed and lying outside of the travelled portion of the highway and upset the buggy, the stone having been left till it could be removed by one who had asked for and obtained it for building purposes, it was held that the town was not liable, as the statutory provision applied only where the want of repair of the highway was the immediate cause of the injury and did not prohibit allowing things which form no part of it to stand in it temporarily. "But if it is admitted, and the court below allowed the jury so to assume, that a city is liable for leaving or allowing in its streets that which is dangerous by reason of its tendency to frighten passing teams,

[97] Stone *v.* Hubbardston, 100 Mass. 49.
[98] Cushing *v.* Bedford, 125 Mass. 526.
[99] Bemis *v.* Arlington, 114 Mass. 507.
[100] Brooks *v.* Acton, 117 Mass. 204.

the question arises how far this record presents such a case. It will not do to apply any far-fetched and unreasonable rule in such cases. . . . It is customary in all towns to allow ditches to be dug and building materials of all kinds and colors to be piled up and kept for considerable periods in the body of the street. . . . The use of streets for such purposes is too common to justify the owners of horses to assume it will not be allowed, and they should be prepared to guard against their animals' freaks and fears of such ordinary appearances." [101]

Where a horse took fright at a log at the side of a narrow road and, when struck with a whip, jumped down a bank, it was held that the proximate cause of the injury was not the narrowness of the way and that the township was not liable.[102] But it is otherwise where the object at which the horse takes fright is a defect in the travelled part of the road.[103]

Where a bridge was without railings so that the horses could see the water and one of them became frightened and backed off, the court below directed a verdict for the defendant on the ground that the want of barriers was not the proximate cause of the loss. This was held to be erroneous, as the question of proximate cause was for the jury. The question of the city's negligence depended on whether it was reasonable to suppose horses of ordinary gentleness would take fright and back and whether ordinary care would have dictated placing barriers in consequence.[104]

In Maine, it was held in an early case that where a horse was frightened by the appearance of an ordinary repair of the highway, the town was not liable. "It is not to be expected

[101] Agnew *v.* Corunna, 55 Mich. 428.

[102] Beall *v.* Athens Tp., 81 Mich. 536. So, a city is not liable for injuries resulting from the fright of a horse at a trench being excavated for the purpose of laying water-pipes; it is not bound, where sufficient room to pass is left, to close the street or erect barriers along the trench during the daytime: O'Rourke *v.* Monroe, 98 id. 520.

[103] Simons *v.* Casco Tp., 105 Mich. 588.

[104] Ross *v.* Ionia Tp., 104 Mich. 320.

that the aspect of the road would not undergo a change by filling a hole and rendering the place where it was, safe as a carriage road, so as to occasion no danger. It would probably be impossible to find materials and so place them that the spot should appear precisely as it did before the defect existed, but if repaired in the usual manner, so that the appearance was not unlike roads when similar injuries were repaired, the town could not be liable therefor on an indictment and consequently not to an individual for an injury received." [105]

So, where a horse was frightened at blocks of granite on a road, procured for the purpose of repairing and left there but a few hours, the town was held not liable.[106] And mere knowledge that there is an obstruction, such as a boiler, in a road will not make the inhabitants of a town liable: they must know that it is unnecessarily and illegally there.[107] If a defect in a highway causes such a breaking of a safe vehicle that a well-broken horse is naturally frightened beyond the control of a reasonably careful driver and the horse falls while running down a steep hill and the plaintiff is thrown out and injured, the jury may find the defect to be the sole cause of the accident. The horse's fall "cannot be reckoned as a contributory cause. It is as much a natural and direct consequence as the fall of the plaintiff herself from the wagon. It is part of the accident caused by the defect." [108] And where a wagon was loosely loaded with barrels and passed over boards negligently laid in the street, thereby frightening the horse, it was held that the accident to the driver was a result to be reasonably expected from the misconduct of the person putting the boards in the way.[109]

But, as opposed to the Massachusetts rule, where the object of fright is situated within and is *per se* a defect upon the trav-

[105] Merrill *v.* Hampden, 26 Me. 234. [106] Farrell *v.* Oldtown, 69 Me. 72.
[107] Bartlett *v.* Kittery, 68 Me. 358.
[108] Willey *v.* Belfast, 61 Me. 569. And see Clark *v.* Lebanon, 63 id. 393.
[109] Lake *v.* Milliken, 62 Me. 240.

elled portion of the highway, the traveller may recover without having come into contact with it. If the plaintiff were dismounting to prevent upsetting while the horse was restless from fright, the defect in the way would be the proximate cause of her injury, but if the horse was manageable and the plaintiff was dismounting to lead him by the defect, when he started up and threw her down, the defect would not be such proximate cause.[110] But a tree on a wagon left standing in a road temporarily is not an "obstruction left" on the highway, at which if a horse is frightened the town is rendered liable.[111]

In Pennsylvania, where damages resulted from a horse being frightened at a stone along the highway, it was held that whether this would frighten an ordinarily quiet horse was a question for the jury, and that the plaintiffs need not show affirmatively that their negligence did not contribute to the injury, as this was a matter of defence.[112] But where horses struck an ash-heap on a road, were frightened, ran away and were killed by a train, the negligence in leaving the ash-heap in the road was held to be the remote, not the proximate, cause of the injury.[113]

Where the plaintiff's horse was frightened at a pile of lumber at the side of the road, the township having notice thereof, it was held that he could recover against the latter, though he might have sued the person who deposited the lumber. "The fright of a horse may, perhaps, as often be attributable to the place in which an object is unexpectedly found as to the frightful appearance of the object itself; still there are ob-

[110] Card *v.* Ellsworth, 65 Me. 547. And see the comments on this case in Nichols *v.* Athens, 66 id. 402, where it is said: "Whether a recovery can be had where the fright is caused by an object outside of the travelled road, but within its located limits and, if so, to what extent and under what limitations and conditions, we are disposed to regard as questions not yet judicially decided in this State."

[111] Davis *v.* Bangor, 42 Me. 522.

[112] Mallory *v.* Griffey, 85 Pa. St. 275. And see Potter *v.* Natural Gas Co., 183 id. 575.

[113] West Mahanoy Tp. *v.* Watson, 116 Pa. St. 344.

jects which are well known to present such an appearance as may be expected to, and naturally will, alarm ordinarily well broken and roadworthy horses, and it is the duty of supervisors of highways to remove all such impediments to safe travel. It makes no difference that the lumber was not in the travelled route; the fact that it was piled upon the margin instead of the path of the highway, does not alter the rule of liability, for the result produced in either event is that the travelled route is thereby rendered unsafe. It is the duty of road officers to forbid and prevent the use of the roadside as a place of deposit for private property, particularly if it be of a character to alarm or frighten ordinary horses." It was also held proper, as affecting the question of notice, to admit evidence showing that lumber was often piled at that place, as it was the duty of the township to know that fact and interfere.[114] Some other important Pennsylvania cases belong more properly to the next section, where they will be considered.

In New York a city was held not liable for the shying of a horse caused by a boulder of great size left in its natural place with the road around it, as its removal would have been difficult and the town officers used their discretion in determining to avoid rather than remove it. To make the town liable, the character of the object should be such as to make the frightening of horses an obvious result.[115] But a turnpike company was held liable for frightening horses by means of a pile of stones placed by the travelled part of the road for making repairs, when it has received reasonable notice and has neglected to remove them.[116] And it is not essential that they should be so placed as *necessarily* to frighten horses.[117] Where the plaintiff's horses were frightened by the defendant's steam boilers which lay between the sidewalk and the

[114] North Manheim Tp. *v.* Arnold, 119 Pa. St. 380.
[115] Barrett *v.* Walworth, 64 Hun (N. Y.) 526.
[116] Eggleston *v.* Columbia Turnp. Co., 82 N. Y. 278.
[117] Wilson *v.* Spafford, 32 N. Y. St. Repr. 532.

gutter, and the horses ran away and were killed, it was held that one owning property next to the street has the right to obstruct traffic temporarily in the street when it is necessary to take articles from or to his place of business, but not to use the street for the purpose of storing property to the damage of others.[118] A person, it has been held, even if he is the owner of land over which a highway passes, commits a nuisance, if he places in the highway an obstruction with which horses or vehicles may come in contact or which is calculated to frighten horses of ordinary gentleness, unless the obstruction is reasonably necessary for the conduct of his business and at the same time does not unreasonably interfere with the right of the public to use the highway.[119]

In Connecticut, the Massachusetts rule as to the non-liability of the town for the fright of horses is not followed, and it is held that objects that would cause fright to horses of ordinary gentleness are a defect for which the town is liable, if the plaintiff observes proper caution.[120] The court said in Ayer *v.* Norwich: "It is conceded that the object is a nuisance. It must also be conceded that the nuisance in both cases is the direct and immediate cause of the injury, and that the injury is the natural and probable consequence of the nuisance. If I strike a horse and cause him to run, whereby persons in the carriage are injured, I am liable in trespass for all the damage. If by my negligence I frighten him and thereby cause injury, I am liable in case. If a town or other corporation by its negligence produce the same result, why should it not be liable? We must confess we are unable to discover any good reason for holding towns liable for injuries caused by collision and not liable for injuries caused by fright.

[118] Stewart *v.* Porter Mfg. Co., 13 N. Y. St. Repr. 220. That the use of a steam roller is not a technical "defect," see Mullen *v.* Glens Falls, 11 N. Y. App. Div. 275.

[119] Tinker *v.* N. Y., O. & W. R. Co., 157 N. Y. 312.

[120] Dimock *v.* Suffield, 30 Conn. 129; Hewison *v.* New Haven, 34 id. 136, 142; Ayer *v.* Norwich, 39 id. 376. And see the note to Hewison *v.* New Haven, 7 Am. L. Reg. N. S. 777.

The cause and effect in each case being the same, the manner and detail are unimportant."

In a Georgia case, where a horse was frightened by the scraping of the wheels of the cart on street car tracks which, contrary to ordinance, were several inches above the street level, and the horse ran away and injured the plaintiff, it was held that the proximate cause of the injury was the vice of the horse—it being a high-blooded animal and having previously tried to run away.[121]

In Illinois, it is the duty of the municipality to remove objects in the street calculated to frighten horses. Where a horse died in the afternoon and, with the knowledge of a policeman, the body lay in the street till the following afternoon, when the plaintiff's horse was frightened by it, the city was held liable.[122]

In Indiana the same rule prevails;[123] and where a horse was frightened by a hole in a turnpike, the company was held liable, the court saying that the Massachusetts cases "are based entirely upon statutes of that State, which are utterly unlike any of our statutes." [124] But where horses before entering a bridge took fright at planks standing upright on the bridge and threw the plaintiff out, the county was held not liable, as it was responsible only for maintaining bridges so that they might safely be travelled on, and was not required to keep them so that horses might not be frightened at them.[125] And where the duty of repairing highways is imposed by statute on township trustees, the county is not responsible for their negligence in leaving lumber on highways so as to frighten horses, as such persons are independent public agents and are personally responsible.[126]

In Kansas, where the plaintiff's horses which he was driv-

[121] Macon *v.* Dykes, 103 Ga. 847. [122] Chicago *v.* Hoy, 75 Ill. 530.
[123] Rushville *v.* Adams, 107 Ind. 475.
[124] Brookville & C. Turnp. Co. *v.* Pumphrey, 59 Ind. 78.
[125] Fulton Co. Commrs. *v.* Rickel, 106 Ind. 501.
[126] Abbett *v.* Johnson Co. Commrs., 114 Ind. 61.

ing sank into a mudhole, became frightened and ran away and were injured in another place before they could be stopped, it was held that the damages were not too remote to be recovered from the city.[127]

In Mississippi, a municipal corporation was held not liable for a horse's fright at articles deposited in a street outside of the travelled way within two hours of the accident, as that was not a sufficient time for notice of the defect.[128]

In New Hampshire, an action may be brought for injuries resulting from fright at objects in the road, such as stones, where they are the direct and proximate cause of the accident;[129] and also where the objects are out of the travelled portion of the highway, unless the person placing them there was at the time using the highway in a manner necessary and proper under all the circumstances.[130] Thus, a declaration that the highway was obstructed by a pig-sty projecting into it and occupied by five swine and that the plaintiff met with an accident by her horses taking fright at their movement and noises, was held good on demurrer, the court saying: "If objects are suffered to remain (except for the merest temporary purposes) resting upon one spot or confined within any particular space within the highway, and are of such a shape or character as to be manifestly likely to frighten horses of ordinary gentleness, injuries caused by the fright thus occasioned may properly be said to happen 'by reason of the obstructions' or 'insufficiency' of the highway, unless the person placing or continuing those objects upon the highway was, in so doing, making such use of the highway as was, under all the circumstances of the case, reasonable and

[127] Topeka *v.* Tuttle, 5 Kan. 311, 425.

[128] Butler *v.* Oxford, 69 Miss. 618.

[129] Littleton *v.* Richardson, 32 N. H. 59.

[130] Winship *v.* Enfield, 42 N. H. 197; Chamberlain *v.* Enfield, 43 id. 356. Where an engine, owned by a private corporation, was placed near, but outside of the limits of, the highway and concealed from view, this was held not to be a defect rendering the town liable for the fright of horses: Hebbard *v.* Berlin (N. H.), 32 Atl. Rep. 229.

proper. . . . Objects calculated to frighten horses would often be far more dangerous and much less easily guarded against by the traveller than many obstructions with which he comes in actual contact or collision; and when they have been suffered to remain in the highway so long that the town may fairly be said to have had notice of their existence there and a reasonable opportunity to remove them, . . . there can be no hardship to the town in holding it liable for damages caused by horses taking fright at them." [131] The court expressly disapproved of the Massachusetts cases of Kingsbury *v.* Dedham and Cook *v.* Charlestown.[132]

Where horses, frightened by the overturning of their load caused by a defect in the highway, ran and collided with a traveller, the town was, accordingly, held liable.[133] But where horses took fright at the large number of sleds used by boys in sliding for sport, it was held that a nuisance might be committed which did not amount to an "obstruction," that this was not such an "obstruction" and, consequently, the city was not liable.[134] And where the horse's fright was caused by the act of a fireman in throwing a stream from a hose into the street, in order to test the force and capacity of a hydrant, the city was held not liable on the ground that this was not a "defect in the street" and also because "a town is not liable for damage done by the fire department." [135]

In Rhode Island, a town is liable where a horse is frightened by an object allowed to remain in the highway, and it is held that the town and the person leaving the object in the road are not joint tort-feasors, the former being liable by statute, the latter at common law.[136] And where the damage was caused by a stream of water, thrown from a city

[131] Bartlett *v.* Hooksett, 48 N. H. 18. [132] Cited supra.
[133] Merrill *v.* Claremont, 58 N. H. 468.
[134] Ray *v.* Manchester, 46 N. H. 59.
[135] Edgerly *v.* Concord, 59 N. H. 78, distinguishing Aldrich *v.* Tripp, infra.
[136] Bennett *v.* Fifield, 13 R. I. 139.

hydrant across a highway by employees of the water commissioners, frightening a horse and causing its death, it was held that the water commissioners and their employees were servants of the city and that the latter was liable.[137] Where A. was injured by a horse driven by B. being frightened by the overturn of a sleigh on snow and ice wrongfully left in the highway by C., it was held that C.'s act was the proximate cause of the injury.[138]

In South Carolina, the liability of municipalities is confined to injuries resulting from an actual defect. Accordingly where a mule was frightened by a placard placed on a bridge without the knowledge of the county commissioners, who removed it as soon as they had notice, it was held that the county was not liable, and doubted whether it would be even with notice, as the statute gave an action only for injuries "through a defect in the repair."[139] And where a horse took fright at a piece of timber and backed the vehicle off a bridge where there was no railing, it was held that the absence of the railing was not a "defect in the repair" and was not the proximate cause of the accident.[140] Nor is a city liable for an injury caused by the fright of a horse at a booth which it has permitted to be erected in the street on the ground that it is a "defect" caused by neglect or mismanagement, the intent of the act being to make municipal corporations liable only for something connected with the keeping of the streets, etc., in proper and safe repair.[141]

In Texas, a city is negligent in allowing stones calculated

[137] Aldrich *v.* Tripp, 11 R. I. 141. In Edgerly *v.* Concord, supra, it is said: "With these authorities Aldrich *v.* Tripp, . . . is not in conflict. The decision in that case was put on the ground that the injury complained of resulted from the careless management of a hydrant by the water commissioners, and not by the fire department."

[138] Lee *v.* Union R. Co., 12 R. I. 383.

[139] Acker *v.* Anderson Co., 20 S. C. 495.

[140] Brown *v.* Laurens Co., 38 S. C. 282. This case was disapproved of in Augusta *v.* Hudson, 94 Ga. 135, cited in § 64, supra.

[141] Dunn *v.* Barnwell, 43 S. C. 398.

to frighten horses of ordinary gentleness to remain by the road for an unreasonable time.[142]

In Vermont, a town is responsible for leaving frightful objects on the margin of a highway, so that teams are terrified, and the responsibility is greater with reference to the removal of obstructions made by the unlawful deposit of private property on the road than of those which exist naturally in the soil or are cast on the margin while the road is being made or repaired. The court dissent from the Massachusetts cases and say: "It is beyond doubt that the placing of an obstruction upon a public way which, by its frightful appearance or otherwise, would 'hinder or impede passing,' might subject the party who made the obstruction to fine and damages, and, if continued, might subject the town to indictment or to damages if the cause of an accident by collision. It is not easy to see the ground upon which the town should be entirely exempted from liability for the other and natural consquence of the obstruction—an accident by fright." [143]

But where trustees having charge of streets purchased a stone-crusher, which frightened a horse, they were held not responsible for the resulting accident on the ground that a municipal officer is not liable to a private individual for the consequences of an act strictly within the official powers and duties.[144]

In Wisconsin, Morse *v.* Richmond, supra, was followed and it was held that an object naturally calculated to frighten horses of ordinary gentleness, though it may be so far removed from the travelled path as to avoid all danger of collision, is a defect for which the town is liable.[145] And it is the duty of the overseer to remove it at once, the intervention

[142] Patterson *v.* Austin (Tex. Civ. App.), 39 S. W. Rep. 976, approving of the decisions in Connecticut, Indiana and Vermont.

[143] Morse *v.* Richmond, 41 Vt. 435. And see the note to this case in 8 Am. L. Reg. N. S. 81.

[144] Bates *v.* Horner, 65 Vt. 471.

[145] Foshay *v.* Glen Haven, 25 Wis. 288.

of Sunday not suspending such duty.[146] But the owner of property adjoining the highway was held to have a right to the temporary use of a reasonable portion of the street for the deposit of material used in plastering his house, and the village permitting this was held not liable for the fright of horses caused thereby, though the material was of a character to frighten horses of ordinary gentleness.[147]

In Canada it has been held that, where the bad state of the road is due to proprietors or lessees, the municipality is not responsible for a resulting runaway.[148] Otherwise, where the excavation of a new tunnel was carelessly filled, whereby an axle broke by reason of a flaw unknown to the plaintiff and the horse ran away and was hurt.[149] And where a runaway was caused by a sleigh being caught in the defendant's track, elevated above the road-bed of the street, the defendant was held liable.[150] Where the object causing fright was left over night on the highway unguarded and unlighted and some of the town councillors knew of the fact, it was held that, under the circumstances, there was not sufficient notice or a sufficient lapse of time to impose liability upon the corporation.[151] And a municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the authority of the corporation, on the untravelled portion of a highway: the person who piled the ties is liable.[152]

The weight of authority in these cases is, therefore, opposed to the Massachusetts doctrine on the reasonable ground that

[146] Bloor *v.* Delafield, 69 Wis. 273.

[147] Loberg *v.* Amherst, 87 Wis. 634.

[148] O'Neil *v.* Quebec, 16 Low. Can. 404. Nor where it is due to a contractor, though the municipality may have otherwise negligently allowed the highway to get out of repair, unless the assent of the latter can be shown: Howarth *v.* McGugan, 23 Ont. 396.

[149] Archambault *v.* Montreal, 2 Leg. News (Can.) 141.

[150] Coristine *v.* Montreal City Pass. R. Co., 3 Leg. News (Can.) 229.

[151] Rice *v.* Whitby 25 Ont. App. 191, reversing 28 Ont. 598.

[152] O'Neil *v.* Windham, 24 Ont. App. 341, following Maxwell *v.* Clarke, 4 id. 460. And see McDonald *v.* Dickenson, 24 id. 31.

fright, if well founded, is as natural a consequence of an obstruction in a highway as a collision, and that, where the objects are of a kind to cause fright, the persons placing them on the highway or permitting them to remain there should be held liable for the result of their actions.

66. Character of Objects Causing Fright.—It has been shown that, where the fright results from actual contact with an obstruction or defect in the highway, the municipality is responsible for the consequences. We shall consider in the present section what the objects are, the mere appearance of which is deemed to warrant a recovery on the part of one injured by the fright caused thereby to his animals.

The question here is not merely one of probable cause and effect, but rather one of negligence under all the circumstances of the case. The principles that govern such cases were admirably laid down by Cooley, Ch. J., in a Michigan case. He says: "The bringing of an unsightly object into the common highway is no more of a wrong because of its tendency to frighten horses of ordinary gentleness, than is the construction of a bridge over a river a wrong because of its tendency to delay vessels. The one may be a wrong under some circumstances and so may the other; but it is equally true that both may be proper and lawful under other circumstances. It would be difficult to pass through the streets of our large towns without encountering objects moving along them which are well calculated to frighten horses of ordinary gentleness until they become accustomed to them, but which nevertheless are used and moved about for proper and lawful purposes. The steam engine for protection against fire may be mentioned as one of these; and though this is usually owned and moved about by public authority, there can be no doubt of the right of a private individual to keep and use one for his own purposes, and to take it through the streets when necessary. But other things which are sometimes moved about on wheels along the streets are equally alarming to

horses when first used. Wild animals collected and moved about the country for exhibition are always more or less likely to frighten domestic animals; but they may nevertheless be lawfully taken on the public highways under proper precautions. . . . In some of the large cities of the country sufficient means of transit by the old methods have become practically out of the question and steam power is permitted as a matter of necessity, not only as a means of moving vehicles by the side of teams in the street, but also over their heads, where the liability to cause fright would perhaps be still greater. Horses of ordinary gentleness would at first be liable to take fright but after a time they become accustomed to the objects that at first are so fearful to them, just as in the country they become accustomed to see trains of cars passing near them along the ordinary railways which sometimes for a considerable distance run in immediate proximity to the common roads. Horses may be, and often are, frightened by locomotives in both town and country, but it would be as reasonable to treat the horse as a public nuisance from his tendency to shy and be frightened by unaccustomed objects as to regard the locomotive as a public nuisance from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential, but only the paramount authority of the legislature can give to either the owner of the horse or the owner of the locomotive exclusive privileges. If one in making use of his own means of locomotion is injured by the act or omission of the other, the question is not one of superior privilege, but it is a question whether, under all the circumstances, there is negligence imputable to some one and, if so, who should be accountable for it." [153]

And in a Pennsylvania case it is said: "The frightening of a horse is a thing that cannot be anticipated and is governed

[153] Macomber v. Nichols, 34 Mich. 212, 218.

by no known rules. In many instances a spirited road horse will pass in safety an obstruction that a quiet farm horse will scare at. A leaf, a piece of paper, a lady's shawl fluttering in the wind, a stone or a stump by the wayside will sometimes alarm even a quiet horse. I may mention by way of illustration that the severest fright I ever knew a horse to feel was caused by the sunlight shining in through the window of a bridge upon the floor." [154]

So in a Connecticut case the court said: "There is a large class of nuisances which may cause injury to persons in the use of a highway for which towns are not liable; and we agree that there are very many objects which may frighten horses upon the highway, in relation to which no duty devolves upon the town and therefore, in case of injury, no liability attaches. But the fact that a horse may be frightened at a piece of paper or the rustling of leaves is no reason why the town should not remove a dead horse or a frightful looking tent. The character of the object, however, should be such as to make the danger obvious and the duty of the town clear. In respect to this no rule can be laid down which will indicate clearly and definitely the line between immunity and liability. It is and must be from the nature of the case, in the main, a question of fact for the jury. We only determine that such nuisances *may* be defects; whether they are so or not, the jury, upon a consideration of the character of the object, its situation, the amount of travel, and all the circumstances, must determine." [155]

It was accordingly held in Macomber *v.* Nichols, supra, that where a horse was frightened by an engine on the street, propelled by steam, it was error to permit the recovery to turn on the fact whether it was calculated to frighten horses of ordinary gentleness, the question, as has been said, being one of negligence under all the circumstances. And this view

[154] Paxson, J., in Pittsb. South. R. Co. *v.* Taylor, 104 Pa. St. 306, 316.

[155] Ayer *v.* Norwich, 39 Conn. 376. And see Laird *v.* Otsego, 90 Wis. 25; Smith *v.* Sherwood Tp., 62 Mich. 159.

with reference to the use of steam engines and implements is sustained by other decisions.[156] On the other hand it has been held that the owner of a traction engine which frightens ordinary horses is liable, though all statutory requirements have been complied with.[157] And in an action against a city for personal injuries caused by the fright of horses at a steam motor used on a street railway by the permission of the city council, it was held that, in the absence of express statutory authority, the city had no power to permit such use and that the grant constituted negligence.[158] But the owner of a traction engine in the hands of a bailee is not responsible for an injury resulting from a horse being frightened by the engine.[159]

Where a horse was frightened at a steam roller the city was held liable, the court saying: "The roller was taken through the street at a time when it was being used by the public and when its passage was necessarily attended with danger. The circumstances required the exercise of a high degree of care and the use of every possible precaution to avoid accident." [160] And such a roller left in the street during the suspension of the work of macadamizing was held an object calculated to frighten horses and a recovery was allowed against the city on the ground of negligence.[161] But in another case it was held that a steam roller properly used in repairing a street was not such an obstruction or defect as would render the city liable for frightening horses.[162]

[156] See Turner *v.* Buchanan, 82 Ind. 147; Sparr *v.* St. Louis, 4 Mo. App. 572; Ouverson *v.* Grafton, 5 N. D. 281.

[157] Bantwick *v.* Rogers, 7 Times L. Rep. 542, where it is said: "The true test of liability is whether the engine is calculated to frighten horses using the road legitimately." And see Galer *v.* Rawson, 6 id. 17; Watkins *v.* Reddin, 2 F. & F. 629.

[158] Stanley *v.* Davenport, 54 Ia. 463.

See State *v.* Kowolski, 96 id. 346, with regard to statutory regulations.

[159] Smith *v.* Bailey, [1891] 2 Q. B. 403.

[160] Denver *v.* Peterson, 5 Colo. App. 41. And see Jeffery *v.* St. Pancras Vestry, 63 L. J. Q. B. 618; Mullen *v.* Glens Falls, 11 N. Y. App. Div. 275.

[161] Young *v.* New Haven, 39 Conn. 435. [162] Lane *v.* Lewiston, 91 Me. 292.

A pumping station maintained by a railroad company near a highway was held not to be a nuisance, though the smoke from the pumping engine sometimes settled down on the road, frightening horses.[163]

It was held in Connecticut that the owners of factories are not entitled to use steam whistles so as to frighten gentle horses and that it is not negligence for a driver to go on in the course of his business, though he knows such a whistle is likely to be blown;[164] and there is a similar decision in New York.[165] But in a well-considered Ontario case it was held that the owners of lawfully operated water-works are not liable for damages from a horse being frightened by a steam whistle used by them for their works near a highway, in the absence of evidence of negligence in its use, or at least that its use might be expected to cause such an accident, so rendering it a nuisance to the highway.[166] And in a later Connecticut case, the facts were that the plaintiff's horse, fastened by a rope in the street, was frightened by the defendant's factory whistle, pulled at the rope, which gave way, and he was killed. It was found that if the whistle, which was shrill and calculated to frighten ordinary horses, had not been sounded, the horse would not have pulled, and that if he had been free from the habit of pulling, he would not have been killed. The court held, upon this finding, that his death could not be regarded as caused by the negligence of the defendants and that they were not liable, saying: "The use of a steam whistle is not *per se* a nuisance. . . . Obviously the plaintiff must take the risk of all known faults in the horse." [167]

In Massachusetts, a city was held not liable for injuries occasioned to a person by his horse becoming frightened, while

[163] Pettit *v.* N. Y. Cent. & H. R. R. Co., 80 Hun (N. Y.) 86.
[164] Knight *v.* Goodyear India Rubber, etc., Co., 38 Conn. 438.
[165] Albee *v.* Chappaqua Shoe Manufg. Co., 62 Hun (N. Y.) 223.
[166] Roe *v.* Lucknow, 21 Ont. App. 1, reversing 29 Can. L. Jour. 217.
[167] Parker *v.* Union Woolen Co., 42 Conn. 399. And see Grogan *v.* Big Muddy Coal & Coke Co., 58 Ill. App. 154.

being driven along the street, by the firing of a cannon in an adjoining common under a license granted in pursuance of a city ordinance. The decision was on the ground that the city did not own the common and the person firing the cannon was not its agent or servant and the firing was not its act, but the court did not decide the question as to whether a private landowner would be liable under such circumstances.[168] And where blasting is done against a city's orders by those in charge of the work, the city is not liable for the resulting fright of a horse.[169]

One cannot be charged with negligence in shouting to a driver that a team wants to pass him, and frightening horses so as to cause a collision.[170] And an averment that the defendant by sliding boisterously in a street contrary to an ordinance had frightened plaintiffs' horses and made them run away and be injured, was held to state no cause of action, as the violation of an ordinance does not necessarily show negligence.[171] But where the defendants ran a race and collided, frightening the plaintiff's horses and making them run away, an action may be maintained. "Reckless and negligent driving on the street and at a rate of speed calculated to frighten horses of ordinary gentleness which are travelling on the same, certainly gives a right of action to a party injured thereby." [172] So, where one wilfully turns a hose on horses and they run away and collide with a wagon, he is liable for the accident." [173]

The fact that a horse is frightened at a bicycle does not render the owner of the latter liable for resulting injuries: the driver of a horse has no rights superior to those of a bicyclist. "It is not the duty of a party lawfully travelling upon a public highway upon a bicycle, when he sees a horse and carriage approaching, to stop and inquire whether the horse is likely

[168] Lincoln *v.* Boston, 148 Mass. 578. [169] Joliet *v.* Seward, 86 Ill. 402.
[170] Pigott *v.* Lilly, 55 Mich. 150. [171] Jackson *v.* Castle, 82 Me. 579.
[172] Mittelstadt *v.* Morrison, 76 Wis. 265.
[173] Forney *v.* Geldmacher, 75 Mo. 113.

to be frightened, especially in the absence of any apparent reason for so doing." [174]

Where a water company created a nuisance in the highway by leaving unfenced a stream of water which they had caused to spout up, and the plaintiff's horses were frightened and fell into an unfenced excavation in the highway, made by contractors who were building a sewer, and were injured, it was held that the water company was liable, and not the contractors. "The proximate cause of the injury is the first negligent act which drove the carriage and horses into the excavation." [175] And where through the defendant's negligence in having a projecting roof so constructed that snow would, in the ordinary course of things, fall from it on the highway, snow did so fall and strike the plaintiff's horse, frightening it and making it run away, the injury received by the plaintiff on being thrown out was held to be a proximate result of the negligence.[176]

The body of a common wagon left at the side of a road and laid up edgewise against the bushes within the limits of a road but outside of the travelled track does not render a town liable for the fright of a horse thereat. It is insufficient to frighten an ordinarily gentle animal, and towns are not insurers.[177] But a land owner and a town which permitted him to store his drays and wagons when not in use in a street were held liable for injuries resulting from the fright of a horse at a dray in the night-time, although the drays and wagons took up only a part of the street.[178] And where a vicious mare was frightened by a van, unreasonably left on the side of a highway, and ran away and kicked and injured her driver so

[174] Thompson *v.* Dodge, 58 Minn. 555.

[175] Hill *v.* New River Co., 9 B. & S. 303.

[176] Smethurst *v.* Proprs. Ind. Cong. Church, 148 Mass. 261. And see Trestler *v.* Dawson, 3 Leg. News (Can.) 76; 5 id. 114.

[177] Nichols *v.* Athens, 66 Me. 402. And see Rounds *v.* Stratford, 26 U. C. C. P. 11. For the requisites of a declaration in such a case, see Rounds *v.* Stratford, 25 U. C. C. P. 123.

[178] Ladoga *v.* Linn, 9 Ind. App. 15.

that he died, it was held that his executors could recover against the owner of the van. "The wrongdoer has no right to lay down the measure of his own wrong or to limit the free use of the highway to horses which shall only shy when frightened and do no further mischief." [179] Where one arranges and decorates a wagon to advertise his business by covering it with flags, and draws it through the streets of a city, he is liable for the consequences of the fright of a horse of ordinary gentleness.[180]

But a property owner on the highway is bound to take care only that objects he has a right to expose are not of a kind to frighten ordinarily gentle and well-trained horses: he is not bound to guard against frightening skittish, vicious and easily frightened animals. So, where a barrel full of whitewash on wheels with a cloth and shovel sticking from it had been left all day at the side of a highway, it was held that the jury should have been instructed that, unless there was something extraordinary in its appearance which would frighten gentle horses, it was not negligence to use it and that its reasonable use for the time required for whitewashing the defendant's fences would not subject him to liability for the fright it caused horses.[181] And where a contractor for building a macadamized road covered a steam roller with canvas and left it over Sunday at the side of the road, he was held not liable for frightening horses, as the plaintiff should have turned back or got out and taken his horse by the head.[182] But, in Wisconsin, a city was held liable for the fright of a horse at large wooden rollers left in the street by its agents.[183] And

[179] Harris *v.* Mobbs, 3 Ex. D. 268. [180] Jones *v.* Snow, 56 Minn. 214.

Whether hanging coats on a street sprinkler tends to frighten horses, is a question for the jury: McCann *v.* Consold. Trac. Co., 59 N. J. L. 481.

[181] Piollet *v.* Simmers, 106 Pa. St. 95.

[182] Keeley *v.* Shanley, 140 Pa. St. 213.

So, tiles placed on the side of a highway and partially concealed were held not to constitute evidence of negligence: MacDonald *v.* Yarmouth Tp., 29 Ont. 259.

[183] Hughes *v.* Fond du Lac, 73 Wis. 380.

But it was held not negligence to leave a top buggy, with the top half

where the defendant farmed land at the side of the highway and his servant removed a roller and set it on the margin of the road and it frightened a pony driven by the plaintiff's wife, thereby causing her death, a verdict that the accident was due to unreasonable user of the highway by the defendant was held warranted by the evidence.[184] But a heap of manure in a field near the road covered with a tarpaulin is not such an object as makes the defendant liable; otherwise "country life would be impossible." [185]

A municipality has been held liable for a horse taking fright at a banner suspended across the street;[186] at a tripod in the highway with a vessel containing syrup and a fire underneath it to manufacture candy;[187] at a scraper left by a workman who had been digging a ditch;[188] and at the carcass of a dead animal, where there has been negligence.[189] So, where one left a sick and disabled cow in the highway where it was reasonable to suppose it would die and its body would frighten horses, this was held sufficient to justify a verdict for the plaintiff.[190] But the owner of a dog who removes its carcass to a safe place, is not liable for its removal to a highway by boys, thereby causing injury to a frightened horse.[191]

A city licensing the exhibition of wild animals in a particular place is liable for the fright of horses thereat;[192] but

down and without the front wheels, twelve feet from the middle of a highway running through a wood, the buggy being a type in common use in the locality: Kumba *v.* Gilham (Wis.), 79 N. W. Rep. 325.

[184] Wilkins *v.* Day, 12 Q. B. D. 110.

Where a servant, in delivering bran for his master, left several bags by the roadside in order to save unnecessary transportation and give him time to attend to his private business, it was held that he was acting in his master's employment, and that the latter was liable for an injury caused by the fright of a horse at the bags: Phelon *v.* Stiles, 43 Conn. 426.

[185] Gibson *v.* Stewart, 21 Rettie (Sc. Ct. Sess.) 437.

[186] Champlin *v.* Penn Yan, 34 Hun (N. Y.) 33.

[187] Rushville *v.* Adams, 107 Ind. 475.

[188] Weatherford *v.* Lowery (Tex. Civ. App.), 47 S. W. Rep. 34.

[189] Fritsch *v.* Allegheny, 91 Pa. St. 226.

[190] Hindman *v.* Timme, 8 Ind. App. 416.

[191] Davis *v.* Williams, 4 Ind. App. 487. [192] Little *v.* Madison, 42 Wis. 643.

where the licensee exhibits in a public street through the negligence of city officers, the city is not liable.[193]

A city which has, for a compensation, granted the right to erect a booth on one of its public squares for the use and exhibition of an ox, is not liable for an injury occasioned by its frightening a horse by emitting an offensive odor, while exercising upon the highway outside of the booth.[194] And where an injury happened to the plaintiff as a result of his horse's taking fright at an elephant passing in a highway in charge of a keeper, it was held that to make the owners liable it would have to be shown that this was the effect of an elephant's appearance upon horses in general, and that the owners knew that fact.[195] The owner of a turkey-cock which without negligence strays upon the highway, contrary to a by-law of the municipality, is not liable for damages resulting from a horse's fright at the bird acting as turkey-cocks usually do.[196]

Going through a militia drill in the public places of a city has been held a malfeasance that will render the captain liable for the running away and killing of a horse frightened thereat.[197]

A railway company maintaining a derrick which projected over the highway, in order to load and unload freight in cars, if it would naturally frighten passing animals, is liable for the injuries sustained by a traveller driving his horse with due care.[198]

Where a horse was frightened by the fluttering of a tidy in a chair belonging to a gate-keeper near the gate of a bridge,

[193] Little *v.* Madison, 49 Wis. 605, explaining the above case on the ground that there the city expressly authorized the show in that particular spot, while here, no place being stated, the license was confined to exhibiting in some suitable place.

[194] Cole *v.* Newburyport, 129 Mass. 594.

[195] Scribner *v.* Kelley, 38 Barb. (N. Y.) 14.

[196] Zumstein *v.* Shrumm, 22 Ont. App. 263.

[197] Childress *v.* Yourie, Meigs (Tenn.) 561.

[198] Jones *v.* Housatonic R. Co., 107 Mass. 261. And see Lawson *v.* Alliston, 19 Ont. 655.

which bridge was in good condition, the bridge company was held not liable in damages for the plaintiff's being thrown out, as the liability of the master does not reach wrongs caused by the carelessness of the servant in work not directed by the former.[199]

In an action to recover for injuries from a horse being frightened at a sled and tubs left near the defendant's buildings in the highway, it was held that the defendant might prove that the highway was little used at that season, but not that his neighbors were accustomed to leave their sleds so while loading them.[200]

With regard to the color of a vehicle in the highway, it was said in an English case: "If a person places his carriage, painted green, brown or any ordinary color, on a highway, and a certain horse has an aversion to the particular color the carriage is painted and takes fright, no action would lie against the owner of that carriage, because he has violated no law and is lawfully using the highway in an ordinary manner; but, on the other hand, if he has his carriage constructed and painted in such a manner as to be very conspicuous indeed, it might then become a nuisance." [201] The question whether fright at a street railway car painted a bright color rendered the company liable was raised, but not settled, in a New Jersey case.[202]

Evidence that other animals have been frightened by the object in question is admissible.[203] So witnesses may testify

[199] Wiltse *v.* State Road Bridge Co., 63 Mich. 639.

[200] Judd *v.* Fargo, 107 Mass. 264.

[201] Jeffery *v.* St. Pancras Vestry, 63 L. J. Q. B. 618.

[202] McCann *v.* Consold. Trac. Co., 59 N. J. L. 481.

[203] House *v.* Metcalf, 27 Conn. 631; Baker *v.* North East Borough, 151 Pa. St. 234; Potter *v.* Natural Gas Co., 183 id. 575; Smith *v.* Sherwood Tp., 62 Mich. 159; Crocker *v.* McGregor, 76 Me. 282; Darling *v.* Westmoreland, 52 N. H. 401; Valley *v.* Concord & M. R. Co. (N. H.), 38 Atl. Rep. 383; Wilson *v.* Spafford, 32 N. Y. St. Repr. 532; Stewart *v.* Porter Mfg. Co., 13 id. 220; Champlin *v.* Penn Yan, 34 Hun (N. Y.) 33; Thomas *v.* Springville City, 9 Utah 426; Brown *v.* Eastern & M. R. Co., 22 Q. B. D. 391.

In Bemis *v.* Temple, 162 Mass. 342, this kind of evidence is distin-

that obstructions are of such a character as would frighten horses of ordinary gentleness.[204]

The liability of railway companies for frightening animals is discussed in § 133, infra.

67. Injury from Other Causes.—A municipality is liable for injuries to animals due to direct contact with some defect in a highway or bridge. Thus where the course of a highway was changed and a new bridge was built, the old road seeming good, the permitting a barrier to decay so that one drove his team into the remains of the old bridge, was held to make the town liable.[205] So it is liable where its commissioner is negligent and does not make a bridge safe for horses.[206] And its negligence is the proximate cause of an injury to the owner of a horse received while attempting to keep the horse from injuring itself after catching its foot in a hole in a bridge.[207] It is liable for an injury received by an animal falling into a defective culvert.[208] So, where a horse hitched

guished from evidence that similar accidents had occurred in a place, the latter being inadmissible.

In Elliott on Roads and Streets, 451, Bloor *v.* Delafield, 69 Wis. 273, and Cleveland, C., C. & I. R. Co. *v.* Wynant, 114 Ind. 525, are cited as opposed to the rule in the text, and it is said: "But the Wisconsin and Indiana cases cannot be taken as expressive of a universal rule, for they ought not to be regarded as going further than that there are some objects which may be declared as matter of law not likely to frighten horses."

See also § 133, infra.

[204] Moreland *v.* Mitchell Co., 40 Ia. 394, 401.

In Burns *v.* Farmington, 31 N. Y. App. Div. 364, it was held that the question whether an irregular pile of wood by the road was an object which a man of ordinary intelligence would judge likely to frighten horses, was one for the jury and not for the opinion of witnesses.

[205] Schuenke *v.* Pine River, 84 Wis. 669.

And see as to highways discontinued without notice: Milwaukee *v.* Davis, 6 id. 377; Bills *v.* Kaukauna, 94 id. 310.

[206] Diamond *v.* East Hants, 20 Nov. Sco. 9.

And see Park *v.* Adams Co., 3 Ind. App. 536.

[207] La Duke *v.* Exeter Tp., 97 Mich. 450.

[208] Hazard *v.* Council Bluffs, 87 Ia. 51; Bowser *v.* Toledo, 9 O. Circ. Ct. 294; Lloyd *v.* New York City, 5 N. Y. 369; Brennan *v.* Friendship, 67 Wis. 223.

with ordinary diligence got loose and fell into a chasm in the street and was killed.[209]

The rule as to excavations was thus stated in an English case: "When an excavation is made adjoining to a public way so that a person walking upon it might, by making a false step or being affected with sudden giddiness or, in the case of a horse or carriage way, might by the sudden starting of a horse be thrown into the excavation, it is reasonable that the person making the excavation should be liable for the consequences; but when the excavation is made at some distance from the way and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. . . . We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way." [210]

The same rule applies to defects in general. Thus, towns are not bound to erect barriers to prevent animals from straying where the dangerous place cannot be reached without straying.[211] And they are not bound to keep the whole highway free from obstructions. Thus, in Massachusetts, where beyond the travelled part of the road were raised gutters and beyond the gutters, nearly eight feet from the travelled path, were large, loose stones which caused an injury to the plaintiff's horse, it was held that the town was not liable. "It cannot be expected that towns shall in all cases make bridges the whole width of the road or fill up ravines or cut down ledges of rock. But there may be such obstructions out of the travelled path as will render the road unsafe, such, for instance, as would frighten horses. It is, in some meas-

[209] Tallahassee *v.* Fortune, 3 Fla. 19.

And see as to an unguarded fill in a turnpike, Lebanon & P. Turnp. Road Co. *v.* Purdy (Ky.), 37 S. W. Rep. 588.

[210] Hardcastle *v.* South Yorkshire R. Co., 4 H. & N. 67, 74.

That the town and a traction company may be jointly liable, see Carstesen *v.* Stratford, 67 Conn. 430.

[211] Puffer *v.* Orange, 122 Mass, 389.

ure, a practical question, what obstructions a town is obliged to remove." [212]

Where a bridge was safe it was held that the company were not liable for an injury to the plaintiff by the stepping of a mule through a hole out of the usual route.[213] But where a street was laid out for its whole width for travel, it was held that where one was injured by his horse's stepping on sticks that were on a part of the street not usually travelled upon, the fact that he did not see the sticks was not contributory negligence.[214] And where a horse going off a highway by reason of a defect therein, fell upon a fence and was injured while he was being removed with reasonable care, the town was held liable.[215]

It was held in a Massachusetts case that where a traveller upon a highway stopped and tied his horse outside of the limits of the highway and the horse got loose and ran on the highway and was injured, he could not maintain an action against the town. "The injury to the plaintiff's horse was the result of causes which happened outside of the limits of the highway, as well as of causes which happened within it. Both contributed to the accident." [216]

The lessees of a ferry are liable for an injury sustained by a horse from a defective rail, of which they knew, giving way, although the horse was at the time under the control and management of its owner.[217] And where railings of an in-

[212] Howard *v.* North Bridgewater, 16 Pick. (Mass.) 189. The *dictum* as to obstructions that would frighten horses is commented on in Davis *v.* Dudley, 4 Allen (Mass.) 557.

So in Michigan and Missouri only the portion of the highway in use need be kept in repair: Whoram *v.* Argentine Tp., 112 Mich. 20; Hannibal *v.* Campbell, 86 Fed. Rep. 297.

[213] Patterson *v.* South. & North. Ala. R. Co., 89 Ala. 318.

[214] Saylor *v.* Montesano, 11 Wash. 328. And see Boltz *v.* Sullivan (Wis.), 77 N. W. Rep. 870.

[215] Tuttle *v.* Holyoke, 6 Gray (Mass.) 447.

[216] Richards *v.* Enfield, 13 Gray (Mass.) 344.

[217] Willoughby *v.* Horridge, 12 C. B. 742. And see Radway *v.* Briggs, 37 N. Y. 256.

sufficient height were erected around a statue near a market, and the plaintiff's cow was killed while trying to jump them, it was held that the owners of the market were bound to keep the market-place free from danger to those frequenting it, and that they had here been guilty of a misfeasance.[218]

Where an open and well-beaten path led from the travelled part of the road to an apparently safe watering-place, which was really a deep and miry pit filled with water, and the plaintiff's horse, having been turned in to drink, fell in and was drowned, it was held that, as the indications of danger were concealed, the town was liable. "Towns are not obliged to provide watering places for the public convenience, but, when they are provided by nature in the highway, they ought not to be suffered to become pitfalls first to allure and then to destroy horses or other animals turned aside to partake the refreshment to which they are thus invited." [219]

Where a team became mired in a highway and, in the effort to get out, one of the horses burst a blood-vessel and died soon afterwards, the injury was held to be the direct and immediate consequence of the defect in the road.[220] But where the miry condition of a road is due solely to the weather and to the nature of the soil, the township is not liable therefor.[221] Nor is it liable where its neglect is not the proximate cause of the injury as where water rose over a highway and ice formed, causing the slipping and drowning of a horse at a point where there was a hole three and a half feet deep.[222]

Where horses are drowned crossing on a highway a stream swollen by a flood, the test of the town's liability is whether the freshet was unusual and extraordinary, and not whether it was unprecedented and not reasonably to be expected by

[218] Lax *v.* Darlington, 5 Ex. D. 28.

[219] Cobb *v.* Standish, 14 Me. 198. As to notice of injuries in Maine, see Lord *v.* Saco, 87 id. 231.

[220] Davis *v.* Longmeadow, 169 Mass. 551.

[221] Brendlinger *v.* New Hanover Tp., 148 Pa. St. 93.

[222] Smith *v.* Walker Tp. (Mich.), 75 N. W. Rep. 141.

the town.[223] A navigation company is liable for a defect in a towpath whereby horses fall into the water and are drowned.[224]

A city is liable for an injury to a horse caused by glass negligently left in a street.[225] And a street car company may be enjoined from scattering salt on its lines, after removing snow, to the injury of horses.[226]

Where the plaintiff drove a steam thresher over a bridge and it broke down, injuring the horses and machinery, the question whether such a use of a bridge was so unusal that it was not to be anticipated, was held to be for the jury.[227] So, a town is liable for an injury to an elephant from a defect in a highway if, in the opinion of the jury, an elephant at the time and place and under the circumstances was an animal which it was reasonably proper to take over a highway kept for the reasonable use of the public.[228]

Where the plaintiff's horse is injured while standing in the street by the carelessness of the defendant's servant driving into him, the defendant is liable for the damage.[229] And where an ass fettered by the forefeet was placed on the highway and was unable to get away from the defendant's wagon which was negligently driven against him, killing him, it was held that the owner could recover, unless the animal's being there was the immediate cause of the accident. "Although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have

[223] Hopkins *v.* Rush River, 70 Wis. 10.

[224] Winch *v.* Thames Conservators, L. R. 9 C. P. 378.

[225] El Paso *v.* Dolan (Tex. Civ. App.), 25 S. W. Rep. 669.

[226] Ogston *v.* Aberdeen District Tramways Co., 24 Rettie (Sc., H. L. Cas.) 8.

[227] Yordy *v.* Marshall Co., 80 Ia. 405. See Blakeley *v.* Baker, 39 L. T. N. S. 359, where the facts were that a horse attached to a cart containing a load weighing a ton came against a fence surrounding an excavation and, it giving way, the horse was killed. It was held that the builder of the fence was not liable.

[228] Gregory *v.* Adams, 14 Gray (Mass.) 242, where the jury disagreed.

[229] Streett *v.* Laumier, 34 Mo. 469.

avoided the consequences of the defendant's negligence, he is entitled to recover." [230] But where the plaintiff's horse was killed by the shaft of the defendant's carriage running into him in the open day on the highway where there was room to pass, it was held that an instruction that the plaintiff was not held to the rule that he must establish a *prima facie* cause of action by showing that the injury came from the defendant's negligence and that the defendant must disprove care and establish negligence on the plaintiff's part—was erroneous.[231] And where the plaintiff's colt while straying on the road was cut by the defendant's reaping machine, the latter trying to keep it off, it was held that the plaintiff could not recover.[232]

The owner of a private road is not responsible for a horse falling in an excavation, there being no duty cast upon him to protect one using the road without a license.[233] And where the plaintiff's horse was injured by striking a projecting bolt while passing through an opening under the defendant's bridge which the former had used for some years, without the defendant's objection, for passing his stock through, it was held that such a use was a mere license, and would not entitle the plaintiff to recover for the injury.[234] Where the owners of land dedicated a foot-way which was dangerous to horses and carriages, the city was held not liable for an injury to horses and carriages driven thereon with ordinary care.[235] A municipal corporation which has never, expressly or by im-

[230] Davies *v.* Mann, 10 M. & W. 546. And see Gulliver *v.* Blauvelt, 14 N. Y. App. Div. 523.

[231] Waters *v.* Wing, 59 Pa. St. 211.

[232] Carr *v.* Black, Mont. L. Rep., 3 S. C. 350.

[233] Murley *v.* Grove, 46 J. P. 360.

[234] Truax *v.* Chic., St. P., M. & O. R. Co., 83 Wis. 547.

[235] Hemphill *v.* Boston, 8 Cush. (Mass.) 195.

See Owen *v.* De Winton, 58 J. P. 833, where it was held that one who widened a dangerous road alongside of a brook was not under the circumstances liable to one who fell off it with his team, the court saying: "If they dedicated the road which was a dangerous road . . . the public must leave it alone, not take to it, or, if they take to it, must take to it as it is."

plication, accepted the dedication of a street, is not liable for injuries to animals by reason of a barbed wire fence on the dedicated ground.[236]

Where a toll-gate keeper shoots the bar at an unusual hour whereby the plaintiff's horse is killed, the company is liable.[237] But where a servant washed a van in a public street and allowed the waste water to run down and freeze as it could not go through the grating, which was obstructed by ice, and there was no evidence that the defendant, his master, knew of the obstruction of the grating, it was held that the slipping and breaking of the leg of a horse on the ice was a consequence too remote to be attributed to a wrongful act of the defendant. "Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrong-doer liable to an action." [238]

Where a telegraph wire broke and fell upon a live trolley wire from which electricity was transmitted through the former wire to horses entangled in it, it was held in New York that the electric railway company was not liable as the proximate cause of the injury was the falling of the telegraph wire.[239] But in similar cases in other States both companies were held liable.[240]

68. Contributory Negligence.—The question whether the plaintiff has or has not been negligent is often an important

[236] Cochran *v.* Shepherdsville (Ky.), 43 S. W. Rep. 250.
[237] Dudley *v.* Canal Bank, 5 La. Ann. 295.
[238] Sharp *v.* Powell, L. R. 7 C. P. 253.
[239] Albany *v.* Watervliet Turnp. & R. Co., 76 Hun (N. Y.) 136.
[240] United Elec. R. Co. *v.* Shelton, 89 Tenn. 423; McKay *v.* South. Bell Teleph. & Teleg. Co., 111 Ala. 337.

And in Godfrey *v.* Streator R. Co., 56 Ill. App. 378, the street railway company was held liable, as it knew or should have known of the situation of the broken telephone wire in time to remove it and prevent accidents.

consideration in these cases. In an Indiana case it was held that where the plaintiff's horses were frightened by a steam engine placed in the street, from which he did not apprehend any danger when he passed, he was not guilty of contributory negligence, the court saying: "The law upon this subject is well stated by Shearman and Redfield on Negligence. They say, § 31: 'Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence or to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would take under similar circumstances.' This doctrine has often been applied and is peculiarly applicable to cases like this. The obstruction is seen in the street; there is room to pass it; it is not known that it will cause fright and the traveller, with due care, knowing the temper of his horses and having control of them, believing there is no danger, attempts to pass. In doing this he is not guilty of negligence; he takes the risk which a prudent man would take, and nothing more. Such an assumption of risk affords no excuse for the wrong-doer—the party who wrongfully put the obstruction in the street." [241] Thus, where the plaintiff was injured by her horse becoming frightened at a steam roller being moved in the street, the horse being very gentle and used to street cars, it was held that the fact that she did not keep a sufficient lookout to have seen and avoided the roller, did not make her guilty of contributory negligence.[242] Nor is the mere taking

[241] Turner *v.* Buchanan, 82 Ind. 147. And see Ouverson *v.* Grafton, 5 N. D. 281; Weatherford *v.* Lowery (Tex. Civ. App.), 47 S. W. Rep. 34.

[242] Denver *v.* Peterson, 5 Colo. App. 41.

But see Lane *v.* Lewiston, 91 Me. 292, where one driving up to a steam roller was held guilty of contributory negligence, though not notified not to use the street.

of a young and timid horse on a ferry negligence.[243] And the right of one to recover for the negligent sounding of a whistle causing his team to run away, is not affected by his failure to warn the driver of the whistle, where there was no stated time for sounding it and a warning would have been useless.[244]

But one cannot recover for an injury caused by his having placed himself in a position which the frightening of a skittish team would render perilous, where there is another and safer road.[245] And where the plaintiff's coachman knew that a pump-house, the noise of which frightened horses, had been by a highway for years, but drove them by and they were frightened, it was held that the plaintiff could not recover.[246] Where a city alderman, knowing of a dangerous obstruction in the street and expressly having called the attention of the city council to the fact, drives by, notwithstanding, and his horse is frightened and runs away, upsetting the occupants of the carriage, he is guilty of such contributory negligence as will prevent a recovery by one driving with him at his invitation, though the other did not know of the obstruction.[247] An owner of a team frightened by negligent blasting is not guilty of negligence in running in front of them and trying in vain to stop them—being injured in consequence. The blasting was the proximate cause of the injury. "A person in charge of horses naturally and instinctively rushes to save them or stop them when he sees them frightened and trying to run away." [248] On the other hand, the driver of a horse not ordinarily frightened at bicycles, is not negligent, where the horse is so frightened, in not alighting from the buggy

[243] Clark *v.* Union Ferry Co., 35 N. Y. 485.

[244] Miller *v.* Rochester Vulc. Pav. Co., 21 N. Y. Suppt. 651.

[245] Peoria *v.* Walker, 47 Ill. App. 182.

[246] Ramsden *v.* Lancashire & Y. R. Co., 53 J. P. 183. And see Salem *v.* Walker, 16 Ind. App. 687.

[247] Whittaker *v.* Helena, 14 Mont. 124.

[248] Prescott *v.* Connell, 22 Can. Sup. Ct. 147, affirming 20 Ont. App. 49.

and taking the horse by the head.[249] Where a horse is frightened by a defect in the road and runs, the driver is bound to use ordinary care after as well as before—such care as a person of ordinary prudence would use, making due allowance for the alarm of the horse.[250]

Where one knowing the unsafe condition of a highway or bridge sends his team over it, he cannot recover for an injury to the team.[251] Thus, where horses fell into an excavation in the street, which was plainly dangerous to drive in, and the driver could have reached his destination by other streets without much loss of time, the owner of the horses cannot recover.[252] And where a horse loaned by the plaintiff to another is killed by reason of the unsafe condition of the road, evidence that the borrower knew of such condition and also of a better road, should be received to show contributory negligence.[253] But it has been held that the fact that the plaintiff could have avoided passing an obstruction by travelling another road going a mile and a half out of his way, is not to be considered on the question of contributory negligence.[254] And where a cabman tried to lead his horse out of a stable through a passage on which the commissioners of sewers had heaped rubbish and the animal fell and was killed, it was held

[249] White *v.* Ballard, 19 Wash. 284.

[250] Brooks *v.* Petersham, 16 Gray (Mass.) 181.

[251] Hill *v.* Tionesta Tp., 146 Pa. St. 11; Hotchkin *v.* Philipsburg (Pa.), 6 Cent. Rep. 898; Riest *v.* Goshen, 42 Ind. 339; Morrison *v.* Shelby Co., 116 id. 431; Artman *v.* Kansas Cent. R. Co., 22 Kan. 296; Travis *v.* Carrollton, 7 N. Y. Suppt. 231; Shampay *v.* Chicago, 76 Ill. App. 429.

See Gulf, C. & S. F. R. Co. *v.* Gasscamp, 69 Tex. 545; Rosedale *v.* Golding, 55 Kan. 167.

As to urging on horses in a highway through water which is getting deeper, see Smith *v.* Walker Tp. (Mich), 75 N. W. Rep. 141.

[252] Cook *v.* Atlanta, 94 Ga. 613.

That this may not amount to contributory negligence as matter of law, see Carstesen *v.* Stratford, 67 Conn. 430. The place of excavation is the "place of injury," though the loss and damage may have resulted from a collision during the subsequent runaway: Ibid.

[253] Forks Tp. *v.* King, 84 Pa. St. 230.

[254] Cairncross *v.* Pewaukee, 86 Wis. 181.

that the defendant was not excused merely because the plaintiff knew that some danger existed and voluntarily incurred it, but that the amount of danger and the circumstances were for the jury to consider.[255] And if one drives his team on a track negligently exposed, not voluntarily, but because his horses are partially beyond his control, he is not to be charged with negligence.[256]

Where the travelled part of the highway was forty feet wide and a strange, hired horse was driven within three feet of an embankment on one side and shied and went over the embankment, the lack of a railing is no ground for a recovery, the plaintiff being guilty of negligence. "They drove where they did, not of necessity, but from choice. The danger was as apparent to them as it could have been to the township authorities." [257]

Where an animal is injured by an obstacle in the street, an action cannot be maintained unless the plaintiff used ordinary care to avoid the obstacle.[258] Where A. placed lime rubbish in the highway the dust of which frightened B.'s horse and nearly brought him into contact with a wagon, in avoiding which B. unskilfully drove over other rubbish placed in the road by C. and was overthrown and hurt, it was held that B. could not recover against A. as the proximate cause of his injury was his own unskilfulness.[259] And where a horse and wagon were injured by a voluntary attempt to drive them

[255] Clayards *v.* Dethick, 12 Q. B. 439.

Bramwell, L. J., in McMahon *v.* Field, 7 Q. B. D. 591, 594, says of the above case: "I may observe, however, that I do not think that that case was rightly decided, for it is not because the plaintiff chose to incur a risk that he behaved reasonably in the way he acted."

[256] Farmer *v.* Findlay St. R. Co. (O.), 53 N. E. Rep. 447.

[257] Kuhn *v.* Walker Tp., 97 Mich. 306.

[258] Smith *v.* Smith, 2 Pick. (Mass.) 621; Butterfield *v.* Forrester, 11 East 60.

[259] Flower *v.* Adam, 2 Taunt. 314.

In Palmer *v.* Andover, 2 Cush. (Mass.) 600, it is said of this case: "The grounds of the decision are, however, very briefly stated and it is somewhat difficult to understand precisely its extent."

upon street car tracks which were raised but not filled up, notwithstanding the street was open for the use of travellers, a recovery was not allowed.[260] Where the plaintiff was driving on a dark night over a road he knew and let the horses go at will and they fell over an embankment built to protect vehicles from slipping down hill, it was held that, as the road was safe for ordinary travel and the plaintiff took the risk of letting the horses find their way, the township was not liable.[261] But it is not negligence as a matter of law to drive a blind horse on a dark night whereby an injury results to the plaintiff. "It was for the jury to consider how dark the night was." [262] Where the plaintiff on his horse becoming frightened, grasped the reins and himself backed the horse off an unguarded embankment, he was not allowed to recover.[263]

Where the plaintiff, while riding, was injured by a defect in the highway, his horse running away because frightened by a dog, it was held that the question of contributory negligence was one of fact, though the plaintiff was riding very fast.[264] A married woman is not chargeable with contributory negligence because she knew that her husband with whom she was driving had but an imperfect use of one hand and arm, though if he had had the complete use of them he might have been able to prevent an accident caused by the horse, which was a gentle one, taking fright at an unusual occurrence as a result of which she sustained personal injuries.[265] It is not negligence for the owner of cattle to let them run at large in the streets, where the ordinance allows it, though excavations are being made for the laying of gas-

[260] Rock Island *v.* Carlin, 44 Ill. App. 610.

[261] Mueller *v.* Ross Tp., 152 Pa. St. 399.

And see Bitting *v.* Maxatawny Tp., 180 id. 357, as to using a lantern so as to frighten a timid horse.

[262] Brackenridge *v.* Fitchburg, 145 Mass. 160. And see Milwaukee *v.* Davis, 6 Wis. 377; Bills *v.* Kaukauna, 94 id. 310.

[263] La Salle *v.* Wright, 56 Ill. App. 294.

[264] Brennan *v.* Friendship, 67 Wis. 223.

[265] Dist. of Col. *v.* Bolling, 4 App. D. C. 397, 404.

pipes.[266] But where one who knew of a hole made by the city in an unopened street, turned his horse loose in the neighborhood which, running at large contrary to law, fell in and was injured, it was held that the plaintiff could not recover though the defendant also was negligent.[267]

Where an expressman left his horse untied in a street near a curbstone while he was delivering a parcel and the wagon was struck by a car and the horse injured, it was held that, in the absence of proof of restiveness or vicious propensity, it was not negligence *per se* to leave the horse under the circumstances, nor was the defendant's liability affected by the fact that the animal's movements increased the damage.[268] And where the plaintiff's horses standing without a driver on the tow-path of a canal were injured by the defendant's negligence, it was held that if they were in a proper place at the time, the fact that a driver might have moved them and so avoided the accident, did not as a matter of law render the plaintiff guilty of contributory negligence in leaving them unattended.[269] So, where a plaintiff left his horse unhitched in the street while he went into a shop a few feet away, but, when the animal became frightened, caught hold of him and was dragged thirty feet, this was held not to be negligence, though an ordinance prohibited leaving a horse unhitched, as such ordinance "was evidently not intended to apply to a horse when in the presence and under the control of the owner or driver." [270]

[266] Noblesville Gas & Imp. Co. *v.* Teter, 1 Ind. App. 322.

[267] Gribble *v.* Sioux City, 38 Ia. 390—though this decision was overruled in part in Kuhn *v.* Chic., R. I. & P. R. Co., 42 id. 420, in so far as it held that the statutes made it unlawful to permit the animal to be at large.

See Bennett *v.* Hazen, 66 Mich. 657.

[268] Albert *v.* Bleecker St., etc., R. Co., 2 Daly (N. Y.) 389. And see Greenwood *v.* Callahan, 111 Mass. 298.

See also § 85, infra.

[269] Schoonmaker *v.* McNally, 6 Thomp. & C. (N. Y.) 47.

See Salvas *v.* New City Gas Co., 2 Leg. News (Can.) 97.

[270] Louisville, N. A. & C. R. Co. *v.* Davis, 7 Ind. App. 222.

And see Kearns *v.* Sowden, 104 Mass. 63; Klipper *v.* Coffey, 44 Md. 117.

On the other hand, where a horse harnessed to a cart was left standing with the bit out of his mouth on the edge of a pier, and room was left for only one vehicle to pass, and one in passing pushed the horse and cart overboard, it was held that the owner was guilty of negligence and could not recover. "He was not only obstructing a public highway . . . but he was guilty of gross negligence in standing his horse at the edge of a pier after removing the bit, the only thing by which the animal could . . . be in any way controlled." [271] So, where a horse attached to a wagon was left loose in the street, it was held that there could be no recovery against a telegraph company for the carelessness of an employee in so handling a broken wire as to strike the horse, frighten him and cause him to run and eventually be killed.[272] And where one after dark, while unloading his wagon, obstructs with his team an electric street car track, his negligence will prevent his recovery for an injury done to his team by a car, although it was more convenient to unload in the position he had chosen. "The substitution of cable and electric cars for the horse car and the omnibus is a change which renders impracticable and dangerous certain uses of the streets which were once permissible and comparatively safe. It introduces new conditions, the non-observance of which constitutes negligence." [273]

But one who places his horse and wagon transversely to a street while loading, is not prevented from bringing an action against one who carelessly drives against and injures the horse, by the fact that there is an ordinance requiring vehicles to be placed lengthwise and near the sidewalk in loading such articles.[274] Where a person leaves his horse in the care of a deaf and dumb boy on the seat of the wagon, the question

[271] Morris *v.* Phelps, 2 Hilt. (N. Y.) 38.

[272] West. Un. Tel. Co. *v.* Quinn, 56 Ill. 319.

[273] Winter *v.* Federal St. & P. V. Pass. R. Co., 153 Pa. St. 26. And see Gilmore *v.* Same, Ibid. 31.

[274] Steele *v.* Burkhardt, 104 Mass. 59.

whether he left him without a competent caretaker is for the jury.[275] So, where a husband left his wife in the wagon and the horses were frightened by a blast, ran away and threw her out.[276] The violation of a local ordinance prohibiting the owners of horses from leaving them unattended in a street and not fastened, is not negligence *per se*, as matter of law, but it is competent evidence of negligence to go before the jury.[277]

An action does not lie in favor of one who receives injuries from a defective highway while using it for horse-racing and matching his horse's speed. Otherwise, it seems, if he drives fast incidentally to some legitimate purpose for which the highway was intended.[278] Playing with a dog is not such a reasonable use of the sidewalk as to make the city liable for injuries resulting from a defect.[279]

The question of contributory negligence is one for the jury, under all the circumstances of the case.[280]

69. Evidence; Damages.—In an action to recover for an injury sustained by reason of a defective way, if it becomes a material question whether the plaintiff's horse had a habit of shying at the time of the accident, the defendants may, after introducing evidence of instances of his shying before that time, prove similar instances afterwards. "The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was

[275] Ark. Teleph. Co. *v.* Ratteree, 57 Ark. 429.
[276] Joliet *v.* Seward, 86 Ill. 402.
[277] McCambley *v.* Staten Island M. R. Co., 32 N. Y. App. Div. 346.
[278] McCarthy *v.* Portland, 67 Me. 167.
[279] Jackson *v.* Greenville, 72 Miss. 220.
[280] Carver *v.* Detroit & S. Plank-Road Co., 69 Mich. 616; Balt. & R. Turnp. Road *v.* State, 71 Md. 573, and the cases cited supra.

competent to prove that his previous conduct was not accidental or unusual, but frequent and the result of a fixed habit at the time of the accident." [281] In a Rhode Island case, however, it was held that testimony as to the behavior or disposition of a horse subsequent to the accident, even if theoretically admissible, should be excluded as impracticable and confusing.[282]

If a horse's disposition is such that when exposed to ordinary objects and noises on a highway he becomes unmanageable with a driver of ordinary care and skill, and this contributes to the injury, the plaintiff cannot recover.[283] So, a habit of stumbling may be shown;[284] or that the horse had defective vision.[285] But where the question was of the plaintiff's contributory negligence in driving over a bridge with no guards or railings a horse blind in one eye, it was held that text-books relating to the effect of blindness in horses were inadmissible in evidence, since the subject was not one of expert testimony but depended on a knowledge of the disposition of the particular animal.[286]

Where as the result of an accident a horse ran away, it was held that evidence showing that a horse once doing this will do so again when the opportunity occurs, is admissible on

[281] Todd *v.* Rowley, 8 Allen (Mass.) 51. And see Maggi *v.* Cutts, 123 Mass. 535; Chamberlain *v.* Enfield, 43 N. H. 356.

[282] Stone *v.* Langworthy (R. I.), 40 Atl. Rep. 832.

[283] Bliss *v.* Wilbraham, 8 Allen (Mass.) 564.

And see Bailey *v.* Belfast (Me.), 10 Atl. Rep. 452. Where the defendant alleged that the mare was a vicious animal and had not been used by a former owner, the plaintiff was allowed to show in rebuttal that the reason she had not been used was because the owner had so many horses that he had not work for all of them: Potter *v.* Natural Gas Co., 183 Pa. St. 575.

[284] Patterson *v.* South. & North. Ala. R. Co., 89 Ala. 318.

And where the plaintiff had opportunities of observing, it need not be shown that he actually knew of the habit: Judd *v.* Claremont, 66 N. H. 418.

[285] Wright *v.* Templeton, 132 Mass. 49.

[286] Gould *v.* Schermer, 101 Ia. 582.

the question of damages.[287] But there is no rule that one injured by being thrown from a wagon as a result of defects in a highway when his horses were running away, cannot recover if it be shown that the horses had run away before: the question of reasonable care is for the jury.[288] And it has even been held that where a defect in the highway caused A.'s team to run away and collide with B., who sued the town—evidence that A.'s team was in the habit of running away was inadmissible.[289]

It has been held that evidence that the plaintiff is habitually a reckless driver, is inadmissible.[290] And, on the other hand, evidence that the plaintiff was commonly careful and skilful in driving, is not admissible to show that at the time of the accident he was exercising due care.[291] It has already been stated that evidence of similar cases of fright at the same object may be given.[292]

The subject of damages for the injury to or death of an animal has been already treated of,[293] but some additional cases may properly be considered here. Damages against a town for injuries to a horse from a defective highway may be proportioned to the length of time of the disability.[294] Evidence of the animal's value before and after the accident is admissible.[295] Where the animal dies, compensation cannot be recovered for the loss of the use of its services in addition to

[287] Balt. & Y. Turnp. R. *v.* Crowther, 63 Md. 558.

So, where a horse acquires a habit of kicking, as the result of the accident: English *v.* Mo. Pac. R. Co., 73 Mo. App. 232.

[288] Centralia *v.* Scott, 59 Ill. 129. [289] Cheney *v.* Ryegate, 55 Vt. 499.

[290] Brennan *v.* Friendship, 67 Wis. 223.

[291] McDonald *v.* Savoy, 110 Mass. 49. [292] See § 66, supra.

[293] See §§ 50, 61, supra.

In an action for damages for an injury to a horse caused by an obstruction in a street, it was held error to charge that the jury might allow such sum as they believed the horse to be damaged, as no rule was furnished by which damages could be ascertained: Badgley *v.* St. Louis (Mo.), 50 S. W. Rep. 817.

[294] Johnson *v.* Holyoke, 105 Mass. 80.

[295] Whiteley *v.* China, 61 Me. 199.

its value before the injury.[296] But, in other cases, the loss of use is a proper element of damages.[297] Where the horse was injured by one carelessly driving against him, it was held that the measure of damages was the expense of his cure, the value of his services while being cured, and the difference between his value before the injury and after the cure.[298] The owner should use ordinary care in looking after the animal and employing a veterinary surgeon, but is not responsible for all the mistakes of the surgeon.[299] The fact that the owner of a horse injured by a defect in the highway kills it, will not prevent his recovering its full value, where there was no reasonable hope of recovery at the time of killing.[300]

Where the horse was frightened by an object on the highway and ran away but was not physically injured, evidence that the market value of horses generally depreciated 50 per cent. on their running away was held inadmissible. "The mode of reaching the amount of injury in its market value to a horse because of its running away, without wounding or physical injury to it, on a trial involving that question, must be to prove the habits of the animal before the occurrence, the circumstances attending it and how the particular horse was then and afterwards affected by it; also a description of the horse and its value prior to the runaway. These are *facts* to be established by proof." [301]

[296] Page *v.* Sumpter, 53 Wis. 652.

[297] See Brown *v.* Southbury, 53 Conn. 212; Wilson *v.* Troy, 60 Hun (N. Y.) 183; Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560.

See also § 61, supra.

[298] Streett *v.* Laumier, 34 Mo. 469. [299] Page *v.* Sumpter, supra.

[300] O'Neil *v.* East Windsor, 63 Conn. 150.

[301] Van Wagoner *v.* N. Y. Cement Co., 36 Hun (N. Y.) 552.

TITLE IV.

LIABILITIES OF OWNERS OF ANIMALS.

CHAPTER I.

ANIMALS TRESPASSING AND RUNNING AT LARGE.

70. The common-law rule with regard to restraining animals.
71. Abrogation of the common-law rule.
72. Division fences.
73. Sufficiency of the fence.
74. Nature and results of the trespass.
75. Animals straying from the highway.
76. General rules affecting liability; *scienter;* intention; recovery.
77. When animals are "running at large"; pasturing in the highway.
78. Statutes and ordinances regulating running at large.
79. Distress.
80. Other remedies against trespassing animals.

70. The Common-Law Rule with Regard to Restraining Animals.—At the common law it was the duty of the owner or keeper of animals to restrain them from trespassing on the lands of others whether enclosed or unenclosed, and the latter had a right of action for such trespasses without regard to whether the lands were protected by fences or not.[1] The only exception to this rule was where by statute, written agreement or prescription the owners of adjoining lands were obliged to maintain partition fences: in this case the party complaining of the trespass had first to show that he had ful-

[1] Cooley Torts, 2d ed., 397.

filled his duty with reference to such fence; otherwise he could not recover.[2] The reason for such a rule in a populous and highly cultivated country is obvious; every encouragement ought to be given to the promotion of agriculture and the welfare of the classes concerned therein, and it is negligence for the owner of animals to allow them to run at large and trespass on the lands of others when there is only a limited amount of territory available for pasture, within which it is perfectly easy to confine and tend them. This rule has been declared to be the law or adopted by statute in many of the States, especially the more populous ones.

In Georgia the common-law rule was formerly not in force;[3] it is otherwise now, however, except in the counties where the stock law does not obtain.[4]

In Illinois it was held in an early case that the common law was not in force, and the reasons given are quoted as applicable to other new communities. The court said: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this common-law rule prevails now, it must have prevailed from the time of the earliest settlements in the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies they brought with them and adopted as applicable to their condition a rule of law requiring each one to fence up his cattle; that they designed the millions of fertile acres stretched out before them to go ungrazed, except as each purchaser from government was able to enclose his part with a fence? This State is unlike any other of the Eastern States in their early settlement, because, from the scarcity of timber, it must be many years yet before our ex-

[2] Ibid. 398; Pollock Torts, 2d ed., 433.

[3] Macon & W. R. Co. *v.* Lester, 30 Ga. 911; Georgia R. & Bkg. Co. *v.* Neely, 56 id. 540.

[4] Bonner *v.* De Loach, 78 Ga. 50. See Newton *v.* Ferrill (Ga.), 25 S. E. Rep. 422.

tensive prairies can be fenced, and their luxuriant growth sufficient for thousands of cattle must be suffered to rot and decay where it grows, unless the settlers upon their borders are permitted to turn their cattle upon them. . . . The universal understanding of all classes of the community upon which they have acted by enclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is, and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common-law rule to the condition and circumstances of our people, that it does not and never has prevailed in Illinois." [5]

In this case the cattle entered the plaintiff's enclosure from the highway, but in a later case where they entered through the space left by the removal of an inside fence it was held that the plaintiff could recover.[6] "The latter decision limits and qualifies the first to stock running at large in the highways and commons, and leaves the common law in force as to inside fences, unless regulated by the statute regarding partition fences." [7]

And now under the statute imposing a penalty on one permitting domestic animals to run at large, except where authorized by a vote, owners must keep their animals from trespassing or be liable for the results. The common-law rule has been entirely restored, except so far as the statute regulating partition fences is concerned.[8]

In Indiana the common-law rule is in force, where no order has been made by county commissioners allowing animals to run at large;[9] and this without reference to the quality of

[5] Seeley *v.* Peters, 5 Gilm. (Ill.) 130. [6] Buckmaster *v.* Cool, 12 Ill. 74.

[7] McCormick *v.* Tate, 20 Ill. 334. And see McBride *v.* Lynd, 55 id. 411; Birket *v.* Williams, 30 Ill. App. 451.

[8] Bulpit *v.* Matthews, 145 Ill. 345; D'Arcy *v.* Miller, 86 id. 102; Selover *v.* Osgood, 52 Ill. App. 260; McPherson *v.* James, 69 id. 337.

[9] Atkinson *v.* Mott, 102 Ind. 431; Welch *v.* Bowen, 103 id. 252; Indianapolis & Cinc. R. Co. *v.* Caldwell, 9 id. 397; Same *v.* McClure, 26 id. 370.

fencing or whether the animals are breachy or accustomed to do mischief.[10] "But this was not the rule in the early settlement of this State. It was not then applicable to our circumstances." [11]

In Kansas the same rule has been held to be in force, and where adjoining owners fence their lands in common, each must take care of his own cattle and is liable if they wander on the other's land. "The statutes do not require the parties to build partition fences." [12] While it has been held, however, that any statute authorizing cattle to run at large on the private property of individuals would be unconstitutional, a statute requiring land to be fenced and enacting that no action shall lie for injuries by cattle unless such fence is built is in force and amounts practically to an abrogation of the common-law rule. "The owner of real estate does not use reasonable and ordinary care and diligence to protect his property from the intrusion of roaming cattle unless he encloses it with a lawful fence. And if he receives any injury through the want of such lawful fence, he is in about the same condition as though he received injury in any other way through his own negligence." [13] And an act excluding certain counties for a time from the operation of this statute was held unconstitutional as not being of uniform operation through the State.[14]

In Maine this rule is in force except so far as division fences are concerned, and where there is no obligatory fence each occupant is obliged to keep his animals off the adjoining

[10] Stone *v.* Kopka, 100 Ind. 458.

[11] Mich. South. & N. I. R. Co. *v.* Fisher, 27 Ind. 96.

[12] Baker *v.* Robbins, 9 Kan. 303.

[13] Un. Pac. R. Co. *v.* Rollins, 5 Kan. 167. And see Caulkins *v.* Mathews, Ibid. 191; Larkin *v.* Taylor, Ibid. 433; Fillmore *v.* Booth, 29 id. 134; Wingrove *v.* Williams, 6 Kan. App. 262.

It is not a misdemeanor in Kansas to drive horses on land and allow them to destroy growing grass: State *v.* Tincher, 57 Kan. 136.

[14] Darling *v.* Rodgers, 7 Kan. 592.

land.[15] The rule is likewise in force in Massachusetts[16] and Maryland.[17]

In Michigan it has been held that the common law has not been changed, as there is no statute requiring individuals to fence their lands; nevertheless the statute does preclude recovery for damage by beasts unless the plaintiff's land was fenced.[18] In Minnesota and New Jersey the common-law rule is in force, except so far as division fences are concerned.[19] So, in New York, where there is no town regulation as to fences or animals running at large.[20] In New Hampshire the owner's liability was held to extend to a case where his cow, of which he had general control, was turned out of its pasture by a stranger and driven in the direction of the plaintiff's close and, being left, strayed upon it.[21] And the common-law rule holds in North Dakota.[22]

In Ohio the common-law rule was formerly not in force.[23] It has, however, been restored by statute. "Prior to the passage of this act, the owner of domestic animals not breachy or unruly had the right in this State to allow them to run at large. . . . By the statute in question a new policy is introduced in the State in regard to the restraint of the classes of domestic animals named in the statute. The object of the

[15] Webber *v.* Closson, 35 Me. 26; Lord *v.* Wormwood, 29 id. 282; Little *v.* Lathrop, 5 Greenl. (Me.) 356; Sturtevant *v.* Merrill, 33 Me. 62; Knox *v.* Tucker, 48 id. 373.

[16] Thayer *v.* Arnold, 4 Metc. (Mass.) 589.

[17] Balt. & O. R. Co. *v.* Lamborn, 12 Md. 257.

[18] Williams *v.* Mich. Cent. R. Co., 2 Mich. 259.

[19] Locke *v.* St. Paul & Pac. R. Co., 15 Minn. 350; Coxe *v.* Robbins, 9 N. J. L. 384; Chambers *v.* Matthews, 18 id. 368; Vandegrift *v.* Rediker, 22 id. 185.

[20] Wells *v.* Howell, 19 Johns. (N. Y.) 385; Stafford *v.* Ingersol, 3 Hill (N. Y.) 38; Angell *v.* Hill, 18 N. Y. Suppt. 824; Tonawanda R. Co. *v.* Munger, 5 Den. (N. Y.) 255.

[21] Noyes *v.* Colby, 30 N. H. 143.

[22] Bostwick *v.* Minneapolis & P. R. Co., 2 N. D. 440.

[23] Kerwhacker *v.* C., C. & C. R. Co., 3 O. St. 172; Cleveland, C. & C. R. Co. *v.* Elliott, 4 id. 474. And see Marietta & Cinc. R. Co. *v.* Stephenson, 24 id. 48.

statute was, in view, doubtless, of the improved condition of the lands of the State, to abolish the former rule and take from the owner of such animals the right previously existing of allowing them to run at large. . . . It is said the authority to take up applies only to such animals as are at large with the consent of, or by the fault of the owner. We do not think so. The danger to the public of mischief from the intrusions of the animals is the same whether they are at large with or without the fault of the owner." [24]

In Oregon it was held in an early case that the common-law rule was not in force.[25] This appears to have been decided, however, on the construction of a particular statute, as a later case holds that, in the absence of a statute changing the common-law rule, one is not obliged to fence his lands before he can maintain an action for trespass by cattle. The statutes being more or less local in their character, this rule may therefore be considered in force.[26]

In Pennsylvania the common-law rule was originally in force.[27] An owner of cattle is, however, not liable for a trespass by their pasturing upon unenclosed woodland. "Their entry is, in strictness a trespass which, for its insignificance, is not noticed by the law, probably on the foot of the maxim *de minimis*, or perhaps because it is better that all waste lands should be treated as common without stint. It certainly saves vexatious litigation." [28] The effect of the early statutes was to make it necessary that the owner of improved lands should fence them, both to restrain his own cattle and shut

[24] Sloan *v.* Hubbard, 34 O. St. 583. The decision in Marietta & Cinc. R. Co. *v.* Stephenson, supra, was held not inconsistent, as "that was an action to recover for injuring cattle; and as they were at large without the omission of reasonable care on the part of the owner, it was held that he was not guilty of contributory negligence."

[25] Campbell *v.* Bridwell, 5 Oreg. 311. And see Moses *v.* So. Pac. R. Co., 18 id. 385, where the same statement is made. Cf. the cases cited infra.

[26] French *v.* Cresswell, 13 Oreg. 418. And see Walker *v.* Bloomingcamp (Oreg.), 43 Pac. Rep. 175; Fry *v.* Hubner (Oreg.), 57 id. 420.

[27] Gregg *v.* Gregg, 55 Pa. St. 227. [28] Knight *v.* Abert, 6 Pa. St. 472.

out those of his neighbors, and without such fence he could not maintain trespass.[29] This does not apply where the duty to fence is common to two adjoining land-owners but is waived by mutual consent: in that case each is liable for the trespass of his cattle.[30] By a late statute the earlier ones are repealed and the rights of the owners of cattle and land are left as they were at the common law: the owner of cattle sued for their trespass must show, to prevent recovery, that he kept or tried to keep his cattle in by a sufficient fence.[31] But this statute did not repeal one that required party-line fences to be maintained sufficient to restrain the tendency of stock to roam.[32]

The common-law rule is in force in Rhode Island.[33] It was held not to be in South Carolina;[34] but the general stock law prohibits the running at large of stock, and an act exempting certain land from the benefit thereof was held unconstitutional as a "taking" of private property by authorizing land to be taken for the building of a fence to enclose a pasture.[35]

In Vermont the common-law rule prevails,[36] and extends to the case of division fences. "The statute imposing the duty on adjoining proprietors of land to erect and maintain fences recognized the same principle. For the object and design of fencing is not to keep the cattle of others off their premises, but to keep their own at home. The owner of a close is not required to guard against the intrusion of cattle

[29] Gregg *v.* Gregg, supra. [30] Milligan *v.* Wehinger, 68 Pa. St. 235.

[31] Barber *v.* Mensch, 157 Pa. St. 390; Arthurs *v.* Chatfield, 9 Pa. Co. Ct. 34.

As to statutes regulating swine, see Mitchell *v.* Wolf, 46 Pa. St. 147; Stewart *v.* Benninger, 138 id. 437.

[32] Erdman *v.* Gottshall, 9 Pa. Super. Ct. 295.

[33] Tower *v.* Providence & W. R. Co., 2 R. I. 404.

[34] Murray *v.* So. Car. R. Co., 10 Rich. L. (S. C.) 227.

[35] Fort *v.* Goodwin, 36 S. C. 445. And see Smith *v.* Bivens, 56 Fed. Rep. 352, where this case was followed.

[36] Keenan *v.* Cavanaugh, 44 Vt. 268.

And see Town *v.* Lamphire, 36 id. 101, as to restraining rams.

or animals belonging to others, but each is required to prevent his own animals from entering upon the close of the other." [37]

In Wisconsin the same rule has been held to be the law, "though it is generally disregarded by common consent in the newly settled parts of the State." [38]

71. Abrogation of the Common-Law Rule.—The reasons why the common-law rule is less suited to the needs of a newly settled country have been admirably stated in the opinions in Seeley *v.* Peters[39] and Buford *v.* Houtz.[40] We, accordingly, find that in many of the States, especially the Western and Southern ones, it has been declared not to be in force or has been abrogated by statute, and that the land-owner is there obliged, not to fence in his own cattle, but to fence out those of others, and is not entitled to recover in trespass unless he can show that he has fulfilled his duty with reference to fencing. As in the preceding section, the States will be considered approximately in their alphabetical order.

In Alabama the common-law rule is not in force, except where by local statutes boundary lines are declared lawful fences rendering the owner of cattle liable for trespasses in passing over them.[41] Nor is the rule in force in Arkansas[42] or California, except in certain counties of the latter State.[43]

In Colorado the common-law rule does not hold as against the trespasses of cattle,[44] but the same custom was held not to apply to the case of sheep. "The owner of cattle in this

[37] Hurd *v.* Rutland & B. R. Co., 25 Vt. 116.

[38] McCall *v.* Chamberlain, 13 Wis. 637.

[39] 5 Gilm. (Ill.) 130, cited supra, q. v. [40] 133 U. S. 320, cited infra, q. v.

[41] Joiner *v.* Winston, 68 Ala. 129; Wilhite *v.* Speakman, 79 id. 400; Mobile & O. R. Co. *v.* Williams, 53 id. 595; Louisville & N. R. Co. *v.* Cochran, 105 id. 354.

[42] Little Rock & F. S. R. Co. *v.* Finley, 37 Ark. 562.

[43] Merritt *v.* Hill, 104 Cal. 184; Waters *v.* Moss, 12 id. 535; Logan *v.* Gedney, 38 id. 579, where it was held that the laws restricting herding are not meant to prohibit free ranging at large.

[44] Morris *v.* Fraker, 5 Colo. 425; Nuckolls *v.* Gaut, 12 id. 361.

State relies almost entirely upon his recorded brand and upon the annual round-up for identification thereof and protection from loss; except in a few isolated instances, such stock is never, except in summer or winter, confined to an enclosed area or kept close-herded upon the range. And the conclusion arrived at in the opinion above mentioned [*i. e.*, Morris *v.* Fraker, cited supra] is based largely upon the general custom that has always prevailed among stockmen in this country of allowing their cattle to *roam at will* upon the public domain. But persons who make sheep raising and wool growing their business always pasture in enclosures or close-herd upon the range. The difference in intelligence and instinct, in disposition and physical characteristics, between sheep and cattle, renders it absolutely necessary to handle them differently. A flock of sheep turned loose to run at will upon the range would soon be entirely lost to the owner. True there is no law except that of self-interest to prevent the owners allowing them to run at large. But the custom of close-herding sheep is as fully established and as universally recognized as is that of allowing cattle to range at will. . . . The farmer in Colorado, aware of the established custom of letting cattle run at will, in the absence of statute, builds a fence sufficient to protect his crop therefrom; but being advised of the equally well-established custom of enclosing or close-herding sheep, he does not so construct his fence as to keep them out of his field. It would be manifestly unjust to apply the same rule for injuries to his crop by the latter that would be applicable for like injuries under similar circumstances by the former." [45]

In Connecticut the common-law rule is not in force,[46] except as to fencing in unruly cattle.[47] And it was held not to apply to the Black Hills country of Dakota as "not in accordance with the common usage and necessities of the new and

[45] Willard *v.* Mathesus, 7 Colo. 76.
[46] Studwell *v.* Ritch, 14 Conn. 292; Hine *v.* Munson, 32 id. 219.
[47] Hine *v.* Wooding, 37 Conn. 123.

growing section." [48] Nor is it the rule in Florida,[49] Indian Territory,[50] Iowa,[51] or Kentucky.[52]

In Mississippi, though the common-law rule does not prevail,[53] a statute requiring owners to enclose stock and providing that trespassing animals may be sold was passed and held constitutional.[54]

This rule is likewise not in force in Missouri,[55] Montana,[56] Nebraska,[57] Nevada,[58] North Carolina,[59] Washington,[60] or West Virginia.[61] Nor does it prevail in Texas. "It is in-

[48] Sprague *v.* Fremont, E. & M. V. R. Co., 6 Dak. 86. And see Williams *v.* North. Pac. R. Co., 3 id. 168, 175.

[49] Savannah, F. & W. R. Co. *v.* Geiger, 21 Fla. 669.

[50] Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. Rep. 347; Eddy *v.* Evans, 58 id. 151.

[51] Alger *v.* Miss. & Mo. R. Co., 10 Ia. 268; Frazier *v.* Nortinus, 34 id. 82; Harrison *v.* Adamson, 76 id. 337.

As to the contrary rule under the statute of 1870, see Little *v.* McGuire, 38 Ia. 560; 43 id. 447.

[52] Wills *v.* Walters, 5 Bush (Ky.) 351; Louisville & N. R. Co. *v.* Simmons, 85 Ky. 151.

[53] Vicksburg & J. R. Co. *v.* Patton, 31 Miss. 156; Mobile & O. R. Co. *v.* Hudson, 50 id. 572.

[54] Anderson *v.* Locke, 64 Miss. 283.

[55] Gorman *v.* Pac. R. Co., 26 Mo. 445; McPheeters *v.* Hannibal & St. J. R. Co., 45 id. 22; Mann *v.* Williamson, 70 id. 661; Bradford *v.* Floyd, 80 id. 207; Fenton *v.* Montgomery, 19 Mo. App. 156; Stovall *v.* Emerson, 20 id. 322; Board *v.* St. Louis, I. M. & S. R. Co., 36 id. 151.

[56] Smith *v.* Williams, 2 Mont. 195.

[57] Delaney *v.* Errickson, 10 Neb. 492; 11 id. 533—at least so far as the uncultivated, unenclosed prairie lands are concerned. In Lorance *v.* Hillyer (Neb.), 77 N. W. Rep. 755, it was held that the Nebraska herd law limits the common-law liability of the owner of trespassing animals only in excluding damages committed on uncultivated lands.

[58] Chase *v.* Chase, 15 Nev. 259.

[59] Laws *v.* No. Car. R. Co., 7 Jones L. (N. C.) 468; Burgwyn *v.* Whitfield, 81 N. C. 261; Runyan *v.* Patterson, 87 id. 343. See State *v.* Edmonds, 121 id. 679.

[60] Timm *v.* North. Pac. R. Co., 3 Wash. Ty. 299. But the pasturing of sheep on the lands of another, whether closed or unenclosed, without his consent, is unlawful by statute: Northern Pac. R. Co. *v.* Cunningham, 89 Fed. Rep. 594.

[61] Blaine *v.* C. & O. R. Co., 9 W. Va. 252; Layne *v.* O. River R. Co., 35 id. 438.

applicable to our situation and the customs and habits of the early settlers of the country, and inconsistent with our legislation in regard to fences and stock." [62] But this does not mean that "for no breach of his fence and invasion of his pasture by domestic animals could a land-owner recover under our laws. It may be admitted that, if his enclosure be sufficient to exclude all cattle of an ordinary disposition, he would have the right to recover for the trespass of such as were peculiarly vicious and prone to break fences." [63] And the owner of cattle is not authorized to enclose another's land so as to reap from it those benefits which, as a rule, are incident exclusively to ownership.[64]

The same principles have been applied to the public lands of the United States in a case where it was held that the plaintiff who asserted title to 350,000 acres out of 921,000 acres should not have a bill granted to restrain the defendants from using the public lands for their stock. The court said: "We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed and no act of government forbids this use. . . . It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds, or else would be liable for their trespasses upon the unenclosed grounds of his neighbors. Such a principle was ill-adapted to the nature and condition of the country at that time. Owing to the

[62] Pace *v.* Potter, 85 Tex. 473. And see Davis *v.* Davis, 70 id. 123; Finley *v.* Bradley (Tex. Civ. App.), 21 S. W. Rep. 609.

[63] Clarendon Land Inv. & Ag. Co. *v.* McClelland, 86 Tex. 179.

As to the offense of staking a horse on the enclosed land of another, see Daly *v.* State (Tex. Cr.), 48 S. W. Rep. 515.

[64] St. Louis Cattle Co. *v.* Vaught, 1 Tex. Civ. App. 388.

scarcity of means for enclosing lands and the great value of the use of the public domain for pasturage, it was never adapted or recognized as the law of the country, except as it might refer to animals known to be dangerous and permitted to go where their dangerous character might produce evil results. Indeed, it is only within a few years past, as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation. Nearly all the States in early days had what was called the fence law, a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals which were permitted to run at large, was prescribed. The character of this fence in most of the statutes was laid down with great particularity, and, unless it was in strict conformity to the statute, there was no liability on the part of the owner of cattle if they invaded the enclosure of a party and inflicted injury on him. If the owner of the enclosed ground had his fence constructed in accordance with the requirements of the statute, the law presumed then that an animal which invaded the enclosure was what was called a *breachy* animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded." [65]

72. Division Fences.—Where by statute, written agreement or prescription adjoining land-owners are severally bound to keep up their own portions of a partition fence, each is liable for the trespasses of his own cattle through the portion of the fence which he is bound to repair.[66] And it is immaterial

[65] Buford *v.* Houtz, 133 U. S. 320. [66] Cooley Torts, 2d ed., 399, 400. And neither can recover where his negligence caused the trespass: Car-

that the plaintiff's own portion was also out of repair.[67] It is incumbent on the defendant to excuse himself by showing that the animals passed through a defect for which the plaintiff was responsible, consequently where there is no evidence as to which portion they passed through, both being out of repair, the plaintiff may recover.[68] On the other hand, it has been held that the injured party must show affirmatively that the trespass was through the other's portion of the fence or through his own portion, which was sufficient.[69] The fact that the defendant has actually maintained the portion of the fence through which the cattle entered has been held *prima facie* evidence to sustain a recovery, in the absence of evidence on the part of the defendant that the plaintiff was bound to maintain that portion.[70]

If there has been no legal division of the fence between the parties, each is liable, where the common-law rule prevails, for the trespass of his own animals.[71] And the same is true

penter *v.* Cook (Vt.), 30 Atl. Rep. 988 [see Same *v.* Same (Vt.), 41 id. 1038]; Scott *v.* Grover, 56 Vt. 499; Cowles *v.* Balzer, 47 Barb. (N. Y.) 562; Griffin *v.* Martin, 7 id. 297; Weide *v.* Thiel, 9 Ill. App. 223; Duffees *v.* Judd, 48 Ia. 256.

As to an action on an agreement where there is no prescription, see Nowel *v.* Smith, Cro. Eliz. 709.

Where there was a prescription, the tenant could be compelled to fence by the writ of *curia claudenda:* Fitzh. Nat. Brev., Cur. Claud. 297.

[67] Ozburn *v.* Adams, 70 Ill. 291; Pinnell *v.* St. Louis, A. & T. R. Co., 49 Mo. App. 170.

In O'Riley *v.* Diss., 41 Mo. App. 184, it was held that the covenant to construct a division fence was mutual and the plaintiff must show performance on his part, but that the contract duty having been waived by both parties, the plaintiff could recover on the defendant's violation of his common-law obligation to keep his cattle in.

[68] Deyo *v.* Stewart, 4 Den. (N. Y.) 101; Phillips *v.* Covell, 79 Hun (N. Y.) 210.

[69] Selover *v.* Osgood, 52 Ill. App. 260; D'Arcy *v.* Miller, 86 Ill. 102.

[70] Colden *v.* Eldred, 15 Johns. (N. Y.) 220. But see Sturtevant *v.* Merrill, 33 Me. 62.

[71] Knox *v.* Tucker, 48 Me. 373; Thayer *v.* Arnold, 4 Metc. (Mass.) 589; McKowan *v.* Harmon, 56 Ill. App. 368; Angell *v.* Hill, 18 N. Y. Suppt. 824.

where the maintenance of a fence has been mutually waived by the parties.[72] But a joint maintenance for a long time will not give rise to a prescriptive obligation by either to maintain a particular portion.[73] Where it is impossible to erect a partition fence owing to the fact that the lands of the parties are separated by a non-navigable river, each is liable, as at common law, for the trespasses of his cattle.[74]

One who removes a partition fence must give due notice to the other party.[75] He is then remitted to his common-law liability for the trespass of his cattle.[76] Otherwise where the fence is on his own land.[77] And where the plaintiff has had a reasonable time to build a proper fence, he cannot recover.[78] So, where the plaintiff had removed a part of the fence erected by the defendant under a claim of right, it was held that after a reasonable time had elapsed for the defendant to rebuild, there was no license for the entry of the latter's cattle and he was liable for their trespass.[79] Where the plaintiff removed his portion of the fence and notified the defendant to remove his cattle, which the latter did not do, and the defendant afterwards removed his own part of the fence, he was held liable for the trespass of his cattle.[80] Where the plaintiff sued for damages to his crop by cattle in consequence of the defendant's removal of the division fence, the crop having been sown *after* the removal, it was held that he could not recover by reason of his negligence.[81] And where the

[72] Myers *v.* Dodd, 9 Ind. 290; Winters *v.* Jacobs, 29 Ia. 115; Milligan *v.* Wehinger, 68 Pa. St. 235.

[73] Webber *v.* Closson, 35 Me. 26.

[74] Bissel *v.* Southworth, 1 Root (Conn.) 269.

[75] McCormick *v.* Tate, 20 Ill. 334.

[76] Holladay *v.* Marsh, 3 Wend. (N. Y.) 142.

[77] Whalon *v.* Blackburn, 14 Wis. 432.

[78] Smith *v.* Johnson, 76 Pa. St. 191.

Recovery should be limited to entries occurring before such time: Watkins *v.* Rist, 67 Vt. 284.

[79] Sturtevant *v.* Merrill, 33 Me. 62.

[80] Van Slyck *v.* Snell, 6 Lans. (N. Y.) 299.

[81] Hassa *v.* Junger, 15 Wis. 598.

defendant removed the division fence without committing a trespass, he was held not liable for the trespass of a stranger's cattle.[82]

The tenant of a close is obliged to fence only against cattle which are rightfully on the adjoining land.[83] And if the fence of the first close is sufficient, he can recover for the trespass of animals entering a second close which is insufficiently fenced.[84] But the rule is otherwise where the first close is insufficiently fenced and the animals pass through that into another close of the same owner, the fence of which is sufficient.[85] "If A. has *green acre*, adjoining to his own close *white acre*, which adjoins to B.'s close *black acre* which A. ought to fence against: If B.'s cattle go from his *black acre* to A.'s *white acre* and thence to A.'s *green acre* this is no trespass, because A. did not fence his *white acre* against B.'s *black acre*." [86] Where the defendant's cattle enter upon the plaintiff's land through the close of a third person in which they have no right to be, the defendant is liable in trespass though both the fences are defective.[87] And the owner of the intermediate close is not liable.[88] In accordance with these principles it was held that where defendant's beast escaped from his field into A.'s field, thence into B.'s, thence into plaintiff's, where he injured a mare, the defendant was liable, though as between him and A., the latter was bound to keep the fence in repair, and though the fence between B.'s field and the plaintiff's was insufficient. "It was negligence to turn the animals into a lot insecurely fenced . . . without regard to the obligations existing between the defendant and the tenant of the next lot. . . . As to the plaintiff, the animals while in

[82] Richardson *v.* Milburn, 11 Md. 340. [83] Rust *v.* Low, 6 Mass. 90.
[84] Herold *v.* Meyers, 20 Ia. 378. [85] Page *v.* Olcott, 13 N. H. 399.
[86] Rust *v.* Low, supra, citing Jenk. 4 Cent. ca. 5.
[87] Bac. Abr., Trespass H.: Lord *v.* Wormwood, 29 Me. 282.
[88] Little *v.* McGuire, 43 Ia. 447; Gowan *v.* St. Paul, S. & T. F. R. Co., 25 Minn. 328; Lawrence *v.* Combs 37 N. H. 331.
Even where the breach of the fence is made by his own cattle, unless occurring under his control: Durham *v.* Goodwin, 54 Ill. 469.

that lot were unlawfully there and no obligation rested upon him to fence his lot against them." [89]

Where A.'s cattle, lawfully on B.'s land, escape thence to C.'s land through a defect in a division fence which B. was bound to repair, A. is liable to C. for the trespass.[90] But it has been held also that if one voluntarily permits a stranger's cattle to mingle with his on his own land and trespass upon his neighbor's land, he is responsible for the damage done by both, and may be regarded as "owner" *pro hac vice* of the stranger's cattle within the meaning of a statute limiting the liability to the "owner" of the trespassing stock.[91] Where A. and B., who were adjoining land-owners, made an agreement to repair a partition fence and A. leased the land, it was held that his tenant could not have an action against B. for damage by animals breaking through a fence that A. was bound to maintain.[92]

Where the plaintiff and A. owned adjoining tracts of pasture land surrounded but not separated by fences, so as to be in one enclosure, and the defendant purchased a part of A.'s land, and, as a part of the agreement, A. separated by a fence the defendant's land from the part retained by him, and the defendant then used the plaintiff's land as well as his own for pasturing stock, it was held that the defendant was not liable for the use of the plaintiff's land from the time the fence was constructed between A.'s property and his own.[93]

The rule where the adjoining lands are purchased by one person has been thus stated: "Where adjoining lands which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing ob-

[89] Lyons *v.* Merrick, 105 Mass. 71.

[90] Stafford *v.* Ingersol, 3 Hill (N. Y.) 38.

[91] Montgomery *v.* Handy, 62 Miss. 16.

That trespass is not the proper remedy for damage to a crop by a stranger's cattle through defendant's failure to fence, see Crawford *v.* Hughes, 3 J. J. Marsh. (Ky.) 433.

[92] Baynes *v.* Chastain, 68 Ind. 376. [93] Pace *v.* Potter, 85 Tex. 473.

ligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose." [94]

In Alabama it was held that where there was a statutory obligation upon adjacent owners for the joint maintenance of the whole of a fence, even if there were a special contract that each should keep up one-half, neither could recover for the trespass of the other's cattle, the remedy being an action for breach of contract.[95] This decision, however, seems to stand alone, and is opposed to the rule laid down in the above cases.

73. Sufficiency of the Fence.—The question as to the sufficiency of the fence to turn off animals is one ordinarily for the jury. It is frequently, however, a matter of statutory regulation. It has been held that no action lies for injuries sustained by the trespass of animals, unless the lands are surrounded by a statutory fence.[96] But a substantial compliance with the statute is sufficient: an immaterial variation in height from a lawful fence will not defeat the action.[97] Other cases have held that a fence need not be a statutory one. If it is sufficient to exclude ordinary cattle this is all that is necessary.[98] In a California case it is said: "A fence which forms a perfect enclosure and is sufficient to turn stock, which is good, strong and substantial and built of stone, must, we think, be the equivalent of the lawful fences specifically described in the statute." [99]

[94] Boyle *v.* Tamlyn, 6 B. & C. 329, 337.
[95] Walker *v.* Watrous, 8 Ala. 493.
[96] Mann *v.* Williamson, 70 Mo. 661; Pruitt *v.* Ellington, 59 Ala. 454.
[97] Smith *v.* Williams, 2 Mont. 195.
[98] Finley *v.* Bradley (Tex. Civ. App.), 21 S. W. Rep. 609; Davis *v.* Davis, 70 Tex. 123; Race *v.* Snyder, 10 Phila. (Pa.) 533.
[99] Meade *v.* Watson, 67 Cal. 591.

It has also been held that the fence prescribed by statute must entirely surround the land: proof that it was of lawful height and strength where the animals broke through is not sufficient.[100] The law, it was said, would presume that cattle were first tempted to break into the enclosure by reason of the lowness of other parts of the fence.[101] Therefore, an instruction that if the average height of the fence was the statutory height, that was sufficient, was held erroneous.[102] But where the defendant entered the plaintiff's premises and left a fence down, whereby stock entered and destroyed the latter's crop, it was held that the fact that the plaintiff's fence was not as high in other places as the statute required was no defence.[103] And other cases have held that the land need not be surrounded by a statutory fence: it is sufficient if it fulfilled the requirements where the animals broke through.[104] The question seems to be largely one of interpretation of particular statutes.

Where the statute speaks of "unruly cattle that will not be restrained by ordinary fences," "ordinary fences" does not mean lawful fences, but such fences as are common and sufficient to restrain orderly cattle.[105] Where breachy animals break through a defective fence, the plaintiff must show that the alleged trespass would have been committed if the fence had been such as a good husbandman ought to keep.[106] In Illinois partition fences must be at least five feet high and an outside fence is sufficient if it would prevent the breaking in of stock not breachy;[107] whereas, in Indiana, it is immaterial whether any fences other than the outside ones were sufficient.[108]

[100] Stovall *v.* Emerson, 20 Mo. App. 322; Smith *v.* Williams, 2 Mont. 195.
[101] Polk *v.* Lane, 4 Yerg. (Tenn.) 36. [102] Prather *v.* Reeve, 23 Kan. 627.
[103] Crawford *v.* Maxwell, 3 Humph. (Tenn.) 476.
[104] Rice *v.* Nagle, 14 Kan. 498; Crane *v.* Ellis, 31 Ia. 510; Noble *v.* Chase, 60 id. 261.
[105] Hine *v.* Wooding, 37 Conn. 123. [106] Phelps *v.* Cousins, 29 O. St. 135.
[107] Scott *v.* Wirshing, 64 Ill. 102; Scott *v.* Buck, 85 id. 334.
[108] Crisman *v.* Masters, 23 Ind. 319.

Where the statutes allow cattle to run at large and the owner of land built a barbed-wire fence sufficient to keep off all the cattle that were in the neighborhood at the time, but insufficient to keep off smaller cattle subsequently found there, such as calves and yearlings, such owner was held liable for the insufficiency of the fence.[109] Where a young stallion escaped through a fence, the sufficiency thereof is a question for the jury, though the fence was common among farmers and usually considered safe.[110] Under a contract to maintain a hedge until it should be sufficient to turn "ordinary stock," that phrase means such stock as are permitted by law to run at large.[111]

Where A.'s fence was built on B.'s land and treated as a partition fence, it was held that A.'s land was enclosed as required by law and he might bring an action for the trespass of B.'s cattle.[112]

In order that a defect in a fence may constitute a defence in trespass, it should be specially pleaded.[113]

74. Nature and Results of the Trespass.—An action will lie for the trespass of an animal irrespective of the extent of the trespass or the amount of damage done. Some damage, if only nominal, is always presumed.[114] In an English case, where a horse bit and kicked a mare through a fence, and his owners were held liable apart from any question of negligence, Lord Coleridge said: "It is clear that in determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has, moreover, been held again and again that there is a duty on

[109] Clarendon Land Inv. & Ag. Co. *v.* McClelland, 86 Tex. 179.
[110] McIlvaine *v.* Lantz, 100 Pa. St. 586.
[111] Usher *v.* Hiatt, 21 Kan. 548. [112] Moore *v.* White, 45 Mo. 206.
[113] Blacklock *v.* Milliken, 3 U. C. C. P. 34.
[114] Pierce *v.* Hosmer, 66 Barb. (N. Y.) 345.

a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass; but it is a trespass in law." [115]

With regard to a dog the rule appears to be different. It has been held that a dog's jumping into a field without the consent of his master is not a trespass for which an action will lie.[116] It is no trespass where the owner of land chases sheep out with a little dog and then calls the dog off;[117] nor where a person goes along a footpath and his dog happens to escape from him and run into a paddock and pull down a deer against his will.[118] In a later case the question was discussed but not decided, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another. The reasons given for a distinction between animals like dogs and cats and others like oxen were, first, the difficulty or impossibility of keeping them under restraint; second, the slightness of damage which their wandering ordinarily causes; third, the common usage of mankind to allow them a wider liberty; fourth, their not being considered so absolutely the owner's chattels as to be the subjects of larceny.[119] And in a Connecticut case it is said: "Although a dog cannot by entering *alone* on the land of another and doing

[115] Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10. And see § 92, infra.

[116] Brown *v.* Giles, 1 C. & P. 118. And see Sanders *v.* Teape, 51 L. T. N. S. 263.

[117] Millen *v.* Fandrye, Poph. 161. [118] Beckwith *v.* Shordike, 4 Burr. 2092. And see Dimmock *v.* Allenby, 2 Marsh. 582; Buck *v.* Moore, 35 Hun (N. Y.) 338; State *v.* Donohue, 49 N. J. L. 548.

[119] Read *v.* Edwards, 17 C. B. N. S. 245, where a dog known to have a propensity for chasing game was allowed by its master to be at large and it entered the plaintiff's wood and did damage. The action was sustained.

mischief, subject his owner to the action of trespass *quare clausum* as cattle and other animals which are naturally inclined to rove and winged animals that prey upon the crops may do, yet if the owner trespass and while on the land his dog unbidden and against his will does mischief, that action will lie for the injury." [120]

The damage done to a fence by a poacher's dog in pursuit of game is not "malicious injury." [121] And it has been held that the driving of a herd of sheep across unenclosed wild lands, not permitting them to graze more than sheep usually graze while being driven to another place, is not a malicious trespass, where there is no evidence of malice.[122]

The subject of injuries by dogs is treated of in other parts of this work.[123]

The owner of animals is liable for the direct results of their trespass. Where rams trespassed on another's land and got his ewes with lamb, the owner of the rams is liable. "As it is unnecessary to prove negligence, so it is unnecessary to prove a *scienter*, because every one is presumed to be aware of the natural instincts common to all animals." [124] And damages received for an injury to the close itself by a stallion breaking in, do not bar a subsequent action for his having got a mare with foal, that fact not being known at the time.[125] Where A.'s unpedigreed bull allowed unlawfully to run at large got B.'s thoroughbred cow with calf, it was held that the damages should not be restricted to the mere physical injury but were the difference in the cow's value for breeding purposes before and after meeting the bull.[126] And where the defendant's buck lambs escaped and got the plaintiff's ewes with lamb out of season, it was held that the measure of damages was the

[120] Butler, J., in Woolf *v.* Chalker, 31 Conn. 121, 128.
[121] Reg. *v.* Prestney, 3 Cox C. C. 505.
[122] State *v.* Johnson (Wyo.), 54 Pac. Rep. 502.
[123] See Title III, Ch. I, supra, and Title IV, Ch. III, infra.
[124] Cargill *v.* Mervyn, 2 N. Z. Jur. N. S. 50, cited in 12 Ir. L. T. 376.
[125] Hagan *v.* Casey, 30 Wis. 553. [126] Crawford *v.* Williams, 48 Ia. 247.

difference in value of the ewes for breeding purposes before and after that time, and not the value of the lambs perishing by reason of being born in cold weather.[127] Damages cannot be recovered for the loss of prospective mule colts where a stallion trespassed in the pasture where mares were kept with a jack, thereby keeping the jack away: such damages are too speculative.[128]

The subject of liability for the communication of disease is treated of elsewhere.[129]

In an action to recover damages for trespass in destroying the plaintiff's fences and trampling on and destroying his grain, the plaintiff cannot recover for injuries to grain by the cattle of a third person for any period of time after the original entry and trespass.[130]

Where the defendant's cow escaped from his premises without his negligence and entered the plaintiff's barn through an open door and the sleepers of the floor, being rotten, gave way and the plaintiff, entering later, fell through the hole made by the cow, it was held that his injuries were not the proximate result of the cow's trespass.[131]

75. Animals Straying from the Highway.—The common-law rule rendering the owner of animals liable for failure to restrain them does not apply with the same strictness to animals lawfully on a public highway. "There is *prima facie* a public right to and a public advantage in the use of the highway by the public for the usual purposes of trade and traffic, and if the owner of adjacent land were allowed to leave the same unfenced, and entitled at the same time to make any person driving animals along the highway responsible for their straying on to such lands, the use of the highway would

[127] Stearns *v.* McGinty, 55 Hun (N. Y.) 101.
[128] Claunch *v.* Osborn (Tex. Civ. App.), 23 S. W. Rep. 937.
[129] See §§ 88, 89, infra.
[130] Berry *v.* San Francisco & N. P. R. Co., 50 Cal. 435.
[131] Hollenbeck *v.* Johnson, 79 Hun (N. Y.) 499.

be restricted or rendered onerous by the sweeping liability thus imposed. . . The principle must be, it would seem, that the land-owner who does not choose to protect his land from the road cannot impose a liability so burdensome to the usual and legitimate use of the highway on the owner of animals." [132]

Accordingly, where cattle properly driven upon the highway escape upon unfenced adjoining land, their owner is not liable if he makes a reasonable effort to remove them and prevent damage.[133] So, where the defendant was using cattle in repairing a highway and they escaped from his control without his fault and ran on the plaintiff's land, the defendant was held not liable in trespass.[134] It is otherwise if they pass into a second close. As was said in a Massachusetts case: "The principle of the common law which requires that each should keep his cattle on his own land is so far modified as to hold the owner not liable for the trespass of his cattle which, passing along the highway and being properly managed therein, casually wander into the unfenced lots bounding thereon, provided he removes them with reasonable promptness. But the cattle are not in such case lawfully upon such lots. They are there only under such circumstances that their trespass, being casual and such as could not have been prevented by reasonable care, is held excusable and this is all. That they should be rightfully and lawfully upon land, the authority or consent of the owner of the close is necessary, and even if he is without a remedy for the injury they may cause him, the owner of the cattle does not acquire his rights as against the owners of adjoining closes. If, after entering upon his close, they proceed into another adjoining thereto, they are there trespassers and an action may be maintained for such trespass by the owner of the second close, even if his

[132] 27 Sol. Jour. 81.

[133] Hartford *v.* Brady, 114 Mass. 466; Erdman *v.* Gottshall, 9 Pa. Super. Ct. 295.

[134] Cool *v.* Crommet, 13 Me. 250.

fence was insufficient and if he was also bound to fence as against the owner of the first close. Being thus bound, he is only bound to fence against cattle rightfully on the first close."[135] So in an English case it is said: "If cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public." It was therefore held that a plea that cattle, *being* in the highway, escaped was not sufficient; it must state that they escaped, *passing* in the highway.[136] It is incumbent on the defendant in such cases to show that he was using care and skill in driving his cattle.[137]

Where animals are not lawfully on the highway, as if they are merely straying there, their owner is responsible if they trespass on adjoining unfenced lands.[138] And as no man has a right to pasture his animals in the highway, except in those parts where he owns soil, he is liable if they break into adjoining lands, whether fenced or not.[139]

In accordance with the above principles it was held in an English case that where an ox, belonging to the defendant, while being driven by his servants through the streets of a country town, entered an ironmonger's shop, adjoining the street, through an open door and damaged goods—the defendant was not liable, no negligence being proved on the

[135] McDonnell *v.* Pittsfield & N. A. R. Co., 115 Mass. 564. And see Lord *v.* Wormwood, 29 Me. 282.

[136] Dovaston *v.* Payne, 2 H. Bl. 527. [137] Ficken *v.* Jones, 28 Cal. 618.

[138] Garrett Nuisances 164; Mills *v.* Stark, 4 N. H. 512.

And they are not lawfully "going at large," as permitted by an ordinance, if they escape from the owner's enclosure into the highway against his will: Tonawanda R. Co. *v.* Munger, 5 Denio (N. Y.) 255.

[139] Avery *v.* Maxwell, 4 N. H. 36; Stackpole *v.* Healy, 16 Mass. 33; Harrison *v.* Brown, 5 Wis. 27.

As to pasturing on the highway, see § 77, infra.

part of those in charge of the animal.[140] This decision gave rise to a great deal of discussion. In an article in the Journal of Jurisprudence it was said: "Mr. Justice Stephen observes: '. . . I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town.' The solid distinction between the cases is just this, that it is usual to fence a field in order to keep people out, and it is not usual to fence a shop because it would keep people out, and the shopkeeper wants them to come in. . . . That the owner of cattle is not liable for the trespass of his cattle into an unfenced field adjacent to a highway is not, as has been said by the learned judges in this case of Tillett *v.* Ward, an exception to the general rule that the owner is liable if his cattle trespass; it is an exemplification of another rule, that a person who neglects a precaution which is ordinarily employed and which can be employed without interfering with the purpose for which the subjects are used, is responsible for the consequences of his own neglect. If the field were properly fenced and cattle were to stray or break into it off the highway, their owner would be liable, just as he is when they stray off his own land. This exception, as it has been called, does not extend, or, to speak more correctly, this other principle does not apply to the case of a shop adjacent to a street. To fence a shop would be inconsistent with the purpose for which it was intended, and to keep a person on guard from one year's end to the other to prevent the inroad of an occasional ox, is utterly inconsistent with the ordinary conduct of business." [141]

In an article replying to this criticism, it is said: "No doubt the shopkeeper does keep open his door for the reason specified. He incurs the risk of an animal's straying in, because it would be inconvenient for trade purposes to have his door shut. It is, as asserted, usual to keep the door open; but why does it necessarily follow that, if mischief results, he is

[140] Tillett *v.* Ward, 10 Q. B. D. 17. [141] 27 Jour. Jurisp. (Sc.) 347.

to be in a better position than the owner of a field? It seems to us that the writer has here fallen into a fallacy. His idea seems to be that, because it is a reasonable and usual act for a shopkeeper to have his door open, therefore he is entitled to indemnity from some one else equally innocent from the consequences of so doing. It is a usual and reasonable thing to run, in the business of life, the risk of remote and improbable contingencies for the sake of obvious and immediate advantage; but it does not follow, if the contingency happens, that the consequences can be imposed on some one else. So it is a usual thing, no doubt, to have a shop door open, but it does not follow that a greater burthen is thereby to be cast on a person using the highway for a lawful purpose than if the shop had been a field. . . . The way our contemporary seeks to put the case is that there is a general duty to keep cattle from straying, but that, in the case of an unfenced field, the owner of the field having neglected an ordinary and usual precaution—viz., that of fencing—cannot complain of the consequences of the animals straying, whereas, in the case of the shop, the owner of the shop has not neglected any usual precaution, because shop doors are usually left open. This is plausible but in our opinion utterly fallacious. It mixes up the question of absolute duty to prevent a thing and duty to use all reasonable diligence to prevent it. It is clearly wrong to say . . . that there is a general duty to keep cattle from straying from the highway, as distinguished from a duty to use due diligence to keep them from straying from the highway, and the *onus* is therefore cast on our contemporary of showing why a shop differs from a field. The difference, he says, is simply that a shopkeeper usually keeps his premises open, but the question is whether, doing so for his own purposes, he must not take upon himself the consequent risk. Why is my lawful use of the highway to be made unsafe and burdensome because of the particular use which the adjacent owner chooses to make of his premises?" [142] Another argu-

[142] 27 Sol. Jour. 595.

ment that might be used against the decision is one based on the habits of animals. The reason for the rule modifying the liability of one driving his animals along the highway is that, it being their habit, from uncertainty or desire of food, to stray somewhat into the adjoining fields, his use of the highway would otherwise be too burdensome and expensive. As it is not their disposition, especially in the case of larger animals, like oxen, to wander through the open doors of houses or shops, the same reason would seem not to hold there and such a case would come under the more general principle that where one of two innocent parties has to suffer, he whose act, though unwittingly, has caused the injury, should be held responsible for it.

The owner of cattle straying on the metalled part of a highway is liable to a penalty therefor, though he had the right of pasturage on the sides.[143]

Injuries committed by animals while actually in the highway are treated of elsewhere.[144]

76. General Rules Affecting Liability; *Scienter*; Intention; Recovery.—As a general rule the person liable for the trespasses of animals is he who is in control of them at the time whether as owner, tenant, bailee, agistor, etc.[145] It has been held in Massachusetts and Maine that either the owner or the agistor may be sued at the plaintiff's election,[146] but this is contrary to the majority of cases, though in New Hampshire it was held that the owner of sheep which had been let to his son was liable for damages from their straying, the court saying:

[143] Golding *v.* Stocking, L. R. 4 Q. B. 516. [144] See § 87, infra.

[145] Smith *v.* Jaques, 6 Conn. 530; Moulton *v.* Moore, 56 Vt. 700; Laflin *v.* Svoboda, 37 Neb. 368; Ozburn *v.* Adams, 70 Ill. 291; Eck *v.* Hocker, 75 Ill. App. 641; Reddick *v.* Newburn, 76 Mo. 423; Kennett *v.* Durgin, 59 N. H. 560.

As to a tenant in possession after the expiration of his lease, see Parker *v.* Thompson (Ky.), 33 S. W. Rep. 628; Toles *v.* Meddaugh, 106 Mich. 398; Morrison *v.* Mitchell, 4 Houst. (Del.) 324.

[146] Sheridan *v.* Bean, 8 Metc. (Mass.) 284; Weymouth *v.* Gile, 72 Me. 446.

"By the ancient common law, agistment did not relieve the owner from liability." [147]

Where, however, the owner has selected a reckless and irresponsible agistor he is liable in case;[148] and this has been held to be the only form of action that can be brought against the owner of agisted cattle.[149]

If the owner of a close takes oxen to keep for their owner and has the custody of them, he must be considered the occupier of the close and bound to keep the cattle on the land, but if the cattle owner keeps them there and has the custody and control of them he is occupier *quoad* the oxen and is liable for their trespasses.[150] And where the defendants agreed that A. should work their farm, they having the right to go upon it but not to interfere, and a ram on the premises at the time was exchanged without the defendants' knowledge for one which trespassed on the plaintiff's premises, it was held that the defendants were not liable as owners of the ram, nor as principals, A. being an "independent contractor." [151]

In a New York case a distinction was suggested between the case of the lessee of a farm and an agistor, the court saying of the Maine and Massachusetts decisions: "In each of these cases the cattle were in the possession of an agistor. An agistor is one who takes cattle for hire to pasture or care for. We think there is a distinction between a person having possession of cattle as an agistor and one who has possession as the lessee of a farm and the cattle thereon. In the case of an agistor, the possession is more in the nature of an agent or bailee; the owner, remaining constructively in the possession, may at any time take them into his actual possession; but in the case of a lessee, the owner's interest in the cattle is parted with for the term of the lease. Within that term he is

[147] Blaisdell *v.* Stone, 60 N. H. 507. [148] Ward *v.* Brown, 64 Ill. 307.
[149] Wales *v.* Ford, 3 Halst. (N. J.) 267; Rossell *v.* Cotton, 31 Pa. St. 525.
[150] Tewksbury *v.* Bucklin, 7 N. H. 518; Kennett *v.* Durgin, 59 id. 560. And see Duggan *v.* Hansen, 43 Neb. 277.
[151] Marsh *v.* Hand, 120 N. Y. 315, affirming 40 Hun 339.

not entitled to their products, cannot regain their possession and they are not subject to his management or control. Without therefore deciding the question as to whether or not the owner would be liable in case the cattle had escaped from the possession of an agistor and committed trespass, we are of opinion that when the escape is from the possession of a lessee of a farm and the cattle thereon, the owner is not liable for the trespass."[152] This distinction does not however appear to be borne out by the cases on the subject. The subject of the rights and liabilities of bailees and agistors is treated of in another part of this work.[153]

A citizen of one county is not exempt from punishment for the violation of the stock laws passed by another county.[154]

Where animals commit a trespass together each owner is liable only for the trespass of his own animals, unless they constitute a common herd, in which case an action may be brought against all the owners jointly.[155] There are many statutory exceptions to this rule, however,[156] and the whole question will be discussed more fully hereafter in treating of injuries caused by vicious animals.[157]

In the case of a trespassing animal doing injury, it need not be shown that the owner knew of its mischievous propensity as in other cases of vicious animals. The mere trespass is the ground of the action and any additional damage is an aggravation thereof, without any regard to *scienter*.[158]

[152] Atwater *v.* Lowe, 39 Hun (N. Y.) 150. [153] See Title V, Ch. I, infra.

[154] Hawthorn *v.* State (Ala.), 22 South. Rep. 894.

[155] 1 Suth. Dams. (2d ed.) § 141; Ozburn *v.* Adams, 70 Ill. 291; Westgate *v.* Carr, 43 id. 450; Jack *v.* Hudnall, 25 O. St. 255; Cogswell *v.* Murphy, 46 Ia. 44; Dooley *v.* 17,500 Head of Sheep (Cal.), 35 Pac. Rep. 1011; Nierenberg *v.* Wood, 59 N. J. L. 112; Shultz *v.* Quinn, 2 Lack. Leg. N. (Pa.) 141.

Where the ownership is joint the plaintiff may elect to sue all or only some of the owners: Brady *v.* Ball, 14 Ind. 317.

[156] See Kerr *v.* O'Connor, 63 Pa. St. 341; Rowe *v.* Bird, 48 Vt. 578; Remele *v.* Donahue, 54 id. 555.

[157] See § 96, infra.

[158] Gresham *v.* Taylor, 51 Ala. 505; Decker *v.* Gammon, 44 Me. 322;

Thus, where a cow breaks down a fence and enters upon the property of another, its owner is liable for personal injuries sustained by one lawfully trying to prevent the trespass, although there is no evidence that the cow had ever been known to be vicious.[159] And in a Massachusetts case, it was held that the owner of a horse rendered nervous by the driver's treatment, hitched near a sidewalk and standing partially on it, was liable for injuries to a passer-by on the sidewalk caused by a kick of the horse, without proof that the animal was vicious to the owner's knowledge. The court said: "It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry, but it is not universally true that every horse is entitled to one kick. In England, if the horse is a trespasser and kicks another, the kick will enhance the damages, without proof that the animal was vicious, and that the owner knew it. . . . So in this commonwealth, going further, it would seem, than the English law, a kick by a horse wrongfully at large upon the highway, can be recovered for without proof that it was vicious. . . . The same law naturally would be applied to a horse upon a sidewalk where it ought not to be . . .; and in this case there was evidence of the further fact that the horse was in an exceptionally nervous condition

Angus *v.* Radin, 5 N. J. L. 815; Van Leuven *v.* Lyke, 1 Comst. (N. Y.) 515; Malone *v.* Knowlton, 15 N. Y. Suppt. 506; Morgan *v.* Hudnell, 52 O. St. 552; Chunot *v.* Larson, 43 Wis. 536; Mosier *v.* Beale, 43 Fed. Rep. 358; Lee *v.* Riley, 18 C. B. N. S. 722.

See the article in 19 Sol. Jour. 211, quoted in § 92, infra.

A child bitten in its father's house by the dog of the defendant, who did not know it to be vicious, cannot recover, as it would have to be for trespass, and, not being the owner of the premises, it had no substantial cause of action to which to annex the aggravation of the dog's bite: O'Connell *v.* Jarvis, 13 N. Y. App. Div. 3.

[159] Troth *v.* Wills, 8 Pa. Super Ct. 1. Wickham, J., dissented, on the ground that the owner of an animal, not known by him to be vicious or ferocious, was not responsible for injuries which were not the natural consequences of the well-known disposition and habits of the class to which the animal belonged.

in consequence of the driver's treatment." [160] So, the owner of a horse who permitted it to go unattended on a sidewalk is liable, without proof of *scienter*, for injuries inflicted by its biting a pedestrian.[161]

An injury to a colt lawfully in the pasture of a third person by the defendant's dog, which he had unlawfully taken there, makes the latter liable without regard to any knowledge of the dog's vicious disposition.[162] But it seems, as has been said above, that in the case of a dog some assent, express or implied, to the trespass must be shown.[163]

In places where the common-law rule as to fencing out animals does not prevail, it is nevertheless a trespass to drive animals on another's land intentionally against his will or without his consent, whether the lands are sufficiently fenced or not.[164] So, one who opens a division fence, though on his own land, at a time and under circumstances that would naturally cause his stock to go on the adjacent land and remain there, is as much a trespasser as if he drove the stock and kept them there.[165] But where A. rented from B. a part of a field and turned his horses on, and there was no fence between his part and the rest, and no stipulation in the lease, and the crop had been gathered, it was held that he was not guilty of knowingly causing his horses to go on B.'s land without the latter's consent.[166]

[160] Hardiman *v.* Wholley (Mass.), 52 N. E. Rep. 518. And see § 93, infra.

[161] Stern *v.* Hoffman Brewing Co., 56 N. Y. Suppt. 188.

[162] Green *v.* Doyle, 21 Ill. App. 205.

So, where the injury was caused by an unattended horse: Barnes *v.* Chapin, 4 Allen (Mass.) 444. Cf. Meegan *v.* McKay, 1 Okla. 59.

[163] See § 74, supra.

[164] Lazarus *v.* Phelps, 152 U. S. 81; Merritt *v.* Hill, 104 Cal. 184; Bedden *v.* Clark, 76 Ill. 338; Harrison *v.* Adamson, 76 Ia. 337; Erbes *v.* Wehmayer, 69 id. 85; Powers *v.* Kindt, 13 Kan. 74; Delaney *v.* Errickson, 11 Neb. 533.

[165] Claunch *v.* Osborn (Tex. Civ. App.), 23 S. W. Rep. 937.

[166] Coggins *v.* State, 12 Tex. App. 109.

On a prosecution under the code for knowingly causing cattle to go within enclosed land of another without the owner's consent, it is pertinent to show that the defendant had no right, claim or interest in the pasture

If A. and B. occupy adjoining lands forming one field and A. authorizes C. to put his cattle into the enclosure, representing that he is the sole owner, and C. does this, the latter is liable for the damage by his cattle going on B.'s land, though he may have believed that A. had full authority to give the license.[167] But the owner of land, who leases it with the understanding that the lessee, if he cannot keep stock out, may charge for the use of the land, cannot maintain trespass against the owner of intruding cattle who arranges with the lessee to use the land for the season for a certain amount; and it is immaterial whether this amount belongs to the landowner or the tenant.[168]

A statute prohibiting the driving of animals on Indian land without the consent of the tribe, does not prohibit delivery under contract of sale.[169]

Where the duty of fencing is on a railway company, the defendant is not responsible to the company's tenant on adjoining land for the trespass of his cattle.[170] Where a fence built by a railway company was sufficient against horses, oxen and sheep but not against pigs, and the plaintiff, an employee of the company, had the hand trolley on which he was returning from work upset by pigs escaping through the fence from the defendant's land, it was held that the word "cattle" in the statute included pigs and that the fence was therefore insufficient, and that, even if the defendant were negligent, the plaintiff could not recover, being identified with the company through whose negligence the accident had occurred.[171]

and that the prosecutor was the rightful possessor: Dickens *v.* State (Tex. Cr.), 46 S. W. Rep. 246.

[167] Daniels *v.* Aholtz, 81 Ill. 440.

[168] Stufflebeem *v.* Hickman (Cal.), 53 Pac. Rep. 438, distinguishing Rogers *v.* Duhart, 97 Cal. 500.

[169] Morris *v.* Cohn, 55 Ark. 401.

[170] Wiseman *v.* Booker, 3 C. P. D. 184.

See, in general, as to fencing by a railway company, Title VII, Ch. II, infra.

[171] Child *v.* Hearn, L. R. 9 Ex. 176.

A lessee of land whose crops are injured by stock escaping thereon through a defective fence along a railway track is entitled to the beneficial provision of a statute requiring the company to fence its right of way.[172] So, the bailee of an animal may recover for an injury done to it by a trespassing animal.[173] And a tenant in common whose property has been injured by a trespassing animal may bring an action without joining his co-tenants.[174] But the owner of property is bound to take ordinary care to prevent the injury.[175]

One having the right to the use of a dam on another's land for the purpose of conveying water to his mill and to enter to repair and protect the dam, cannot recover for damages caused thereto by the cattle of the land-owner who may use the water for his stock, it not appearing that the dam might not have been protected by the plaintiff or so constructed as not to be liable to injury by cattle.[176]

77. When Animals are "Running at Large"; Pasturing in the Highway.—Where the owners or keepers of animals are made by statute liable for the consequences of permitting them to "run at large," the meaning of this expression has been a frequent subject of consideration in the courts.[177] In a Vermont case it is said: "Running at large is used in the statute in the sense of strolling without restraint or confinement; as wandering, roving or rambling at will, unrestrained. Perhaps no precise abstract rule under the statute can be laid down, applicable to every case, as to the nature, character and amount of restraint necessary to be exercised over a domestic animal when suffered, as in this case, to be on the highway incident to its use. But the restraint need not be entirely physical; it may depend upon the training, habits and in-

[172] Langkop *v.* Mo. Pac. R. Co., 55 Mo. App. 611.
[173] Mason *v.* Morgan, 24 U. C. Q. B. 328.
[174] Morgan *v.* Hudnell, 52 O. St. 552. [175] Little *v.* McGuire, 38 Ia. 560.
[176] Keller *v.* Fink (Cal.), 37 Pac. Rep. 411.
[177] See, also, on the subject of animals running at large, § 134, infra, and Title III, Ch. I, supra.

stincts of the animal in the particular case; and the sufficiency of the restraint is to be determined more from its effect upon , and controlling and restraining influence over, the animal than from the nature or kind. Suppose a span of horses to be so accustomed to be kept and driven together that, while the owner is riding one, the other will voluntarily follow as closely almost as if led by a halter; the owner, while taking them along the highway in this manner could not be said to suffer the horse so voluntarily following its mate, to run at large in violation of the statute. The same may be said of a young sucking colt upon the highway, with no restraint other than instinct to follow its dam, which is being driven in a carriage on the highway." [178]

In this case, the defendant used to ride a horse from his house along the highway for about a mile and a half, and then fasten the reins to a surcingle around the horse so that it could not feed, and leave it to go home alone while he went on further. The animal was a kind one and would go directly toward home until it met the defendant's son, a boy ten years old, who was waiting to take care of it. It was held that if the defendant or his son kept all the time so near the horse that, owing to its training, it would not wander about the highway but go directly home, while it was on its way back it was not "running at large" in the highway, so as to expose the defendant to a penalty.

And in Maine where the phrase in the statute was "at large without a keeper," the court said: "The phrase . . . must have a reasonable interpretation applicable to the subject-matter. 'A keeper,' says Worcester, 'is one who has something in charge.' To be 'without a keeper' in the purview of the statute is to be without the charge of any one having the right of control, or 'not under the care of a keeper,' as the statute of Massachusetts expresses it. Such charge or care

[178] Russell *v.* Cone, 46 Vt. 600.

That a colt following its dam is not "running at large," see Elliott *v.* Kitchens, 111 Ala. 546.

does not, in all cases, imply direct physical power to control the actions of the animals; in some cases moral means would be sufficient for this purpose, such as the proximity of the owner to the animals, the human voice, gestures and like means. Whether in a given case physical or moral power over the animals is necessary depends upon their nature, age, character, habits, discipline and business or use at the time, and whatever other circumstances have a bearing upon the subject. What would constitute a person a keeper of one animal would not make him a keeper of another under different circumstances. It is sufficient to constitute the owner of animals their keeper, in a given case, if it appears that he possessed the means upon which a person in the exercise of ordinary care, judgment and intelligence upon those matters would rely to control their actions. Whether or not animals are thus in charge is a question of fact to be determined by the jury under proper directions." [179]

"At large" has been held to mean "without restraint or confinement," [180] and "confined" and "prohibited from running at large" mean substantially the same thing.[181] And in an English periodical it is said: "The ordinary meaning of the words 'at large' is taken to be 'without restraint' or 'unconfined.' A dog loose upon the premises of his owner is, to a certain extent, confined, at any rate so long as he remains within the premises; but if he wanders away and enters upon premises not his master's, it is clear that he must have been at large in some sense of the word. To say that a dog must be not only off the premises of his master but also not upon those of any one else, to make his owner punishable, is to decide that the words 'at large' are limited to mean 'in the

[179] Jennings *v.* Wayne, 63 Me. 468, 470.

[180] Goener *v.* Woll, 26 Minn. 154. "It follows that if a ram is suffered to go about without restraint or confinement, even though it be upon land belonging to his owner, or of which such owner has a rightful use, he runs at large within the meaning of the statute:" Ibid.

[181] St. Louis & S. F. R. Co. *v.* Mossman, 30 Kan. 336.

streets' or 'in a public place,' and from such a limitation we differ *in toto cœlo*. If a dog is once lost sight of, and is away from the absolute and immediate control of his owner, he is at large to all intents and purposes; if he be within his master's premises, his being at large may be questioned, but anywhere away from that spot his master cannot control him and he must be muzzled in compliance with the law."[182] So in a Nebraska statute authorizing the killing of dogs, "running at large" means "running on the public road or off from the owner's premises without any person claiming an interest in the dog being near at hand."[183] A dog is "going at large" in a town if he is loose and following the person in charge of him through the streets at such a distance that control cannot be exercised over him which will prevent his doing mischief.[184] "A ferocious and over-grown dog, known to the owner or keeper to be accustomed to bite mankind, is to be regarded as at large, within the common import of those terms, in a plea in bar, when he is so far free from restraint as to be liable to do mischief to man or beast; and this such a dog is always liable to do, when not physically restrained. . . . His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints of authority."[185] A hound, near a fellow-huntsman of his master but out of sight and hearing of the latter, has been held not to be "running at large."[186]

In Canada, where horses were startled by the barking of dogs running at large on the highway and jerked a rope, injuring the plaintiff's hands, the owner of the dogs was held

[182] 9 Sol. Jour. 794.

Dogs are not "under control" unless the control is effective: Hay *v.* Bennett, 3 Times L. Rep. 24.

[183] Nehr *v.* State, 35 Neb. 638.

[184] Com. *v.* Dow, 10 Metc. (Mass.) 382.

A dog unmuzzled and unaccompanied by its owner is "running at large" though it had just escaped and its master is pursuing it: Julienne *v.* Jackson, 69 Miss. 34.

[185] Brown *v.* Carpenter, 26 Vt. 638. [186] Wright *v.* Clark, 50 Vt. 130.

liable, the court saying: "While the French and our law do not contain the special prohibition of the Roman law [*i. e.*, against dogs being on the streets at all], I have to hold that with us a domestic animal like the dog brings his master no special privileges of exemption and that he who owns one lets him stray or even takes him upon a public highway at his own peril and his own risk." [187]

Sheep grazing upon an open common with the consent of the land-owner and herded by a boy in charge are not "running at large" so as to be liable to be impounded.[188] Nor are cattle driven along a road in the charge of a herder, which in passing casually eat the grass growing on the roadside, even though the herder fall asleep while tending them.[189] "When cattle are in the public highway in charge of a person directing or controlling their movements, they are not running at large within the meaning of the statute." [190] And the mere fact of an animal being found unattended in the highway cannot be regarded as making the owner liable for the consequences. "In order to constitute the being there of such animals wrongful on the part of the owner, it should appear that the circumstances and occasion or that the character and habits of the animal were such as to show carelessness on the part of such owner in reference to the convenience and safety of travellers on such highway." [191] But though

[187] Vital *v.* Tétrault, Montr. L. Rep., 4 S. C. 204.

A statement in a deposition that dogs were "at large on the defendant's premises" is not sufficient evidence to show that they were running at large or permitted to run at large: Reg. *v.* Crandall, 27 Ont. 63.

[188] Ibbottson *v.* Henry, 8 Ont. 625. And see Spect *v.* Arnold, 52 Cal. 455.

[189] Thompson *v.* Corpstein, 52 Cal. 653.

[190] Bertwhistle *v.* Goodrich, 53 Mich. 457. And see Beeson *v.* Tice, 17 Ind. App. 78.

Nor are they "turned loose": Sherborn *v.* Wells, 3 B. & S. 784. But they may be "found lying about any highway" so as to subject their owner to a penalty: Lawrence *v.* King, L. R. 3 Q. B. 345.

That there should be a keeper, see Parker *v.* Jones, 1 Allen (Mass.) 270.

[191] Holden *v.* Shattuck, 34 Vt. 336.

See Shipley *v.* Colclough, 81 Mich. 624, where it is held that one who

scienter is evidence of negligence, it need not otherwise be shown in such cases, as has already been said.[192]

Cattle which escape or are released from an enclosure where the owner has put them, and are immediately searched for by him are not "running at large."[193] Where such escape is without any fault of the owner, he is not liable.[194] It is otherwise where he is negligent. "If the swine are at large through the negligence of the owner or his servants, or are permitted to continue at large after notice of their escape from his enclosure, it will be suffering them to run at large, within the true intent and meaning of the statute. But if the owner exercises ordinary care and diligence in restraining them, and they are at large against his will and without any fault in him, they are not subject to be impounded."[195]

Cattle ranging in pastures containing about 400,000 acres may be levied upon as "running at large," although the entrances are guarded.[196] "Stock running at large are animals

turns his cattle loose in the highway without a keeper, in violation of a statute, assumes all the risks of such action.

The owner of hogs letting them run in the highway without a keeper is responsible for an injury to the plaintiff's daughter from the fright of her horse thereat: Jewett *v.* Gage, 55 Me. 538.

[192] See § 76, supra. See also Baldwin *v.* Ensign, 49 Conn. 113; Baird *v.* Vaughn, 3 Tenn. Cas. 316; Goodman *v.* Gay, 15 Pa. St. 188.

[193] McBride *v.* Hicklin, 124 Ind. 499; Stephenson *v.* Ferguson, 4 Ind. App. 230; Wolf *v.* Nicholson, 1 id. 222; Kinder *v.* Gillespie, 63 Ill. 88.

[194] Rutter *v.* Henry, 46 O. St. 272; Rudi *v.* Lang, 1 O. C. D. 482; Montgomery *v.* Breed, 34 Wis. 649—where the penalty was imposed on one who "permits or suffers" his animal to run at large; Underwood *v.* Henderson, 1 Fraser (Sc. Ct. Justic.) 9.

But an animal is "running at large" in the sense of an impounding statute, though it has escaped from an enclosure without the owner's fault: Paris *v.* Hale (Tex. Civ. App.), 35 S. W. Rep. 333. But see McSloy *v.* Smith, 26 Ont. 508; Adams *v.* Nichols, infra.

[195] Adams *v.* Nichols, 1 Aik. (Vt.) 316, 319. And see Gilbert *v.* Stephens (Okla.), 55 Pac. Rep. 1070.

A bull left by agreement on premises to which it had escaped was held to be "running at large in the night-time," so as to make the owner liable for an injury done by it: Duggan *v.* Hansen, 43 Neb. 277.

[196] Gunter *v.* Cobb, 82 Tex. 598.

that roam and feed at will and are not under the immediate direction and control of any one. They may be in an enclosure which may restrain the limits in which they shall wander and feed, or they may be on an unfenced range, relatively without limit, where they may roam and feed at will; but in either case they are not subject to the direction and control of any one." [197]

Where the owner of a farm and a bull by arrangement with the occupant of an adjoining farm allows stock to run across to the other farm to graze and both farms are enclosed, such bull is not "running at large." [198] So, where A. consents that B. shall turn his swine into his own fields which are not fenced from A.'s, the latter cannot take them up as "running at large." [199] But where animals are turned loose on premises not enclosed so as to confine ordinary cattle, the fence having openings through which they pass to the land of another, they are running at large.[200]

A horse which becomes frightened and escapes from its owner is not "running at large." [201] In Oklahoma, it has been held that the statutes providing for damage done on cultivated lands by stock running at large do not apply to cases of injury by one domestic animal to another.[202] But a statute prohibiting the owner of an animal from letting it run at large imposes only the duty of using reasonable care to prevent it.[203]

With regard to pasturing animals in the highway, the rule seems to be that this is not one of the uses of the highway to which the public is entitled, but that the owner of land adjoining a highway, owning, as is usually the case, the soil to the centre thereof, may let his cattle graze there under the

[197] Keeney *v.* Oreg. R. & Nav. Co., 19 Oreg. 291.
[198] Mo. Pac. R. Co. *v.* Shumaker, 46 Kan. 769.
[199] Martin *v.* Reed, 10 Pa. Co. Ct. 614.
[200] Osborne *v.* Kimball, 41 Kan. 187.
[201] Presnall *v.* Raley (Tex. Civ. App.), 27 S. W. Rep. 200.
[202] Meegan *v.* McKay, 1 Okla. 59.
[203] Marietta & Cinc. R. Co. *v.* Stephenson, 24 O. St. 48.

charge of a keeper.[204] And it is extremely doubtful whether such a right can be conferred on any other by statute. "It is sometimes thought that a vote of the town authorizing cattle to run at large might make such a use of the highway [*i. e.*, for pasture] legal; but as the grass and herbage in the highway ordinarily belong to the abutter, at least when, as is usually the case, he owns the fee to the centre of the road, and although he may pasture his own cows there under the charge of a keeper, . . . it is difficult to see what right a town has to authorize other persons to take and carry away such owner's grass, either by cutting or grazing. That would be taking private property for private uses, and without even the show of making compensation therefor. Probably the only effect of such a municipal vote is to shield the cattle owner from criminal or penal liability for violating a town by-law or ordinance, but not to protect him from a civil suit by the landowner injured." [205]

A city ordinance making it unlawful for the owner of certain domestic animals to permit them to run at large or graze is violated by permitting them to graze, though without preconceived intention. "Nor would a mere incidental and trifling act of grazing be sufficient as if a horse were to snatch a mouthful of grass when led along the street. There must be something substantial and it must be permitted, but it is

[204] Parker *v.* Jones, 1 Allen (Mass.) 270; Robinson *v.* Flint & P. M. R. Co., 79 Mich. 323, 327. And see Holladay *v.* Marsh, 3 Wend. (N. Y.) 142; Holden *v.* Shattuck, 34 Vt. 336.

[205] 22 Am. L. Reg. (N. S.) 240—note by E. H. Bennett.

And see Stackpole *v.* Healy, 16 Mass. 33; Tonawanda R. Co. *v.* Munger, 5 Denio (N. Y.) 255, cited in § 78, infra.

But see Griffin *v.* Martin, 7 Barb. (N. Y.) 297; Hardenburgh *v.* Lockwood, 25 id. 9, where a statute authorizing the electors of each town to determine the time and manner in which animals might run at large on the highway was held constitutional. In the former case it is said: "It cannot with truth be said that a by-law like the one in question takes the property of one man and gives it to another, or even to the public, without compensation. The owner of the soil is not deprived of the pasturage any more than he is of the way. He can enjoy both in common with his neighbors."

not necessary to show design or intention; permission is enough." [206]

78. Statutes and Ordinances Regulating Running at Large.— An act or ordinance prohibiting the running at large of animals within certain districts is not unconstitutional.[207] A city may by virtue of its police power impose a fine on the owners of animals found astray,[208] direct the seizure of such animals,[209] prohibit the going of animals on the sidewalk,[210] require that dogs be registered and collared to prevent their running at large,[211] etc. Regulations with regard to impounding will be treated of hereafter.[212]

A charter authorizing a city council to restrain animals from running at large was held not to authorize an ordinance providing a penalty for trespasses committed by herdsmen in herding cattle on private lands.[213]

Where power was granted to enact by-laws and ordinances necessary for the well-regulation, interest, health, etc., of the town, not inconsistent with the laws of the State, and to abate nuisances, this was held not to authorize the enactment of a by-law restraining animals from running at large where that was in contravention of the State laws.[214] But where the legislature confers on the town the power to declare what

[206] Petersburg *v.* Whitnack, 48 Ill. App. 663.

[207] Spigener *v.* Rives, 104 Ala. 437; Chattanooga *v.* Norman, 92 Tenn. 73; Haigh *v.* Bell, 41 W. Va. 19; Chamberlain *v.* Litchfield, 56 Ill. App. 652.

A plea that the ordinance was not being enforced at the time of the alleged violation, was held bad in Kitchens *v.* Elliott, 114 Ala. 290.

[208] Third Munic. of N. O. *v.* Blance, 1 La. Ann. 385.

[209] Wilson *v.* Beyers, 5 Wash. 303.

[210] Com. *v.* Curtis, 9 Allen (Mass.) 266.

[211] State *v.* Topeka, 36 Kan. 76; Independence *v.* Trouvalle, 15 id. 70.

[212] See Title IV, Ch. II, infra.

[213] State *v.* Johnson, 41 Minn. 111.

A statute providing for the restraint of animals running at large was held not to give an exclusive remedy in Bowles *v.* Abrahams, 65 Mo. App. 10.

[214] Collins *v.* Hatch, 18 O. 523.

shall be nuisances and to provide for their abatement, an ordinance declaring that swine running at large are nuisances to be abated, is valid, though by the State law the right of common may exist. Such a right is "within legislative control. It may be abridged or destroyed, wherever and whenever the law-making power may think the public good may require it." [215] And the power to restrain animals has been held to be included under a power "to have and exercise control over the streets" and "to cause nuisances to be removed at the expense of the persons by whom they were occasioned," [216] and under a power to "exercise all rights, powers and privileges of a corporation for purposes of municipal regulation and control; to impose adequate penalties on persons neglecting them, etc., and to pass rules not inconsistent with the United States or State Constitution and laws." [217]

An ordinance prohibiting the running at large of animals acts upon non-residents as well as residents.[218] But the legislature, after having empowered municipal authorities to regulate this matter, may by an amendatory statute curtail such powers by enacting that they are not conferred over the property of non-residents.[219]

A by-law enacting that certain animals shall not run at large, does not impliedly allow others not named to do so.[220] But where it was made unlawful for animals of "species bull" to run at large, this was held to embrace bulls of all kinds and descriptions without reference to size, age or quality, but not to extend to cows, heifers or steers.[221] A statute prohibiting

[215] Roberts *v.* Ogle, 30 Ill. 459. And see Hagerstown *v.* Witmer, 86 Md. 293.

[216] Waco *v.* Powell, 32 Tex. 258.

[217] McKee *v.* McKee, 8 B. Mon. (Ky.) 433. And see Com. *v.* Bean, 14 Gray (Mass.) 52.

[218] Whitfield *v.* Longest, 6 Ired. L. (N. C.) 268.

[219] Smith *v.* Oatts, 92 Ga. 692.

[220] Crowe *v.* Steeper, 46 U. C. Q. B. 87; Jack *v.* Ontario & Simcoe R. Co., 14 id. 328.

[221] Oil *v.* Rowley, 69 Ill. 469.

the allowing of "stallions" to run at large does not apply to colts until they are of such an age as to be troublesome to mares or dangerous to be at large.[222]

The provision of a code authorizing the restraining of sheep and swine from running at large by a majority vote of the people of the several counties, is not unconstitutional on the ground that "all laws of a general nature shall have a uniform operation," nor for the reason that it depends for validity upon the vote of the people, not on the expressed will of the legislature.[223] And the herd law restraining live stock from running at large but allowing the electors in a district to permit this, was held to be not within the prohibition of the United States Statutes at Large against Territorial legislatures passing local or special laws regulating township and county affairs, as the herd law merely permitted districts to regulate their own affairs.[224] But an act making it a misdemeanor wilfully to permit stock to run at large in local option territory was held invalid as applied to counties which had previously adopted the local option stock law—it providing only a civil remedy for its violation.[225]

Voting upon permitting animals to run at large in a county is voting upon a public measure within the meaning of an election law prescribing the form of ballot.[226] Mere irregularities in conducting such an election will not render it invalid.[227]

Although a city by its charter has power to restrain animals from running at large, a complainant alleging special damage by reason of council's neglect to pass any ordinance on the subject, does not show a cause of action.[228] Nor

[222] Aylesworth *v.* Chic., R. I. & P. R. Co., 30 Ia. 459.
[223] Dalby *v.* Wolf, 14 Ia. 228. [224] Johnson *v.* Mocabee, 1 Okla. 204.
[225] McElroy *v.* State (Tex. Cr.), 47 S. W. Rep. 359.
[226] Union Co. *v.* Ussery, 147 Ill. 204.
[227] Hannah *v.* Shepherd (Tex. Civ. App.), 25 S. W. Rep. 137.
[228] Kelley *v.* Milwaukee, 18 Wis. 86. And this holds where such an ordinance was passed, but afterwards repealed or suspended: Rivers *v.* Augusta, 65 Ga. 376.

is a city passing such an ordinance responsible for its violation.[229]

It was held in Massachusetts that the public having no right in a highway but that of passing, no permission can be given to them to pasture their animals there.[230] In New York, a provision permitting beasts to run at large upon public highways was said to be unconstitutional, the court remarking: "Cattle at large in the highway will not only trample down, but also crop and eat the grass and herbage there growing; and if the legislature have power to authorize their running at large, the grazing cannot be wrongful. What would this be but taking the private property of the owner of the land used as a highway, and transferring it to the owner of the cattle? In my judgment the legislature have no such power, whether compensation be made or not, but certainly in no case unless compensation is made. On this short ground, I think the town regulation assuming to authorize cattle to 'run at large' was wholly void." [231] But the Supreme Court dissented from this *dictum* in two later cases.[232]

Where the owner of the animals also owns the soil on which they graze at the side of the highway, the rule is different, as has already been stated.[233]

The subject of summary proceedings is discussed in § 80, infra.

79. Distress.—At the common law if an animal trespasses on a man's land, not being at the time under anyone's charge,

[229] Levy *v.* N. Y. City, 1 Sandf. (N. Y.) 465. See Cochrane *v.* Frostburg, 81 Md. 54, where it is held that it is the duty of the municipal authorities to abate the nuisance of animals running at large on the streets so as to be a source of discomfort and danger to the inhabitants.

[230] Stackpole *v.* Healy, 16 Mass. 33.

[231] Beardsley, C. J., in Tonawanda R. Co. *v.* Munger, 5 Denio (N. Y.) 255. And see the opinion in Holladay *v.* Marsh, 3 Wend. (N. Y.) 142.

[232] Griffin *v.* Martin, 7 Barb. (N. Y.) 297; Hardenburgh *v.* Lockwood, 25 id. 9—cited in § 77, supra.

[233] See § 77, supra.

it might be distrained *damage feasant*.[234] This right has been held not to exist in Ohio,[235] Indiana,[236] or Missouri.[237] In Maine it exists wherever no pound-keeper has been appointed by statute.[238]

The remedy exists only with reference to present or immediate damage. The owner of a freehold cannot seize an animal which has done damage but has ceased doing so, when it is not necessary to detain it to prevent further damage.[239] Therefore, the animal cannot be distrained if it has escaped from the land before capture,[240] or has been driven out and has afterwards returned.[241] And where the plaintiff distrained the defendant's cattle and went to tell the latter, and the cattle escaped into the defendant's land where the plaintiff's son allowed them to remain for half an hour, and on the plaintiff's return he drove them back and the defendant took them thence, the last act was held not to be a rescue, as leaving the cattle in the defendant's ground was an abandonment of the distress.[242] A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit.[243]

Where cattle trespass upon unfenced land immediately adjoining a highway, the owner of the land may distrain them after a reasonable time has elapsed to remove them in. What is a reasonable time is for the jury to determine under all the circumstances.[244] "The qualification of reasonable time to

[234] Garrett Nuisances 161.

See also the cases on liens in § 80, infra.

This right is not a matter of course: it depends upon circumstances: Ruter *v.* Foy, 46 Ia. 132. As to the California statutes, see Wigmore *v.* Buell, 122 Cal. 144.

[235] Northcott *v.* Smith, 4 O. Circ. Ct. 565.

[236] Little *v.* Swafford, 14 Ind. App. 7.

[237] Crocker *v.* Mann, 3 Mo. 472. [238] Mosher *v.* Jewett, 63 Me. 84.

[239] Wormer *v.* Biggs, 2 C. & K. 31.

[240] Co. Litt. 161 a; Clement *v.* Milner, 3 Esp. 95; Warring *v.* Cripps, 23 Wis. 460; Holden *v.* Torrey, 31 Vt. 690.

[241] Graham *v.* Spettigue, 12 Ont. App. 261. And see Vaspor *v.* Edwards, 12 Mod. 658.

[242] Knowles *v.* Blake, 5 Bing. 499. [243] Rich *v.* Woolley, 7 Bing. 651.

[244] Goodwyn *v.* Cheveley, 28 L. J. Ex. 298; 4 H. & N. 631.

recover the cattle does not apply except in the case of a highway being the place from which the cattle have deviated." [245]

But where a horse escaped from a stable to the defendant's pasture-land and was pursued by the plaintiff's son-in-law, who was leading it out of the field when it was distrained, the distress was held to be illegal.[246]

In Illinois, where the owner of unfenced lands cannot recover for the trespasses of cattle, he cannot distrain them for the same damages.[247] It is otherwise where there is no such requirement as to fencing, but he is limited to the recovery of the actual damages and reasonable charges for keeping and feeding.[248]

Taking an animal and confining it in a barn is a sufficient distress.[249] And it seems that if one finds stray cattle *damage feasant* on his land in the afternoon, he may, if necessary to protect his crops, confine them over night and turn them into the highway in the morning, but not drive them in the highway in a direction opposite to that of the owner's house.[250] Where a hog was taken *damage feasant* and kept sixteen months with the plaintiff's knowledge and the parties agreed to arbitrate, but did not do so, it was held, in replevin, that the defendant was not obliged to give notice and that the holding was not unreasonable.[251] Where the owner has been legally notified, or has waived the formality of notice, trover will not lie.[252] The distrainor must, however, comply with the statute and where he was not able to do so on account of its

[245] 17 Ir. L. T. 533. [246] McIntyre *v.* Lockridge, 28 U. C. Q. B. 204.

[247] Oil *v.* Rowley, 69 Ill. 469. As to an owner distraining on a tenant unlawfully holding over, see Wright *v.* Mahoney, 61 Ill. App. 125.

[248] McPherson *v.* James, 69 Ill. App. 337.

[249] Hamlin *v.* Mack, 33 Mich. 103.

[250] Tobin *v.* Deal, 60 Wis. 87.

See, as to turning or driving out trespassing animals, § 45, supra.

[251] Shroaf *v.* Allen, 12 Neb. 109.

[252] Norton *v.* Rockey, 46 Mich. 460. And see, as to waiver of notice, Parks *v.* Kerstetter, 113 id. 520.

As to statutory notice of the assessment of damages, see Healy *v.* Jordan, 103 Ia. 735.

failure to provide a necessary officer, the distress was held to be unlawful.[253] But one was held not to be estopped from claiming that he sought the statutory remedy by taking unnecessary steps under another statute not applicable to the assertion of his rights.[254] Where the statute limits the right of distress to damage "within the enclosure of the distrainor," the owner in fee of land included in the highway has no right to distrain cattle grazing upon the highway, and such cattle were not distrainable at common law, at least since the statute of Marlborough.[255] But where a servant distrains unlawfully by driving cattle from the highway into his master's close, he does not make the latter responsible. "A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one." [256] A horse in a street, damaging a barnyard fence while fighting a horse inside, may be distrained by the owner of the yard as "doing damage within the enclosure." [257]

The damage in respect of which trespassing animals may be distrained *damage feasant* is not confined to damage to the freehold but includes injuries to other animals.[258] Each beast can be distrained only for its own damage, not for the general damage, or any part of it done by the rest.[259] One into whose field cattle have strayed through a defect in a fence which he was bound to repair cannot distrain them *damage feasant* in another field into which they had gone by

[253] Armbruster *v.* Wilson, 43 Hun (N. Y.) 261, where the statutory remedy was held to be additional to the common-law one.

So the appraisement must be in strict compliance with law: Warring *v.* Cripps, 23 Wis. 460. Where the distrainor purchases and claims title under a sale which is void for want of the required statutory notice to the owner, he loses his statutory lien: Chase *v.* Putnam, 117 Cal. 364.

[254] Blair *v.* Small, 55 Mich. 126.

[255] Taylor *v.* Welbey, 36 Wis. 42. [256] Lyons *v.* Martin, 8 A. & E. 512.

[257] Pettit *v.* May, 34 Wis. 666.

[258] Boden *v.* Roscoe, [1894] 1 Q. B. 608, on the authority of Rolle's Abr., where it is said that greyhounds or ferrets chasing and killing rabbits may be distrained *damage feasant.*

[259] Vaspor *v.* Edwards, 12 Mod. 658.

breaking through a hedge which he had kept in good repair, his neglect being the original cause of the injury.[260] And, in general, where trespassing cattle are distrained on land not enclosed by a lawful fence, the owner may recover possession of them without paying damages;[261] and he may enter the other's land for the purpose of driving them back without incurring a liability for trespass.[262] Replevin is the ordinary remedy in case of a wrongful distress.[263]

One commoner cannot distrain the cattle of another commoner, as they come upon the commonable land by color of right.[264] So, where two persons have concurrent possession of land for the purpose that each may take profits of a special nature not inconsistent with the rights of the other, as if one has the exclusive right to dig stone, the other to pasture—one may not distrain the other's cattle *damage feasant*.[265] Where two had the right of common over a whole field but agreed not to exercise such right, one cannot distrain the other's cattle.[266]

A tenant holding over after the expiration of his term cannot distrain the landlord's cattle put upon the premises by way of taking possession.[267]

Cattle in actual use of the party cannot be distrained *damage feasant*.[268] Nor can a horse with a rider on him,[269] though the contrary has been held where he was led by a person at the time.[270] Where it was averred that a dog when taken was in the actual possession of the plaintiff's son and

[260] Singleton *v.* Williamson, 7 H. & N. 410.

[261] Blizzard *v.* Walker, 32 Ind. 437. [262] Camp *v.* Flaherty, 28 Ia. 520.

[263] 1 Chit. Pl. 164.

[264] Cape *v.* Scott, L. R. 9 Q. B. 269, citing Hall *v.* Harding, 4 Burr. 2426, and holding the principle to be applicable to common *pur cause de vicinage* as well as to common appurtenant.

[265] Churchill *v.* Evans, 1 Taunt. 529.

[266] Whiteman *v.* King, 2 H. Bl. 4. [267] Taunton *v.* Costar, 7 Term 431.

[268] Field *v.* Adames, 12 A. & E. 649.

[269] Storey *v.* Robinson, 6 Term 138.

[270] Wagstaff *v.* Clack, Cambridge Sum. Assizes, 1826, Ms.

servant and under the personal care of and being used by the servant, this was held insufficient, as applied to a dog, to show such user as would exempt it from seizure *damage feasant.*[271]

The word "stock" in a statute regulating the right of distress was held to include swine. "The word 'stock,' in agriculture, means domestic animals collected, raised or used on a farm." [272]

A distress *damage feasant* cannot be made after a tender of amends before the taking, nor can it be detained if a tender is made after the taking and before the impounding. But after the impounding the tender comes too late to make either the taking or detainer unlawful.[273] The subject of impounding is reserved for another chapter.[274]

The injured person may make his election as to whether he will distrain or sue in trespass, but when he has done so he has no other remedy unless that be ineffectual by act of God or of the other party.[275]

80. Other Remedies Against Trespassing Animals.—Apart from the right to distrain discussed in the preceding section, the owner of land on which animals have trespassed has no lien upon them or authority, in the absence of a statute, to pen or detain them, and one may, without incurring liability, throw down another's fence in order to recover his animals so detained.[276] The land-owner may remove the animals from the land. Beyond that, his right is limited to impounding them according to the law of the place, and where he drives them to his own premises and holds them there until damages done on that occasion and previous ones are paid, he is liable in replevin.[277] Nor can he in such a case recover the

[271] Bunch *v.* Kennington, 1 Q. B. 679.
[272] State *v.* Clark, 65 Ia. 336, citing Webs. Dict.
[273] Oldham *v.* Foster Distress, 2d ed., 308. And see McPherson *v.* James, 69 Ill. App. 337; Gilbert *v.* Stephens (Okla.), 55 Pac. Rep. 1070.
[274] See §§ 81-84, infra.
[275] Vaspor *v.* Edwards, 12 Mod. 658. And see Brown *v.* Howard, infra.
[276] Hill *v.* State, 104 Ala. 64. [277] Ladue *v.* Branch, 42 Vt. 574.

cost of keeping the animals in confinement.[278] Where a right is given by statute to detain and treat trespassing animals as estrays where they "break into the enclosure," this does not apply where the animals of a known owner temporarily escape from his enclosure and are found trespassing on the unenclosed lands of another, and the latter, if he takes them, is liable in replevin.[279] A law giving the owner of cultivated lands a lien on trespassing stock has been held to be applicable to lands within limits in which a mayor and council had power by charter to provide by ordinance for impounding animals running at large.[280]

A lien is waived by the election of the land-owner to enforce his common-law remedy of trespass *quare clausum fregit* against the owner of cattle.[281] And a statutory lien cannot be acquired unless the party injured by the trespass complies substantially with the provisions of the statute.[282] One who holds under such a lien is liable to the owner of animals for injuries to them resulting from his failure to feed and care for them.[283]

Continuous trespasses do not constitute several causes of action.[284] In a New York case it is said: "In case of cattle trespassing on the lands of an adjoining owner, it often happens that the injury is a continuing one, committed by the different animals on the same or on different days, so that it would be almost impossible to separate the acts of trespass. It was indispensable [*i. e.*, at the common law] in such cases to avoid a multiplicity of actions and to relieve parties from

[278] North *v.* McDonald, 47 Barb. (N. Y.) 528. And see Wormer *v.* Biggs, 2 C. & K. 31.

[279] Anderson *v.* Worley, 104 Ind. 165.

And see Mackler *v.* Schuster, 68 Mo. App. 670.

[280] Lingonner *v.* Ambler, 44 Neb. 316. See also Brown *v.* Sylvester, 37 id. 870, as to what are "cultivated lands."

[281] Brown *v.* Howard, 86 Me. 342. [282] Deirks *v.* Wielage, 18 Neb. 176.

As to notice to the owner, see Sloan *v.* Bain, 47 id. 914.

[283] Richardson *v.* Halstead, 44 Neb. 606.

[284] De La Guerra *v.* Newhall, 53 Cal. 141.

the obligation of proving distinct and independent causes of action, that they might allege the trespass with a *continuando*, recovering for such injury as they were able to prove to have been done by the defendant's cattle." It was there held that this rule was still in force under the code, and that where the complaint alleged that on a day and on divers other days and times between that day and the commencement of the suit, the defendant's cattle broke into, etc., it was competent to prove any number of trespasses between the day alleged and the bringing of the suit.[285]

The plaintiff may recover the value of the crops destroyed at the time of their destruction, but cannot prove what amount of crop he would have had without the injury.[286] And it was held inadmissible for the defendant to prove in mitigation of damages that the crop was grown in shares and the plaintiff withheld a part of the defendant's share.[287]

A statute authorizing the seizure and sale, without proper judicial proceedings and notice, of an animal found trespassing on private grounds is unconstitutional, as such a forfeiture is a deprivation of property without due process of law,[288] and the same principle extends to an ordinance directing a town officer to take into possession and sell animals running at large, without notice to the owner.[289] The rule appears to be that a statute providing for such a summary sale of an animal for the expenses of taking it up and keeping it, is constitutional, but in so far as it provides for a sale for a fine or

[285] Richardson *v.* Northrup, 66 Barb. (N. Y.) 85.

[286] Gresham *v.* Taylor, 51 Ala. 505. [287] Frout *v.* Hardin, 56 Ind. 165.

[288] Rockwell *v.* Nearing, 35 N. Y. 302; Leavitt *v.* Thompson, 56 Barb. (N. Y.) 542; McConnell *v.* Aernam, Ibid. 534, and note.

[289] Varden *v.* Mount, 78 Ky. 86, where it is said: "The right to forfeit without citation and without hearing can only exist from necessity. That right in this instance should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases and judicial proceedings looking to forfeiture may then properly begin."

See also Donovan *v.* Vicksburg, 29 Miss. 247; Bullock *v.* Geomble, 45 Ill. 218; Tiedeman Munic. Corp. § 155.

penalty without a judicial investigation or an opportunity to show that the owner of the animals had not incurred the penalty, it is unconstitutional.[290]

Where, however, an opportunity of judicial investigation is given, the statute is constitutional, and it is immaterial that personal notice to the owner is not required: notice by posting is sufficient. "The proceedings are in the nature of proceedings *in rem*, the penalty or forfeiture attaching to and being a lien upon the offending animals." [291] It is essential that the requirements of statutes regulating summary proceedings should be strictly complied with, or else such proceedings are void.[292]

[290] See 97 Am. Dec. 90 n., citing Wilcox *v.* Hemming, 58 Wis. 144; Gosselink *v.* Campbell 4 Ia. 296; Poppen *v.* Holmes, 44 Ill. 360; Gilchrist *v.* Schmidling, 12 Kan. 263; Campau *v.* Langley, 39 Mich. 451. *Contra:* Kennedy *v.* Sowden, 1 McMull. L. (S. C.) 323; Crosby *v.* Warren, 1 Rich. L. (S. C.) 385, where it was held that such a sale even for a fine or a penalty does not deprive the owner of property without due process of law. And see Strauser *v.* Kosier, 58 Pa. St. 496, sustaining an act by which swine running at large may be forfeited and sold for a penalty, without notice. See also Spitler *v.* Young, 63 Mo. 42; Roberts *v.* Ogle, 30 Ill. 459, and § 84, infra.

[291] Campbell *v.* Evans, 45 N. Y. 356. And see Fox *v.* Dunckel, 55 Barb. (N. Y.) 431; Hellen *v.* Noe, 3 Ired. L. (N. C.) 493.

[292] Cory *v.* Dennis, 93 Ala. 440; Strauser *v.* Kosier, 58 Pa. St. 496.

TITLE IV.

LIABILITIES OF OWNERS OF ANIMALS.

CHAPTER II.

IMPOUNDING. INJURIES ON HIGHWAYS. DISEASED ANIMALS. NUISANCES. RACING.

81. Nature of a pound.
82. The right to impound.
83. Manner of impounding; remedies of the owner.
84. Damages; sale.
85. Horses left unguarded in the highway.
86. Liability in case of horses running away.
87. Damage done in highways by passing animals.
88. Diseased animals; sale.
89. Diseased animals; transportation and liability in general.
90. Nuisances; diseased and dead animals.
91. Racing and betting.

81. Nature of a Pound.—The subject of impounding is one that is largely regulated by statute. There are some general principles, however, that it may be well to consider here.

Where animals are found trespassing or running at large in violation of law, they may be captured and driven to a pound. A town pound, *ex vi termini*, is an enclosed piece of land secured by a firm structure of stone or of posts and timber, placed in the ground; and by the grant or exception in a deed of a town pound, the land on which it stands is conveyed or excepted, not as an appurtenance but as parcel of the subject-matter.[1] A shed on another lot used as the entrance to a pound is a part of it.[2] A pound-keeper may use

[1] Wooley *v.* Groton, 2 Cush. (Mass.) 305.
[2] Wilcox *v.* Hemming, 58 Wis. 144.

as a pound a yard furnished and used by the town, if there is no other place, though no action of the town has established it as a pound.[3] But it has been held that where there is no public town pound, the pound-keeper has no authority to confine animals in his own yard.[4] It was held in Maine that where there is no pound or pound-keeper, one may legally detain in his own custody an animal taken *damage feasant* upon his premises, and has a lien upon it for expenses necessarily incurred in taking suitable care of it. "He was therefore without remedy unless we hold that the common-law mode of impounding survived in cases not covered by the statute. . . . At common law, cattle could be impounded either in a common or a private pound at the option of the impounder. The statutes of New Hampshire, Vermont and Massachusetts respectively require towns, under similar penalties, to erect and maintain pounds, but provide that creatures must be impounded in the public pound if there be any in the town, otherwise in the barn or enclosure of the person taking them up. To be sure there is no such express provision in the statute of this State, but it should practically receive the same construction." [5] But in a Vermont case it was held that the restraining of cattle without putting them in a pound and without an intent to impound them, does not constitute an impounding, though there was no usable public pound in the town.[6]

Where it is by statute made the duty of selectmen to "erect and maintain" pounds, this duty is fully discharged by their purchasing or hiring to be used as pounds suitable enclosures already erected.[7] The place legally chosen will continue to be the pound till changed by the proper authorities.[8]

[3] Anthony *v.* Anthony, 6 Allen (Mass.) 408.
[4] Collins *v.* Larkin, 1 R. I. 219.
[5] Mosher *v.* Jewett, 63 Me. 84.
[6] Howard *v.* Bartlett (Vt.), 40 Atl. Rep. 825.
[7] Whitlock *v.* West, 26 Conn. 406.
[8] Colp *v.* Halstead, 63 Ill. App. 116.

82. The Right to Impound.—A statute or ordinance authorizing the impounding and sale of animals running at large is not unconstitutional.[9] And where a town is authorized to enact ordinances restraining animals from running at large, this includes the power to provide for impounding and sale.[10] But the office of a pound-keeper is a public office and a municipal corporation has no power to appoint one nor to create a forfeiture of the property unless the authority is specially given in the charter.[11] A statute requiring owners to confine their cattle at night does not justify impounding where this is not done.[12] And a statute providing that the owner of enclosed premises might impound stock trespassing thereon and that damages might be assessed by three freeholders and the stock sold in payment thereof, was held unconstitutional, no public pound being provided for and the interested party being made sole judge of the trespass.[13] Replevin will not lie against a constable impounding a cow running at large upon the street in violation of a valid ordinance, he being an authorized officer.[14] And where an officer found two persons driving hogs to the pound and assisted them, it was held that he was not unlawfully detaining the hogs, having found them at large before they were impounded.[15] In a New York case it was held that an ordinance authorizing a street inspector to drive animals to the pound and to hire assistance, does not authorize anyone but the inspector and his assistants under his immediate direction

[9] Dillard *v.* Webb, 55 Ala. 468; Burdett *v.* Allen, 35 W. Va. 347; Rose *v.* Hardie, 98 N. C. 44; Rood *v.* McCargar, 49 Cal. 117; Coyle *v.* McNabb, 4 Tex. App. Civ. Cas. 487.

[10] Folmar *v.* Curtis, 86 Ala. 354; Whitlock *v.* West, 26 Conn. 406.

But see Johnson *v.* Daw, infra.

[11] White *v.* Tallman, 26 N. J. L. 67; Slessman *v.* Crozier, 80 Ind. 487.

And an authority to impose a "fine for forfeiture" does not authorize a forfeiture: Johnson *v.* Daw, 53 Mo. App. 372.

[12] Oil *v.* Rowley, 69 Ill. 469.

[13] Armstrong *v.* Traylor, 87 Tex. 598.

See also the cases cited in § 80, supra.

[14] McJunkin *v.* Mathers, 158 Pa. St. 137. [15] Friday *v.* Floyd, 63 Ill. 50.

to drive animals to the pound, though the inspector had given public notice that anyone who should do so would receive payment.[16]

Animals cannot be impounded except for the causes provided by the statute.[17] But impounding is not a necessity: it is a cumulative, and not an exclusive remedy,[18] and the land-owner may drive the stray cattle into the highway without being guilty of conversion.[19]

An ordinance forbidding the running at large of animals and directing their impounding justifies the impounding of animals belonging to non-residents of the town.[20] An act providing that the driving of live stock into a city for the purpose of getting them impounded is a misdemeanor, that the poundage of non-residents of a town where stock may be impounded shall not be more than one-fourth of the amount paid by residents, and that non-residents living more than a mile from the city limits shall pay no poundage for the first three times their stock are impounded, was held not unconstitutional as granting exclusive privileges or as denying the equal protection of the laws.[21]

[16] Jackson *v.* Morris, 1 Denio (N. Y.) 199.

[17] Jones *v.* Clouser, 114 Ind. 387.

Thus, under the Delaware statute, animals in a public road entering a field cannot be impounded in the absence of negligence of their owner or his agents, but they may be impounded where they escaped by reason of his leaving open the bars of his enclosure: Spruance *v.* Truax, 9 Houst. (Del.) 129. See, as to the place of taking, McKeen *v.* Converse (N. H.), 39 Atl. Rep. 435.

As to the right to impound, under the Indiana statute, see McManaway *v.* Crispen (Ind. App.), 53 N. E. Rep. 840.

[18] Bonner *v.* De Loach, 78 Ga. 50; Walker *v.* Wetherbee, 65 N. H. 656.

[19] Stevens *v.* Curtis, 18 Pick. (Mass.) 227.

[20] Rose *v.* Hardie, 98 N. C. 44; Folmar *v.* Curtis, 86 Ala. 354; Friday *v.* Floyd, 63 Ill. 50.

[21] Broadfoot *v.* Fayetteville, 121 N. C. 418. An act prohibiting a town from charging fines and poundage where stray animals belong to non-residents does not prevent the town from impounding such animals and selling them for the cost of feeding while impounded: Aydlett *v.* Elizabeth City, Ibid. 4.

The land-owner cannot impound cattle that enter through a breach in a fence which he is bound to repair,[22] though it may be immaterial that his own part of a division fence is out of repair where the animals break through the other part.[23] And where he has agreed to keep a portion of the division fence in repair, he cannot impound animals entering through a defect, though it may be unlawful for animals to run at large.[24]

One fencing government land with his own in violation of a statute cannot detain cattle found in the enclosure under a statute authorizing the impounding of trespassing animals.[25]

83. Manner of Impounding; Remedies of the Owner.—The animals taken up must be driven to the pound within a reasonable time [26] and with reasonable diligence,[27] and these questions are for the jury. In the latter case it is said: "A person who first lawfully distrains cattle is entitled to retain them in custody until he can deliver them into the custody of the pound-keeper. He is entitled so to keep them as will enable him surely to deliver them to such keeper. Were he in danger of losing that custody by driving them in the darkness of the night when it would be easy for them to escape and when there was reasonable danger that they would, we do not see that he might not keep that custody by shutting them up until they could be safely driven. He would have no right unreasonably to delay and without necessity keep them from the pound. His duty is to give all reasonable diligence and

[22] Akers *v.* George, 61 Ill. 376; Hitchcock *v.* Tower, 55 Vt. 60; Coor *v.* Rogers, 97 N. C. 143. And see McSloy *v.* Smith, 26 Ont. 508.

Or that the adjoining cattle-owner is *not* liable to repair: Eastman *v.* Rice, 14 Me. 419, under a statute.

[23] Hine *v.* Munson, 32 Conn. 219, under a statute.

[24] Hopkins *v.* Ott, 57 Mo. App. 292. And see Field *v.* Bogie, 72 id. 185. See § 72, supra.

[25] Taylor *v.* Buford, 8 Utah 113. [26] Drew *v.* Spaulding, 45 N. H. 472.

[27] Angell *v.* Simmons, 10 R. I. 418.

in good faith to deliver them at the pound without endangering the custody he has."

The distrainor of cattle is bound to impound them in a proper pound, and if the usual one is not in a fit condition he must find another.[28] So, the party impounding, must feed and water the cattle properly according to the usage of the country and of good husbandry or he will be considered a trespasser *ab initio*.[29] Merely driving them off the land into the highway and detaining them till the owner comes to take them away and demanding a sum of money as damages, do not amount, as a matter of law, to an impounding.[30] Where a field-driver in taking an animal to the pound drives it first upon the owner's premises his act is not necessarily unlawful.[31] And where running at large is unlawful, an officer may pursue the animals to private property used as a common or take them up and impound them when loose upon a common. "To hold that such right having once attached entirely ceased or became suspended whenever such cattle temporarily passed from such public place and became trespassers upon private property, would tend to defeat the very object of the ordinance."[32] One driving an animal from one place in a district where running at large is forbidden to another, for the purpose of impounding it, is not guilty of driving it from a lawful into an unlawful district to be impounded.[33]

The impounder has the right to use the same force to maintain his possession that a sheriff has to protect his possession of property taken by him on legal process. And one so taking possession does not, by afterwards abandoning his intention, become a trespasser *ab initio* so as to be liable for the force he used in defence of the property before he gave it up.[34]

[28] Bignell *v.* Clarke, 5 H. & N. 485; Wilder *v.* Speer, 8 A. & E. 547.
[29] Adams *v.* Adams, 13 Pick. (Mass.) 384.
[30] Conners *v.* Loker, 134 Mass. 510.
[31] Parker *v.* Jones, 1 Allen (Mass.) 270.
[32] O'Mally *v.* McGinn, 53 Wis. 353. [33] Ghent *v.* State, 96 Ala. 17.
[34] Barrows *v.* Fassett, 36 Vt. 625.

But the impounder must comply with all the statutory provisions with regard to impounding or he will be a trespasser *ab initio*.[35] This has been held to be the case with regard to the memorandum to be left with the pound-keeper,[36] the ascertainment of damages by fence-viewers,[37] and the notice to be given to the owner.[38] But where the statute defined the form of notice to be given forty-eight hours after the impounding, it was held that a verbal notice given at once was sufficient, the owner of the animals not being injured by the omission.[39] And where the owner replevied the cattle within twenty-four hours after the impounding, it was held that he could not afterwards object that no statutory notice was given.[40] So, if he discovers the facts within the time allowed for giving notice and refuses to pay reasonable damages.[41] A notice given by a field-driver to the owner of cattle that they are impounded for going at large on a public highway is *prima facie* evidence that they were so at large and puts on the owner the burden of proving the contrary.[42] Failure to

[35] Merrick *v.* Work, 10 Allen (Mass.) 544; Smith *v.* Gates, 21 Pick. (Mass.) 55; Fitzwater *v.* Stout, 16 Pa. St. 22; Sutton *v.* Beach, 2 Vt. 42; Frazier *v.* Goar, 1 Ind. App. 38; Nafe *v.* Leiter, 103 Ind. 138.

[36] Sherman *v.* Braman, 13 Metc. (Mass.) 407; Newhouse *v.* Hatch, 126 Mass. 364; Morse *v.* Reed, 28 Me. 481; Palmer *v.* Spaulding, 17 id. 239.

[37] Merritt *v.* O'Neil, 13 Johns. (N. Y.) 477, where the fact that the owner of the animals was himself the pound-master was held to be no defence.

[38] Rounds *v.* Stetson, 45 Me. 596; Hanscom *v.* Burmood, 35 Neb. 504; Forsyth *v.* Walsh, 4 Ind. App. 182. See Young *v.* Rand, 18 N. H. 569.

For notice held sufficient, see Goodsell *v.* Dunning, 34 Conn. 251; Pickard *v.* Howe, 12 Metc. (Mass.) 198; Moore *v.* Robbins, 7 Vt. 363; Hooper *v.* Kittredge, 16 id. 677.

For notice held insufficient, see Sanderson *v.* Lawrence, 2 Gray (Mass.) 178; Coffin *v.* Field, 7 Cush. (Mass.) 355; Jones *v.* Dashner, 89 Mich. 246.

[39] Sweeney *v.* Sweet, 14 R. I. 195.

[40] Wild *v.* Skinner, 23 Pick. (Mass.) 251, where it was also held that where cattle may be impounded "at any time," it may be done on Sunday as a work of necessity.

[41] Norton *v.* Rockey, 46 Mich. 460.

[42] Pickard *v.* Howe, 12 Metc. (Mass.) 198.

give notice is not waived by the owner's appearing and demanding his property.[43]

The pound-keeper is a public officer discharging a public duty and is not liable for detaining a distress unless he has done some act beyond his duty whereby the owner suffered some particular damage not recoverable against the distrainor, or when, by going out of the line of his duty, he makes himself a party to some illegal act of the distrainor.[44] He must strictly comply with the statute regulating responsibilities.[45] He is bound to receive everything offered to his custody, whether legally impounded or not;[46] and is ordinarily not liable in replevin for doing so.[47] "When Lord Mansfield says that the pound-keeper cannot let things impounded go 'without a replevin,' he obviously means a replevin brought against the distrainor. . . . But the situation of a pound-keeper is not that of a bailiff or servant. He is a public officer." [48] So, he is not subject to replevin by the owner of the impounded animals for acts done by the impounder prior to the time when he (the pound-keeper) could exact security or lawfully refuse to perform his statutory duties.[49] But where he takes the beasts from the pound and drives them elsewhere to feed, he loses control of them and the owner may take them away and bring replevin for them, if retaken.[50] The pound-keeper is bound to keep them in the pound only, unless the removal is necessary to save them from injury, and if a constable, with notice of their removal from the pound, sells them at auction at the request of the

[43] Wyman *v.* Turner, 14 Ind. App. 118.

[44] Wardell *v.* Chisholm, 9 U. C. C. P. 125.

[45] Clark *v.* Lewis, 35 Ill. 417; Marshall *v.* Yoos, 20 Ill. App. 608.

[46] Badkin *v.* Powell, Cowp. 476.

[47] Wardell *v.* Chisholm, 9 U. C. C. P. 125; Ibbottson *v.* Henry, 8 Ont. 625; Bills *v.* Kinson, 21 N. H. 448; Folger *v.* Hinckley, 5 Cush. (Mass.) 263.

[48] Wardell *v.* Chisholm, supra, commenting on Lindon *v.* Hooper, Cowp. 414.

[49] Mattison *v.* Turner (Vt.), 39 Atl. Rep. 635.

[50] Bills *v.* Kinson, supra. And see Harriman *v.* Fifield, 36 Vt. 341.

pound-keeper, such request will not protect him and he is guilty of trespass. The keeper who has removed the animals "has put an end to the effect of the act of impounding and has become the keeper of an animal belonging to another, with no right in reference thereto other than to deliver it upon demand to the owner." [51] So, where a distrainor takes an animal out of the pound for the purpose of using it unlawfully, the owner may take it out of his possession without rendering himself liable for either rescue or pound-breach.[52]

There is no relation of debtor and creditor created by law between the impounder and the pound-keeper in relation to the expense of keeping and feeding, and, in the absence of an express contract that the impounder will pay expenses, the pound-keeper has no remedy against him therefor. If the animals were impounded contrary to law, so that the impounder is a trespasser, this will not enable the pound-keeper to recover of the impounder such expense in an action upon a book-account.[53]

Where the fence of the pound is sufficient, the fact that a horse kills himself by rushing or kicking against it or by trying to clear it does not make the municipal corporation liable.[54] And in replevin brought against the field-driver, the owner cannot show that the cattle were not suitably provided for or were ill-treated in the pound.[55] A private individual impounding a beast in the town pound is not liable for an injury which it receives from cattle confined in the same pound.[56]

Taking away and setting at liberty, even without violence or threats, is a rescue of a distrained or impounded animal.[57]

[51] Collins *v.* Fox, 48 Conn. 490. [52] Smith *v.* Wright, 6 H. & N. 821.
[53] Williams *v.* Willard, 23 Vt. 369. [54] Greencastle *v.* Martin, 74 Ind. 449.
[55] Pickard *v.* Howe, 12 Metc. (Mass.) 198.
[56] Brightman *v.* Grinnell, 9 Pick. (Mass.) 14.
[57] Hamlin *v.* Mack, 33 Mich. 103.
That this at least is essential to the offense of pound-breach, see State *v.* Young, 18 N. H. 543.

So, where a person takes cattle from the lawful custody of the field-driver when he is driving them to the pound, though they are never out of the latter's sight and are at last surrendered to him and impounded.[58] "When a man hath taken a distresse and the cattle distreyned, as he is driving of them to the pound, go into the house of the owner, if he that took the distresse demand them of the owner, and he deliver them not, this is a *rescous* in law." [59] So, where the owner aids the rescuers on meeting them, he is guilty of pound-breach.[60] Where one, without force or fraud, impounds another's cattle, the latter must resort to law, though the impounding is without right;[61] and in an indictment for pound-breach, the illegality of the impounding cannot be shown in defence.[62]

The owner is entitled to the return of the animals if he tenders amends before the impounding.[63] "If he does not choose to replevy, but is desirous to have his cattle immediately re-delivered, he may make amends and then bring an action of trespass for taking his cattle, and particularly charge the money so paid by way of amends as an aggravation of the damage occasioned by the trespass." [64] Where the cattle distrained were in a private pound and the distrainor admitted that they were to be forwarded to a public pound, it

[58] Vinton *v.* Vinton, 17 Mass. 342.

But where the defendant was in pursuit of her animals which the prosecutor was trying to impound, she was held not to be indictable for "releasing impounded animals" because she drove them from his enclosure: State *v.* Hunter, 118 N. C. 1196.

[59] Co. Litt. 161 a.

[60] Pierce *v.* Josselyn, 17 Pick (Mass.) 415.

[61] Bowman *v.* Brown, 55 Vt. 184.

[62] Com. *v.* Beale, 5 Pick. (Mass.) 514. And see Melody *v.* Reab, 4 Mass. 471.

But the owner of cattle wrongfully impounded within a fenced enclosure is not guilty of injuring the fence of another without his consent, if he takes down the fence to release the cattle: Klein *v.* State (Tex. Cr.), 39 S. W. Rep. 369. See also Matthews *v.* Schmidt, 8 Kulp (Pa.) 471.

[63] Sheriff *v.* James, 1 Bing. 341; Singleton *v.* Williamson, 7 H. & N. 747.

[64] Lord Mansfield in Lindon *v.* Hooper, Cowp. 414.

was held that a tender made then was not too late;[65] and if, where the animal is in a private pound, the distrainor, by demanding an excessive sum for damages as the condition of release, obtains such sum, the payment is not voluntary and the amount may be recovered in an action for money had and received.[66] But it has been held that case does not lie against the distrainor for impounding the animals instead of accepting the compensation tendered before the impounding.[67]

Where the animals have been impounded, the owner cannot replevy them until he pays or offers to pay the costs and expenses of the proceeding.[68] He does not, by paying the pound-keeper's fees, waive his right to bring trespass for an irregularity or omission.[69]

An ordinance fixing certain fees which must be paid before an impounded animal will be released, creates no lien for any fees or charges not included within those specified.[70]

A statute allowing impounding and demanding an allowance for keeping where animals break through a lawful fence must be strictly construed, and was held not to apply to other cases, as where the owners agreed to have no partition fence, but to keep their stock from trespassing.[71]

84. Damages; Sale.—The party impounding is confined in his recovery to damages occasioned by the particular trespass for which the animals were impounded. He cannot demand payment for any damage previously done.[72] The actual ex-

[65] Browne *v.* Powell, 4 Bing. 230, where it was also held that a tender to the distrainor's wife who has acted as his agent is sufficient.

[66] Green *v.* Duckett, 11 Q. B. D. 275. See Gulliver *v.* Cosens, 1 C. B. 788.

[67] Anscomb *v.* Shore, 1 Taunt. 261.

[68] Wilhelm *v.* Scott, 14 Ind. App. 275; Schlachter *v.* Wachter, 78 Ill. App. 67.

[69] Coffin *v.* Field, 7 Cush. (Mass.) 355. See as to fees, Colp *v.* Halstead, 63 Ill. App. 116.

[70] Martin *v.* Foltz, 54 Neb. 162. [71] Dent *v.* Ross, 52 Miss. 188.

[72] Holden *v.* Torrey, 31 Vt. 690; Smith *v.* Brownlee, 10 Leg. News

penses of impounding may also be recovered, but not where the animal has done no damage,[73] or the impounder's act has been unlawful.[74] Where the impounder sues for damages without claiming expenses and the judgment is for the defendant, the former is not entitled to any compensation for keeping the animals pending the suit.[75]

The statutes generally provide that a sale shall follow the impounding, should the owner not appear or refuse to discharge his obligations. The question of summary sales has been already discussed,[76] and the same principles apply to a sale after an impounding. Where the owner is subjected to a penalty, there must be some judicial inquiry into the facts. In an Illinois case it is said: "Every citizen has a right to a judicial investigation when charged with an offense. Suffering horses to run at large in the streets of the city was an offense punishable by a fine of five dollars for each head. The seventh section of the ordinance empowers the pound-master to give notice that, unless the animals are claimed by the owners and the penalty and the cost of their keeping paid within five days thereafter, the animals will be sold to satisfy the same. This provision is void as contravening that constitutional right every man has to an investigation in court when charged with an offense punishable by fine. Such a penalty can only be enforced by action at law, in which the owner would have a right to show he was not liable to the penalty—that his case was not within the spirit and meaning of the ordinance." [77] Where the sale of the animal is for the purpose only of paying the expenses of the impounding, it

(Can.) 405; Meunier *dit* Legacé *v.* Cardinal, Rap. Jud. Quebec, 10 C. S. 250.

[73] Dudley *v.* McKenzie, 54 Vt. 685; Osgood *v.* Green, 33 N. H. 318; Dunton *v.* Reed, 17 Me. 178.

[74] McBride *v.* Hicklin, 124 Ind. 499. [75] Hamil *v.* Cox, 90 Ga. 54.

[76] See § 80, supra.

[77] Willis *v.* Legris, 45 Ill. 289, 292. See Spitler *v.* Young, 63 Mo. 42.

That an act providing for the sale of an impounded animal after notice is not unconstitutional, see Brophy *v.* Hyatt, 10 Colo. 223.

has been held that it is a legitimate exercise of police power and need not be preceded by a judicial inquiry.[78] Such proceedings are *in rem* and constructive service by publication is sufficient to give validity to the sale, without personal notice being served on the owner.[79]

But in a Kentucky case it was held that to authorize the sale of an animal impounded for running at large to pay the fees and costs of impounding, some formal proceeding is necessary to determine the fact that the animal seized was actually running at large, in which the owner may have an opportunity of being heard; that, if possible, personal service should be had upon him, but, if not, the proceeding may be *in rem* and some public notice given him of the time and place of sale; and that it is not necessary that the owner should have permitted the animal to run at large, as the city has the right to subject it to fees and costs without reference to the owner's being in fault.[80] An ordinance providing for the impounding of dogs running at large, notification to their owners, and the killing of dogs not redeemed within twenty-four hours, is not unconstitutional.[81]

One impounding cattle, before he can sell them at auction, must protect himself by a legal warrant of sale, and must show that his prior proceedings and those of the pound-keeper have been regular and in conformity with the law.[82] The statute must be strictly observed or the field-driver will be held to be a trespasser *ab initio*.[83] But the field-driver is not such a trespasser where he has lawfully impounded and given notice, though he fails to return or sell according to law through the pound-keeper's default or the insufficiency of the pound.[84]

In an action against a city to recover the value of an ani-

[78] Wilcox *v.* Hemming, 58 Wis. 144. [79] Wilson *v.* Beyers, 5 Wash. 303.
[80] Gentry *v.* Little, 16 Ky. L. Rep. 26. And see Armstrong *v.* Brown (Ky.), 50 S. W. Rep. 17.
[81] Hagerstown *v.* Witmer, 86 Md. 293. [82] Cate *v.* Cate, 44 N. H. 211.
[83] Smith *v.* Gates, 21 Pick. (Mass.) 55.
[84] Coffin *v.* Vincent, 12 Cush. (Mass.) 98.

mal impounded and sold, the burden is on the defendant to show that proper notice has been given.[85] The notice of sale should mention the place where the sale occurs, or it is not legal.[86]

An ordinance providing that the pound-keeper may in his discretion sell impounded animals to the highest bidder does not authorize doing so at a private sale.[87]

A person claiming title under a pound-master's sale must show, in order to divest the owner's title, that the animal was liable to be impounded and that the proceedings were authorized by law.[88] But in Nova Scotia it was held that the owner of an animal wrongfully impounded could not recover against a purchaser at a public auction by the pound-keeper under a lien for maintenance, where the sale had been regularly and properly conducted.[89]

85. Horses Left Unguarded in the Highway.—With regard to leaving horses unhitched or unguarded in the highway, the prevailing rule appears to be that this is not negligence *per se* but is to be left for the jury to consider with all the circumstances.[90] "Whether it is negligent to leave a horse unhitched must depend upon the disposition of the horse, whether he was under the observation and control of some person all the time and many other circumstances, and it is a question to be determined by the jury from the facts of each case." [91] And in a Kansas case where it was held that a person is liable for an injury done by his runaway horse that had

[85] Fort Smith *v.* Dodson, 51 Ark. 447.

[86] Sutton *v.* Beach, 2 Vt. 42.

See, as to sufficiency of notice, Dodge *v.* Baker, 24 Nov. Sco. 552.

[87] Archer *v.* Baertschi, 8 O. Circ. Ct. 12.

[88] Johnston *v.* Kirchoff, 31 Minn. 451.

[89] Dodge *v.* Baker, 24 Nov. Sco. 552.

[90] Dexter *v.* McCready, 54 Conn. 171; Park *v.* O'Brien, 23 id. 339; Potter & Parlin Co. *v.* N. Y. Cent. & H. R. R. Co., 22 Misc. (N. Y.) 10.

See Fallon *v.* O'Brien, 12 R. I. 518.

See, also, on this subject, § 68, supra.

[91] Griggs *v.* Fleckenstein, 14 Minn. 81.

been left untied, though the driver is careful and the horse an ordinarily gentle one, the court said: "We do not hold that the leaving of a team of horses in a street without being tied or held by the reins is, under all circumstances, as a matter of law, negligence *per se*. . . . The driver, however, in such cases ought to be near his horse and in a condition to control him by his voice and to reach him, if necessary, with his hand in an emergency." [92]

So it was held not to be negligence *per se* for the driver of a quiet horse standing in the street to let go the reins while he alighted to fasten the head-weight, there being at the time little traffic and no noise in the street, the horse becoming frightened by a sudden noise just after the driver had alighted.[93] And a porter was held not to be obliged, under the circumstances, to put a person at his horse's head while he removed the goods from his cart.[94]

It was held in Kentucky that where a runaway was caused by a driver's leaving his team standing in the street, evidence could not be given of an ordinance making this unlawful. "It is the legal duty of every person having charge of a horse in city or country to apportion the care with which he handles him to the danger to be apprehended from a failure to keep him constantly under control. . . . It may be dangerous for a driver to leave his team upon the street and the city council no doubt had authority to prohibit such an act; but the simple fact that they did prohibit it does not prove nor

[92] Moulton *v.* Aldrich, 28 Kan. 300.

That negligence is presumed in such a case in the absence of explanation, see Davis *v.* Kallfelz, 22 Misc. (N. Y.) 602.

That the fact that horses got loose after being hitched would be some evidence of negligence, see Strup *v.* Edens, 22 Wis. 432.

[93] Sullivan *v.* McWilliam, 20 Ont. App. 627. Otherwise, where there is reason to anticipate fright: Benner Livery & U. Co. *v.* Busson, 58 Ill. App. 17. And see Milne *v.* Nimmo, 25 Rettie (Sc. Ct. Sess.) 1150.

[94] Hayman *v.* Hewitt, Peake's Add. Cas. 170. And see Smith *v.* Wallace, 25 Rettie (Sc. Ct. Sess.) 761; Wright *v.* Dawson, 5 Sc. L. T. Rep. 196.

even tend to prove that the appellant's driver was guilty of such negligence as renders them liable for an injury resulting from their team having been left standing upon the streets in violation of the ordinance." [95] But in other States the failure to comply with such a provision, whereby the animals run away and do damage, has been held to be negligence *per se*.[96]

There are many circumstances, however, that will render the owner liable, as where the horse is high-spirited or addicted to running away,[97] or the place is a crowded city street,[98] or there has been negligence in the hitching or guarding.[99]

But the leaving the animal unhitched or unattended need not be the immediate cause of the injury: the owner was held

[95] Dolfinger *v.* Fishback, 12 Bush (Ky.) 474, where it was also held that an ordinance prohibiting the hitching of animals to shade-trees was made competent evidence for the defendant by the plaintiff's proving that there were shade-trees near where the team was left.

[96] Siemers *v.* Eisen, 54 Cal. 418; Bott *v.* Pratt, 33 Minn. 323.

[97] McIntosh *v.* Waddell, 24 Rettie (Sc. Ct. Sess.) 80.

It is for the jury to determine whether it was negligence to leave the team unhitched where the evidence showed it had run away once before: Doyle *v.* Detroit Omnib. Line Co., 105 Mich. 195. See Benoit *v.* Troy & L. R. Co., 154 N. Y. 223; Donnelly *v.* Fitch, 136 Mass. 558; cited in § 86, infra.

[98] Phillips *v.* De Wald, 79 Ga. 732, where it is said: "Every horse whatever, no matter how gentle and amiable, must be properly attended or secured in the crowded business streets of a city, when there by the act of the owner and subject to his control. The instincts common to the species render this necessary, and of these instincts every owner must be presumed to have notice."

See, also, Pierce *v.* Conners, 20 Colo. 178; Williams *v.* Koehler, 58 N. Y. Suppt. 863; Guimond *v.* Montreal, 4 Rev. Leg. (Can.) 285; McEwan *v.* Cuthill, 25 Rettie (Sc. Ct. Sess.) 57.

[99] Frazer *v.* Kimler, 2 Hun (N. Y.) 514; Wagner *v.* Goldsmith, 78 Ind. 517; Wasmuth *v.* Butler, 86 Hun (N. Y.) 1.

And see Rumsey *v.* Nelson, 58 Vt. 590, where the question was held not to be whether the defendant knew that the horse had a propensity to break his fastenings but whether his servant, under the circumstances, used the care of a prudent man in hitching.

liable where the damage was occasioned by the act of a passer-by in striking the horse.[100] "It is not material what frightened the horse, if he was not properly taken care of so as to prevent his running. It is the duty of the owner of a horse under such circumstances to exercise care on his part to guard against such an accident; and his neglect in so doing involves him in liability for the consequences, as well as the person who may have caused the frightening of the horse." [101] So, where the immediate cause of the running away was the falling of hot water from an elevated road;[102] or of icicles. "The falling of the ice was in itself no cause of injury directly and immediately to the plaintiff. . . . The defendant is not held responsible for the falling of the ice, but for his negligence in leaving his horse in a condition where he might run away, if alarmed by such or any similar cause." [103] And the fact that a horse would not have run away if it had not been hit by stones thrown by boys does not relieve the owner from liability to an injured person, where the horse could not have broken loose but for the defective condition of the rope with which it was tied.[104]

Where the driver of a carriage used to convey passengers for hire left the horses unguarded and unhitched while a passenger was inside and they ran away and the passenger was injured while trying to jump out, the driver and owner were held liable jointly or severally.[105] Attempting to lead two skittish horses attached to a buggy by means merely of a halter fastened around the neck of the near horse was held to be negligence.[106]

The proprietors of a race-course are not liable for injuries

[100] Illidge *v.* Goodwin, 5 C. & P. 190.
[101] McCahill *v.* Kipp, 2 E. D. Smith (N. Y.) 413.
[102] Rompillon *v.* Abbott, 1 N. Y. Suppt. 662.
[103] Bigelow *v.* Reed, 51 Me. 325.
[104] Pearl *v.* Macaulay, 6 N. Y. App. Div. 70.
[105] Youmans *v.* Padden, 1 Mich. N. P. 127.
[106] Pickens *v.* Diecker, 21 O. St. 212.

caused by the running away of a spectator's horse, left unguarded upon their grounds.[107]

A carriage is "passing" upon a highway where, in the course of a journey from one place to another, it is at a standstill, and the driver is liable to the statutory penalty if negligently or wilfully he is at such a distance that he cannot have the direction and government of the horses.[108]

The question of contributory negligence is often an important one in these cases. Where the defendant negligently left his horse and cart unattended in the street and the plaintiff, a child seven years old, got into the cart to play, and another child led the horse on, whereby the plaintiff was thrown out and hurt, the defendant was held liable. "The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief." [109]

Where a servant unlawfully left his master's horse and wagon unhitched in the street and the horse strolled away and upset a ladder erected in the middle of the street upon which the plaintiff was working, the failure of the latter to have the ladder guarded was held not to be such contributory negligence as would bar recovery from the master.[110]

Where an unattended horse and cart collided with an unattended horse and van and no one saw the accident, it was held error to withdraw from the jury the question of contributory negligence.[111]

An ordinance making it unlawful for animals to run at large

[107] Hart *v.* Washn. Park Club, 54 Ill. App. 480, affirmed in 157 Ill. 9.

[108] Phythian *v.* Baxendale, [1895] 1 Q. B. 768.

[109] Lynch *v.* Nurdin, 1 Q. B. 29.

Whether, where one leaves a horse unattended to and a child creeps under the wagon and the owner returning drives off and injures the child, the former act is the proximate cause of the damage, see Morrison *v.* M'Ara, 23 Rettie (Sc. Ct. Sess.) 564.

[110] Jones *v.* Belt, 8 Houst. (Del.) 562.

[111] Walton *v.* London, B. & S. C. R. Co., 1 H. & R. 424.

on public streets which the residents had improved by constructing boulevards, etc., except under the care of a competent person and secured by a rope, etc., was held not invalid as depending upon the will of the residents whether they construct boulevards or not, as it was not the validity, but the application of the ordinance that so depended. Whether a stick or whip in the driver's hands was a "device" for controlling, as contemplated by the ordinance, was held not to be a question of fact for the jury, but of law for the court.[112]

86. Liability in Case of Horses Running Away.—This question has been partially discussed in the preceding section. As a general rule it may be stated that the owner or driver of a team of horses running away is not responsible for a collision or other injury resulting therefrom unless there has been fault or negligence on his part.[113] In a Connecticut case it is said: "A man driving furiously along the street runs into my carriage and breaks it. Here the act indicates negligence on the part of the driver. Again, the defendant's horse is running furiously along the street, dragging the shafts of a carriage after him, and runs against and breaks my carriage. This indicates accident only, and not negligence. It is a mere matter of human presumption in each case. The common judgment of mankind would see in the one case a *prima facie* case of culpable negligence—in the other only of sheer accident. Now in suits brought for damages done in these cases, if the plaintiff should prove only the fact of collision and the defendant should offer no evidence whatever, the court ought to charge the jury that the burden of proof is not in

[112] Chamberlain *v.* Litchfield, 56 Ill. App. 652.

[113] Boyle *v.* McWilliams, 69 Conn. 201; Bennett *v.* Ford, 47 Ind. 264; Robinson *v.* Simpson, 8 Houst. (Del.) 398; Brown *v.* Collins, 53 N. H. 442; Shawhan *v.* Clark, 24 La. Ann. 390; Hall *v.* Huber, 61 Mo. App. 384; Short *v.* Bohle, 64 id. 242; Gougeon *v.* Contant, 5 Leg. News (Can.) 182; McWillie *v.* Goudron, 30 Low. Can. Jur. 44; Quebec *v.* Picard, Rap. Jud. Quebec, 14 C. S. 94; Hammack *v.* White, 11 C. B. N. S. 588; Manzoni *v.* Douglas, 6 Q. B. D. 145; Wakeman *v.* Robinson, 8 Moore 63.

either case thrown upon the defendant as matter of law, but that the plaintiff is to recover or not, according as they shall, in the exercise of their judgment, consider the acts as in themselves indicating or not indicating negligence on the part of the defendant. The failure of the defendant to offer any explanatory evidence may operate to strengthen the plaintiff's case, but it must always be in a case where the act done carries in itself an indication of negligence or, in other words, creates a presumption of fact, not of law, that the defendant has been guilty of negligence." [114]

But the mere fact that the horse was running away raises in itself no presumption of negligence.[115] "If a horse is running away with his driver, there is nothing in the fact itself which tends to show negligence in the driver or which tends to show how the horse became unmanageable any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise, and it would seem that it could as well be inferred in such a case that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is running away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might not be carried." [116] The fact that the runaway horse

[114] Button *v.* Frink, 51 Conn. 342, 351.

[115] O'Brien *v.* Miller, 60 Conn. 214; McMahon *v.* Kelly, 9 N. Y. Suppt. 544; Gray *v.* Tompkins, 15 id. 953; Gottwald *v.* Bernheimer, 6 Daly (N. Y.) 212.

See Hummell *v.* Wester, Bright. (Pa.) 133; Cadwell *v.* Arnheim, 152 N. Y. 182.

[116] Button *v.* Frink, supra. The case of Unger *v.* 42d St. & Grand St. Ferry R. Co., 51 N. Y. 497, and Strup *v.* Edens, 22 Wis. 432, are thus commented upon: "In both these cases the court held that the fact that the horses were running unattended in the public street, afforded some evidence that the horses had been left either unfastened in the public street or improperly and negligently secured. Manifestly this is an inference which could not be drawn in the case at bar."

had been left unattended may, however, show negligence *prima facie* so as to shift the burden of proof to the defendant.[117] And the fact that a team is found running away without a driver requires some explanation, and if the driver does not testify, or his absence is not accounted for, it is fair to presume that no satisfactory explanation could have been given.[118]

Where there was evidence that the horses had been used for more than six weeks and were considered safe and that the driver, though not well, was not unable to perform his duties, there was held to be no evidence of negligence.[119]

Where the plaintiff introduced evidence to show that the defendant's horse had run away a year and a half before, the defendant was held entitled to show that a horse which has not run away for that length of time requires no more care than if had never done so.[120] And in the New York Court of Appeals it was held, reversing the judgment of the lower court, that the fact that a pair of ordinarily gentle horses on one occasion ran away through fright naturally following from the conduct of third parties, does not of itself show a vicious propensity, nor does the knowledge thereof render the owner liable, in the absence of negligence, if he thereafter used them and they again ran away. The court said: "The use of horses is very general. That they may on an occasion escape from the control of their driver and run away is not an uncommon experience. Must the owner, after such an occasion, stop using them, except under the onerous burden of absolute liability, if they shall run away a second time and cause injury? It may be admitted, as suggested on the trial,

[117] Doherty *v.* Sweetser, 82 Hun (N. Y.) 556; Norris *v.* Kohler, 41 N. Y. 42; Pearl *v.* Macaulay, 6 N. Y. App. Div. 70. And see the opinion in Button *v.* Frink, quoted in the last note.

[118] Maus *v.* Broderick (La.), 25 South. Rep. 977.

[119] Quinlan *v.* Sixth Ave. R. Co., 4 Daly (N. Y.) 487.

[120] Donnelly *v.* Fitch, 136 Mass. 558.

The fact that a horse shies occasionally does not necessarily show negligence: Young *v.* Cowden, 98 Tenn. 577.

that horses that have once run away are less safe thereafter. This may bear upon the degree of care which should be exercised by the owner in their management. But does it place the horses under the ban of the law and make the owner liable, in the absence of negligence, if he uses them thereafter, and they again run away and cause injury? It may very well be that horses may be so unmanageable that they cannot be driven in the public streets without manifest danger. If this was established in a particular case, we see no reason why their use by the owner, with knowledge of their vicious character, should not make him responsible for any consequent injury. . . . The cause of the running away of the horses on both occasions was fright, naturally following from the conduct of third persons, for those acts the defendant was not responsible, and the fact that defendant knew of the circumstances of the first runaway did not, we think, justify the submission to the jury of the question whether the horses were vicious or dangerous or unsafe to be used in driving along the street." [121]

The lack of ordinary care must be proved to entitle the plaintiff to recover, and greater care is required where the horse is near a throng of people than where it is in a less frequented place. To show the use of ordinary care, the defendant was held entitled to introduce evidence of the directions of one servant to another respecting the management of the horse just before its running away.[122]

One whose servant so negligently drives in a public street as to come into collision with a carriage and cause the horses drawing it to take fright and run away, is liable in damages to one who is injured by the runaway horse.[123] But where

[121] Benoit *v.* Troy & L. R. Co., 154 N. Y. 223.

See Doyle *v.* Detroit Omnib. Line Co., 105 Mich. 195, cited in § 85, supra.

[122] Sullivan *v.* Scripture, 3 Allen (Mass.) 565.

[123] McDonald *v.* Snelling, 14 Allen (Mass.) 290. And see Thomas *v.* Royster, 98 Ky. 206; Langlois *v.* Drouin, Rap. Jud. Quebec, 13 C. S. 49.

there was no negligence in the servant, the defendant who was with him at the time was held not liable in trespass for a personal injury to the plaintiff from the horses becoming unmanageable.[124]

Where two teams going the same way collided and a person behind the front team was upset and killed, this was held to be due to the negligence of the driver of the colliding team, even if the horses of the other team could have been checked by the driver when running away; otherwise if the latter driver had done some act, not merely negligence, contributing to the running away.[125]

Where a street car driver after stopping his car on a busy street, detached the horses and swung them around without observing whether any teams were approaching, and a collision occurred and the horses were frightened, ran away and injured the plaintiff, the driver was held to be negligent.[126] But such a driver is not necessarily negligent in allowing the horses to follow their usual route instead of making them keep straight on.[127]

Where the plaintiff was upon the rear platform of a street car and about to enter it, when the driver whipped up to avoid a collision with a runaway horse and carriage and the jolt threw the plaintiff to the ground and she was struck and injured by the runaway, it was held that the court should have instructed the jury that, even if the car-driver was guilty of negligence, such negligence was not the proximate cause of the injury and the plaintiff could not recover. "It was certainly not a *natural* consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a *probable* consequence. The utmost that can be said would be that such a consequence might possibly happen." [128]

[124] Holmes *v.* Mather, L. R. 10 Ex. 261. [125] Belk *v.* Peo., 125 Ill. 584.
[126] Sutter *v.* Omnibus Cable Co., 107 Cal. 369.
[127] Rainnie *v.* St. John City R. Co., cited infra.
[128] South Side Pass. R. Co. *v.* Trich, 117 Pa. St. 390.

A street car company is responsible for injury to a passenger from the horses being frightened by a train and running away, where the horses are unsuitable for the course.[129]

Negligence in not checking and getting under control a team driven at reckless speed through the street and colliding with a foot passenger, was held as a matter of law not to be rendered a remote cause by the fact that the person was struck by the horse shying at an elevated railroad train. "The accident is attributable to both or either and it is for the jury to determine which of them is the proximate cause." [130]

Where the defendant's horse ran away through his negligence, the fact that the crowd hallooed and tried to stop it, thus making it swerve and do damage, will not relieve the defendant. "The rule of law is well settled that where the plaintiff has been injured in his person or property by the wrongful act or omission of the defendant, or through his culpable negligence the fact that a third party, by his wrong or negligence, contributed to the injury, does not relieve the defendant from liability." [131]

A street car company must use reasonable care in selecting its horses and ascertaining whether they are safe for such use, and the fact that a passenger is riding on the front platform is not the proximate cause of an injury received as he is trying to alight by being kicked by the horses through whose fright the car had been thrown off the track.[132]

But where a street car horse ran away and struck a post,

[129] Rainnie *v.* St. John City R. Co., 31 N. B. 582, where it is said: "It is not essential (as in insurance cases) that the proximate cause shall alone be regarded. It is sufficient if an efficient cause of the thing complained of is found in some tortious acts of the defendant. Here the accident is found to have been caused by a negligent act of defendants, namely, the employment of horses unsuitable for the route they were placed on."

[130] Van Houten *v.* Fleischman, 20 N. Y. Suppt. 643.

[131] Griggs *v.* Fleckenstein, 14 Minn. 81.

[132] Noble *v.* St. Joseph & B. H. St. R. Co., 98 Mich. 249. And see Rainnie *v.* St. John City R. Co., supra.

frightening a woman so as to bring on a nervous disease, the company were held not responsible for the sickness.[133]

Where the defendant's horse through his servant's negligence ran away and turned into the defendant's yard, and the plaintiff's wife, who was paying a visit, came out to see what was the matter and was injured, it was held that as the defendant's servant was not bound to anticipate that the plaintiff's wife would be in the yard, there was no duty towards her on the defendant's part, and therefore he was not liable.[134]

While a person insured under an accident policy was driving, his horse became frightened by an object on the street and ran away without upsetting the carriage or coming into contact with anything before he was brought under the driver's control. The person was apparently in great danger at the time and suffered so severely either from fright or the strain caused by the physical exertion in restraining the horse that he died within about an hour afterwards. It was held that death might be considered as having ensued from bodily injuries effected through external, violent and accidental means. "If it is to be admitted that death was caused through fright, even then we are just as strongly convinced that it was also caused by external means. Whether one thing or another shall be considered the proximate cause, depends upon the relation of the parties to the suit with each other, as well as upon other circumstances. If the death be laid to fright, it must be because fright produced bodily injury, and the means which produced fright were external." [135]

Where the defendant tied his horses for a blacksmith to shoe and then went away, and the blacksmith began to shoe

[133] Lehman *v.* Brooklyn City R. Co., 47 Hun (N. Y.) 355.

[134] Tolhausen *v.* Davies, 58 L. J. Q. B. 98.

[135] McGlinchey *v.* Fidelity & Cas. Co., 80 Me. 251.

Death from the sting of an insect is effected through "external, violent and accidental means," and the sting is the proximate cause of death resulting from blood poisoning: Omberg *v.* U. S. Mut. Assn. (Ky.), 40 S. W. Rep. 909.

the horse, which pulled the halter off and ran away and injured the plaintiff, it was held that the latter could not recover. "If the horse had bolted before the blacksmith had taken charge of it, the insufficiency of the tying would be evidence in support of the charge against the defendant. But the defendant was not a servant of the blacksmith to tie the horses for the purpose of shoeing them. The defendant's obligation ceased, that of the blacksmith's began, as soon as the latter took charge of the horses. The defendant would not be liable as owner of the horse, unless the horse was vicious and that fact was known to the defendant and the injury to the plaintiff had been caused by the vice of the animal." [136]

Where an injury was caused by the defendant's horse shying and coming into contact with a street-organ and the defendant knew that the horse became restive at the sound of an organ, he was held guilty of *prima facie* negligence in driving it in a town where such organs abounded, without taking due precautions against accident, which presumption must be rebutted by his showing that he had taken all possible precautions.[137]

Where knowledge of the horse's disposition must be shown, the knowledge of the husband will be imputed to the wife.[138] Where the defendant was intoxicated and fell asleep in his sleigh and his horses ran away and injured the plaintiff's horse, it was held that trespass and not case was the proper form of action.[139]

Contributory negligence may, of course, defeat recovery; but one who enters a carriage knowing that the team is unsafe or dangerous does not thereby assume the risk arising from the driver's negligence.[140] And the passenger on a ferry-boat on which there were no animals or vehicles was

[136] Maxwell *v.* Cooke, 9 Austral. Law Times 92, cited in 22 Ir. L. T. 361.
[137] Mella *v.* Baston, 72 L. T. 318.
[138] Huntoon *v.* Trumbull, 2 McCrary C. Ct. (U. S.) 314.
[139] Waldron *v.* Hopper, 1 N. J. L. 389.
[140] Smith *v.* Team (Miss.), 16 South. Rep. 492.

held not guilty of negligence in starting to pass from the boat by the way used by vehicles which had been opened to passengers by those in charge, so as to prevent his recovery for an injury received from a runaway horse which had bolted into the ferry-house and on to the driveway.[141] Where the plaintiff's horse became frightened by a collision with the defendant's team, and the plaintiff seized the bridle rein of the horse to keep him from running away, and in so doing was injured by the horse, he was held not to be negligent, as a matter of law, nor could the proximate cause be said to be some act intervening between the collision and the injury.[142]

In an action for an injury to goods on a sidewalk by a runaway horse, it was held no defence to show an ordinance prohibiting the placing of wares on the pavement.[143]

The subject of the present section has been thus admirably summed up in an article in the Solicitors' Journal: "Of course there are cases where the question of negligence may arise, though the damage is the result of the volition of animals. If the known character of the animal is such that mischief that arises may be expected and foreseen, of course the duty of using a greater amount of precaution to prevent it may arise. A man driving a vicious bull along a street or letting a dog of known bad character be at large cannot rely on the fact that the damage was done by the animal *sua sponte*. So in the old case of Mitchil *v.* Alestree (1 Vent. 295) where the defendant took an unbroken horse into Lincoln's Inn Fields for the purpose of breaking the horse, and the horse was so unruly that he broke from the defendant and ran over the plaintiff, the defendant was held liable. The question will always arise in cases with regard to animals, whether there is any negligence in the use of the animal for the purposes for—and under the circumstances in—which it was used, having regard to the character of the animal. This must be

[141] Watson *v.* Camden & A. R. Co., 55 N. J. L. 125.
[142] Willis *v.* Providence Telegram Pub. Co. (R. I.), 38 Atl. Rep. 947.
[143] Gannon *v.* Wilson (Pa.), 2 Cent. Rep. 305.

a matter of degree. As to the use of an unbroken horse in a crowded public thoroughfare, there could be little doubt. If a horse, which, though broken, could be proved to be of a very restive character, were taken into a similar place, a more doubtful question might arise. But with regard to horses of ordinary temperament, constant experience shows that there is little danger from the use of them, and it is therefore a reasonable use of the highway to employ them for traffic. . . . We are not a little puzzled sometimes by the law of animals, and doubt whether it can be reduced to an altogether logical basis. A man, it would appear, is absolutely liable in trespass for the act of his beast, such as a bullock, in trespassing on a neighbor's land, apart from any question of negligence. In other words, he is bound to keep his animal in. Therefore I am liable for the spontaneous act of my animal if he trespass against my neighbor's land, but not if he trespass against my neighbor's person, unless I by negligence have conduced to the latter mischief. This may at first seem anomalous. . . . The answer, as it seems to us, is that there is a radical difference between the case of trespass to a person's land, or to himself upon his own land, and to himself when using the highway. . . . The highway is for the reasonable use of all persons according to the ordinary practice and usages of life and business, and a man using it takes a certain amount of risk of accident, whereas he is entitled to a more absolute security on his own land. We have been dealing rather with acts done by animals not induced by any apparent external cause, but the question may give rise to difficulty, how far and under what circumstances any liability rests upon the owner of an animal which does an act, being impelled thereto by unusual circumstances of which the owner is not the cause. Take, for instance, the case of a horse frightened by a fire and running away. Perhaps a fire is to be considered a reasonable cause for any animal's running away; but take some small cause such as would only make a very spirited or nervous horse run away, then a more

difficult and complex question arises, viz.: as to whether it was negligence to bring such an animal into the place where he was being used, in the sense that, if any mischief arises, the owner ought to pay for it.[144] These are questions of much nicety and largely questions of degree. We do not think that there has ever been much attempted by way of systematizing the law with regard to these subjects and others of a similar nature, and perhaps it is impossible to do so." [145]

87. Damage Done in Highways by Passing Animals.—The subject of liability for injuries committed by animals straying from the highway has been already considered.[146] Where the injury is committed in the highway, the question is largely one of negligence in the owner or person in charge of the animal. Thus in a Rhode Island case it is said: "We agree with the Pennsylvania and New York cases that a horse, even though he is not vicious, is a dangerous animal to be at large in the frequented streets of a city. We think, however, that the learned judge who tried this case with the jury went too far when he instructed the jury that the defendant, if his horse caused the injury, was absolutely liable for it, without regard to whether the horse's presence in the highway was attributable to his negligence or not." [147] So, one driving another's cattle carelessly in a highway is responsible for the damage they do, and the owner is not liable unless the driver was acting as his servant.[148] And where the driver is employed by one who exercises an independent employment, he is not a servant of the owner.[149]

Where a bull driven through a street became excited by a noise and broke loose in consequence of a latent defect in the nose-ring by which it was led, it was held that the leader was

[144] See Mella *v.* Baston, supra. [145] 25 Sol. Jour. 385.
[146] See § 75, supra. [147] Fallon *v.* O'Brien, 12 R. I. 518.
[148] Smith *v.* French, 83 Me. 108. And see Pfaffinger *v.* Gilman (Ky.), 38 S. W. Rep. 1088; Clowdis *v.* Fresno Flume & Irrign. Co., 118 Cal. 315.
[149] Milligan *v.* Wedge, 12 A. & E. 737.

not responsible for the resulting damage if he used the precautions which are usual and reasonably safe under the circumstances, even though there are other methods of removing bulls which are more secure and well known.[150] Where a cow, led by one man, was startled and became unmanageable in consequence of smelling the blood in a slaughter-house from which she was being taken, the owner was held liable for the damage done.[151]

It was held not negligence *per se* to permit a boy fifteen years old to drive a cow in the highway, whereby a collision was caused and the plaintiff injured.[152]

Where an animal is running at large in the highway contrary to an ordinance, the city is not responsible for any damage done;[153] unless it could have prevented the same by ordinary care and diligence or the owner has been in fault.[154] One racing horses on the street is liable for injury to others, whether or not racing often takes place with the consent of the city officials.[155]

Where a horse going at large on a sidewalk kicks a person, it is immaterial whether its act was vicious or merely playful: the owner is liable in either case.[156]

It is sufficient in such cases to show that the road is used by the public as a highway: it is not necessary to show that it was legally established.[157] A turnpike road is a highway within the statutory sense.[158]

[150] Harpers *v.* Great North of Scotland R. Co., 13 Rettie (Sc. Ct. Sess.) 1139.

[151] Phillips *v.* Nicoll, 11 Rettie (Sc. Ct. Sess.) 592.

[152] Smith *v.* Matteson, 41 Hun (N. Y.) 216.

[153] Levy *v.* N. Y. City, 1 Sandf. (N. Y.) 465.

[154] Cochrane *v.* Frostburg, 81 Md. 54.

[155] Hanrahan *v.* Cochran, 12 N. Y. App. Div. 91. And see Osborn *v.* Jenkinson, 100 Ia. 432.

[156] Dickson *v.* McCoy, 39 N. Y. 400.

[157] Meier *v.* Shrunk, 79 Ia. 17.

[158] Pickard *v.* Howe, 12 Metc. (Mass.) 198; Gilmore *v.* Holt, 4 Pick. (Mass.) 258.

88. Diseased Animals; Sale.—Where animals are sold which are to the knowledge of the seller afflicted with a contagious disease of which the purchaser is kept in ignorance, the latter may rescind the contract.[159] And an agent will render his principals civilly liable though they are ignorant of his fraud in selling the diseased animal.[160] If the disease is one not easily detected by those having no experience of it and the seller does not disclose it, he is guilty of fraudulent concealment of a latent defect for which he must answer: the rule of *caveat emptor* does not apply.[161]

Where a statute prohibited persons from sending animals affected with a contagious disease to market and inflicted penalties on one so doing, the action of knowingly sending them was held to be a public offense but not to amount by implication to a representation that they were sound so as to give a purchaser a right to a remedy by action.[162] In this case the seller made a statement in writing that he would not warrant the goods, that they were open to inspection and that the purchaser must take them with their faults; but in a later case it was said by Lord Blackburn that where the owner of an animal takes it to a public market for sale, this furnishes evidence of a representation on his part that it is not, so far as he knows, suffering from any infectious disease.[163] To bring a horse infected with glanders into a public place to the danger of infecting the people is an indictable misdemeanor at common law, although the defendant may not have been aware that the disease is so communicable.[164] But the fraudulent sale of a horse by one knowing it has a contagious disease like glanders to one ignorant thereof, will not render the seller

[159] Wintz *v.* Morrison, 17 Tex. 372; Budd *v.* McLaughlin, 10 Ma. 75. As to the sale of diseased animals for food, see § 29, supra.
[160] Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518.
[161] Grigsby *v.* Stapleton, 94 Mo. 423.
[162] Ward *v.* Hobbs, 4 App. Cas. 13.
[163] Bodger *v.* Nicholls, 28 L. T. N. S. 441.
[164] Reg. *v.* Henson, Dears. C. C. 24.

liable for the death of one contracting the disease while taking care of the horse for the purchaser unless the death is the natural and probable consequence of coming into contact with the horse.[165] Where an act provided that anyone selling an infected animal, respecting which there was a cause of suspicion, should incur a penalty, and the defendant sold a glandered horse without warranty, concerning which the trial judge found that he had no cause of suspicion, it was held in an action for damages that he was not liable, and that, even if there had been a breach of the statutory duty, the rule of *caveat emptor* would apply.[166] But in a civil action to recover damages for the violation of an act to prevent the spread of contagious diseases among swine, it is not necessary to allege or prove that the defendant has been convicted in a criminal prosecution for a violation of the act.[167]

Under the Iowa code the fact that the buyer of sheep infected with a contagious disease knew thereof will not prevent the sale from being invalid; but it is otherwise where the seller did not know.[168] To constitute the offense of killing and selling a diseased animal the meat must be sold for food, with knowledge of the seller that it is bad, and the indictment should state those facts.[169]

The damages must not be too remote, and in an action for

[165] State *v.* Fox, 79 Md. 514, where it was held that glanders is not a disease so frequently taken by men that the court should take judicial notice of its character.

That an action for damages for offering to trade a glandered horse cannot be maintained where the trade was made on Sunday, see Gunderson *v.* Richardson, 56 Ia. 56.

[166] Rothwell *v.* Milner, 8 Ma. 472.

Under an act against frauds in the supplying of milk to cheese manufacturers, the physical condition of the milk supplied is the test, irrespective of the intent: Reg. *v.* McIntosh, 33 Can. L. Jour. 246.

[167] Conard *v.* Crowdson, 75 Ill. App. 614, where it was also held that the common-law right of action had not been superseded by the statute, the remedy under which must be considered cumulative.

[168] Caldwell *v.* Bridal, 48 Ia. 15.

And, as to the Wisconsin statute, see Newell *v.* Clapp, 97 Wis. 104.

[169] Schmidt *v.* State, 78 Ind. 41.

the fraudulent sale of diseased sheep to the plaintiff as sound and healthy, the refusal of a person to purchase from him in performance of a contract by reason of the disease, and the refusal of his customers to deal with him in consequence of the report, cannot be considered in estimating the damages.[170]

Where the seller knowingly represents or warrants the animal to be free from contagious diseases, when it is not so, he is liable for the resulting injury to other animals,[171] even though he did not know that the purchaser had other animals or intended to bring them together.[172] In an English case, the defendant was held liable if, at the time he sold the diseased cow, he knew that the plaintiff was a farmer and would or might place it with others.[173]

Where sheep sold, under a warranty that they are sound and healthy, have an infectious disease, the resulting injury to lambs dropped soon after the purchase is a proper item of damages.[174] And where all the animals in a herd are sold with warranty, and some of them are affected with a contagious disease, the buyer is not confined in his recovery to the value of those originally diseased.[175] And where the stock are rendered absolutely worthless, the defect is covered by an implied warranty and the purchaser may recover the purchase price of all the stock lost and the expenses reasonably incurred in quarantining and doctoring the stock.[176]

Where the purchaser of a horse sent him back to the seller on the ground that he did not comply with the warranty,

[170] Crain *v.* Petrie, 6 Hill (N. Y.) 522.

[171] Mullett *v.* Mason, H. & R. 779; Stevens *v.* Bradley, 89 Ia. 174; Joy *v.* Bitzer, 77 id. 73; Faris *v.* Lewis, 2 B. Mon. (Ky.) 375; Greenby *v.* Brooks, 13 Ky. L. Repr. 298; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; Lewis *v.* Bracken (Ga.), 22 S. E. Rep. 943.

[172] Sherrod *v.* Langdon, 21 Ia. 518; Packard *v.* Slack, 32 Vt. 9.

[173] Smith *v.* Green, 1 C. P. D. 92. [174] Broquet *v.* Tripp, 36 Kan. 700.

[175] Bradley *v.* Rea, 14 Allen (Mass.) 20; Marsh *v.* Webber, 16 Minn. 418; Wintz *v.* Morrison, 17 Tex. 372.

[176] Snowden *v.* Waterman (Ga.), 31 S. E. Rep. 110.

which was not the fact, and the horse while in the purchaser's stables had contracted a contagious disease, of which he was not aware, and the seller's horse caught this disease and died, it was held that the seller could not recover for the loss of his horses, there being no fraud and no evidence of warranty, but each party was directed to bear his own costs, the case being a hard and exceptional one.[177] In order to prevent the spread of a contagious disease, it was held sufficient that the plaintiff should use "reasonable diligence and care to obtain and apply such remedies and relief as the experience and knowledge of sheep men in that community afforded him." [178]

89. Diseased Animals; Transportation and Liability in General. —The liability of a railroad company for the consequences of transporting animals affected with a contagious disease is the same as that of an individual.[179] Thus it is liable where it drives cattle on a public highway after receiving notice of their diseased condition.[180] But where the owner drives the cattle into another county such new transportation is an independent offense for which the railway company is not liable.[181] Where it is liable by statute for diseases communicated to cattle "in the neighborhood or along the line" of transportation, it was held not liable where the diseased cattle were sent by the consignee to the plaintiff's farm, two miles from the railroad, under a contract with the plaintiff for pasturage, and his cattle there caught the disease.[182] The statutory liability is not absolute: the injury is only a *prima facie*

[177] Wright *v.* Hetton Downs Co-op. Soc., 1 C. & E. 200.

[178] Sherrod *v.* Langdon, 21 Ia. 518.

[179] Chic. & Alton R. Co. *v.* Gasaway, 71 Ill. 570.

As to what in England is "causing, directing or permitting the movement" of diseased animals in contravention of local regulations, see Midland R. Co. *v.* Freeman, 12 Q. B. D. 629; Williams *v.* Gt. West. R. Co., 52 L. T. N. S. 250.

[180] Mo. Pac. R. Co. *v.* Finley, 38 Kan. 550.

[181] Surface *v.* Hannibal & St. J. R. Co., 60 Mo. 216; 63 id. 452.

[182] Coyle *v.* Chic. & A. R. Co., 27 Mo. App. 584.

cause of action, which may be rebutted by showing freedom from negligence.[183]

There have been a number of decisions as to the validity of statutes regulating the transportation of cattle affected with Texas fever. In a United States case a statute which prohibited the bringing of any Texas, Mexican or Indian cattle into a State between March 1 and December 1 in any year, and provided that, if they passed through the State on board of cars or steamboats, the carrier should be liable for all the contagion spread by them—was held void. The Supreme Court took the ground that while a State may prevent persons or animals suffering from a contagious or infectious disease from entering its borders, and, for that purpose, establish reasonable quarantine and inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its protection, or, under cover of exercising its police power, substantially prohibit or burden either interstate or foreign commerce.[184] This case has been followed in some of the State courts.[185] Its effect has been somewhat modified, however, by a later case, where it was held that a statute making persons having in their possession Texas cattle which have not been wintered north liable for any damage which may accrue from permitting them to run at large and thereby spread the Texas fever—was not unconstitutional. The Supreme Court said that the decision in Hannibal & St. J. R. Co. *v.* Husen rested upon the ground that no discrimination was made by the statute in the transportation forbidden between sound cattle and diseased cattle, that no attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts through the

[183] Farley *v.* Chic., M. & St. P. R. Co., 90 Ia. 146.

[184] Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465.

[185] Gilmore *v.* Hannibal & St. J. R. Co., 67 Mo. 323; Urton *v.* Sherlock, 75 id. 247; Salzenstein *v.* Mavis, 91 Ill. 391 [overruling Yeazel *v.* Alexander, 58 id. 254]; Chic. & A. R. Co. *v.* Erickson, 91 id. 613.

A law declaring it to be unlawful to bring sheep into the State without having them dipped discriminates between persons who may desire to

summer months were infected with the disease or that such cattle were so generally infected with it that it would have been impossible to separate the healthy from the diseased—upon proof of which a general question might have been presented for the consideration of the court. The court added that certainly all animals thus infected may be excluded from the State by its laws until they are cured of the disease or some safe means of transportation is devised.[186]

In a late Missouri case it was held that a statute forbidding the transportation through Missouri of Texas or other cattle affected with Texas fever, was void as an interference with interstate commerce, but that a State may prevent the importation of such diseased cattle into its territory or prescribe the kind of cars in which they may be transported through the State and such other precautionary measures as may be reasonably necessary. It was also held that to make a railroad company liable for cattle catching disease by treading over the ground after diseased cattle, it must be shown that they knew such an act would communicate disease and that the diseased animals escaped through their negligence. Courts will take judicial notice of the fact that Texas cattle have some contagious or infectious disease communicable to native cattle [overruling the earlier case of Bradford *v.* Floyd[187]]. "Scientific investigation has demonstrated, and it is now a matter of general information or knowledge that Texas cattle are not, in fact, diseased themselves so as to render them unhealthy for food, but that all Texas cattle are infected in their systems with a parasite or germ, which is harmless to them but which, when taken into the stomach by native cattle, produces what is known as Texas fever." [188]

bring sheep into the State and those who have sheep within the State, and is unconstitutional: State *v.* Duckworth (Ida.), 51 Pac. Rep. 456.

[186] Kimmish *v.* Ball, 129 U. S. 217. And see Mo., K. & T. R. Co. *v.* Haber, 169 id. 613.

[187] 80 Mo. 207. And see Patee *v.* Adams, 37 Kan. 133.

[188] Grimes *v.* Eddy, 126 Mo. 168. And see Selvege *v.* St. Louis & S. F. R. Co., 135 id. 163.

Concerning the advisability of framing such statutes it is said in a Kansas case, "We shall assume for the purposes of this case that the . . . 'Texas cattle law' is constitutional and valid. . . . There certainly is a great necessity for some such law. If that class of men who care nothing for the rights of others were allowed by law to bring cattle to Kansas from Texas and the Indian country whenever they might choose, and thereby spread disease and death among our native cattle, it would either make cattle-raising in Kansas so hazardous a business that but few men would wish to engage in it, or it would lead to such concerted force, and possibly mob violence, that those who care nothing for the rights of others would hardly dare to bring their Southern, death-disseminating cattle among the native cattle of this State. There are several differences between this act of the legislature of Kansas and a similar act of the legislature of Missouri, which the Supreme Court of the United States, in the case of R. R. Co. *v.* Husen, 95 U. S. 465, declared unconstitutional and void, and, with these differences, the Supreme Court of the United States would perhaps declare the act of the legislature of Kansas constitutional and valid." [189]

The management of cattle domiciled in a State is regulated by State laws, not by the act of Congress of May 29, 1884, unless the State has determined to co-operate with the Secretary of Agriculture in the execution of the act. The latter

That a statute assuming this latter fact does not require the jury to believe without evidence that the disease is thus communicated, see Davis *v.* Walker, 60 Ill. 452. As to what is an unloading of diseased matter that will make a railway company liable, see Pike *v.* Eddy, 53 Mo. App. 505; Bradford *v.* Mo., K. & T. R. Co., 64 id. 475, cited in § 113, infra.

See also Mo., K. & T. R. Co. *v.* Haber, infra.

[189] Stager *v.* Harrington, 27 Kan. 414, 419.

That an act of Congress establishing means for the suppression of disease does not interfere with the State statutes, see Mo., K. & T. R. Co. *v.* Haber, 56 Kan. 694, affirmed in 169 U. S. 613. And acts preventing the exportation of diseased cattle and permitting the owner of dead animals to dispose of them as he pleases, are not in substantial conflict: Cotting *v.* Kansas City Stock Yards Co., 79 Fed. Rep. 679.

has no power to make regulations as to the removal of cattle from the State in which contagion exists to other parts of the United States.[190]

A conditional ownership growing out of a lien will not make one liable for damages for infection by Texas cattle unless he has the actual possession and control of the cattle.[191] Where several owners of different droves of cattle drove them at different times over another's herding ground, by reason of which the latter's cattle caught the disease, it was held that there was no joint liability.[192] It is error to instruct the jury that if cattle took a disease from one of two herds and the testimony as to which herd is responsible is equally balanced, they should find for the defendant, in an action against the owner of one of the herds. If it is impossible to say that one herd was more concerned than another, it seems the verdict should be for the plaintiffs.[193]

The entry of diseased cattle into another's close by which his cattle are infected is a trespass.[194] And where the sheep of B. and C. were in the same pasture and A.'s sheep, getting through an ill-kept division fence, infected B.'s sheep which infected C.'s, it was held that C. could recover from A.,[195] and that the fact that one of the plaintiff's sheep had communicated the disease to the defendant's sheep would not exonerate the latter from liability.[196] But the owner of infected sheep pasturing them in his own lot adjoining the lot of

[190] Mullen *v.* Western Union Beef Co., 5 Colo. App. 497.

As to the sufficiency of an indictment for shipping a cow into a State without sending the Secretary of Agriculture a certificate that it was free from tuberculosis, see State *v.* Snell (R. I.), 42 Atl. Rep. 869. See, also, Howman *v.* Angus, 25 Rettie (Sc. Ct. Justic.) 8.

[191] Smith *v.* Race, 76 Ill. 490; Hatch *v.* Marsh, 71 id. 370. See, also, § 104, infra.

[192] Yeazel *v.* Alexander, 58 Ill. 254.

[193] Frazee *v.* Milk, 56 Ill. 435; Newkirk *v.* Same, 62 id. 172.

[194] Anderson *v.* Buckton, Strange 192.

[195] Herrick *v.* Gary, 65 Ill. 101.

[196] Same *v.* Same, 83 Ill. 85. And the plaintiff may recover though he failed to treat the disease properly: Ibid.

another, also occupied by sheep, is not liable if the latter sheep catch the disease.[197]

The owner of horses afflicted with a contagious disease has no right to permit them to go at large in the highway or to water them at a public tank used for watering sound horses, and he should use prudence in placing them so far from a partition between his and his neighbor's stable that contact with the latter's animals is impossible.[198]

Where the defendant, knowing a horse to be glandered, delivers him to the plaintiff to be kept in the latter's stable, without telling him of the disease, and the latter's horses catch it, the defendant is liable.[199] So, where the defendant represents the horse to have recovered from distemper, knowing that he still has it.[200] And where one was allowed to remain on land as a mere licensee and his sheep were infected, and, when he had gone, the owner moved on with his sheep, being ignorant of the danger and assured by the other that there was none, the licensee was held liable for the catching of the disease by the owner's sheep.[201]

With regard to *scienter*, the rule at common law is that if a man knows an animal in his possession to be diseased and allows it to stray and affect another's cattle, he will be liable to an action, although there is no special evidence of negligence in reference to its straying, but that it is otherwise if at the time the animal strayed he had no knowledge that it was diseased: in that case he will not be liable, in the absence of special evidence of negligence.[202] That knowledge of the disease on the part of the owner or his agent must be shown

[197] Fisher *v.* Clark, 41 Barb. (N. Y.) 329.

[198] Mills *v.* N. Y. & H. R. Co., 2 Rob. (N. Y.) 326, affirmed in 41 N. Y. 619.

[199] Penton *v.* Murduck, 22 L. T. N. S. 371.

[200] Fultz *v.* Wycoff, 25 Ind. 321, cited also, as to evidence of damages, in § 107, infra.

[201] Eaton *v.* Winnie, 20 Mich. 156.

As to the liability of an agistor for contagion, see § 104, infra.

[202] Garrett Nuisances, 170; Cooke *v.* Waring, 2 H. & C. 332.

is generally laid down in the cases.[203] Where, however, the action was brought for the trespass on the plaintiff's land, the defendant has been held chargeable with the consequent damages, such as communicating disease to the plaintiff's animals, without regard to his knowledge of the diseased condition of his own animals,[204] though this may be shown to enhance the damages, even if not alleged in the declaration.[205]

Under an act of Congress imposing penalties on the transportation of infected live-stock, it was held that actual knowledge of the infection on the part of the defendant need not be shown: it is sufficient that the stock come from a locality known to be infected.[206]

The contributory negligence of the plaintiff is, of course, a competent defence in actions of this kind.[207] Thus where the plaintiff negligently permits his cattle to come into contact with those of the defendant, knowing the latter to be diseased, he cannot recover;[208] nor where he keeps diseased cattle after he knows of the disease;[209] nor where his fence is not a sufficient legal fence and the diseased animals pass through it.[210] And where by the law of the State the owner of cattle is not compelled to restrain them, he is not liable where they

[203] Nicholls *v.* Hall, L. R. 8 C. P. 322; Earp *v.* Faulkner, 34 L. T. N. S. 284; Carroll *v.* Eivers, I. R. 7 C. L. 226; Hawks *v.* Locke, 139 Mass. 205; Bradford *v.* Floyd, 80 Mo. 207; Coyle *v.* Conway, 35 Mo. App. 490; Patee *v.* Adams, 37 Kan. 133; Hite *v.* Blandford, 45 Ill. 9; St. Louis, I. M. & S. R. Co. *v.* Goolsby, 58 Ark. 401; Clarendon Land Inv. & Ag. Co. *v.* McClelland, 89 Tex. 483.

[204] Lee *v.* Burk, 15 Ill. App. 651.

But see Clarendon Land Inv. & Ag. Co. *v.* McClelland, supra.

[205] Barnum *v.* Vandusen, 16 Conn. 200.

[206] Lynch *v.* Grayson, 5 N. M. 487, affirmed in Grayson *v.* Lynch, 163 U. S. 468. And see Croff *v.* Cresse, 7 Okla. 408.

[207] Patee *v.* Adams, 37 Kan. 133.

[208] Coyle *v.* Conway, 35 Mo. App. 490; St. Louis, I. M. & S. R. Co. *v.* Goolsby, 58 Ark. 401.

[209] Harris *v.* Hatfield, 71 Ill. 298. Except for the damage done before he knew of it: Ibid.

[210] Demetz *v.* Benton, 35 Mo. App. 559.

enter through a fence around the plaintiffs' range and communicate a disease to their cattle.[211]

Where animals grazed on a common range and the plaintiff was warned of the danger of disease, it was held equally incumbent on him to keep his stock away from the defendant's as it was upon the defendant to keep his upon his own premises and prevent their running at large and communicating the disease.[212]

With reference to expert testimony it is said in an Illinois case: "We are not prepared to hold that no one but a veterinary surgeon can properly testify in respect to the appearance and symptoms of diseased horses and give an opinion upon the question of the existence or non-existence of a particular disease or malady in such horses. It would seem that farmers and other persons who for many years have had the personal care and management of horses, both sick and well, and have had an extensive practical experience with such animals, and with some particular disease to which they are subject, and ample opportunity to observe and know the characteristics and symptoms of such disease, are qualified to state whether in a particular case such characteristics and symptoms do or do not exist. And it would also seem that they, after detailing facts which show that they have a practical and personal knowledge and experience in respect thereto, may properly venture an opinion in regard to the existence or non-existence of a disease with which observation has made them familiar." [213]

90. Nuisances; Diseased and Dead Animals.—The power of a municipality to order the destruction of dangerous animals as nuisances has been already considered.[214] This power ex-

[211] Clarendon Land Inv. & Ag. Co. *v.* McClelland, 86 Tex. 179. And see Grayson *v.* Lynch, 163 U. S. 468.

[212] Walker *v.* Herron, 22 Tex. 55.

[213] Pearson *v.* Zehr, 138 Ill. 48, 53. And see Grayson *v.* Lynch, supra.

[214] See § 46, supra.

tends equally to diseased animals.[215] It has been held, however, that the action of the municipality through its officers in ordering the destruction of an animal as suffering from a particular disease, as a horse from glanders, is not conclusive on the rights of the owner of the animal. He may introduce evidence to show that the animal was not in fact so diseased and that the act of the commissioners was therefore illegal.[216] In a commentary on Miller *v.* Horton it was said: "Reviewing the arguments and authorities upon both sides of this question, the conclusion of the majority of the court seems best warranted: first, because a construction of the statute giving express or implied power to the commissioners to kill healthy animals would render it unconstitutional; second, not having such power, the commissioners are liable for the result of their acts, which in one point of view may be said to be without their statutory jurisdiction and which in any point of view takes private property from the owner without due process of law." [217] But where sound cattle have been destroyed by order of the commission, no action lies against the State for this tortious act of its officers: the remedy is against them individually.[218]

The exclusion by the sanitary commission of cattle of another State, as affected with a contagious disease, will be presumed to be a proper exercise of their judgment.[219] And an order issued by a sanitary commission has been held to be a sufficient *prima facie* justification of a sheriff's refusal to re-

[215] Chambas *v.* Gilbert (Tex. Civ. App.), 42 S. W. Rep. 630.

[216] Miller *v.* Horton, 152 Mass. 540; Newark & S. O. H. C. R. Co. *v.* Hunt, 50 N. J. L. 308; Pearson *v.* Zehr, supra.

See, as to contagious and infectious diseases, Wirth *v.* State, 63 Wis. 51, where it was held that influenza was not such a disease as would warrant a conviction.

[217] 32 Cent. L. Jour. 249 n.

[218] Shipman *v.* State Live-Stock Sanitary Comn. (Mich.), 73 N. W. Rep. 817; Houston *v.* State, 98 Wis. 481.

[219] St. Louis S. W. R. Co. *v.* Smith (Tex. Civ. App.), 49 S. W. Rep. 627.

turn to the owner stock held in quarantine before the expenses of quarantine were paid.[220]

Where the animals were found to have been actually diseased when killed, it was held that, under the statute, the owner was properly limited to their actual value in their diseased condition.[221]

It has been held by the Supreme Court of the United States that the grant of an exclusive right to maintain slaughter-houses for cattle, guarded by a proper limitation of prices to be charged and imposing the duty of providing ample conveniences, with permission to all owners of stock to land and to all butchers to slaughter at those places—was a police regulation within the power of a State legislature.[222] So, an ordinance granting to a person an exclusive right to remove from the city limits all such dead animals, not slain for human food, as should not be removed by the owner in person or by his immediate employee within twelve hours after death, and requiring the owner, if not intending to remove it himself, to deposit immediately a notice of the death in a box provided for that purpose by the aforesaid person, was held a valid exercise of police power and not to be open to the objection of creating a monopoly or of depriving persons of their

[220] Hardwick *v.* Brookover, 48 Kan. 609.

As to the expense of cattle quarantined on the owner's premises, see Kenneson *v.* Framingham, 168 Mass. 236.

[221] Tappen *v.* State, 146 N. Y. 44. And see Campbell *v.* Manchester (N. H.), 36 Atl. Rep. 877.

Where the appraisement has been made at their value as diseased cattle, mandamus will not issue to compel the commission to change their appraisement: Shipman *v.* State Live-Stock Sanitary Comn., supra.

[222] Slaughter-House Cases, 16 Wall. (U. S.) 36.

But the legislature has no right to continue the exclusive right to a slaughter-house so that no future legislation, nor even the same body, can in future modify it: Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746.

As to the right of the commissioner of a department to restrict bidders for supplies to the use of animals killed and dressed within the State, see In re Rooney, 26 Misc. (N. Y.) 73.

property without due process of law.[223] And such a person may have an injunction restraining a pound-keeper from delivering such carcasses or causing them to be delivered to any other person.[224]

But an ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within the city limits, to the exclusion of the right of the owners to remove and use them before they become a nuisance.[225] It was said in a Louisiana case: "If the property is not a nuisance, the owner should not be prevented from obtaining its value and should not be denied the right to make any disposition of it (however innocent and useful). It is not possible under police regulation to take property from one man and give it to another. The city might, as a sanitary measure, after having given the owner the opportunity to dispose of his dead animals, authorize a contractor to cart them away and appropriate them to his own use. In warm climates the police of cities requires regulations that should be enforced with great vigilance to prevent nuisances injurious to health. The necessity of such ordinances would not justify the council in declaring that all dead animals found in the city not killed for human food are nuisances immediately after death." [226] And an ordinance allowing such fees to the public contractor as amount practically to a confiscation of the property, is unconstitutional.[227]

Evidence that the animals died of suffocation and that ani-

[223] National Fertilizer Co. *v.* Lambert, 48 Fed. Rep. 458. And see, to the same effect, State *v.* Fisher, 52 Mo. 174; Louisville *v.* Wible, 84 Ky. 290.

See, also, as to municipal power over dead animals as nuisances, 38 L. R. A. 330 n.

[224] Alpers *v.* San Francisco, 32 Fed. Rep. 503.

[225] River Rendering Co. *v.* Behr, 77 Mo. 91; Schoen *v.* Atlanta, 97 Ga. 697; Meyer *v.* Jones (Ky.), 49 S. W. Rep. 809.

See Alpers *v.* Brown, 60 Cal. 447.

[226] State *v.* Morris, 47 La. Ann. 1660.

[227] Knauer *v.* Louisville (Ky.), 45 S. W. Rep. 510.

mals so dying were sometimes taken to market and sold for food and that the removal was by direction of the city inspector was held not to be a sufficient justification in an action for converting the plaintiff's property. "A dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose." [228]

Where a city authorizes the removal from its limits of dead animals, leaving the place and manner of disposing of them to its marshal, it is liable for his negligence in removing them to a place where they become a private nuisance on account of the stench.[229] So, the fact that the business of rendering dead animals is one of great public convenience is no defence to an indictment for keeping a nuisance in permitting carcasses, offal and filth to be collected and deposited at the rendering tanks to the prejudice of others.[230]

A slaughter-house within city limits may be prohibited as a nuisance.[231] Otherwise, where it is at a reasonable distance from the population and its business is not conducted negligently or recklessly.[232] But the best conducted slaughter-house in the wrong place may be a nuisance.[233] And it is sufficient to constitute a slaughter-house a nuisance that its odors are offensive to the senses, it not being necessary that

[228] Underwood *v.* Green, 42 N. Y. 140.

[229] Hillsboro *v.* Ivey, 1 Tex. Civ. App. 653.

[230] Seacord *v.* Peo., 121 Ill. 623.

As to keeping carcasses on deposit in a borough without a license, see Simpson *v.* Proctor, 23 Rettie (Sc. Ct. Justic.) 22.

[231] Ex parte Heilbron, 65 Cal. 609; Chicago *v.* Rumpff, 45 Ill. 90; Beiling *v.* Evansville, 144 Ind. 644; Rund *v.* Fowler, 142 id. 214; Seifried *v.* Hays, 81 Ky. 377; Woodyear *v.* Schaefer, 57 Md. 1; Catlin *v.* Valentine, 9 Paige (N. Y.) 575; Portland *v.* Meyer, 32 Oreg. 368. And see the cases cited in 38 L. R. A. 646 n.

The penalty of a slaughter of cattle may be imposed on a company that allows persons to slaughter in a building: Liverpool New Cattle Market Co. *v.* Hudson, L. R. 2 Q. B. 131.

[232] Beckham *v.* Brown (Ky.), 40 S. W. Rep. 684.

[233] Moses *v.* State, 58 Fed. Rep. 185.

the public health should be endangered thereby.[234] Where a statute prohibited using any place as a slaughter-house without a license, it was held that "slaughter-house" included not merely the premises where the actual slaughtering of cattle takes place, but also the premises used for processes connected with or incident to slaughtering and that the latter are used as slaughter-houses, though no actual slaughtering takes place.[235] The authority conferred by a State constitution on municipal corporations and parishes to regulate within their limits the slaughtering of animals for human food does not strip the State of the police power to provide for the appointment of an inspector of all such animals slaughtered throughout the State, such inspector to be under the supervision of the board of health.[236]

The bleating of calves kept over night at a slaughter-house to the annoyance of the neighbors is a nuisance.[237] But in another case it was held that the squealing of hogs was not such a nuisance as would justify the destruction of the slaughter-house business for the sole purpose of ridding the neighborhood of such noise.[238]

The manufacture of fish into oil and scrap or fertilizer in a populous neighborhood has been held to be a nuisance *per se*.[239]

One may recover for loss of health and comfort to himself and family from another burying a dead animal on the adjacent premises so insufficiently as to cause a nuisance. And

[234] State *v.* Woodbury, 67 Vt. 602.

[235] Hides *v.* Littlejohn, 74 L. T. N. S. 24.

[236] State *v.* Slaughter-house & Refg. Co., 46 La. Ann. 1031.

As to an indictment for not making a butcher's report of animals slaughtered, see Braun *v.* State (Tex. Cr.), 49 S. W. Rep. 620.

[237] Bishop *v.* Banks, 33 Conn. 118.

[238] Ballentine *v.* Webb, 84 Mich. 38—the court saying, "It is only when it reaches the point of discomfort where it is injurious to health that the injury can be said to be irreparable so as to call forth the extraordinary power of a court of chancery to destroy it."

[239] State *v.* Luce, 9 Houst. (Del.) 396.

the fact that the plaintiff might have abated the nuisance and did not do so, will not prevent his recovering and will not necessarily mitigate the damages.[240] If A. wrongfully neglects to bury the carcass of his ox found on B.'s land, the latter may bury it without saving the hide. If he saves and sells it, the proceeds are to be disposed of on equitable principles, but not in an action of tort brought by A.[241]

It is indictable to throw into a well the carcass of an animal, tainting and corrupting the water used by a family.[242] So, the maintenance of stables and hog-pens directly upon the banks of a non-navigable stream, polluting the waters which are used by many persons, is a nuisance.[243] And the "penning" or "corralling" of sheep over a stream to be a statutory misdemeanor, need not necessarily be done by an artificial structure, but may be done by means of men and dogs, either alone or with natural or artificial barriers.[244]

A piggery in which swine are kept in such numbers that their natural odors fill the air and make the occupation of the neighboring houses and the passage over the adjacent highways disagreeable, is a nuisance.[245] But it was held error for the court to charge that if the smell of the defendant's pig-

[240] Jarvis *v.* St. Louis, I. M. & S. R. Co., 26 Mo. App. 253. And see Louisville & N. R. Co. *v.* Bolton (Ky.), 38 S. W. Rep. 498.

[241] Morse *v.* Boston & L. R. Co., 66 N. H. 148.

[242] State *v.* Buckman, 8 N. H. 203. And see Peo. *v.* Truckee Lumber Co., 116 Cal. 397.

One whose spring is tainted by the burial of a carcass near it may recover the damages sustained, not merely the cost of removing the nuisance: Louisville & N. R. Co. *v.* Simpson (Ky.), 33 S. W. Rep. 395.

[243] Peo., Ricks Water Co. *v.* Elk River M. & L. Co., 107 Cal. 214.

[244] Peo. *v.* Borda, 105 Cal. 636.

[245] Com. *v.* Perry, 139 Mass. 198. And see Ohio & M. R. Co. *v.* Simon, 40 Ind. 278; Whipple *v.* McIntyre, 69 Mo. App. 397; St. Louis *v.* Stern, 3 id. 48; Babcock *v.* N. J. Stock Yard Co., 20 N. J. Eq. 296; Board of Health of Raritan Tp. *v.* Henzler (N. J. Ch.), 41 Atl. Rep. 228; Com. *v.* Van Sickle, Bright. (Pa.) 69; Banbury Urban Sanitary Auth. *v.* Page, 8 Q. B. D. 97.

And it is no defence that the pens are as clean as they could be under the circumstances: Burlington *v.* Stockwell, 5 Kan. App. 569. As to an in-

pen were not sufficient alone to constitute a nuisance, yet if it contributed with other pens in the neighborhood to forming a nuisance, he would be guilty. "The defendant can only be held liable for the consequences which his act produced. The mischief complained of must be the natural and direct cause of his own act." [246]

Under statutes giving the power to define nuisances and to regulate and control the keeping of animals in a town it was held that the court could not declare that an ordinance making it unlawful to keep any hog within the corporate limits of the town was void for unreasonableness.[247] So it was held that open cattle yards and pens were nuisances which might be abated under an ordinance prohibiting the keeping of cattle within the corporate limits.[248] On the other hand, an ordinance making it a nuisance to erect hog-pens within city limits or to permit hogs to run at large in any lot or enclosed place in the city, except at certain designated places and directing that all such lots and pens be abated was held invalid, as being too broad and sweeping.[249] So, a by-law that no pig or piggery should be kept within a city was held to be *ultra vires* as being a general prohibition against the keeping of pigs and not restricted to cases that might prove to be nuisances.[250]

Where it is made a penal offense to "keep" swine within fifty yards of a dwelling-house, it was held that one who sold them elsewhere in the morning, brought them within the fifty yards and sent them off in the evening, was guilty, it not being necessary to the offense to keep them all night.[251] But a

dictment for keeping cattle-pens, see Com. *v.* T. J. Megibben Co. (Ky.), 40 S. W. Rep. 694. See also 38 L. R. A. 332 n.

[246] Gay *v.* State, 90 Tenn. 645.

[247] Darlington *v.* Ward, 48 S. C. 570. This was on the ground that the court could pass only on the constitutionality of the ordinance. The decision was by a divided court.

[248] Opelousas Bd. of Aldermen *v.* Norman (La.), 25 South. Rep. 401.

[249] Ex parte O'Leary, 65 Miss. 80. [250] McKnight *v.* Toronto, 3 Ont. 284.

[251] Steers *v.* Manton, 57 J. P. 584.

by-law prohibiting the keeping of swine within fifty feet of any dwelling-house has been held unreasonable and therefore void.[252] An ordinance prohibiting the keeping of cows within two hundred feet of any dwelling without a "special permit" from the board of health, was held invalid as an attempt by the board to license such keeping not sanctioned by the statute.[253]

A stable for horses is a nuisance if used in such a way that the noises and odors arising therefrom are an annoyance to the neighborhood.[254] And this is so, though it may be constructed with all modern improvements;[255] and though it may formerly have caused no annoyance.[256] But the lessor of a stable, so constructed as with proper care not to cause discomfort to persons of ordinary sensibility, is not liable for the improper use of the stable by the tenant or his employees.[257] And an ordinance prohibiting the location of a livery-stable in or opposite to any block in which is a school building, without reference to the manner of construction or use or any

[252] Heap *v.* Burnley Union, 12 Q. B. D. 617.

A by-law prohibiting the keeping of a cow at a less distance than forty feet from a dwelling-house was held reasonable in McKnight *v.* Toronto, supra.

[253] Flushing *v.* Carraher, 87 Hun (N. Y.) 63.

As to the power to make regulations concerning the ventilation of cow-sheds, see Baker *v.* Williams, [1898] 1 Q. B. 23.

[254] Rapier *v.* London Tramways Co., [1893] 2 Ch. 588; Broder *v.* Saillard, 2 Ch. D. 692; Kaspar *v.* Dawson (Conn.), 42 Atl. Rep. 78; Filson *v.* Crawford, 5 N. Y. Suppt. 882; Robinson *v.* Smith, 7 id. 38; Dargan *v.* Waddill, 9 Ired. L. (N. C.) 244; Gifford *v.* Hulett, 62 Vt. 342. And see 38 L. R. A. 653 n. As to the measure of damages, see Gempp *v.* Bassham, 60 Ill. 84.

The prohibition of a stable for more than four horses unless licensed by the board of health is not unconstitutional: Newton *v.* Joyce, 166 Mass. 83. See also Phillips *v.* Denver, 19 Colo. 179, cited in § 107, infra.

[255] Drysdale *v.* Dugas, 26 Can. Sup. Ct. 20. But see Forget *v.* Laverdure, Rap. Jud. Quebec, 9 C. S. 98.

[256] Ball *v.* Ray, 8 Ch. App. 467.

[257] Metropolitan Sav. Bk. *v.* Manion, 87 Md. 68.

Notice to the defendant not to put in windows in the side of his stable opposite the plaintiff's dwelling will not affect the former's liability: Ibid.

further specification of distance, has been held unreasonable and void.[258]

Teamsters will be enjoined from spending their idle time with their horses in front of private houses, so that noxious odors are caused.[259] But the fact that excrement is deposited in a street by horses tied to hitching-posts erected by a city is no ground for an injunction against the maintenance of the posts.[260] Where, however, hitching-posts are an obstruction and detrimental to the public health and convenience, it may become the duty of the municipal authorities to remove them.[261]

The business of keeping a stallion for service in the principal parts of a village is, by reason of the indecent noises and other offensive accompaniments, in its nature a nuisance which may be enjoined.[262]

Whether bees are or are not a nuisance is to be judicially determined in each case, and an ordinance which makes the owning, keeping or raising them within city limits a nuisance *per se* is too broad and is, therefore, invalid.[263] Where the evidence showed that the defendants were keeping a large number of hives of bees in a lot immediately adjoining the plaintiff's dwelling-house and that at certain seasons they were a source of great annoyance to him and his family, and also that they could be removed without material difficulty to a place where they would not disturb the neighbors, it was held that the case was a proper one for a permanent injunction.[264]

[258] Phillips *v.* Denver, 19 Colo. 179.

[259] Lippincott *v.* Lasher, 44 N. J. Eq. 120.

[260] Miller *v.* Webster City, 94 Ia. 162.

[261] Gray *v.* Henry County (Ky.), 42 S. W. Rep. 333.

[262] Hoops *v.* Ipava, 55 Ill. App. 94. And see Crane *v.* State, 3 Ind. 193; Nolin *v.* Franklin, 4 Yerg. (Tenn.) 163.

But the keeping of a stallion in a town or elsewhere is not *per se* a nuisance: Ex parte Robinson, 30 Tex. App. 493.

[263] Arkadelphia *v.* Clark, 52 Ark. 23.

[264] Olmsted *v.* Rich, 6 N. Y. Suppt. 826.

The subject of killing troublesome dogs has been already considered.[265] With regard to noisy dogs, it was said in a leading case, already frequently cited: "Whether dogs kept on the premises of their owner may by their noise become nuisances to adjoining proprietors and subject their owner to action for a nuisance seems to be an open question. An elementary writer says they cannot (1 Hilliard on Torts, 2d ed. 644), on the authority of Street *v.* Tugwell [2 Selw. N. P. 1070] where an action was brought for keeping a kennel of pointers so near to the plaintiff's dwelling-house as to disturb his family during the daytime and prevent them from sleeping in the night, and there was a verdict for the defendant. But that case has been doubted. It has been remarked that Lord Kenyon in refusing a new trial intimated that if the nuisance was continued a new action could be brought, which was an intimation that an action could be *maintained;* and Judge Nelson in Brill *v.* Flagler . . . [23 Wend. (N. Y.), 354] plainly intimates that the decision is not a correct exposition of the law. And if the noise of a boiler manufactory . . . or a steam engine . . . may be a nuisance, *a fortiori* should a kennel of pointers who disturb the sleep of a family be, for undisturbed sleep is not merely a comfort, it is absolutely necessary to health." [266] So, the keeping of roosters and hens may become a nuisance.[267] But where an ordinance declared it a nuisance for one to "keep" within the city, for the purpose of feeding for the market, more than fifty chickens, it was held that a dealer who on Saturday took in a large number of chickens and retained them in a railroad building occupied by him, near which ran a sidetrack, and shipped them on Monday, having fed them in the meantime,—did not violate the ordinance, its purpose being "to prevent the gathering and continued feeding of fowls in prep-

[265] See §§ 43, 46, supra. [266] Woolf *v.* Chalker, 31 Conn. 121.

[267] Ireland *v.* Smith, 3 Sc. L. T. Rep. 180. And see the unreported case of Desmond *v.* Smith (Me. Co. Ct.), referred to in 9 Green Bag 550. See, also, 41 Sol. Jour. 167.

aration for the market or for slaughtering as may become offensive to the senses." [268]

A company authorized to use their railway for cattle traffic and to buy lands for such purposes are not liable for the noise of cattle and drovers which otherwise would constitute a nuisance to the occupiers of land near their station.[269] And the fact that a stockyards company by transporting stock through a city creates a nuisance does not justify the city in removing the tracks and destroying the value of the entire road, where the charter authorizes the company to transport property of every kind.[270] Where the erection and use of stock-pens cause annoyance of a permanent character to the adjoining residents, the measure of damages is the difference in the value of property with and without such annoyance.[271]

91. Racing and Betting.—The subject of betting on races is one that has been much exploited in judicial decisions and about which there have been great differences of opinion. It seems to be generally admitted that at the common law a wager on a horse-race was not illegal;[272] and this doctrine has been followed in some modern cases.[273] But this is contrary to the general tendency of the later cases which are disposed to hold such a wager to be illegal and immoral.[274] In

[268] Long *v.* Portland (Ind.), 51 N. E. Rep. 917.

[269] London, Brighton & S. C. R. Co. *v.* Truman, 11 App. Cas. 45.

[270] Chicago *v.* Union Stockyards & T. Co., 164 Ill. 224. And see, as to municipal power over stockyards as nuisances, 38 L. R. A. 655 n.

[271] Denison & P. S. R. Co. *v.* O'Maley (Tex. Civ. App.), 45 S. W. Rep. 227.

[272] See McAllester *v.* Haden, 2 Camp. 438; Gibbons *v.* Gouverneur, 1 Denio (N. Y.) 170; Harris *v.* White, 81 N. Y. 532.

As to what constitutes a "race meeting" within the meaning of a statute limiting its length, etc., see State *v.* Forsythe (Ind.), 44 N. E. Rep. 593.

[273] See Barret *v.* Hampton, 2 Brev. (S. C.) 226; Grayson *v.* Whatley, 15 La. Ann. 525; Walker *v.* Armstrong, 54 Tex. 609; Com. *v.* Shelton, 8 Gratt (Va.) 592; Challand *v.* Bray, 1 Dowl. P. R. N. S. 783.

[274] See Gridley *v.* Dorn, 57 Cal. 78; Odell *v.* Atlanta, 97 Ga. 670; Morgan *v.* Beaumont, 121 Mass. 7; Wilkinson *v.* Tousley, 16 Minn. 299; Corson *v.* Neatheny, 9 Colo. 212; Cheesum *v.* State, 8 Blackf. (Ind.) 332; McLain

a Nebraska case it is said: "The rule at the common law was that all wagering contracts that were contrary to good morals or public policy were illegal and void. The courts of England at an early day held that betting on a horse-race was not opposed to good morals. The courts of that country reluctantly followed this early precedent until the common law interpretation of wagering contracts was changed by the statutes of 8 and 9 Victoria which made all contracts of wager void. Is betting on the result of a race contrary to good morals? We are not bound by the decision of the courts of England in determining that question. Whether a thing in the eyes of the law is moral or immoral may depend largely upon when and where it occurred. An act may be upheld as moral in one country and be regarded as immoral in another. A wager contract might have been sustained a hundred years ago as being in conformity with good morals and be condemned to-day as immoral. In this country betting on a race is now generally regarded as against sound morals. As a general rule the courts of this country, in the more recent decisions, have refused to enforce all wagering contracts, even though they are not declared illegal by statute. Such contracts are certainly against good morals, a detriment to society, and under the principles of the common law are illegal and void."[275]

A horse-race is a "game" in the sense of a statute against gaming.[276] So it is gaming to bet on a cock-fight,[277] or a

v. Huffman, 30 Ark. 428; Bledsoe *v.* Thompson, 6 Rich. L. (S. C.) 44; Bollinger *v.* Com. (Ky.), 35 S. W. Rep. 553.

[275] Deaver *v.* Bennett, 29 Neb. 812.

[276] Goodburn *v.* Marley, Strange 1159; Blaxton *v.* Pye, 2 Wils. 309; Clayton *v.* Jennings, 2 W. Bl. 706; Stone *v.* Clay, 18 U. S. App. 622; Swigart *v.* Peo., 154 Ill. 284; Ellis *v.* Beale, 18 Me. 337.

Telegraphic instruments, blackboards, etc., for receiving or recording news of horse races are "apparatus for the purpose of registering bets": Com. *v.* Healey, 157 Mass. 455; Com. *v.* Clancy, 154 id. 128.

[277] Bagley *v.* State, 1 Humph. (Tenn.) 486; Johnson *v.* State, 4 Sneed (Tenn.) 614; Com. *v.* Tilton, 8 Metc. (Mass.) 232; Storey *v.* Brennan, 15 N. Y. 524; Squires *v.* Whisken, 3 Camp. 140; Rex *v.* Howel, 3 Keb. 465.

dog-fight.[278] On the other hand horse-racing has been held not to be a "gambling device," [279] nor a "game of hazard or skill," [280] nor a "game of chance." [281] Nor is a dog-race a "game of chance." [282] And game-cocks are not "implements of gaming" in the sense of a statute authorizing the destruction of such implements.[283]

Where the betting has been held illegal, the selling of pools on the race is, of course, forbidden.[284] In all such cases the authority of the stakeholder may be revoked and the money recovered from him by either party.[285] "The stakeholder is not to be held *in pari delicto* with the persons who are the parties to the wagering contract. He does not share in their guilt. That portion of the transaction with which he is connected is innocent; or, at most, it is not in violation of any statute and, if in contravention of public policy or morality at all, it is so slightly so that, in a suit like this, the rule that the law will leave all who share in the guilt of an illegal or immoral transaction where it finds them, has no application." [286] But the stakeholder cannot, even with the con-

[278] Egerton *v.* Furzeman, 1 C. & P. 613. See Grace *v.* McElroy, 1 Allen (Mass.) 563.

[279] State *v.* Lemon, 46 Mo. 375.

[280] State *v.* Rorie, 23 Ark. 726. But it was held to be a "hazard" in the statutory sense, in Cheek *v.* Com., 100 Ky. 1.

[281] Harless *v.* Adams, 1 Morr. (Ia.) 169.

[282] Hirst *v.* Molesbury, L. R. 6 Q. B. 130.

[283] Coolidge *v.* Choate, 11 Metc. (Mass.) 79.

[284] Parker *v.* Mosher, 60 N. H. 73; Peo. *v.* Weithoff, 51 Mich. 203, 93 id. 631; McBride *v.* State, 39 Fla. 442.

Pool-selling was held not to be a "lottery," in the sense of the Constitution, in Reilly *v.* Gray, 77 Hun (N. Y.) 402. *Contra:* Irving *v.* Britton, 8 Misc. (N. Y.) 201.

Bookmaking on a horse race was held to be a game of chance or gambling device or contrivance, and a bookmaker's booth a place for gaming, in Miller *v.* U. S., 6 App. D. C. 6.

[285] Cleveland *v.* Wolff, 7 Kan. 184; Corson *v.* Neatheny, 9 Colo. 212; Deaver *v.* Bennett, 29 Neb. 812; Wilkinson *v.* Tousley, 16 Minn. 299; Bledsoe *v.* Thompson, 6 Rich. L. (S. C.) 44; Peo. *v.* Fallon, 152 N. Y. 1.

[286] Cleveland *v.* Wolff, supra. A clerk attending his employer and recording his bets is not guilty of book-making: Peo. *v.* Fallon, supra.

sent of both parties given after the event, be shielded from liability by paying the stakes to the winner.[287] Where two persons contribute money to be used by one of them for the purpose of betting on a horse-race, the other cannot recover any of the money so advanced. The holder of the money is not a stakeholder but a partner.[288] In England, the business of a bookmaker on the turf not being illegal if carried on according to the provisions of the Betting Act, 1853, a partner, with *bona fide* intentions and ignorant of any breach of the law, is entitled to an account and to payment of his share of the profits.[289]

Racing for a purse or prize has been generally held not to be illegal as it lacks the element of chance of gain or risk of loss which characterizes the wager agreement.[290] But such racing was held illegal where the statute prohibited the racing of horses "for any bet . or for any reward to be given to the owner." [291] And there are cases where the distinction between a race for a reward and one for a wager does not seem to be observed.[292] Where the plaintiff and defendant agreed to ride a race each on his own horse, both the horses ridden to become the property of the winner, it was held that the horse could not be regarded as a "contribution toward a prize," within the meaning of a statutory proviso, and that the

[287] Kensler *v.* Jennings (N. J.), 41 Atl. Rep. 918; Ruckman *v.* Pitcher, 1 N. Y. 392, 20 id. 9; Storey *v.* Brennan, 15 id. 524.

[288] Shaffner *v.* Pinchback, 133 Ill. 410.

[289] Thwaites *v.* Coulthwaite, [1896] 1 Ch. 496.

[290] Misner *v.* Knapp, 13 Oreg. 135; Delier *v.* Plymouth Co. Agricul. Soc., 57 Ia. 481; Porter *v.* Day, 71 Wis. 296; Harris *v.* White, 81 N. Y. 532; Alvord *v.* Smith, 63 Ind. 58; Ballard *v.* Brown, 67 Vt. 586; Re Dwyer, 14 Misc. (N. Y.) 204; Peo. *v.* Fallon, 152 N. Y. 12; Peo. *v.* Van De Carr, 150 id. 439.

And an agreement between the owners to pool and divide the premiums is valid: Hankins *v.* Ottinger, 115 Cal. 454.

[291] Bronson Agricul. & Breeders' Assn. *v.* Ramsdell, 24 Mich. 441. See Harris *v.* White, supra.

[292] See Comly *v.* Hillegass, 94 Pa. St. 132; Dudley *v.* Flushing Jockey Club, 14 Misc. (N. Y.) 58.

contract was therefore void as being "by way of gaming or wagering." [293]

Where the plaintiff put in the hands of the defendant, who was secretary of a driving association, $60 as an entrance fee to entitle him to trot his horse over a race-course to compete for two purses of $300 each and the plaintiff trotted one race and was defeated and the other race was withdrawn on account of bad weather, and the association tendered the plaintiff $30 which he refused to accept, it was held in an action to recover $60 that there was no such contract of wager between the plaintiff and defendant as would defeat the action.[294]

It was held in Delaware that a wager on a horse-race out of the jurisdiction of the State is not illegal. "Any bet . . . on a horse-race instituted and run in this State would be illegal and void; but this court cannot regard a horse-race as illegal which is run in the State of Maryland, where racing is not prohibited; neither can we regard a bet made on such a race as unlawful, here or there. Neither the race nor the bet is immoral in itself; nor is it prohibited by our act of assembly which does not reach the case. If, therefore, this race in reference to which the bet was made was run in Maryland, and the appointed judges of the race have decided against the plaintiff, he cannot recover back from the stakeholder the money placed in his hands. Whether their decision was right or wrong is not open for discussion as they are the chosen judges of this question." [295]

There is a similar decision in New York.[296]

In Virginia it was held that where one keeps a house wherein he posts the names of horses running on a race-track

[293] Coombes *v.* Dibble, L. R. 1 Ex. 248.

[294] Jordan *v.* Kent, 44 How. Pr. (N. Y.) 206. And see Hankins *v.* Ottinger, 115 Cal. 454.

As to what is a "stake race," see Stone *v.* Clay, 18 U. S. App. 622.

[295] Ross *v.* Green, 4 Harr. (Del.) 308.

[296] Harris *v.* White, 81 N. Y. 532.

in another State and telegraphs orders to customers to bet money thereon, which bets are accepted at the track, he does not violate the statute as the betting is not done in that house but where the offer to bet is accepted.[297] But, under the act of 1896, the State has exercised its authority to forbid its citizens to bet on horse-racing in another State, and this right has been held not to be affected by the fact that the money is to be placed in a third State.[298]

In Tennessee it is gaming to bet within the State on a horse-race to be run in another State, where it is lawful to bet on such race. The offense is consummated if the bet is commenced, *a fortiori* if it is completed, within the State.[299] But betting on horses is not gaming within that State if the races are run and the betting made within enclosures;[300] though the selling of "auction-pools" or "book-making" on races to be run on unlicensed tracks in the State or upon any track outside of the State has been held to be gaming.[301]

In North Carolina a note given in consideration of a bet won on a horse-race cannot be enforced, though it was given in a State in which such contracts are valid.[302]

In Maryland it is unlawful to make or sell pools or bet on horse-races except in the grounds of an agricultural association upon a race held within the same on the same day.[303]

[297] Lescallett *v.* Com., 89 Va. 878.

In Canada a telegraph office, through the aid of which bets are made and moneys paid over to the winners, is a betting house: Reg. *v.* Giles, 26 Ont. 586; Reg. *v.* Osborne, 27 id. 185.

[298] Lacey *v.* Palmer, 93 Va. 159.

As to a complaint for sending money out of a State to be bet in horse races, see State *v.* Falk, 66 Conn. 250.

[299] Williams *v.* State, 92 Tenn. 275; Edward *v.* State, 8 Lea (Tenn.) 411.

[300] Williams *v.* State, supra.

The statute is not invalid as vicious class legislation, though partial: Debardelaben *v.* State (Tenn.), 42 S. W. Rep. 684.

[301] Palmer *v.* State, 88 Tenn. 553; Brown *v.* State, Ibid. 566.

[302] Gooch *v.* Faucett, 122 N. C. 270.

[303] Stearns *v.* State, 81 Md. 341.

The place cannot be changed nor the period of exemption extended: State *v.* Dycer, 85 id. 246.

A note given in the State in consideration of money loaned for making books on races run in another State where the laws authorize book-making is given for money loaned for gambling purposes and is void.[304] In New Jersey, also, under an act making unlawful all wagers on any race, it is immaterial that the race is to be run in another State.[305]

In California, it was held that an ordinance prohibiting the selling of pools on horse-races, except within the enclosure of the track, is a valid police regulation and not void because its incidental effect may be to confer special privileges or benefits upon those owning or controlling race-courses by giving them the exclusive right of carrying on the business or of selling to others the privilege of pool-selling.[306] While in Missouri, a statute prohibiting book-making except under similar circumstances was held to violate the constitutional prohibition against passing any local or special law granting to any corporation or individual any special or exclusive right, privilege or immunity.[307]

A contract to pay a certain sum of money as a forfeit for declining to run a horse-race was held valid in Texas.[308]

In Ontario, the race-courses of incorporated associations are reserved by the Criminal Code as places where bets may be made during the actual progress of a race meeting without the bettors being subject to a penalty. An agreement for the sale of betting and gaming privileges at a race meeting by an unincorporated association, who are the lessees of an incorporated association, the owners of the race-course, is not illegal.[309]

In England, to make out the statutory offense of keeping

[304] Spies *v.* Rosenstock, 87 Md. 14.

[305] Kensler *v.* Jennings (N. J.), 41 Atl. Rep. 918.

As to an indictment for transmitting bets on races by telephone, see State *v.* Spear (N. J.), 42 id. 840.

[306] Ex parte Tuttle, 91 Cal. 589.

[307] State *v.* Walsh, 136 Mo. 400; State *v.* Bliler, 138 id. 139.

[308] Wheeler *v.* Friend, 22 Tex. 683.

[309] Stratford Turf Assn. *v.* Fitch, 28 Ont. 579.

a "place for betting with persons resorting thereto," persons must "resort" physically to the place. Sending letters and telegrams is not enough.[310] In a New Jersey case it was held that a common-law form of indictment for keeping a disorderly house and permitting persons to be and remain in the house betting on horse-races, did not charge a violation of the statute making it an offense to keep a house to which persons may resort for betting upon horse-races, as the statute contemplated the keeping of a place with the intent that persons may resort thither for betting upon horse-races.[311]

A steeple-chase for fifty pounds or upwards is a lawful race under the English statutes and evidence was held admissible that "across a country," in sporting phraseology, means over all obstructions and prohibits the rider from availing himself of an open gate.[312]

A coupon competition in a newspaper in which the coupons are to filled up with the names of horses likely to win, —the prize to be given to the lucky guesser,—is not a lottery or betting.[313] A list of horses expected to win in a race is not a literary composition which may be copyrighted.[314] A newspaper which excludes racing and betting intelligence is not a "sporting paper," within the meaning of an agreement framed to protect the copyright of papers specially connected with horse-racing.[315]

[310] Reg. *v.* Brown, [1895] 1 Q. B. 119.

For the meaning of "place" used for betting, see Eastwood *v.* Miller, L. R. 9 Q. B. 440; Bradford *v.* Dawson, [1897] 1 Q. B. 307; Hawke *v.* Dunn, Ibid. 579; McInaney *v.* Hildredth, Ibid. 600; Liddell *v.* Lofthouse, [1896] 1 Q. B. 295; Reg. *v.* Leigh, 102 L. T. 136; Doggett *v.* Catterns, 19 C. B. N. S. 765; Powell *v.* Kempton Park Racecourse Co., [1897] 2 Q. B. 243, [1899] A. C. 143; Reg. *v.* Humphrey, [1898] 1 Q. B. 875; Reg. *v.* Hobbs, [1898] 2 Q. B. 647; Kitson *v.* Ashe, [1899] 1 Q. B. 425; Brown *v.* Patch, Ibid. 892. See, also, 41 Sol. Jour. 616.

[311] State *v.* Ackerman (N. J.), 41 Atl. Rep. 697.

[312] Evans *v.* Pratt, 4 Scott N. R. 378.

[313] Stoddart *v.* Sagar, [1895] 2 Q. B. 474.

[314] Chilton *v.* Progress P. & P. Co., [1895] 2 Ch. 29.

[315] McFarlane *v.* Hulton, [1899] 1 Ch. 884.

Where a contract as to a horse-race is silent as to the consequences of a failure to start when the word is given, parol evidence of custom is admissible by way of explanation. The presumption is, where the contract is silent, that the parties had in view the rules of the turf, and evidence of these rules does not vary the contract but explains its meaning.[316] Where the judges are unable to agree as to the fairness of the start or as to which horse won, the race should be considered a draw, entitling those betting thereon to withdraw their bets.[317]

One of two persons engaged in trotting their horses against each other may maintain an action against the other for wilfully running him down, although they were trotting for money, contrary to law.[318] And promissory notes given for an interest in race-horses are not invalidated in the hands of an innocent holder because the parties contemplated entering into a partnership for racing horses for money, contrary to statute.[319] But where three persons agreed to buy a horse, race it against the horse of another and divide the proceeds, deceiving the owner of the other horse as to the qualities of their horse it was held that no action for an accounting lay, the agreement being dishonest and the arrangement about the division of proceeds not being a subsequent collateral agreement founded on a new consideration.[320] And where a check was given by the defendant in payment of bets upon horse-races lost by him, and endorsed by the payee to the plaintiff for value, with notice of the consideration for which it was given, it was held that the plaintiff could not maintain an action upon the check as it must be deemed to have been given for an illegal consideration.[321]

[316] Walker *v.* Armstrong, 54 Tex. 609.

[317] Shain *v.* Searcy, 20 Tex. 122; Jackson *v.* Nelson (Tex. Civ. App.), 39 S. W. Rep. 315.

[318] Welch *v.* Wesson, 6 Gray (Mass.) 505.

[319] Biegler *v.* Merch. Loan & Trust Co., 164 Ill. 197.

[320] Morrison *v.* Bennett, 20 Mont. 560.

[321] Woolf *v.* Hamilton, [1898] 2 Q. B. 337.

In an action to recover an unpaid trotting premium claimed to have been won by the plaintiff's horse in a horse-race conducted by the defendant, it was held that the judges constituted the tribunal to which the parties submitted when they entered their horses for the race and by their decision, if honestly given, the parties were bound, but that the plaintiff was not debarred from recovering when the judges, through the fraud of one of their number, were led to award the premium to another horse.[322] A reasonable discretion must be allowed the judges to determine when races shall terminate for a given day, and it will be presumed that they acted fairly and within the exercise of a sound discretion when they declared a race postponed till the following day.[323]

A racing association may exclude from its races any person who has been ruled off the turf by the Jockey Club.[324] Such an association, where it is not given the power of eminent domain nor aid from the State, is a private and not a quasi-public corporation and may refuse to allow certain persons to enter horses for its races.[325]

Engaging in a horse-race, where horse-racing is unlawful and where injury or death results to the insured during the race or while endeavoring to stop one of the horses during the progress of the race, is an act falling within the terms of a policy whereby the insurance is forfeited when death is caused by "duelling, fighting or other breach of the law on the part of the insured." [326]

[322] Wellington *v.* Monroe Trotting Park Co., 90 Me. 495.
And see Corrigan *v.* Coney Island Jockey Club, 61 N. Y. Super. Ct. 393.
[323] Molk *v.* Daviess County Agricul., etc., Assn., 12 Ind. App. 542.
[324] Grannan *v.* Westchester Racing Assn., 153 N. Y. 449.
The officers may expel persons distributing score cards of the races without right: Bower *v.* Robinson, 53 Ill. App. 370.
[325] Corrigan *v.* Coney Island Jockey Club, 22 N. Y. Suppt. 394. Allowing the corporation to register bets and sell pools is not a grant of State aid rendering it quasi-public, but is merely the removal of the statutory prohibition against a common-law right: Ibid.
[326] Insurance Co. *v.* Seaver, 19 Wall. (U. S.) 531.

An advertisement by an agricultural association that the races at its annual fair would be conducted "under the rules of the American Trotting Association" was held not to be notice to one entering his horses that the society was a member of that association and that all questions arising upon the races were to be referred to it for decision, so as to render such a decision binding upon him.[327]

Horse-races exhibited within enclosures and to which the public is admitted upon payment of an entrance fee, are "shows and amusements" which a city may license, tax, regulate or suppress.[328]

Horse-racing grounds to which the public are invited must be kept in a reasonably safe condition for the spectators. But the negligence of the person conducting the race cannot be presumed from the mere fact that a spectator was injured by a runaway horse within the place reserved for spectators.[329] The proprietor of a race-track is responsible for permitting the track to be obstructed so that the plaintiff's horse collides with another and is injured.[330]

[327] Moshier *v.* LaCrosse County Agricul. Soc., 90 Wis. 37.

[328] Webber *v.* Chicago, 148 Ill. 313. And they come under the head of circuses, menageries, etc., "and all other exhibitions" in an ordinance: Ibid.

[329] Hart *v.* Washington Park Club, 157 Ill. 9.

[330] North Manchester Tri-County Agricul. Assn. *v.* Wilcox, 4 Ind. App. 141. And see Fairmount Un. Jt. Stock Agricul. Assn. *v.* Downey, 146 Ind. 503.

TITLE IV.

LIABILITIES OF OWNERS OF ANIMALS.

CHAPTER III.

VICIOUS AND FEROCIOUS ANIMALS.

92. Wild and dangerous animals.
93. Negligence and contributory negligence.
94. *Scienter.*
95. Evidence.
96. Liability of owner or keeper; joint and several liability.
97. Action; pleading; damages.

92. Wild and Dangerous Animals.—Where an animal is of a species known to be wild and ferocious, the mere keeping of it subjects the owner or keeper to liability for any injury done by it, irrespective of any negligence in the keeping or any knowledge of the particular animal's disposition. Thus, where a bear was kept tied in a city and A.'s hired boy, not in his presence, teased him, and the bear, breaking loose, attacked and killed A., a club that kept the bear were held liable, including one who was absent and knew nothing of the bear, —the court saying, "Animals of this kind, such as lions, tigers, bears, are universally recognized as dangerous. It is the duty of those who own or keep them to keep them in such a manner as to prevent them from doing harm, under any circumstances, whether provoked, as they are liable to be, or not provoked. There must be security against them, under all contingencies." [1] This was also held to be true of a wolf,

[1] Vredenburg *v.* Behan, 33 La. Ann. 627. See also, as to bears, Besozzi *v.* Harris, 1 F. & F. 92; Wyatt *v.* Rosherville Gardens Co., 2 Times L. Rep. 282. And see Spring Co. *v.* Edgar, 99 U. S. 645.

fed from the defendant's butcher shop,[2] and of a boar,—the court thinking it "a matter of common experience that a boar, though it be in a sense a domestic animal, is certainly not *mansuetæ naturæ*, and that on the slightest provocation it is apt to do such mischief as has happened in this case." [3]

In an English case it was held that an elephant came in the same category and that the fact that the persons exhibiting it did not know it to be dangerous would not prevent recovery by one injured. "Unless an animal is brought within one of these descriptions, that is, unless it is shown to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation—it falls within the class of animals as to which the rule is that a man who keeps one must take the responsibility of keeping it safe. . . . It falls within the class of animals that a man keeps at his peril and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself." [4] In a review of this case, it was said: "The Court of Appeal . . . has been a little hard upon the elephant in classing him with the lion, the bear and the wolf, animals enumerated by Lord Hale as beasts *feræ naturæ* which a man keeps at his peril. . . . The elephant might be supposed to have a record which would entitle him to more favorable consideration. In his wild state he is doubtless not altogether desirable as a companion, but he has been sufficiently tamed to render many services to man and stands in a very different position to animals which are quite irreclaimable. But for the tame elephant of India the Court of Appeal cares nothing.—In England, however docile he may be, he is but a specimen of a savage race and cannot escape the stigma of his past state of wildness. The cow, the horse and the dog have been with us for generations and have so won a character for respectability. In the

[2] Manger *v.* Shipman, 30 Neb. 352.
[3] Hennigan *v.* McVey, 9 Rettie (Sc. Ct. Sess.) 411.
[4] Filburn *v.* Peo. Palace & Aquar. Co., 25 Q. B. D. 258.

long course of the ages the Master of Rolls appears to think the elephant may attain the same high level, but till he has done so it matters not what progress he makes abroad. The result is doubtless right enough, though the reasoning is not altogether clear. However domesticated the whole race of elephants might become in India, it seems that this would make no difference in their legal credit here until members of the race had actually been born and for many generations domesticated in England. Conversely the English cow, and probably even the English sheep, ought upon their introduction into a new country to be treated as retaining the savage character of their distant ancestry. These animals might join the elephant in saying that such a doctrine was hardly in accordance with the comity of nations."[5]

As was said in the case last cited the defendant is liable "unless the person to whom the injury is done brings it on himself." So in Besozzi *v.* Harris, supra, it was said, "If the plaintiff, with knowledge that the bear was there, put herself in a position to receive the injury, she could not recover." This question of contributory negligence will be discussed in the next section.

The rule above stated has been held to apply to other cases than those of animals *feræ naturæ*. Thus where a bull breaks into the field of its owner's neighbor and gores his horse till it dies, this creates a liability in trespass *quare clausum fregit* to pay for the horse. "Injuries committed by bulls on horses occur so frequently that it is difficult to avoid coming to the conclusion that every owner of a bull ought to be held answerable in an action of trespass for his bull in killing or injuring when running at large, either by his negligence or permission, the horse of another, though it be the first offense of the kind that the animal has ever been known to commit." [6]

[5] 34 Sol. Jour. 596.

[6] Dolph *v.* Ferris, 7 W. & S. (Pa.) 367. And see Mason *v.* Morgan, 24 U. C. Q. B. 328; Burke *v.* Daley, 32 Ill. App. 326.

Cf. Clark *v.* Armstrong, 24 D. (Sc. Ct. Sess.) 1315, cited in § 93, infra.

In the case of Ellis *v.* Loftus Iron Co. already cited,[7] it was held that where the defendants' horse injured the plaintiff's mare by biting and kicking through a fence, this was a trespass for which the defendants were liable apart from any question of negligence. The following remarks have been made on this case: "The more doubtful question appears to be whether, in the absence of negligence or default, the owner is liable in trespass for the acts of his animal. We have some difficulty about the principle of this liability. It can hardly be put on the ground of agency without an approach to the ludicrous and yet, strictly, if trespass lies, it would seem logically that it must be a case of *qui facit per alium facit per se*. The animal has a will of its own. . . . If my dog, roving about on a third person's ground, bite another, I am only liable if there be evidence of the *scienter;* but suppose my dog strays off my ground on to my neighbor's and bites my neighbor there, how then? Wherein does this case differ from the case of a horse kicking through a fence? . . . Where is the connection between the trespass to the land and the damage to the mare? The former was *per se* a triviality; the latter was the serious question. . . . There is—or, at any rate, in many cases, there may be—no essential, but only an accidental connection between the trespass to the land and the damage to the chattel or the person on the land. If a man enters my land, tears my coat and breaks my head, it is not a proper statement of it that he entered my land, whereby he tore my coat and broke my head: there are two distinct trespasses, one to the land, the other to the goods or person. If this be so, the ordinary rules applicable to the acts of animals, apart from ownership of the soil, ought to have been applied to the damage to the mare. If so, negligence or default would seem to have been essential to the right to recover. . . . We would . . . suggest that to the spontaneous acts of animals the legal elements of trespass *quare clausum*

[7] L. R. 10 C. P. 10. See § 74, supra.

fregit are wholly wanting, and that all actions for such acts are actions on the case, *i. e.*, where there is negligence or non-performance of an absolute duty imposed by the law. The law imposes a duty on the owner to restrain the known natural propensities of his animal where the exercise of such propensities would injure others: thus, where a dog is used to bite, the owner must prevent him. Animals are generally inclined to stray; therefore the owner must keep them from going on the land of others. We incline to think that this, or some such view, is the correct one." [8]

In an old case, in trespass *quare clausum fregit* where the declaration averred that, through the defendant's negligence in keeping, his horse broke into the plaintiff's close and bit his mares *per quod* they died, and verdict was for the plaintiff, the court arrested the verdict because *scienter* was not alleged.[9] But in a note the accuracy of the report of this case was questioned so far as it represented the action to have been trespass *quare clausum fregit:* "Supposing the action to have been trespass *on the case,* and the loss of the plaintiff's mares to have been the substantial injury complained of, it may then indeed have been held necessary to allege a knowledge of the horse's propensity to bite." [10]

It may here be said, incidentally, that where the plaintiff in the defendant's employment drove against his will a vicious horse by which he was injured, it was held that the horse was "plant" used in the defendant's business, and that his vice was a "defect" in the condition of such plant, within the meaning of a statute.[11] On the other hand, where by a clause in a railway contract for excavation "all machinery and other plant," etc., provided by the contractor were to be the

[8] 19 Sol. Jour. 211.

[9] Scetchet *v.* Eltham, Freeman C. P. 534.

[10] Ibid. note (a), citing Mason *v.* Keeling, 1 Ld. Raym. 606; Buxendin *v.* Sharp, 2 Salk. 662. And see 1 Law Jour. 492.

[11] Yarmouth *v.* France, 19 Q. B. D. 647; S. P. Fraser *v.* Hood, 15 Rettie (Sc. Ct. Sess.) 178.

property of the company until the completion of the work, when such as had not been used should be delivered to the contractor, but in other clauses the words "team and horses" were used as well as the word "plant," it was held that horses were not included in "plant" and that expert evidence was not admissible to explain the meaning of the word.[12] And cab-horses were held not to be "plant" within the meaning of the Bills of Sale Amendment Act 1882, providing that the act should not a render a bill of sale void as to "any fixtures separately assigned or charged and any plant or trade machinery." "It is plain that the word 'plant' was intended to refer to things more or less similar in kind to trade fixtures or trade machinery." In the Court of Appeal it was held that cab-horses could not be said to be "used in, attached to or brought upon" the premises, even if "plant" might sometimes include living animals. Chitty, L. J., said: "A horse that turns a mill for grinding chalk, or the like might, I think, be plant within the sub-section. But that case would be quite different from the present, for there, the horse would be used in the factory or other place where the mill was." [13]

To return to the subject of the present section, Justice Cooley in his work on Torts thus speaks of the liability of the owners of animals *feræ naturæ:* "Lord Hale says in respect to injuries by beasts that 'these things seem to be agreeable to law: 1. If the owner have notice of the quality of his beast and it doth anybody hurt, he is chargeable with an action for it. 2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ* as a lion, a bear, a wolf, yea, an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in Andrew Baker's case, whose child was bit by a

[12] Middleton *v.* Flanagan, 25 Ont. 417.

[13] London and East. Counties L. & D. Co. *v.* Creasey, [1897] 1 Q. B. 442; affirmed in Ibid. 768.

monkey that broke his chain and got loose. 3. And therefore, in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable in damages.'[14] If this doctrine is good law at this day, it must be because the keeping of wild beasts accustomed to bite and worry mankind is unlawful, for if the keeping of such beasts is not a wrong in itself, then no wrong can come from it until some wrongful circumstance intervenes: in other words until there is negligence. . . . The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems, therefore, safe to say that the liability of the owner or keeper for any injury done by them to the person or property of others must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge, but if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries for which a civil action will not lie."[15] And, in a note, he adds: "As to the law respecting the keeping of wild animals, we should say that the higher cultivation of the intellect of the mass of the people, as compared with two or three centuries ago, and the recognition of wants in human nature then ignored, must have worked some changes, and that we must take up the common law of that period in this as in many other particulars more to locate accurately our point of departure than to fix definitely a stake to which we must tie and adhere. When wild animals are

[14] 1 Hale P. C. 430.
[15] Cooley Torts 348; approved of in 18 Am. L. Reg. 623.

kept for some purpose recognized as not censurable, all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him."

93. Negligence and Contributory Negligence.—Although, where the animal is known by the owner or keeper to be dangerous, it is not necessary to aver or prove negligence in its keeping,[16] such negligence is, notwithstanding, frequently a ground of liability, whether the owner has or has not a knowledge of any propensity to do the kind of injury complained of. For instance, where the defendant's two greyhounds, coupled together, rushed against the plaintiff on a highway, knocked him down and broke his leg, it was held that the defendant was guilty of negligence though there was no evidence of *scienter*. "The negligence alleged is not in allowing dogs to be on the highway without restraint but in the fact that these greyhounds coupled together were there without being led or guided." [17] And where the defendant, seeing a cat running past in a public street, called to a dog beside him to "seize it" and the dog, accordingly, gave chase and, while doing so, knocked down and injured a child, it was held that the defendant in setting a dog to chase a cat through the street acted negligently and without due care for the passers-by and was liable in damages.[18] So, one who takes a dog into a tram-car accepts an additional liability for any damage it may occasion while in the car and it is not necessary to prove a propensity on its part to do injury. Damages were, accordingly, awarded to a passenger whose dress was destroyed by a dog while it sat unsecured under the seat of the car.[19]

If an injury is caused by the ordinary propensity of an ani-

[16] See § 94, infra.
[17] Jones *v.* Owen, 24 L. T. N. S. 587.
[18] Brogan *v.* Worton, 78 Sc. L. Rev. (Sher. Ct. Rep.) 162.
[19] Thomson *v.* Cartmell, 10 Sc. L. Rev. (Sher. Ct. Rep.) 179.

mal and a servant is negligent in view of such propensity, the owner is liable, though no specific exhibition of viciousness has been brought to his knowledge.[20] Thus, where a gamekeeper sent his dog after some boys who had trespassed on the ground which he was appointed to watch and the dog bit one of the boys, it was held that the keeper's employer was liable in damages.[21] But where a watchman in the defendants' employment set their dogs on the plaintiff, the defendants were held not liable for the injuries as they had no knowledge of the dog's viciousness and, if they had, the watchman was acting out of the sphere of his employment.[22] Where a passenger in an omnibus was injured by a blow from the hoof of one of the horses which had kicked through the front panel, and there was no evidence that the horse was a kicker but it was shown that the panel bore the marks of other kicks and that no precaution had been taken by the use of a kicking-strap, etc., and no explanation was offered on the part of the defendants, it was held that there was evidence of negligence proper to be submitted to a jury.[23]

The owner is bound to guard against the general propensities of the class to which the animal belongs as well as against the special tendencies of the specific animal known to him.[24] But in an action in Scotland by a dairymaid against her master for injuries received while removing cows from a field where there was also a bull belonging to the defendant, which attacked and trampled upon her, it was held that, as it was not proved that the animal was vicious, the master was not liable. The court said: "It is no doubt true that all bulls are of a

[20] Linnehan *v.* Sampson, 126 Mass. 506. See, also, with regard to liability for the acts of a servant, the cases cited in § 96, infra.

[21] Macdonald *v.* Lye, 4 Sc. L. Rev. (Sher. Ct. Rep.) 376.

[22] Gracie *v.* Hedderwick, 5 Sc. L. Mag. 75.

[23] Simson *v.* London Gen. Omnib. Co., L. R. 8 C. P. 390. And as to liability resulting from kicking, see Gilbertson *v.* Richardson, 5 C. B. 502; and Hardiman *v.* Wholley (Mass.), 52 N. E. Rep. 518, cited in § 76, supra.

[24] Hammond *v.* Melton, 42 Ill. App. 186, where the animal was a stallion. And see Meredith *v.* Reed, 26 Ind. 334.

dangerous or at least uncertain temper and liable to be suddenly and unexpectedly excited; but is there any rule of law that all bulls must be confined and shut up? Can we affirm in this country, where the breeding of cattle is of so much importance, that the owners of bulls are under an obligation to treat them as wild beasts and in such a way as greatly to interfere with the breeding of cattle? There is no authority for that. I hold that the owner of a bull is only bound to use a reasonable discretion, and is not bound to confine it unless when it has shown some more than ordinary vicious propensity; but there is nothing whatever of that kind in the evidence. . . . The law of Scotland will not, any more than that of England, make a master responsible for injury done by a domestic animal unless it be an animal of unusually vicious habits and propensities and known to the owner to be so." [25]

In another Scotch case, the Lord Chancellor said: "There cannot be blame or negligence in the owner merely from his allowing liberty to an animal which has not by nature the propensity to cause mischief. Blame can only attach to the owner when after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of the anomalous habits." [26] Of which *dictum* the Journal of Jurisprudence says: "The observation of the Lord Chancellor was all the more remarkable that it was contrary to the law of England, and it was not intended as a statement of the law of Scotland." [27]

The place where the animal is kept is often of importance in deciding the question of negligence. Where the owner of an unfenced pasture across which a road ran, not laid out as a highway but used as such, fastened a bull known to be vicious so that it gored a person passing along the road, the owner was held liable though he had warned the person not to

[25] Clark *v.* Armstrong, 24 D. (Sc. Ct. Sess.) 1315. See Dolph *v.* Ferris, 7 W. & S. (Pa.) 367, cited in § 92, supra.

[26] Fleeming *v.* Orr, 2 McQu. (Sc.) 14. [27] 25 Jour. Jurisp. 451.

pass. "It is negligence and want of ordinary care for a person to keep a vicious bull or other dangerous animal insecurely fastened, upon his own premises at a place where other persons are known to go, whether they have a right to go there or not." [28] So, one keeping a vicious dog must see that it is secured so that a person going lawfully on his premises or along the highway may not be injured.[29] Otherwise, in England, he is indictable for a misdemeanor.[30] And where a dog known to have attacked persons while guarding its master's team was left unsecured and unmuzzled on the sidewalk near the sleigh and a young child meddled with the whip and was attacked, it was held that the master was liable and that the child's act was not a defence.[31] So, where a dog was tied in an alley easy of access by a chain six feet long, and a policeman while pursuing a suspicious character was bitten, the owner of the dog was held liable, the keeping being negligent under the circumstances.[32] And it was held negligence to chain a dog that was large and powerful and suspected of a disposition to attack strangers, under a table in a cabin where the libellant had been assigned to sleep and where he had a right to go.[33]

But it is not a nuisance to keep a vicious dog to guard one's premises where it is cautiously used and sufficiently confined, and this was held to be the case where the dog was so chained

[28] Glidden *v.* Moore, 14 Neb. 84. And see Mahoney *v.* Dwyer, 84 Hun (N. Y.) 348; Graham *v.* Payne, 122 Ind. 403.

[29] Sylvester *v.* Maag, 155 Pa. St. 225; Roehers *v.* Remhoff, 55 N. J. L. 475; Conway *v.* Grant, 88 Ga. 40; Wheeler *v.* Brant, 23 Barb. (N. Y.) 324; McGuire *v.* Ringrose, 41 La. Ann. 1029; Shultz *v.* Griffith, 103 Ia. 150; Miller *v.* Bourbonnière, Rap. Jud. Quebec, 9 C. S. 413; Smillie *v.* Boyd, 14 Rettie (Sc. Ct. Sess.) 150.

As to dog owners' rights and liabilities, with especial reference to Scotch law, see 3 Sc. L. T. 61, 65, 81, etc.

[30] Woolf *v.* Chalker, 31 Conn. 121, citing Burns' Justice, 578.

[31] Meibus *v.* Dodge, 38 Wis. 300. See also as to a child's discretion, Marsland *v.* Murray, 148 Mass. 91.

[32] Melsheimer *v.* Sullivan, 1 Colo App. 22.

[33] The Lord Derby, 17 Fed. Rep. 265.

that it could move along the portion of the premises to be protected, but was secured from reaching anyone coming to the house by any of the approaches provided for that purpose.[34] Where bees had been kept in a certain place for eight years and had done no injury, this rebutted the idea of the defendant's knowledge that it would be dangerous to keep them there.[35]

In the Roman law also it was forbidden to have certain animals where there is a thoroughfare, under penalty of double damages.[36]

With regard to liability to trespassers, it has been held in England that one bitten by a dog, in consequence of being himself without right on the owner's land, cannot recover for the injury.[37] The law is thus stated in the Irish Law Times: "While, if a dog is known to be vicious, its owner is under an obligation to keep it in proper restraint yet knowledge that it is a vicious dog does not impose an obligation on the owner's friends and acquaintances to stay away from his premises, and they are merely bound to exercise a reasonable amount of precaution. The owner is excepted from liability where the person injured was a trespasser, or where the dog was kept in the owner's own premises during the night to protect them. . . . But on the other hand, it is no ground of defence that the dog was kept in premises during the day if it was kept in such a position that it could attack a person who calls at the premises on lawful business, whether of the owner or of the visitor." [38]

[34] Woodbridge *v.* Marks, 17 N. Y. App. Div. 139.

[35] Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630, the court saying, "The law looks with more favor upon the keeping of animals that are useful to man than such as are purely noxious and useless. And the keeping of the one, although in more rare instances they may do injury, will be tolerated and encouraged, while there is nothing to excuse the keeping of the other."

[36] See Salkowski's Rom. Priv. Law § 137.

[37] Sarch *v.* Blackburn, 4 C. & P. 297. Though, if no suspicion is thrown upon the plaintiff, he will be presumed to be rightly there: Ibid.

[38] 21 Ir. L. T. 53, citing Brock *v.* Copeland, 1 Esp. 203; Sarch *v.* Black-

The law is otherwise in the United States. One attacked by a ferocious dog in the daytime, though he is technically a trespasser on the premises, may recover in trespass against the dog's owner. "When the owner of such a dog has permitted him to run at large on his own premises and a trespasser has been bitten by him the owner has been holden liable. . . . A man may not in this country use dangerous or unnecessary instruments for the protection of his property against trespassers. Such instruments may be used in England, but the principles on which their decisions purport to rest are not sustainable or applicable here. . . . A dog is an instrument for protection. A ferocious dog is a dangerous instrument and the keeping him on the premises to protect them against trespassers is unlawful, upon the same principle that setting spring guns or concealed spears or placing poisonous foods is unlawful." [39] But the decisions in which dogs have attacked human beings though trespassers are not applicable where one dog attacks another. The plaintiff must show that the defendant's dog was the aggressor or he cannot recover. "It is one thing for a dog to be dangerous to human life and quite another to be unwilling to have strange dogs upon the master's premises. . . . It [*i. e.*, the judgment] can only be supported upon the broad ground that when two dogs fight and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog; and I know of no such rule." [40]

burn, supra; Curtis *v.* Mills, 5 C. & P. 489; Charlwood *v.* Greig, 3 C. & K. 46.

And see Dandurand *v.* Pinsonnault, 7 Low. Can. Jur. 131.

[39] Woolf *v.* Chalker, 31 Conn. 121. And see Sherfey *v.* Bartley, 4 Sneed (Tenn.) 58; Loomis *v.* Terry, 17 Wend. (N. Y.) 496; Pierret *v.* Moller, 3 E. D. Sm. (N. Y.) 574; Kelly *v.* Tilton, 2 Abb. App. Dec. (N. Y.) 495; Kinmouth *v.* McDougall, 19 N. Y. Suppt. 771; Marble *v.* Ross, 124 Mass. 44.

That no notice of the vicious character of the dog need be given as against trespassers, see Woodbridge *v.* Marks, 17 N. Y. App. Div. 139.

[40] Wiley *v.* Slater, 22 Barb. (N. Y.) 506.

Damages lie for negligently keeping a savage and dangerous cock, whereby the plaintiff is pecked and injured.[41]

The owner of bees is responsible for damage caused by them, as stinging a horse to death, where proper care is not taken to prevent it.[42]

The owner of an animal is sometimes protected from liability where he has given notice of the character of the animal beforehand to the person injured, as by a printed notice on the outside of the premises.[43] But it is otherwise where the plaintiff is not in fault, as where he cannot read.[44] Where the vicious habit of the animal is directly dangerous, such as kicking and biting in a horse, hooking in a horned animal or biting in a dog, the owner, if he knows it, is bound to notify those dealing with the animal, but not where the habit is not one that would directly inflict an injury, as pulling. This was held in a case where the plaintiff, while hitching a mare in a stable, put the halter rope through a ring, when the mare pulled back and the plaintiff's finger was caught between the rope and the ring and torn.[45] And one hiring a horse to another is bound to inform the latter of its vicious propensities; or he will be liable for resulting damages.[46] A servant engaged in his master's business and bitten without provocation by a dog allowed to go at large has a right to damages though he had been warned of the character of the dog.[47]

The question of the plaintiff's negligence is often an important one in these cases. If this contributes materially to

[41] Walford *v.* Mathews, cited in 13 Ir. L. T. 288.

[42] Tellier *v.* Pelland, 5 Rev. Leg. (Can.) 61.

[43] See the opinion of Bayley, J., in Ilott *v.* Wilkes, 3 B. & Ald. 304.

[44] Sarch *v.* Blackburn, 4 C. & P. 297. See, however, Prud'homme *v.* Vincent, Rap. Jud. Quebec, 11 C. S. 27, where the owner was held not liable, though the plaintiff could not read the notice.

[45] Keshan *v.* Gates, 2 Thomp. & C. (N. Y.) 288.

[46] Campbell *v.* Page, 67 Barb. (N. Y.) 113. So, of permitting a vicious horse to run in a race: Lane *v.* Minn. State Agric. Soc., 62 Minn. 175, 67 id. 65. As to driving a vicious stallion, see Clore *v.* McIntire, 120 Ind. 262.

[47] Auprix *v.* Lafleur, 25 Low. Can. Jur. 251.

the injury, he cannot recover.[48] Thus, one who needlessly aggravates a dog cannot recover damages if he is bitten.[49] But an action may be brought for injuries by a dog to a boy thirteen years old, where the boy struck the dog and incited him to bite and was old enough to know that such would be the probable result of his action, if the boy was exercising such care as could reasonably be expected from one of his age and capacity.[50] So, a boy seven years old may recover even if the biting was produced by his kicking the dog, and it is not competent to show that at other times he had teased and worried the animal.[51]

In an action for an injury by a vicious bull, the plaintiff may recover though he drove the cow that attracted the bull and first struck him on the head to drive him away.[52] And the fact that the plaintiff put his hand on one of two dogs in order to prevent a fight and was bitten, does not necessarily show contributory negligence. "In cases of this kind a great deal depends on the size, the apparent disposition, the conduct and the situation of the two dogs, and upon other circumstances which are usually proper for the consideration of a jury." [53] So, where the defendant, while interfering to part two fighting dogs, in raising his stick accidentally struck the plaintiff, it was held that if he used due care he was not liable and that the burden was on the plaintiff to show the want of due care.[54]

Where the plaintiff's horses were attacked by a dog and

[48] Earhart *v.* Youngblood, 27 Pa. St. 331; Mareau *v.* Vanatta, 88 Ill. 132.

[49] Quimby *v.* Woodbury, 63 N. H. 370; Keightlinger *v.* Egan, 65 Ill. 235; Worthen *v.* Love, 60 Vt. 285; Bush *v.* Wathen (Ky.), 47 S. W. Rep. 599.

Otherwise, where the interference is accidental, as by inadvertently stepping on the dog: Fake *v.* Addicks, 45 Minn. 37.

[50] Plumley *v.* Birge, 124 Mass. 57. And see Munn *v.* Reed, 4 Allen (Mass.) 431. But see Pilon *v.* Shedden Co., Rap. Jud. Quebec, 9 C. S. 83.

[51] Linck *v* Scheffel, 32 Ill. App. 17.

[52] Blackman *v.* Simmons, 3 C. & P. 138.

[53] Matteson *v.* Strong, 159 Mass. 497.

[54] Brown *v.* Kendall, 6 Cush. (Mass.) 292.

kicked and became frightened, the fact that he rose to his feet by the reins, afterwards falling out, was held not to show contributory negligence.[55] Nor the fact that a horse injured by the bite of a dog was harnessed to a wagon and being led tied behind another wagon.[56] But where the plaintiff was driving along the highway with the halter twisted around his thumbs and his horse started by reason of the barking of the defendant's dog and his thumbs were injured, it was held that the immediate cause of the injury being his negligence in so arranging the halter, he could not recover.[57]

In a New York case the rule as to contributory negligence is thus stated: "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. . . To enable an owner of such an animal to interpose this defence, acts should be proved, with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself. . . . As negligence in the ordinary sense is not the ground of liability, so contributory negligence in its ordinary meaning is not a defence. These terms are not used in a strictly legal sense in this class of actions, but for convenience. There is considerable reason in favor of the doctrine of absolute liability for injuries produced by a savage dog, whose propensities are known to the owner, on the ground of its being in the interest of humanity and out of regard to the sanctity of human life, but as these animals have different degrees of ferocity, and the rule must be a general one, I think, in view of all the authorities, that the rule of liability before indicated is a

[55] Meracle *v.* Down, 64 Wis. 323.

[56] Boulester *v.* Parsons, 161 Mass. 182.

[57] Vital *v.* Tétrault, Mont. L. Rep. 6 S. C. 501, reversing 4 id. 204, cited in § 77, supra.

reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself with full knowledge of its probable consequences." [58]

In a later case in the same court where it was held that undue familiarity with a dog running loose, such as offering it a piece of candy, on the part of one having no knowledge of its viciousness, did not constitute negligence so as to relieve the owner of liability, it was said: "If a person should thrust his arm into a bear's mouth and get bit, it could not be said that the injury was caused by keeping the bear; and so, if a person, knowing the vicious propensities of a dog, should wantonly or wilfully do an act to induce the dog to bite, or should unnecessarily and voluntarily put himself in the way of the dog, knowing the probable consequences, the same principle would apply." [59]

It has been held to be contributory negligence where the plaintiff, knowing a dog was kept chained in a bed-room, suffered his three-year old child to go there unattended; [60] where an employee goes voluntarily and unnecessarily near a vicious dog kept chained on the employer's premises, [61] or within reach of a vicious stallion in a stable; [62] where a servant, knowing a dog's dangerous disposition, tried to feed it, while chained, at the suggestion of a fellow-servant; [63] where one imprudently goes on premises where a dog is kept in the

[58] Muller *v.* McKesson, 73 N. Y. 195.

[59] Lynch *v.* McNally, 73 N. Y. 347.

The plaintiff may recover, if his position near a chained dog was such as might be assumed by a person of ordinary sense and judgment: Wooldridge *v.* White (Ky.), 48 S. W. Rep. 1081.

[60] Logue *v.* Link, 4 E. D. Sm. (N. Y.) 63.

[61] Daly *v.* Arrol Bros., 24 Sc. L. Repr. 150; Farley *v.* Picard, 78 Hun (N. Y.) 560. And see Badali *v.* Smith (Tex. Civ. App.), 37 S. W. Rep. 642.

[62] Buckley *v.* Gee, 55 Ill. App. 388. And see Fraser *v.* Hood, 15 Rettie (Sc. Ct. Sess.) 178; Noel *v.* Duchesneau, Rap. Jud. Quebec, 15 C. S. 352.

[63] Werner *v.* Winterbottom, 56 N. Y. Super. Ct. 126.

night-time;[64] where the plaintiff voluntarily went into a place where horses were sold, knowing that they were tried without a protecting barrier, and the attendant hit a horse to make him trot and he swerved and kicked the plaintiff.[65] So an employee assumes the risk of injury by elks and deer kept by his employer when he voluntarily engages to work inside of the enclosure in which they are kept.[66]

On the other hand, it has been held to be no defence that the plaintiff was warned the day before not to go near the dog, if the jury think the accident was not due to his negligence and want of caution;[67] that the plaintiff knew of a dog's habit of attacking teams and was not cautious in driving by the defendant's house, the latter having let the animal loose;[68] that the plaintiff was walking fast and talking loud when attacked by a dog;[69] that the plaintiff passed near a horse that he knew to be vicious, not knowing it was temporarily unmuzzled;[70] that the plaintiff was unlawfully travelling on Sunday when bitten by a dog;[71] that a woman thrown off a bridge by a passing bull had not left the bridge when she first saw the bull;[72] that the plaintiff permitted his colt to trespass

[64] Brock *v.* Copeland, 1 Esp. 203.

[65] Abbott *v.* Freeman, 35 L. T. N. S. 783, reversing 34 id. 545. So, where a spectator at a fair who had been warned to move back is injured by a horse bolting the track; and neither the owner nor the fair association is liable, both having been ignorant that the animal was unruly: Hallyburton *v.* Burke Co. Fair Assn., 119 N. C. 526.

[66] Bormann *v.* Milwaukee, 93 Wis. 522.

[67] Curtis *v.* Mills, 5 C. & P. 489,—the court saying, "You may be of opinion that, the master of the dog walking just before the plaintiff and, as it were, leading him on, the plaintiff might think he was safe, more especially as no caution was given him at this time by the defendant."

And see Marble *v.* Ross, 124 Mass. 44.

[68] Jones *v.* Carey, 9 Houst. (Del.) 214.

[69] Dockerty *v.* Hutson, 125 Ind. 102.

[70] Koney *v.* Ward, 36 How. Pr. (N. Y.) 255.

[71] White *v.* Lang, 128 Mass. 598. "The act of travelling is a condition, not a contributory cause of the injury." And see Schmid *v.* Humphrey, 48 Ia. 652.

[72] Barnum *v.* Terpening, 75 Mich. 557.

on another's land, where it was killed by the defendant's mule, also trespassing and known by the owner to be vicious;[73] that one employed as a dressmaker went at her employer's request into the kitchen where she was bitten by a dog known by her to be vicious but generally kept tied up: the risk was not incidental to the service.[74]

Nor can the negligent acts of others be imputed to the plaintiff. Where A. was killed by the running away of horses frightened by vicious dogs, in a suit brought by his widow against the owner of the dogs, it appearing that A. was not driving at the time, it was held that evidence of the driver's contributory negligence was inadmissible.[75] And where school children, without their teacher's knowledge and consent, during recess vexed a ram which attacked and injured the teacher, this conduct cannot be imputed to the latter in an act brought by her for her injuries.[76]

The question of the care used by the plaintiff is one for the jury under all the circumstances.[77]

In some cases it has been held that the plaintiff must aver and prove that he exercised due care,[78] but this is contrary to the weight of decisions.[79]

The rule of comparative negligence exists, or formerly existed, in a few jurisdictions.[80]

[73] Hill *v.* Applegate, 40 Kan. 31.

[74] Mansfield *v.* Baddeley, 34 L. T. N. S. 696. Cf. Fraser *v.* Hood, 15 Rettie (Sc. Ct. Sess.) 178, where one who was bitten while tying up, at his master's order, a horse known to be vicious, was held not entitled to recover.

[75] Mann *v.* Weiand, 81* Pa. St. 243.

[76] Kinmouth *v.* McDougall, 19 N. Y. Suppt. 771.

[77] Linnehan *v.* Sampson, 126 Mass. 506; Meier *v.* Shrunk, 79 Ia. 17.

[78] Williams *v.* Moray, 74 Ind. 25; Eberhart *v.* Reister 96 id. 478; Raymond *v.* Hodgson, 161 Mass. 184. This was held to be the case where the statute made the owner of a dog liable in damages "except when the party injured is doing an unlawful act:" Stuber *v.* Gannon, 98 Ia. 228.

[79] Brooks *v.* Taylor, 65 Mich. 208; 27 Am. L. Reg., 636 n. and cases cited; Hussey *v.* King, 83 Me. 568.

[80] See Marble *v.* Ross, 124 Mass. 44. The doctrine has been abolished in Illinois: Cicero & P. St. R. Co. *v.* Meixner, 160 Ill. 320.

If the act of a dog is the sole and proximate cause of a horse's shying and such shying is not caused by a vicious habit, the fact that it contributed to the injury will not prevent the plaintiff's recovering against the dog's owner.[81] And if the statute makes the latter liable regardless of the question of care or negligence on his part, the fact that the colt is skittish and the carriage unsafe is immaterial.[82] And, although an action will not lie where a horse is frightened simply by seeing a dog lying or running in the street, it is otherwise where a direct attack is made, whether by jumping and barking or by actual assault; nor is the fact that the rein broke from a latent defect material.[83]

94. ***Scienter.***—Except in the case of animals *feræ naturæ*, it is essential to show that the owner or keeper of an animal knew of its vicious or dangerous disposition: otherwise there can be no recovery for an injury committed by it.[84] He may, however, if he fails to exercise ordinary supervision of an animal under his care, be chargeable with knowledge that he

[81] Denison *v.* Lincoln, 131 Mass. 236. The fact that the owner has seen his dog run out to the fence and bark is not sufficient notice of its vicious habit of jumping against the fence so as to frighten horses: Bradley *v.* Myers, 10 Lanc. L. Rev. (Pa.) 137.

[82] Chickering *v.* Lord (N. H.), 32 Atl. Rep. 773.

[83] Sherman *v.* Favour, 1 Allen (Mass.) 191.

[84] Buxendin *v.* Sharp, 2 Salk. 662; Mason *v.* Keeling, 1 Ld. Raym. 606; Cox *v.* Burbridge, 13 C. B. N. S. 430; Chase *v.* McDonald, 25 U. C. C. P. 129; Spring Co. *v.* Edgar, 99 U. S. 645; Shaw *v.* Craft, 37 Fed. Rep. 317; Pickering *v.* Orange, 2 Ill. 492; Wormley *v.* Gregg, 65 id. 251; Mareau *v.* Vanatta, 88 id. 132; West Chicago St. R. Co. *v.* Walsh, 78 Ill. App. 595; Perkins *v.* Mossman, 44 N. J. L. 579; State *v* Donohue, 49 id. 548; Staetter *v.* McArthur, 33 Mo. App. 218; Bell *v.* Leslie, 24 id. 661; Murphy *v.* Preston, 5 Mackey (D. C.) 514; Knowles *v.* Mulder, 74 Mich. 202; Murray *v.* Young, 12 Bush (Ky.) 337; Woolf *v.* Chalker, 31 Conn. 121; Finney *v.* Curtis, 78 Cal. 498; Reed *v.* South. Expr. Co., 95 Ga. 108; Meegan *v.* McKay, 1 Okla. 59; Coggswell *v.* Baldwin, 15 Vt. 404; Klenberg *v.* Russell, 125 Ind. 531; Moynahan *v.* Wheeler, 117 N. Y. 285; Campbell *v.* Brown, 19 Pa. St. 359; Kitchens *v.* Elliott, 114 Ala 290.

would have obtained by inquiry.[85] If the animal is *feræ naturæ*, that fact is in itself sufficient notice. In a case in the Supreme Court of the United States it is said: "Certain animals *feræ naturæ* may doubtless be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the class known as tame or domestic animals; but, inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that, if they do so and the owner becomes notified of their vicious habit, they are included in the same rule as if they had never been domesticated, the gist of the action in such a case, as in the case of untamed wild animals, being not merely the negligent keeping of the animal, but the keeping of the same with knowledge of the vicious and mischievous propensity of the animal." [86]

Some of the cases go still further than the principle stated above and hold that, even in the case of a domestic animal like the dog, such knowledge is the sole ground of action and that negligence in the keeping need not be shown. Thus in a New York case it is said: "In some of the cases it is said that from the vicious propensity and knowledge of the owner negligence *will be presumed*, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal and, unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute. . . . It may be that, in a certain sense, an action against the owner for an injury by a vicious dog is based upon negligence; but such negligence consists not in the manner of keeping or confining the animal or the care exer-

[85] Turner *v.* Craighead, 83 Hun (N. Y.) 112; Lawlor *v.* French, 14 Misc. (N. Y.) 497, 2 N. Y. App. Div. 140; Lynch *v.* Richardson, 163 Mass. 160; Hayes *v.* Smith, 8 O. C. D. 92. But see Laherty *v.* Hogan, 13 Daly (N. Y.) 533.

[86] Spring Co. *v.* Edgar, 99 U. S. 645.

cised in respect to confining him, but in the fact that he is ferocious and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice." [87]

So, where a watch-dog was kept chained on account of its ferocity but broke the chain and bit a person who was passing the house, it was held that the owner in keeping a dog that he knew to be ferocious must take all the risk of doing so, and therefore the fact that he took reasonable precaution to restrain it which ultimately by unforeseen accident turned out insufficient, did not protect him from liability for the injuries sustained.[88]

The same rule was applied to the case of a stallion, after notice of its propensity to attack mankind.[89]

It is questionable, however, whether a rule that is applicable to the keeping of wild and comparatively useless animals like lions, tigers and bears should be extended to the case of animals whose very ferocity may be the ground of their usefulness, if the owner has taken every reasonable precaution to confine them and prevent injury.[90] Otherwise, the only conclusion would be that it is the legal duty of the owner of an animal that is unfriendly to strangers, however attached to him, to kill it, though its services may be very valuable and though he is able and willing to use every means to guard

[87] Muller *v.* McKesson, 73 N. Y. 195.
And see Lynch *v.* McNally, Ibid. 347.

[88] Burton *v.* Moorhead, 18 Sc. L. Repr. 640.

[89] Hammond *v.* Melton, 42 Ill. App. 186. So of a bull or cow: 1 Hale P. C. 430, quoted in § 92, supra.

[90] See the dissenting opinion of Crockett, J., in Laverone *v.* Mangianti, 41 Cal. 138, where it is said, "I think the more reasonable rule is announced in Sarch *v.* Blackburn . . . to the effect that every one has a right to keep a watch dog for the protection of his premises and is only responsible for injuries resulting from negligence in the keeping. . . . If the earlier cases establish a different rule, the interests of society demand that it should now be abrogated, considering the various useful purposes for which such animals are now employed."

others from any possible danger. This is an advance even on the old doctrine laid down in Smith *v.* Pelah [91] where "the Chief Justice ruled that 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 [facts which might naturally go to show negligence], 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. The *scienter* is the gist of the action." And see the remarks of Justice Cooley on the keeping of animals *feræ naturæ*, quoted in § 92, supra.

It seems to be admitted, however, that negligence need not be averred or proved in the first place, the burden being on the defendant to disprove that implied imputation.[92] Justice Cooley says of the case of May *v.* Burdett,[93] often cited as holding that negligence is no element in such an action: "The decision in this case seems to be that the keeper of such an animal is *prima facie* responsible for the injuries done by it, but it is not decided that he may not meet the case by showing that he observed in respect to it proper care." [94]

Scienter need not be shown where the injury is committed by an animal while trespassing, as was said above,[95] the gist of the action there being the trespass and the injury being an aggravation thereof.

[91] 2 Strange 1264.

[92] Spring Co. *v.* Edgar, supra. And see Partlow *v.* Haggarty, 35 Ind. 178; Popplewell *v.* Pierce, 10 Cush. (Mass.) 509; Snow *v.* McCracken, 107 Mich. 49; Jackson *v.* Smithson, 15 M. & W. 563.

[93] 9 Q. B. 101.

[94] Cooley Torts 348. And see Briscoe *v.* Alfrey, 61 Ark. 196, where the owner of an unaltered mule, kept in a well-fenced stable, was held not liable for the consequences of its breaking out at night without his knowledge.

[95] See § 76, supra. See, also, the article in 19 Sol. Jour. 211, quoted in § 92, supra.

The knowledge need not be of any specific act: knowledge of a general vicious propensity is sufficient.[96] As was said in a Washington case: "According to the more modern and reasonable doctrine, it is not necessary that he should have had actual positive notice. If he has notice that the disposition of the animal is such that it would be likely to commit an injury similar to the one complained of, it is sufficient. It is not necessary that the notice be of injury actually committed. Thus, in case of a dog known to be vicious and ferocious by its keeper, it is unnecessary to show that he had previously bitten any person. The keeper of such a dog must see to it that he is kept securely or be responsible for all injury done by him." [97]

So in an article in the Journal of Jurisprudence it is said: "We do not think the dog is entitled to one worry or one bite. In the first place, this doctrine is rather hard upon the man who is privileged to receive the honor of the first bite. . . . It does seem to us that the distinction of the English law between the *ferœ naturœ* and *ferœ mansuetœ* is somewhat artificial, and is irrelevant to the question of fault and consequent reparation. It is artificial because a dog is not originally and is not necessarily a domesticated animal, any more than a monkey is. Both may be tamed and both are. But some traces of the wild blood do occasionally manifest themselves with no apparent reason for it. . . . The real ground of liability is *culpa*. It is the *scienter*, the knowledge of the animal's propensity to do hurt that fixes the date of the liability. But

[96] Argersinger *v.* Lever, 17 N. Y. Civ. Proc. 352; McGarry *v.* N. Y. & H. R. Co. 60 N. Y. Super. Ct. 367; McCaskill *v.* Elliott, 5 Strobh. L. (S. C.) 196; Barnum *v.* Terpening, 75 Mich. 557; Renwick *v.* Von Rotberg, 2 Rettie (Sc. Ct. Sess.) 855; Worth *v.* Gilling, L. R. 2 C. P. 1; Charlwood *v.* Greig, 3 C. & K. 46; Wood *v.* Vaughan, 28 N. B. 472, 18 Can. Sup. Ct. 703.

[97] Robinson *v.* Marino, 3 Wash. 434.

And in Canada " 'the first bite' is not admitted as a defence to an action for injury done by a dog, however good its reputation may have been previously:" 13 Leg. News (Can.) 314.

when does the *scienter* begin? Surely not, as the English law has it, only when the owner becomes aware that the particular dog has done damage or has attempted to do damage; and everybody knows that dogs are apt to bite and do damage." [98]

And in a Vermont case it is said: "The formula used in text-books and in forms given for pleadings in such cases, 'accustomed to bite,' does not mean that the keeper of a ferocious dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person. But, as he is held to be a man of common vigilance and care, if he had good reason to believe, from his knowledge of the ferocious nature and propensity of the dog, that there was ground to apprehend that he would under some circumstances bite a person, then the duty of restraint attached; and to omit it was negligence." [99]

On which these comments are made in a Missouri case: "We are inclined to go further even than Judge Redfield and to hold with some authorities that proof of the mischievous character of an animal and previous knowledge thereof by the owner or keeper is sufficient to sustain a recovery, even though the animal was neither malicious nor ferocious. . . . It is immaterial to the victim whether the dog bit him in play or in malice." [100] But it is not sufficient to show merely that a dog has the habit of bounding upon people, but not so as to hurt them.[101] Where a dog leaped upon a porter and caused

[98] 25 Jour. Jurisp. (Sc.) 454. And in 34 Sol. Jour. 686, reference is made to "the long exploded fallacy, first propounded, we believe, by Lord Cockburn in a Scotch case, that 'the law of England allows each dog to have one worry with impunity.' "

[99] Godeau *v.* Blood, 52 Vt. 251, 254, per Redfield, J. And see Flansburg *v.* Basin, 3 Ill. App. 531; Kolb *v.* Klages, 27 id. 531; Warner *v.* Chamberlain, 7 Houst. (Del.) 18; Kennett *v.* Engle, 105 Mich. 693; Rider *v.* White, 65 N. Y. 54.

[100] Staetter *v.* McArthur, 33 Mo. App. 218, 222. See also State *v.* McDermott, 49 N. J. L. 163; Hathaway *v.* Tinkham, 148 Mass. 85.

[101] Line *v.* Taylor, 3 F. & F. 731.

him to drop a piece of coal on the plaintiff's foot, an action was held maintainable, *scienter* being alleged.[102]

Knowledge of a particular injury committed by the animal is sufficient to make the owner liable for injuries of a similar kind.[103] Thus, the owner of a dog that has destroyed one kind of animal is liable for its destroying another kind, when he lets it run at large.[104] "If a man keeps a dog which is accustomed to bite sheep, etc., and the owner knows it and notwithstanding he keeps the dog still, and afterwards the dog bites a horse, this shall be actionable, notwithstanding that the precedents are all of the same species; because the owner, after notice of the first mischief, ought to have destroyed or hindered him from doing any more hurt. Now in this case the fact was that the boar had bit a child before, of which the defendant had notice, and afterwards he bit this mare of the plaintiff's." [105]

And so, where a dog killed sheep, evidence was admitted that four years before he had attacked and bitten a child to the defendant's knowledge.[106] But in another case it was said: "If a dog is known to have killed one sheep—a jury would be able from their knowledge of that animal to infer that he would kill another, if an opportunity presented itself. If so, the owner would in law be liable. But if a dog is known to have bitten a man, a jury would not be apt to infer that he

[102] Fraser *v.* Bell, 14 Rettie (Sc. Ct. Sess.) 811.

[103] Reynolds *v.* Hussey, 64 N. H. 64; Mann *v.* Weiand, 81* Pa. St. 243; Cuney *v.* Campbell (Minn.), 78 N. W. Rep. 878; Kittredge *v.* Elliott, 16 N. H. 77; Arnold *v.* Norton, 25 Conn. 92; Fairchild *v.* Bentley, 30 Barb. (N. Y.) 147; Webber *v.* Hoag, 8 N. Y. Suppt. 76; Bauer *v.* Lyons, 23 N. Y. App. Div. 204.

And it is no defence to show that the animal is generally inoffensive: Buckley *v.* Leonard, 4 Den. (N. Y.) 500.

[104] Pickering *v.* Orange, 2 Ill. 338. [105] Jenkins *v.* Turner, Ld. Raym. 109.

[106] Gettring *v.* Morgan, 5 W. R. 536. And see Woolf *v.* Chalker, 31 Conn. 121, 128, where it is said: "If a dog becomes mischievous and inclined to injure the property of others, 'his owner is bound to restrain him on the first notice' and liable for any mischief he may thereafter do to property of any kind."

would kill a sheep, because the one act proceeds from voraciousness, the other from combativeness, and fierce dogs are not so apt to be sheep-killing dogs. If a bull so far loses sight of his submission to the 'dominion of man' as on one occasion to rebel and offer combat, it does not follow as a *matter of course* that he would be likely to attack a horse, and that fact must be decided by the jury from the nature of the animal, the provocation and other circumstances attending the act." [107] So, in an action to recover damages for personal injury from being bitten by a vicious dog, it was held that the owner's knowledge of the dog's propensity to bite men, not merely other animals, must be proved.[108] And the owner of a stallion was held not liable for injuries from its kicking in the absence of proof that it had before kicked a human being.[109] So, the fact that a mare ordinarily gentle is in the habit of kicking horses when in heat does not impose upon the owner any duty to restrain her at other times, and consequently he is not responsible for her kicking another horse when not in heat.[110] And in an action to recover damages for the kick of a horse, mere evidence that for some months prior to the accident it had been seen to snap at persons on different occasions and had kicked a stableman, but only when punched with sticks and tickled and teased—was held insufficient to show *scienter* on the owner's part.[111]

And, generally speaking, the act must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of, and this is a matter to be decided by the jury, not by the court.[112]

[107] Cockerham *v.* Nixon, 11 Ired. L. (N. C.) 269. And see Hartley *v.* Harriman, 1 B. & Ald. 620.

[108] Keightlinger *v.* Egan, 65 Ill. 235. Thus, it is not sufficient that the owner knew that the dog had attacked and bitten a goat: Osborne *v.* Chocqueel, [1896] 2 Q. B. 109. And see Norris *v.* Warner, 59 Ill. App. 300.

[109] Durrell *v.* Johnson, 31 Neb. 796. [110] Tupper *v.* Clark, 43 Vt. 200.

[111] McHugh *v.* Mayor, 31 N. Y. App. Div. 299.

[112] Cockerham *v.* Nixon, 11 Ired. L. (N. C.) 269, quoted supra.

With regard to the knowledge of a servant in charge of an animal the rule has been stated as follows: "It is important to notice that in some cases and under certain circumstances the knowledge of a servant, although not communicated to his master, may be equivalent to the knowledge of the master. The test in such a case would appear to be whether the servant in question was in such a position with regard to the custody of the animal or the control of the premises in which the animal was kept, as to render it natural and proper that complaint should be made to him of acts of viciousness and to make it his duty to report the same to his master." [113]

Therefore where a person was bitten by a dog on the premises of a corporation, and the dog had previously bitten a person within the knowledge of some of the servants who had no control over the affairs of the corporation, or over the animal, it was held that the defendants were not liable, there being no evidence of their knowledge of the dog's character.[114]

It is otherwise where the servant has been put in charge of the premises or of the animal: in that case his knowledge is imputable to the master.[115] And notice to one of several joint keepers is notice to all.[116]

In some instances the proof of *scienter* on the part of the owner has been dispensed with by statute.[117] This is frequently the case in the interest of the farming community

[113] Garrett Nuisances 158.

[114] Stiles *v.* Cardiff Steam Navig. Co., 33 L. J. Q. B. 310. And see Harris *v.* Fisher, 115 N. C. 318; Twigg *v.* Ryland, 62 Md. 380; Friedmann *v.* McGowan (Del.), 42 Atl. Rep. 723; Colget *v.* Norrish, 2 Times L. Rep. 471.

[115] Baldwin *v.* Casella, L. R. 7 Ex. 325; Applebee *v.* Percy, L. R. 9 C. P. 647; Corliss *v.* Smith, 53 Vt. 532; McGarry *v.* N. Y. & H. R. Co., 60 N. Y. Super. Ct. 367; Keenan *v.* Gutta Percha, etc., Mfg. Co., 46 Hun (N. Y.) 544; Byrne *v.* Morel (Ky.), 49 S. W. Rep. 193; Brown *v.* Green (Del.), 42 Atl. Rep. 991.

[116] Hayes *v.* Smith, 8 O. C. D. 92.

[117] See Pressey *v.* Wirth, 3 Allen (Mass.) 191; Gries *v.* Zeck, 24 O. St.

where sheep are killed by dogs.[118] Where the owner of a dog was made liable by statute without proof of *scienter* for injuries to any "cattle and sheep," it was held that the word "cattle" included horses.[119] But proof must be given in all cases not specially covered by the statute.[120]

With regard to this rule requiring the plaintiff to prove *scienter*, it was said in Murphy *v.* Preston:[121] "It is true that this principle has recently been sharply criticised (1 Taylor's Ev. 279), but it has the countenance of the earliest decisions; and these accord with the rule announced by the Hebrew lawgiver in Exodus, that, if an ox gore a man or a woman, the owner shall go free unless '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,' in which case only the owner should be held liable."

On the other hand, in an article in the Law Times the following remarks are made: "Among the minor absurdities and iniquities which still infest and disfigure our jurisprudence, there is none more absurd and iniquitous than the rule under which the owner of a domestic animal is exempted from liability for damage inflicted by the animal, unless the animal was, to his knowledge, of a vicious or mischievous disposition. . . . It has always struck us as intolerable that a person

329; Koestel *v.* Cunningham, 97 Ky. 421; Orne *v.* Roberts, 51 N. H. 110; Newton *v.* Gordon, 72 Mich. 642; Schaller *v.* Connors, 57 Wis. 321.

Cf. Slinger *v.* Henneman, 38 Wis. 504.

[118] See Kerr *v.* O'Connor, 63 Pa. St. 341; Kertschacke *v.* Ludwig, 28 Wis. 430; Trompen *v.* Verhage, 54 Mich. 304; Jacobsmeyer *v.* Poggemoeller, 47 Mo. App. 560; Job *v.* Harlan, 13 O. St. 485; Cockfield *v.* Singletary, 15 Rich. L. (S. C.) 240; Reg. *v.* Perrin, 16 Ont. 446; Smith *v.* Buck, 29 N. B. 268.

As to *culpa* on the part of the owner of a sheep-killing dog, under the Scotch law, see Smith *v.* Hurll, 1 Sc. L. Rev. (Sher. Ct. Rep.) 246; Turner *v.* McLaren, 3 id. 57; Duncan *v.* Rodger, 7 id. 313; Howison *v.* White, 8 id. 318; Taylor *v.* McKerrow, 13 Jour. Jurisp. (Sc.) 104; McIntyre *v.* Carmichael, 8 Macph. (Sc. Ct. Sess.) 570.

[119] Wright *v.* Pearson, 38 L. J. Q. B. 312.

[120] Osincup *v.* Nichols, 49 Barb. (N. Y.) 145. [121] 5 Mackey (D. C.) 514.

who has been injured by an animal, say, for instance, bitten by a dog—and who has, perhaps with difficulty, succeeded in discovering the dog's owner should also have the burden cast upon him of instituting an investigation into the dog's antecedent character; of making out, if the fact were so, that the dog had previously bitten others or was presumably of a savage disposition, and that the owner was aware of the dog's savage acts or proclivities. To compel such an inquiry is to aggravate the original injury. The proof is seldom easy, often impossible, as the facts may and generally do lie peculiarly within the knowledge of the owner who is directly interested in concealing any savagery on the part of the animal. Moreover the rule itself is utterly destitute of any reasonable foundation. *Qui sentit commodum debet et sentire onus.* Knowledge or the absence of knowledge on the part of the owner of the animal's disposition ought to have no effect whatever on his *civil* liability for the animal's acts. In a criminal prosecution the fact of knowledge would be all important, *animus* being an essential element, and there could be none without knowledge. The distinction between civil and criminal procedure in such cases is clear and well marked. If indeed knowledge is requisite to fix the owner with civil liability, then we say that it should be made an irrefragable presumption of law that the owner of a domestic animal must be aware of the indubitable fact that all animals from sickness or other causes are liable to accessions of ill-temper in which they may be expected to commit savage acts foreign to their natural or ordinary disposition, and that some classes of these animals are also liable to a peculiar madness, and have then the power of communicating disease and death in their most awful and repulsive forms, and we say that on such presumption of knowledge the owner should be made liable accordingly. . . . They manage these things better in France. Art. 1385 of the Code Napoléon is as follows: 'Le propriétaire d'un animal ou celui qui s'en sert pendant qu'il est à son usage est responsable du dommage que l'animal a

causé soit que l'animal fût sous sa garde, soit qu'il fût égaré ou échappé.' Here we have a broad, intelligible principle, clearly expressed, which we ought to adopt from our neighbors as speedily as may be, and rid ourselves of the antiquated barbarism and sophistry which make it necessary to prove the *scienter* in these cases." [122]

95. Evidence.—The defendant's knowledge of the vicious character of his animal may be proved in many ways. In most cases it is made out by showing that he has seen or been informed of previous attacks.[123] The fact that he keeps a dog tied or chained in the daytime is also evidence of *scienter*.[124] A report in the neighborhood that a dog had been bitten by a mad dog has also been held to be evidence of *scienter*,[125] though it has been said that this case "cannot be supported on any good grounds, and may be considered of no authority." [126] It has been held proper, however, to show the general reputation of a dog as vicious and dangerous for the purpose of raising an inference that the owner knew of his vicious propensities.[127] And where there is evidence that the defendant knew of the dog's biting on other occasions, evi-

[122] 49 L. T. 181. And see similar views expressed in 1 Law Jour. 492; 10 Sol. Jour. 320; The Jurist, quoted in 11 Pitts. Leg. Jour. 180 and 10 U. C. L. J. 14.

[123] 7 Am. L. Reg. 655.

[124] Montgomery *v.* Koester, 35 La. Ann. 1091; Goode *v.* Martin, 57 Md. 606; Brice *v.* Bauer, 108 N. Y. 428; Hahnke *v.* Friederich, 140 id. 224; Warner *v.* Chamberlain, 7 Houst. (Del.) 18; Cotton *v.* Walpole, 34 Jour. Jurisp. (Sc.) 155.

The act of the jurors in going on the premises with one of the defendants, who took hold of the chain which held the dog at the time of the injury and stretched it to show how far it would reach, was held to be misconduct as to entitle the plaintiff to a new trial: Wooldridge *v.* White (Ky.), 48 S. W. Rep. 1081.

[125] Jones *v.* Perry, 2 Esp. 482. [126] 7 Am. L. Reg. 659.

[127] Cameron *v.* Bryan, 89 Ia. 214; Trinity & S. R. Co. *v.* O'Brien (Tex. Civ. App.), 46 S. W. Rep. 389; Friedmann *v.* McGowan (Del.), 42 Atl. Rep. 723; Cuney *v.* Campbell (Minn.), 78 N. W. Rep. 878.

But see Norris *v.* Warner, 59 Ill. App. 300.

dence is admissible that the fact of his savage disposition is notorious in the neighborhood.[128] And the plaintiff may show by a former owner that the dog was vicious though the defendant had no knowledge of the acts testified to, where there is other evidence of his knowledge of the animal's viciousness.[129]

Proof that the defendant had warned a person to beware of a dog is evidence of *scienter*,[130] and so is a promise to make compensation if the injury could be proved—though entitled to little weight.[131] In an earlier case it was held not sufficient to show that the dog was of a savage disposition and usually tied up and that the defendant promised pecuniary satisfaction after biting, there being no proof of his having before bitten any other person;[132] but this is certainly contrary to the weight of authority.[133] Evidence of the treatment of the dog after the accident is admissible to show his previous character.[134] Where by statute it is not necessary to show *scienter* on the part of the owner of a dog biting a person off of the owner's premises, the peaceable character of the animal is not admissible in evidence.[135]

Notice to a wife has been held sufficient to show *scienter* in a husband,[136] though the converse has been denied.[137] This would depend, however, on the local law governing marital

[128] Fake *v.* Addicks, 45 Minn. 37. And see Broderick *v.* Higginson, 169 Mass. 482.

[129] Plummer *v.* Ricker (Vt.), 41 Atl. Rep. 1045.

A witness cannot be permitted to testify to exclamations made by the plaintiff while asleep, to the effect that "the dog was biting him," "take him off," etc.. Ibid.

[130] Judge *v.* Cox, 1 Stark, 227. [131] Thomas *v.* Morgan, 2 C., M. &. R. 496.

[132] Beck *v.* Dyson, 4 Camp. 198.

[133] See 7 Am. L. Reg. 659, where this case is considered to have been overruled by Thomas *v.* Morgan, supra.

[134] Webber *v.* Hoag, 8 N. Y. Suppt. 76.

[135] Kelly *v.* Alderson, 19 R. I. 544.

[136] Gladman *v.* Johnson, 36 L. J. C. P. 153. And see Barclay *v.* Hartman, 2 Marv. (Del.) 351.

[137] Miller *v.* Kimbray, 16 L. T. N. S. 360.

rights and duties. Where the defendant was informed where he bought a bull that it had been tied up for two years and was advised to restrain it, proof of this was held sufficient to make him liable without actual negligence.[138]

Where the plaintiff wearing a red handkerchief was attacked by a bull driven along a public highway, the defendant's statement that the color of the handkerchief had caused the injury and that he knew bulls would run at red things was held to be evidence of *scienter* of the animal's mischievous propensity. "We think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing as he did the knowledge that, if it met a person with a red garment, it was likely to run at and injure him." [139]

In an action to recover for injuries from a vicious horse, evidence of its docile character after the accident was held not admissible,[140] and such evidence would, in fact, prove nothing. But, on the other hand, evidence of a stage-horse's misbehavior twenty months after the accident was held admissible.[141] When a dog is shown to have bitten before, evidence that at other times he did not bite is not admissible.[142] Where the others showed that their dogs the summer before had gone among their sheep without molesting them, it is competent for the plaintiffs to prove that sheep-killing dogs are not accustomed to attack the sheep of their owners, but that they go away to do it.[143]

[138] Rogers *v.* Rogers, 4 N. Y. St. Repr. 373.

[139] Hudson *v.* Roberts, 6 Ex. 697. And see Linnehan *v.* Sampson, 126 Mass. 506.

[140] Knickerbocker Ice Co. *v.* De Haas, 37 Ill. App. 195.

[141] Kennon *v.* Gilmer, 131 U. S. 22, citing Todd *v.* Rowley, 8 Allen (Mass.) 51, 58; Maggi *v.* Cutts, 123 Mass. 535; Chamberlain *v.* Enfield, 43 N. H. 356.

[142] Linck *v.* Scheffel, 32 Ill. App. 17.

[143] Dover *v.* Winchester (Vt.), 41 Atl. Rep. 445, where it was also held that the fact that dogs killed sheep in one place in one way is no evidence that they killed, in another place, sheep which appeared to have been killed in the same way, as the two facts were not related in any way to one another.

A dog may be brought into court and shown to the jury so that they may judge of its disposition.[144]

Where a horse that was being led swerved to the sidewalk and kicked the plaintiff, it was held proper to receive in evidence a village ordinance forbidding anyone to lead a horse on a sidewalk.[145]

96. Liability of Owner or Keeper; Joint and Several Liability.—As a general rule, the person liable for an injury committed by an animal is the owner or, if the animal is not in his possession, its harborer or keeper. That one who knowingly harbors a vicious animal is responsible for its actions, whether he is the owner or not, is well established in all the cases.[146] Especially is this so where such keeping is without the consent or authority of the real owner;[147] and, conversely, a keeper in his own wrong cannot bring an action against the owner.[148]

With regard to who is a "keeper," it has been said: "The party who shall be held responsible for an injury committed by a dog must be—not one who harbors a dog and permits it to remain temporarily upon his premises . . .: he must be in a different sense the keeper of the dog;—and . . . he only is liable who, 'having the possession and control of a house or premises, suffers and permits a dog to be kept on the premises in the way such domestic animals are usually kept—as a member of the family, so to speak.' " [149] So in another case it is said: "A man may own a dog and yet not be his keeper.

[144] Line *v.* Taylor, 3 F. & F. 731.

[145] Grinnell *v.* Taylor, 85 Hun (N. Y.) 85.

[146] M'Kone *v.* Wood, 5 C. & P. 1; Frammell *v.* Little, 16 Ind. 251; Wilkinson *v.* Parrott, 32 Cal. 102; Bundschuh *v.* Mayer, 81 Hun (N. Y.) 111; Keenan *v.* Gutta Percha, etc., Manufg. Co., 46 id. 544; Hornbein *v.* Blanchard, 4 Colo. App. 92; Marsel *v.* Bowman, 62 Ia. 57.

[147] Mitchell *v.* Chase, 87 Me. 172.

[148] Burnham *v.* Strother, 66 Mich. 519.

[149] Cummings *v.* Riley, 52 N. H. 368. And see O'Hara *v.* Miller, 64 Ia. 462; Shultz *v.* Griffith, 103 id. 150; O'Donnell *v.* Pollock, 170 Mass. 441; Boylen *v.* Everett (Mass.), 52 N. E. Rep. 541; Plummer *v.* Ricker (Vt.), 41 Atl. Rep. 1045; Fitzgerald *v.* Brophy, 1 Pa. Co. Ct. 142.

One may take somebody else's dog to keep. For instance, a man may be from home and temporarily or permanently have his dog cared for in another family; and whoever has him under these circumstances is the keeper of the animal."[150]

An innkeeper is, in England, deemed to be the owner of a dog living in his hotel and is liable for injuries to cattle caused by it, notwithstanding the dog was at the time under the control of a person staying at the hotel, to whose care it had been committed by the real owner.[151]

The law as to liability has thus been laid down in the Journal of Jurisprudence: "It seems to us that the liability of the original owner depends upon whether the animal has passed beyond his control or not, and that is a question of fact. If it has passed beyond his control, it does not matter whether the custodier is trustworthy or not; and, if it has not, the trustworthiness of the custodier . . . is not a defence. The owner must take the responsibility of the custody and precautions being effectual. 'It is a nice question' says Mr. Shearman (§ 197) 'to determine how far the notice which the legal owner of an animal has of its habits is to be imputed to other persons having it in charge and standing in the position of the owner in respect to third persons. Against one who unlawfully takes an animal the case is clear. Having unlawfully assumed the position of an owner under circumstances which by his own fault prevented him from knowing the nature of the animal, he should bear all the burdens and be charged with the knowledge or notice chargeable to the real owner.' This last case is clear enough; but as regards the case of a borrower, it is only his actual knowledge that should make him liable. On the principle that knowledge is required to make one liable for the acts of the animal, how can it be contended that he is liable when in point of fact he had

[150] Burnham *v.* Strother, supra. In Kentucky it was held that the owner of a dog is liable for injuries inflicted by it, while under the control of a kennel club: Bush *v.* Wathen (Ky.), 47 S. W. Rep. 599.

[151] Gardner *v.* Hart, 44 W. R. 527.

not such knowledge? But if the owner transfers the custody of an animal which he knows to be dangerous without communicating his knowledge and mischief ensues, it is he who being in fault ought to be responsible. Mr. Shearman draws a distinction between a gratuitous borrower and a borrower for hire. The latter has a right to have information of the quality of the article let on hire, and a claim against the owner if any damage results from that information not being communicated. The borrower for hire, says Mr. Shearman, has a claim over the lender 'which affords more grounds for holding him responsible for the possession of the information to which he has thus a right.' But if the borrower has not the knowledge, he is not responsible to third persons. If he suffered damage himself, he would have a claim against the lender. And surely the borrower's claim against the lender affords no ground of liability in a question with third persons. The claim possibly might not be effectual. The lender may be a man of straw from whom nothing could be obtained. In a question with third persons, the relations between the lender and the borrower do not seem of any importance." [152]

The question of liability often rises as between employer and employee. It has been held that the employer is not liable for mischief done by a dog belonging to a hired laborer, where the dog was in the habit of following its master daily to his work on the employer's farm and of returning each night with its master and staying at his house.[153]

Where a dog belonged to a hired man living with the defendant and there was no evidence that it was kept for the latter's benefit or service, it was held that the question whether he was the keeper of the dog was for the jury, not for the court.[154]

[152] 25 Jour. Jurisp. (Sc.) 528. And see Cowan *v.* Dalziel, 5 Rettie (Sc. Ct. Sess.) 241.

[153] Auchmuty *v.* Ham, 1 Denio (N. Y.) 495. And see Simpson *v.* Griggs, 58 Hun (N. Y.) 393.

[154] Whittemore *v.* Thomas, 153 Mass. 347.

But where the dog belonged to a toll-keeper, it was held that an action could not be brought against the owner of the bridge, it appearing that he did not keep or harbor the dog in person, nor authorize or require it to be kept nor need that it should be kept for the conduct of his business.[155] And the fact that a dog owned by the superintendent of the poor-farm of a city is kept at the farm with the knowledge of one of the overseers and, without his objecting thereto, is fed with food furnished by the city for the use of the farm and during a part of the time is allowed the run of the farm, does not as a matter of law show that the city is the keeper of the dog and liable for its injuring anyone;[156] nor are the directors of an almshouse liable where a steward's dog, after his removal, is left on the premises without their authority or acquiescence.[157]

Where there was evidence tending to show that a dog was kept about the stable of a horse-car company by a person employed by them to have charge of the same and with the knowledge and implied assent of their superintendent, it was held that the jury might properly find that the dog was kept by the company.[158] And where a vicious animal was used in the business of a theatrical company, it was held that the president and manager who controlled the business and could hire and discharge animals was responsible for injuries done by it.[159]

If the owner of the premises knows of the dangerous character of a dog owned by his agent and permits him to retain it and let it run at large on the premises, the former is liable

[155] Baker *v.* Kinsey, 38 Cal. 631. [156] Collingill *v.* Haverhill, 128 Mass. 218. A municipal corporation is not liable for damages resulting from the negligence of its officers in giving an employee a vicious and unsafe horse to use: Backer *v.* West Chic. Park Commrs., 66 Ill. App. 507.

[157] Sproat *v.* Direc. of Poor, 145 Pa. St. 598.

[158] Barrett *v.* Malden & M. R. Co., 3 Allen (Mass.) 101.

[159] Lawlor *v.* French, 14 Misc. (N. Y.) 497. This decision was reversed in 2 N. Y. App. Div. 140, on the ground that the evidence was insufficient to show knowledge of viciousness.

for any damage done to a passer-by.[160] And if the owner of a dog in possession of his bailee declines to take care of it at the latter's request, or to consent to proper measures being taken to prevent its doing mischief, he is liable for any resulting injuries.[161]

An uncle who permitted a minor nephew living with him to keep a dog known to be vicious, was held liable for injuries caused thereby to a child, the court adding, "We do not wish, however, to be regarded as assenting to any general rule that the owner of the premises on which a dog may be harbored is liable for its vicious acts regardless of the age, employment or home of its owner, or the circumstances under which the injury was inflicted. The question of liability must depend on the circumstances in each case." [162] Where a father put his dog in the hands of his son to keep it from his creditors, the son having the right of control, the latter was held liable for an injury committed by the dog.[163]

The question of liability as between husband and wife depends necessarily on local laws. In New York in an action against both to recover damages for the bite of a dog, it appeared that the husband owned the dog but kept it upon his wife's premises on which they both lived, she paying the expenses of the household and being aware of the dog's character. There was no evidence that the husband had property on the premises or was her tenant or had control of her property or directed the animals or knew of the dog's nature, and it was sought to hold him simply on the ground of his marital liability for his wife's torts. It was held that she was liable and that a judgment against him was erroneous.[164] The fact of her owning the premises does not make her liable, however, for injuries by her dogs where the husband is a

[160] Harris *v.* Fisher, 115 N. C. 318.

[161] Lettis *v.* Horning, 67 Hun (N. Y.) 627. And see Renwick *v.* Von Rotberg, 2 Rettie (Sc. Ct. Sess.) 855.

[162] Snyder *v.* Patterson, 161 Pa. St. 98.

[163] Marsh *v.* Jones, 21 Vt. 378.

[164] Quilty *v.* Battie, 135 N. Y. 201.

householder, supporting the family.[165] And where a dog, obtained to protect premises owned in part by the defendant's wife, went to the defendant on the death of the other part-owner, the defendant was held liable as owner and harborer for injuries caused by it.[166]

The fact that a wife carries on a separate business on her husband's premises does not make her, as a matter of law, keeper of dogs there and liable for their biting.[167]

In a case in Canada, a bear belonging to one of the defendants escaped from premises, the separate property of the wife, the other defendant, where it had been confined by him without her objecting thereto. It was held that, as she had a legal right to have it removed and had not done so, she was liable for an injury caused to the plaintiff.[168] This decision was commented on in the Canada Law Journal as follows: "The Divisional Court was of opinion that the fact that the wife suffered the bear to remain upon her premises made her equally responsible with the owner, her husband, for its safe keeping. We believe that in this respect this case carries the law beyond any previous decision that is to be found in the books. The relationship of husband and wife would formerly have protected her from all liability and it certainly does not now, even under the altered state of the law as to the wife's capacity to hold property, impose on the wife any greater liability than if she were a stranger to her husband. She is held liable because the law has given her the same dominion over her separate property as she would have if a *feme sole*, with all responsibilities which that dominion entails; and one of those responsibilities the court has determined to be the due keeping of any wild animals she suffers to be brought upon her property. This is an effect of

[165] Bundschuh *v.* Mayer, 81 Hun (N. Y.) 111. And see Strouse *v.* Leipf, 101 Ala. 433.

[166] Kessler *v.* Lockwood, 42 N. Y. St. Repr. 563.

[167] McLaughlin *v.* Kemp, 152 Mass. 7.

[168] Shaw *v.* McCreary, 19 Ont. 39.

the Married Women's Property Act which was hardly contemplated. This liability, if it exists, is not confined to married women, but must be one that is common to all persons who permit wild animals to be brought upon their premises: *e. g.*, an inn-keeper who takes in a strolling tramp and his dancing bear would appear under this decision to be responsible not only for any injury the bear might do while on his premises, but also for any injury it may do off his premises, should it break loose in the night. This is, as we have said, an extension of the law of liability for damages occasioned by wild animals beyond any previous decision; and it is worthy of consideration whether the principle which is laid down in this case is a sound one, and a legitimate development of the previous decisions on the subject. . . . When Lord Tenterden spoke of keeping a dog about one's premises, he can hardly be intended to imply that the liability depends on the question of the actual ownership of the land on which the animal is harbored. He must be understood in the colloquial and not the strictly legal sense, *i. e.*, the premises on which a man lives or carries on his business, though they may, in no strictly legal sense, be his. It could hardly be supposed that if a man leases land from another for the purpose of keeping a menagerie that he thereby imposes on his landlord a liability for any damage which his wild animals may do by escaping from the demised premises. . . . But does the case of a husband living with his wife upon her premises stand in any different position? Are not the wife's premises for the purpose of keeping anything he may choose to bring upon them to be deemed the husband's premises? Can he be said to be in any different position than a tenant at sufferance? He is there lawfully by the consent of the owner and, being there, he brings upon the premises a wild animal; if he were in sole possession, his wife could hardly be held responsible because she happened to be the rightful owner of the property, and it is somewhat difficult to see why a more extended liability can arise merely from the fact that she happens to be also living

on the property and carrying on her own business there. . . . The mere permission to bring a bear upon one's premises is not *per se* a wrongful act; the wrong is occasioned by the neglect of the owner or keeper of the animal safely to keep it, so that it may not do harm. That appears to be a wrong for which the owner or keeper of the animal alone is responsible, and not the person who merely passively permits him to use his land on which to keep it." [169]

The defendant is the "owner and keeper" of a dog though it is kept at a house owned by him as member of a firm, Where the liability is on either the owner or the keeper and the defendant is declared as both, that must be proved.[170] A statute making the "owner" or "keeper" of a dog liable does not create a joint or several liability, and one who fails to collect a judgment against one cannot bring an action against the other.[171] But, as a rule, all who take part in harboring a dog may be sued jointly.[172]

Liability for the acts of another depends on whether the other person is acting within the scope of his authority, actual or apparent. The owner of a dog is therefore not liable for the wilful act of his servant or child in setting it on another's cattle.[173] And if he keeps the dog properly secured and another lets it loose and urges it to mischief, the former is not liable.[174] But where a groom touched a horse with a spur and it kicked the plaintiff, it was held that the act of using the spur so near the plaintiff made his master responsible for the injury.[175] And the owner of a vicious horse which kicked a

[169] 26 Can. L. Jour. 421. [170] Grant *v.* Ricker, 74 Me. 487.

[171] Galvin *v.* Parker, 154 Mass. 346. [172] Hayes *v.* Smith, 8 O. C. D. 92.

[173] Steele *v.* Smith, 3 E. D. Smith (N. Y.) 321; Tifft *v.* Tifft, 4 Denio (N. Y.) 175.

See, also, Macdonald *v.* Lye, 4 Sc. L. Rev. (Sher. Ct. Rep.) 376; Gracie *v.* Hedderwick, 5 Sc. L. Mag. 75, cited in § 93, supra.

[174] Fleeming *v.* Orr, 2 Macq. H. L. Cas. (Sc.) 14, where proof that A.'s dog killed B.'s sheep was held not sufficient, as another might have let him loose.

[175] North *v.* Smith, 10 C. B. N. S. 572.

colt at a fair was held not to be relieved from liability by the fact that his servant had, without his knowledge or consent, temporarily placed the animal in charge of a third person.[176] A joint owner of a ram is chargeable with damage done by it by butting while in the co-owner's pasture, though the latter in the former's absence and without his advice, put it in the pasture without trying to restrain it,—the former having given no directions as to restraining the animal and not having been consulted as to keeping it;[177] nor can he enforce a claim for contribution against the co-owner unless there has been an undertaking to indemnify.[178] Where a person passing between a carriage and a team of horses on opposite sides of a street is kicked by the team against the carriage and injured, he cannot recover jointly against persons who without concert placed the obstructions there.[179]

The rule of liability where animals of several owners commit a trespass together has already been stated,[180] and applies to other kinds of injury as well. In the absence of statutory provisions to the contrary, a joint action will not lie against the owners of animals doing mischief.[181] "When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog; and it would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining in doing mischief, could make

[176] Campbell *v.* Trimble, 75 Tex. 270.

[177] Oakes *v.* Spaulding, 40 Vt. 347.

[178] Spaulding *v.* Oakes, 42 Vt. 343.

[179] Bard *v.* Yohn, 26 Pa. St. 482. [180] See § 76, supra.

[181] Adams *v.* Hall, 2 Vt. 9; Van Steenburgh *v.* Tobias, 17 Wend. (N. Y.) 562; Denny *v.* Correll, 9 Ind. 72; Dyer *v.* Hutchins, 87 Tenn. 198; Nierenberg *v.* Wood, 59 N. J. L. 112.

And see Flansburg *v.* Basin, 3 Ill. App. 531, where it is said: "It is not necessary to consider whether there can be joint liability of owners for a joint attack of their dogs; as it is not so with cattle, it is probably not so with dogs."

See, however, Smith *v.* Hurll, 1 Sc. L. Rev. (Sher. Ct. Rep.) 246, where a different rule is stated.

their owners jointly liable. This would be giving them a power of agency which no animal was ever supposed to possess." [182]

And where a statute provided that every owner or keeper of a dog should "forfeit to any person injured by such dog double the amount of damages sustained by him," it was held that each owner was liable only for the damage done by his own dog and not for the whole damage done by two dogs.[183] But where the statute made the owner of a dog injuring sheep liable for "all damages so done," he was held liable for all damages in the doing of which the dog took part with other dogs, and it was held to be no defence that one of the dogs so engaged belonged to the sheep-owner.[184] And, by statute, the owner of a dog that injures or kills sheep is often made liable for the entire amount of damage done with other dogs.[185] With regard to criminal liability it was said in Rex *v.* Huggins:[186] "If through negligence the beast goes abroad after warning or notice of his condition, it is the opinion of Hale that it is manslaughter in the owner. And if he did purposely let him loose and wander abroad, with a design to do mischief, nay, though it were but with a design to fright people and make sport, and he kills a man, it is murder in the owner."

97. Action; Pleading; Damages.—Where damage is committed by an animal in its owner's absence, the regular remedy

[182] Russell *v.* Tomlinson, 2 Conn. 206.

But see Rowe *v.* Bird, 48 Vt. 578, where it is said: "It is elementary and a familiar rule in actions of tort that each or all are liable for a joint trespass." See, also, Murray *v.* Brown, 19 Sc. L. Repr. 253, where it was held that each of the owners of dogs which had worried sheep was liable for the whole damage on the ordinary rule applicable to joint delinquents.

[183] Buddington *v.* Shearer, 20 Pick. (Mass.) 477.

[184] Worcester Co. *v.* Ashworth, 160 Mass. 186.

[185] McAdams *v.* Sutton, 24 O. St. 333; Kerr *v.* O'Connor, 63 Pa. St. 341; Remele *v.* Donahue, 54 Vt. 555.

[186] 2 Ld. Raym. 1574, 1583.

is case, not trespass;[187] though it has been held that trespass may be brought. "The person who will not house or chain his dogs becomes consenting to the mischief which they commit, and takes upon himself the risk of saying—Go at large; if you destroy sheep, I will pay for them. It is not like the doing some act, innocent in itself, from which the person could not reasonably infer that injury or damages would follow and which, when they did happen, were rather the result of accident or misadventure than design." [188] And where a dog was set upon some horses, one of which, while being pursued and jumping a fence, was killed, it was held that trespass was the proper remedy.[189]

Such an action may survive the plaintiff's death by statute though it does not at common law.[190]

If a dog owned or kept in one State strays into another and there bites a person, no action lies against the owner or keeper under a statute of the former State dispensing with proof of *scienter* on the part of the owner.[191]

By the Roman Law where a domestic animal has committed an injury by no one's fault an *actio de pauperie* lies, *pauperies* being damage inflicted without a wrongful act on the part of the agent. An action on the case lies where the injury by the animal is the result of another's act or neglect.[192]

In pleading, it has already been said that it is not necessary to aver negligence in keeping.[193] Nor need the place of

[187] Dilts *v.* Kinney, 15 N. J. L. 130; Stumps *v.* Kelley, 22 Ill. 140; Mulherrin *v.* Henry, 11 Pa. Co. Ct. 49; Fallon *v.* O'Brien, 12 R. I. 518.

[188] Paff *v.* Slack, 7 Pa. St. 254. And see Dolph *v.* Ferris, 7 W. & S. (Pa.) 367.

[189] Painter *v.* Baker, 16 Ill. 103, quoting Lord Ellenborough: "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief comes to any person, I am answerable in trespass."

[190] Prescott *v.* Knowles, 62 Me. 277.

[191] Le Forest *v.* Tolman, 117 Mass. 109.

[192] See Salkowski's Rom. Priv. Law § 137.

[193] See § 94, supra.

keeping be alleged,[194] nor that it was the duty of the defendant to use reasonable care.[195] The plea of "not guilty" puts in issue the ferocity of the animal and the *scienter* of the defendant.[196]

The amount of damages should include such as naturally arose from the injury sustained, as medical attendance, suffering and inability to attend to business.[197] Proof of the plaintiff's daily earnings is admissible.[198] In the case of the bite of a dog, especially in a warm climate, it is a very serious matter outside of the actual pain. The dangers of lockjaw, the fear of hydrophobia, and the general shock to the system are all to be taken into consideration.[199] So, evidence was held admissible that a child ever since the bite had shown signs of fright and excitement at the sight of any dog.[200] And where the petition alleged that the plaintiff was still suffering, it was held that damages should not be limited to the date of bringing the suit.[201] But damages for future pain and anguish are not allowed unless the petition alleges that the plaintiff has not recovered.[202] The action may be brought without regard to the extent of the bite or the size of the dog.[203] Where a dog that had previously bitten the plaintiff's wife flew at her when she was *enceinte* and caused a miscarriage, the defendant was held liable. "The law is settled that if a breach of duty exposes a person toward whom the duty is contracted to obvious peril, the act of the latter in endeavoring to escape from the peril, although it may be the

[194] Brooks *v.* Taylor, 65 Mich. 208.
[195] Card *v.* Case, 5 C. B. 622. [196] Ibid.
[197] Warner *v.* Chamberlain, 7 Houst. (Del.) 18; Gries *v.* Zeck, 24 O. St. 329.
[198] Hubert *v.* Bedell, 50 N. Y. St. Repr. 251.
[199] The Lord Derby, 17 Fed. Rep. 265.
[200] Roswell *v.* Leslie, 133 Mass. 589.
So, injuries to a flock of sheep by fright may be shown: Campbell *v.* Brown, 19 Pa. St. 359.
[201] Lemoine *v.* Cook, 36 Mo. App. 193.
[202] Shultz *v.* Griffith, 103 Ia. 150. [203] Ritter *v.* Ewing, 4 Pa. Dist. 203.

immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrong-doer." [204] Where an infant child had been wounded by a vicious animal and thereby been disfigured or deformed, it was held that the father could recover only for such expenses as he incurred in healing the original wound, not for those incurred in removing the deformity or disfiguration.[205]

Where a statute gives double damages for injuries from dogs to "any person injured," a parent may bring an action for the loss of services of a minor child and the expenses to which he is put.[206] But a statute giving double damages to one whose domestic animal is killed by a dog was held penal and not designed for cases where the owner of the dog was in no matter at fault; it did not apply to the case of a mad dog.[207]

Exemplary damages have been granted in the case of the bite of a dog where gross negligence has been proved;[208] and where *scienter* need not be shown by statute evidence of it is admissible in aggravation of damages.[209] But where one voluntarily assisted in harnessing a vicious horse, it was held that vindictive damages were not recoverable.[210]

In the absence of proof as to how much damage was done by each of a number of animals, the presumption is that all did equal damage.[211] But where two dogs of different sizes killed sheep in the dark, the jury were held to have rightly

[204] Hall *v.* Atkinson, London Law. Jour., cited in 14 Alb. L. Jour. 104.

[205] Karr *v.* Parks, 44 Cal. 46.

[206] McCarthy *v.* Guild, 12 Metc. (Mass.) 291.

[207] Elliott *v.* Herz, 29 Mich. 202. And see the dissenting opinion.

[208] Meibus *v.* Dodge, 38 Wis. 300; Hahn *v.* Kordula, 5 Kan. App. 142; Falardeu *v.* Couture, 2 Low. Can. Jur. 96.

Where the injury occurred through the negligence of the carrier's servant in fastening the dog, punitive damages cannot be recovered from the carrier: Trinity & S. R. Co. *v.* O'Brien (Tex. Civ. App.), 46 S. W. Rep. 389.

[209] Swift *v.* Applebone, 23 Mich. 252; Koestel *v.* Cunningham, 97 Ky. 421.

[210] Brown *v.* Green (Del.), 42 Atl. Rep. 991.

[211] Partenheimer *v.* Van Order, 20 Barb. (N. Y.) 479.

determined that the bigger dog killed more sheep.[212] The plaintiff cannot recover for the aggravation of his wound by improper surgical treatment.[213]

Though a statute imposes on a town the duty of paying damages for sheep killed by dogs, the law will not imply a contract to do it, there being no consideration therefor.[214] Where the statute charged the owner of such a dog with the amount of damage done as fixed by the selectmen of the town, without an opportunity of being heard, it was held so far unconstitutional.[215] Otherwise where the statute implies that if the matter is not settled without suit, the fact of the injury and the amount of damages are to be determined in other suits for which provision is made.[216]

[212] Wilbur *v.* Hubbard, 35 Barb. (N. Y.) 303.

[213] Moss *v.* Pardridge, 9 Ill. App. 490.

[214] Davis *v.* Seymour, 59 Conn. 531.

A town paying such damages succeeds to the rights of the owner and may, by statute, maintain a joint action against the owners of the dogs: Fairchild *v.* Rich (Vt.), 34 Atl. Rep. 692.

[215] East Kingston *v.* Towle, 48 N. H. 57.

[216] Wilton *v.* Weston, 48 Conn. 325.

TITLE V.

BAILMENT AND CARRIAGE.

CHAPTER I.

BAILMENT.

98. Nature of bailment.
99. Rights of the bailee.
100. Duties and liabilities of the bailee.
101. Negligence of servants.
102. Driving or riding beyond the agreed point; Sunday driving.
103. Action; damages.
104. Agistment.
105. Lien of agistors and trainers.
106. Breeding.
107. Livery-stable keepers.
108. Lien of livery-stable keepers.
109. Innkeepers.

98. Nature of Bailment.—The principles of the law of Bailment as applied to animals involve many peculiarities that require careful consideration. Where an animal is borrowed, the borrower is bound to exercise extraordinary care over it.[1] Where it is hired, the degree of care required is such as is usual with men of ordinary discretion in the use of their own property.[2] The latter rule applies to all cases where the possession of the animal is for the joint advantage of bailor and bailee.[3] Therefore, if one who wishes to buy a horse, takes it on trial and it dies or is injured in his possession, he

[1] Hagebush *v.* Ragland, 78 Ill. 40.

[2] Howard *v.* Babcock, 21 Ill. 259; Bennett *v.* O'Brien, 37 id. 250; Moore *v.* Cass, 10 Kan. 288.

[3] Jackson *v.* Robinson, 18 B. Mon. (Ky.) 1.

is liable only for lack of ordinary care.[4] And where the plaintiff having a horse for which he had no use, to avoid the expense of keeping it, requested the defendant to take it and do his work with it in consideration of its food and keeping, this was held not to be a mere gratuitous loan, under which the defendant would be required to use extraordinary care but a contract for the mutual benefit of both parties under which ordinary care was sufficient.[5] In ordinary cases of borrowing, however, the bailment does not lose its gratuitous character because the bailee pays for the keep of the animal while he has it in his possession.[6] Where a horse was placed by A. in B.'s possession with the understanding that it was to be worked for its food and was to do A.'s plowing and milling and to be used by A. when she wanted it, this was held to be a contract of bailment and governed by the principle that the bailee cannot dispute the bailor's title.[7]

Where one rides a horse at the request of the owner for the purpose of exhibiting and offering it for sale without any benefit to himself, he is bound to use such skill as he possesses and, if proved to be skilled in the management of horses, is equally liable with a borrower for an injury done to the horse.[8]

An agreement whereby one undertakes to make a horse gentle and fit for the use of the owner's family in consideration of permission to ride it, is a contract of hiring and not a gratuitous loan.[9] So, one who is hired to drive horses is like a bailee for hire and liable only for negligence, unskilfulness or wilful misconduct.[10] One with whom a horse is left

[4] La Borde *v.* Ingraham, 1 Nott & McC. (S. C.) 419; Nichols *v.* Balch, 8 Misc. (N. Y.) 452; Colton *v.* Wise, 7 Ill App. 395.

[5] Chamberlin *v.* Cobb, 32 Ia. 161. [6] Bennett *v.* O'Brien, 37 Ill. 250.

[7] Maxwell *v.* Houston, 67 N. C. 305.

[8] Wilson *v.* Brett, 11 M. & W. 113. But there being no personal benefit, it may be doubted whether extraordinary care could be required in such a case.

[9] Neel *v.* State, 33 Tex. Cr. 408.

[10] Newton *v.* Pope, 1 Cow. (N. Y.) 109.

to be trained must take such care of it as an ordinarily prudent person would take of his own property.[11]

If A. delivers cattle to B. who promises to re-deliver them within one year with the natural increase and to pay for such as should be lost or destroyed, this is letting the cattle for a valuable consideration, viz., the return of the increase, and not a mere naked bailment.[12]

A contract by which a yoke of cattle was delivered to a hirer "to keep and use in a farmer-like manner for one year" and then to return them, with the privilege of paying an agreed price and keeping them, the hire being paid at the time, was held to be a bailment, not a conditional sale.[13] So, where A. delivered to B. two colts under a contract that B. should keep and sell them before a certain date for A., who fixed the minimum price,—if not, that he should return them in good condition.[14]

Where A., having found out the price of B.'s horse, asked to take and try it, promising to return it in good condition if he did not like it, and the horse was delivered by B. to A.'s servant, but, on the way to the latter's house and without the servant's fault, escaped, was injured and was not tried by A. or returned to B., it was held that an action for the price could not be maintained, as the contract was one of bailment, not of sale.[15]

Where B. undertook to transport A.'s cattle to his farm at his expense and there care for them for some weeks in order that they might be profitably marketed by A., and agreed that they should not deteriorate in flesh or condition, that he would pay for all losses, and employ at his own expense a herdsman selected by A., and be compensated by the money

[11] Kimball *v.* Dahoney (Ky.), 38 S. W. Rep. 3.

[12] Putnam *v.* Wyley, 8 Johns. (N. Y.) 432.

[13] Chamberlain *v.* Smith, 44 Pa. St. 431. And see Colton *v.* Wise, 7 Ill. App. 395.

[14] Middleton *v.* Stone, 111 Pa. St. 589.

[15] Hunt *v.* Wyman, 100 Mass. 198.

realized from the sale of the cattle exceeding a stated sum per head, after deducting expenses of shipment and sale, and also waived any lien against the cattle,—this was held not to be a conditional sale but a bailment.[16]

99. Rights of the Bailee.—Before considering the important question of the responsibilities of the bailee, a few words may be said regarding some of his rights.

The lessee of an animal cannot be divested of possession by the lessor's sale to a third party;[17] and the lessor is liable in trover if he removes the animal before the term has expired.[18] Nor as a general rule can the owner recover if the animal is injured by doing the very thing contracted for,[19] though this rule has qualifications that will be considered later. And where a horse is let on a contract providing that on a day's notice it should be returned in the same condition as when received, its death without the bailee's fault is an excuse for non-compliance.[20]

Where both parties are silent as to the number of persons who may ride in a hired carriage, the hirer may carry such a number as the vehicle was made for, not exceeding the ordinary load adapted to the team.[21] And the hirer of a horse is authorized to put on the horse, in addition to his own weight, such reasonable baggage as is usual for men to carry on horseback.[22]

[16] Union Stock-Yards & Transit Co. *v.* Western Land & Cat. Co., 59 Fed. Rep. 49.

[17] Hardy *v.* Lemons, 36 La. Ann. 146. See Mahon *v.* Crowe, 28 Nov. Sco. 250.

[18] Hickok *v.* Buck, 22 Vt. 149.

The owner of a horse left at another's stable to be boarded at a certain rate per week cannot end his responsibility for board by mere notice without accepting possession of the horse: Andrews *v.* Keith, 168 Mass. 558.

[19] Ruggles *v.* Fay, 31 Mich. 141.

[20] Amer. Preservers Co. *v.* Drescher, 4 Misc. (N. Y.) 482; Whitehead *v.* Vanderbilt, 10 Daly (N. Y.) 214.

[21] Harrington *v.* Snyder, 3 Barb. (N. Y.) 380.

[22] McNeill *v.* Brooks, 1 Yerg. (Tenn.) 73.

Where one undertakes to drive another's horses to a distant market and sell them as he would his own and becomes ill on the way and unable to attend to them in person, he may employ an agent to do so without incurring additional liability.[23] And where A. asked the agent of the seller of a horse to let him have it to try and the agent did so, it was held that A. was entitled to put a competent person on the horse and not limited to trying it himself.[24]

The bailee of an animal may maintain an action against a third person for an injury to the animal.[25] Thus, where the gratuitous bailee of a horse turned it into a field at night surrounded by a fence which his neighbor neglected to repair and by reason thereof the horse fell into an adjoining field and was killed, it was held that the bailee could recover the value of the horse in an action.[26] So, the bailee with whom a yoke of oxen are left "as a pawn or indemnity" for the return of a hired horse, may maintain detinue against any person who does not show a better title.[27] And the bailee may sue for the breach of a contract for the transportation of the animal,[28] or for the conversion of an animal unlawfully impounded.[29]

Where the hirer has paid the owner, the value of the animal may properly be recovered in an action by the hirer against the person through whose negligence it was killed.[30]

But where the owner of a horse delivered it to the plaintiff, an auctioneer, for sale with liberty to use it till sold, and the horse, while driven by the plaintiff's servant along a highway,

[23] McLean *v.* Rutherford, 8 Mo. 109.

[24] Camoys (Lord) *v.* Scurr, 9 C. & P. 383.

[25] Hare *v.* Fuller, 7 Ala. 717; Harrison *v.* Marshall, 4 E. D. Smith (N. Y.) 271.

He may recover for an injury done to it by a trespassing animal: Mason *v.* Morgan, 24 U. C. Q. B. 328, cited in § 76, supra.

[26] Rooth *v.* Wilson, 1 B. & Ald. 59. [27] Noles *v.* Marable, 50 Ala. 366.

[28] Harvey *v.* Terre Haute & I. R. Co., 74 Mo. 538.

[29] McKeen *v.* Converse (N. H.), 39 Atl. Rep. 435.

[30] Littlefield *v.* Biddeford, 29 Me. 310.

was frightened by a steam tramcar of the defendants travelling at an improper rate of speed and was injured and the plaintiff brought an action to recover for diminution in value, it was held that he, being under no liability to his bailor for the injury, could not recover.[31]

100. Duties and Liabilities of the Bailee.—The bailee of an animal must return it in as good a plight as when received with allowance for the ordinary results of use, and where it is returned in bad condition or is not returned at all the burden is on him of showing that he exercised due care.[32]

The law implies that the hirer is bound to provide the animal with food, unless there is an agreement to the contrary.[33] And where the hirer of a horse by improperly feeding and watering it made it sick and returned it in that condition to the owner, it was held that he was liable for the full value, if the owner by reasonable care employed a veterinary surgeon who used his best judgment in treating the animal, though such treatment was improper and contributed to its death.[34] It is the duty of the owner in such cases to use all reasonable efforts to cure the animal and for his expense, as well as for his trouble and attention, he may recover damages.[35] If the hirer himself calls in a physician, he is not answerable for a mistake which the latter may make in treatment, but if he prescribes for the horse himself and from unskilfulness gives it a medicine which causes its death, though acting in good faith he is liable to the owner as for gross negligence.[36]

After a hired horse has become sick or exhausted, the hirer

[31] Claridge *v.* South Staffordshire Tramway Co., [1892] 1 Q. B. 422.

[32] Morris *v.* Armit, 4 Ma. 152; Mackenzie *v.* Cox, 9 C. & P. 632; Arnot *v.* Branconier, 14 Mo. App. 431; Baren *v.* Cain, 15 Ill. App. 387; Bennett *v.* O'Brien, 37 Ill. 250; Purnell *v.* Miner (Neb.), 68 N. W. Rep. 942.

[33] Handford *v.* Palmer, 5 Moore 74.

[34] Eastman *v.* Sanborn, 3 Allen (Mass.) 594.

[35] Graves *v.* Moses, 13 Minn. 335. [36] Dean *v.* Keate, 3 Camp. 4.

is bound not to use it or he may become liable for its value.[37] Thus, it was held that the owner of a mare who lets her to a street-car company engages that she is fit for the service, but that, if she turns out not to be, it is the duty of the company to abstain from further use without obtaining the owner's consent.[38] On the other hand, it has been held that one is not, as matter of law, guilty of negligence in driving a hired horse after it has become sick or exhausted.[39]

Reasonable care must be exercised in driving or riding a horse: the bailee is responsible for overtasking its capacity; [40] and, unless he is manifestly incapable of exercising such care, it is immaterial whether or not the bailor expected he would be careless or unskilful.[41] If through carelessness the hirer allows the horses to run away, he is liable for the result.[42] But it is not necessarily an act of negligence to hitch a hired horse to a tree by a road for an hour or two, though the horse, in consequence of restlessness caused thereby, broke from the control of the driver and ran away.[43]

Where the drover for hire of cattle, some of which had been frightened away by a train, continued to the end of his journey before returning to seek the missing cattle, in an action against him it was held that evidence was admissible of what would have been the expense of feeding the rest of the drove during the probable delay caused by such a return and of the usual practice of drovers under like circumstances, but not of drovers for hire alone as distinguished from those that drove their own cattle; but that evidence of the price received for driving the missing cattle was not admissible as

[37] Bray *v.* Mayne, Gow 1; Thompson *v.* Harlow, 31 Ga. 348; Marshall *v.* Bingle, 36 Mo. App. 122.

[38] Bass *v.* Cantor, 123 Ind. 444.

[39] Spencer *v.* Shelburne, 11 Tex. Civ. App. 521.

[40] Wentworth *v.* McDuffie, 48 N. H. 402; Wilcox *v.* Hogan, 5 Ind. 546.

[41] Mooers *v.* Larry, 15 Gray (Mass.) 451.

[42] West *v.* Blackshear, 20 Fla. 457; Casey *v.* Suter, 36 Md. 1.

[43] Bradbury *v.* Lawrence, 91 Me. 457.

affecting the measure of care he was bound to exercise for their recovery.[44]

Where, without fault or negligence on the part of the borrower of a horse he was met by some cavalry officers of the United States who took the horse forcibly from him, he was held not liable. "The borrower is not liable if the goods be taken from him by robbery or irresistible force, or stolen out of his possession, he having exercised such extraordinary care. If, however, by his own rashness, he expose the property to such peril, he will be liable." [45] And, therefore, where one who hires a horse and buggy to go to a certain town and return agrees to put them in a livery-stable while at such town but fails to do so, he is liable to the owner for their value, if they are stolen.[46]

When animals are hired for certain uses and put to different uses also and when returned are found injured, the reasonable inference is that the injury occurred while they were being improperly used.[47] And where a party hires a team and a driver to be used at a certain place or for a certain purpose and uses them otherwise, he is responsible for an injury without any negligence on the driver's part: the driver is not the agent of the owner in respect to obeying such directions of the bailee as are not contemplated in the contract.[48] So, one hiring a horse for a definite time and using it after the time has expired, is liable for any injury that may happen to it.[49] A disregard of instructions as to the manner of using a horse will render a bailee for hire liable when the loss is occasioned thereby—a gratuitous bailee, perhaps, absolutely.[50] The subject of driving or riding horses beyond the agreed point is treated of in § 102, infra.

[44] Maynard *v.* Buck, 100 Mass. 40.
[45] Watkins *v.* Roberts, 28 Ind. 167. [46] Line *v.* Mills, 12 Ind. App. 100.
[47] Buchanan *v.* Smith, 10 Hun (N. Y.) 474.
[48] De Voin *v.* Mich. Lumber Co., 64 Wis. 616. And see Fox *v.* Young, 22 Mo. App. 386.
[49] Stewart *v.* Davis, 31 Ark. 518. [50] Cullen *v.* Lord, 39 Ia. 302.

The bailee of sheep should, in the absence of an express contract as to the manner of keeping, keep them separate from his ram during the period when he should restrain the latter from running at large.[51]

The bailee is not liable for an accidental injury or illness happening to the animal not due in any way to negligence;[52] except where he has failed to return it when the contract of hiring expired.[53] Thus, where one borrowed a horse which, when being driven, stumbled and was injured, the borrower is not liable if he can prove he has exercised reasonable care.[54] Some evidence of negligence must be given: the naked fact that the animal has become sick on a journey, or has been returned with its knees broken, has been held not sufficient to raise the presumption of negligence.[55] But the modern rule appears to be that proof of the non-return of the animal or of its return in an injured condition is *prima facie* evidence of negligence: the burden of accounting for these facts is on the bailee.[56] If the horse is not fit for the journey for which it was hired and becomes lame, it has been held that the hirer may leave it at an inn and give notice to the owner who is bound to send for it, and cannot recover for the price agreed on for the journey nor for the loss of the animal's services after notice.[57]

Where an ice company hired horses for scraping snow from ice, it was held not to be bound to have at that place ropes and appliances for hauling the horses out of the water in case

[51] Phelps *v.* Paris, 39 Vt. 511.

[52] Fortune *v.* Harris, 6 Jones L. (N. C.) 532; Millon *v.* Salisbury, 13 Johns. (N. Y.) 211; Hovey *v.* Bromley, 85 Hun (N. Y.) 540; Buis *v.* Cook, 60 Mo. 391; Leach *v.* French, 69 Me. 389; Henderson *v.* Barnes, 32 U. C. Q. B. 176.

[53] Cochran *v.* Walker (Tex. Civ. App.), 49 S. W. Rep. 403.

[54] Bain *v* Strang, 16 Rettie (Sc. Ct. Sess.) 186.

[55] Leach *v.* French, supra; Carrier *v.* Dorrance, 19 S. C. 30; Cooper *v.* Barton, 3 Camp. 5, note.

[56] See Schouler Bailm. (3d ed.) § 23; 3 Amer. & Eng. Encyc. of Law (2d. ed.) 750. See, also, § 104, infra.

[57] Chew *v.* Jones, 10 L. T. 231.

they broke through, and not to be liable for not notifying the driver of a thin place, where the horses were uncontrollable and such a precaution could not have saved them.[58]

Where an animal is hired or borrowed so as to give the hirer or borrower complete control over it, he and not the owner is responsible for damage arising from its vicious habits,[59] or trespasses,[60] or from his own negligence.[61]

Where one of several joint hirers drives and causes an injury to the carriage and horses, the agreement having been that the driver alone should drive, all of the hirers are liable.[62] So, where a horse is hired by A. and delivered on his credit by the owner to B. who drives it to death with the cooperation of A., who is driving another horse in company with him—they may be held jointly liable.[63] And where the defendants hired a team of horses and one of the defendants shot one, alleging it was diseased and acting merely on his own opinion which was shown by the evidence to have been erroneous, it was held that the defendants were jointly liable for the horse's death.[64]

101. Negligence of Servants.—When the servant of a bailee for hire of a mare takes and uses it in the business in which he is employed by the bailee, the master is liable for a loss arising from carelessness, though no express assent is shown.[65] So, one who hires a horse and carriage is liable

[58] Stacy *v.* Knickerbocker Ice Co., 84 Wis. 614.

[59] Bell *v.* Leslie, 24 Mo. App. 661, citing Shearm. & Red. on Negl. § 195. Otherwise, where the resulting injury is to the animal itself. The plaintiff must then show that it is not vicious: Hale *v.* Smith, 78 N. Y. 480. And see, on this subject, § 96, supra. See, also, Béliveau *v.* Martineau, Montr. L. Rep. 2 Q. B. 133.

[60] See § 76, supra. [61] Bard *v.* Yohn, 26 Pa. St. 482.

Where he is injured as the result of the slipping of a saddle which he knew was improperly adjusted, he cannot recover: Wilson *v.* Dickel, 7 N. Y. App. Div. 175.

[62] O'Brien *v.* Bound, 2 Spears (S. C.) 495.

[63] Banfield *v.* Whipple, 10 Allen (Mass.) 27.

[64] Morris *v.* Armit, 4 Ma. 152. [65] Sinclair *v.* Pearson, 7 N. H. 219.

for an injury caused by the negligence of his coachman who, instead of obeying his orders to take them to the stable, drove them for his own purpose in a different direction.[66] But he is not liable for the negligence of an innkeeper or hostler to whom his driver without negligence had entrusted the horses.[67] If the manager of sheep has the direct charge and control of them as a bailee and employs the herders to assist him and they are subject to his directions, he is responsible for their acts, done within the scope of his employment, though done without his knowledge or authority and contrary to his order.[68]

Where the owner of a carriage hired of a stable keeper a pair of horses to draw it for a day and the owner of the horses provided a driver through whose negligent driving an injury was done to a third person, the owner of the carriage was held not liable.[69] And where the horses are injured under such circumstances, the hirer is not liable;[70] unless he has interfered with the driving, in which case the owner may maintain trespass *vi et armis* against him.[71]

The hirer of mules who substitutes a driver instead of the owner's is guilty of conversion and liable for damages whether negligent or not and whether he directed the substitution or simply permitted it.[72]

Where a company was in the business of furnishing boys to drive teams for customers and, on request, sent one to the plaintiff and through the boy's negligence the team ran away

[66] Coupé Co. *v.* Maddick, [1891] 2 Q. B. 413.

See an article in 17 L. Mag. & Rev. 97 by Thomas Beven, Esq., disapproving of this decision on the ground that the master should not be held liable for the wilful act of his servant in such a case.

[67] Ruggles *v.* Fay, 31 Mich. 141. [68] Bileu *v.* Paisley, 18 Oreg. 47.

[69] Laugher *v.* Pointer, 5 B. & C. 547. And see to the same effect Sammell *v.* Wright, 5 Esp. 263; Smith *v.* Lawrence, 2 M. & R. 1; Quarman *v.* Barnett, 6 M. & W. 499.

See Hughes *v.* Boyer, infra, where the point was left undecided.

[70] Hughes *v.* Boyer, 9 Watts (Pa.) 556.

[71] Dean *v.* Branthwaite, 5 Esp. 35.

[72] Kellar *v.* Garth, 45 Mo. App. 332.

and one of the horses was injured and had to be shot, the company was held liable.[73]

Where a horse received an injury while being shod by a farrier, the accident being caused by his groom striking him with a whip, the farrier was held relieved from liability though no damage would have resulted had it not been for the unsafe condition of the floor of the smithy.[74]

102. Driving or riding beyond the agreed point; Sunday driving.—The cases generally hold that one going beyond the agreed distance with a hired horse is guilty of conversion and liable without regard to negligence, if injury or death has resulted therefrom to the horse.[75] If the owner, however, receives payment for the whole distance travelled he thereby ratifies the hirer's act so that trover will not lie, and if the horse has been injured by ill usage, the owner's remedy is by action on the case for misfeasance.[76]

An infant also is liable in trover in such a case.[77] Thus, where A., an infant, hired a horse from B. and agreed not to drive it beyond G. but returned it sick and took another horse with the intention of driving it beyond G. without, however, disclosing such intention to B. who understood he was not to drive it beyond G., and the horse was over-driven and died in consequence, A was held liable in tort.[78] But an action of contract for riding cannot be changed into tort in order to make the defendant, an infant, liable.[79]

Where one hires a horse to drive to a particular place and

[73] Amer. Dist. Tel. Co. *v.* Walker, 72 Md. 454.

[74] Allan *v.* Mullin, 4 Leg. News (Can.) 387.

[75] Wheelock *v.* Wheelwright, 5 Mass. 104; Lucas *v.* Trumbull, 15 Gray (Mass.) 306; Martin *v.* Cuthbertson, 64 N. C. 328; Farkas *v.* Powell, 86 Ga. 800; Welch *v.* Mohr, 93 Cal. 371; Kennedy *v.* Ashcraft, 4 Bush (Ky.) 530; Fisher *v.* Kyle, 27 Mich. 454; Murphy *v.* Kaufman, 20 La. Ann. 559; Evertson *v.* Frier (Tex. Civ. App.), 45 S. W. Rep. 201.

[76] Rotch *v* Hawes, 12 Pick. (Mass.) 136.

[77] Homer *v.* Thwing, 3 Pick. (Mass.) 492. [78] Ray *v.* Tubbs, 50 Vt. 688.

[79] Jennings *v.* Rundall, 8 Term 335.

on his return unintentionally takes a wrong road and, after driving a few miles thereon and discovering his mistake, takes what he thinks to be the best way back to the place of hiring, he is not liable in trover for the conversion of the horse.[80] And the contract to go to a certain place does not confine the hirer to a particular road nor prevent his deviating from the road chosen, if done prudently to rest or refresh the horse or for any other purpose not detrimental to the animal.[81] Nor does mere delay amount to a conversion, where the horse was hired to drive to and from a place without stopping.[82]

A well-considered modern case departs somewhat from the older rule stated above and holds that a mere diversion from the line of travel or going beyond the point for which a team was hired will not, without more, amount to a conversion of the property for which an action will lie. The court says of the old rule: "It must be borne in mind that in almost every case where that strict rule has been applied, the facts have shown that the hirer, in addition to departing from the contract line of travel, was guilty of negligence or wilful misconduct or that he injured or destroyed the property while outside of the limits of the contract of hiring. . . . To constitute a conversion in a case like that at bar, there must be some exercise of dominion over the thing hired in repudiation of, or inconsistent with, the owner's rights. We hold that the mere act of deviating from the line of travel which the hiring covered, or going on beyond the point for which the horse was hired, are acts which in and of themselves do not necessarily imply an assertion of title or right of dominion over the property, inconsistent with, or in defiance of, the bailor's interest therein." [83]

[80] Spooner *v.* Manchester, 133 Mass. 270.

[81] Early *v.* Wilson, 2 Harr. (Del.) 47. [82] Evans *v.* Mason, 64 N. H. 98.

[83] Doolittle *v.* Shaw, 92 Ia. 348, 26 L. R. A. 366 and note. The note says, "While Doolittle *v.* Shaw is a departure from the weight of authority upon this question, it certainly has much more of equity and the spirit

Where the contract has been made on Sunday and is, therefore, generally void,[84] this does not preclude an action of tort being brought for an injury resulting from driving beyond the agreed distance or from negligence or wilfulness of any other kind.[85] There are some decisions to the contrary,[86] but the above rule is undoubtedly better law.

103. Action; Damages.—It has been already said that the bailee may bring an action for an injury to the animal.[87] If the owner seeks to recover for the killing of his animal by a third person while in the hands of a bailee for hire, his remedy is case, not trespass.[88] And the bailee's negligence was held no defence where the action was brought by the owner for a colt's death from falling into a ditch negligently constructed by the defendant through a corner of the bailee's enclosure.[89] Where A. had hired out his horse to B. for a month and B. kept it for two months and then sold it to C., it was held that A. might recover the value from C., though the latter had acted *bona fide* and had paid B. the full value.[90]

Where A. let B. his team to be used for joint account on the lands of A., and B. left it unfastened while he got over

of modern decisions in it than have the older decisions which regard the slightest intentional deviation from the terms of the contract as a conversion which charges the hirer with the value of the horse at that time and only permits him to avoid paying the owner for it by its return to the latter while equally valuable."

[84] See Berrill *v.* Smith, 2 Miles (Pa.) 402; Chenette *v.* Teehan, 63 N. H. 149.

[85] Stewart *v.* Davis, 31 Ark. 518; Frost *v.* Plumb, 40 Conn. 111; Hall *v.* Corcoran, 107 Mass. 251; Morton *v.* Gloster, 46 Me. 520; Woodman *v.* Hubbard, 5 Fost. (N. H.) 67; Doolittle *v.* Shaw, supra.

[86] See Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Way *v.* Foster, 1 Allen (Mass.) 408 [overruled in Hall *v.* Corcoran, supra]; Whelden *v.* Chappel, 8 R. I. 230.

[87] See § 99, supra.

The bailee cannot bring trespass against the bailor for feeding and caring for the stock: Sheaffer *v.* Sensenig, 182. Pa. St. 634.

[88] Hall *v.* Pickard, 3 Camp. N. P. 187.

[89] Kellar *v.* Shippee, 45 Ill. App. 377. [90] Shelley *v.* Ford, 5 C. & P. 313.

the fence into the highway and fought with C., which caused the horses to run away, one of them being killed in consequence,—it was held that, as against strangers, B. was A.'s agent in the care of the team and that his want of ordinary care being the proximate cause of the loss, A. could not recover against C.[91]

Where the bailee has agreed to pay the price of the animal if it is not in good condition when he returns it, the acceptance of the animal is no waiver of the bailor's right of action.[92] And where the bailor presents an account for hire in which there is no claim for damages for the loss of the horse, and takes a receipt "in full of all demands," this receipt does not bar a recovery for the loss: it may be explained by evidence *aliunde*.[93] In an action against the bailee to recover the value of an animal killed, the bailee cannot, under a general denial, show that it had been killed without his fault.[94]

The measure of damages where the animal is returned and accepted is the difference between its value at the time of conversion and at that of return.[95] Where the horse was sent to the farrier's for six weeks to be cured and it was then ascertained that it had been permanently damaged to the extent of twenty pounds, it was held that the proper measure of damages was the keep of the horse at the farrier's, the amount of his bill, and the difference between the value of the horse at the time of the accident and at the end of the six weeks, but that the plaintiff ought not to be allowed also for the hire of another horse during the six weeks.[96]

[91] Puterbaugh *v.* Reasor, 9 O. St. 484. [92] Austin *v.* Miller, 74 N. C. 274.

[93] Bigbee *v.* Coombs, 64 Mo. 529.

[94] Cochran *v.* Walker (Tex. Civ. App.), 49 S. W. Rep. 403.

As to the burden of proof in an action by the owner against the bailee, see §§ 100, supra, 104, infra.

[95] Gove *v.* Watson, 61 N. H. 136.

[96] Hughes *v.* Quentin, 8 C. & P. 703.

As to a sheriff's right to be compensated for the keep of cattle seized under a fi. fa. where a claim to some of them has been admitted, see Brady *v.* Williams, [1898] 2 I. R. 703.

Nor is the fact that a party had other horses to use in place of the damaged one an element in the estimate of damages.[97]

Where the bailee agreed to pay one dollar a day for the use of oxen and to feed and care for them till they were returned, it was held that the bailor's pecuniary compensation was limited to the number of days they were actually used, though they were kept for a longer time.[98]

104. Agistment.—Agistors of cattle, as Judge Story says in his work on Bailments, "do not insure the safety of the cattle agisted, but they are merely responsible for ordinary negligence. It will, however, be such negligence for an agistor or his servants to leave open the gates of his field; and if, in consequence of such neglect, the cattle stray away and are stolen, he will be responsible for the loss. They have also, in virtue of their custody, such a possession and title that they may maintain trespass or trover against a wrong-doer for any injury to their possession, or any conversion of the property. By the Roman law the agistor was made responsible, not only for reasonable diligence but for reasonable skill in his business, and ignorance of his proper duty is treated as negligence. . . . The same rule prevails in the modern foreign law." [99]

That agistors, as such, do not insure the safety of the animals entrusted to them and are responsible only for ordinary negligence is a well-settled principle.[100]

Where the bailor has shown that the animals were not re-delivered or were re-delivered in an injured condition, the

[97] Fulliam *v.* Hagens, 83 Ia. 763.

[98] Learned-Letcher Lumber Co. *v.* Fowler, 109 Ala. 169.

[99] Story Bailm. § 443.

[100] Broadwater *v.* Blot, Holt 547; Brush *v.* Clarendon Land, I. & A. Co., 2 Tex. Civ. App. 188; Callahd *v.* Nichols, 30 Neb. 532; Waldo *v.* Beckwith, 1 N. M. 97; Wood *v.* Remick, 143 Mass. 453; Union Stock Yard & T. Co. *v.* Mallory, etc., Co., 157 Ill. 554; Mansfield *v.* Cole, 61 id. 191; Umlauf *v.* Bassett, 38 id. 96; Ransom *v.* Getty, 37 Kan. 75; Robin *v.* Brière, Montr. L. Rep. 7 Q. B. 361.

burden of accounting for the loss or injury is on the agistor. There is some conflict in the decisions, but this appears to be the better rule.[101]

The agistor is not liable for a loss resulting from severe weather, where there has been no negligence on his part;[102] nor is he liable where the animals were in a bad condition to endure cold weather when he received them;[103] nor where an animal unaccountably disappeared though the fence was a sufficient one.[104]

The rule, as was said, is otherwise where there is negligence. The agistor is liable if his fence is not a good one: in such a case, he should immediately repair it.[105] Thus, he is responsible if sheep escape into another field and become infected by other sheep.[106] But in New York it has been held that the agistor is not liable for cattle contracting Texas fever from being pastured in fields previously occupied by Texas cattle when he did not know there was such danger, —the liability of native cattle to contract disease under such circumstances not being sufficiently well known in that State to charge the defendant constructively.[107] When cattle escape from an agistor's field, it is his duty to find and reclaim them and, if he is guilty of negligence in not using proper care over them, in legal effect he suffers them to run at large.[108]

Where the agistor knowingly keeps a vicious animal on

[101] See Schouler Bailm. (3d ed.) § 23; 3 Amer. & Eng. Encyc. of Law (2d ed.) 750; Ware Cattle Co. *v.* Anderson (Ia.), 77 N. W. Rep. 1026; Goodfellow *v.* Meegan, 32 Mo. 280; Cummings *v.* Mastin, 43 Mo. App. 558; Rayl *v.* Kreilich, 74 id. 246; Wood *v.* Remick, supra; Sutherland *v.* Hutton, 23 Rettie (Sc. Ct. Sess.) 718; Bélanger *v.* Quiner, 9 Rev. Leg. (Can.) 530.

[102] Brush *v.* Clarendon Land, I. & A. Co., 2 Tex. Civ. App. 188.

[103] O'Keefe *v.* Talbot, 84 Ia. 233. [104] Race *v.* Hansen, 12 Ill. App. 605.

[105] Cecil *v.* Preuch, 4 Mart. N. S. (La.) 256; Lucia *v.* Meech (Vt.), 34 Atl. Rep. 695.

[106] Sargent *v.* Slack, 47 Vt. 674.

[107] Gibbs *v.* Coykendall, 39 Hun (N. Y.) 140. See §§ 88, 89, supra.

[108] Schlachter *v.* Wachter, 78 Ill. App. 67.

his place, he is liable for an injury happening therefrom to the agisted animal.[109] But he is not exempt from liability merely on the ground that he did not know the animal to be ferocious. All the circumstances may, nevertheless, show a want of reasonable care and the rule as to *scienter* does not apply to such cases of contract.[110]

Where the agisted horse was killed by falling into a hole in a field situated over old mineral workings, which hole had been noticed some time before by neighbors, it was held that the agistor was liable as he had failed to take that reasonable care of the property which a reasonable man would have taken of his own.[111] On the other hand, where a horse was drowned in a pond or quagmire existing to the owner's knowledge on the pasture ground, the agistor was held not liable because he had not fenced it off, such places not being usually fenced.[112]

Where the plaintiff agreed not to overstock the pasture, it was held that such agreement was not affected by the defendant's having inspected the pasture before the cattle were turned in, so that he might have known it would be overstocked.[113] Where the kind of pasturage is expressly defined in the contract, an instruction that the agistor is required to furnish only the average quantity and quality for the locality and the season is properly refused.[114]

The agistor is bound to employ careful and trustworthy servants and is liable for injuries done by them through negligence, though not if they are malicious or wilful.[115] He must notify his customers as to any unusual risk to which

[109] Schroeder *v.* Faires, 49 Mo. App. 470.

[110] Smith *v.* Cook, 1 Q. B. D. 79, approving of Dolph *v.* Ferris, 7 W. & S. (Pa.) 367. And see the review of this case in 10 Ir. L. T. 117.

[111] McLean *v.* Warnock, 10 Rettie (Sc. Ct. Sess.) 1052. And see Pearce *v.* Sheppard, 24 Ont. 167.

[112] McKeage *v.* Pope, Rap. Jud. Quebec, 10 C. S. 459.

[113] McAuley *v.* Harris, 71 Tex. 631.

[114] Ware Cattle Co. *v.* Anderson (Ia.), 77 N. W. Rep. 1026.

[115] Halty *v.* Markel, 44 Ill. 225.

their cattle are exposed on his land.[116] He is bound to know about the health of the animals he takes and if he knows of their having a contagious disease and neglects to inform a customer of the fact, whose horse takes the disease and dies, he is liable for its value, though the contract of pasturage is void because entered into on Sunday.[117] On the other hand, where the agistor was to receive as compensation part of the wool and increase of sheep and the fact was fraudulently concealed from him that some of them were diseased, it was held that he was entitled as damages to the cost in time and expense of caring for them, including that required by the disease, less any profits realized under the contract.[118]

Under a contract to pasture for a term not longer than eight months, the owner reserving the right to remove the animals whenever he was liable to loss from lack of food or water, paying for the expired time, it was held that the agistor did not bind himself to pasture for the full eight months but might recover for the time actually used.[119]

If the agistor sells the agisted animals without authority or reason to suppose he had authority, he is guilty of larceny as bailee.[120] Where by the contract he has authority to sell them to pay the expenses of keeping, he has the right to sell as many as will pay the debt: to sell more is a conversion.[121] It has been held that the proprietors of a stock-yard, whose business it is to furnish temporary accommodation for animals, are authorized to sell such stock, when the owner cannot be found, for his account.[122] The agistor has no authority to pledge the animals, and a farmer who received

[116] McLain *v.* Lloyd, 5 Phila. (Pa.) 195.

[117] Costello *v.* Ten Eyck, 86 Mich. 348.

[118] Parker *v.* Marquis, 64 Mo. 38. [119] Meuly *v.* Corkill, 75 Tex. 599.

[120] Reg. *v.* Leppard, 4 F. & F. 51.

He is not guilty of larceny at common law. See § 51, supra.

[121] Whitlock *v.* Heard, 13 Ala. 776.

[122] Millcreek Tp. *v.* Brighton Stock Yards Co., 27 O. St. 435. See, as to their responsibilities, Union Stock Yard & T. Co. *v.* Mallory, etc., Co., 157 Ill. 554.

sheep from an agistor was held liable in trover to the owner, on his claiming to detain them for a debt due the agistor, and was not allowed to deduct from the amount of the credit the sum for feed which had been tendered by the owner and refused.[123] That an agistor has used feed belonging to an estate of which he is administrator without accounting for it is no defence in an action brought by him as an individual against the owner of cattle for their keeping.[124]

Under a contract for the pasturage of cattle, on breach of provisions to furnish them with water and protect them by fences, the owner may recover for all damage to the cattle thereby and is not limited to the recovery of the amount expended by him in trying to protect himself from damage after the breach.[125]

Where the agistor had falsely represented that there would be a sufficient supply of water during the whole winter for cattle pastured in his lands which were at no time under his control or subject to his direction, the measure of damages was held not to be the market value of the cattle lost and the difference between the value of the herd as wintered and their value if the supply of water had been ample, but the increased cost and inconvenience in driving them to water or moving them to proper quarters,—the agistor not being an insurer of the lives or health of the herd.[126] And the proper damages in an action for violating a contract for the use of a well were held to be the cost of hiring a man to drive the stock twelve miles over a rough and dry country and the resulting damages to the stock: the value of the horses that killed themselves seeking for water while so driven was held too remote.[127] Where a water company failed to comply with their contract to furnish cattle with water and the owner was obliged, in consequence thereof, to construct a fence-way

[123] Prentice *v.* Taylor, 1 F. & F. 469. [124] Bates *v.* Sabin, 64 Vt. 511.
[125] Hardin *v.* Newell (Tex. Civ. App.), 40 S. W. Rep. 331.
[126] Godding *v.* Colo. Springs Live Stock Co., 4 Colo. App. 14.
[127] Westfall *v.* Perry (Tex. Civ. App.), 23 S. W. Rep. 740.

to the river, it was held that he was entitled to the expense so incurred, if he used reasonable care, and that he was not bound to inquire whether another company could supply the water, unless he knew such facts as would have put a prudent man on inquiry.[128] Where the owner of cattle, in consequence of the defendant's breach of contract to furnish distillery slop to fatten them, was compelled to sell them at a sacrifice, he may recover the reasonable profits he would have made if the contract had been carried out.[129]

An action against an agistor to recover damages is an action founded on tort.[130]

While the defendant was in possession of land as care-taker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant. It was held that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit and, as long as the cattle were upon the land, the defendant was not in exclusive possession and the Statute of Limitations did not begin to run in his favor.[131]

105. Lien of Agistors and Trainers.—The common-law principle governing liens was thus laid down by Parke, B., in Jackson *v.* Cummins:[132] "The general rule . . . is that by the general law, in the absence of any special agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now the case of agistment does not fall within that principle, inasmuch as the agistor does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession; . . . he simply takes in the animal to feed it."

[128] Waco Artesian Water Co. *v.* Cauble (Tex. Civ. App.), 47 S. W. Rep. 538.
[129] New Market Co. *v.* Embry (Ky.), 48 S. W. Rep. 980.
[130] Turner *v.* Stallibras, [1898] 1 Q. B. 56.
[131] Rennie *v.* Frame, 29 Ont. 586. [132] 5 M. & W. 342.

No agistor's lien, therefore, exists at the common law,[133] unless there is a special agreement.[134] Such a lien is, however, commonly given by statute,[135] and a claim therefor has been held to be assignable.[136] The lien is confined to the kind of animals mentioned in the statute.[137] Where the law provided that the agistor should have a lien until the charges under the agreement are paid, the buyer of a mare with foal, who agreed that the seller should have the colt when four months old, was held to have no lien on the colt for the amount the seller agreed to pay for the use of the mare, there being no agreement by which the latter was to pay anything for the care or keep of the colt.[138] But where one takes a number of animals to pasture on an entire contract for an agreed sum, he has a lien on each for the amount due on all, and one cannot be taken away without paying for all, though enough remain to secure the debt.[139]

The lien can arise only in favor of one who has actually "kept" the animal, not of one who has merely paid or contracted to pay some other for the keeping.[140] The owner of a farm residing on it has no lien for pasturage on the stock of his tenant who works his farm and has the custody of the stock: such owner is not a herder, feeder and keeper of stock for hire within the meaning of the statute.[141] Where

[133] Ibid; Chapman *v.* Allen, Cro. Car. 271; Bissell *v.* Pearce, 28 N. Y. 252; Goodrich *v.* Willard, 7 Gray (Mass.) 183; Wills *v.* Barrister, 36 Vt. 220; Lewis *v.* Tyler, 23 Cal. 364; Mauney *v.* Ingram, 78 N. C. 96.

Otherwise, by the law of Scotland: 2 Bell Com. 110.

[134] See Chapman *v.* Allen, supra; McCoy *v.* Hock, 37 Ia. 436.

[135] See Smith *v.* Marden, 60 N. H. 509; Bunnell *v.* Davison, 85 Ind. 557; Kroll *v.* Ernst, 34 Neb. 482; Gates *v.* Parrott, 31 id. 581; Lambert *v.* Nicklass (W. Va.), 31 S. E. Rep. 951, and other cases cited in the present section.

[136] First Nat. Bk. *v.* Barse Commn. Co., 61 Mo. App. 143.

[137] Fein *v.* Wyo. Loan & Trust Co., 3 Wyo. 332.

[138] Cook *v.* Shattuck, 21 N. Y. Suppt. 29.

[139] Yearsley *v.* Gray, 140 Pa. St. 238. [140] Cox *v.* McGuire, 25 Ill. App. 315.

[141] Wright *v.* Waddell, 89 Ia. 350.

As to a partner, see Auld *v.* Travis, 5 Colo. App. 535.

one with the knowledge of another's title as bailee undertook to take care of the horse, he was held to have no lien for the care and keeping, if the bailee had no authority to contract therefor.[142]

An agistor's lien was not allowed in favor of a servant who drives his master's cattle to pasture in the morning and back in the evening.[143] So, a statute giving a lien to a "herder" of cattle and others "entrusted" with the care of sheep does not give it to one merely hired to take care of sheep, the possession and control of which remain in the owner.[144] And where stock is not entrusted to a ranchman to be fed, but remains in the owner's custody, and the ranchman simply sells the food and has no other custody than that which arises from permission to use his yards for feeding purposes, he has no lien.[145]

Where a mortgagee gave the mortgage to A. to foreclose and A. put the horse in his own stable and the mortgagee was paid by the surety, it was held that A. had no lien for the keeping: he was only the agent to foreclose, and not "procured, contracted with to feed and take care of the horse." [146] But where the plaintiff by direction of the sheriff under an order from the mortgagee pastured the cattle, he was held to have a lien under the statute.[147]

In Louisiana it was held that a factor or merchant has no

[142] Sherwood *v.* Neal, 41 Mo. App. 416.

[143] Bailey *v.* Davis, 19 Oreg. 217. And see Underwood *v.* Birdsell, 6 Mont. 142.

[144] Hooker *v.* McAllister (Wash.), 40 Pac. Rep. 617, where it was also held that an allegation that the defendant owned a certain number of sheep, giving their number and county, was not a sufficient description of the sheep in an action to foreclose a lien for services in taking charge of them.

See, also, as to the owner's control, Feltman *v.* Chinn (Ky.), 43 S. W. Rep. 192.

[145] Tabor *v.* Salisbury, 3 Colo. App. 335. [146] Hale *v.* Wigton, 20 Neb. 83.

[147] Vose *v.* Whitney, 7 Mont. 385.

That a mortgagor is not an "owner" with whom the agistor may "contract," see Graham *v.* Winchell, 3 Ohio N. P. 106.

privilege on mules, cattle and implements attached to a plantation or on the proceeds of the sale thereof, for advances made or supplies furnished to make a crop.[148]

Where A. sold swine to B. on credit and B. returned them, claiming to rescind the contract and refusing to receive them back, and A. recovered in an action for the price and B. brought trover, it was held that A. by bringing his action lost his lien as seller but that, by the return of the animals, he was made bailee by compulsion and had a particular lien upon them for his expense.[149]

Replevin will lie against one obtaining possession of an animal with notice of an agistment lien against it.[150] A purchaser for value without notice of an agistor's lien takes subject thereto, where the agistor has not voluntarily relinquished possession.[151]

The trainer of a horse, also, has a lien on the animal for his skill and expenses,[152] though in the case of a race-horse it has been held that this does not apply where by usage or contract the owner may send the horse to run at any race he chooses and may select the jockey.[153] The modern decisions, however, are broader and admit in a more unqualified manner the lien of the trainer of a race-horse.[154]

[148] Howe *v.* Whited, 21 La. Ann. 495. [149] Leavy *v.* Kinsella, 39 Conn. 50.

[150] Storey *v.* Patton, 61 Mo. App. 12.

[151] Weber *v.* Whetstone, 53 Neb. 371.

[152] Bevan *v.* Waters, 3 C. & P. 520; Towle *v.* Raymond, 58 N. H. 64; Scott *v.* Mercer, 98 Ia. 258; Farney *v.* Kerr (Tenn. Ch. App.), 48 S. W. Rep. 103.

Perhaps this includes a breaker: Grinnell *v.* Cook, 3 Hill (N. Y.) 485.

As to a farrier's lien, see Nicolls *v.* Duncan, 11 U. C. Q. B. 332; Hoover *v.* Epler, 52 Pa. St. 522.

[153] Forth *v.* Simpson, 13 Q. B. 680.

And see Jacobs *v.* Latour, 2 M. & P. 201; Jackson *v.* Cummins, 5 M. & W. 342, per Parke, B.; Reilly *v.* McIllmurray, 29 Ont. 167, where it was held that even if he has a lien, he loses it by delivering the animal to a sale stable, giving up complete possession, the animal remaining at the cost and under the control of the owner.

[154] See Hartman *v.* Keown, 101 Pa. St. 338; Harris *v.* Woodruff, 124 Mass. 205.

A person hired as a groom has not a lien as such, but he has a lien for feed, keeping and shoeing which should have been furnished by the owner.[155]

The question of the priority of liens has been already discussed.[156]

There are various ways in which the lien may be waived or surrendered. It is lost by voluntarily delivering the animals to their owner.[157] But when the agistor leaves the stock to to be herded temporarily by another and they are driven off during his absence by the owner or one having a special property in them and the agistor at once demands their return, he does not lose his lien.[158] And where, at the expiration of the time for which the agistor had agreed to keep cattle, he delivered a portion to the owner, retaining the remainder as security for his claim, it was held that he did not lose his lien for the keep of those delivered by surrendering them, but was entitled to hold those retained for the whole amount due.[159] The lien is also lost by the agistor's denying the owner's title;[160] by his attempting to justify in replevin under the stray law;[161] by his making a sale of the stock without complying with the statute;[162] and by his accepting less than the amount of the claim in full payment,

[155] Hoover *v.* Epler, 52 Pa. St. 522. And see Skinner *v.* Caughey, 64 Minn. 375.

[156] See § 38, supra.

[157] First Nat. Bk. *v.* Barse Commn. Co., 61 Mo. App. 143; Seebaum *v.* Handy, 46 O. St. 560; Kroll *v.* Ernst, 34 Neb. 482; Estey *v.* Cooke, 12 Nev. 276.

[158] Willard *v.* Whinfield, 2 Kan. App. 53. And see Weber *v.* Whetstone, 53 Neb. 371.

[159] Barse Live Stock Commn. Co. *v.* Adams (Ind. Ty.), 48 S. W. Rep. 1023. He was, accordingly, held entitled to recover from a mortgagee, who seized the portion retained by replevin, the amount due on the whole herd and the value of the keep of those retained from the expiration of the time agreed on to the date of their seizure.

[160] Williams *v.* Smith, 153 Pa. St. 462.

[161] Workman *v.* Warder, 28 Mo. App. 1.

[162] Greenawalt *v.* Wilson, 52 Kan. 109.

though the horse is not delivered.[163] It has been held in some cases, also, that the agistor's lien is lost by his causing the property to be taken in execution at his own suit;[164] but in other cases this has been denied.[165] One wrongfully retaining cattle after the tender of the amount due for pasturage is not entitled to a lien for subsequent pasturage unless they are allowed to remain under the contract for a longer term.[166]

106. Breeding.—One who rents the services of a male animal for breeding purposes must take all ordinary care to prevent injury. Where the mare served died from rupture, he is liable for not taking the usual amount of precaution.[167] Evidence that the mare was so confined as to prevent sufficient freedom shows negligence.[168] Where the mare is injured by bad service it has been held, on the one hand, error to require the plaintiff to show that this was due to the defendant's negligence, the inference being that it was.[169] On the other hand, it has been held that the proprietor of the stallion is not in the first place liable: it must be shown that the injury had for its cause some fault on his part or that of his servant.[170] Probably *some* evidence of negligence ought to be required in all cases.

After an injury to a mare during service, her owner gave his note containing the clause: "All accidents—at owner's risk." It was held that this did not affect his right of action

[163] Rosema *v.* Porter, 112 Mich. 13.

[164] Jacobs *v.* Latour, 2 M. & P. 201; Fein *v.* Wyo. Loan & Trust Co., 3 Wyo. 332.

[165] Lambert *v.* Nicklass (W. Va.), 31 S. E. Rep. 951; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703.

[166] Powers *v.* Botts, 58 Mo. App. 1.

The plaintiff by taking no active step waives the tortious act: Same *v.* Same, 63 id. 285.

[167] Bergeron *v.* Brassard, 10 Rev. Leg. (Can.) 21; Cavender *v.* Fair, 40 Kan. 182.

[168] Scott *v.* Hogan, 72 Ia. 614.

[169] Peer *v.* Ryan, 54 Mich. 224.

[170] Brouillet *v.* Coté, Montr. L. Rep. 3 S. C. 164.

and that the accident clause was inadmissible in an action for negligence.[171]

There is no implied warranty in a contract for the service of a stallion that he is free from disease that may be transmitted to the offspring.[172]

One who has made a contract for the service of his mare by a particular stallion with a warranty of a foal and a provision that the mare must be returned regularly for service and that in case of the stallion's death another may be used, may, where the stallion dies before securing a foal, recover his service fee and is not bound to send back the mare for service by another horse.[173] On an issue as to whether a foal was insured as a part of the contract, it was held that the advertised terms of service were not admissible in favor of the owner of the stallion.[174] A contract to breed another's mare at one's own expense and to keep her till the colt is foaled and weaned when the mare is to be returned and the colt to remain with the bailee as his property, is not void as to the bailor's creditors as the sale of a thing not in existence, but is an agreement for the use of the mare for a particular purpose with a right to her produce in the meantime.[175]

The owner of a stallion has a lien on the mare served for his fees.[176] In New York this lien exists from the time of service and one who purchases the mare after service and before the filing of the notice of the lien, but before the time for filing the notice has expired, takes subject to the lien.[177] Where one who purchases a mare after serivce has actual notice thereof, he has notice of the lien sufficient to bind the colt

[171] Scott *v.* Hogan, supra. [172] Briggs *v.* Hunton, 87 Me. 145.
[173] Tatro *v.* Bailey, 67 Vt. 73.
[174] White *v.* Williams (Ky.), 49 S. W. Rep. 808.
[175] Maize *v.* Bowman, 93 Ky. 205.
See, as to the sale of the increase of animals, § 17, supra.
[176] Scarfe *v.* Morgan, 4 M. & W. 270.
[177] Tuttle *v.* Dennis, 58 Hun (N. Y.) 35.

in his possession.[178] Where the statute requires the owner of a stallion to file a certificate with the register of deeds, no action can be brought by him for its service unless he has complied.[179] But he need not allege in his petition that he has procured the statutory license.[180]

Where, by statute, animals imported for breeding purposes are admitted free of duty, it is a sufficient compliance therewith if the importer in good faith intends them for such purposes, and this does not prevent his afterwards disposing of them otherwise if he finds it necessary or desirable to do so.[181] But the fact that they are fit for breeding purposes will not exempt them, if they are in fact imported for sale.[182]

Where, under an Inclosure Act, lands have been allotted "in satisfaction and discharge of" the great tithes, the burden of keeping up a custom that the parson as owner of the great tithes shall provide and keep a bull and a boar for the common use of the parishioners is not, in the absence of express words in the act to that effect, shifted to the allottees of those lands.[183]

107. Livery-Stable Keepers.—The owners of livery-stables are bound to use ordinary care, though they are not insurers of animals left with them: negligence on their part or on the part of their servants must be shown.[184] Where the horse

[178] Harby *v.* Wells (S. C.), 29 S. E. Rep. 563.

[179] Nelson *v.* Beck, 89 Me. 264. And see Briggs *v.* Hunton, 87 id. 145; Wyman *v.* Wentworth (Me.), 10 Atl. Rep. 454; Smith *v.* Robertson (Ky.), 50 S. W. Rep. 852.

[180] Crumbaugh *v.* Williams (Ky.), 41 S. W. Rep. 268.

[181] U. S. *v.* 196 Mares, 29 Fed. Rep. 139.

[182] U. S. *v.* 11 Horses, 30 Fed. Rep. 916.

[183] Lanchbury *v.* Bode, [1898] 2 Ch. 120.

[184] Dennis *v.* Huyck, 48 Mich. 620; Eaton *v.* Lancaster, 79 Me. 477.

As to the sale of a customer's horse by a livery-stable keeper, see Witkowski *v.* Stubbs, 91 Ga. 440, cited in § 30, supra. As to a livery-stable keeper's license, see Wilson *v.* Lexington (Ky.), 49 S. W. Rep. 806.

See, also, with reference to the subject of the present section, §§ 99-102, supra.

while in the stable-keeper's care was shorn of its mane and tail, it was held that he was responsible and that, without proof to the contrary, the damage would be presumed to have been committed by his servants or a consequence of their negligence.[185] And where he permitted the owner of certain horses to go into the stable at a late hour of the night and take them out, in consequence of which a horse of the plaintiff's escaped and was lost, either by passing out with the others or by the door being left open, the stable-keeper was held liable for the loss.[186] But where the keeper rents a stall to another who finds his own employee and food for his horses, the former is not liable if the animals are lost or stolen.[187]

It is the duty of the keeper when the horse becomes sick to see that such treatment is given as reasonable care would dictate, or else to give notice of sickness to the owner.[188] Where the owner falsely represented that his horse had recovered from distemper, thereby causing an injury to two stallions in the livery-stable, it was held, in an action brought by the stable-keeper, that evidence of the profit the plaintiff would probably have derived from the service of the animals during the foaling season could be given, not definitely to fix the measure of damages, but for the consideration of the jury as an aid in estimating them.[189]

Evidence that the defendant left his horse at the plaintiff's stable and that the latter furnished board and attendance and medical care for it, will, standing alone, justify a recovery by the plaintiff.[190]

The horse of a customer standing at livery in a stable

[185] Durocher *v.* Maunier, 9 Low. Can. 8.
[186] Swann *v.* Brown, 6 Jones L. (N. C.) 150.
And see Lockridge *v.* Fesler (Ky.), 37 S. W. Rep. 65.
[187] Berry *v.* Marix, 16 La. Ann. 248.
[188] Hexamer *v.* Southal, 49 N. J. L. 682.
[189] Fultz *v.* Wycoff, 25 Ind. 321. And see § 89, supra.
[190] Smith *v.* Kiniry, 86 Hun (N. Y.) 541.

is not exempt from rent due to the landlord of the premises.[191]

With regard to the stable-keeper's own horses, when he lets them to hire he impliedly promises that they are suitable for the purpose for which they are required and not vicious.[192] If he knows of the viciousness or bad habit of the animal, or by the exercise of reasonable care should know of it, he is liable for an injury resulting to the hirer.[193] And if the hirer took a horse not intended for him, the keeper knowing of the mistake and of the purpose for which it was wanted, but giving no notice, the latter is liable for an injury caused by its unsuitableness for such a purpose.[194] But the keeper's implied warranty does not extend to defects which he does not know of and could not have discovered by the exercise of due care, and he is not liable if the hirer is injured through such defects.[195] Nor is he liable where his horses ran away and injured one whom he had not contracted to drive.[196] And he is not responsible for the warranty of a particular horse by one who conducts an auction sale of horses at his stable, or for an agreement by him to take back the horse if it is not as represented to be, where such stable-keeper is not a party to the contract.[197] Where the keeper knew that the hirer expected to use a road over ice and failed to warn him of circumstances which might render the road dangerous and the horse and sleigh went through the ice and were lost, it was held that there could be no recovery in damages.[198]

With reference to the employment of servants, it is his duty, as was said in an Illinois case, "as a carrier of passengers, to furnish a driver, competent, skilful and careful . . . and

[191] Parsons *v.* Gingell, 4 C. B. 545. [192] Windle *v.* Jordan, 75 Me. 149.
[193] Lynch *v.* Richardson, 163 Mass. 160; Kissam *v.* Jones, 56 Hun (N. Y.) 432. As to his duty to notify the hirer, see § 93, supra.
[194] Horne *v.* Meakim, 115 Mass. 326.
[195] Copeland *v.* Draper, 157 Mass. 558. [196] Siegrist *v.* Arnot, 86 Mo. 200.
[197] Smith *v.* Kiniry, 86 Hun (N. Y.) 541.
See, also, as to warranty, § 30, supra.
[198] McKenzie *v.* Lewis, 31 Nov. Sco. 408.

to use that care, vigilance and foresight under the circumstances, and in view of the service undertaken, and the mode of conveyance adopted, as would reasonably guard against and prevent accidents and consequent injury to passengers, and slight neglect or want of care in this regard creates liability to respond in damages for the injuries thereby occasioned."[199] If the hirer simply applies to a livery-stable keeper to drive him between certain points or for a certain time and the latter supplies everything that is necessary, the hirer is in no sense responsible for negligence on the driver's part. But, if the carriage, horse and livery are the property of the person hiring the services of the driver, especially where the driver has often driven the hirer before and the horse is one with whose peculiarities neither the livery-stable keeper nor the driver has had an opportunity of becoming acquainted, there is evidence that the driver is the servant, not of the livery-stable keeper but of the hirer, and the latter is responsible for injuries done by the horse escaping from control.[200]

A passenger in a livery carriage is not, as a matter of law, guilty of contributory negligence in jumping from the carriage when the horses start to run away;[201] nor in getting into the buggy without holding the reins behind a horse said by the stable-keeper to be unsafe.[202]

108. Lien of Livery-Stable Keepers.—On the principle already stated in discussing agistment, a livery-stable keeper, as he does not confer any additional value on the animal entrusted to him, is not at the common law entitled to any lien for his services.[203] And if the stable-keeper employs, at the

[199] Benner Livery & U. Co. *v.* Busson, 58 Ill. App. 17.
[200] Jones *v.* Scullard, [1898] 2 Q. B. 565.
[201] Benner Livery & U. Co. *v.* Busson, supra.
[202] Monroe *v.* Lattin, 25 Kan. 351.
[203] Judson *v.* Etheridge, 1 Cr. & Mee. 743; McDonald *v.* Bennett, 45 Ia. 456; Powers *v.* Hubbell, 12 La. Ann. 413; Whiting *v.* Coons, 2 id. 961; Miller *v.* Marston, 35 Me. 153.

owner's request, a veterinary surgeon to attend the horse while standing at livery, he has no lien for the surgeon's charges.[204] Nor can the lien be created by the force of usage prevailing in a particular town. "To acquire the force of law, such customs must have been *established*, and have become *general*, so that a presumption of knowledge by the parties can be said to arise."[205] Nor has such stable-keeper a lien though he is also an innkeeper, unless the horses are kept for a guest at the inn.[206] It is otherwise where there is a special contract, as where an animal is kept by agreement for the repayment of money advanced on it or for its keep: in such a case the stable-keeper has a lien.[207]

A lien is very frequently, however, given by statute;[208] and this has been held to attach as the care and feed are being bestowed and not merely from the time the board becomes due.[209] And it attaches to a horse exempt from sale on execution.[210] The statutory lien does not exist where the animal is placed with the livery-stable keeper without the owner's knowledge or authority.[211] Where the stable-keeper has by statute, as against the actual bailor, a lien on an animal left with him for the whole account in the line of his business, yet if the depositor is not the true owner or there is a prior lien, the stable-keeper's lien is only good as against the true owner or prior incumbrancer for the expense of feeding or taking care of that particular animal.[212] Ordinarily, however, the right of lien is joint and several and one animal may

[204] Orchard *v.* Rackstraw, 9 C. B. 698.

[205] Saint *v.* Smith, 1 Coldw. (Tenn.) 51.

[206] Wall *v.* Garrison, 11 Colo. 515. See § 109, infra.

[207] Donathy *v.* Crowther, 11 Moore 479; Richards *v.* Symons, 8 Q. B. 90.

[208] See Andrews *v.* Crandell, 16 La. Ann. 208, and the cases cited infra.

[209] Walls *v.* Long, 2 Ind. App. 202.

[210] Flint *v.* Luhrs (Minn.), 68 N. W. 514—the statute being held not to be unconstitutional as to such exempt property.

[211] Lowe *v.* Woods, 100 Cal. 408; Stott *v.* Scott, 68 Tex. 302; Domnau *v.* Green (Tex. App.), 19 S. W. Rep. 909.

[212] Colquitt *v.* Kirkman, 47 Ga. 555.

be detained for the keep of all.[213] Where the statutory lien is on the animal only, a claim of a lien on a "horse and carriage" is not enforceable against a mortgagee, where there is no way of distinguishing what sum was claimed for the carriage and what for the horse.[214]

The lien is lost by a voluntary surrender of the animal to the owner or his representative.[215] Where the stable-keeper sells his stable and lets the owner take the horse, he loses his lien unless he arranges that the horse is to be held for his benefit.[216] His lien is waived by surrendering possession to a mortgagee without claim on his part and cannot be revived by subsequent payment by and assignment of the lien to the mortgagee, it not appearing that the assignment was executed pursuant to any agreement made when the horses were taken away.[217] Where A., a livery-stable keeper, received a horse from a trainer and took an assignment of his account against the owner, and the latter in A.'s absence took his horse away and put it in B.'s stable and repudiated to A. the trainer's demand and A. said he would let it go until the trainer came home and they would then "fix it up," and then took the horse away from B.'s stable, in the latter's absence, it was held in an action by B. against A. to recover possession that the latter's lien, if any, for keep or on the assigned account was waived when the adjustment was postponed till the return home of the trainer.[218]

As to one who has acquired a subsequent *bona fide* interest

[213] Young *v.* Kimball, 23 Pa. St. 193.

[214] Varney *v.* Jackson, 2 Mo. App. Repr. 1374.

And see Robinson *v.* Kaplan, 21 Misc. (N. Y.) 686; Sides *v.* Cline, 19 Pa. Co. Ct. 481.

[215] Ferriss *v.* Schreiner, 43 Minn. 148; Seebaum *v.* Handy, 46 O. St. 560; Vinal *v.* Spofford, 139 Mass. 126; Cardinal *v.* Edwards, 5 Nev. 36; Gorman *v.* Williams, 26 Misc. (N. Y.) 776.

It is lost, also, by voluntarily accepting the note of a third person for the amount due: Gorman *v.* Williams, supra.

[216] Fitchett *v.* Canary, 59 N. Y. Super. Ct. 383.

[217] Shellhammer *v.* Jones, 87 Ia. 520. [218] Bray *v.* Wise, 82 Ia. 581.

in the horse, the livery-stable keeper's lien is divested where he has consented to the removal.[219] But the lien is not lost by the mere temporary absence of the horse from the stable while it is being used in the usual manner by the owner who intends to return it.[220] Nor if it is wrongfully removed, while it is in the possession of the owner or one claiming under him with notice of the lien;[221] though it is, perhaps, otherwise as against a *bona fide* purchaser.[222] Where it is a part of the ordinary course of business to deliver horses to the driver as often as they are needed, the loss of custody of some of them does not defeat the lien, which is joint and several.[223] And the fact that the owner employs his own driver is not inconsistent with the lien.[224]

The fact that the horse has been wrongfully removed will not, however, protect the livery-stable keeper's lien if he has failed to give the statutory notice.[225]

The stable-keeper does not abandon his lien by using the horses reasonably, and evidence to show that he has waived it by claiming too much should be clear and distinct.[226] Nor does the fact that he used the horses on a hack from which he derived profit amount necessarily to a conversion so as to prevent his enforcing his lien, where there was evidence that they were benefited thereby.[227]

Where the bailor had notified the stable-keeper that the horse no longer belonged to her and she would not be responsible for its keep, it became the duty of the keeper to

[219] Fishell *v.* Morris, 57 Conn. 547; State *v.* Shevlin, 23 Mo. App. 598.

[220] Caldwell *v.* Tutt, 10 Lea (Tenn.) 258; Welsh *v.* Barnes, 5 N. D. 277; Walls *v.* Long, 2 Ind. App. 202; Young *v.* Kimball, 23 Pa. St. 193.

See Cardinal *v.* Edwards, 5 Nev. 36.

[221] Heaps *v.* Jones, 23 Mo. App. 617; Wallace *v.* Woodgate, 1 C. & P. 575.

[222] See Vinal *v.* Spofford, 139 Mass. 126.

[223] Young *v.* Kimball, 23 Pa. St. 193. [224] Ibid.

[225] Kline *v.* Green, 83 Hun (N. Y.) 190.

See Lessels *v.* Farnsworth, 13 Daly (N. Y.) 473; Jackson *v.* Kasseall, 30 Hun (N. Y.) 231.

[226] Munson *v.* Porter, 63 Ia. 453. [227] Brintnall *v.* Smith, 166 Mass. 253.

enforce his lien or otherwise assert his legal rights within a reasonable time and not needlessly permit damages to grow.[228]

109. Innkeepers.—The exact extent of the liability of an innkeeper, apart from statutory law, has been a much mooted question, the decisions on the subject being quite irreconcilable. On the one hand he has been held to be, like a common carrier, an insurer of the goods placed in his charge and absolutely responsible for their safe-keeping except in case of loss or injury by act of God or by the public enemy or by the negligence of the guest himself or his servants. Under this rule the innkeeper is liable where the loss results from a fire without his fault or from robbery or burglary.[229]

On the other hand, the rule as to liability has been thus stated by Judge Story in his work on Bailment: "By the Roman Law, if shipmasters, innkeepers and stable-keepers did not restore what they had received to keep safe, they were held liable; and this is the law of Continental Europe. . . . But innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn will be presumptive evidence of negligence on the part of the innkeeper or of his domestics. But he may, if he can, repel this presumption by showing that there has been no negligence whatsoever, or that the loss is attributable to the personal negligence of the guest himself; or that it has been occasioned by inevitable casualty or by superior force." [230]

[228] Mason Stable Co. *v.* Lewis, 16 Misc. (N. Y.) 359.

[229] Lawson Bailm. § 76; Hulett *v.* Swift, 33 N. Y. 571; Russell *v.* Fagan, 7 Houst. (Del.) 389; Thickstun *v.* Howard, 8 Blackf. (Ind.) 535.

[230] Story Bailm. §§ 464, 467, 472. See note by Schouler to 9th ed., § 472, and also Browne Bailm. 80, where it is said: "In recent times this necessity [*i. e.*, of absolute liability] has almost entirely passed away, at least in the older and orderly communities, and the ancient liability has been by statutes in England and most of the United States reduced to the exercise of a high degree of care, and the innkeeper is absolved from the consequences of fire and of robbery without his fault."

See, also, 11 Amer. & Eng. Encyc. of Law, 58, etc.

Under this rule, which seems to be supported by the weight of authority, the innkeeper may exonerate himself by showing that the injury to or loss of an animal placed in his charge was not due to his negligence or that of his servants.[231] This applies especially to the case of the destruction of an animal by fire or otherwise for, as was said in an Illinois case,—"an innkeeper can have no motive to destroy the animal of his guest and there is not the same reason for holding him responsible at all events for such a loss, as there would be a common carrier or even an innkeeper for the loss of goods which had disappeared from his possession; because in the latter case he may have converted the goods to his own use, while, in the former, he could gain nothing by the death of the animal. Accordingly a distinction is made in the law books between the liability of innkeepers and common carriers, particularly for losses occasioned by the death of animals." [232]

The innkeeper is bound to provide safe stabling for the horses of his guests and is liable for any injury resulting from his negligence in that respect.[233] Where a guest's horse is injured by being kicked by another, the presumption is that the innkeeper was negligent.[234] So, where it is choked to death in a stall owing to the method of hitching or the condition of the stall.[235] But where the plaintiff tied a horse to a stall where it had been previously kept and the next day it was found dead from having caught its head in a trough and it was not sufficiently shown that the plaintiff was a

[231] Dawson *v.* Chamney, 5 Q. B. 164; Cutler *v.* Bonney, 30 Mich. 259; Merritt *v.* Claghorn, 23 Vt. 177; Vance *v.* Throckmorton, 5 Bush. (Ky.) 41; Hill *v.* Owen, 5 Blackf. (Ind.) 323; Metcalf *v.* Hess, 14 Ill. 129.

[232] Metcalf *v.* Hess, supra. And see the cases cited in the last note.

[233] Dickerson *v.* Rogers, 4 Humph. (Tenn.) 179. And see, as to cattle, Hilton *v.* Adams, 71 Me. 19.

[234] Dawson *v.* Chamney, supra; Sibley *v.* Aldrich, 33 N. H. 553; Clary *v.* Willey, 49 Vt. 55.

[235] Walker *v.* Sharpe, 31 U. C. Q. B. 340; Jordan *v.* Boone, 5 Rich. L. (S. C.) 528

guest, the innkeeper was held not liable, his want of ordinary care not having been proved.[236] No private arrangement between the landlord and his hostler can affect the guest, and where, by arrangement with the innkeeper, the hostler took charge of horses and exercised a guest's horse which had been left there and it was frightened by a locomotive and injured, the innkeeper was held liable.[237] If the hostler omits to put bits in the mouth of the guest's hired horse whereby it becomes unmanageable and damages the buggy, the guest is liable, as the innkeeper or his servant is not presumed to possess peculiar skill which authorizes the hirer of the animal to act without responsibility.[238] And the innkeeper is not responsible for the consequences of the negligent driving of a guest to whom he had hired a horse and vehicle.[239] And, although licensed to let post-horses, he is not liable to an action for refusing to supply them to a guest.[240]

Where the guest keeps goods for show or sale, the innkeeper is relieved from special liability as to such goods, as where the defendant agreed to keep the plaintiff's stallion for two days in each week during the breeding season and to furnish oats and meals for the man in charge and the horse was lost in a conflagration of the defendant's stable.[241] So, an innkeeper is not liable, without proof of negligence, for the loss of a mule put by a drover into a lot belonging to the landlord separate from the inn, to be kept under a special agreement. "If one having a drove of horses or hogs to sell, puts up at an inn and, besides entertainment for himself, procures from the landlord a lot in which to keep his animals, for the purpose of showing and selling them, they are not specially protected; and it makes no difference whether, by the agreement, the landlord has them fed or whether the

[236] Thickstun *v.* Howard, 8 Blackf. (Ind.) 535.
[237] Day *v.* Bather, 2 H. & C. 14.
[238] Hall *v.* Warner, 60 Barb. (N. Y.) 198.
[239] Béliveau *v.* Martineau, Montr. L. Rep. 2 Q. B. 133.
[240] Dicas *v.* Hides, 1 Stark. 247. [241] Mowers *v.* Fethers, 61 N. Y. 34.

drover buys provender of the landlord or a third person and feeds them himself; for, as Lord Ellenborough says, . . . 'An innkeeper is not bound by law to find show-rooms for his guests, but only convenient lodging-rooms and lodging.' " [242] But where, by the innkeeper's direction, the guest took his horse and cart to a livery-stable, belonging to the innkeeper but not connected with the inn, and put them in the care of the innkeeper's hostler, it was held that this was a delivery to the innkeeper for safe custody and the property was *infra hospitium*.[243]

It was held in Calye's case [244] that, if the horse of a guest is stolen, the innkeeper is not liable if it were put to pasture at the guest's request: otherwise, if the innkeeper of his own accord had put the horse to grass. Of this case Judge Story says: "However, it has been said that this rule requires some qualifications; for if it is the common custom of the country (as it is in the summer season in the interior towns of America) to put horses in such a case to pasture, the implied consent of the owner may be fairly presumed, if he knows the custom. And the common usage of the country must have great weight in all such cases. In the country towns in America it is very common to leave chaises and carriages under open sheds all night at inns; and also to leave the stable doors open or unlocked. Under such circumstances, if a horse or chaise should be stolen, it would deserve consideration how far the innkeeper would be liable, as the traveller might be presumed to consent to the ordinary custom." [245]

An innkeeper is not liable as such if sheep are put to pasture under the guest's direction and are injured by eating poisonous plants, unless he is chargeable with negligence.[246] Where he is sued for weakness developed in a horse while

[242] Neal *v.* Wilcox, 4 Jones L. (N. C.) 146.
[243] Cohen *v.* Manuel, 91 Me. 274.
[244] 8 Co. 32 a. [245] Story Bailm. § 478.
[246] Hawley *v.* Smith, 25 Wend. (N. Y.) 642.

under his care, he may show that the injury was the result of disease.[247]

The high degree of care required of an innkeeper is not necessary where the relationship of innkeeper and guest does not exist: the former is then merely a bailee for hire and has no lien on the animal.[248] It becomes important, therefore, to consider who is a guest. In some of the older cases it was held that if one leaves his horse at an inn though neither he nor his servants lodge there, this alone constitutes him a guest so far as the horse is concerned,[249] and this opinion has been approved of in some modern cases.[250] It cannot, however, be considered any longer the prevailing doctrine.[251]

An innkeeper receiving horses as a livery-stable keeper has no lien because the owner takes occasional refreshment or sends a friend to be lodged there at his charge.[252] Nor is a horse to be considered the property of a guest where it is placed at the inn by police under suspicious circumstances.[253] But where the innkeeper agreed with the owner of the horse to entertain the man having charge of it one day in each week or oftener, if he stopped with the horse, the innkeeper furnishing provender and allowing the horse to be kept in a certain stall under the exclusive care of the man in charge, it was held that the innkeeper was answerable as such for an injury received by the horse in the stall.[254] On the other

[247] Howe Mach. Co. *v.* Pease, 49 Vt. 477.

[248] Healey *v.* Gray, 68 Me. 489; Ingallsbee *v.* Wood, 33 N. Y. 577.

[249] Gelley *v.* Clerk, Cro. Jac. 188; Yorke *v.* Grenaugh, 2 Ld. Raym. 866, Holt, C. J. diss.

[250] Mason *v.* Thompson, 9 Pick. (Mass.) 280; McDaniels *v.* Robinson, 26 Vt. 316. In Mason *v.* Thompson, it was held that if the innkeeper is also a livery-stable keeper, he must give notice that he receives the horse in the latter capacity or he will be liable in the former.

[251] Browne Bailm. 75; Ingallsbee *v.* Wood, 33 N. Y. 577; Grinnell *v.* Cook, 3 Hill (N. Y.) 485; Healey *v.* Gray, 68 Me. 489.

[252] Smith *v.* Dearlove, 6 C. B. 132.

[253] Binns *v.* Pigot, 9 C. & P. 208. But see Johnson *v.* Hill, 3 Stark. 172, cited infra.

[254] Washburn *v.* Jones, 14 Barb. (N. Y.) 193.

hand, where the plaintiff's hired man boarded at the defendant's inn for some months and kept the plaintiff's horses in his livery-stable, going out with them to work every morning and returning them at night, and the defendant charged a fixed sum per week for the man's board and the horses' keep, it was held that the defendant had no lien on the horses for their keep, neither the plaintiff nor his man being a guest within the common-law meaning of the term, and there being no continuing possession of the horses nor right to it.[255] And where an innkeeper issued invitations to a Fourth of July party at the inn with music, supper, and horse-stabling for two dollars and one attended and paid the two dollars required and more for drinks, it was held, in an action brought by the latter for an injury to his horse, that the relation of innkeeper and guest did not exist.[256]

An occasional absence of the guest does not destroy this relationship so far as concerns either the lien or the degree of care required of the innkeeper.[257]

The point has been raised whether a traveller who sends his horse in advance to an inn, saying he would soon be there himself, is to be deemed a guest from the time the innkeeper receives his property.[258] The relation is not terminated when the guest has paid his bill and his servant has begun to harness the team.[259]

The innkeeper's lien on the property of his guest is given to him by law as compensation for the high degree of care that is required of him and for the necessity he is under of accepting, like a common carrier, whatever is brought to him. It extends to the animals of his guest both for their

[255] Neale *v.* Croker, 8 U. C. C. P. 224.

So, where the owners of a line of stages entered into a contract with an innkeeper for the stabling and feed of their horses: Dixon *v.* Dalby, 11 U. C. Q. B. 79.

[256] Fitch *v.* Casler, 17 Hun (N. Y.) 126.

[257] Grinnell *v.* Cook, 3 Hill (N. Y.) 485, per Bronson, J.; Allen *v.* Smith, 12 C. B. N. S. 638.

[258] Grinnell *v.* Cook, supra. [259] Seymour *v.* Cook, 53 Barb. (N. Y.) 451.

keep and for the charges for the guest's personal entertainment.[260] The lien exists only as against one who is at the time a guest, not one who is an ordinary bailor for hire.[261] If, after the lien has accrued, the animal is removed and subsequently brought back, the lien is revived on its return.[262]

The innkeeper has a lien on a horse for its keep although it had been wrongfully seized under color of a legal proceeding, unless he knew that the party making the seizure was a wrongdoer at the time.[263] But the owner of a stolen horse taken to an inn is not liable to the innkeeper for a lien on its keep to more than the value of the horse: the innkeeper must look for the residue to the person from whom he received the horse.[264] And the sale of a stolen horse for the innkeeper's lien, as directed by statute, does not divest the real owner's title.[265]

The lien is waived where the innkeeper sells the animal in order to reimburse himself.[266] At the common law he could not sell at all: his remedy to enforce the lien was by an action in the nature of a bill in chancery.[267]

Where one requires refreshment at an inn while accompanied by a large dog and insists, against the innkeeper's protest, on the dog staying with him, the presence of the dog affords a lawful excuse to the innkeeper to refuse to receive the traveller or give him refreshment or accommodation.[268]

[260] Lawson Bailm. § 82; Mulliner *v.* Florence, 3 Q. B. D. 484.

[261] Hickman *v.* Thomas, 16 Ala. 666; Grinnell *v.* Cook, supra; Fox *v.* McGregor, 11 Barb. (N. Y.) 41; Elliott *v.* Martin, 105 Mich. 506.

[262] Huffman *v.* Walterhouse, 19 Ont. 186.

[263] Johnson *v.* Hill, 3 Stark. 172.
See Binns *v.* Pigot, 9 C. & P. 208, cited supra.

[264] Black *v.* Brennan, 5 Dana (Ky.) 310.

[265] Gump *v.* Showalter, 43 Pa. St. 507.

[266] Mulliner *v.* Florence, 3 Q. B. D. 484.

[267] Fox *v.* McGregor, 11 Barb. (N. Y.) 41.

[268] Reg. *v.* Rymer, 46 L. J. M. C. 108.

TITLE V.

BAILMENT AND CARRIAGE.

CHAPTER II.

CARRIERS OF ANIMALS.

110. Nature of the contract of carriage.
111. Restriction of liability.
112. Receiving; loading; unloading; delivery.
113. Mode of transportation.
114. Food and water.
115. Delay and accident.
116. Injuries due to the nature and condition of animals.
117. Notice.
118. Evidence.
119. Damages.

110. Nature of the Contract of Carriage.—The exact character of the contract for the carriage of animals has been the subject of much judicial discussion. The prevailing opinion and, as it seems, the better one, is that carriers of live-stock are, like carriers of goods, common carriers and insurers against all losses except those resulting from the acts of God or the public enemy or the shipper himself, or from the peculiar nature and disposition of the property carried.[1]

[1] Wood Railroads, 2d ed., 1928 n., 1929, where the rule is said to be the one adopted by nearly all of the American and later English cases, though a number of the earlier English cases are said to induce grave doubts as to whether the liability of a carrier of live-stock was any more than that of a carrier of passengers and did not extend to actual negligence only. But see the discussion of these cases in the present section.

And see 67 Am. Dec. 208, note, where the opinion of Mr. Justice Willes in Blower *v.* Gt. West. R. Co., L. R. 7 C. P. 655, is quoted to the effect that the conflict of opinion on the question "may turn out after all to be a mere controversy of words," and the statement is made that "in most

Though it may be optional with the railway companies whether they will accept this full responsibility, yet if they do so without any express restriction, they are liable as common carriers.[2] But they may for a less hire agree simply to transport cattle, furnish cars, etc., and if the shipper agrees to the lower rate, he cannot hold them as common carriers. "For a given reward they proffer to become his carrier; for a less reward they proffer to furnish the necessary means that the owner may be his own carrier." [3] Thus, the liability of a common carrier does not attach to a company that has contracted to move a menagerie or circus in the latter's own cars, controlled by its own agents, and run on schedule to suit the menagerie;[4] though the mere fact that it uses the shipper's private car will not alone have this effect.[5] So, the company may decline to hold itself out as a common carrier of dogs, and merely take them as an ordinary bailee for hire or for the accommodation of passengers.[6]

cases it will be found that, whatever may be the form of the rule laid down upon this subject, the carrier will be held liable under the same circumstances."

See also Hutchinson Carriers, §§ 221, 222; Kan. Pac. R. Co. *v.* Nichols, 9 Kan. 235; Mo. Pac. R. Co. *v.* Harris, 67 Tex. 166; Cohen *v.* Hume, 1 McCord (S. C.) 439.

The question was held a doubtful one in McManus *v.* Lancashire & Y. R. Co., 2 H. & N. 693, 4 H. & N. 327, and in Honeyman *v.* Or. & C. R. Co., 13 Oreg. 352.

The decisions will be considered in detail in the next section in discussing the restriction of liability, negligence, etc.

[2] Palmer *v.* Grand Junc. R. Co., 4 M. & W. 749, where they were held liable for an injury to a horse by the train colliding with a horse straying through a broken fence.

[3] Kimball *v.* Rutland & B. R. Co., 26 Vt. 247. And see East Tenn. & Ga. R. Co. *v.* Whittle, 27 Ga. 535; Harris *v.* Midland R. Co., 25 W. R. 63.

[4] Coup *v.* Wabash, St. L. & P. R. Co., 56 Mich. 111; Robertson *v.* Old Colony R. Co., 156 Mass. 525; Chic., M. & St. P. R. Co. *v.* Wallace, 66 Fed. Rep. 506.

[5] Fordyce *v.* McFlynn, 56 Ark. 424.

[6] Dickson *v.* Gt. North. R. Co., 18 Q. B. D. 176; Richardson *v.* N. E. R. Co., L. R. 7 C. P. 75; Honeyman *v.* Or. & C. R. Co., 13 Oreg. 352.

But notice of that fact must be given to the owner, or the carrier will

It was held, however, in Michigan that a charter granted to a railway company before the prevalence of the custom of carrying live-stock by rail, did not impose on the company the duty of transporting cattle, except by a special agreement: hence, the company were not common carriers of animals. The court said: "The transportation of cattle and live-stock by common carriers by land was unknown to the common law, when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the acts of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving, in their transportation, much fewer risks and of quite a different kind from those which are incident to the transportation of live-stock by railroad. Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting and frequent concussions of the cars, in their frenzy injure each other by trampling, plunging, goring, or throwing down; and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue and fright, the weak easily fall and are trampled upon and unless helped up, must soon die. Hogs also swelter and perish. . . . It is a mode of transportation which, but for its necessity, would be gross cruelty and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in

be liable: Kan. City, M. & B. R. Co. *v.* Higdon, 94 Ala. 286. Regulations prohibiting passengers from taking dogs with them in the passenger cars and requiring payment for carrying dogs in baggage cars are reasonable: Gregory *v.* Chic. & N. R. Co., 100 Ia. 345.

As to responsibility for receiving a vicious dog, see Trinity & S. R. Co. *v.* O'Brien (Tex. Civ. App.), 46 S. W. Rep. 389.

reference to other kinds of property that I do not think this kind of property falls within the reasons upon which the common-law liability of common carriers was fixed." [7] This decision has been followed in later cases in the same State.[8] And the opinion that railway companies are not insurers of animals but are bound to use only reasonable care and diligence has been expressed in Tennessee,[9] Kentucky,[10] Alabama,[11] and New York.[12]

The importance of the distinction consists in the fact that, if the carrier of live-stock is a common carrier and insurer, "in case of loss or injury to the freight," as is said by a well-known authority, "the burden of proving that it arose from its own fault rests upon him if he would excuse himself upon that ground. Whereas, if he is to be considered merely as the paid agent of the owner for the transportation of his stock, his liability would rest solely upon the question of negligence, the burden of proving which would be upon the owner of the freight." [13]

The contract of carriage is controlled by the law of the State where it is made, unless a contrary intention is shown.[14] And a provision in a contract for the transportation of a person to accompany the shipment, that questions arising under it shall be determined by the laws of a certain State, does not indicate the intention that the contract on the other

[7] Mich. South. & N. I. R. Co. *v.* McDonough, 21 Mich. 165, 189, per Christiancy, J.

[8] See Lake Shore & Mich. S. R. Co. *v.* Perkins, 25 Mich. 329; Heller *v.* Chic. & G. T. R. Co., 109 id. 53.

And see an article in 5 Alb. L. Jour. 299 approving of that case.

That railroads in Michigan are strictly private enterprises and have not a quasi-public character, see Kan. Pac. R. Co. *v.* Nichols, 9 Kan. 235.

[9] Baker *v.* Louisville & N. R. Co., 10 Lea (Tenn.) 304.

[10] Louisville, Cinc. & L. R. Co. *v.* Hedger, 9 Bush. (Ky.) 645.

[11] E. Tenn., V. & G. R. Co. *v.* Johnston, 75 Ala. 596.

[12] Cragin *v.* New York Cent. R. Co., 51 N. Y. 61.

[13] Hutchinson Carriers § 222.

[14] Ill. Cent. R. Co. *v.* Beebe, 174 Ill. 13.

side of the paper for the shipment of horses shall be governed by such laws.[15]

Where the animals are to be sent beyond the terminus of the contracting carrier, a question arises as to its responsibility for any loss sustained on the line of a connecting carrier. In England, where the contract is to forward the live-stock all the way, the original carrier alone is liable for an injury received on one of the other lines, though it may have contracted that it shall incur no liability beyond its own line: there is no privity of contract with the connecting carriers.[16] In this country, however, the mere receipt of the property by the connecting carrier creates sufficient privity between it and the shipper to enable the latter to maintain an action against it on the contract and the connecting carrier may avail itself of limitations in the contract by specially pleading them.[17] The action in such a case may be brought against the carrier in fault as well as against the carrier primarily responsible. This is said to be the universal law of this country.[18]

Where there is no special contract or the contract is simply to deliver the stock to a connecting carrier, the responsibility of the carrier is confined to its own line and ceases with delivery.[19] In England and in some of the States the mere receipt of goods to be carried to a destination beyond the original carrier's line is held to be evidence of a contract to transport beyond its terminus, but this rule does not prevail

[15] Brockway *v.* Amer. Exp. Co., 171 Mass. 158.

[16] Coxon *v.* Gr. Western R. Co., 5 H. & N. 274.

[17] Halliday *v.* St. Louis, K. C. & N. R. Co., 74 Mo. 159.

An agreement to accept a proportionate amount of freight has been held in Texas not to create privity nor to make the company a connecting line in the statutory sense: Gulf, C. & S. F. R. Co. *v.* Short (Tex. Civ. App.), 51 S. W. Rep. 261.

[18] Hutchinson Carriers § 150, citing *contra* some early cases in Georgia, where the law has since been changed by statute.

[19] Myrick *v.* Mich. Cent. R. Co., 107 U. S. 102; Ala. Gr. South. R. Co. *v.* Thomas, 83 Ala. 343; Gulf, C. & S. F. R. Co. *v.* Baird, 75 Tex. 256; Louisville & N. R. Co. *v.* Cooper (Ky.), 42 S. W. Rep. 1134.

in a majority of the States.[20] Where a company contracted to "forward" cattle to a certain point beyond its own line and that it and the connecting lines should be liable only for gross negligence, it was held to be liable for the ordinary negligence of itself or any one of the connecting carriers.[21]

A carrier making a through contract for the shipment of stock over its own and a connecting line may make an express contract limiting its liability to its own line.[22] This limitation enures to the benefit of each of the connecting carriers and confines its liability to its own line.[23] Where the liability is limited to the delivery of the stock to a connecting line and it is delivered to a stock-yards company to be redelivered to the other line, the original carrier is liable for injuries received while the stock is in the hands of the stock-yards company.[24] A connecting carrier receiving horses, though with notice that the shipper attempted to prepay freight but had not paid in full according to its tariff, has a

[20] Hutchinson Carriers § 149; McCarn *v.* Internat. & G. N. R. Co., 84 Tex. 352; Ortt *v.* Minneapolis & St. L. R. Co., 36 Minn. 396.

[21] St. Louis, K. C. & N. R. Co. *v.* Piper, 13 Kan. 505.

As to the meaning of the term "to forward," see Hutchinson Carriers §§ 155. 156.

[22] Hutchinson Carriers § 149 b.; Ortt *v.* Minneapolis & St. L. R. Co., supra; McCarn *v.* Internat. & G. N. R. Co., 84 Tex. 352; Gulf, C. & S. F. R. Co. *v.* Thompson (Tex. Civ. App.), 21 S. W. Rep. 186; Gulf, W. T. & P. R. Co. *v.* Griffith (Tex. Civ. App.), 24 id. 362.

Some of the Texas Court of Appeal cases are opposed to this. See Gulf, C. & S. F. R. Co. *v.* Vaughn, 4 Tex. App. (Civ. Cas.) 269; Tex. & Pac. R. Co. *v.* Scrivener, 2 id. 284. But the former case is expressly disapproved of in McCarn *v.* Internat. & G. N. R. Co., supra.

See, however, where the companies are partners, Gulf, C. & S. F. R. Co. *v.* Wilson, 7 Tex. Civ. App. 128; Galveston, H. & S. A. R. Co. *v.* Houston (Tex. Civ. App.), 40 S. W. Rep. 842; Hutchinson Carriers §§ 158-170.

And see as to an interstate shipment, Galveston, H. & S. A. R. Co. *v.* Armstrong (Tex. Civ. App.), 43 S. W. Rep. 614.

[23] Ft. Worth & D. C. R. Co. *v.* Williams, 77 Tex. 121; Internat. & G. N. R. Co. *v.* Mahula, 1 Tex. Civ. App. 182.

[24] Gulf, C. & S. F. R. Co. *v.* Eddins, 7 Tex. Civ. App. 116; Larimore *v.* Chic. & A. R. Co., 65 Mo. App. 167.

lien on the horses for the amount of the additional freight.[25] A plea that the way-bill showed that mules were shipped "at a released rate, which was a reduced rate of freight" was held not equivalent to an allegation that the defendant, a connecting carrier, accepted the contract of the original carrier releasing it and the connecting carriers at their option from liability for damages not caused by negligence.[26] Where the defendant is not liable for "anything beyond" its line "except to protect through rate of freight," it is not liable for the refusal of the connecting carrier to deliver cattle unless a greater rate of freight is paid.[27]

The shipper of horses who is present and permits the connecting carrier to receive his horses and pay advance charges, thus acquiring a lien, cannot recoup the damages done to the horses by the prior carrier against such lien, though the connecting carrier knew of the damages and of the shipper's intention to demand compensation from the prior carrier.[28]

In the absence of evidence to the contrary, the injury is presumed to have taken place on the line of the last carrier.[29] And where there is no special contract, the burden is not on the shipper to show on what line the injury occurred, though a person accompanied the cattle;[30] otherwise, where the liability is expressly limited.[31]

Where there is a stipulation in the contract that the shipper may accompany the stock free of charge, this can be availed

[25] Crossan *v.* N. Y. & N. E. R. Co., 149 Mass. 196. And see Lewis *v.* Richmond & D. R. Co., 25 S. C. 249.

[26] Western R. Co. of Ala. *v.* Harwell, 97 Ala. 341.

[27] Little Rock & Ft. S. R. Co. *v.* Odom, 63 Ark. 326.

[28] St. Louis, I. M. & S. R. Co. *v.* Lear, 54 Ark. 399.

[29] Paramore *v.* Western R. Co., 53 Ga. 383; Tex. & Pac. R. Co. *v.* Barnhart, 5 Tex. Civ. App. 601.

[30] Tex. & Pac. R. Co. *v.* Tom Green County Cattle Co. (Tex. Civ. App.), 38 S. W. Rep. 1138.

[31] St. Louis S. W. R. Co. *v.* Vaughan (Tex. Civ. App.), 41 S. W. Rep. 415.

of only by him. Another person who assists him and claims an interest in the stock cannot claim such rights as a free passenger.[32] A passenger on a drover's pass is a passenger for hire and his rights and obligations are similar to those of an ordinary passenger who has bought a ticket.[33] But this does not mean that he is entitled to all of such rights: there is an implied condition that he will submit to whatever inconveniences are necessarily incident to the undertaking.[34] "This principle by no means implies that a passenger upon a freight train, having in charge live-stock for transportation, is entitled to the same facilities for getting on and off the cars that persons have upon strictly passenger trains where stations and platforms are usually provided. No negligence can be imputed to the defendant by an omission to erect such stations or platforms." [35] But a company cannot stipulate against liability for an injury to such a passenger caused by its negligence any more than in the case of an ordinary passenger for hire.[36] If he fails to remain in the caboose car, however, as he had contracted to do, the company will not be liable for an injury received by him while voluntarily

[32] Richmond & D. R. Co. *v.* Burnsed, 70 Miss. 437.

That a statute requiring railway companies to furnish free transportation to shippers of live-stock did not apply to interstate shipments, see State *v.* Otis (Kan.), 56 Pac. Rep. 14.

[33] Little Rock & Ft. S. R. Co. *v.* Miles, 40 Ark. 298; Pa. Co. *v.* Greso, 79 Ill. App. 127; Rosted *v.* Great Northern R. Co. (Minn.), 78 N. W. Rep. 971; Saunders *v.* South. Pac. Co., 13 Utah 275; Louisv. & N. R. Co. *v.* Bell, 100 Ky. 203. See, also, 8 Am. Eng. R. R. Cas., N. S., 419 n.; 61 Am. St. Rep. 89 n.

[34] Omaha & R. V. R. Co. *v.* Crow, 47 Neb. 84. And see Mo. Pac. R. Co. *v.* Tietken, 49 id. 130; Heyward *v.* Boston & A. R. Co., 169 Mass. 466.

[35] Pitcher *v.* Lake Shore & M. S. R. Co., 8 N. Y. Suppt. 389.

[36] Carroll *v.* Mo. Pac. R. Co., 88 Mo. 239; N. Y. Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Cleveland, P. & A. R. Co. *v.* Curran, 19 O. St. 1; Ill. Cent. R. Co. *v.* Beebe, 174 Ill. 13; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Smith *v.* New York Cent. R. Co., 24 N. Y. 222; Porter *v.* N. Y., L. E. & W. R. Co., 59 Hun (N. Y.) 177; St. Louis S. W. R. Co. *v.* Nelson (Tex. Civ. App.), 44 S. W. Rep. 179.

standing or walking on the top of a moving car.[37] But this provision may be waived.[38]

It has been held that, in the absence of a special contract by the carrier to look after the stock, a shipper who neglects to send a care-taker assumes all damages caused by their disposition to crowd and injure one another.[39] A contract that the plaintiff should accompany and take care of the stock may be pleaded, though the action sounds in tort.[40] Cattle-owners on a ship were held not entitled to share in a salvage reward for saving derelict, they not assisting personally in any way.[41]

A man sent by the owner of horses with the car that contained them, who had the money to pay for the freight, has an implied authority to make any reasonable contract for the shipment of the horses to their final destination, beyond the point where the owner's contract terminates.[42]

Where it is impossible to carry out the original contract, owing to a strike of the carrier's employees, an agent of the carrier may make a new contract, imposing a greater obligation on it, there being no other consideration than that the shipper relieves the agent of the necessity of a personal supervision of the stock.[43]

[37] Ft. Scott, W. & W. R. Co. *v.* Sparks, 55 Kan. 288. And see Mobile & O. R. Co. *v.* Bogle (Tenn.), 46 S. W. Rep. 760; Walker *v.* Green, infra.

[38] Mo., K. & T. R. Co. *v.* Cook, 8 Tex. Civ. App. 376. And see Ill. Cent. R. Co. *v.* Beebe, supra; Tex. & Pac. R. Co. *v.* Reeder, 170 U. S. 530; Chic., R. I. & P. R. Co. *v.* Lee, 92 Fed. Rep. 318.

But permission by the trainmen to ride in the freight car is no excuse: Walker *v.* Green (Kan.), 56 Pac. Rep. 477.

[39] Heller *v.* Chic. & G. T. R. Co., 109 Mich. 53. And see Terre Haute & L. R. Co. *v.* Sherwood, 132 Ind. 129.

[40] Oxley *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 629. See Un. Pac. R. Co. *v.* Langan, 52 Neb. 105, as to the breach of such a contract.

[41] The Coriolanus, 15 P. D. 103.

[42] Armstrong *v.* Chic., M. & St. P. R. Co., 53 Minn. 183.

So, on behalf of the carrier, a station agent has authority to make a contract within the scope of his employment: Wilson *v.* Mo. Pac. R. Co., 66 Mo. App. 388.

[43] Carstens *v.* Burleigh (Wash.), 55 Pac. Rep. 221.

The fact that there is a contract will not prevent an action in tort being brought for a failure to carry and deliver safely.[44]

111. Restriction of Liability.—There are an indefinite number of ways in which a carrier of live-stock may restrict his ordinary liability for losses. One notable qualification of this principle, however, is that a carrier cannot restrict his liability for injuries resulting from his own negligence or misconduct or that of his employees.[45] But where a contract of carriage is made, agreeing on the valuation of animals carried with the rate of freight based on condition that the carrier assumes liability only to the extent of the agreed valuation, it is held in many jurisdictions that, even where the loss is caused by negligence, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight he receives, and of protecting himself against extravagant and

[44] Clark *v.* St. Louis, K. C. & N. R. Co., 64 Mo. 440. And see Mo., K. & T. R. Co. *v.* Byrne (Ind. Ty.), 49 S. W. Rep. 41; San Antonio & A. P. R. Co. *v.* Graves (Tex. Civ. App.), Ibid. 1103.

[45] N. Y. Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 357; Cent. R. & Bkg. Co. *v.* Smitha, 85 Ala. 47; E. Tenn., V. & G. R. Co. *v.* Johnston, 75 id. 596; South & North Ala. R. Co. *v.* Henlein, 52 id. 606; Cent. R. Co. *v.* Bryant, 73 Ga. 722; Ill. Cent. R. Co. *v.* Adams, 42 Ill. 474; Chic. & A. R. Co. *v.* Grimes, 71 Ill. App. 397; Terre Haute & L. R. Co. *v.* Sherwood, 132 Ind. 129; Indianapolis, P. & C. R. Co. *v.* Allen, 31 id. 394; St. Louis, K. C. & N. R. Co. *v.* Piper, 13 Kan. 505; St. Louis & S. F. R. Co. *v.* Tribbey, 6 Kan. App. 467; Louisville, Cinc. & L. R. Co. *v.* Hedger, 9 Bush. (Ky.) 645; Sager *v.* Portsm., S. & P. & E. R. Co., 31 Me. 228; Rice *v.* Kan. Pac. R. Co., 63 Mo. 314; Vaughn *v.* Wabash R. Co., 62 Mo. App. 461; Potts *v.* Wabash, St. L. & P. R. Co., 17 id. 394; Chic., R. I. & P. R. Co. *v.* Witty, 32 Neb. 275; Welsh *v.* Pittsb., F. W. & C. R. Co., 10 O. St. 65; Cleveland, P. & A. R. Co. *v.* Curran, 19 id. 1; Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577; Mo. Pac. R. Co. *v.* Cornwall, 70 Tex. 611; Chesapeake & O. R. Co. *v.* Amer. Exch. Bank, 92 Va. 495; Abrams *v.* Milwaukee, L. S. & W. R. Co., 87 Wis. 485 [see Betts *v.* Farmers' Loan & T. Co., 21 id. 80; 13 Am. L. Reg. N. S. 151 n.]; Grand Trunk R. Co. *v.* Vogel, 11 Can. Sup. Ct. 612; Leuw *v.* Dudgeon, L. R. 3 C. P. 17 n.; Ronan *v.* Midland R. Co., 14 L. R. Ir. 157; Tattersall *v.* Nat. Steamship Co. Limd., 12 Q. B. D. 297.

fanciful valuations.[46] Where, however, the limitation is *merely* to restrict the carrier's liability for negligence, and not a *bona fide* valuation of the animal, it will not be upheld. Thus, where a horse was worth $1,500, an agreement limiting its value to $100 was not sustained.[47] On the other hand, a limitation to $50 was held reasonable if based on a reduction in the charge, though the real value of the animal was from $600 to $800.[48] Such stipulations are strictly construed and, where the animal is described as a horse or a mule, the plaintiff is not limited in the amount of his recovery for damages to a jack.[49]

In some States the doctrine that a carrier may relieve himself from liability for his negligence by an agreed valuation of goods carried at a lower rate, does not obtain.[50] The

[46] Hart *v.* Pa. R. Co., 112 U. S. 331; West. R. of Ala. *v.* Harwell, 91 Ala. 340, 97 id. 341 [see Louisville & N. R. Co. *v.* Kelsey, 89 id. 287]; St. Louis, I. M. & S. R. Co. *v.* Weakly, 50 Ark. 397; Same *v.* Lesser, 46 id. 236; Hill *v.* Boston, H. T. & W. R. Co., 144 Mass. 284; Alair *v.* North. Pac. R. Co., 53 Minn. 160 [see Moulton *v.* St. Paul, M. & M. R. Co., 31 id. 85]; Harvey *v.* Terre Haute & I. R. Co., 74 Mo. 538; Doan *v.* St. Louis, K. & N. R. Co., 38 Mo. App. 408; Duntley *v.* Boston & M. R. Co., 66 N. H. 263; Zimmer *v.* N. Y. Cent. & H. R. R. Co., 137 N. Y. 460; Johnstone *v.* Richm. & D. R. Co., 39 S. C. 55; Zouch *v.* Chesapeake & O. R. Co., 36 W. Va. 524; Louisville & N. R. Co. *v.* Sowell, 90 Tenn. 17; Starnes *v.* Louisv. & N. R. Co., 91 id. 516; Robertson *v.* Gd. Trunk R. Co., 24 Can. Sup. Ct. 611, 24 Ont. 75, 21 Ont. App. 204; McCance *v.* London & North-Western R. Co., 3 H. & C. 343; Nevin *v.* Great Southern & W. R. Co., 30 L. R. Ir. 125; Great West. R. Co. *v.* McCarthy, 12 App. Cas. 218.

That the value must be fixed at a specified sum which must be in consideration of a special reduced rate, see Kellerman *v.* Kansas City, St. J. & C. B. R. Co., 136 Mo. 177.

[47] Eells *v.* St. Louis, K. & N. W. R. Co., 52 Fed. Rep. 903.

And see Alair *v.* North. Pac. R. Co., 53 Minn. 160; Moulton *v.* St. Paul, M. & M. R. Co., 31 id. 85; Abrams *v.* Milwaukee, L. S. & W. R. Co., 87 Wis. 485; Schwartzchild *v.* Nat. Steamship Co., 74 Fed. Rep. 257.

[48] St. Louis, I. M. & S. R. Co. *v.* Weakly, 50 Ark. 397.

[49] Richardson *v.* Chic. & A. R. Co., 62 Mo. App. 1; Same *v.* Same (Mo.), 50 S. W. Rep. 782.

[50] Hart *v.* Chic. & N. R. Co., 69 Ia. 485; Kansas City, St. Jos. & C. B. R. Co. *v.* Simpson, 30 Kan. 645; Ohio & M. R. Co. *v.* Tabor, 98 Ky. 503;

doctrine is said, in an article on the subject, to be the law in the Supreme Court of the United States and in nineteen States, while the opposite doctrine obtains in twelve States and the District of Columbia, "so that though the larger number of jurisdictions are in favor of allowing the carrier to contract away his liability for negligence, yet the law cannot by any means be regarded as settled." [51]

In England it has been held that a carrier may limit his liability even for his own negligence, by stipulating that the shipper is to assume all the risks of the journey; [52] and there are decisions to the same effect in Canada.[53] This has also been held to be the law in New York: "In this State it is well settled that a carrier may, by express contract, exempt himself from liability for damages resulting from any degree of negligence on the part of his servants, agents and employees." [54] Therefore, where the plaintiff assumed the risk of injuries caused by heat and a number of the hogs died from the result of the negligence of the defendant's employees in not watering them and cooling them by wetting, it was held that as the carriers of live-stock were liable only for negligence, in order to give effect to the stipulation it must be construed as exempting the defendant from liability for injuries by heat, the result of negligence.[55] But in a later case, it was held that where the general words of exemption

Baughman *v.* Louisville, E. & St. L. R. Co., 94 id. 150; Louisville & N. R. Co. *v.* Owen, 93 id. 201; Chic., St. L. & N. O. R. Co. *v.* Abels, 60 Miss. 1017; South. Pac. R. Co. *v.* Maddox, 75 Tex. 300.

And see Ashendon *v.* London, B. & S. C. R. Co., 5 Ex. D. 190; Dickson *v.* Great North. R. Co., 18 Q. B. D. 176.

[51] 4 Harv. L. Rev. 288.

[52] Austin *v.* Manchester, S. & L. R. Co., 10 C. B. 454; Shaw *v.* York & N. M. R. Co., 13 Q. B. 347; Carr *v.* Lancashire & Y. R. Co., 7 Ex. 707; Great North. R. Co. *v.* Morville, 21 L. J. Q. B. 319.

[53] Fairr *v.* Gt. West. R. Co., 35 U. C. Q. B. 534; O'Rorke *v.* Gt. West. R. Co., 23 id. 427.

[54] Cragin *v.* New York Cent. R. Co., 51 N. Y. 61. And see Wilson *v.* N. Y. Cent. & H. R. R. Co., 27 Hun (N. Y.) 149, affirmed in 97 N. Y. 87.

[55] Cragin *v.* New York Cent. R. Co., supra.

do not include negligence, the carrier will not be released, and, therefore, where he was released from liability for injuries to sheep "caused by burning of hay, straw, or other material used for feeding said animals, or otherwise," and, owing to the negligence of the carrier in not supplying the train with proper appliances for putting out a fire, a number of animals were burned to death, the defendant was held liable.[56] The weight of authority is, however, against this rule allowing the carrier to limit its liability for negligence.[57]

Under the Railway and Canal Traffic Act, 17 and 18 Vict. c. 31, s. 7, conditions may be enforced that are judged to be "just and reasonable" and the late English decisions depend principally upon the meaning attached to this statutory phrase. Some examples are accordingly cited here.

It is not unreasonable to limit the value of the animals to a certain amount if they are carried at a cheaper rate under which the shipper assumes all risks.[58] And a condition that the company should be free from all loss or damage to cattle in loading or unloading from suffocation, or from being trampled on, bruised, or otherwise injured in transit from fire or from any other cause whatsoever was held just and reasonable where the drover accompanied the cattle and saw them put into a closed car which could only be opened by a slide, the lid having afterwards been closed and some of the cattle suffocated.[59] But in a later case a condition that a company should be free from all risk and responsibility for loss or damage from loading or unloading or injury in transit from any cause whatever, it being agreed that

[56] Holsapple *v.* Rome, W. & O. R. Co., 86 N. Y. 275, where the case last cited was distinguished on the ground that there the injury resulted from the vitality and inherent nature of the animals for which the carrier was not liable at the common law, while here it resulted from fire for which the common-law liability would have attached.

[57] Hutchinson Carriers § 260.

[58] McCance *v.* London & North-Western R. Co., 7 H. & N. 477, 3 H. & C. 343.

[59] Pardington *v.* South Wales R. Co., 1 H. & N. 392.

the animals were to be carried at the owner's risk and that he was to see as to the fitness of the car before the stock were placed therein and to make complaint, if there were occasion, in writing, to the company's officer before the car left the station,—was held to be unjust and unreasonable. "They provide for the complete exemption of the company from all responsibility whatever." [60] And the fact that free passes are given to the persons in charge of the stock does not make such a contract reasonable.[61] So, a contract exempting a railway company from liability for loss of, or any damage or injury to, animals arising from dangers and accidents of the sea, or of steam navigation, act of God, queen's enemy, jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels,—was held unreasonable.[62] Also, a condition exempting a company from all liability in respect of horses, whether in loading or unloading or in transit and conveyance, whilst in the company's vehicles and on their premises, where a low rate was charged; and a condition that the claim would not be sustained unless the injury was stated and pointed out by the company's agent at the time of unloading.[63] And a condition is unreasonable that tends to exempt the carrier from responsibility for negligence or default in the selection of cattle on landing, on loading or unloading.[64] So, con-

[60] Gregory *v.* West Midland R. Co., 2 H. & C. 944, following McManus *v.* Lancashire & Y. R. Co., 4 H. & N. 327, which reversed 2 id. 693.

[61] Rooth *v.* North-Eastern R. Co., L. R. 2 Ex. 173. And see Tex. & Pac. R. Co. *v.* Avery (Tex. Civ. App.), 46 S. W. Rep. 897.

[62] Doolan *v.* Midland R. Co., 2 App. Cas. 792.

[63] Lloyd *v.* Waterford & L. R. Co., 15 Ir. C. L. R. 37.

A contract to carry at a reduced rate "at owner's risk and exempt from all liability not occasioned by wilful misconduct" is valid: Knox *v.* Gr. North. R. Co., [1896] 2 I. R. 632; Curran *v.* Midland Gr. West. R. Co., Ibid. 183.

[64] McNally *v.* Lancashire & Y. R. Co., 8 L. R. Ir. 81.

ditions that cattle should be conveyed by sea at the owner's sole risk and on land "where the charge of conveyance is per wagon, as owner or his servant is required to superintend loading of stock, and is allowed to place as many animals in the wagon as he considers may be conveyed with safety, the company will not be responsible for loss from overcrowding or injury done in loading and unloading, or in consequence of one animal injuring another,"—were held unjust and unreasonable.[65] And a contract is unreasonable whereby a company claims immunity from any consequences arising from over-carriage, detention or delay, although a low rate is charged.[66] A condition that a company will not be liable "in any case" for loss or damage to a horse or dog above a certain specified value unless the value is declared, is not just and reasonable as it is unconditional and would protect the company even from the negligence or wilful misconduct of its servants.[67] But a company was held not liable for the negligence of its servants, in a case where the shipper had notice of a higher rate that he might have adopted.[68] And a condition that a company would not be liable for dogs beyond a specified value, unless a higher value was declared at the time of delivery and a percentage paid upon the excess of the value so declared was held reasonable.[69]

Returning to the American cases, we shall consider some

[65] Corrigan *v.* Great Northern and Manchester, S. & L. R. Cos., 6 L. R. Ir. 90.

[66] Allday *v.* Great West. R. Co., 11 Jur. (N. S.) 12. And see Robinson *v.* Great West. R. Co., H. & R. 97.

[67] Ashendon *v.* London, B. & S. C. R. Co., 5 Ex. D. 190.

[68] Great West. R. Co. *v.* McCarthy, 12 App. Cas. 218.

[69] Welch *v.* Great Western R. Co. (Co. Ct. case), 106 L. T. 218. Granger, J., said: "It seems almost impossible that a railway company could carry on its business if it is bound to take dogs at their full value. There is no end to the value of dogs. If a railway company was not protected in this way, dogs of the value of £100 might be sent without notice to the company. In practice, as a matter of fact, people always run the risk."

of the restrictions on the carrier's liability that have been passed upon in the courts. In Arkansas it was held that a bill of lading containing fifteen sections limiting the carrier's common-law liability, required to be accepted by the shipper in advance of the shipment, was, under the circumstances, invalid as being unfair and unreasonable, and that an intermediate carrier could claim no more rights under it than the original carrier could have claimed.[70] In Kansas, a statute prohibits a stipulation limiting or changing the common-law liability of the company, except by regulation or order of the board of railroad commissioners.[71] The carrier in consideration of a reduced rate may stipulate for exemption from liability for overcrowding, suffocation, heat, fire, collision, running off the track, etc.[72] But this will not exempt him, on the general principle already discussed, where the injury is due to his negligence. Therefore, when the shipper agreed to ship an animal in a box-car if the doorway was slatted and signed a special contract that, having examined the car, he assumed all risks of suffocation and the animal was suffocated in consequence of the car not being slatted, it was held that suffocation for want of ventilation was not one of the shipper's risks.[73] And where the shipper assumes the risk of fire, if the company permit straw or combustible materials to be used on the car in such a way that they may be easily ignited, this is negligence for which the shipper may re-

[70] St. Louis, I. M. & S. R. Co. *v.* Spann, 57 Ark. 127.

[71] See St. Louis & S. F. R. Co. *v.* Sherlock, 59 Kan. 23.

[72] Georgia R. Co. *v.* Beatie, 66 Ga. 438; Same *v.* Spears, Ibid. 485; Mitchell *v.* Georgia R. Co., 68 id. 644; Meyers *v.* Wabash, St. L. & P. R. Co., 90 Mo. 98; Squires *v.* New York Cent. R. Co., 98 Mass. 239.

In 19 Cent. L. Jour. 165, it is said of Mitchell *v.* Ga. R. Co., supra: "It would seem as the latter [*i. e.*, the carrier] was the cause of the overcrowding, the case is of doubtful, if of any, authority." And see Internat. & G. N. R. Co. *v.* Parish (Tex. Civ. App.), 43 S. W. Rep. 1066.

[73] Kan. City, M. & B. R. Co. *v.* Holland 68 Miss. 351. And see Sturgeon *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 569; Leuw *v.* Dudgeon, L. R. 3 C. P. 17 n.

cover.[74] A common carrier cannot contract against failure to provide suitable facilities for loading, unloading, watering and feeding, as this is negligence.[75]

There is nothing unreasonable or against public policy in providing in a bill of lading for cattle shipped on deck that, if necessary, they may be jettisoned for the safety of the ship, without the ship-owner's incurring any liability.[76] But if sound cattle are thrown overboard in a mild storm, without sufficient reason, the vessel will be liable for the loss, and a clause in the contract that the cattle are to be at the owner's risk, the carrier not to be accountable for accident or mortality even when occasioned by negligence or default, will not exempt the latter from responsibility.[77] Now, however, by the act of February 13, 1893, if a vessel transporting merchandise or property to or from any port in the United States is seaworthy and properly equipped, neither the vessel nor her owner or charterers shall be responsible for damages resulting from faults or errors in navigation or in the management of the vessel.[78]

It was held in a Michigan case that where the owner took all risks of "loading, unloading, conveyance," etc., whether from negligence, default or misconduct, this did not excuse the company for not furnishing suitable cars.[79] And a special contract devolving on the owner the personal care of the cattle with the risk of their escape or injury through natural restiveness or viciousness, does not exonerate the company from responsibility for failure to provide a safe car.[80] And though the owner assumes all risk except from

[74] McFadden *v.* Mo. Pac. R. Co., 92 Mo. 343; Powell *v.* Pa. R. Co., 32 Pa. St. 414.

[75] Chesapeake & O. R. Co. *v.* Amer. Exch. Bank, 92 Va. 495.

[76] The Enrique, 5 Hughes C. Ct. (U. S.) 275.

[77] Compania de Navigation La Flecha *v.* Brauer, 168 U. S. 104.

[78] Act of February 13, 1893, Ch. 105; 27 Stat. L. 445.

[79] Hawkins *v.* Great Western R. Co., 17 Mich. 57, 18 id. 427. And see Potts *v.* Wabash, St. L. & P. R. Co., 17 Mo. App. 394.

[80] Rhodes *v.* Louisv. & N. R. Co., 9 Bush (Ky.) 688.

negligence, if he ships his horse in a box-car the doors of which are fastened only from the outside, and is inside with the horse, he has a right to expect the conductor will close the door before starting: otherwise, the company will be liable for the consequences.[81] A clause in a bill of lading of cattle by which the shipper assumes all risk of the fittings, is void as against public policy, in so far as it relates to the defective condition of fittings through the negligence of employees, unknown to the shipper, as a result of which they gave way in an ordinary gale and some of the cattle were killed.[82]

In New York the company may exempt itself from liability by reason of the insecurity of the cars.[83] And in an English case where the company issued tickets for the transportation of cattle, subject to the owner taking all risks and the company not being responsible for any injury, and the cattle were frightened and escaped from the truck owing to its being defectively constructed, it was held that the company were protected from liability by the terms of the ticket, as they excluded the implied stipulation that the truck was fit for the purpose for which it was to be used.[84]

The reasonableness of the alternative of a reduced rate with restricted liability or of a higher rate with ordinary liability is for the court, not for the jury to decide.[85] The stipulation limiting liability for an animal is waived where the carrier in adjusting damages resulting from its negligence agrees to take the injured property and pay the shipper a larger sum than that named in the limitation.[86] But where the owner is to take all risks, proof that the company had been in the habit of conveying cattle for him without his presence on

[81] Lavoie *v.* Reg., 3 Can. Exch. 96.
[82] The Iowa, 50 Fed. Rep. 561.
[83] Wilson *v.* N. Y. Cent. & H. R. R. Co., 97 N. Y. 87.
[84] Chippendale *v.* Lancashire & Y. R. Co., 21 L. J. Q. B. 22.
[85] Sheridan *v.* Midland G. W. R. Co., 24 L. R. Ir. 146.
[86] Chic. & East. Ill. R. Co. *v.* Katzenbach, 118 Ind. 174.

the train does not show a waiver of this part of the contract.[87]

A contract limiting the carrier's liability signed under duress after the animals are on board the train is not binding.[88] Such a contract, however, in the absence of fraud or misrepresentation, will bind the shipper though he has not read it.[89] And it was held in a Missouri case that a prior verbal understanding cannot be proved against a written bill of lading, in the absence of fraud or mistake, though it contains conditions limiting the carrier's liability and is presented to him for signature after the stock are loaded and when he has no time to examine it sufficiently before the departure of the train.[90] But in Texas a verbal contract has been upheld under such circumstances, the subsequent written contract being held to be without consideration.[91] And where a shipper pays freight charges and receives a paper that he thinks is a receipt but which contains stipulations exempting the carrier from liability for a failure to carry promptly, the shipper may show by parol a contract to carry with special despatch.[92]

[87] Chic. & N. R. Co. *v.* Van Dresar, 22 Wis. 511.

[88] Atchison, T. & S. F. R. Co. *v.* Dill, 48 Kan. 210; Kan. Pac. R. Co. *v.* Reynolds, 17 id. 251; Atchison, T. & S. F. R. Co. *v.* Mason, 4 Kan. App. 391; German *v.* Chic. & N. R. Co., 38 Ia. 127; Wabash R. Co. *v.* Lannum, 71 Ill. App. 84; Mo., K. & T. R. Co. *v.* Carter, 9 Tex. Civ. App. 677; Gulf, C. & S. F. R. Co. *v.* Wood (Tex. Civ. App.), 30 S. W. Rep. 715; Tex. & Pac. R. Co. *v.* Avery (Tex. Civ. App.), 46 id. 897.

As to when the restriction goes into effect, see Hodgman *v.* West Midland R. Co., 5 B. & S. 173, 35 L. J. Q. B. 85.

And see, as to the acceptance of a drover's pass, Hastings *v.* N. Y., O. & W. R. Co., 6 N. Y. Suppt. 836.

[89] West. Ry. of Ala. *v.* Harwell, 91 Ala. 340; Stewart *v.* Cleveland, C., C. & St. L. R. Co., 21 Ind. App. 218; O'Rorke *v.* Gt. West. R. Co., 23 U. C. Q. B. 427.

[90] St. Louis, K. C. & N. R. Co. *v.* Cleary, 77 Mo. 634.

Where the defendant relies on the written contract, he should be required, on motion, to file it: Caldwell *v.* Felton (Ky.), 51 S. W. Rep. 575.

[91] San Antonio & A. P. R. Co. *v.* Wright (Tex. Civ. App.), 49 S. W. Rep. 147.

[92] King *v.* Woodbridge, 34 Vt. 565.

With regard to the burden of proof it has been said: "The uniform holding of the Supreme Court of Illinois has been that the carrier must show affirmatively that the restrictions of liability claimed by it were in fact known and assented to by the shipper. This seems, however, to be contrary to the weight of American and English decisions which hold that the fair and honest acceptance of a bill of lading, without dissent, raises a presumption that all limitations contained therein were brought to the knowledge of the shipper and agreed to by him." [93]

112. Receiving; Loading; Unloading; Delivery.—The responsibility of the carrier extends from the time the animals are received till the cars are unloaded.[94] This is true even where a statute provides that the liability shall begin at the time of signing the bill of lading.[95] And where a contract provided that the company should not be liable before the car was loaded and the door fastened, they were, nevertheless, held liable where the lambs drank salt water, negligently allowed to flow in the stock-yard, before they were put on the car, though they did not die till they were in the possession of a connecting carrier.[96] The liability begins with the placing of the animal in a cattle-pen preparatory to shipment, by order of the company's agent, and the fact that the shipper saw the pens, which were weak and rotten, does not prevent recovery.[97] And where the injury was received in the pens of a connecting carrier after the animals had been tendered to

[93] 38 Cent. L. Jour. 97, citing 3 Wood Railways 1577-78, n. 2, Hutchinson Carriers, §§ 238-9, etc.

[94] Moffat *v.* Great Western R. Co., 15 L. T. N. S. 630.

Where a horse was injured while the defendant's porter was trying to put it into a box at the railway station, it was held that carriage had commenced: Knox *v.* Gr. North. R. Co., [1896] 2 I. R. 632.

[95] Internat. & G. N. R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186.

[96] Norfolk & W. R. Co. *v.* Harman (Va.), 22 S. E. Rep. 490.

[97] Mason *v.* Mo. Pac. R. Co., 25 Mo. App. 473. And see Galveston,

the defendant company but before they were loaded on their cars, the latter were held liable in the absence of a legal excuse for not receiving them at the time of tender.[98]

The carrier is obliged to provide facilities for receiving stock, such as enclosed yards.[99] It is also bound to furnish proper places and appliances for loading and unloading the animals. Thus the delivery of a horse at a chute designated by the company's agent for use in loading the car is sufficient to charge the company if the chute is rotten, and a subsequent contract of shipment exempting the defendant from liability for loss by loading, etc., does not relieve the latter from liability and is inadmissible in evidence.[100] And the company is liable for an injury resulting from an accumulation of ice on the floor of the chute after the lapse of sufficient time since the storm to remove it in, and the shipper is not guilty of contributory negligence by reason of his failure to put ashes or sand on such floor.[101] Where a horse is injured by reason of a defect in the platform used for loading, the company if under any circumstances excusable, are not so unless they used full diligence to discover any defect before exposing the animal to the risk of injury.[102]

Where the company are required by statute to erect suitable freight buildings, they cannot avoid liability by showing

H. & S. A. R. Co. *v.* Jackson (Tex. Civ. App.), 37 S. W. Rep. 255; Mo., K. & T. R. Co. *v.* Byrne (Ind. Ty.), 49 id. 41.

Where cattle are frightened by a train and escape through a gate of the stock-pen which is negligently out of repair, this negligence is the proximate cause of a resulting injury to the cattle, but not to the shipper personally: Tex. & Pac. R. Co. *v.* Bigham, 90 Tex. 223.

[98] Gulf, C. & S. F. R. Co. *v.* Godair, 3 Tex. Civ. App. 514.

[99] Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128.

[100] McCullough *v.* Wabash West. R. Co., 34 Mo. App. 23. And see Rooth *v.* North-Eastern R. Co., L. R. 2 Ex. 173.

That failure to have a chute at a station is not necessarily negligence, see Regan *v.* Adams Exp. Co., 49 La. Ann. 1579.

[101] Kincaid *v.* Kan. City, C. & S. R. Co., 62 Mo. App. 365. And see White *v.* Cinc., N. O. & T. P. R. Co., 89 Ky. 478.

[102] E. Tenn., V. & G. R. Co. *v.* Herrman, 92 Ga. 384.

that their pens for the shipment of cattle are so badly kept as to make it contributory negligence for the shipper to use them.[103] Where sufficient stock pens are not provided for loading the cattle within a reasonable time, the company are liable for loss by shrinkage resulting therefrom.[104] Nor, where pigs are injured in the company's pens by lime-wash negligently put on the pens to disinfect them, is it any defence that they were only carrying out statutory directions for the prevention of disease.[105]

A railway company is not justified in making the stock-yards of a certain company its exclusive live-stock depot, when access thereto must be purchased, there being other stock-yards in the neighborhood where the public may be suitably served at lower rates.[106] It may, however, by posting schedules, as required by the interstate commerce law, make a charge for freight to a city and a separate terminal charge of a fixed sum per car for delivery at stock-yards off its line.[107] It is not an unreasonable discrimination in favor of shippers of dead freight for a company to refuse to build a spur track for the shipment of live-stock as in the former case, as the receipt of dead freight is less burdensome.[108]

The carrier must provide a safe platform for unloading,[109] and is liable for not furnishing the usual means.[110] Thus, a

[103] Gulf, C. & S. F. R. Co. *v.* Trawick, 80 Tex. 270.

[104] Mo., K. & T. R. Co. *v.* Woods (Tex. Civ. App.), 31 S. W. Rep. 237.

[105] Shaw *v.* Great S. & W. R. Co., 8 L. R. Ir. 10.

[106] Keith *v.* Ky. Cent. R. Co., 1 Interst. Com. Rep. (Co-op. ed.) 601. And see Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128.

[107] Walker *v.* Keenan, 73 Fed. Rep. 755, distinguishing Covington Stock-Yards Co. *v.* Keith, supra. The business of a stock-yards company is not "interstate commerce" and exempt from State regulation, though the yards are located in two States: Cotting *v.* Kansas City Stock-Yards Co., 79 Fed. Rep. 679.

[108] Butchers & D. Stock-Yards Co. *v.* Louisville & N. R. Co., 67 Fed. Rep. 35.

[109] Owen *v.* Louisville & N. R. Co., 87 Ky. 626.

[110] Chesapeake & O. R. Co. *v.* Amer. Exch. Bank, 92 Va. 495. And see Mexican Nat. R. Co. *v.* Savage (Tex. Civ. App.), 41 S. W. Rep. 663.

Where horses are unloaded *en route* and escape from the pen in which

ferryman is liable for not providing proper means for landing a horse from his boat, though the animal is under its owner's charge.[111] But a company need not provide fences or guards at the station where the animals are landed between the tracks and the station-yard so as to prevent them from straying on to the former.[112] Where an animal was kept on a plank floor for some days after reaching its destination, in an action for negligence in so doing it was held error to exclude evidence that it was customary to do it in that place.[113]

Where the shipper furnishes and loads his own car, the carrier is not liable for negligent loading, though it was the duty of its officers to see that the loading was properly done.[114] And where the agent of the owner of race-horses insisted upon loading the car as he thought best, owing to difficulty in the loading, the company were held not responsible for a resulting injury.[115] Where cattle shipped upon an ocean steamer in hot weather were by the shipper's act placed between decks and they grew sick and died, it was held that no negligence was to be presumed in the carrier.[116] Where the shipper had notice that the cars were being overloaded, he cannot recover damages therefor, though he had contracted for a sufficient number of cars to hold the animals that were being loaded.[117] So, a shipper who asks for an additional car on the day of shipment and crowds his cattle into

the carrier placed them, the latter is liable as an insurer without regard to negligence: Tex. & Pac. R. Co. *v.* Turner (Tex. Civ. App.), 37 S. W. Rep. 643.

[111] Willoughby *v.* Horridge, 12 C. B. 742.

[112] Roberts *v.* Great Western R. Co., 4 C. B. N. S. 506.

As to negligence in turning unloaded stock on an unprotected lot in cold weather, see Cooper *v.* Raleigh & G. R. Co. (Ga.), 30 S. E. Rep. 731.

[113] Moses *v.* Port Townsend S. R. Co., 5 Wash. 595.

[114] Fordyce *v.* McFlynn, 56 Ark. 424. And see Mo. Pac. R. Co. *v.* Edwards, 78 Tex. 307; East Tenn. & G. R. Co. *v.* Whittle, 27 Ga. 535.

[115] Bowie *v.* B. & O. R. Co., 1 MacArth. (D. C.) 94.

[116] The Powhatan, 21 Blatch. C. Ct. (U. S.) 8.

[117] Ft. Worth & D. C. R. Co. *v.* Word (Tex. Civ. App.), 32 S. W. Rep. 14.

a close box car instead of waiting for a day when a stock car could have been had, cannot recover for resulting injuries.[118]

Where the company receives an overloaded car of animals, it assumes the responsibility for the same.[119] Thus, where a connecting carrier receives cars overpacked with hogs its duty is to demand that such manner of loading be changed and new cars added, or to do so itself, and, if the hogs are suffocated when they arrive at their destination, that carrier, being the last one, is responsible therefor and the burden is on it to show whether the suffocation was before or after it had received the hogs.[120]

A carrier under a contract that the animals are taken at the owner's risk "during course of transportation, loading and unloading" is bound to unload, though at the owner's risk, irrespective of local usage or a general regulation of the company requiring the consignee to unload.[121] But where the shipper assumed all the risks and was to load and unload with the carrier's assistance and, a snow-storm occurring, the cattle were in the cars for twenty-four hours in consequence of the carrier's refusal to build a platform for unloading, so that some of them were injured and died, it was held that the carrier's duty was simply to transport reasonably, that the clause as to unloading referred only to the end of the journey and that the carrier was not obliged to unload before, it not being burdened with the care of the animals during the transit.[122] Where the shipper asked to have the cattle placed where they might be unloaded on account of a flood and the request was not granted, the question of negligence was held to be under the circumstances, for the jury.[123] Where the plaintiffs had the right to have the car left at a station if the

[118] Huston Bros. *v.* Wabash R. Co., 63 Mo. App. 671.
[119] Kinnick *v.* Chic., R. I. & P. R. Co., 69 Ia. 665.
[120] Paramore *v.* Western R. Co., 53 Ga. 383.
[121] Benson *v.* Gray, 154 Mass. 391.
[122] Penn *v.* Buffalo & E. R. Co., 49 N. Y. 204.
[123] Bills *v.* N. Y. Cent. R. Co., 84 N. Y. 5.

condition of the hogs required it and the animals were injured by the refusal of the conductor to do so, an instruction to find for the defendant if the car reached its destination in a reasonable time was held erroneous.[124] If horses are not unloaded at the time agreed on by the company's freight agent, the fact that the conductor before starting stated to the owner that he did not think they could be unloaded at that time does not relieve the company from liability.[125]

Where the company transfer cattle to the car of another line without giving the shipper an opportunity of attending to the loading, they are liable for not furnishing sufficient bedding and partitions whereby injury results.[126] Cattle may be unloaded by a connecting carrier, if there is no provision in the contract to the contrary, and the men in charge of them have not the right to decide when this is to be done. If after they are unloaded they are seized to pay a fine imposed upon the owner, the carrier is not liable therefor as the damages are too remote.[127] If the shipper unloads the stock between the points of shipment named in the bill of lading and takes it out of the possession of the carrier for the purpose of feeding it, this does not render it subject to seizure by his creditors as against a transferee of the bill of lading.[128] Where cattle when they are unloaded to be fed are lost by being mingled with other cattle and afterwards loaded in the wrong car, the company is liable, its agents having exclusive charge of them during the unloading and loading.[129]

The carrier must deliver the animals to the person designated by the terms of shipment or to his order at the place of destination, and is liable if they are delivered to one not entitled to receive them.[130] It need not, however, hunt up the

[124] Johnson *v.* Ala. & V. R. Co., 69 Miss. 191.
[125] Corbett *v.* Chic., St. P., M. & O. R. Co., 86 Wis. 82.
[126] Ala. G. S. R. Co. *v.* Thomas, 89 Ala. 294.
[127] McAlister *v.* Chic., R. I. & P. R. Co., 74 Mo. 351.
[128] Lewis *v.* Springville Bkg. Co., 166 Ill. 311.
[129] Norfolk & W. R. Co. *v.* Sutherland, 89 Va. 703.
[130] North Pa. R. Co. *v.* Com. Nat. Bk., 123 U. S. 727.

consignee: its duty is done when it has unloaded the cattle, stored them in a proper place, cared for them and is ready to deliver them on demand. It need not give the consignee notice.[131] And where game unlawfully killed is delivered to a carrier for shipment by one not entitled to its possession, the carrier, on delivering the game to the State on demand, is not bound to give notice to the consignor.[132] Where a passenger, without special notice of the company's regulation that "live animals are allowed as baggagemen's perquisites" committed his dog to the care of the baggage-master and paid him for its transportation, the company was held liable for the loss of the dog by the baggage-master's delivering it to the wrong person.[133] Where one sent a horse by rail consigned to himself at a station on the line and paid the fare and, there being no one to receive it, the company placed it with a livery-stable keeper, it was held that the company could recover from the owner the reasonable charges of the stable keeper.[134] Where the animals are killed during the journey by an accident for which the carrier is not responsible, he is not required to deliver their carcasses even though they have a market value, the owner having refused to take charge of them.[135]

The shipper of stock to a particular place may withdraw them at any point on the route, on payment of freight to the destination.[136]

A shipper contracting to load, unload and feed the animals

[131] Chic. & East. Ill. R. Co. *v.* Pratt, 13 Ill. App. 477. And see Shepherd *v.* Bristol & E. R. Co., L. R. 3 Ex. 189; Wise *v.* Great West. R. Co. 1 H. & N. 63.

[132] Thomas *v.* Northern Pac. Exp. Co. (Minn.), 75 N. W. Rep. 1120.

[133] Cantling *v.* Hannibal & St. J. R. Co., 54 Mo. 385.

[134] Great Northern R. Co. *v.* Swaffield, 9 L. R. Ex. 132.

[135] Lee *v.* Marsh, 43 Barb. (N. Y.) 102.

[136] Sharp *v.* Clark, 13 Utah 510.

That a purchasing agent of the consignee has no power to change the destination of cattle while they are in transit, see Lake Shore & M. S. R. Co. *v.* Nat. Live-Stock Bk., 178 Ill. 506.

at his own expense, who is guilty of any negligence or wrong act therein, cannot recover against the carrier: as if he negligently puts hay into the car which takes fire.[137] But where he negligently leaves a horse untied, if the carrier moves the car while the animal is loose, it is still liable if the injury was one likely to result from the circumstances.[138] In another case where the carrier was not to be liable for loss "by jumping from cars" and the plaintiff put the horse in the car and tied it near a door which he left open, it was held that though it was, perhaps, negligence in the carrier to move the car with the door open, yet the plaintiff was guilty of contributory negligence and could not recover.[139] Where the injury to an animal under the control of the shipper's agent results from the latter's act, as by his entering the car with a lantern and its taking fire, the carrier is not liable, irrespective of the question of negligence on the agent's part.[140]

The shipper should load so that the train will not be unnecessarily delayed.[141] Though he may contract to load, unload and reload at his own risk, this is no defence where the unloading and loading of cars at feeding stations were actually assumed by the carrier's employees.[142] And where the agent at a transfer station who has authority to keep the cattle in the original cars or to transfer them, tells the shipper there will be no change, this relieves the latter of his duty by bill of lading.[143]

In order to avoid the injurious consequences of a long journey, it is provided in § 4386 of the Revised Statutes of the United States that in interstate shipments of live-stock any

[137] Pratt *v.* Ogdensburg & L. C. R. Co., 102 Mass. 557.

[138] Doan *v.* St. Louis, K. & N. R. Co., 38 Mo. App. 408.

[139] Hutchinson *v.* Chic., St. P., M. & O. R., 37 Minn. 524. And see Newby *v.* Chic., R. I. & P. R. Co., 19 Mo. App. 391.

[140] Hart *v.* Chic. & N. R. Co., 69 Ia. 485.

[141] Louisville, N. A. & C. R. Co. *v.* Godman, 104 Ind. 490.

[142] Mo. Pac. R. Co. *v.* Kingsbury (Tex. Civ. App.), 25 S. W. Rep. 322. See Fordyce *v.* McFlynn, 56 Ark. 424.

[143] Ala. G. S. R. Co. *v.* Thomas, 89 Ala. 294.

company that shall keep the animals in the cars for more than twenty-eight consecutive hours without unloading them for at least five hours for rest, food, etc., shall be liable to a penalty, unless they are prevented by storm or other accidental causes or unless the animals are carried in a car where they can and do have opportunity to rest, etc. This statute applies only to interstate shipments, not to shipments between two points in the same State.[144] It applies where a part of the time of confinement is outside of the State, and it is immaterial that the owner is in charge of the stock.[145] The carrier is liable not only for the statutory penalty but for damages sustained by the owner of the animals.[146] The receiver of a company, however, incurs no liability.[147] An accident to a train due to negligence does not excuse non-compliance with the statute.[148] Nor does the fact that the stock-yards were on fire when the train arrived:[149] "other accidental causes" means other unavoidable accidental causes and excludes the idea of negligence.[150] The statute was not, however, intended to fix the period during which the company could without liability hold the cattle without unloading: the question of negligence is still left as at the common law.[151]

[144] U. S. *v.* E. Tenn., V. & G. R. Co., 13 Fed. Rep. 642.

As to when a stock-yards company may be held to be engaged in interstate commerce and to be an illegal monopoly, see U. S. *v.* Hopkins, 82 Fed. Rep. 529.

[145] Hendrick *v.* Boston & A. R. Co., 170 Mass. 44, where it was also held that the statute was not superseded by an order of the board of cattle commissioners forbidding a railroad company's unloading any neat cattle for any purpose whatever, except upon written permission from the board, at any place except certain designated quarantine stations.

[146] Nashville, C. & St. L. R. Co. *v.* Heggie, 86 Ga. 210; Hale *v.* Mo. Pac. R. Co., 36 Neb. 266.

[147] U. S. *v.* Harris, 85 Fed. Rep. 533.

[148] Newport News & M. Val. Co. *v.* U. S., 61 Fed. Rep. 488. And Brockway *v.* Amer. Exp. Co., 168 Mass. 257.

[149] Nashville, C. & St. L. R. Co. *v.* Heggie, supra.

[150] Chesapeake & O. R. Co. *v.* Amer. Exch. Bank, 92 Va. 495.

[151] Mo. Pac. R. Co. *v.* Ivy, 79 Tex. 444. And see Galveston, H. & S. A. R. Co. *v.* Warnken, 12 Tex. Civ. App. 645.

Nor can the statute be so construed as to make the unlawful confinement of each animal a separate offense and thus multiply the penalty by the whole number of animals.[152] The words "cattle, sheep, swine or other animals" include horses, mules, etc., as well as animals intended for food.[153]

Where the contract relieves the defendant of all liability beyond the line of its own road, this does not permit it to escape the consequences of its failure to comply with the shipper's request to unload the cattle after they had been kept in the cars for more than twenty-eight hours, though after the connecting carrier had refused to take the cars; and the fact that the shipper has a remedy against the connecting carrier for refusing to accept and unload the cattle is immaterial.[154]

113. Mode of Transportation.—It is the duty of the carrier to furnish safe and suitable cars for the transportation of live-stock;[155] and if their method of transportation is unsafe, the fact that it was usual with them is no defence.[156] Nor is the fact that the animal escaped beyond the terminus of the road, though there is a special contract limiting the company's liability to that point.[157] And the mere presence of the owner, who has no power over the train, does not lessen their liability for furnishing defective cars.[158] Where the shipper assented to the cars chosen, after notice of their condition and proper observation, the carrier was held in a Michigan case not to be

[152] U. S. *v.* Boston & A. R. Co., 15 Fed. Rep. 209.

[153] Chesapeake & O. R. Co. *v.* Amer. Exch. Bank, supra.

[154] Tex. & Pac. R. Co. *v.* Birchfield (Tex. Civ. App.), 46 S. W. Rep. 900.

[155] Ohio & M. R. Co. *v.* Tabor, 98 Ky. 503; McDaniel *v.* Chic. & N. R. Co., 24 Ia. 412; St. Louis & S. R. Co. *v.* Dorman, 72 Ill. 504; Union Pac. R. Co. *v.* Rainey, 19 Colo. 225.

[156] Leonard *v.* Fitchburg R. Co., 143 Mass. 307.

Where cattle-pens on a steamship arriving from a foreign port were larger than the size prescribed by the Board of Agriculture, a fine was inflicted by a police court, though the regulations of the foreign government provided for a larger space: 103 L. T. 582.

[157] Indianapolis, B. & W. R. Co. *v.* Strain, 81 Ill. 504.

[158] Peters *v.* New Orleans, J. & G. N. R. Co., 16 La. Ann. 222.

liable for defects.[159] And where the owner selects the cars himself the carrier is not liable unless the defects are not apparent and not pointed out.[160] So, where he has assumed the duty of loading and has loaded the car without objecting that it was not bedded with straw or other material, he cannot hold the company for the consequences of this failure.[161] Nor, under similar circumstances, can he testify that some other kind of car was better suited to the purpose.[162] And where his agent, knowing of the defects, had tried to remedy them, refusing the offer of a better car at a higher rate, it was competent for the jury to find that the plaintiff had assumed the risks.[163]

In other cases a more rigid rule is laid down. Thus, it has been held that the fact that the shipper accepted a defective car knowingly does not exempt the carrier from liability unless the shipper distinctly assumes the risk.[164] And the shipper is not estopped from complaining of an injury owing to the lack of trapdoors in the roof of a car, as required by statute, by the fact that he knew of the deficiency at the time of loading.[165] And a stipulation in the bill of lading that the shipper has examined the car and accepted it as "suitable and sufficient" for the purposes of his shipment will not protect the carrier from loss owing to defects,[166] though the burden will be on the shipper to disprove the truth of his recital.[167]

[159] Great Western R. Co. *v.* Hawkins, 18 Mich. 427. And see Nevin *v.* Great South. & West. R. Co., 30 L. R. Ir. 125.

[160] Harris *v.* North Ind. R. Co., 20 N. Y. 232. And see Union Pac. R. Co. *v.* Rainey, 19 Colo. 225; Leonard *v.* Whitcomb, 95 Wis. 646.

[161] E. Tenn., V. & G. R. Co. *v.* Johnston, 75 Ala. 596. And see Betts *v.* Farmers' Loan & T. Co., 21 Wis. 80, cited infra.

[162] Chic. & N. R. Co. *v.* Van Dresar, 22 Wis. 511.

[163] Coupland *v.* Housatonic R. Co., 61 Conn. 531.

[164] Pratt *v.* Ogdensburg & L. C. R. Co., 102 Mass. 557.

[165] Paddock *v.* Mo. Pac. R. Co., 60 Mo. App. 328.

[166] Louisville & N. R. Co. *v.* Dies, 91 Tenn. 177.

[167] West. R. Co. of Ala. *v.* Harwell, 91 Ala. 340.

The carrier is liable though the car accepted by it belongs to another company[168] or to the owner of the animals.[169] But where hogs were shipped in the owner's care, the company not to be liable for loss from jumping out except by collision or running off the track, and the owner refused to use the carrier's cars but used those of another company, the former were held not liable for the escape of hogs by reason of a defective door-fastening of which they did not know.[170]

A car for the transportation of horses and mules which is liable to be broken by slight kicks is not reasonably safe.[171] But the carrier is not bound to provide cars strong enough to transport safely animals that are vicious and unmanageable but only such as are ordinarily unruly.[172] Where without inspection a horse was put in a car one door of which could not be closed, the company was held guilty of gross negligence.[173] But where the owner of the animals found the car door in a weak and unsafe condition but did not inform the company's agent, it was held that the company was not liable.[174]

A statute requiring a company to furnish double-decked cars for carrying sheep, when requested, has been held to be constitutional.[175] A statute requiring a company to furnish suitable cars, does not authorize a penalty for failure to fur-

[168] Louisville & N. R. Co. *v.* Dies, supra; Wallingford *v.* Columbia & G. R. Co., 26 S. C. 258; Combe *v.* London & S. W. R. Co., 31 L. T. N. S. 613.

[169] Fordyce *v.* McFlynn, 56 Ark. 424.

[170] Ill. Cent. R. Co. *v.* Hall, 58 Ill. 409.

[171] Betts *v.* Chic., R. I. & P. R. Co., 92 Ia. 343. And see Smith *v.* New Haven & N. R. Co., 12 Allen (Mass.) 531.

With regard to mules it was said in Ill. Cent. R. Co. *v.* Teams, 75 Miss. 147: "Common observation and the experience of mankind at all familiar with the capacity for gymnastics on the part of this hybrid warn us not to place reliance in mere opinions of witnesses on this point [*i. e.*, their being overcrowded]."

[172] Selby *v.* Wilmington & W. R. Co., 113 N. C. 588.

[173] Root *v.* N. Y. & N. E. R. Co., 83 Hun (N. Y.) 111.

[174] Betts *v.* Farmers' Loan & T. Co., 21 Wis. 80.

[175] Emerson *v.* St. L. & H. R. Co., 111 Mo. 161.

nish "stable stock cars": statutes of this kind are to be strictly construed.[176]

If a break in the floor of the car would naturally cause the injuries, the carrier must show that they were not in fact so caused.[177]

A shipper is not entitled to have his cattle carried in cars of a special kind selected by him belonging to a third person and superior to the ordinary cattle cars, by reason of the fact that the carrier transports some cattle in other cars having some of the improvements of the former, available to all shippers equally, which are furnished by another party under a special contract and unlike those that the shipper asks for, can be used for carrying coal also. Such a refusal on the part of the carrier is not an unjust discrimination.[178]

A contract for the shipment of cattle implies that there shall be sufficient ventilation and, if insurance cannot be effected upon the cattle placed in the allotted space without additional ventilation which the master refuses to provide, the shipper is justified in declining to ship more cattle than can be insured and the ship is liable for the failure to transport the animals thus shut out.[179] But the mere fact that a number of cattle had died on a voyage from no apparent cause is not sufficient proof of the want of ventilation, where inspectors and experts had declared it to be sufficient and before and after the voyage the vessel had carried cattle with little mortality.[180]

A carrier is not responsible for cattle being injured by, or dying from heat unless through its negligence or misfeasance;[181] especially where the real cause of death is the want

[176] Austin & N. R. Co. *v.* Slator, 7 Tex. Civ. App. 344.

[177] Ohio & M. R. Co. *v.* Tabor, 98 Ky. 503.

[178] Morris *v.* Del., L. & W. R. Co., 2 Interst. Com. Rep. (Co-op. ed.) 617.

[179] The Alvah, 45 U. S. App. 210. But the fact that a single underwriter refused is not sufficient proof of the insufficiency of ventilation: Ibid.

[180] The Mondego, 56 Fed. Rep. 268.

[181] Maslin *v.* Balt. & O. R. Co., 14 W. Va. 180.

of inherent vitality in the animals.[182] But where live hogs are shipped and by reason of their crowded and unnatural condition they become heated and the conductor, though notified, fails to apply water to them, the company is liable.[183] And where a company that should have delivered hogs to a connecting carrier neglected to give notice that they had arrived and kept them for three hours at the point of arrival whereby they were killed by heat, the company was held guilty of gross negligence.[184]

Where cattle-fittings in a ship were old and insufficiently constructed and in a mild storm the cattle were injured by a lurch of the vessel, this was held to be negligence in the carrier.[185] But where the respondents show that the storm was an extraordinary one and also the character of their damages and that of other ships having cattle, the burden is on the libellant to prove that the losses were occasioned by a want of due care in the fittings.[186] Where a horse escapes from its fastenings, this is *prima facie* negligence in the carrier.[187] And where a greyhound, with a cord about its neck but no collar, was delivered to a carrier who gave a receipt and the dog was afterwards lost, it was held that the carrier could not set up as a defence that the animal was not properly secured when delivered to him.[188] But where a dog, fastened in the ordinary way by a strap and collar, slipped these while being moved to another train and running upon the track was

[182] Chic., R. I. & P. R. Co. *v.* Harmon, 12 Ill. App. 54.

[183] Ill. Cent. R. Co. *v.* Adams, 42 Ill. 474. And see Toledo, W. & W. R. Co. *v.* Thompson, 71 id. 434.

[184] Rock Island & P. R. Co. *v.* Potter, 36 Ill. App. 590.

[185] The Brantford City, 29 Fed. Rep. 373.

[186] The J. C. Stevenson, 17 Fed. Rep. 540.

[187] Porterfield *v.* Humphreys, 8 Humph. (Tenn.) 497.

[188] Stuart *v.* Crawley, 2 Stark. 323. And see, to the same effect, Sloan *v.* Great Northern R. Co., 33 Ir. L. T. Rep. 79, where the company by its conduct was held to have waived a by-law that it would not be responsible for a dog delivered to it unless the animal was secured with a proper chain, collar and muzzle.

killed, it was held that the fastening it by means furnished by the owner which appeared sufficient was no evidence of the company's negligence.[189] And where cattle died in transit by reason of the shipper's negligence in failing to provide sufficient bedding and ropes with which to tie them in the stalls provided by the ship, a libel against the ship will be dismissed.[190]

Injuries caused by an excessive amount of jolting, shunting, abrupt starting, etc., which might have been avoided by due care will also render the carrier liable.[191]

An order in Council requiring cattle-carrying vessels to be disinfected after landing and before taking on a new cargo was held to require disinfecting even when those parts which had not been used for carrying cattle were used for the new cargo.[192] Where a company furnishes cars without cleaning them as required by statute, and the shipper throws out the hay containing offal, the company is liable to the owner of cattle which eat it while grazing and die of fever.[193]

A company is not relieved of the duty of exercising proper care in attending to the animals on its trains by reason of the rush of business;[194] nor is this a proper excuse for not fur-

[189] Richardson *v.* N. E. R. Co., L. R. 7 C. P. 75, distinguishing Stuart *v.* Crawley, supra, as there (though not here) the defendant was a common carrier, and his servant had the means of seeing the dog was insufficiently secured.

As to the liability of the company for damage done by an escaped dog, see Gray *v.* North British R. Co., 18 Rettie (Sc. Ct. Sess.) 76.

[190] The Oranmore, 92 Fed. Rep. 396.

[191] Gulf, C. & S. F. R. Co. *v.* Ellison, 70 Tex. 491; Schaeffer *v.* P. & R. R. Co., 168 Pa. St. 209; Pavitt *v.* Leh. Val. R. Co., 153 id. 302; Newman *v.* Pa. R. Co., 33 N. Y. App. Div. 171; Atchison, T. & S. F. R. Co. *v.* Ditmars, 3 Kan. App. 459; Ainsby *v.* Great Northern R. Co., 8 T. L. R. 148. See Smith *v.* Midland R. Co., 57 L. T. N. S. 813.

[192] Ismay *v.* Blake, 66 L. T. N. S. 530.

And see, as to negligence in disinfecting, Tattersall *v.* Nat. Steamship Co. Limd., 12 Q. B. D. 297.

[193] Bradford *v.* Mo., K. & T. R. Co., 64 Mo. App. 475.

[194] Internat. & G. N. R. Co. *v.* Lewis (Tex. Civ. App.), 23 S. W. Rep. 323.

nishing cars according to agreement.[195] But it has been held that if the company has sufficient cars to meet ordinary demands and there is an unusual demand and it furnishes them as soon as it can, consistently with the rights of other shippers, it is not liable; but that it is the company's duty to inform the shipper within a reasonable time if it is unable to furnish cars,—otherwise, if he is ready with the stock, it will be liable.[196]

The carrier is not liable for an injury to an animal caused by the improper interference of the shipper or his agent with the management of the car by the carrier's employees.[197] Thus, where horses were placed in the defendant's cars and the latter's agent ordered a servant to lock the door and he was prevented from doing so by the plaintiff's agent and some of the horses were lost, it was held that the defendant was not guilty of negligence in failing to lock the door, and consequently was not liable.[198]

A traveller driving his horse and wagon on a ferry-boat and retaining custody of the horse is bound to use ordinary care, and if he leaves the horse and it becomes frightened and breaks a chain and is drowned, the owners of the ferry are not liable.[199] The fact that the plaintiff took his horse on the platform of a car that he knew to be unsafe was held not to show contributory negligence as a matter of law.[200]

A word may be said in this place as to injuries in transportation, caused not to, but by, animals, *i. e.*, by vermin. It was held in England that rats which gnawed a hole in a pipe

[195] Cross *v.* McFaden, 1 Tex. Civ. App. 461; Gulf, C. & S. F. R. Co. *v.* Hume, 87 Tex. 211.

But see Ill. Cent. R. Co. *v.* Haynes, 64 Miss. 604.

[196] Pittsburgh, C., C. & St. L. R. Co. *v.* Racer, 5 Ind. App. 209. And see § 115, infra.

[197] Roderick *v.* B. & O. R. Co., 7 W. Va. 54.

[198] Lee *v.* Raleigh & G. R. Co., 72 N. C. 236.

[199] White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155. And see Hoboken Land & Imp. Co. *v.* Lally, 48 N. J. L. 604.

[200] Gulf, C. & S. F. R. Co. *v.* Wood (Tex. Civ. App.), 30 S. W. Rep. 715.

whereby seawater escaped and damaged rice were "dangers and accidents of the seas" and came within the exception in a bill of lading.[201] In similar cases in this country the opposite opinion was held, rats being considered not to be a peril of the sea.[202] It has been held also that they did not come within an exception of damages from vermin,[203] but this decision has been reversed.[204] The owners of vessels are also liable for unseaworthiness caused by worms: such injuries are not perils of the sea.[205]

114. Food and Water.—The duty of a carrier to see that animals entrusted to it are properly fed and watered depends somewhat upon the contract with the shipper. But whether or not the shipper is obliged to feed and water his animals, the carrier is always required to furnish places and facilities for doing this;[206] and is liable for failure to do so, though the damages are but temporary.[207] But where a carrier's contract terminates on delivery of the cattle to a connecting car-

[201] Hamilton *v.* Pandorf, 12 App. Cas. 518.

[202] The Euripides, 71 Fed. Rep. 728; Kanter *v.* The Italia, 59 id. 617.

And see, to the same effect, The Carlotta, 9 Ben. (U. S.) 1; The Isabella, 8 id. 139, where the fact of damage was held sufficient evidence of insufficient care and skill in trying to rid the vessel of rats.

[203] The Timor, 46 Fed. Rep. 859, citing Stevens *v.* Navigazione Gen. Ital., 39 id. 562.

[204] The Timor, 67 Fed. Rep. 356.

[205] The Giles Loring, 48 Fed. Rep. 463.

[206] Smith *v.* Mich. Cent. R. Co., 100 Mich. 148; Gulf, C. & S. F. R. Co. *v.* Gann, 8 Tex. Civ. App. 620; Ft. Worth & D. C. R. Co. *v.* Daggett, 87 Tex. 322; Internat. & G. N. R. Co. *v.* McRae, 82 id. 614; Gulf, C. & S. F. R. Co. *v.* Simmons (Tex. Civ. App.), 28 S. W. Rep. 825; Taylor, B. & H. R. Co. *v.* Montgomery, 4 Tex. App. (Civ. Cas.) 401; Bryant *v.* Southwestern R. Co., 68 Ga. 805; Wabash, St. L. & P. R. Co. *v.* Pratt, 15 Ill. App. 177; Toledo, W. & W. R. Co. *v.* Hamilton, 76 Ill. 393; Abrams *v.* Milwaukee, L. S. & W. R. Co., 87 Wis. 485; Atchison, T. & S. F. R. Co. *v.* Ditmars, 3 Kan. App. 459.

The company is not liable to a penalty for failure to feed when the road is in the hands of a receiver: Tex. & Pac. R. Co. *v.* Barnhart, 5 Tex. Civ. App. 601.

[207] Gulf, C. & S. F. R. Co. *v.* Simmons, supra.

rier, it has a right to deliver to the latter at once and need not give an opportunity to the shipper to feed and water them, and in a three hours' journey no such opportunity need be given: the carrier has the right to presume the animals are in proper condition when they were shipped and need not feed or water them oftener than would be done by an ordinarily prudent man with his own stock.[208] But where there is an improper detention, the carrier is liable for an injury from the stock not being watered at the place of detention;[209] otherwise, where the shipper especially agrees that in case of accidents, delays, etc., he shall feed and water the animals at his own expense.[210] And where the company furnishes a car in which the stock can be fed to a shipper who has agreed to feed them at his own expense, he has no right to have the car stopped but can secure delay only by abandoning his contract or contracting for a longer time.[211]

It is not, however, the negligence of the carrier but the extent of injury likely to flow therefrom and the expense likely to be incurred in an attempt to avert loss, which must be looked to in determining whether a shipper in a railway wreck had the right to rescind the contract of shipment and to refuse to feed and water the stock as he had agreed to do. Where the delay is slight and little injury could result, it is negligence in the shipper or his agent to refuse to feed and water the stock when facilities are furnished by the company

[208] Tex. & Pac. R. Co. *v.* Stribling (Tex. Civ. App.), 34 S. W. Rep. 1002. See Galveston, H. & S. A. R. Co. *v.* Ivey (Tex. Civ. App.), 23 id. 321, cited infra.

[209] Harris *v.* North Ind. R. Co., 20 N. Y. 232. And see Brockway *v.* Amer. Exp. Co., 168 Mass. 257.

Where a statute requires the company to feed the stock at the request of the owner and it is their custom to feed animals at the consignor's expense during a delay in the transit, a request will be implied and the company held liable for any loss occasioned by leaving the animals unfed: Curran *v.* Midland Gr. West. R. Co., [1896] 2 I. R. 183.

[210] Boaz *v.* Cent. R. Co., 87 Ga. 463.

[211] Ill. Cent. R. Co. *v.* Peterson, 68 Miss. 454.

and the wants of the cattle demand such attention. Such abandonment by the agent in charge does not impose the burden of care upon the carrier to the extent of relieving the shipper of his duty to care for his stock under the shipping contract.[212]

Apart from such considerations as these, the carrier is ordinarily not liable where the shipper has especially agreed to feed and water his stock;[213] unless such liability is imposed by statute.[214] But a company's obligation to unload, feed and water the stock when transferring them to another company, cannot be imposed on the owner even if he is accompanying them under a contract to take care of them while in transit.[215] And where the carrier contracts not to be liable beyond its own terminus, it is, notwithstanding, liable for injuries resulting from a refusal to feed and water the stock at its terminus, though the injuries do not appear until the stock are on a connecting line.[216] Where the period of confinement is regulated by statute, a connecting carrier is bound to take notice of the fact as to how long the animals had been confined by the former carrier.[217]

It is not necessary to allege in the petition the places on the road where the defendant failed to feed and water the stock.[218]

A ship is answerable for damages for insufficiency of food

[212] Ft. Worth & D. C. R. Co. *v.* Daggett, 87 Tex. 322, reversing 27 S. W. Rep. 186.

[213] Mo. Pac. R. Co. *v.* Tex. & Pac. R. Co., 41 Fed. Rep. 913; Cent. R. Co. *v.* Bryant, 73 Ga. 722; Burgher *v.* Chic., R. I. & P. R. Co., 105 Ia. 335; Mobile & O. R. Co. *v.* Francis (Miss.), 9 South. Rep. 508; Cleveland, C., C. & St. L. R. Co. *v.* Patterson, 69 Ill. App. 438.

[214] Comer *v.* Columbia, N. & L. R. Co., 52 S. C. 36.

[215] Dunn *v.* Hannibal & St. J. R. Co., 68 Mo. 268.

[216] Galveston, H. & S. A. R. Co. *v.* Ivey (Tex. Civ. App.), 23 S. W. Rep. 321; Galveston, H. & S. A. R. Co. *v.* Herring (Tex. Civ. App.), 24 id. 939. See Tex. Pac. R. Co. *v.* Stribling (Tex. Civ. App.), 34 id. 1002, cited supra.

[217] Comer *v.* Columbia, N. & L. R. Co., supra.

[218] Gulf, C. & S. F. R. Co. *v.* Wilhelm, 4 Tex. App. (Civ. Cas.) 413.

up to the arrival at the port of destination but not for further damages through the absence of a proper supply at that port. It is not justified in sailing without taking sufficient fodder for cattle carried, according to agreement, by reason of an alleged remark of their drover that the fodder was sufficient, especially where the vessel waits long enough to have it brought aboard and the cattle owners demand that that be done.[219]

A company is not liable for special damages for delay in the transportation of food for cattle, as a result of which the cattle were without food for several days, where the company was not aware at the time the contract was executed that such special damages would arise from delay.[220]

If water is so scarce on the line that it cannot be procured for the animals, the company should inform the shippers of the fact beforehand, otherwise they are liable if death results. It is *prima facie* negligence in the company to permit a pump at a station to be out of repair, under such circumstances.[221]

A shipping contract to carry live-stock from an interior station in one State to a station in another State is an interstate contract, and where there is a failure to feed and water the stock in either State there is no liability to a penalty under a statute of that State.[222]

115. Delay and Accident.—A carrier is liable for injuries to animals resulting from unreasonable delay in transportation.[223] And the fact that the delay is caused by lack of

[219] The Connemara, 57 Fed. Rep. 314.

[220] Mo., K. & T. R. Co. *v.* Belcher, 89 Tex. 428.

[221] Toledo, W. & W. R. Co. *v.* Thompson, 71 Ill. 434.

[222] Gulf, C. & S. F. R. Co. *v.* Gray, 87 Tex. 312; Gulf, C, & S. F. R. Co. *v.* Gann, 8 Tex. Civ. App. 620.

[223] Gulf, C. & S. F. R. Co. *v.* Ellison, 70 Tex. 491; Mo. Pac. R. Co. *v.* Harris, 67 id. 166; Belcher *v.* Mo., K. & T. R. Co. (Tex.), 50 S. W. Rep. 559; Harris *v.* North Ind. R. Co., 20 N. Y. 232; Richmond & D. R. Co. *v.* Trousdale, 99 Ala. 389.

Though the inherent propensities of the animals may have contributed

proper appliances for transporting stock is no defence.[224] Nor that it is caused by a failure of the water supply for the operation of trains due to a drought known to the carrier at the time the contract was made.[225] Nor that it was caused by a break on the track due to a storm on a day later than that on which the shipment was to have been made.[226] And the fact that the connecting carrier was unprepared to continue the transportation with due promptness is no excuse for the neglect of the first carrier to observe diligence in forwarding the stock.[227] The receipt of the animals by the company is equivalent to an obligation to transport them without unnecessary delay.[228] The company is bound to inform the shipper within a reasonable time whether it can furnish cars, and if the shipper, relying on its contract, has the stock ready and there are no cars, the company is liable.[229] An agreement by a station-agent to transport cattle at a given time is binding, though not within the scope of his authority, unless the shipper has notice of that fact.[230]

Where the company transports the cattle within a reasonable time but they do not reach their destination at the time

to the result: Galveston, H. & S. A. R. Co. *v.* Herring (Tex. Civ. App.), 36 S. W. Rep. 129.

A company in partnership with another may be sued with the latter for delay in the county in which the latter operates its road though the former does not: San Antonio & A. P. R. Co. *v.* Graves (Tex. Civ. App.), 49 S. W. Rep. 1103.

[224] Tucker *v.* Pac. R. Co., 50 Mo. 385.

[225] Cinc., N. O. & T. P. R. Co. *v.* Webb (Ky.), 46 S. W. Rep. 11.

[226] Gulf, C. & S. F. R. Co. *v.* McCorquodale, 71 Tex. 41. And see Gann *v.* Chic. Great Western R. Co., 72 Mo. App. 34.

[227] Alexander *v.* Pa. R. Co., 7 Pa. Super. Ct. 183.

[228] Pruitt *v.* Hannibal & St. J. R. Co., 62 Mo. 527; Cinc., I., St. L. & C. R. Co. *v.* Case, 122 Ind. 310.

[229] Ayres *v.* Chic. & N. R. Co., 71 Wis. 372. And see § 113, supra.

What is a "reasonable time" for furnishing cars is a question of fact for the jury: Davis *v.* Tex. & Pac. R. Co. (Tex.), 44 S. W. Rep. 822.

[230] Gann *v.* Chic. Great Western R. Co., 72 Mo. App. 34; Gulf, C. & S. F. R. Co. *v.* Hume, 87 Tex. 211; Pittsb., C., C. & St. L. R. Co. *v.* Racer, 10 Ind. App. 593.

designed by the shipper, the company is not liable unless it has been notified of such design at the time the cattle were received.[231] A contract as to what shall constitute a reasonable time for transportation and that the carrier shall not be liable if the stock are transported within that time is not a contract to transport *at or within* a fixed time, but is a contract that, if the transportation is within such time, the carrier shall not be liable for damages unless the delay is caused by negligence.[232]

The carrier is liable for delay caused by the presentation for shipment of cattle belonging to a third person and the use of the cars contracted for to ship the latter's cattle, the inspection of the plaintiff's cattle having been sufficiently completed to warrant shipment without delay.[233] And where the owner assumed all risks of loss from loading, unloading and conveyance and the carriers did not undertake to forward by a particular train or at a specified hour and were not to be responsible for delivery within a certain time or for a particular market, this was held not to exempt the carriers from liability for discrimination in favor of other freight by which the cars were placed on a side track where the cattle could not be unloaded, fed or watered and where they remained for two or three days: this was not negligence in the performance of the contract but an entire abandonment of all effort to perform it for the time and constituted a breach thereof.[234]

It has been held to be the duty of the carrier to transport live-stock by the first train after they are loaded;[235] though

[231] Atchison, T. & S. F. R. Co. *v.* Bryan (Tex. Civ. App.), 28 S. W. Rep. 98. And see Gulf, C. & S. F. R. Co. *v.* Baugh (Tex. Civ. App.), 42 id. 245. See, as to dogs sent to a show, Welch *v.* Great Western R. Co. (Co. Ct. case), 106 L. T. 218.

[232] Blanchard *v.* Chic. & A. R. Co., 60 Mo. App. 267.

[233] Internat. & G. N. R. Co. Receivers *v.* Wright, 2 Tex. Civ. App. 198.

[234] Keeney *v.* Grand Trunk R. Co., 47 N. Y. 525.

[235] Ill. Cent. R. Co. *v.* Waters, 41 Ill. 73.

The omission of a train on account of scarcity of freight, without notice to the shipper, is no defence: Kan. & A. V. R. Co. *v.* Ayers, 63 Ark. 331.

this has been denied, where the shipment is within a reasonable time.[236] The company was held liable where the train was side-tracked for six hours to let another train pass;[237] also where the stock train was allowed to pass without taking the car containing the cattle so that they could not get to their destination in time for the required market.[238]

If the company fails to ship the stock by passenger service, as agreed upon, and ships it by freight service, it is responsible for injuries resulting from the delay and the rougher service and cannot avail itself of a stipulation relieving it from liability as an insurer at common law.[239] But in West Virginia it was held that, under counts against the defendant merely as a carrier or bailee of cattle, the shipper cannot recover for losses resulting from a misrepresentation of the defendant's agent whereby the former was induced to ship in a slow instead of a fast train.[240]

A company is liable for a delay on a connecting road when it has contracted to deliver the cattle at a certain point, unless there is a special contract exempting it from such liability.[241]

A carrier cannot excuse itself for the delay on the ground that it was caused by an unusual rush of business;[242] though in Mississippi there is a decision to the contrary.[243] And an unconstitutional statute prohibiting the carrying of Texas cattle is no excuse for refusal or delay on the part of the carrier.[244] The shipper is, however, bound by the ordinary

[236] Pennsylvania Co. *v.* Clark, 2 Ind. App. 146.
[237] Douglass *v.* Hannibal & St. J. R. Co., 53 Mo. App. 473.
[238] Ill. Cent. R. Co. *v.* Simmons, 49 Ill. App. 443.
[239] Pavitt *v.* Lehigh Val. R. Co., 153 Pa. St. 302.
[240] Maslin *v.* B. & O. R. Co., 14 W. Va. 180.
[241] Toledo, W. & W. R. Co. *v.* Lockhart, 71 Ill. 627.
[242] Internat. & G. N. R. Co. *v.* Anderson, 3 Tex. Civ. App. 8; Gulf, C. & S. F. R. Co. *v.* McAulay (Tex. Civ. App.), 26 S. W. Rep. 475.
See also § 113, supra.
[243] Ill. Cent. R. Co. *v.* Haynes, 64 Miss. 604.
[244] Chic. & A. R. Co. *v.* Erickson, 91 Ill. 613.

traffic arrangements of the company whether published or not. The reasonableness of such arrangements is not for the jury.[245]

Where the shipper put the cattle into the stock pens provided by the company, expecting the cars at any hour and there being no grass in the neighborhood and no other place to keep the cattle in, and they were injured on account of the lack of food and water in the pens, it was held that he was not guilty of negligence contributing to the damage caused by the delay in shipment.[246] Where the animals are not shipped at the proper time, the delay occasioned by the non-shipment and the necessary expense of taking care of and feeding them while waiting transportation were held to be the natural and proximate consequences of the carrier's act, but not the loss occasioned by death or shrinkage in weight of the animals while so waiting, unless caused directly by the defendant's act.[247]

The wreck of a train has been held to be a legal excuse for a delay.[248] But where the propeller shaft of a steamer broke owing to weakness caused by long use, existing at the time of sailing, this was held to be a breach of a warranty of seaworthiness, which was not included in an exception in the bill of lading of perils of the sea and damage by delays and defects of machinery, and the vessel was held liable for the damage caused to the cattle by the increased length of the voyage.[249]

Where the shipment of live-stock is delayed by a wash-out and the company has a way around the wash-out by the use of which the delay would have been avoided, the company

[245] Tobin *v.* London & N. R. Co., [1895] 2 I. R. 22.

[246] Internat. & G. N. R. Co. *v.* Ritchie (Tex. Civ. App.), 26 S. W. Rep. 840.

[247] Ballentine *v.* North Mo. R. Co., 40 Mo. 491.

See Gann *v.* Chic. Great Western R. Co., 72 Mo. App. 34.

[248] Newport News & M. V. R. Co. *v.* Mercer, 96 Ky. 475.

[249] The Caledonia, 50 Fed. Rep. 567, 43 id. 681, 157 U. S. 124.

is liable.[250] And where an express company undertakes to transport horses with knowledge that floods have obstructed a portion of its route, they are not such an act of God as will relieve the company from an injury sustained by the horses while they were being conveyed over another route.[251]

Where, owing to atmospheric or other influences, on the telegraph wires, beyond the carrier's control, the engineer failed to receive orders to move a train, the company was held not liable for delay in delivering the stock, whether the failure of the wires was to be attributed to the act of God or not.[252] So, the company was held not liable in Michigan where the live-stock could not have been taken on from a way-station without an extra engine, owing to an unavoidable exigency.[253]

A strike attaining sufficient proportions to be put down by the military power of the State was held to be a sufficient excuse for a company's not carrying out a contract to receive and carry live-stock.[254] And where the shipper assumed the risks of transportation and agreed that the company should not be responsible for delays at the terminal points, it was held that the company was not responsible for a delay caused by a riot, whereby some of the animals fell sick and died.[255] Nor was the carrier held liable, under similar circumstances, where the delays were caused by the public enemy and the necessary employment of the road in the service of the Government.[256]

[250] Mo., K. & T. R. Co. Receivers *v.* Olive (Tex. Civ. App.), 23 S. W. Rep. 526.

[251] Adams Exp. Co. *v.* Jackson, 92 Tenn. 326.

[252] Internat. & G. N. R. Co. *v.* Hynes, 3 Tex. Civ. App. 20.

[253] Mich. S. & N. I. R. Co. *v.* McDonough, 21 Mich. 165.

[254] Pittsb., Cinc. & St. L. R. Co. *v.* Hollowell, 65 Ind. 188. And see Internat. & G. N. R. Co. *v.* Tisdale, 74 Tex. 8.

But evidence of a strike at the point of destination cannot be introduced under the general denial: St. Louis, I. M. & S. R. Co. *v.* Pumphrey (Tex. Civ. App.), 42 S. W. Rep. 246.

[255] Bartlett *v.* Pittsb., C. & St. L. R. Co., 94 Ind. 281.

[256] Bankard *v.* Balt. & O. R. Co., 34 Md. 197.

The carrier is not, in general, obliged to furnish cars for the transportation of live-stock on Sunday.[257] But it has been held error to charge that the defendant need not run a train on Sunday.[258]

Where it is alleged that the delay was caused by the company's negligence without stating what that negligence was, evidence may be given of the bad condition of the track in order to show negligence.[259] Declarations of trainmen as to the cause of delay are admissible against the company.

Where the carriage of cattle was prepaid but that fact was not made known to the company's servants at the place of delivery and they refused to deliver for two days whereby a damage by exposure was caused, it was held that the refusal to deliver did not come within the meaning of "detention," the risk of which the shipper had assumed, and that the company was liable.[261] A clause in a contract that no action for delay in transportation should lie unless the citation was served within forty days was held void as against public policy.[262]

A carrier does not insure against an irresistible act of nature and hence is not liable for the death of an animal caused by extraordinarily bad weather.[263] So, a snow-storm of such violence as to prevent the moving of trains is an act of God for which the carrier is not liable.[264] But where a heavy snow-storm stopped the train and the cattle were put into cattle sheds and injured by exposure, although the company had substantially-built horse stables which could have been

[257] Guinn *v.* Wabash, St. L. & P. R. Co., 20 Mo. App. 453. And see Waters *v.* Richm. & D. R. Co., 108 N. C. 349.

[258] Belcher *v.* Mo., K. & T. R. Co. (Tex.), 50 S. W. Rep. 559.

[259] St. Louis, A. & T. R. Co. *v.* Turner, 1 Tex. Civ. App. 625.

[260] Atchison, T. & S. F. R. Co. *v.* Consold. Cattle Co. (Kan.), 52 Pac. Rep. 71.

[261] Gordon *v.* Great Western R. Co., 8 Q. B. D. 44.

[262] Gulf, C. & S. F. R. Co. *v.* Hume, 87 Tex. 211.

[263] Nugent *v.* Smith, 1 C. P. D. 423.

[264] Black *v.* Chic., B. & Q. R. Co., 30 Neb. 197.

used for shelter, it was held that the damage was not due to inevitable accident but to want of proper care and that the fact that the plaintiff's servant accompanied the cattle on a free pass did not exempt the defendant from liability for the negligence of its servants.[265] So, where a shipment made in January was delayed by the freezing of the pipes between the tank and the boiler of the engine, it was held that the carrier was liable, as such freezing was not "caused by stress of weather" within the meaning of the exception in the contract.[266]

Where a vessel struck a hidden obstruction and filled with water and a cabin containing bees floated to the shore, but no effort was made by the master to use care in saving them, the steamboat line was held liable for damage to them, though the vessel was insured and was abandoned to the underwriters as a total loss.[267] And the owners of a steamboat were held liable for the loss of animals which, at a difficult point of the navigation, were sent on shore to lighten the boat and strayed away through the negligence of those in charge of the boat.[268]

116. Injuries Due to the Nature and Condition of Animals.— The carrier, as has already been said, is not an insurer against or liable for injury to animals resulting from their nature and propensities, without any negligence on his part;[269] nor is

[265] Feinberg *v.* Del., L. & W. R. Co., 52 N. J. L. 451.

[266] Cleveland, C., C. & St. L. R. Co. *v.* Heath (Ind. App.), 53 N. E. Rep. 198.

[267] Bixby *v.* Deemar, 54 Fed. Rep. 718.

[268] Pitre *v.* Offutt, 21 La. Ann. 679, where it was held that a custom that the ship took no risks must be brought to the knowledge of the shipper to constitute a good defence.

[269] See § 110, supra; Coupland *v.* Housatonic R. Co., 61 Conn. 531; Black *v.* Chic., B. & Q. R. Co., 30 Neb. 197; Louisville & N. R. Co. *v.* Wynn, 88 Tenn. 320; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Ill. Cent. R. Co. *v.* Brelsford, 13 Ill. App. 251; Mynard *v.* Syracuse, B. & N. Y. R. Co., 71 N. Y. 180; Penn *v.* Buffalo & E. R. Co., 49 id. 204; Heyman *v.* P. & R. R. Co., 54 N. Y. Super. Ct. 158; Bamberg *v.* So. Car. R. Co., 9 S. C. 61; McCoy

he liable where the injuries were due to the original condition of the animals and their want of inherent vitality.[270] The rule is otherwise where the injury, though due to the propensities of the animal, could have been prevented by the exercise of due care.[271] But an instruction that the defendant is not liable for injuries to cattle caused by their inherent viciousness is rightly refused if such issue has not been raised by the pleading and no evidence has been brought out by the plaintiff.[272] It is the shipper's duty to disclose any peculiarities of the animals not apparent, that would increase the risk of carriage.[273]

The condition in a contract that the company should not be liable for injury resulting from fear or restiveness was held good where it did not include fear and restiveness occasioned by the company's negligence.[274] Where the plaintiff's agent told the conductor that the animals were frightened and in danger of being hurt and asked to have the car set off at an intermediate station, it was the carrier's duty to comply and it is liable for negligence in not doing so.[275]

v. K. & D. M. R. Co., 44 Ia. 424; Schoenfeld *v.* Louisv. & N. R. Co., 49 La. Ann. 907; South & North Ala. R. Co. *v.* Henlein, 52 Ala. 606; Evans *v.* Fitchburg R. Co., 111 Mass. 142; Smith *v.* New Haven & N. R. Co., 12 Allen (Mass.) 531; Louisville, N. O. & T. R. Co. *v.* Bigger, 66 Miss. 319; Lindsley *v.* Chic., M. & St. P. R. Co., 36 Minn. 539; Nugent *v.* Smith, 1 C. P. D. 423; Blower *v.* Gt. West. R. Co., L. R. 7 C. P. 655.

[270] Mo. Pac. R. Co. *v.* Tex. & P. R. Co., 41 Fed. Rep. 913; Indianapolis & St. L. R. Co. *v.* Jurey, 8 Ill. App. 160; Chic., R. I. & P. R. Co. *v.* Harmon, 12 id. 54; Mo. Pac. R. Co. *v.* Heath (Tex.), 18 S. W. Rep. 477.

[271] Clarke *v.* Rochester & S. R. Co., 14 N. Y. 570; Giblin *v.* Nat. Steamship Co., 8 Misc. (N. Y.) 22; Kinnick *v.* Chic., R. I. & P. R. Co., 69 Ia. 665; Loeser *v.* Chic., M. & St. P. R. Co., 94 Wis. 571.

[272] Ft. Worth & D. C. R. Co. *v.* Greathouse, 82 Tex. 104.

See Mo. Pac. R. Co. *v.* Fagan (Tex. Civ. App.), 29 S. W. Rep. 1110, where the company was held not liable though its pleadings did not raise the issue.

[273] Hutchinson Carriers § 223.

[274] Moore *v.* Great Northern R. Co., 10 L. R. Ir. 95. And see, in general, § 111, supra.

[275] Coupland *v.* Housatonic R. Co., 61 Conn. 531.

In Texas it has been held that where a part of the stock were mares in foal the company were liable only for failure to exercise reasonable care;[276] and in a later case between the same parties it was held that where a mare in foal was injured, the common carrier was not liable unless it had notice to that effect or of facts sufficient to charge it with knowledge of her condition.[277] But in Iowa a shipper was held not to be bound to inform the carrier that a cow was about eight months gone with calf.[278] And in a Federal case where cattle miscarried and suffered an impairment in their breeding capacity through a collision, it was held that the defendant's liability for damages for negligence was not lessened by the fact that he had received no notice that they were intended for breeding purposes, especially as they were being shipped away from the market for beef cattle.[279] And this view was sustained by the Supreme Court which held that where cows with calf were damaged by abortions caused by the carrier's negligence, in order to charge the latter it was not necessary to show that it had notice that the cows were with calf, there being nothing to show that any special or unusual care was requisite by reason of their being pregnant; and it was held not material whether the plaintiffs intended to keep the cattle upon their farms for breeding purposes or to sell them on the market.[280]

A stipulation that a shipper should furnish each conductor a statement of the condition of the cattle and that failure to do so would be conclusive evidence of their good condition, was held unreasonable.[281] A written statement as to the good condition of the animals made by the shipper's agents in transit does not estop him from showing that it is not true,

[276] Mo. Pac. R. Co. *v.* Fagan, 72 Tex. 127.
[277] Mo. Pac. R. Co. *v.* Fagan (Tex. Civ. App.), 27 S. W. Rep. 887.
[278] McCune *v.* B., C. R. & N. R. Co., 52 Ia. 600.
[279] Estill *v.* N. Y., L. E. & W. R. Co., 41 Fed. Rep. 849.
[280] N. Y., L. E. & W. R. Co. *v.* Estill, 147 U. S. 591.
[281] Mo., K. & T. R. Co. *v.* Carter, 9 Tex. Civ. App. 677.

though it adds to his burden of proving their bad condition.[282]

The question of the burden of proof in these cases is considered in § 118, infra.

117. Notice.—A stipulation that the shipper before removing his stock and mingling them with others should give notice of his claim for damages to some officer or agent of the company is a reasonable one and will be enforced.[283] In the absence of such a stipulation, one may maintain an action without giving the carrier notice of the injury or offering the animal to him to be cared for.[284] And such notice is not necessary in the case of a claim for damages for delay in transportation, but only where the animal has been physically injured in the transit.[285] Nor is it necessary where the animal is dead on arrival.[286] If the extent of the injury is not known by the exercise of reasonable diligence at the time of removal, the shipper has a reasonable time afterwards in which to give notice.[287] Thus, the stipulation as to notice before removal was held *prima facie* unreasonable where horses were injured by the burning of the car, it not being probable that the full amount of damage would

[282] St. Louis, A. & T. R. Co. *v.* Turner, 1 Tex. Civ. App. 625.

[283] Owen *v.* Louisville & N. R. Co., 87 Ky. 626; Selby *v.* Wilm. & W. R. Co., 113 N. C. 588; Wichita & W. R. Co. *v.* Koch, 47 Kan. 753; Sprague *v.* Mo. Pac. R. Co., 34 id. 347; Goggin *v.* Kan. Pac. R. Co., 12 id. 416; Gulf, C. & S. F. R. Co. *v.* Wright, 1 Tex. Civ. App. 402.

But see Smitha *v.* Louisville & N. R. Co., 86 Tenn. 198; Mo. Pac. R. Co. *v.* Harris, 67 Tex. 166; Good *v.* Galveston, H. & S. A. R. Co. (Tex.), 11 S. W. Rep. 854; Ohio & M. R. Co. *v.* Tabor, 98 Ky. 503.

See, also, 6 Am. & Eng. R. R. Cas., N. S., 632 n.

[284] Evans *v.* Dunbar, 117 Mass. 546.

[285] Louisville & N. R. Co. *v.* Bell, 13 Ky. L. Rep. 393; Kramer *v.* Chic., M. & St. P. R. Co., 101 Ia. 178.

[286] Kan. & A. V. R. Co. *v.* Ayers, 63 Ark. 331.

[287] Western R. Co. of Ala. *v.* Harwell, 97 Ala. 341; Louisville, N. A. & C. R. Co. *v.* Steele, 6 Ind. App. 183; Gulf, C. & S. F. R. Co. *v.* Stanley, 89 Tex. 42; Ormsby *v.* Un. Pac. R. Co., 2 McCrary C. Ct. (U. S.) 48.

be immediately disclosed.[288] And where the stipulation was to give notice within twenty-four hours, and at the time the injury appeared slight but the animal after receiving proper care proved seriously and permanently injured, shortly after which the agent of the company was notified and answered that the claim was being investigated and would be settled on the merits, it was held that non-compliance with the stipulation would not prevent recovery.[289] Where a number of hogs died from exposure before reshipment by the company over a connecting road and the shipper orally notified the company thereof and demanded damages before the reshipment, it was held that the written notice required by the shipping contract was not a condition precedent to an action for damages.[290] And, in general, the company may waive a provision that the claim for damages shall be in writing by receiving verbal notice without objection and treating the claim as pending.[291]

Contracts have been upheld where the stipulation was to give notice of the injury within one day after delivery;[292] within five days[293] or ten days[294] after unloading; within thirty days after the accident,[295] or delivery.[296] But a clause that an action for damages must be brought within fourteen days was held to be in conflict with a statute making it unlawful to limit the time to a shorter period than two years.[297]

[288] Houston & T. C. R. Co. *v.* Davis (Tex. Civ. App.), 31 S. W. Rep. 308.

[289] Harned *v.* Mo. Pac. R. Co., 51 Mo. App. 482.

[290] Wichita & W. R. Co. *v.* Koch (Kan. App.), 56 Pac. Rep. 538.

[291] Chic. & A. R. Co. *v.* Grimes, 71 Ill. App. 397.

[292] Internat. & G. N. R. Co. *v.* Garrett, 5 Tex. Civ. App. 540; Kan. & A. V. R. Co. *v.* Ayers, 63 Ark. 331.

But see Mo. Pac. R. Co. *v.* Paine, 1 Tex. Civ. App. 621.

[293] Dawson *v.* St. Louis, K. C. & N. R. Co., 76 Mo. 514; McBeath *v.* Wabash, St. L. & P. R. Co., 20 Mo. App. 445; Wabash, St. L. & P. R. Co. *v.* Black, 11 Ill. App. 465.

[294] Case *v.* Cleveland, C., C. & St. L. R. Co., 11 Ind. App. 517.

[295] Armstrong *v.* Chic., M. & St. P. R. Co., 53 Minn. 183.

[296] Louisville, N. A. & C. R. Co. *v.* Widman, 10 Ind. App. 92.

[297] St. Louis S. W. R. Co. *v.* Williams (Tex. Civ. App.), 32 S. W. Rep.

And a stipulation that suit should be brought within forty days was held unreasonable.[298]

Taking an injured mule from the cars at the destination and letting it run on the commons there, the shipper refusing to receive it, was held not to be removal or mingling within the meaning of the stipulation as to notice.[299]

It must be shown that the company had an officer or station-agent near the place of delivery to whom notice might be given;[300] and where the plaintiff has no knowledge of such and no one is named in the contract, the stipulation as to notice has been held unreasonable.[301]

Mere knowledge by the agents of the company that the shipper claimed to have lost some of his stock, coupled with a search therefor along the track, does not amount to a waiver of the stipulated notice.[302] It is otherwise where the agents, with knowledge of the injury, have consented to the removal of the stock before reaching their destination;[303] or, in consequence of an injury in unloading, have returned an animal, free of charge, to the place of shipment;[304] or have

225. And see Ft. Worth & D. C. R. Co. *v.* McAnulty, 7 Tex. Civ. App. 321.

[298] Gulf, C. & S. F. R. Co. *v.* Stanley, 89 Tex. 42. And see Gulf, C. & S. F. R. Co. *v.* Hume, 87 id. 211.

[299] Chic., St. L. & N. O. R. Co. *v.* Abels, 60 Miss. 1017.

[300] Mo. Pac. R. Co. *v.* Childers, 1 Tex. Civ. App. 302; St. Louis, A. & T. R. Co. *v.* Turner, Ibid. 625; Good *v.* Galveston, H. & S. A. R. Co. (Tex.), 11 S. W. Rep. 854.

[301] Galveston, H. & S. A. R. Co. *v.* Williams (Tex. Civ. App.), 25 S. W. Rep. 1019; Galveston, H. & S. A. R. Co. *v.* Short (Tex. Civ. App.), 25 id. 142; Baxter *v.* Louisv., N. A. & C. R. Co., 165 Ill. 78; Smitha *v.* Louisville & N. R. Co., 86 Tenn. 198; Engesether *v.* Gr. North. R. Co., 65 Minn. 168.

See Mo. Pac. R. Co. *v.* Childers, 1 Tex. Civ. App. 302; Same *v.* Paine, Ibid. 621, where it was held that the question of reasonableness was for the jury.

[302] Case *v.* Cleveland, C., C. & St. L. R. Co., 11 Ind. App. 517.

[303] Cent. R. Co. *v.* Pickett, 87 Ga. 734. And see Atchison, T. & S. F. R. Co. *v.* Temple, 47 Kan. 7; Rice *v.* Kan. Pac. R. Co., 63 Mo. 314; Wood *v.* Southern R. Co., 118 N. C. 1056.

[304] Owen *v.* Louisville & N. R. Co. (Ky.), 9 S. W. Rep. 841.

taken the animal after the injury to a distant point and killed it and the shipper has had no means of learning of the injury within the designated time.[305] But where a company deviates from its contract to transport live-stock by passenger service and the animals are injured by the delay and rougher service, this deviation does not relieve the shipper from giving notice of his claim for damages according to agreement.[306]

118. Evidence.—It is, of course, essential to recovery that the shipper should show in the first place that his animals were delivered to the carrier and that they were lost or damaged in the course of transportation.[307] In the latter case, more evidence seems to be required in the case of live-stock and other property subject to inherent defects than in the case of inanimate property in general: the shipper must prove to some extent that the injury has not resulted from the inherent defect.[308] Thus, where a horse in apparently good condition was shipped on a steamer and delivered in a dying condition, but without any external injury, it was held that some negligence on the part of the carrier must be shown by the shipper before the burden would be on the former to show that he was in no fault. "When the damage to the thing shipped is apparently the result of its inherent nature or inherent defects, the shipper must show something more than its damaged condition before the carrier can be called on to explain." [309] And in a similar case in England where a quiet horse was found injured when there had been no acci-

[305] Richardson *v.* Chic. & A. R. Co., 62 Mo. App. 1; Same *v.* Same (Mo.), 50 S. W. Rep. 782.

[306] Pavitt *v.* Lehigh Val. R. Co., 153 Pa. St. 302.

[307] Hutchinson Carriers §§ 759, 764.

A shipping receipt reciting the shipment of cattle may be contradicted by the carrier's showing that it never received the cattle: Lake Shore & M. S. R. Co. *v.* Nat. Live-Stock Bk., 178 Ill. 506.

[308] Hutchinson Carriers § 768.

[309] Hussey *v.* The Saragossa, 3 Woods C. Ct. (U. S.) 380. And see Louisville & N. R. Co. *v.* Wathen (Ky.), 49 S. W. Rep. 185.

dent to the train and there was no proof of the defendant's negligence, the cause of the injuries being unknown except that they appeared to have been caused by the horse getting upon the floor of the horse-box, it was held that the defendants were not liable, as it was to be inferred that the damage resulted from the propensity of the horse.[310] So, in a Pennsylvania case, where a horse was shipped under a contract relieving the carrier from loss in transit except through gross negligence, and died on the way, and there was no proof of the cause of the death, it was held that no presumption of negligence arose from the fact of the loss and the plaintiff was not entitled to recover. The court said: "If, for any reason, an 'injurious accident' happens to, or by reason of, that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an 'injurious accident' is not shown to exist, the presumption which arises from it cannot be invoked by a plaintiff. The contract of the carrier does not insure against death generally, but only as it may be the result of an injurious accident in the course of the carriage." [311] Subject to the above qualification, loss is *prima facie* proof of the carrier's negligence,[312] and it has been held that where the stock were wholly in the carrier's care he must show by a preponderance of evidence that their death resulted from the inherent nature of the animals without any contributory negligence on his part.[313] In fact, the qualifica-

[310] Kendall *v.* London & S. W. R. Co., L. R. 7 Ex. 373.

[311] Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577.

[312] Louisville, Cinc. & L. R. Co. *v.* Hedger, 9 Bush (Ky.) 645; Porterfield *v.* Humphreys, 8 Humph. (Tenn.) 497; Mo. Pac. R. Co. *v.* Scott, 4 Tex. Civ. App. 76; St. Louis & S. F. R. Co. *v.* Parmer (Tex. Civ. App.), 30 S. W. Rep. 1109; Curran *v.* Midland Gr. West. R. Co., [1896] 2 I. R. 183.

[313] Lindsley *v.* Chic., M. & St. P. R. Co., 36 Minn. 539; Dow *v.* Portland S. P. Co., 84 Me. 490.

tion itself would seem to be confined to cases where the injury has *apparently* resulted from some intrinsic propensity or defect. Otherwise there is no reason why the ordinary rule as to inanimate property should not apply here also.

The shipper having proved the damage and having overcome the apparent presumption of intrinsic defect, the burden of proof is then on the carrier to show that the damage falls within one of the exceptions to his general liability either at the common law or by the provisions of the special contract restricting that liability in various ways.[314] Whether the carrier, having shown this, is obliged also to show that the injury was not due in any way to his own negligence or whether the proof of the fact that the loss falls within the excepted perils shifts to the shipper the burden of proving the carrier's negligence, is a much disputed question. The opinion that seems more rational on general principles is that the burden of disproving his own negligence rests with the carrier as having almost exclusively the means of knowledge.[315] A natural exception to this rule would be where the shipper accompanies the animals and takes charge of them at his own risk. Accordingly, it was held in Indiana that in such a case he cannot recover for a failure to carry safely without alleging and showing that the loss was not due to a breach of his own stipulations, but was caused by the carrier's breach of duty. "The animals were not . . . in the exclusive custody and control of the carrier, so that the case is not within the reason of the rule that the carrier, and not the shipper, has the burden of proof, because the former has

[314] Hutchinson Carriers § 765; Wallingford *v.* Columbia & G. R. Co., 26 S. C. 258.

[315] This rule is said in Hutchinson Carriers § 766 to prevail in Alabama, Georgia, Mississippi, Ohio, South Carolina, Texas and West Virginia, and to be approved of in Minnesota and Nebraska, "and certainly seems to be the better rule and in accord with reason and public policy."

See, also, 2 Greenleaf Evidence § 219; Boehl *v.* Chic., M. & St. P. R. Co., 44 Minn. 191; Western R. Co. of Ala. *v.* Harwell, 91 Ala. 340; Mitchell *v.* Carolina Cent. R. Co. (N. C.), 32 S. E. Rep. 671, and cases cited.

all the means of explanation and excuse at hand. Here the shippers, better than the carrier, can explain many things, and these things they do not undertake to explain, nor do they undertake to show that the loss was not attributable to a failure to perform acts they themselves agreed to perform." [316]

But the majority of decisions go further than this and hold that the burden of proving the carrier's negligence in these cases falls on the shipper whether he accompanied the stock or not.[317]

Expert evidence is admissible as to the market value of animals; [318] *a fortiori*, as to their value where there is no market value.[319] Thus, witnesses experienced in handling and shipping cattle may express an opinion as to the extent such cattle would shrink in weight in a given time, though they had never seen the plaintiff's cattle.[320] And the plaintiff may testify as to the condition and weight of cattle when he purchased them, as tending to show their value.[321] And proof of the good condition of the cattle when shipped is

[316] Terre Haute & L. R. Co. *v.* Sherwood, 132 Ind. 129. And see the note in 17 L. R. A. 339. See also Clark *v.* St. Louis, K. C. & N. R. Co., 64 Mo. 440; St. Louis, I. M. & S. R. Co. *v.* Weakly, 50 Ark. 397; Tex. & Pac. R. Co. *v.* Arnold (Tex. Civ. App.), 40 S. W. Rep. 829; St. Louis S. W. R. Co. *v.* Vaughan (Tex. Civ. App.), 41 id. 415; Grieve *v.* Ill. Cent. R. Co., 104 Ia. 659.

[317] Hutchinson Carriers § 767,—where it is said that this rule "seems to be supported by a preponderance of authority" and prevails in England, Arkansas, Kansas, Louisiana, Missouri, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee and the United States courts, and probably in Iowa and Maine.

And see Smith *v.* Midland R. Co., 57 L. T. N. S. 813; Harris *v.* Midland R. Co., 25 W. R. 63; Bankard *v.* Balt. & O. R. Co., 34 Md. 197; The J. C. Stevenson, 17 Fed. Rep. 540.

[318] Cantling *v.* Hannibal & St. J. R. Co., 54 Mo. 385; Mo., K. & T. R. Co. *v.* Woods (Tex. Civ. App.), 31 S. W. Rep 237.

[319] Lachner Bros. *v.* Adams Exp. Co., 72 Mo. App. 13.

[320] Mo. Pac. R. Co. *v.* Hall, 66 Fed. Rep. 868.

[321] St. Louis S. W. R. Co. *v.* Williams (Tex. Civ. App.), 32 S. W. Rep. 225.

admissible, in connection with other evidence.[322] Testimony as to the market value of cattle on a certain day based on newspaper reports read by a witness is admissible.[323] Evidence is properly received as to the elements of value in an animal used for breeding purposes, and as to its pedigree.[324] An expert witness may testify as to whether a car is reasonably safe.[325] But cattlemen cannot testify that they will not use ordinary cars if they can get the improved kind.[326] Where the plaintiff's horse was injured in the carrier's stable, evidence may be given of the character of stables ordinarily used in the neighborhood.[327] Evidence may be received of the incompetence of an employee of the carrier resulting in an injury.[328] And evidence of the general course of the carrier's business is admissible on the question of negligence.[329]

Evidence that animals of the number and weight could not be shipped in one car in hot weather is admissible. It is not expert evidence but proof of a fact to which anyone could testify.[330] The fact that a shipment of cattle bedded by the shipper arrived in good condition is not admissible to prove that the death of a similar shipment made at the same time in cars of the same character, but sent over another route, was caused by the negligence of the carrier in bedding the cars.[331]

[322] Hendrick *v.* Boston & A. R. Co., 170 Mass. 44.

[323] Fort Worth & D. C. R. Co. *v.* Daggett (Tex. Civ. App.), 27 S. W. Rep. 186, reversed on another point in 87 Tex. 322.

And see Hudson *v.* North. Pac. R. Co., 92 Ia. 231.

[324] Winchell *v* Nat. Express Co., 64 Vt. 15. And see Pacific Exp. Co. *v.* Lothrop (Tex. Civ App.), 49 S. W. Rep. 898.

[325] Betts *v.* Chic., R. I. & P. R. Co., 92 Ia. 343.

[326] Mo., K. & T. R. Co. *v.* Darlington (Tex. Civ. App.), 30 S. W. Rep. 251.

[327] Armstrong *v.* Chic., M. & St. P. R. Co., 45 Minn. 85.

[328] Galveston, H. & S. A. R. Co. *v.* Johnson (Tex.), 19 S. W. Rep. 867; Martin *v.* Towle, 59 N. H. 31.

[329] Hendrick *v.* Boston & A. R. Co., 170 Mass. 44.

[330] Wabash, St. L. & P. R. Co. *v.* Pratt, 15 Ill. App. 177.

[331] Houston & T. C. R. Co. *v.* Wilson (Tex. Civ. App.), 50 S. W. Rep. 156.

The evidence need not show the exact number of the dead and injured animals where this can be computed.[332] And where cattle injured by the perils of the sea are thrown overboard with others not so injured, the failure of the respondent to prove the precise number that were injured does not make him responsible for all that were lost.[333] The actual market value need not be alleged; and where the animals have no market value at the place of destination proof of their intrinsic value is admissible.[334] So is proof of their cost, though that is not conclusive.[335]

119. Damages.—Where animals have been injured in transportation the measure of damages in an action against the carrier is the difference, after deducting the cost of transportation, between their market value at the point of destination when they were actually delivered and what it would have been but for the injury, with interest and incidental expenses.[336] And this is so, though the intention was to pasture them at the destination and not to sell them at once.[337] But where the owner keeps the injured cattle until they recover, the measure of damages is the actual damage

[332] Mo. Pac. R. Co. *v.* Edwards, 78 Tex. 307.

[333] Brauer *v.* Compania de Navign. La Flecha, 35 U. S. App. 44. affirmed in Compania de Navign. La Flecha *v.* Brauer, 168 U. S. 104.

[334] Mo., K. & T. R. Co. *v.* Chittim (Tex. Civ. App.), 40 S. W. Rep. 23. And see Lachner Bros. *v.* Adams Exp. Co., 72 Mo. App. 13, cited supra.

See in general, in this subject, Hutchinson Carriers §§ 759-768 a.

[335] Pacific Exp. Co. *v.* Lothrop (Tex. Civ. App.), 49 S. W. Rep. 898.

[336] Hutchinson Carriers § 770 a; N. Y., L. E. & W. R. Co. *v.* Estill, 147 U. S. 591; E. Tenn., V. & G. R. Co. *v.* Hale, 85 Tenn. 69; Galveston, H. & S. A. R. Co. *v.* Johnson (Tex.), 19 S. W. Rep. 867; Internat. & G. N. R. Co. *v.* Dimmit Co. Pasture Co., 5 Tex. Civ. App. 186; Tex. & Pac. R. Co. *v.* Arnold (Tex. Civ. App.), 40 S. W. Rep. 829; Smith *v.* New Haven & N. R. Co., 12 Allen (Mass.) 531; St. Louis, I. M. & S. R. Co., *v.* Deshong, 63 Ark. 443.

Evidence of what the animals sold for at a place other than their destination some time after their arrival is inadmissible: San Antonio & A. P. R. Co. *v.* Wright (Tex. Civ. App.), 49 S. W. Rep. 147.

[337] Gulf, C. & S. F. R. Co. *v.* Stanley, 89 Tex. 42.

caused by their improper treatment by the carrier and any extra expenses to which he is put in attending to them.[338] The reasonable expense of efforts to cure the animals is recoverable.[339] On the other hand, the fact that with reasonable care on the part of the owner the damages could have been mitigated by recuperation should be considered.[340] In an action for injuries to a mare, causing the death of a colt, evidence of the value of the colt, had it been born uninjured, is inadmissible as speculative.[341] But the fact that mares were with foal and thus predisposed to injury is to be considered in calculating the damages.[342]

Where an animal is lost, killed or rendered worthless its value at the place of destination in the condition in which it should have been delivered is recoverable, deducting in the proper cases the value of the carcass, where that is appreciable.[343] Where the carcass of an animal that had been accidentally killed on a voyage was not claimed by the shipper's agent who was present at the arrival of the steamer, and the company sold it to the best advantage, it was held that this was not a wrongful conversion rendering the company liable to the defendant on a counter-claim in trover.[344] But a

[338] Gulf, C. & S. F. R. Co. *v.* Godair, 3 Tex. Civ. App. 514.

[339] Galveston, H. & S. A. R. Co. *v.* Tuckett (Tex. Civ. App.), 25 S. W. Rep. 670.

[340] Houston & T. C. R. Co. *v.* Williams (Tex. Civ. App.), 31 S. W. Rep. 556.

The fact that the consignee did not use ordinary care to avoid injury caused by the defendant's negligence will not preclude the recovery of damages actually occasioned by such negligence which could not have been prevented by ordinary diligence on the plaintiff's part: Belcher *v.* Mo., K. & T. R. Co. (Tex.), 50 S. W. Rep. 559.

[341] Tex. & Pac. R. Co. *v.* Randle (Tex. Civ. App.), 44 S. W. Rep. 603.

[342] Gulf, W. T. & P. R. Co. *v.* Staton (Tex. Civ. App.), 49 S. W. Rep. 277.

[343] Hutchinson Carriers § 769; Sturgeon *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 569; Atchison, T. & S. F. R. Co. *v.* Grant, 6 Tex. Civ. App. 674; Tex. & Pac. R. Co. *v.* Sims (Tex. Civ. App.), 26 S. W. Rep. 634; Same *v.* Klepper (Tex. Civ. App.), 24 id. 567; Houston & T. C. R. Co. *v.* Williams (Tex. Civ. App.), 31 id. 556.

[344] London & North-Western R. Co. *v.* Hughes, 26 L. R. Ir. 165.

company that has realized a sum of money by the sale of carcasses of pigs destroyed on a voyage is liable for money had and received.[345] And a shipper who has effected such a sale must be allowed a reasonable amount for his time and trouble.[346]

Where cattle are permitted to escape during transportation, the cost of services and expenses in recapturing them is recoverable as part of the damages.[347]

Where the carrier refuses to accept or convey the stock, the measure of damages is the difference between the market value at their destination at the time when they should have arrived there and their value at the same time at the place of shipment, less the freight.[348] In a case where the company's failure compelled the plaintiff to send his horses that were not in good condition by road, it was held that the measure of damages was the deterioration which the horses, if they had been in ordinary condition, would have suffered by the journey, and the time and labor expended on the road.[349]

Where there has been unreasonable delay, the measure of damages is the difference between the market value of the stock at the place of destination on the day on which they should have arrived and on the day of their actual arrival, with interest from the former time.[350] But evidence is not

[345] Hayes *v.* South Wales R. Co., 9 Ir. C. L. R. 474.

[346] Dean *v.* Chic. & N. R. Co., 43 Wis. 305.

[347] North Mo. R. Co. *v.* Akers, 4 Kan. 453.

As to the liability of a company for damages done by a dog that escaped from the company's porter while it was being led to rejoin the train, see Gray *v.* North British R. Co., 18 Rettie (Sc. Ct. Sess.) 76.

[348] Hutchinson Carriers § 774.

This rule seems to have been wrongly applied in Gelvin *v.* Kan. City, S. J. & C. B. R. Co., 21 Mo. App. 273, where the damages were really caused by delay.

[349] Waller *v.* Midland Great West. R. Co., 4 L. R. Ir. 376.

[350] Hutchinson Carriers § 771; Hudson *v.* North. Pac. R. Co. 92 Ia. 231; Gulf, C. & S. F. R. Co. *v.* McCarty, 82 Tex. 608; Tex. & P. R. Co. *v.* Truesdell (Tex. Civ. App.), 51 S. W. Rep. 272; The Caledonia, 50 Fed.

admissible to show a decline in the market value between the time of arrival and the time of sale.[351]

It has been held in Texas that where a petition does not ask for damages resulting from a fall in the market, evidence tending to show such a fall and consequent loss is inadmissible.[352] And in Missouri it was held that it must be averred in the petition that the shipper informed the agent or that he knew at the time that the stock were designed for sale in market at the point of destination: such knowledge may be inferred from all the circumstances, but must be alleged.[353] And similar proof was required in a Maryland case.[354]

The fact that the loss owing to the depreciation in the market did not occur while the animals were in the carrier's possession is not material, if the price fell while they were in transit and the loss is the direct consequence of the carrier's delay.[355] Where there is no difference in market values the plaintiff can recover only for injury in fitness for market caused by the delay, and the cost of feeding and caring for the stock in the meantime.[356] And a shipper cannot recover if,

Rep. 567; The Suffolk, 31 id. 835; Ill. Cent. R. Co. *v.* Simmons, 49 Ill. App. 443.

Contra, Vaughn *v.* Wabash R. Co., 62 Mo. App. 461, citing no authorities. The correct rule is laid down, however, in Glascock *v.* Chic. & A. R. Co., 69 Mo. 589; Sturgeon *v.* St. Louis, K. C. & N. R. Co., 65 id. 569.

Damages resulting from loss of weight and physical injury caused by non-shipment should, in proper cases, be included: Gann *v.* Chic. Great Western R. Co., 72 Mo. App. 34. So should the extra expenses rendered necessary by the negligent mixing of carloads of cattle while unloading them: Kansas City Stock-Yards Co. *v.* Hawkins (Kan. App.), 55 Pac. Rep. 470.

[351] Glascock *v.* Chic. & A. R. Co., supra.

[352] Gulf, C. & S. F. R. Co. *v.* McAulay (Tex. Civ. App.), 26 S. W. Rep. 475. *Sed quare?*

[353] Gelvin *v.* Kan. City, S. J. & C. B. R. Co., 21 Mo. App. 273, a case where, as was said, supra, the rule laid down for measure of damages was that applicable where the carrier refuses to accept the stock, whereas, according to the facts, it was guilty here of unreasonable delay only.

[354] Phila., W. & B. R. Co. *v.* Lehman, 56 Md. 209.

[355] Sisson *v.* Cleveland & T. R. Co., 14 Mich. 489.

[356] Newport News & M. V. R. Co. *v.* Mercer, 96 Ky. 475. And see Mo.

after knowing of the delay in the time of sailing of a vessel, the cattle could have been sold without loss.[357] The fact that a part of the stock brought more at the destination on account of the delay should be considered in reduction of the loss sustained on the others.[358]

The shipper cannot ordinarily recover for a loss of profits unless he has informed the carrier of the intended use to which the stock is to be put. Thus, where one failed to give notice of an outstanding contract by which his jack was to have been put to mares, he could not recover for his loss sustained by his inability to carry it out.[359] So, where the animals are to be sold to a third person under contract, special damages cannot be recovered of the carrier unless he has been informed of the fact or of the importance of their reaching their destination in time.[360] But where the carrier has notice that dogs are shipped to a dog-show and, by reason of the delay, they arrive too late to compete, the shipper may recover his anticipated profits.[361]

The measure of damages for the loss of a horse is his market value in cash, and not what the owner might have made by using him as a racer on the track.[362] But evidence is admissible of the value of a trotting mare before and after the injury and also of her speed.[363]

Pac. R. Co. *v.* Paine, 1 Tex. Civ. App. 621; Louisv. & N. R. Co. *v.* Robinson (Ky.), 36 S. W. Rep. 6.

[357] Goldsmith *v.* Tower Hill Steamship Co., 37 Fed. Rep. 806.

[358] Gulf, C. & S. F. R. Co. *v.* Hughes (Tex. Civ. App.), 31 S. W. Rep. 411.

Cf. the *dictum* in Vaughn *v.* Wabash R. Co., 62 Mo. App. 461, cited supra.

[359] Chic., B. & Q. R. Co. *v.* Hale, 83 Ill. 360.

[360] Gulf, C. & S. F. R. Co. *v.* Cole, 4 Tex. App. (Civ. Cas.) 97. And see Hamilton *v.* West. N. C. R. Co., 96 N. C. 398; Gulf, C. & S. F. R. Co. *v.* Martin (Tex. Civ. App.), 28 S. W. Rep. 576; Tex. & Pac. R. Co. *v.* Randle (Tex. Civ. App.), 44 id. 603.

[361] Kennedy *v.* Amer. Exp. Co., 22 Ont. App. 278. See Welch *v.* Great Western R. Co., 106 L. T. 218.

[362] Ormsby *v.* Un. Pac. R. Co., 2 McCrary C. Ct. (U. S.) 48.

[363] Reed *v.* Rome, W. & O. R. Co., 48 Hun (N. Y.) 231.

The measure of damages for the destruction by the carrier of a collection of birds and animals in a museum is the value of such specimens at the nearest market, rather than the value of the owner's time in collecting them.[364]

Evidence of the value of the stock at other places than their destination is inadmissible.[365] And it was said in a Texas case that a stipulation by the company that the value of the cattle shipped, if lost, should be paid by them at the value at the place of shipment was against public policy and void.[366] But in Illinois such an agreement has been upheld.[367]

Various incidental losses may be recovered in actions for injury or delay. Thus the shrinkage in weight of the stock is an item of damage.[368] And so is the cost of keeping the animals;[369] but only to the day when the plaintiff sells them or could have sold them.[370] Where cattle were to be kept in pasture at their destination, the excess in cost of keeping them at the place of delay over that at the place of destination is recoverable, and not the entire cost of herding and pasturage at the point of delay.[371] Damages for delay in arriving to receive a cargo of cattle are only such expense as keeping the cattle during the period of delay and the additional insurance that the shipper may have had to pay for the increased risk.[372]

[364] Yoakum *v.* Dunn, 1 Tex. Civ. App. 524.

[365] Tex. & Pac. R. Co. *v.* Barber (Tex. Civ. App.), 30 S. W. Rep. 500; Hendrick *v.* Boston & A. R. Co., 170 Mass. 44.

[366] Mo. Pac. R. Co. *v.* Edwards, 78 Tex. 307. And see Internat. & G. N. R. Co. *v.* Parish (Tex. Civ. App.), 43 S. W. Rep. 1066.

[367] Chic., R. I. & P. R. Co. *v.* Harmon, 17 Ill. App. 640. And see Indianapolis, B. & W. R. Co. *v.* Strain, 81 Ill. 504.

[368] Sturgeon *v.* St. Louis, K. C. & N. R. Co., 65 Mo. 569; Ft. Worth & D. C. R. Co. *v.* Greathouse, 82 Tex. 104; Goldsmith *v.* Tower Hill Steamship Co., 37 Fed. Rep. 806; The Caledonia, 50 id. 567; Ill. Cent. R. Co. *v.* Simmons, 49 Ill. App. 443.

[369] Goldsmith *v.* Tower Hill Steamship Co., supra; Ill. Cent R. Co. *v.* Simmons, supra.

[370] Ayres *v.* Chic. & N. R. Co., 75 Wis. 215.

[371] Gulf, C. & S. F. R. Co. *v.* Hume, 87 Tex. 211.

[372] The J. C. Stevenson, 17 Fed. Rep. 540. *Semble*, that under the cir-

It was held in Texas that the plaintiff cannot recover, where cattle are killed in transit, the freight paid, in addition to their value at the place of destination.[373] But in a Federal case it was held that damages for cattle lost at sea through the negligence of the ship include the freight paid in advance and the *pro rata* premiums of insurance.[374] Where, however, the shippers of cattle signed a general contract stipulating that freight was payable thereon on the number shipped, whether delivered alive or not delivered at all, and was payable in Liverpool on the arrival of the vessel and that freight should be paid by the consignees, it was held that, upon the loss of the vessel and cattle before arrival, the shippers were liable for the full amount of the freight.[375]

Live animals such as horses and cattle are "goods" within the meaning of a statute providing that where goods are carried on deck all dues payable on the ship's tonnage should be payable as if there were added to the registered tonnage the tonnage of the space occupied by such goods. And in computing such tonnage, the measurement is to include only the space occupied by the animals themselves, fair allowance being made for their free bodily movements, and is not to include the sheds or pens in which they are confined.[376]

cumstances the shipper would have a lien on the vessel for such damages: Ibid.

[373] Gulf, C. & S. F. R. Co. *v.* Kemp. (Tex. Civ. App.), 30 S. W. Rep. 714; Galveston, H. & S. A. R. Co. *v.* Kelley (Tex. Civ. App.), 26 id. 470.

[374] Brauer *v.* Compania de Navign. La Flecha, 61 Fed. Rep. 860, affirmed in Same *v.* Same, 35 U. S. App. 44 and Compania de Navign. La Flecha *v.* Brauer, 168 U. S. 104.

[375] The Queensmore, 53 Fed. Rep. 1022.

[376] Richmond Hill Steamship Co. *v.* Trinity House Corpn., [1896] 1 Q. B. 493; [1896] 2 Q. B. 134.

TITLE VI.

CRUELTY—GAME LAWS.

CHAPTER I.

CRUELTY AND MALICIOUS MISCHIEF.

120. Cruelty to animals in general.
121. What animals are protected.
122. What acts are prohibited.
123. Injuring for sport; dishorning and spaying.
124. Societies for the prevention of cruelty; charitable bequests.
125. Indictment for cruelty.
126. Malicious mischief to animals.
127. Proof of malice; indictment.

120. Cruelty to Animals in General.—Having discussed the various rights and liabilities of the owners of animals, we come now to the consideration of what are ethically, though not technically, the rights of the animals themselves. It is said in a leading periodical: "Although the courts may differ as to what is a 'wanton' killing, and what 'unnecessary' cruelty, they all treat the subject from the standpoint of humanity, and allow a man a dominion over other 'living creatures' that cannot be reconciled with the idea that the latter have any rights—either to liberty, life or security from pain. The conclusion, therefore, must be that cruelty to animals is illegal, not because of its effect on the animals, but because of its effect upon men."[1] Whether in the light of the evolution of legal principles this theory may or may not be disputed does not concern us here. Practically the ques-

[1] 38 Cent. L. Jour. 166.

tion is free from difficulty. By the statutes of all civilized countries cruelty to animals is, within certain restrictions, made a punishable offense and the only dispute that can arise is as to the definition of those restrictions.

Closely allied to the prohibitions against Cruelty are those against Malicious Mischief to animals. In the latter case the animal is considered as property that is being injured or destroyed, but, as actual malice against the owner need not necessarily be shown, the two offenses are so nearly related that, though some of their features should be discussed separately, much of the reasoning applicable under the one head applies to the other as well.

With regard to the laws against cruelty, it has been well said in an Arkansas case: "They are not made for the protection of the absolute or relative rights of persons or the rights of men to the acquisition and enjoyment of property, or the peace of society. They seem to recognize and attempt to protect some abstract rights in all that animate creation, made subject to man by the Creator, from the largest and noblest to the smallest and most insignificant. The rights of persons and the security of property and the public peace are all protected by other laws, with appropriate sanctions. The objects of the two classes should not be confounded. It will lead to hopeless confusion. The peculiar legislation we are now called to discuss must be considered wholly irrespective of property, or of the public peace, or of the inconveniences of nuisances. The misdemeanors attempted to be defined may be as well perpetrated upon a man's own property as another's, or upon creatures the property of no one; and, so far as one act is concerned, it is all the same whether the acts be done amongst refined men and women whose sensibilities would be shocked, or in the solitude of closed rooms or secluded forests. It is in this view that such acts are to be construed, to give them, if possible, some beneficent effect, without running into such absurdities as would, in the end, make them mere dead letters. A literal construction of them

would have that effect. Society, for instance, could not long tolerate a system of laws which might drag to the criminal bar every lady who might impale a butterfly or every man who might drown a litter of kittens, to answer there and show that the act was needful. Such laws must be rationally considered with reference to their objects, not as the means of preventing aggressions upon property, otherwise unlawful; nor so as to involve absurd consequences, which the legislature cannot be supposed to have intended. So construed, this class of laws may be found useful in elevating humanity, by enlargement of its sympathy with all God's creatures and thus society may be improved. Although results in other States and in England have not, as we judge from the paucity of decisions, been such as to excite sanguine hopes, yet to a limited extent the objects of the laws may be practically obtained. It is the duty of the courts to co-operate to that end, so far as the rules of construction may warrant. . . From the view we have taken of the nature and scope of this class of acts, it is obvious that the term 'needless' cannot be reasonably construed as characterizing an act which might by care be avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction. . . . All acts of killing are not 'needless' in the meaning of the statute, which are unlawful. A man, for instance, might kill his neighbor's sheep for food, which would be *unlawful* and either a trespass or felony, according to the circumstances; but such killing could not, with any show of reason, come within the intention of the act in question. The lawfulness or unlawfulness of the act has really no bearing upon its character, as charged." [2]

The question as to the nature of the acts constituting cruelty is discussed in §§ 122, 123, infra. It was said in a New York case that wanton cruelty to an animal was a misdemeanor at the common law;[3] and in a Federal case it was

[2] Grise *v.* State, 37 Ark. 456, 458.

[3] Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.), 51.

held that public cruelty to a cow and beating her to death in or near a public street was an indictable offense at the common law as a public nuisance and that it was unnecessary for the prosecution to prove that the animal died of the beating.[4] The established opinion is, however, that cruelty to animals *as such* was not indictable at the common law, but that the laws on the subject are the result of modern civilization.[5] "The idea of protecting animals from cruelty for their own sake is comparatively modern. Formerly the only protection animals possessed was given them under the law against malicious injuries to property; and Mr. Justice Heath, in the case of Reg. *v.* Parker (July Sessions, 1794), says: 'In order to convict a man of barbarous treatment of a beast, it should appear that he had malice towards the prosecutor.' The project of remedying this state of affairs secured the valuable assistance of Lord Erskine's eloquence in 1809, but though a bill twice received the approval of one House, it was on the first occasion thrown out by the other . . . and ultimately dropped." [6]

This subject will be more fully considered in treating of Malicious Mischief in § 126, infra.

121. What Animals are Protected.—Before treating of the various forms of cruelty, a few words should be said as to the definitions given by the courts to the terms "animals," "domestic animals," etc., as denoting the objects protected by the statutes.

Linnets caught, kept in captivity and trained to act as decoy birds for the purpose of catching other birds, were held to be "domestic animals," within the meaning of the statute against cruelty.[7] On the other hand, a tame sea-gull used

[4] U. S. *v.* Jackson, 4 Cranch C. Ct. (U. S.) 483.

[5] Peo. *v.* Brunell, 48 How. Pr. (N. Y.), per Sutherland, J.; 12 Crim. L. Mag. 378; 1 Bish. New Crim. Law, § 594.

[6] Article in Law Gazette reprinted in 28 Ir. L. T. 289, 301, 310, 320. For Lord Erskine's speech in full, see 2 Car. L. Repos. 364.

[7] Colam *v.* Pagett, 12 Q. B. D. 66, where it is said: "These words

by a photographer in his business was held not to be a domestic animal," and the case last cited was distinguished as there "the linnets were trained to perform a particular service which cannot be correctly asserted of the sea-gull in the present case." [8] So, young, unacclimated parrots were held not to come within the protection of the statute; [9] nor lions kept in a cage and made to give a public performance by means of fear.[10] In the latter case, Wright, J., said: "I agree with the argument for the appellant to this extent, that animals, however wild by nature, may become domestic under some circumstances. I should think that leopards trained to hunt for their master, otters trained to catch fish, and elephants trained to assist in the capture of wild elephants, might be held to be domestic. Speaking for myself, I should be prepared, if necessary, to say that they were. Domestic is not the same thing as domesticated, but I think that an animal ought to be regarded as a domestic animal which is of a kind ordinarily domesticated, and which is in fact itself domesticated."

Lizards, known as American chameleons, are not made domestic by the fact that they are bought and sold as pet ornaments and toys.[11]

Coursing with dogs and cruelly torturing wild rabbits which had been caught in nets five or six days before and since kept in confinement, was held not to be cruelty to "domestic animals." [12]

A domestic cock is an "animal" within the protection of

would indicate, I think, any pet bird such as a parrot, canary or linnet."

[8] Yates *v.* Higgins, [1896] 1 Q. B. 166.

[9] Swan *v.* Saunders, 44 L. T. N. S. 424. And see 71 L. T. 117.

[10] Harper *v.* Marcks, [1894] 2 Q. B. 319, where it is said: "It is impossible to say that a wild animal kept in a cage becomes by the mere fact a domestic animal."

[11] In re Racey (Montreal Police Court), 49 Alb. L. Jour. 252; S. P. C. A. *v.* Graetz, 17 Leg. News (Can.) 74.

[12] Aplin *v.* Porritt, [1893] 2 Q. B. 57.

the statute;[13] even where this enumerates a list of quadrupeds only and "other domestic animals."[14] But this latter decision was dissented from in a Scotch case.[15]

So, a fox is protected by the statute. "The word 'animal' must be held to include wild and noxious animals, unless the purpose of the statute or the context indicates a limited meaning."[16] And the word includes a dog not listed for taxation.[17]

A rat is not a "domestic animal" within the meaning of the English statute against cruelty. Under the English law "a scientific man may be punished heavily for performing a painful experiment upon a living rat in the cause of science, but a laborer may inflict just as severe pain upon the rat out of mere wantonness with impunity."[18]

The word "cattle" in statutes prohibiting cruelty and malicious mischief has been held to designate all domestic quadrupeds collectively,[19] and to include horses, mares and colts,[20] geldings,[21] pigs,[22] asses,[23] and goats.[24] But a buffalo, though domesticated, has been held not to come within the definition.[25]

[13] Peo. *v.* Klock, 48 Hun (N. Y.) 275; State *v.* Bruner, 111 Ind. 98; Bates *v.* McCormick, 8 Ir. Jur., N. S., 239.

[14] Budge *v.* Parsons, 3 B. & S. 382.

[15] Johnstone *v.* Abercrombie, 3 White Justic. Rep. (Sc.) 432. And see 94 L. T. 213.

[16] Com. *v.* Turner, 145 Mass. 296.

[17] State *v.* Giles, 125 Ind. 124. And see Wilcox *v.* State, 101 Ga. 563.

[18] 42 Solic. Jour. 503 [quoted in 57 Alb. L. Jour. 374], citing and commenting on a magistrate's case.

[19] State *v.* Pruett, 61 Mo. App. 156.

[20] Rex *v.* Paty, 2 Bl. 721; Rex *v.* Moyle, 2 East P. C. 1076; State *v.* Hambleton, 22 Mo. 452. But see Brown *v.* Bailey, 4 Ala. 413.

[21] Rex *v.* Mott, 2 East P. C. 1075.

[22] Rex *v.* Chapple, R. & R. C. C. 77; State *v.* Pruett, supra. And see Decatur Bank *v.* St. Louis Bank, 21 Wall. (U. S.) 294.

[23] Rex *v.* Whitney, 1 M. C. C. 3. And see Ohio & M. R. Co. *v.* Brubaker, 47 Ill. 462; Toledo, W. & W. R. Co. *v.* Cole, 50 id. 184.

[24] State *v.* Groves, 119 N. C. 822.

[25] State *v.* Crenshaw, 22 Mo. 457. See, for the nomenclature of animals in larceny statutes, §§ 55-57, supra.

122. What Acts Are Prohibited.—In an article already quoted, the reasons that will justify the infliction of pain are said to be: 1. To save an animal's life; *a fortiori* to save human life. 2. To cure the animal of disease, sickness, injury or malformation; *a fortiori* with the view of curing human disease, etc. 3. To assist development or proper growth, fit the animal for ordinary use, or to fulfil the part for which by common consent it is designed. Other doubtful reasons are: 1. For convenience. 2. For profit or raising prices. 3. To comply with fashion or custom.[26]

The rule has been elsewhere stated in various ways:

"The cruelty aimed at by the statute is the unnecessary abuse of the animal. Abuse may be necessary when it has for its object to make the animal more fit for the service of man, but this implies the service of mankind in general, and not the profit or convenience of individuals; and even when in this sense it is necessary, yet to be justified it must also be reasonable. In other words, there must first be an object which the law will allow, and then the pain inflicted in obtaining it must not be out of proportion to its importance. There remains the further qualification that where the object is lawful, yet it may not be sought to be attained in a painful manner where this is really useless, or where a less painful one is equally efficacious, and the fact that the painful method is customary or the only one which the operator himself knows or believes in will not be an excuse." [27]

"Undoubtedly every treatment of an animal which inflicts pain, even the great pain of mutilation, and which is cruel in the ordinary sense of the word, is not necessarily within the act. . . . Whenever the purpose for which the act is done is to make the animal more serviceable for the use of man the statute ought not to be held to apply. As was said by Wightman, J., in Budge *v.* Parsons,[28] the cruelty intended by the statute is the *unnecessary* abuse of the animal." [29]

[26] Law Gazette, quoted in 28 Ir. L. T. 301. [27] 33 Sol. Jour. 485.
[28] 3 B. & S. 382. [29] Gleasby, B., in Murphy *v.* Manning, 2 Ex. D. 307, 313–34

"Any operation upon an animal which causes pain is 'cruel ill-treatment, abuse or torture of' the animal . . unless the act be justified by showing that it was done for some lawful purpose legalized by custom, for the benefit of the animal itself, or for making it more serviceable for the lawful use of man." [30]

The intention to inflict the injury is not essential: therefore in a prosecution for cruelly beating and killing an animal, evidence that the defendant voluntarily struck it in a cruel manner and killed it, was held sufficient for conviction, though he did not intend to kill it.[31] And in a Massachusetts case, it is said: "The motive of intending to inflict injury or suffering is not, by the terms of the statute, made an essential element of the offense. And although the most common case to which the statute would apply is undoubtedly that in which an animal is cruelly beaten or tortured for the gratification of a malignant or vindictive temper, yet other cases may be suggested where no such express purpose could be shown to exist, which would be within the intent as well as the letter of the law. Thus, cruel beating or torture for the purpose of training or correcting an intractable animal; pain inflicted in wanton or reckless disregard of the suffering it occasioned and so excessive in degree as to be cruel; torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation, we can have no doubt would be punishable under the statute, even if it did not appear that the pain itself was the direct and principal object. Severe pain inflicted upon an animal for the mere purpose of causing pain or indulging vindictive passion is cruel. And so it is if inflicted without any justifiable cause and with reasonable cause to know that it is produced by the wanton or reckless conduct of the person who occasions it." [32]

[30] 63 L.T. 38. [31] State *v.* Hackfath, 20 Mo. App. 614. See Peo. *v.* Ross, infra.
[32] Com. *v.* Lufkin, 7 Allen (Mass.) 579, per Hoar, J. And see Com. *v.*

But a beating for the purpose of training or discipline, though unnecessarily severe, has been held not to constitute an offense under the statute.[33] And where a cabman, intending to beat his horse for refusing to draw a load, struck it a single blow upon the neck which killed it, he was held to be rightfully acquitted if the evidence showed no deliberation to kill the animal but only to chastise it.[34]

Some knowledge of the nature of the act is, however, essential. Thus, driving a horse while ignorant that it is sick or sore is not *per se* tormenting or torturing it.[35] And in an indictment against a minor for cruelly over-driving a horse, an instruction that he was presumed to intend the natural consequence of his acts, but that, if in the exercise of his judgment he thought he was not over-driving, he must be acquitted, was held correct.[36] Where the receiver of a large consignment of cattle, which he was supposed to receive and attend to personally, had not removed the head-ropes from cattle arriving in the port on Saturday until the following Monday, and was convicted of cruelty, it was held that as there was no evidence of guilty knowledge or of his wilfully abstaining from knowledge, the conviction must be quashed.[37] And where certain horses in a colliery were worked while suffering from raw wounds, it was held that the certificated manager could not be convicted when he and

Magoon (Mass.), 51 N. E. Rep. 1082, where it was held that the defendant's guilt does not depend on whether he thought he was unnecessarily cruel, but whether he was so in fact and did unnecessarily cruel acts. See, also, Duncan *v.* Pope, 80 L. T. N. S. 120.

[33] State *v.* Avery, 44 N. H. 392.

[34] Peo. *v.* Ross, 3 N. Y. City Hall Rec. 191, cited in Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51, 63. Cf. State *v.* Hackfath, supra.

Where a policeman struck a runaway horse with a stone, the question of cruelty, it was held, should be left to the jury: State *v.* Isley (N. C.), 26 S. E. Rep. 35.

[35] Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

[36] Com. *v.* Wood, 111 Mass. 408. And see State *v.* Roche, 37 Mo. App. 480.

[37] Elliott *v.* Osborn, 65 L. T. N. S. 378.

the owner were not present and had no knowledge of the state of the horses.[38] On the other hand where, in the absence of the licensed owner of a slaughter-house, his foreman, disobeying orders to save himself trouble, slaughtered a sheep in the pound in view of other sheep, contrary to a by-law, it was held that the by-law was good and that the owner was liable for the act of his servant which was committed within the scope of his employment, though contrary to orders.[39]

Where F. conveyed nine sheep in a wagon and one broke its leg on getting out and F. drove them into a pen at the market for sale, put that sheep with the others and they trampled on it, it was held that, though the facts showed carelessness, there was no evidence of F.'s causing the sheep to be tortured.[40]

The driver and conductor of a horse-car are liable for overdriving the horses and overloading the car.[41] The use of a tight check-rein has been held, though with doubtful authority, not to be cruelty.[42]

On a complaint for unnecessarily failing to provide a horse with proper food, drink and protection from the weather, where the evidence was that the defendant unnecessarily left the horse harnessed to a carriage in a wood, where it remained all night uncared for and actually without food and drink for more than twenty-four hours except what it obtained by browsing, it was held that he was rightly convicted. It is not essential that the animal should have

[38] Small *v.* Warr, 47 J. P. 20.

[39] Collman *v.* Mills, [1897] 1 Q. B. 396.

[40] Westbrook *v.* Field, 51 J. P. 726.

[41] Peo. *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

[42] S. P. C. A. *v.* Lowry, 17 Leg. News (Can.) 118. In 30 Can. L. Jour. 581, it is said: "It is scarcely necessary to point out the manifest fallacies of this extraordinary decision. Even if a check is necessary to manage a horse when driving, it is not, therefore, necessary when a horse is 'standing at ease' : nor does ill-treatment and cruelty cease to be ill-treatment and cruelty because it is said to be necessary to make the unfortunate subject of it look handsomer or bring a higher price."

cruelly suffered.[43] But where parrots were sent by rail in a box without water for ten hours, there was held to be no evidence of cruelty.[44] Grove, J., said: "Cruelty has been defined as the unnecessary abuse of an animal. I should prefer to define the word as unnecessary ill usage by which the animal substantially suffers. . . . Cruelty does not mean any inconvenience or discomfort incidental to travelling from one place to another which may happen to the animal. To keep a bird in September without water for one night is, without frittering away the effect of the statute, not such cruelty as to be punishable."

Administering poison to animals comes within the statutory meaning of "cruelty." [45]

The omission to kill an animal which has been lawfully wounded, is in great pain and incurably ill, is not necessarily an offense. This was held in a case where the defendant thought he had killed a dog and dragged it into a road where he found it to be still alive and left it. It was held that the statute did not apply to such passive cruelty but only to intentional cruelty.[46] So, the owner of a horse incurably diseased and in pain, who omits to have it slaughtered is not guilty: otherwise, where he keeps it in such a manner that it suffers intense pain in moving around a field to graze. He is then as guilty as if he had actually tortured it with his own hand.[47] So, chasing a pig, hacking it with a carpenter's axe

[43] Com. *v.* Curry, 150 Mass. 509. See, also as to failure to provide with shelter, Ferrias *v.* Peo., 71 Ill. App. 559.

[44] Swan *v.* Saunders, 44 L. T. N. S. 424.

The decision was based partly, as is said supra, on the ground that the parrots in question were not "domestic animals."

[45] Peo. *v.* Davy, 32 N. Y. Suppt. 106.

The word "land" in an act against placing poisoned flesh or meat "in or upon any land" is not limited to merely open land but applies to enclosed gardens, buildings and dwelling-houses: Rogers *v.* Hull, 60 J. P. 584.

[46] Powell *v.* Knight, 38 L. T. N. S. 607.

[47] Everitt *v.* Davies, 38 L. T. N. S. 360.

and leaving it for two days before killing it, was held to be cruelty.[48]

A dog, though not a beast of burden, may be lawfully used in a treadmill or other serviceable employment, but, if he is cruelly used, the employer is criminally liable.[49]

Cropping a dog's ears was held in one case to be cruelty;[50] and a defendant has been fined for docking with instruments not very sharp.[51] Concerning the latter operation it has been said: "Compliance with fashion merely is no excuse for the infliction of pain. 'Docking' said Mr. Justice Hawkins . . . in Ford *v.* Wiley,[52] 'is another painful operation which may occasionally be justified, but I hold a very strong opinion against allowing fashion or the whims of individuals to afford a justification for such painful mutilation.' We may indeed take it that 'docking' as formerly performed on a grown horse is illegal, but if it is performed on the animal as a foal, and with proper care, possibly there are other reasons strong enough to make it justifiable, particularly protection against accidents arising from entanglements of the reins." [53]

The offenses of "maiming," and "disfiguring" animals will be treated of under the head of Malicious Mischief.

Cutting off a cock's comb and causing great pain cannot be justified on the ground that it is done for cock-fighting or winning prizes.[54]

Dislocating the limbs of animals to be slaughtered while they are yet alive and plunging them, while alive, in boiling water are criminal offenses.[55] In a Scotch case it seems to be held that the Jewish method of slaughtering a bullock, *i. e.*,

[48] Adcock *v.* Murrell, 54 J. P. 776.
[49] Peo. *v.* Spec. Sessions, 4 Hun (N. Y.) 441.
[50] 2 Scots L. T. 460, citing an English Police Court case.
[51] Reg. *v.* Fownes, 58 J. P. 185.
[52] 23 Q. B. D. 203.
[53] Law Gazette, quoted in 28 Ir. L. T. 301.
[54] Murphy *v.* Manning, 2 Ex. D. 307. And see 63 L. T. 38.
[55] Davis *v.* S. P. C. A., 16 Abb. Pr. N. S. (N. Y.) 73.

by a swift, deep "throat-cut," without previously stunning the animal, is not "cruelty." [56]

The intoxication of defendant is no defence for his cruelty.[57] But the fact that the animal was attacking or trespassing is in many cases a justification for acts that would otherwise be indictable. One may use necessary means to drive trespassing animals out of his land and if this results in injury to them he is not guilty of cruelty or wilful or wanton mischief.[58] So, one who set on his premises a steel trap which caught and injured another's dog depredating, was held not guilty of "needlessly torturing or mutilating" the animal.[59] And where the defendant killed hogs ravaging his crop in order to protect it and not from a spirit of cruelty, he was held not guilty, and it was considered immaterial whether he had a lawful fence or not. "The motive with which the act was done is the test as to whether it was criminal or not." [60] On the other hand it has been held that one cannot justify killing a trespassing animal unless his field was properly protected against such trespass.[61] And one who pursued with dogs and killed a hog trespassing on his premises and injuring a growing crop was held guilty of criminal trespass.[62] So it was held no defence to an indictment for wounding a cow that the defendant shot her for entering a field to destroy his crops at a point where the cow's owner should have kept the fence in repair. "It never was the law that a man might shoot and kill his neighbor's horses and

[56] In re Littman, (Aberdeen Police Court), cited in 37 Sol. Jour. 818 and 48 Alb. L. Jour. 383.

[57] State *v.* Avery, 44 N. H. 392.

[58] Avery *v.* Peo., 11 Ill. App. 332. See also § 45, supra.

[59] Hodge *v.* State, 11 Lea (Tenn.) 528.

[60] Stephens *v.* State, 65 Miss. 329. As to fencing against trespassing animals, see §§ 70-73, supra.

[61] Jones *v.* State, 3 Tex. App. 228; Davis *v.* State, 12 id. 11.

[62] Thompson *v.* State, 67 Ala. 106. But see McMahan *v.* State, 29 Tex. App. 348; Brewer *v.* State, 28 id. 565.

cows for a trespass upon his crops." [63] "And the needless killing of chickens though done without torture is cruelty under the North Carolina code, and it is no defence that they were destroying peas in the garden of the defendant's father.[64] But in a Texas case it is said: "A trespass may be wilful without being wanton, according to the intention. . . It may be done under such circumstances as negative a wanton act, as where an animal is in the habit of trespassing on a man's crop and is killed during an act of trespass, not from wantonness, but to prevent the destruction of his crop. In that case he might be liable to a civil suit for damages, but not to a criminal prosecution for malicious mischief. . . . This would not apply to a case where the crop was not properly protected against trespass by stock." [65]

Where a cow strayed into the defendant's unenclosed field and he set his dogs to drive her out and, after she came out on the public road, they bit and injured her, he was held guilty of wilfully and unlawfully abusing another's cattle in an enclosure not surrounded by a lawful fence.[66]

One does not wilfully or wantonly injure or kill an animal who does it to protect his own animal that is being attacked.[67] And where the defendant saw his father's sheep running at full speed and a number of hounds behind them, and shot one of the hounds, thinking the sheep were in danger, whereas the hounds were in fact following a fox trail leading across the pasture and had no designs on the sheep,

[63] State *v.* Butts, 92 N. C. 784. But see Reedy *v.* State, 22 Tex. App. 271; State *v.* Landreth, 2 N. C. Law Repos. 446.

[64] State *v.* Neal, 120 N. C. 613. [65] Branch *v.* State, 41 Tex. 622.

[66] State *v.* Godfrey, 97 N. C. 507.

[67] Thomas *v.* State, 14 Tex. App. 200; Lane *v.* State, 16 id. 172; Farmer *v.* State, 21 id. 423, where it is said: "It is well settled law that if an animal be killed or injured by a person in the necessary protection of such person's property, after he had ineffectually used ordinary care to otherwise protect such property, such killing or injuring will not be deemed either wilful or wanton, within the meaning of the Penal Code." And see Cornelius *v.* Grant, 7 Rettie (Sc. Ct. Justic.) 13.

it was held that the defendant could not be convicted of "cruelly beating or needlessly mutilating or killing" an animal. "If one destroys the life of an animal for the honest purpose of protecting his person or property and the circumstances are of such a character as to readily justify the belief that the measure is necessary to that end, the act would not be in violation of the statute under consideration, though it turned out that the apprehensions were in fact groundless and the destruction of life not necessary." [68] One charged with injuring animals running at large cannot set up as a defence a law making it unlawful for them to run at large.[69]

123. Injuring for Sport; Dishorning and Spaying.—With regard to the taking of life for sport, it was said in a Missouri case: "The universal love of so-called 'sports' which involve the destruction of animal life cannot now be ignored in a search after the legislative meaning in the act before us. Such diversions are not always resorted to for the means of human sustenance. Yet they are not considered 'needless' for man's enjoyment of his legitimate dominion over the brute creation. The individual who finds a healthful recreation in gunning or fishing can hardly be told that this must not be gained at the expense of his dumb subjects. The plea for life which he might hear, if the gift of speech were not denied, would have little weight against even the momentary triumphs of the marksman who brings down his game. It may be that the day will come when sentiments of mercy and humanity shall have so far advanced, with the progress of refining thought, that the man who can so estimate a fleeting satisfaction above a life, however lowly, which only omnipotence can bestow, will be regarded as exceptionally selfish and cruel. But no such feeling prevails as a basis for the interpretation of a legislative enactment." [70]

It was there held that pigeon-shooting was not an offense

[68] Hunt *v.* State, 3 Ind. App. 383. [69] State *v.* Rivers, 90 N. C. 738.
[70] State *v.* Bogardus, 4 Mo. App. 215, 219, per Lewis, P. J.

against a statute making it an offense "needlessly to kill," on the ground that there was no mutilation, but on the contrary the birds were killed in a more humane way than by wringing their necks, the ordinary method.

So, in Pennsylvania, a member of a gun club who at a pigeon shooting match, shoots at and wounds a pigeon let loose from a trap, which is immediately killed on discovery of its wounded condition, is not guilty of "wantonly or cruelly ill-treating or abusing" it. There was held to be no real distinction between a bird in a cage and one in a wood which a sportsman would undoubtedly have the right to kill. "The right to kill the pigeon was and must be conceded, and there is no finding of the jury, that its suffering was greater because of the manner of its death than if it had been killed in some other way." [71] There is a similar decision in Canada;[72] but in North Carolina pigeon-shooting was held to be an offense under the code defining "cruelty" as including every act, omission and neglect whereby unjustifiable physical pain, suffering or death is caused or permitted.[73] So, also, in Colorado, where the statute prohibited needless mutilation or torture.[74]

The reasoning in these cases would seem to apply to fox-hunting, though in Massachusetts this has been held to be a form of cruelty.[75]

Cock-fighting has been held to be "cruelty to domestic animals" in England and Ireland,[76] though not in Scotland.[77]

[71] Com. *v.* Lewis, 140 Pa. St. 261, reversing 7 Pa. Co. Ct. 558.

[72] S. P. C. A. *v.* Coursolles (Canada Police Court), cited in 20 Ir. L. T. 548.

[73] State *v.* Porter, 112 N. C. 887.

[74] Waters *v.* Peo. (Colo.), 46 Pac. Rep. 112.

[75] Com. *v.* Turner, 145 Mass. 296. See Renton *v.* Wilson, 15 Rettie (Sc. Ct. Justic.) 84, where Lord Young said *obiter* that fox hunting was not an offense under the statute.

[76] Budge *v.* Parsons, 3 B. & S. 382; Bates *v.* McCormick, 8 Ir. Jur. N. S. 239.

[77] Johnstone *v.* Abercrombie, 3 White Justic. Rep. (Sc.) 432. See 1 Scots. L. T. 180, 211; 2 id. 622. Cf. Brown *v.* Renton, infra.

But the statutory penalties against it are restricted to combats in a place particularly kept for the purpose.[78] "Under these decisions it would appear that a person may daily move about from one field or place to another and fight cocks in presence of invited spectators, regardless of the statute which is meant to prevent cruelty to animals in every place, provided he does not charge for admission into the field or place, which would probably amount to keeping a place for the purpose."[79]

A match took place between the owners of two dogs to ascertain which could kill the greater number of rabbits by running after them in a field, three acres in area, walled in so that the rabbits could not escape. It was held that this was not "baiting animals" within the meaning of a statute. Cockburn, C. J., said: "That term is usually applied when an animal is tied to a stake or confined so that it cannot escape."[80]

The dishorning of cattle has been held to be cruelty to animals in England on the ground that no adequate object was to be attained to justify such a proceeding.[81] A similar decision was made in an Irish case,[82] but departed from in later Irish cases which held that if the operation was performed with due care and skill for the purpose of rendering the cattle more profitable to farmers and exporters in the course of their trade, it was not cruelty.[83] Murphy, J., said in Callaghan *v.* S. P. C. A.: "The defendants have procured evidence to show, first, that the pain caused by the operation complained of is very brief; that the animal feeds very soon after

[78] Morley *v.* Greenhalgh, 3 B. & S. 374; Clark *v.* Hague, 8 Cox. C. C. 324; Coyne *v.* Brady, 12 Ir. C. L. R. 577, 7 Ir. Jur. N. S. 105. And see Brown *v.* Renton, 19 Rettie (Sc Ct. Justic.) 22, decided under a similar Scotch statute.

[79] 23 Ir. L. T. 16. As to what is a "public place" within the prohibition of a statute against cock-fighting, see Finnem *v.* State, 115 Ala. 106.

[80] Pitts *v.* Millar, L. R. 9 Q. B. 380. [81] Ford *v.* Wiley, 23 Q. B. D. 203.

[82] Brady *v.* M'Argle, 14 L. R. Ir. 174.

[83] Callaghan *v.* S. P. C. A., 16 L. R. Ir. 325; Reg. *v.* M'Donagh, 28 id. 204.

the operation; that it thrives with them better than an animal from which the horns are not removed; that, in being carried in railway wagons, the dishorned animals suffer less, and are carried with greater safety than animals of the same kind with the horns on; that on board of steamers, the cattle with horns are liable to suffer from being gored one by the other; but, if the horns are removed from all, they make the sea-journey in safety; that, after being dishorned, numbers can with safety be fed in enclosed places that could not with equal safety be fed in places of the same extent; and they finally produced evidence, which is not contradicted, to prove that in the English markets, to which they resort for sale, the animals dishorned bring £2 per head more than animals of the same weight and quality would with horns on."

In Scotland also, the operation if skilfully performed has been held not to be cruelty,[84] and there is a similar decision in Canada.[85] In Ohio it has been held in a police court case to be within a statute declaring it a misdemeanor to torture an animal, and not to be excused on the ground of convenience and profit to the owner and dealer.[86]

The operation of "spaying" performed on cows has been held justifiable as being done with the object of increasing weight and securing proper development, even if it is in fact unnecessary and useless.[87] This decision has been criticised on the ground that no particular benefit to humanity was proved to result from the practice of spaying.[88]

[84] Renton *v.* Wilson, 15 Rettie (Sc. Ct. Justic.) 84; Todrick *v.* Wilson, 18 id. 41. See an article from the Journal of Jurisprudence (Sc.) disapproving of these decisions, quoted in 25 Ir. L. T. 259: "We still . hold to the opinion of the English judges that dishorning 'causes extreme pain without an adequate and reasonable object, and is an unnecessary abuse of the animal, and therefore unjustifiable under the existing statute.' "

[85] S. P. C. A. *v.* Shepard, 13 Leg. News (Can.) 127.

[86] State *v.* Crichton, 4 O. Dec. 481.

[87] Lewis *v.* Fermor, 18 Q. B. D. 532. And see 28 Ir. L. T. 301.

[88] 51 J. P. 561, quoted in 21 Ir. L. T. 536.

124. Societies for the Prevention of Cruelty; Charitable Bequests.—These societies are of a semi-municipal character and their officers have usually by statute the right to arrest offenders without first obtaining a warrant, nor will an equitable action be sustained to restrain them from doing so.[89]

It was held in England, in an action for false imprisonment, that if a constable is required by another person to take a third person into custody for cruelty not committed in the constable's own view, he, before taking the person into custody, should either inquire into all particulars or see the animal so as to form a judgment as to what has occurred;[90] and the same rule would doubtless apply to officers of the Society for the Prevention of Cruelty.

The officer who has preferred an information and complaint before a court of summary jurisdiction has the right to appear on behalf of the society and to examine and cross-examine witnesses on the hearing of such information.[91]

The court will not enjoin the society from arresting the drivers or servants of a stage company, but may enjoin them from stopping the vehicles, except for making an arrest for a clear violation of the law, or from taking custody of the animals or stages or interfering with the passengers.[92]

An act requiring every owner of a dog to procure a yearly license paying a dollar therefor, under penalty of seizure and destruction of the animal by the society, but not declaring the keeping of an unlicensed dog to be a misdemeanor nor the dog a nuisance, is unconstitutional, as depriving the owner of his property without due process of law.[93] And so is an act authorizing an agent of the society to condemn

[89] Davis *v.* American S. P. C. A., 75 N. Y. 362, affirming 16 Abb. Pr. N. S. (N. Y.) 73. And see State *v.* Karstendiek, 49 La. Ann. 1621.

[90] Hopkins *v.* Crowe, 7 C. & P. 373. [91] Duncan *v.* Toms, 56 L. T. N. S. 719.

[92] Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

[93] Fox *v.* Mohawk & H. R. Humane Soc., 25 N. Y. App. Div. 26. Whether an officer of the society can be made a peace officer, *quære:* Ibid. The law was held not to constitute the society a "subordinate governmental agency."

an animal and cause it to be appraised and destroyed without notice to the owner.[94] Where the officer may kill an animal found abandoned if in the judgment of two reputable citizens the animal is past recovery for any useful purpose, he is liable for doing so unless he proves its condition, and the judgment of the citizens without notice to the owner is not conclusive.[95] And where the agent is authorized to destroy any animal that is "injured, disabled, diseased past recovery or unfit for any useful purpose," he may not take an animal properly hitched on a street and kill it, however bad its condition, where it is not abandoned or cruelly treated or afflicted with a contagious disease.[96]

The opinion was expressed in an English case that the prevention of cruelty to animals was a good charitable purpose, though unaccompanied by any reference to the utility or improvement of man.[97] And in Massachusetts the S. P. C. A. has been held to be exempt from taxation as a charitable and benevolent institution.[98] In another English case it seemed to be considered that the society for the protection of animals liable to vivisection and the home for lost dogs were charities, and perhaps also the society for the total suppression of vivisection;[99] and this last point was so decided in later cases.[100] A gift to a vegetarian society advocating the disuse of animal food on the ground that the slaughtering of living animals is inconsistent with their rights and needlessly cruel to them, has also been held to be a charitable gift.[101]

[94] King *v.* Hayes, 80 Me. 206; Loesch *v.* Koehler, 144 Ind. 278.

[95] Sahr *v.* Scholle, 89 Hun (N. Y.) 42.

[96] Goodwin *v.* Toucy (Conn.), 41 Atl. Rep. 806. His remedy is under those statutes requiring notice to be given to the owner: Ibid.

[97] Marsh *v.* Means, 3 Jur. N. S. 790.

[98] Mass. S. P. C. A. *v.* Boston, 142 Mass. 24.

[99] Obert *v.* Barrow, 35 Ch. D. 472.

[100] Armstrong *v.* Reeves, 25 L. R. Ir. 325; Cross *v.* London Anti-Vivisection Society, [1895] 2 Ch. 501. And see Purday *v.* Johnson, 60 L. T. N. S. 175.

[101] Webb *v.* Oldfield, [1898] 1 I. R. 431. See the dissenting opinion of Holmes, L. J.

A bequest for founding and upholding an institution for investigating, studying and curing maladies of quadrupeds or birds, useful to man, and for providing a superintendent or professor to give free lectures to the public, was held good as a charitable legacy.[102]

A trust for the maintenance of particular horses and dogs so long as they shall live is not invalid as a perpetuity, though it is not a charity.[103]

125. Indictment for Cruelty.—It is not sufficient to charge in the indictment that the defendant did "knowingly torture" an animal, in the absence of a statement of facts constituting such torture.[104] But an indictment is sufficient that charges "cruelly beating, bruising and wounding" a cow,[105] or "knowingly and wilfully suffering and permitting said dog to be bitten, mangled and cruelly tortured by a certain other dog";[106] or "cruelly overdriving," without a more particular statement of what constituted overdriving;[107] or "cruelly beating a certain horse." "The word clearly includes both the wilfulness and cruel temper of mind with which the act was done, and the pain inflicted by the act. If the act were merely accidental or did not give pain, it would not be cruel in the ordinary sense of the word as applied to such an act."[108] So, where the statute forbids cruelly driving a horse when unfit for labor, the indictment may allege that the defendant did "cruelly drive" the horse, without stating that he knew it to be unfit for labor. "The word 'cruelly' . . . exhausts the requirements of the statute, whatever they may be, with regard

[102] Univ. of London *v.* Yarrow, 23 Beav. 159, affirmed in 1 De G. & J. 72.
[103] Cooper-Dean *v.* Stevens, 41 Ch. D. 552. And see Mitford *v.* Reynolds, 16 Sim. 105.
[104] State *v.* Watkins, 101 N. C. 702; State *v.* Bruner, 111 Ind. 98.
[105] Com. *v.* Whitman, 118 Mass. 458.
[106] Com. *v.* Thornton, 113 Mass. 457.
[107] State *v.* Comfort, 22 Minn. 271.
[108] Com. *v.* McClellan, 101 Mass. 34. And see Burgman *v.* State (Tex. Cr.), 34 S. W. Rep. 111.

to the state of mind of the actor." [109] The cruel act is properly charged as "unlawfully and wilfully done." [110] But under the Kansas statute, it has been held that the complaint must charge the specific acts relied on, and that it was not sufficient to charge that the defendant "did unlawfully overdrive and kill two animals." [111]

Where the information states the means employed in the commission of the offense, it need not describe the injury inflicted on the animal, where the statute itself does not do so.[112] But an indictment under a statute prohibiting the torture of an animal, which merely charged that the defendant tied brush or boards to the horse's tail, and did not aver the effect of the act, was held insufficient, as such an act does not necessarily produce torture.[113] Where the statute makes one guilty of cruelty to animals in his charge who unnecessarily fails to provide them with food, drink and shelter, the word "unnecessarily" is a material part of the charge and a count failing to contain that word or its equivalent will be quashed on motion.[114]

It is not necessary to allege the ownership of the animal; [115] nor its value,[116] unless the statute makes the value the basis of the verdict.[117] But the value of the animal before and after the alleged cruelty is proper evidence of the nature of the treatment.[118] The value of the animal in the immediate neighborhood and at near and accessible markets may be proved.[119] And a witness acquainted with the animal be-

[109] Com. *v.* Porter, 164 Mass. 576. [110] State *v.* Allison, 90 N. C. 733.
[111] State *v.* Patterson, 6 Kan. App. 677.
[112] State *v.* Giles, 125 Ind. 124.
[113] State *v.* Pugh, 15 Mo. 509. [114] Ferrias *v.* Peo., 71 Ill. App. 559.
[115] Grise *v.* State, 37 Ark. 456; State *v.* Brocker, 32 Tex. 611; Com. *v.* McClellan, 101 Mass. 34.
In Maine, by statute, the custody only need be alleged or proved: State *v.* Clark, 86 Me. 194. And see State *v.* Spink, 19 R. I. 353.
[116] Grise *v.* State, supra; Caldwell *v.* State, 49 Ala. 34.
[117] State *v.* Garner, 8 Porter (Ala.) 447.
[118] McKinne *v.* State, 81 Ga. 164. [119] Walker *v.* State, 89 Ala. 74.

fore and after the injury may state his opinion as to the amount of damage, though unskilled in veterinary or medical science.[120]

The animal need not be fully described in the indictment.[121] A period of time instead of a single date may be alleged where the offense involves continuous action.[122] The overworking and the neglect properly to feed and shelter cattle may be charged as one offense;[123] so may ill-treating a horse and causing it to be ill-treated.[124] Under the English statute the defendant was held liable to summary conviction upon an information charging him with having cruelly ill-treated a horse by causing it to be worked in an unfit state, although the offense proved was that he had knowingly counselled the horse's owner to cause the act of cruelty to be done.[125]

126. Malicious Mischief to Animals.—Whether malicious mischief to property was an indictable offense at common law is a disputed question. In an article reviewing some of the cases favoring the doctrine it is said: "We cannot but think that some of these cases have lost sight of the true distinction between crimes and private trespasses and, in their abhorrence of the wanton cruelty and wicked disposition exhibited by the defendants in the several cases, have forgotten that after all there was no more injury to the public in destroying private property wantonly and maliciously than in any other manner, and they seem rather to declare what the law should be than what it then was. It is clear that the various acts now punished as malicious mischief, such as destroying trees, killing domestic animals, etc., were not indictable in England until made so by statute. . . . 'Any damage arising from the mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made

[120] Johnson *v.* State, 37 Ala. 457.
[121] Com. *v.* McClellan, 101 Mass. 34.
[122] State *v.* Bosworth, 54 Conn. 1.
[123] Ibid.
[124] Bartholomew *v.* Wiseman, 56 J. P. 455.
[125] Benford *v.* Sims, [1898] 2 Q. B. 641.

penal in the highest degree:' 4 Bl. Com. 243. Here we have the direct testimony of this learned commentator in accordance with the principle we have before laid down, and in conflict with many early decisions in this country. . . The absence of any reported cases of indictments for malicious trespass in the English books anterior to the passage of the several statutes hereafter referred to and the great frequency of them soon afterwards, are both pregnant facts, furnishing some evidence that at common law such acts were not indictable, for we can hardly believe that mankind were so much more depraved in the latter than in the former period, or that the rights of property were more clearly understood or more conscientiously respected in the fifteenth and sixteenth than in the seventeenth and eighteenth centuries. In 1 Hale's P. C. 561, it is laid down that 'Burning of a frame of a house (not a dwelling) or of a stack of corn was not felony by the common law.' From the fact, too, that the older writers on criminal law say nothing of such an offense as malicious mischief, it would be inferred that anterior to the statutes it was unknown and was not a fact of the ancient common law of England. The first English statute on the subject was not passed until the 22 Hen. VIII. . . . It can hardly be claimed, therefore, with truth that these statutes comprised any part of the common law at the time our ancestors came here, and were brought with them as such. . . . It would seem, therefore, that all our decisions on this subject (in States where no statutes exist) should conform to the English law anterior to the statutes above cited, and in many States we find this to be the case." [126]

The premises of this writer might be admitted without accepting *in toto* his conclusion. If the common law is a living organism, and not a mere fossil, it must be influenced from within by the evolution in the sentiments of mankind as well as from without by the moulding force of statutes. It by no means follows that because, in ages when men were

[126] 7 Law. Repr. N. S. 88-92.

habituated to and hardened by the sight of human torture and bloodshed, the infliction of suffering upon animals was not viewed in the light of a public offense, therefore in these days of greater sensibility and more universal sympathy a court must pronounce the offenses of malicious mischief and cruelty to animals not to be indictable "at common law," nor at all, unless there are statutory provisions on the subject. The common law is too large a factor in history and life to be limited in its operation to days anterior to all legislation.

These remarks may serve to throw some light on the discrepancies we find in the cases. An early English case holds that no indictment lies at the common law for unlawfully with force and arms maiming a horse: that it is only a trespass, independent of statute.[127] In Vermont it was held that an indictment for maiming colts is sustainable where the *gravamen* is wanton cruelty;[128] but in a later case it was held that no indictment would lie for "feloniously, maliciously, mischievously and wickedly killing a beast," the property of another.[129] Whereas in New York there is a decision just to the contrary, the court saying: "The offense is distinguishable from an ordinary trespass in this: that it is not only a violation of private right, without color or pretence, but without the hope or expectation of gain."[130] And in Tennessee it was held that the killing of an animal was indictable at the common law;[131] though a later case holds the malicious destruction of goods not to be indictable.[132]

[127] Ranger's Case, 2 East P. C. 1074. "It was so held also as late as 1840 in Reg. *v.* Wallace, 1 Crawf. & Dix. Cir. Cas. 403:" State *v.* Beekman, 127 N. J. L. 124.

[128] State *v.* Briggs, 1 Aik. (Vt.) 226, distg. Ranger's Case supra where "force and arms" alone appeared and not "all the wicked and malicious motives and intentions set forth in this indictment."

[129] State *v.* Wheeler, 3 Vt. 344.

[130] Peo. *v.* Smith, 5 Cow. (N. Y.) 258. S. P. Respublica *v.* Teischer, 1 Dall. (Pa.) 335. And see Com. *v.* Leach, 1 Mass. 59.

[131] State *v.* Council, 1 Overt. (Tenn.) 305.

[132] Shell *v.* State, 6 Humph. (Tenn.) 283.

Maiming or wounding an animal without killing it, is held not to be an indictable offense in late cases in New Jersey[133] and North Carolina;[134] but in the latter State it has been held that the malicious killing of a dog is indictable.[135] In Pennsylvania the malicious wounding of an animal has been held to be an indictable offense at the common law.[136]

In a review of the cases on this subject it was said that malicious mischief "has been recognized and declared to be an indictable offense under the common law," that "such is unquestionably the rule which has received the approval of the most respected and highest authority of this country," but that "it must, however, be admitted that the inclination of recent decisions, so far as the common law is concerned is to restrict the injured party to his civil remedies, except in those cases where the offense is accompanied by excessive wantonness and cruelty; or where it is committed with stealth and secrecy, in the night-time; or where it is productive of a breach of the peace."[137]

The wanton killing of an animal is an ordinary form of malicious mischief. One who sets fire to a cow-house and burns to death a cow therein may be indicted for killing the cow.[138] And where the defendant had not a lawful fence and cattle got in and the defendant, wishing to frighten them off though not to kill them, fired and killed a mule he did not see on account of the height of the corn, he was held

[133] State *v.* Beekman, 127 N. J. L. 124.

[134] State *v.* Manuel, 72 N. C. 201, where it is said, "Both the elementary writers and the decisions hold that such offense is not indictable, but is a civil trespass only." And see Branch *v.* State, 41 Tex. 622, 624.

[135] State *v.* Latham, 13 Ired. L. (N. C.) 33.

[136] Com. *v.* Cramer, 2 Pears. (Pa.) 441,—and this though the animal is trespassing at the time and there is no malice against the owner.

[137] 32 Am. Dec. 662 n. Cf. 72 Am. Dec. 357 n, holding that originally malicious mischief to animals was not indictable and tracing chronologically the changes due to statutory law and judicial interpretation of what constitutes "malice."

[138] Rex *v.* Haughton, 5 C. & P. 559.

liable, his carelessness supplying the criminal motive.[139] So, one is liable who causes the death of an animal by gratifying his own depraved tastes, and not caring whether it is injured or not, though bearing no ill-will either to the owner or to the animal itself.[140]

A dog has been held to be such "property" as to come within the statutory provisions against malicious mischief.[141] But where a statute prohibited the injuring or destroying of "public or private property," this was held not to include dogs but to refer only to inanimate property, and the court said: "We do not think it probable that the legislature of this State ever regarded the dog as being, in a general sense, property concerning which a criminal offense could be committed. . We find nothing in our criminal statutes suggesting any reason why this animal should be regarded as a subject-matter of crime in any instance where it is not expressly so declared." [142] And in a Texas case it is said: "It seems probable from the use of the words 'injure or destroy' in reference to the property designated by the phrase 'any other property' that this latter expression was intended . . . to include only inanimate property to the injury or destruction of which the terms 'kill,' 'maim,' 'wound,' etc., . . . could not properly be applied. However this may be, dogs are not mentioned in the statute; nor do they come within either class or description of the animals which are men-

[139] State *v.* Barnard, 88 N. C. 661.

As to the offense of killing or injuring attacking or trespassing animals, see § 122, supra.

[140] Reg. *v.* Welch, 1 Q. B. D. 23, where the defendant inserted the handle of a stable fork in the vagina of a mare and pushed it.

[141] Kinsman *v.* State, 77 Ind. 132; State *v.* Sumner, 2 id. 377; State *v.* McDuffie, 34 N. H. 523. And see State *v.* Latham, 13 Ired. L. (N. C.) 33 and the cases cited in 40 L. R. A. 511 n.

So, a dog is a "dumb animal" within the meaning of a statute against wanton killing: McDaniel *v.* State, 5 Tex. App. 475.

That it is not error to refuse to admit evidence of the value of a dog on the part of the defendant, see Dinwiddie *v.* State, 103 Ind. 101.

[142] Patton *v.* State, 93 Ga. 111.

tioned. They are not regarded by law as being of the same intrinsic value as property, as the animals enumerated in the statute; and cannot, we think, be brought within the prohibition under the general expression 'any other property' by intendment. Nor, in point of fact, do we suppose it was intended by the law-makers to include them. Had it been, they would doubtless have been included among the animals expressly enumerated." [143]

In Virginia under a statute making it indictable to destroy wilfully any tree or other timber, or property, real or personal, belonging to another, it was held that no criminal prosecution lay for killing a dog. "In a penal act the word 'property' standing alone ought to be considered to mean full and complete property, such as by the common law may be protected by a public prosecution for the larceny thereof." [144] And in Minnesota the malicious killing of a dog was held not to be indictable under the words "horse, cattle, or other beasts." "All such as have in law no value were not intended to be included in that general term." [145]

The *status* of the dog as the subject of property has been already discussed in this work.[146] The decisions based on the theory that he is either not "property," or property possessing no intrinsic value, though of historical interest, are of slight authority now. The civil and criminal liabilities for injuries to the property of others ought to be, and generally are, attached to those inflicted on dogs, as well as on other domestic animals.

The maiming, wounding, disfiguring, etc., of animals are forbidden in the statutes against malicious mischief. The word "maim" implies a permanent injury; [147] and where a

[143] State *v.* Marshall, 13 Tex. 55.

[144] Com. *v.* Maclin, 3 Leigh (Va.) 809. And see Davis *v.* Com., 17 Gratt. (Va.) 617.

[145] U. S. *v.* Gideon, 1 Minn. 292. [146] See §§ 20-22, supra.

[147] State *v.* Harris, 11 Ia. 414; Reg. *v.* Jeans, 1 C. & K. 539.

horse threw the defendant and he caught hold of its tongue, a part of which was left in his hand, but the wound healed and the animal could work as well as before, this was not "maiming" the horse.[148] To maim means to cripple and it is not essential that the act should constitute mayhem at the common law.[149] Pouring acid into a mare's eye and thereby blinding her, is maiming;[150] but not injuring a sheep by setting a dog on it.[151] Disfiguring is a lower grade of the same offense and need not be permanent and, however slight it is, if it lessens the animal's value and is done with malicious intent, it is indictable as such.[152] Thus, cutting off the hair of the tail or mane of a horse is disfiguring it;[153] though, where the statute prohibited "marking, branding or disfiguring" another's animal, it was held that the latter word applied only where the defendant's act was such as to prevent identity being ascertained, and did not render it an offense to shave the mane and crop the hair from the tail of a mare in the owner's stable.[154]

Where a nail was maliciously driven into the frog of a horse's hoof, producing a temporary injury, this was held to be "wounding." "The word *wound* appears to be used as contradistinguished from a permanent injury such as maiming."[155] But it is not necessary to prove that any instrument was used to inflict the wound, and evidence that the prisoner pulled at the horse's tongue is sufficient. "Under this statute the word 'wound' must be taken in the ordinary sense; for

[148] Reg. *v.* Jeans, supra.

[149] Turman *v.* State, 4 Tex. App. 586.

In Texas one may be indicted for wilfully or wantonly maiming an animal though such animal is within his own enclosure: Cryer *v.* State, 36 Tex. Cr. 621.

[150] Rex *v.* Owens, 1 Moody C. C. 205.

[151] Rex *v.* Hughes, 2 C. & P. 420.

[152] State *v.* Harris, supra.

[153] Boyd *v.* State, 2 Humph (Tenn.) 39. And see Oviatt *v.* State, 19 O. St. 573; Reg. *v.* Smith, 1 Nov. Sco. Dec. (G. & O.) 29.

[154] State *v.* Smith, 1 Cheves (S. C.) 157.

[155] Rex *v.* Haywood, 2 East P. C. 1076.

the mischief is just as great where manual power is used as if it were inflicted by an instrument."[156]

127. Proof of Malice; Indictment.—The essence of the offense of malicious mischief is malice toward the owner or custodian of the property on the part of the perpetrator of the act.[157] This was held in cases arising under the Black Act,[158] concerning which the following comments were made in an Ohio case: "The key to these decisions is furnished by Mr. East, who, in speaking of the preamble . and the two acts named, by reference, says: 'The offense herein described seems by the preamble to be pointed at such as commit it from a motive of malice to the owner of the property:' 2 East P. C. 1063. And after quoting the statutes and noticing the cases above cited and others on the same point, he concludes the subject in these words: 'In all these cases there was reasonable evidence appearing upon the face of the transaction itself to impute the motive of the fact to resentment against the particular animals; and not to any personal malice against the owner. But it does not appear to have been decided that it is necessary to give express evidence of previous malice against the owner, in order to bring a case within the act; but the fact being proved to be done wilfully, which can only proceed from a brutal or malignant mind, it seems a question solely for the consideration of the jury to attribute the real motive to it, to which the transaction itself will most probably furnish a clue:' East P. C. 1074. From this it appears that, notwithstanding the severity of the pen-

[156] Reg. *v.* Bullock, L. R. 1 C. C. 115.

[157] State *v.* Newby, 64 N. C. 23; State *v.* Latham, 13 Ired. L. (N. C.) 33; Northcot *v.* State, 43 Ala. 330; Hobson *v.* State, 44 id 380; State *v.* Enslow, 10 Ia. 155; State *v.* Lightfoot (Ia.), 78 N. W. Rep. 41; U. S. *v.* Gideon, 1 Minn. 292; State *v.* Wilcox, 3 Yerg. (Tenn.) 278; Stone *v.* State, 3 Heisk. (Tenn.) 457.

And malice toward the owner's son was held not to be sufficient in Northcot *v.* State, 43 Ala. 330.

[158] Pearce's Case, Leach 527; Shepherd's Case, Ibid. 539.

alty and the fact that by the preamble to the first-named act the offense seems to be pointed at such as committed it for motives of malice against the owner, the English decisions only went to the extent of holding that there could be no conviction where, upon the face of the transaction itself, the motive for the act could be imputed *only* to resentment or anger against the particular animal. In all other cases, the question of malice was to be left to the jury to be determined by the testimony. Having borrowed the English statute, we accept the above as the proper construction to be given to our statute on this point. We are aware that the decisions in some of the States seem to go further than this, but we decline to follow them." [159]

In an Alabama case it was said: "It is not indispensable to a conviction that the defendant did or said anything, either before or after the commission of the act, indicative of express malice towards the owner. Malice may be inferred, if the injury is unlawful, from the instrument used or the wantonness of the deed, and from any attendant circumstances which would justify the inference in other crimes where malice is an essential constituent." [160] And in an Iowa case, the court said: "If the act was wilful and wanton, the defendant intended to inflict an unnecessary and inexcusable injury upon the owner, and his malice embraces both the animal and the owner." [161]

The fact, therefore, that the defendant did not know who the owner was does not show a lack of malice.[162] Nor does the fact that the defendant was intoxicated at the time.[163]

[159] Brown *v.* State, 26 O. St. 176.

The Black Act is not in force in Georgia: State *v.* Campbell, Charlton, T. U. P. (Ga.), 166.

[160] Hobson *v.* State, 44 Ala. 380. And see Hill *v.* State, 43 id. 335.

[161] State *v.* Williamson, 68 Ia. 351. And see Reg. *v.* Tivey, 1 C. & K. 704; Ty. *v.* Crozier, 6 Dak. 8; State *v.* Avery, 44 N. H. 392.

[162] Peo. *v.* Olsen, 6 Utah 284; State *v.* Linde, 54 Ia. 139; State *v.* Phipps, 95 id. 491.

[163] State *v.* Avery, 44 N. H. 392.

But the jury ought to be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge; and "acting maliciously" was held not to be sufficiently defined as "the wilfully doing of any act prohibited by law, or for which the defendant has no lawful excuse." "The learned judge was probably of opinion that if the mare was injured, as alleged, by the discharge of a gun loaded with powder and shot, that *ipso facto* would be conclusive proof of malice. But that question, we think, should have been submitted to the jury." [164] And the fact that the animal was trespassing at the time would tend to disprove malice.[165]

Evidence of a general scheme of poisoning the horses of a neighborhood for the purpose of defrauding their owners out of fees for curing them was held to be sufficient to show malice.[166] Whereas, if the prisoner administered poison to horses under an idea that it would improve their appearance, he was not guilty of administering poison with intent to kill.[167] But where one was indicted for poisoning horses in order to prevent their running in a race, the defendant having betted against them, this intent was held to constitute malice.[168] An indictment for wilfully and maliciously administering poison to a horse, in the words of the statute, is sufficient without further averment of criminal intent or of injury to the horse.[169] And it need not be alleged that the quantity of poison was sufficient to kill.[170] Where the administering of poison is made by statute a specific offense,

[164] Com. *v.* Walden, 3 Cush. (Mass.) 558. And see State *v.* Allen, 72 N. C. 114.

[165] See Thomas *v.* State, 30 Ark. 433, 435; Chappell *v.* State, 35 id. 345; Bennefield *v.* State, 62 id. 365; Lott *v.* State, 9 Tex. App. 206; Wright *v.* State, 30 Ga. 325; Gaskill *v.* State, 56 Ind. 550.

[166] Brown *v.* State, 26 O. St. 176.

[167] Rex *v.* Mogg, 4 C. & P. 364.

[168] Dawson's Case, Ms., cited in 3 Chit. Cr. L. 1087 n.

[169] Com. *v.* Brooks, 9 Gray (Mass.) 299. And see State *v.* Isaacson, 8 S. D. 69.

[170] State *v.* La Bounty, 63 Vt. 374, where it was held that the words "Paris green" sufficiently imported poison.

it is not punishable under another section of the code as "wilful and wanton destruction of property."[171]

The indictment need not charge the act to have been done out of malice to a particular person, on the principle already discussed;[172] though it has been held that the name of the owner, if known, should be stated.[173] And even where it need not be given, if it is actually stated, the proof must correspond with the allegation.[174] Where the injury done to the owner enters into the penalty and is the element out of which it springs, the amount of injury must be alleged.[175]

An indictment for maliciously or needlessly killing need not allege the mode or circumstances of the killing.[176] Nor need the fact that the animal was killed while trespassing in an enclosure having an insufficient fence be alleged.[177]

Where the statutory offense consists in the injury being done "maliciously," an allegation that the defendant's act was "wilful and unlawful" is not sufficient.[178]

Under a statute punishing "wilful" or "wilful *or* malicious" injuries, malice need not be shown.[179] It has been held that the word "feloniously" must be used, where the killing of an animal is a statutory felony;[180] but that the act need not be

[171] Peo. *v.* Knatt, 156 N. Y. 302.

[172] State *v.* Scott, 2 Dev. & Bat. L. (N. C.) 35; State *v.* Hambleton, 22 Mo. 452. See State *v.* Hill, 79 N. C. 656; State *v.* Pierce, 7 Ala. N. S. 728; Thompson *v.* State, 51 Miss. 353.

By Stat. 24 & 25 Vict. c. 97 s. 60, an intent to injure particular persons need not be stated in the indictment.

[173] State *v.* Deal, 92 N. C. 802; State *v.* Pierce, supra; State *v.* Smith, 21 Tex. 748; State *v.* Jackson, 7 Ind. 270. See 2 Bish. New Crim. Proc. §§ 838-846.

[174] McLaurine *v.* State, 28 Tex. App. 530.

[175] State *v.* Heath, 41 Tex. 426.

[176] State *v.* Greenlees, 41 Ark. 353; Com. *v.* Sowle, 9 Gray (Mass.) 304. See State *v.* Jackson, 7 Ind. 270.

[177] Dean *v.* State, 37 Ark. 57. See Gerdes *v.* State (Tex. Cr.), 34 S. W. Rep. 268.

[178] State *v.* Lightfoot (Ia.), 78 N. W. Rep. 41.

[179] Wallace *v.* State, 30 Tex. 758; Johnson *v.* State, 37 Ala. 457.

[180] State *v.* McCarron, 51 Mo. 26.

alleged to have been wilfully and wantonly done.[181] The court should, however, in a proper case instruct the jury what "wilful and wantonly" wounding means.[182] An indictment for "shooting" a cow is sufficient, though the statute speaks of "wounding." A wound, in criminal law, is "an injury to the person by which the skin is broken" and "shooting" would naturally include this.[183] An allegation that the defendant did "wound and kill" a mule was held not to be supported by proof that the mule, though wounded, was not killed.[184]

The naming of animals in penal statutes and indictments has been already considered.[185]

A malicious injury to two animals inflicted in one transaction is one offense in law and, if the jury find the defendant guilty as to one animal and say nothing of the other, they acquit as to the latter.[186]

[181] Burgman *v.* State (Tex. Cr.), 34 S. W. Rep. 111.
[182] Browder *v.* State, 30 Tex. App. 614.
[183] State *v.* Butts, 92 N. C. 784. [184] Reid *v.* State, 8 Tex. App. 430.
[185] See §§ 55-57, 121, supra. [186] Haworth *v.* State, 14 Ind. 590.

TITLE VI.

CRUELTY—GAME LAWS.

CHAPTER II.

GAME LAWS.

128. Power to enact game laws.
129. Capture, sale or possession of game in the close season.
130. Right to shoot in private lands.

128. Power to Enact Game Laws.—It is not intended in the present chapter to give a synopsis of the various game laws of Great Britain and the different States of this country. These are statutes of purely local importance, and compilations of them already exist.[1] But there are some general principles of law that relate to all of them which cannot be overlooked in a treatise of this nature.

The ownership of the wild game in a country, in so far as it is capable of ownership, is in the State itself for the benefit of all the people in common.[2] The legislature has the right to withhold from or grant to individuals the right to hunt and kill game, or qualify and restrict it, as in the opinion of its members will best subserve the public welfare.[3] Nor can

[1] See Book of the Game Laws (Forest and Stream Pubg. Co., N. Y.); Austin's Farm and Game Law, Ch. XIV; O'Brien's Ont. Game and Fishing Laws, etc.

[2] Geer *v.* Conn., 161 U. S. 519. See, as to property in game, Tit. I, Ch. I, supra.

[3] Magner *v.* Peo., 97 Ill. 320. And see Garcia *v.* Gunn, 119 Cal. 315.

the owner of the soil while his lands are unenclosed prohibit the exercise of this right to others: the hunting of wild animals in the forests and unenclosed lands of this country is as ancient as its settlement, and the right to engage in it is coeval therewith.[4]

"It is a very common police regulation to be found in every State, to prohibit the hunting and killing of birds and other wild animals in certain seasons of the year, the object of the regulation being the preservation of these animals from complete extermination by providing for them a period of rest and safety, in which they may procreate and rear their young. The animals are those which are adapted to consumption as food, and their preservation is a matter of public interest. The constitutionality of such legislation cannot be questioned." [5] And an act providing for greater restrictions as to hunting game and severer penalties therefor upon nonresidents of the State than upon residents, is not unconstitutional.[6]

In Arkansas and Minnesota it was held that statutes making it unlawful to export game or fish from the State were not unconstitutional.[7] But in Kansas, this was held to be a regulation of interstate commerce and therefore void.[8] The same question arose in Connecticut, where a similar statute was held to be constitutional on the ground that the State had

[4] McConico *v.* Singleton, 2 Mill (S. C.) 244; Broughton *v.* Singleton, 2 Nott & McC. (S. C.) 338.

If a man has a limited right of passage over private ground, that does not entitle him, while using such right, to kill game: Colt *v.* Webb, 1 Fraser (Sc. Ct. Justic.) 7.

[5] Tiedeman Limns. of Pol. Power 440.

[6] Allen *v.* Wyckoff, 48 N. J. L. 90.

[7] Organ *v.* State, 56 Ark. 267; State *v.* North. Pac. Expr. Co., 58 Minn. 403.

Under such a statute game killed by tribal Indians on a reservation may be seized by the game warden while it is in the possession of a common carrier to whom it had been delivered for shipment in another State: Selkirk *v.* Stevens (Minn.), 75 N. W. Rep. 386.

[8] State *v.* Saunders, 19 Kan. 127.

a right to enact that birds may be killed and sold for domestic consumption only: "The birds in question never became articles of commerce. . . They became private property of a qualified character." [9] This judgment was affirmed in the Supreme Court of the United States where, without deciding whether the game killed was an article of commerce, the court said: "The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the State to control the killing of and ownership in game being admitted, the commerce in game which the State law permitted was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it. All ownership in game killed within the State came under this condition, which the State had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the State consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce." [10]

This decision establishes the principle that the police power of a State authorizes it to forbid the killing of certain game within the State with the intent of procuring its transportation beyond the State limits, or having it in possession with like intention.

The State may also forbid internal commerce in game. A provision that "it shall be unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou or deer, or any part thereof except the head or skin," was held not to be unconstitutional as depriving the citizen of his privileges and property without due process of law; the only restriction

[9] State *v.* Geer, 61 Conn. 144.

[10] Geer *v.* Conn., 161 U. S. 519, 532. Justices Field and Harlan dissented.

being that the game could not be consigned to a common carrier, which prevented its becoming an article of general commerce and thereby materially decreased the amount killed.[11]

An act forbidding the killing of deer for ten years is not in conflict with the contitutional provision that the inhabitants of the State should have liberty in reasonable times to hunt, etc., under proper regulations.[12] And a statute making it a misdemeanor to sell or offer for sale the hide or meat of any deer is not in excess of the police power of the State; nor is a police regulation making it an offense to buy and sell deer-meat within the State cut from an entire carcass from without the State unconstitutional as an attempt to regulate interstate commerce.[13]

The subject of destroying or selling game in the close season is treated of in the next section.

The provision in the treaty with the Bannock Indians that they should have "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon and so long as peace subsists between the whites and Indians on the borders of the hunting districts" was held to confer a privilege of merely limited duration, and to be repealed by the act admitting the Territory of Wyoming into the Union, as it was not intended to give them the right to exercise the privilege within the limits of that State in violation of its laws.[14]

A statute and order of the Secretary of the Treasury forbidding the killing of otters by any but natives was held not to prohibit a company from taking natives on board under an agreement and usually purchasing skins from them, though each native was free to sell his skins elsewhere.[15]

The State has, of course, the right to demand that no one

[11] State *v.* Chapel, 63 Minn. 535. [12] State *v.* Norton, 42 Vt. 258.
[13] Ex parte Maier, 103 Cal. 476.
[14] Ward *v.* Race Horse, 163 U. S. 504, reversing 70 Fed. Rep. 598.
[15] The Kodiac, 53 Fed. Rep. 126.

shall deal in game without a license. In England an excise license is not required to enable a person to deal in game killed abroad.[16] To warrant a conviction for buying game from an unlicensed person, it is sufficient to prove that the dealer bought or obtained game from an unauthorized person without proving guilty knowledge on his part.[17]

Where a pheasant breeder set pheasants' eggs to be hatched under barnyard hens, reared young birds in coops or pens, cutting one wing off each to assist in its identification and prevent its escape and sold the pheasants to the public, it was held that he was liable for the penalty of dealing in game without a license, as the pheasants were game and not tame birds, though reared under hens.[18] Taking, killing and pursuing without a license is one offense.[19]

A complaint charging the use of a prohibited kind of gun of a certain calibre must say that it was for the purpose of killing game or animals.[20]

Concerning penalties for offenses against the game laws, it was said in a Minnesota case: "The punishment for offenses against game laws are usually graduated in one of two ways, —either by making the unlawful killing or possession of each animal a separate and distinct offense, or (which works out the same result) by graduating the penalty according to the number of animals killed or possessed, so that the greater the offense, the greater the punishment. This method of graduating punishment is distinctly recognized in many of our criminal statutes. Our game law is not more severe in its penalties than the game laws of other States, the validity of which in this respect has rarely been questioned, so far as we have discovered." [21]

Each member of a firm which is in possession of three

[16] Pudney *v.* Eccles, [1893] 1 Q. B. 52.
[17] Reg. *v.* Muirhead, 51 J. P. 760. [18] Harnett *v.* Miles, 48 J. P. 455.
[19] Laxton *v.* Jefferies, 58 J. P. 318.
[20] Ex parte Peterson, 119 Cal. 578.
[21] State *v.* Rodman, 58 Minn. 393, 402.

caribou at a forbidden season is a possessor of all such caribou and liable for the full penalty.[22]

An action for the penalty, though in the name of the people, is a civil action and the defendant is not entitled to trial in the county where the cause of action accrued, as in criminal cases.[23] The complaint need not, however, allege to whom the penalty goes.[24]

Where the fish and game protectors, and also a private person, may sue for the penalties, a judgment in an action by the latter is a bar to an action by the former.[25]

Under a statute imposing a penalty on any who should hunt on their own lands on Sunday, except those who observed Saturday as the Sabbath, it was held that the complaint should aver that the defendant was not within the exception or that he was not hunting on his own land.[26]

Fish has been held to be "game" within the meaning of a constitutional prohibition against the enactment of special laws for the protection of game.[27]

129. Capture, Sale or Possession of Game in the Close Season.—Although, as was said in the preceding section, the passage of acts forbidding the capture, sale or possession of game at certain seasons is recognized as within the police power of the State, there has been some diversity of opinion as to the construction of such statutes with regard to the sale and possession during the close season of game that has been captured or killed at a lawful time or place.

In England it was held to be no defence to an information under the Wild Birds Protection Act, 1876 (39 and 40 Vict. c. 29), for exposing wild birds for sale during the close season, that such birds had been bought of or received from one residing out of the United Kingdom. Coleridge, C. J.,

[22] Allen *v.* Leighton, 87 Me. 206.
[23] Peo. *v.* Rouse, 15 N. Y. Suppt. 414. [24] State *v.* Thrasher, 79 Me. 17.
[25] Peo. *v.* Robbins, 39 Hun. (N. Y.) 137.
[26] State *v.* Peters, 51 N. J. L. 244. [27] State *v.* Higgins, 51 S. C. 51.

said: "It is said that it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering directly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad." [28]

In a later case, under a statute prohibiting buying, selling or having in possession any bird of game after the expiration of ten days from the day on which it becomes unlawful to kill or take "such birds of game," it was held that it was not unlawful for a game-dealer to have in possession foreign birds of the same kind, killed abroad and commercially consigned to England as articles of food. The court distinguishes Whitehead *v.* Smithers, supra, as, in that case, "there is nothing . . . in the section then before the court to limit the latter part of it to the possession of a wild fowl which had been recently unlawfully killed according to the earlier part of the same section." [29] It had been previously held under the statutes 2 Geo. 3, c. 19, and 39 Geo. 3, c. 34, that one having in his possession a partridge killed before the close time was not guilty of the offense.[30] And a licensed dealer in game is not prohibited by statute 1 and 2 Wm. 4, c. 32, from entering into a contract made in the season to deliver live game out of a mew or breeding-place at any time including the close season.[31]

In New York it was held that the legislature had full power to pass an act prohibiting having possession of game birds, though they were killed at a time when by the act such killing was not forbidden, or brought from another State where

[28] Whitehead *v.* Smithers, 2 C. P. D. 553.
[29] Guyer *v.* Reg., 23 Q. B. D. 100. And see 53 J. P. 433; 23 Ir. L. T. 421.
[30] Simpson *v.* Unwin, 3 B. & Ad. 134.
[31] Porritt *v.* Baker, 10 Ex. 759.

there was no such prohibition.[32] And one controlling game consigned from another State for sale is liable for having possession out of season, though the consignment was made at a proper time and the game was stored in the refrigerator warehouse of a company.[33]

In Illinois a similar statute was held not to be unconstitutional as conflicting with the power of Congress to regulate commerce. Scholfield, J., said: "We think it obvious that the prohibition of *all* possession and sales of such wild fowls or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here, beyond the State and afterwards bringing them into the State for sale, or by other subterfuges and evasions. It is quite true that the mere act of allowing a quail netted in Kansas to be sold here does not injure or in anywise affect the game here; but a law which renders all sales and all possession unlawful, will more certainly prevent any possession or any sale of the game within the State, than will a law allowing possession or sales here of the game taken in other States. This is but one among the many instances to be found in the law where acts, which in and of themselves alone are harmless enough, are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful."[34] In Missouri also the statute was held to be violated by having game in possession during the close season irrespective of the time and place of killing. "The game laws would be nugatory if, during the prohibitory season, game could be imported from the neighboring States. It would be impossible to show in most instances where the game was caught."[35] There

[32] Phelps *v.* Racey, 60 N. Y. 10.

[33] N. Y. Game Assn. *v.* Durham, 51 N. Y. Super. Ct. 306.

[34] Magner *v.* Peo., 97 Ill. 320, followed in Merritt *v.* Peo., 169 id. 218.

[35] State *v.* Randolph, 1 Mo. App. 15. And see State *v.* Judy, 7 id. 524; State *v.* Farrell, 23 id. 176.

are similar decisions in Ohio,[36] California,[37] and Minnesota.[38]

On the other hand, it has been held in many of the States that the prohibition of the statute extends only to the possession or sale of game unlawfully captured or killed. In Massachusetts the statute is directed against "whoever takes or kills any woodcock, etc., or sells, etc., any of said birds," and possession is made *prima facie* evidence to convict. It was held that this did not prohibit having in possession and selling within the close time game lawfully killed in another State, and the court said: "Saying that possession shall be *prima facie* evidence necessarily implies that it shall not be conclusive; if the mere possession of birds during the time within which the taking or killing of them is prohibited of itself constituted an offense under the previous sections of the statute, to say that such possession should be *prima facie* evidence would be superfluous, if not absurd." [39]

In Michigan the statute contains a similar provision as to *prima facie* evidence and the decision in Com. *v.* Hall, supra, was followed. "The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and, therefore, detrimental to the public health, but the whole end and object of the legislation is to protect and preserve game in the State of Michigan." [40]

In Pennsylvania the statute prohibits killing or exposing for sale or having possession of game "after the same has been killed." The court said: "What does the word 'same' here refer to? Clearly, the antecedent game, the killing of which had already been prohibited." It was held accordingly that the sale during the close season of game killed in another State did not come within the statutory prohibition.[41]

[36] Roth *v.* State, 7 O. Cir. Ct. 62, affirmed in 51 O. St. 209.
[37] Ex parte Maier, 103 Cal. 476.
[38] State *v.* Rodman, 58 Minn. 393.
[39] Com. *v.* Hall, 128 Mass. 410.
[40] Peo. *v.* O'Neil, 71 Mich. 325.
[41] Com. *v.* Wilkinson, 139 Pa. St. 298.

The same interpretation has been given to the statutes of Maine,[42] Maryland,[43] Oregon,[44] Ontario,[45] and Quebec.[46]

It was held in Maine that where the plaintiff captured a moose at an unlawful time he had no action against a game warden who without process liberated it. The court said: "Suppose a hunter has his rifle levelled at game in close time and some one shoves it aside so that the game is missed. Shall the hunter have damages? He has only been prevented from continuing a criminal act. Suppose lobsters illegally taken are thrown overboard alive. Is he who does it a trespasser? Shall the taker of them have damages for his illegal catch? Or suppose one lands a salmon in violation of law and a bystander, while it is yet alive, throws it back into the water. Shall the fisherman have the value of the salmon that the law forbids his having at all? When game is killed it absolutely becomes property, but when taken alive, only conditionally so; for when released, property in it is gone. So long, then, as the possession of live game is illegal, qualified property in it is illegal also, and the releasing of such game interferes with no legal right or title of the person illegally holding it captive." [47] But in the same case it was held that where the plaintiff had purchased a deer in close time and it was not shown to have been unlawfully captured, he might recover against a game warden for taking it away.

In Massachusetts, however, it was held that the fact that the possession of one having rabbits for sale was unlawful did not prevent his maintaining an action for their wrongful

[42] State *v.* Bucknam, 88 Me. 385. [43] Dickhaut *v.* State, 85 Md. 451.
[44] State *v.* McGuire, 24 Oreg. 366.
[45] Davis *v.* McNair (Can. Gen. Sess.), 21 Cent. L. Jour. 480; 7 Crim. L. Mag. 213.
[46] Shewan *v.* Drummond, 35 Low. Can. Jur. 113.
[47] James *v.* Wood, 82 Me. 173.
The possession of only one moose in the open season is not sufficient evidence of its illegal capture to throw the burden of proof on the defendant: State *v.* Lynch, 89 id. 209. As to a complaint charging the illegal possession of dead game, see State *v.* Thomas, 90 id. 223.

seizure by a deputy of the game commissioners without a warrant or order from court.[48]

An act imposing a penalty on having in possession at one time more than a certain quantity of game does not make it unlawful for a common carrier to transport during the prohibited season more than the legal amount, if it was killed at a lawful time.[49]

Where by statute the possession of a bird of a certain kind is evidence that it was killed in violation of law, the possession being shown, the burden is on the accused to show that his possession is consistent with a lawful taking.[50] And where game unlawfully killed is commingled with game lawfully killed, the burden is on the possessor to prove, as against the State, what portion was lawfully killed.[51]

One who has in possession or offers for sale deer at a forbidden season is not exempt from liability by reason of the fact that his title and possession were by purchase at a sheriff's sale on execution against the killer of the game.[52]

Where the plaintiffs employed the defendant to store game during the "closed season" which they had on hand at the commencement of such season, intending to withdraw it when the "open season" returned, and subsequently brought an action for damages owing to the game being insufficiently kept, it was held that the plaintiffs could not recover as the intention of the parties could not be considered and the defendant's contract to preserve and restore the game was void

[48] Averill *v.* Chadwick, 153 Mass. 171.

[49] Bennett *v.* American Exp. Co., 83 Me. 236. And see 13 L. R. A. 804 n, where this is said to be an "important modification" of some of the decisions cited above. See also Allen *v.* Young, 76 Me. 80

A deer roaming wild in the defendant's park containing from 700 to 800 acres, and surrounded by the sea except a narrow strip, where artificial structures had been placed, was held not to be so in the defendant's possession that he could kill it in close time: State *v.* Parker, 89 id. 81.

[50] State *v.* Stone (R. I.), 40 Atl. Rep. 499.

[51] Thomas *v.* Northern Pac. Exp. Co. (Minn.), 75 N. W. Rep. 1120.

[52] Bellows *v.* Elmendorf, 7 Lans. (N. Y.) 462.

under the statute making it a misdemeanor to have in possession such game during the close season.[53]

Killing wild animals in close time when they are pursuing and destroying the defendant's domestic animals is not a violation of the game laws.[54] Where the statute prohibited the shooting of certain game in the night-time, it was held error to instruct that night ends one hour before sunrise, as it is day when there is daylight enough by which to discern a person's face.[55] A statute making it an offense to have in possession a certain kind of game "from the first day of January to the first day of October" will be construed as reading "between the first day of January and the first day of October." [56]

Where a statute imposed a penalty for the killing or exposure for sale or possession of "eagles . . . or song birds," it was held that exposing live birds for sale in a shop was not a violation thereof, as the purpose of the statute was to prevent the destruction of birds and prohibits the possession and sale of dead birds only.[57]

One starting to hunt prairie chickens with a loaded gun in the close season is not thereby attempting to kill prairie chickens in violation of statute, so as to forfeit the benefit of an accident insurance policy.[58]

130. Right to Shoot in Private Lands.—The right that a man has to hunt and shoot game on his own land, subject, of course, to the Game Laws, may be transferred to others. The grant

[53] Haggarty *v.* St. Louis Ice Manufg. & S. Co., 143 Mo. 238.

[54] Aldrich *v.* Wright, 53 N. H. 398, where four minks were killed while pursuing geese.

[55] Klieforth *v.* State, 88 Wis. 163.

[56] State *v.* Stone (R. I.), 38 Atl. Rep. 654.

[57] Peo. *v.* Fishbough, 134 N. Y. 393.

[58] Cornwell *v.* Fraternal Acc. Assn. of Amer., 6 N. D. 201, where it is also held that hunting game with a loaded gun or trying to scale a bank under such circumstances is not a "voluntary exposure to unnecessary danger."

of this right is of an incorporeal hereditament and should be by deed:[59] it is a grant of an interest in land and within the Statute of Frauds.[60] The grant to a person, his heirs and assigns of "free liberty with servants or otherwise to come into and upon lands and there to hawk, hunt, fish and fowl," was held to be the grant of a license of profit and not of a mere personal license of pleasure, and, therefore, it authorized the grantee, his heirs and assigns to hawk, etc., *by* his servants in his absence. Such a liberty is a *profit a prendre*.[61] Where one has the sole and exclusive right to shoot on another's land, this does not authorize the former to permit others to exercise the same privilege.[62]

A reservation in a case of the liberty of hawking, hunting, fishing and fowling, is not legally a reservation or exception, but a privilege granted to the lessor.[63] A right of shooting game over allotments declared by an Enclosure Act to be the freehold of the allottees can be reserved to the lord only in express terms or by necessary implication.[64] A stipulation of a tenant that he will not destroy any game and will endeavor to preserve all game bred and being on the farm was held not to be a reservation of game to the landlord and the tenant could not be convicted of unlawfully killing game.[65]

A landlord who has verbally reserved game to himself has sufficient authority to give leave to another to kill game

[59] Bird *v.* Higginson, 2 A. & E. 696. And see Thomas *v.* Fredericks, 10 Q. B. 775, where the grant was held valid as an agreement, even where it did not pass the estate.

[60] Webber *v.* Lee, 9 Q. B. D. 315.

[61] Wickham *v.* Hawker, 7 M. & W. 63. S. P. Ewart *v.* Graham, 7 H. L. Cas. 331; Hudson *v.* Foott, 9 Ir. C. L. R. 203.

[62] Bingham *v.* Salene, 15 Oreg. 208. See Marquis of Huntly *v.* Nichol, 23 Rettie (Sc. Ct. Sess.) 610; Reynolds *v.* Moore, [1898] 2 I. R. 641.

[63] Doe dem. Douglas *v.* Lock, 2 A. & E. 705; Reynolds *v.* Moore, supra.

[64] Duke of Devonshire *v.* O'Connor, 24 Q. B. D. 468, following Sowerby *v.* Smith, L. R. 9 C. P. 524, and commenting on Leconfield, Lord, *v.* Dixon, L. R. 3 Ex. 30.

[65] Coleman *v.* Bathurst, L. R. 6 Q. B. 366.

on such farm to prevent the latter from being a trespasser thereon in pursuit of game.[66] Where the right of shooting is reserved, the tenant may maintain an action against those entitled to shoot for overstocking the land with game so as to cause damage to his crops.[67]

Where a right of shooting over land is demised, there is no implied covenant by the lessor that the surface of the land or the course of cultivation shall remain unchanged.[68] And under such a grant the tenant has no right to prevent the landlord from cutting down trees in the proper course of management of the estate, even though the result will be prejudicial to the shooting. The right is that of shooting over the lands as they may happen to be at the time, the landlord not doing anything for the express purpose of destroying such right.[69] One having only a right of shooting over land has no right to empower keepers to apprehend parties trespassing in search of game.[70]

A lease of an island which authorizes the lessee to "utilize the wild goats" found thereon, in moderation, so as not to destroy them, and reserves in the lessor a power of inspection, creates a property right in all the animals, precluding others from hunting them or making the product of such hunting the property of the lessee. A reservation in favor of the government making the lease of a certain portion of the island for public use is a condition subsequent and, until the selection of the portion has been made, the lessee is entitled to the whole island with control of all the goats thereon. The right of possession to the goats is immediate, so that the lessee may maintain replevin against a trespasser who invades such right and is not relegated to an action of trespass.[71]

[66] Jones *v.* Williams, 36 L. T. N. S. 559.
[67] Farrer *v.* Nelson, 15 Q. B. D. 258.
[68] Jeffryes *v.* Evans, 19 C. B. N. S. 246.
[69] Gearns *v.* Baker, L. R. 10 Ch. App. 355.
[70] Reg. *v.* Wood, 1 F. & F. 470; Reg. *v.* Price, 5 Cox C. C. 277.
[71] Garcia *v.* Gunn, 119 Cal. 315.

Under a statute providing that every agreement, condition or arrangement which purports to divest or alienate the rights of the occupier of land to kill and take ground game or which gives him any advantage in consideration of his forbearing, shall be void, it was held that an agreement by the occupier of a farm with the sole right of taking game and rabbits on it, to let for an annual sum the sole right of killing all winged game, hares and rabbits on his farm, was not invalid.[72] In Ohio it was held that the statutory right of the owner of land to use ferrets to catch rabbits was personal and that his permission to another would not relieve the latter from the penalty.[73]

A statute against the use of fire-arms, poison and spring-traps in killing ground game was held not to apply to the owner of land doing acts on his own land.[74]

The right of free warren is divisible.[75] But free warren cannot be parcel of a manor and therefore will not pass by a grant of the manor with the appurtenances, though it is held with the manor. Warren can appertain to a manor only by prescription.[76]

The demise of the exclusive right of sporting over a farm does not justify the lessee in turning out on it game not bred thereon in the ordinary way; and, it seems, in such a case the lessor is justified in keeping down the excess.[77] It was held in one case that one having the right to shoot has no right to turn rabbits on a farm without express leave and is liable for the damage they do;[78] while in another case it was

[72] Morgan *v.* Jackson, [1895] 1 Q. B. 885.

As to the right of a tenant to employ a person to kill ground game, see Richardson *v.* Maitland, 24 Rettie (Sc. Ct. Justic.) 32; Bruce *v.* Prosser, 25 id. 54.

[73] Hart *v.* State, 29 O. St. 666.

[74] Smith *v.* Hunt, 54 L. T. N. S. 422.

[75] Beauchamp (Earl) *v.* Winn, L. R. 6 H. L. 223.

[76] Morris *v.* Dimes, 3 N. & M. 671. Grouse are not birds of warren: Devonshire (Duke) *v.* Lodge, 7 B. & C. 36.

[77] Birkbeck *v.* Paget, 31 Beav. 403. [78] Hilton *v.* Green, 2 F. & F. 821.

held that he is not liable for damage done by rabbits or birds unless he has turned out an unreasonable and excessive number.[79] Rabbits were held not to be "game" within the meaning of Stat. 27 Geo. 3, c. 35, or 27 & 28 Vict. c. 67, inflicting a penalty on trespassing "in pursuit of game." [80] Where an act imposed a penalty on one carrying a gun without a license, but excepted an occupier doing so for the purpose only of scaring birds or of killing vermin, it was held that rabbits were not "vermin" within the meaning of the statute.[81] The reservation in a lease of the right of shooting and sporting over the land demised is not limited to game strictly so called but reserves to the lessor the exclusive right to follow and shoot such animals as are in common parlance understood to be the subject of sport.[82]

An action does not lie against a man for making coney burrows in his own lands "for so soon as the conies come on his neighbor's land he may kill them, for they are *ferœ naturæ* and he who makes the coney burrows has no property in them, and he shall not be punished for the damage which the conies do in which he has no property, and which the other may lawfully kill." [83]

Firing at wild fowl near a decoy so as to make birds take flight is an unlawful disturbance for which an action on the case lies.[84] And one whose game is enticed away by a neighbor is liable to an action for exploding combustibles so as to be a nuisance to the latter, in order to frighten away the game from his land and prevent his killing them and enticing other game.[85]

[79] Paget *v.* Birkbeck, 3 F. & F. 683. And see Stanser *v.* Bacon, 106 L. T. 439.

See 13 Ir. L. T. 315, on the subject of damages caused by rabbits.

[80] Cleary *v.* De Vesci, [1895] 2 I. R. 704.

[81] Lord Advocate *v.* Young, 25 Rettie (Sc. Ct. Sess.) 778.

[82] Jeffryes *v.* Evans, 19 C. B. N. S. 246. [83] Boulston's Case, 5 Co. 104 b.

[84] Carrington *v.* Taylor, 11 East 571; Keeble *v.* Hickeringill, Ibid. 574 n, cited also in § 41, supra.

[85] Ibottson *v.* Peat, 3 H. & C. 644, cited also in § 41, supra.

With regard to trespassing in pursuit of game, it has been held that one having the right to shoot over land may do so only in the usual and reasonable way, and may not tread over fields of standing crops at a time when it is not usual or reasonable.[86] But one of a hunt is not liable for damage caused by the horses of the other members.[87] If, however, one goes out sporting with his friends and purposely leads them on another's land, he is equally guilty of a trespass, though he may himself remain off the land.[88] Permission to shoot with "lessor, his heirs and assigns and any friend of his or them" was held to be a privilege not confined to a single friend at a time.[89] Where the tenant of lands, with no reservation of game by the landlord, and his lessee both give leave to another to shoot, the latter cannot be convicted of trespassing in pursuit of game.[90]

A person is not justified in entering the land of another against his will for the purpose of fox-hunting.[91] But where the demurrer admitted that the means adopted were the only means for destroying the fox, it was held that the trespass was justifiable.[92] If a hunted stag runs into a barn for shelter, the owner of the hounds and his servants have no right to enter the barn, and, if they do so, they are trespassers.[93]

Where the owner of land set up a sign "No shooting or hunting allowed on these premises," it was held to be a penal

[86] Hilton *v.* Green, 2 F. & F. 821.

[87] Paget *v.* Birkbeck, 3 F. & F. 683.

[88] Hill *v.* Walker, Peake's Add. Cas. 234. S. P. Baker *v.* Berkeley, 3 C. & P. 32.

[89] Gardiner *v.* Colyer, 10 L. T. N. S. 715.

[90] Pochin *v.* Smith, 52 J. P. 4. And see, as to a license, Taylor *v.* Jackson, 78 L. T. N. S. 555.

[91] Paul *v.* Summerhayes, 4 Q. B. D. 9.

[92] Gundry *v.* Feltham, 1 Term 334.

[93] Baker *v.* Berkeley, 3 C. & P. 32.

The offenses of trespass in pursuit of game and unlawfully using a dog for taking game, not having a license, are not the same: Bollard *v.* Spring, 51 J. P. 501.

offense, under a statute, to shoot and kill on the land though within the channel of a navigable river.[94]

Firing at game from a highway is "trespassing in pursuit of game." [95] And where one was on the highway for the express purpose of interfering with another's right of shooting, it was held that as he was there for purposes other than its use as a highway, he was a trespasser.[96] Where B.'s covert adjoined A.'s field, and B. went on a public foot-path in this field to shoot, directing his servant to beat his own covert and hedge, it was held that he could not set up a claim of right to oust the magistrate's jurisdiction, no title being involved, and should have been convicted.[97]

Where A. upon his own land shot at a pheasant which rose from his land, but the act of shooting took place while the pheasant was in the air over B.'s land, and the pheasant fell dead on B.'s land and A. went over and picked it up, this was held not to be a trespass in pursuit of game.[98] But where a pheasant was on the ground in an adjoining close and A. shot it and then entered and picked the bird up, it was held that the shooting and picking up were one continuous act and would justify a conviction under the statute of "being upon and entering land in pursuit of game." [99]

An injunction will lie for trespassing on game preserves

[94] State *v.* Shannon, 36 O. St. 423. As to who is an "owner," see Wellington *v.* State, 52 Ark. 266.

[95] Mayhew *v.* Wardley, 14 C. B. N. S. 550. And see Reg. *v.* Pratt, 24 L. J. M. C. 113.

[96] Harrison *v.* Duke of Rutland, [1893] 1 Q. B. 142.

See as to arrests in the highway for offenses against the game laws, Lloyd *v.* Lloyd, 14 Q. B. D. 725; Turner *v.* Morgan, L. R. 10 C. P. 587; Clarke *v.* Crowder, 4 id. 638. And see Hall *v.* Robinson, 53 J. P. 310.

[97] Philpot *v.* Bugler, 54 J. P. 646.

[98] Kenyon *v.* Hart, 11 L. T. N. S. 733. And see Taunton *v.* Jervis, 43 J. P. 784.

[99] Osbond *v.* Meadows, 6 L. T. N. S. 290. And see Horn *v.* Raine, 78 id. 654, where the shooting and going upon the land were held to form one transaction though they were several hours apart.

and killing and frightening away game, the remedy at law being inadequate.[100]

The right of the owner of unenclosed land to shoot and fish thereon exists even if the land be covered by navigable water. The public can use it solely for purposes of navigation and must not unnecessarily disturb the right.[101]

[100] Kellogg *v.* King, 114 Cal. 378, where by the Code, "animals wild by nature are the subject of ownership while living only when on the land of the person claiming them."

[101] Beatty *v.* Davis, 20 Ont. 373.

TITLE VII.

INJURIES TO ANIMALS BY RAILWAYS.

CHAPTER I.

LIABILITY IRRESPECTIVE OF FENCING LAWS.

131. General liability; negligence; cause of injury.
132. Duties of trainmen; rate of speed; signals.
133. Liability for frightening animals.
134. Animals running at large; contributory negligence.
135. Notice; action; parties; pleading.
136. Evidence.
137. Damages.

131. General Liability; Negligence; Cause of Injury.—With regard to the class of liabilities we are now about to consider, it was said in a leading text-book on the Law of Railways: "The decisions upon the subject of injuries to domestic animals by railways are very numerous, but may be reduced to comparatively few principles."[1] It will be unnecessary to enter into the details of all these cases to as full an extent as has hitherto been done in this work. Most of them have been decided on a particular state of facts and to attempt to sum up all such facts would result in an array of material that could be only confusing. Accordingly, the principles of decision in the important cases will be stated as concisely as possible.

The natural division into which the cases fall is that arising

[1] 1 Redf. Rys., 6th ed., 183.

from the effect on the liability of railway companies of statutes compelling them to fence their tracks. In the present chapter their liability will be considered irrespective of such statutes.

It may be laid down as a general rule that the responsibility of the company for the death of or injury to an animal is one that depends on negligence, and that it is incumbent on the plaintiff to show such negligence,[2] and that it contributed to the injury.[3] The effect of statutes making the injury itself *prima facie* evidence of negligence will be considered in a later section.[4] Where the common-law rule requiring the owner of animals to restrain them is in force, the company is ordinarily responsible only for wanton or wilful misconduct or for gross negligence amounting to it. Where this rule is not in force and the company is not obliged to fence, it must use ordinary care and diligence.[5] A statute making the company absolutely liable for the killing of stock, irrespective of negligence, has been held unconstitutional.[6]

The negligence of the company must be the proximate cause of the injury; otherwise, there can be no recovery. Thus, where cattle stopped on a highway by a standing train were injured by another train, the obstruction caused by the

[2] Alexandria & M. R. Co. *v.* Miles, 76 Va. 773; Turner *v.* St. Louis & S. F. R. Co., 76 Mo. 261; Savannah, F. & W. R. Co. *v.* Geiger, 21 Fla. 669; New Orleans & N. E. R. Co. *v.* Thornton, 65 Miss. 256; Davidson *v.* Cent. Ia. R. Co., 75 Ia. 22; Tex. Cent. R. Co. *v.* Childress, 64 Tex. 346.

[3] Nashville, C. & St. L. R. Co. *v.* Hembree, 85 Ala. 481; Jeffersonville R. Co. *v.* Martin, 10 Ind. 416.

[4] See § 136, supra.

[5] See the note to Tonawanda R. Co. *v.* Munger [5 Denio (N. Y.) 255], in 49 Am. Dec. 261.

See §§ 70, 71 supra, with reference to the common-law rule.

See also Great Western R. Co. *v.* Thompson, 17 Ill. 131; St. Louis, A. & T. H. R. Co. *v.* Linder, 39 id. 433; Rockford, R. I. & St. L. R. Co. *v.* Rafferty, 73 id. 58; Pittsb., Cinc. & St. L. R. Co. *v.* Stuart, 71 Ind. 500.

[6] Un. Pac. R. Co. *v.* Bullis, 6 Colo. App. 64; Denver & R. G. R. Co. *v.* Wheatley, 7 id. 284.

former train was held to be too remote a cause of injury to make the company liable.[7] And the fact that the company was negligent in failing to provide stock-pens, whereby cattle escaped and were killed by one of its trains, would not alone make it liable, if its agents and employees were free from fault at the time of the killing.[8] Where one walking by a track was struck by a cow which was thrown from the track by the engine, the injury was held to be a proximate result of striking the cow and the company was held liable, if the engineer was negligent, though there was no negligence towards the plaintiff.[9] Where the animal is badly wounded and the owner kills it to put it out of suffering, the company is liable for the killing.[10] Damages from the non-thriving of cattle owing to the construction of a railway through a pasture where they are feeding are not remote or speculative but are recoverable in an action of trespass *quare clausum fregit*.[11]

Where the company left an unnecessarily large space between the rail and a plank placed beside it to facilitate the passing of teams, it was held liable to the owner of a horse fatally injured by catching its hoof therein and wrenching it off.[12] Otherwise, where a horse caught its foot at a private crossing, not used by the company or serviceable to it.[13] So, the company was held liable for the death of a horse caused by its stepping on a spike in an overturned plank at a railway crossing which employees were repairing, where they invited the owner to drive across and he did not see

[7] Brown *v.* Wabash, St. L. & P. R. Co., 20 Mo. App. 222. And see Hyer *v.* Chamberlain, 46 Fed. Rep. 341.

[8] Louisville & W. R. Co. *v.* Hall (Ga.), 32 S. E. Rep. 860.

[9] Ala. G. S. R. Co. *v.* Chapman, 80 Ala. 615.

[10] Atchison, T. & S. F. R. Co. *v.* Ireland, 19 Kan. 405.

[11] Balt. & O. R. Co. *v.* Thompson, 10 Md. 76.

[12] Cuddeback *v.* Jewett, 20 Hun (N. Y.) 187. And see Cotton *v.* New York, L. E. & W. R. Co., 20 N. Y. Suppt. 347.

[13] Pratt Coal & Iron Co. *v.* Davis, 79 Ala. 308.

the spike.[14] Where the company converts to its own use another's animal killed by it, it may be made liable in damages whether the killing was negligent or not.[15]

The company is liable where the animal was attracted to the track by salt spilled by employees and negligently left there;[16] or by molasses from its cars.[17] And where stock was killed by eating cotton-seed scattered near the track, the company must, to overcome the presumption of negligence, show that its servants had used reasonable care.[18] Evidence that the drainage of brine from a refrigerator had attracted animals for more than a year shows negligence.[19] But it was held not negligence *per se* to leave a car, loaded with hay in the afternoon, on a track over night,—the plaintiff's cow having been killed while eating the hay.[20] And the act of an agent of a railway company, who also kept a store at the station, in placing an open barrel of salt under a warehouse situated beside the track and belonging to a third person, though on the company's right of way, was held not to be the act of the company so as to render it liable for injuries to cattle attracted thereby and killed by a train.[21] Nor is a company leasing lands for the purposes of a grain elevator liable for killing stock that may be attracted by grain dropped in loading cars from the elevator.[22] The use of salt to free switches from ice, thereby attracting animals, does

[14] Terre Haute & I. R. Co. *v.* Grandfield, 58 Ill. App. 136.

And see Harper *v.* Mo., K. & T. R. Co., 70 Mo. App. 604; Kimes *v.* St. Louis, I. M. & S. R. Co., 85 Mo. 611.

As to an injury received by reason of the switch premises not being in good condition, see Chic. & I. R. Co. *v.* De Baum, 2 Ind. App. 281.

[15] Atchison, T. & S. F. R. Co. *v.* Tanner, 19 Colo. 559.

[16] Crafton *v.* Hannibal & St. J. R. Co., 55 Mo. 580.

[17] Page *v.* No. Car. R. Co., 71 N. C. 222.

[18] Little Rock & F. S. R. Co. *v.* Dicks, 52 Ark. 402.

[19] Morrow *v.* Hannibal & St. J. R. Co., 29 Mo. App. 432.

[20] Harlan *v.* Wabash, St. L. & P. R. Co., 18 Mo. App. 483.

[21] Burger *v.* St. Louis, K. & N. R. Co., 123 Mo. 679, reversing 52 Mo. App. 119.

[22] Gilliland *v.* Chic. & A. R. Co., 19 Mo. App. 411.

not render the company liable for injuring such animals,—its principal duty being to its passengers.[23]

In North Carolina it was held that a company must remove bushes or other growth, calculated to obstruct the view of its engineers, to the outer bank of the side ditches, or from all the ground of which it assumes actual dominion for corporate purposes, and if it fails to do so and a horse is killed because concealed in the bushes, it is liable.[24] But in a Texas case it was held that the company was not guilty of negligence as a matter of law where it permitted weeds to grow on the roadbed whereby a cow was struck and a passenger injured—negligence being a question of fact for the jury.[25] And in Arkansas it was held that the fact that a clump of bushes was allowed to grow so that trainmen could not see, was not negligence. The court said: "This measure of vigilance does not require a lookout over the entire breadth of the right of way and an apprehension of danger whenever an animal is discovered upon it. . . . How then can it be said that the company owes him the duty of keeping the right of way in such a condition as to afford its employees a view of it?" [26]

The company is not required to keep excavations along the sides of the track free from water and ice, and is not liable for animals killed in consequence of ice being therein, so as to prevent escape from the track.[27]

[23] Kirk *v.* Norfolk & W. R. Co., 41 W. Va. 722; Louisville, N. O. & T. R. Co. *v.* Phillips (Miss.), 12 South. Rep. 825.

[24] Ward *v.* Wilmington & W. R. Co., 113 N. C. 566. And see Same *v.* Same, 109 id. 358.

[25] San Antonio & A. P. R. Co. *v.* Long, 4 Tex. Civ. App. 497. And see Eames *v.* Tex. & N. O. R. Co., 63 Tex. 660, where the company was held liable, the facts being admitted by demurrer. The court said: "It is a question of fact, in the given case, whether the omission or neglect, which is imputed as the cause of the accident, constituted neglect or not."

[26] Kansas City, S. & M. R. Co. *v.* Kirksey, 48 Ark. 366.

For cases on the necessity of keeping a lookout, see § 132, infra.

[27] Peoria & R. I. R. Co. *v.* McClenahan, 74 Ill. 435.

It is the duty of the company to carry a headlight to avoid collision, though this may prevent the engineer from seeing objects on the track, as a result of which cattle are run over.[28] A non-expert witness may testify his opinion as to how far the headlight throws a light forward and to the right and left.[29]

A question that has often arisen is whether or not, under the statute, an action lies against a railway company where there has been no actual collision between the engine or cars and the animal. The wording of the particular statute has been an important factor in the decision of these cases. In New York, where the action is grounded on an injury caused by the company's "engines or agents," it has been held that actual contact is necessary: an injury caused by jumping from the track is not a sufficient basis of action.[30] So, a company is not liable for an injury to an animal straying on the track and becoming caught between the ties of a bridge: the bridge cannot be said to be an "agent."[31] It is otherwise where the animal is not a trespasser and dies as the result of falling into a cut, owing to the company's failure to fence, as that is a case outside of the scope of the statute.[32]

So, in Indiana, where the statute makes the company liable when stock is killed or injured by the locomotive or cars, a collision must be averred and shown.[33] But this does not

[28] Bellefontaine & Ind. R. Co. *v.* Schruyhart, 10 O. St. 116.

[29] St. Louis & San Fran. R. Co. *v.* Thomason, 59 Ark. 140.

[30] Hyatt *v.* New York, L. E. & W. R. Co., 64 Hun (N. Y.) 542.

[31] Knight *v.* New York, L. E. & W. R. Co., 99 N. Y. 25, reversing 30 Hun (N. Y.) 25.

[32] Graham *v.* Delaware & H. Can. Co., 46 Hun. (N. Y.) 386, distinguishing Knight *v.* N. Y., L. E. & W. R. Co., supra, as in that case the plaintiff did not own the premises adjoining the railway and the defendant was therefore guilty of no negligence with respect to fences between its road and his land, and he was entitled to no relief except by statute, which statute did not apply.

[33] Ohio & Miss. R. Co. *v.* Cole, 41 Ind.. 331; Pittsburgh, C. & St. L. R. Co. *v.* Troxell, 57 id. 246; Balt., P. & C. R. Co. *v.* Thomas, 60 id. 107; Croy *v.* Louisville, N. A. & C. R. Co., 97 id. 126; Jeffersonville, M. & I.

prevent a common-law action for negligence as where, under certain circumstances, an animal was frightened and jumped off a trestle;[34] and where the defendant's employees, refusing to wait till help could be had to remove a colt from a trestle, kicked and threw it off, thereby causing its death.[35]

In Tennessee, where the statute renders the company liable for an "accident or collision," it is not necessarily liable for failure to sound the whistle where the animal is frightened and runs on a trestle. "The accident must be so far in the nature of a collision as to be produced by the train, as, for example, by steam from the engine, the shaking of the train, or the rush of wind created by its rapid motion. Beyond such possible cases, the two words are only different expressions of the same thing."[36] And in South Carolina it has been held that injuries caused by the frightening of horses are not caused by "collision" within the meaning of the statute.[37]

In Missouri, under the statute giving double damages for stock killed by trains, an actual collision must be proved,[38] though this may be done inferentially.[39] But this does not prevent the bringing of a common-law action where there was no collision.[40]

R. Co. *v.* Dunlap, 112 id. 93; Childers *v.* Louisville, N. A. & C. R. Co., 12 Ind. App. 686.

[34] Indianapolis, B. & W. R. Co. *v.* McBrown, 46 Ind. 229.

[35] Fort Wayne, C. & L. R. Co. *v.* O'Keefe, 4 Ind. App. 249. See the comments on the act of 1885 in this case.

[36] Holder *v.* Chic., St. L. & N. O. R. Co., 11 Lea (Tenn.) 176. And see Nashville, C. & St. L. R. Co. *v.* Sadler, 91 Tenn. 508, where it was held that actual contact must be shown. See, also, Sinard *v.* Southern R. Co., 101 id. 473.

[37] Kinard *v.* Columbia, N. & L. R. Co., 39 S. C. 514; Whilton *v.* Richmond & D. R. Co., 57 Fed. Rep. 551.

[38] Foster *v.* St. Louis, I. M. & S. R. Co., 90 Mo. 116; Lafferty *v.* Hannibal & St. J. R. Co., 44 id. 291; Seibert *v.* Mo., Kan. & T. R. Co., 72 id. 565; Lowry *v.* St. Louis & H. R. Co., 40 Mo. App. 554. See a comment on these cases, disapproving of them, in 25 Am. L. Rev. 114.

[39] Harbeston *v.* Kan. City, Ft. S. & M. R. Co., 65 Mo. App. 160.

[40] Lowry *v.* St. Louis & H. R. Co., supra.

As to liability under the Missouri statutes, see 11 L. R. A. 426 n.

In Colorado it would seem that the company is liable only where the animal is struck by the engine.[41] In Texas, where the animal must be "injured by the locomotive and cars . . . in running over" the railway, a company is not liable for an animal injured on a trestle through fright and not by contact.[42] In a recent case, however, it was said: "The decisions of our Court of Appeals, holding that to render a railroad liable under our statute for stock killed it is necessary to show actual contact with the cars, do not apply to a case where other negligence than a failure to fence the track is shown to have been the proximate cause of the injury;" and the case was decided accordingly.[43]

So in Illinois where the statute provided that, if the required fences were not erected or were not kept in good repair, an action lay for damages by the "agents, engines or cars" of the company, it was held that in an action brought under the statute actual contact must be shown.[44] But where the statute prohibited the running of trains in towns at a greater rate of speed than the ordinance allowed, and the plaintiff's horses were frightened by a train so run, it was held that no collision need be proved. Such an action was brought, not to recover for "damages done to the person or property by such train, locomotive engine or car," but for a penalty for violation of the statute.[45]

In Iowa, however, where the company has failed to fence, the injury need not have been caused by collision: if the animal jumps from the track through fright or runs along the

[41] Denver & R. G. R. Co. *v.* Nye, 9 Colo. App. 94.

[42] International & G. N. R. Co. *v.* Hughes, 68 Tex. 290. And see Gulf, C. & S. F. R. Co. *v.* Ritter, 4 Tex. App. (Civ. Cas.) 212; Tex. & Pac. R. Co. *v.* Mitchell, Ibid. 454.

[43] Tex. & Pac. R. Co. *v.* McDowell, 7 Tex. Civ. App. 341.

[44] Schertz *v.* Indianapolis, B. & W. R. Co., 107 Ill. 577.

[45] Chic. & East. Ill. R. Co. *v.* Peo., 120 Ill. 667. And see Ill. Cent. R. Co. *v.* Crawford, 169 id. 554, where a general distinction is made in this respect between statutes regulating speed and those requiring the erection of fences.

track into a bridge and is killed, the company is liable.[46] This is the law also in Nebraska.[47]

In Kansas, where the statute makes the company liable for injuries caused "in operating such railway," no actual collision need be shown.[48] In Oregon, the statute makes the company liable for injuries near an unfenced track when caused by a moving train upon such track, and this was held to extend to the case of a horse injured by falling from a trestle, whether there had been actual collision or not.[49] In a Mississippi case it was held that evidence that a horse was injured by rushing into a pit through fright, without having been struck by the train, would not support a judgment against the railway company, as no wrong of its servants had been shown, though it was said that a company might be responsible for such wrong though there had been no actual contact.[50]

In Canada, a company not complying with the statutory requirement of ringing the bell when approaching a crossing was held liable for injuries resulting to the occupants of a carriage from the fright of a horse, though there had been no actual contact.[51]

And, in general, it may be stated that the issue involved in the above cases is ordinarily one of statutory interpretation and that, irrespective of actions brought under particular statutes, there are in all the jurisdictions many instances of railway companies' incurring a common-law liability for the

[46] Van Slyke *v.* Chic., St. P. & K. C. R. Co., 80 Ia. 620; Liston *v.* Cent. Ia. R. Co., 70 id. 714.

[47] Chic., B. & Q. R. Co. *v.* Cox, 51 Neb. 479, following Fremont. E. & M. V. R. Co. *v.* Pounder, 36 id. 247, and overruling Burlington & M. R. R. Co. *v.* Shoemaker, 18 id. 369.

[48] Atchison, T. & S. F. R. Co. *v.* Jones, 20 Kan. 527; Same *v.* Edward, Ibid. 531; Mo. Pac. R. Co. *v.* Eckel, 49 id. 794.

[49] Meeker *v.* Northern Pac. R. Co., 21 Oreg. 513

[50] New Orleans & N. E. R. Co. *v.* Thornton, 65 Miss. 256.

[51] Grand Trunk R. Co. *v.* Sibbald, 20 Can. Sup. Ct. 259.

result of their negligence, as in the case of frightening animals, where no question of direct collision arises at all.[52]

132. Duties of Trainmen; Rate of Speed; Signals.—In considering the responsibility of railway companies for injuries to animals caused by the acts or omissions of their employees, it must be remembered that the first duty of the latter is to the persons on the train, and that this is paramount to that of trying to avoid injury to animals on or near the track.[53] This principle has been frequently applied where the question has been whether the speed of the train should or should not have been slackened. "In such case the first duty of the engineer is for the safety of his passengers and it is held that, when he cannot stop his train before striking the cattle, he is justified in running at a high rate of speed, if in so doing there is less danger of derailing his train, though the result is to render the escape of the cattle more difficult."[54] So, the engineer may prefer his own safety to that of the animal.[55] Conversely, where the collision should have been avoided, the company is liable for resulting injuries to passengers.[56] Thus, where an animal knocked down by a train was left too close to the track, the company was held liable for an injury to a passenger by the derailment of a later train, if the employees on the first train knew that the animal was knocked

[52] See § 133, infra, with regard to liability for frightening animals.

[53] Witherell *v.* Milwaukee & St. P. R. Co., 24 Minn. 410; Kentucky Cent. R. Co. *v.* Lebus, 14 Bush (Ky.) 518; Kirk *v.* Norfolk & W. R. Co., 41 W. Va. 722; Wallace *v.* St. Louis, I. M. & S. R. Co., 74 Mo. 594.

[54] Robinson *v.* Flint & P. M. R. Co., 79 Mich. 323, citing 1 Thomp. Negl. 506. And see Bemis *v.* Conn. & P. R. R. Co., 42 Vt. 375; Judd *v.* Wabash, St. L. & P. R. Co., 23 Mo. App. 56; E. Tenn., Va. & Ga. R. Co. *v.* Selcer, 7 Lea (Tenn.) 557; Bunnell *v.* Rio Grande W. R. Co., 13 Utah 314; Chic., St. L. & N. O. R. Co. *v.* Jones, 59 Miss. 465.

[55] Yazoo & M. V. R. Co. *v.* Brumfield, 64 Miss. 637.

[56] Atchison, T. & S. F. R. Co. *v.* Elder, 50 Ill. App. 276; Eames *v.* Tex. & N. O. R. Co., 63 Tex. 660.

down and was so near the track as to endanger the safety of other trains.[57]

In some jurisdictions it has been held not sufficient to show that the engineer used reasonable diligence after discovering the animal: he must keep a proper lookout all the time and is negligent if he fails to do so,[58] except, of course, where that would interfere with important duties.[59] In other States it is held that where there has been no negligence with regard to fencing, and the presence of the animal is not to be reasonably anticipated, no lookout need be kept: care after discovery is sufficient.[60] In Arkansas it has been held that an animal running at large not being a trespasser, a lookout must be kept.[61] But now the rule there appears to be that

[57] Mexican C. R. Co. *v.* Lauricella (Tex. Civ. App.), 26 S. W. Rep. 301.

[58] E. Tenn., V. & G. R. Co. *v.* Watson, 90 Ala. 41; Western R. of Ala. *v.* Lazarus, 88 id. 453; Louisville & N. R. Co. *v.* Rice, 101 id. 676; Ala. G. S. R. Co. *v.* Moody, 92 id. 279; Louisville & N. R. Co. *v.* Posey, 96 id. 262; Cent. R. & Bkg. Co. *v.* Lee, Ibid. 444; Birmingham Mineral R. Co. *v.* Harris, 98 id. 326; Carlton *v.* Wilmington & W. R. Co., 104 N. C. 365; Omaha & R. V. R. Co. *v.* Wright, 47 Neb. 886; Cinc. & Z. R. Co. *v.* Smith, 22 O. St. 227; Louisv. & Nashv. R. Co. *v.* Stone, 7 Heisk. (Tenn.) 468; Layne *v.* Ohio River R. Co., 35 W. Va. 438; McMaster *v.* Montana Un. R. Co., 12 Mont. 163; Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. Rep. 347; Same *v.* Johnson, 54 id. 474.

[59] E. Tenn., Va. & Ga. R. Co. *v.* Bayliss, 77 Ala. 429, 74 id. 150; Same *v.* Baker, 94 id. 632; Ill. Cent. R. Co. *v.* Burns, 32 Ill. App. 196; Howard *v.* Louisville, N. O. & T. R. Co., 67 Miss. 247; Rogers *v.* Georgia R. Co., 100 Ga. 699.

And it is not incumbent on the company to have a third employee on the engine to keep such lookout: Rogers *v.* Georgia R. Co., supra.

[60] Brooks *v.* Hannibal & St. J. R. Co., 27 Mo. App. 573 [Cf. Same *v.* Same, 35 id. 571]; Welch *v.* Same, 20 id. 477; Jewett *v.* Kan. City, C. & S. R. Co., 38 id. 48; Castor *v.* Kan. City, Ft. S. & M. R. Co., 65 id. 359; Averill *v.* Santa Fé Recrs., 72 id. 243; Ill. Cent. R. Co. *v.* Noble, 142 Ill. 578; Delta Electric Co. *v.* Whitcamp, 58 Ill. App. 141; Stacey *v.* Winona & St. P. R. Co., 42 Minn. 158; Palmer *v.* North. Pac. R. Co., 37 id. 223; Mooers *v.* Same, 69 id. 90; Home Constr. Co. *v.* Church, 14 Ky. L. Rep. 807; Harrison *v.* Chic., M. & St. P. R. Co., 6 S. D. 100; Houston & T. C. R. Co. *v.* Carruth (Tex. Civ. App.), 50 S. W. Rep. 1036.

[61] Little Rock & Ft. S. R. Co. *v.* Finley, 37 Ark. 562. And see Gulf, C. & S. F. R. Co. *v.* Johnson, 54 Fed. Rep. 474.

it is not necessary to keep a perpetual lookout for animals on the track.[62] In Minnesota the rule that a lookout is not necessary in the case of a trespassing animal has been held to apply to the case of an animal wrongfully on the highway at a railway crossing.[63] Where the statute requires a lookout to be kept, it need not be shown that it has always been kept: it is sufficient for the company to prove that the precaution was observed when the accident happened.[64] And where keeping a lookout would have availed nothing, the animal having been concealed from view, the fact that none was kept affords no ground for recovery.[65] The engineer, where he does not see the animal, need not necessarily attend to the gestures of third persons.[66]

When an animal on the track is seen in time to avoid collision, the duty of the engineer depends somewhat on circumstances. He need stop the engine only where there is a reasonable apprehension that the animal will remain there.[67] But there is no presumption that the animal will step from the track in time to avoid injury.[68] And where a team was stationary on the track, the engineer was held guilty of negligence in assuming that it would be removed in time, whereas the wagon was stalled.[69] On the other hand, where an engineer saw horses attached to a load of logs a mile away, he

[62] Memphis & L. R. R. Co. *v.* Kerr, 52 Ark. 162.

[63] Palmer *v.* North. Pac. R. Co., 37 Minn. 223.

Cf. Harrison *v.* Chic., M. & St. P. R. Co., 6 S. D. 100.

[64] Louisville & Nashv. R. Co. *v.* Stone, 7 Heisk. (Tenn.) 468.

The approved equipment of the train is not a sufficient defence: Mobile & B. R. Co. *v.* Kimbrough, 96 Ala. 127.

[65] Choate *v.* Southern R. Co. (Ala.), 24 South. Rep. 373.

[66] Dennis *v.* Louisville, N. A. & C. R. Co., 116 Ind. 42.

[67] Grimmell *v.* Chic. & N. R. Co., 73 Ia. 93; Little Rock & Ft. S. R. Co. *v.* Trotter, 37 Ark. 593; Warren *v.* Chic., M. & St. P. R. Co., 59 Mo. App. 367.

[68] Dennis *v.* Louisville, N. A. & C. R. Co., 116 Ind. 42; Elmsley *v.* Ga. Pac. R. Co. (Miss.), 10 South. Rep. 41.

[69] Chic. & Alton R. Co. *v.* Hogarth, 38 Ill. 370. And see Saffer *v.* Westchester Elec. R. Co., 22 Misc. (N. Y.) 555.

was held not to be sufficiently warned that the load was fast and could not be moved, and the plaintiff was held guilty of contributory negligence in not unhitching the horses, as he could have done, when he saw the smoke of the approaching train.[70] And where a boy, the plaintiff's agent, rode a horse on a track without a bridle and therefore failed to get him off in time, no recovery was allowed, the engineer not having been grossly negligent in failing to signal, as he had a right to expect a person on the track to act with reasonable care and caution.[71]

Where a collision is to be apprehended, blowing the whistle to frighten the animal is not sufficient: the train should be stopped, or, at least, its speed slackened.[72] Thus, it is gross negligence where the engineer drives the animals to a place where there is little probability they can leave the track and does not stop.[73] And it is immaterial that the engineer does not recognize the nature of the obstacle.[74] But in a New York case where the engineer sounded the whistle for a quarter of a mile but did not slow up and the horse could have got off the track at any time but did not do so and was killed, it was held that there could be no recovery without proof of wantonness.[75] The engineer should stop also to avoid a self-inflicted

[70] Frost *v.* Milwaukee & N. R. Co., 96 Mich. 470.

[71] Wabash, St. L. & Pac. R. Co. *v.* Krough, 13 Ill. App. 431.

[72] Campbell *v.* Great West. R. Co., 15 U. C. Q. B. 498; Bullington *v.* Newport News & M. V. Co., 32 W. Va. 436; Kan. City, M. & B. R. Co. *v.* Watson, 91 Ala. 483; Ala. Gt. South. R. Co. *v.* Powers, 73 id. 244; Chattanooga S. R. Co. *v.* Daniel (Ala.), 25 South. Rep. 197; Chic. & Alton R. Co. *v.* Kellam, 92 Ill. 245; Toledo, W. & W. R. Co. *v.* McGinnis, 71 id. 346; Chic. & N. R. Co. *v.* Barrie, 55 id. 226; Ohio & M. R. Co. *v.* Stribling, 38 Ill. App. 17; Shuman *v.* Indianapolis & St. L. R. Co., 11 id. 472; Mo. Pac. R. Co. *v.* Gedney, 44 Kan. 329; Mobile & O. R. Co. *v.* Gunn, 68 Miss. 366; Lawson *v.* Chic., R. I. & P. R. Co., 57 Ia. 672; Snowden *v.* Norfolk S. R. Co., 95 N. C. 93; Denver & R. G. R. Co. *v.* Nye, 9 Colo. App. 94.

[73] Ill. Cent. R. Co. *v.* Baker, 47 Ill. 295. And see St. Louis, I. M. & S. R. Co. *v.* Bragg (Ark.), 5 S. W. Rep. 273.

[74] Gilchrist *v.* Reg., 2 Can. Exch. 300.

[75] Boyle *v.* New York, L. E. & W. R. Co., 39 Hun (N. Y.) 171.

injury to a frightened animal.[76] The question of speed is considered further, infra.

If the animal is on or dangerously near the track, every effort should be made to frighten it away.[77] Where there is nothing to show that an animal near the track will go on it, it is not necessary to stop or slacken speed [78] or give signals,[76] unless this is necessary to frighten such animal away.[80] The company is not liable unless it is in some fault with regard to fences, etc., for killing an animal that suddenly springs on the track in front of the engine; [81] and, in general, where the accident was inevitable in spite of every precaution, no liability is incurred.[82] Nor need ordinary precautions

[76] Newman *v.* Vicksburg & M. R. Co., 64 Miss. 115.

[77] Kan. City, M. & B. R. Co. *v.* Watson, 91 Ala. 483; South & North Ala. R. Co. *v.* Jones, 56 id. 507; Mo. Pac. R. Co. *v.* Gedney, 44 Kan. 329; East Tenn., V. & G. R. Co. *v.* Burney, 85 Ga. 635; Port Royal & W. C. R. Co. *v.* Phinizy, 83 id. 192; Warren *v.* Chic., M. & St. P. R. Co., 59 Mo. App. 367; McMaster *v.* Mont. Union R. Co., 12 Mont. 163; Memphis & C. R. Co. *v.* Scott, 87 Tenn. 494.

[78] Young *v.* Hannibal & St. J. R. Co., 79 Mo. 336; Grant *v.* Same, 25 Mo. App. 227; Sloop *v.* St. Louis, I. M. & S. R. Co., 22 id. 593; Milburn *v.* Hannibal & St. J. R. Co., 21 id. 426; New Orleans & N. R. Co. *v.* Bourgeois, 66 Miss. 3; Yazoo & M. V. R. Co. *v.* Brumfield, 64 id. 637; Same *v.* Whittington, 74 id. 410; Peoria, P. & J. R. Co. *v.* Champ, 75 Ill. 577; St. Louis, A. & T. H. R. Co. *v.* Russell, 39 Ill. App. 443; Robinson *v.* Flint & P. M. R. Co., 79 Mich. 323; Louisv. & N. R. Co. *v.* Bowen (Ky.), 39 S. W. Rep. 31.

[79] Chic., Burlington & Q. R. Co. *v.* Bradfield, 63 Ill. 220.

[80] East Tenn., V. & G. R. Co. *v.* Watson, 90 Ala. 41; Western R. Co. *v.* Lazarus, 88 id. 453.

[81] E. Tenn., V. & G. R. Co. *v.* Bayliss, 77 Ala. 429; Ala. G. S. R. Co. *v.* Moody, 90 id. 46; Same *v.* Smith, 85 id. 208; Louisville & N. R. Co. *v.* Brinckerhoff (Ala.), 24 South. Rep. 892; Ga. R. & Bkg. Co. *v.* Middlebrooks, 91 Ga. 76; Douglas *v.* E. Tenn., V. & G. R. Co., 88 id. 282; Wabash R. Co. *v.* Aarvig, 66 Ill. App. 146; Ill. Cent. R. Co. *v.* Wren, 43 Ill. 77; Judd *v.* Wabash, St. L. & P. R. Co., 23 Mo. App. 56; Davis *v.* Wabash R. Co., 46 id. 477; Wattson *v.* Phila. & T. R. Co., 7 Phila. (Pa.) 249; Galveston, H. & S. A. R. Co. *v.* Wink (Tex. Civ. App.), 31 S. W. Rep. 326.

That the presence of a runaway horse in a street is not to be foreseen, see Phillips *v.* People's Pass. R. Co., 190 Pa. St. 222.

[82] Nashville, C. & St. L. R. Co. *v.* Hembree, 85 Ala. 481; Mobile & G.

be taken where they would not be of the slightest use.[83] It has been held, however, that a company using the plaintiff's land, even with his consent, is bound not to injure his cattle and that it is immaterial that the company was not bound to fence or could not have avoided striking the animal after it was seen.[84]

Ordinary care to avoid the injury is, as a rule, all that is required.[85] But it is harmless error to charge that the engineer must use the "utmost care" where it is evident that no care at all was exercised.[86] Where negligence could be imputed from the act of either the engineer or the fireman

R. Co. *v.* Caldwell, 83 id. 196; St. Louis & S. F. R. Co. *v.* Basham, 47 Ark. 321; Little Rock & Fort S. R. Co. *v.* Turner, 41 id. 161; Same *v.* Holland, 40 id. 336; Higgins *v.* Wilmington City R. Co., 1 Marv. (Del.) 352; Savannah, F. & W. R. Co. *v.* Rice, 23 Fla. 575; Ga., M. & G. R. Co. *v.* Harris, 83 Ga. 393; Ga. R. & Bkg. Co. *v.* Wilhoit, 78 id. 714; Same *v.* Wall, 80 id. 202; Western & Atl. R. Co. *v.* Trimmier, 84 id. 112; Moye *v.* Wrightsville & T. R. Co., 83 id. 669; Savannah, F. & W. R. Co. *v.* Gray, 77 id. 440; Louisville, N. O. & T. R. Co. *v.* Tate, 70 Miss. 348; Yazoo & M. V. R. Co. *v.* Smith, 68 id. 359; Louisville, N. O. & T. R. Co. *v.* Smith, 67 id. 15; New Orleans & N. R. Co. *v.* Burkett (Miss.), 2 South. Rep. 253; Seawell *v.* Raleigh & A. R. Co., 106 N. C. 272; Joyner *v.* So. Car. R. Co., 26 S. C. 49; Lynch *v.* North. Pac. R. Co., 84 Wis. 348; McFie *v.* Can. Pac. R. Co., 2 Ma. 6; Falconer *v.* European & N. A. R. Co., 1 Pug. (N. B.) 179.

[83] Savannah & W. R. Co. *v.* Jarvis, 95 Ala. 149; Nashville, C. & St. L. R. Co. *v.* Hembree, 85 id. 481; Flattes *v.* Chic., R. I. & P. R. Co., 35 Ia. 191; Cleaveland *v.* Chic. & N. R. Co., Ibid. 220; E. Tenn., Va. & Ga. R. Co. *v.* Scales, 2 Lea (Tenn.) 688, (refusing to follow the *dictum* in Nashville & Chat. R. Co. *v.* Thomas, 5 Heisk. (Tenn.) 262); Hawker *v.* Balt. & O. R. Co., 15 W. Va. 628.

[84] Matthews *v.* St. Paul & S. C. R. Co., 18 Minn. 434.

[85] Richmond & D. R. Co. *v.* Buice, 88 Ga. 180; Savannah, F. & W. R. Co. *v.* Wideman, 99 id. 245; Little Rock and Fort S. R. Co. *v.* Henson, 39 Ark. 413; Miss. Cent. R. Co. *v.* Miller, 40 Miss. 45; Mobile & O. R. Co. *v.* Malone, 46 Ala. 391; Mo. Pac. R. Co. *v.* Wilson, 28 Kan. 637; Lake Erie & W. R. Co. *v.* Norris, 60 Ill. App. 112; Chic., M. & St. P. R. Co. *v.* Phillips, 14 id. 265; Washington *v.* Balt. & O. R. Co., 17 W. Va. 190; Molair *v.* Port Royal & A. R. Co., 29 S. C. 152; Baker *v.* Chic., B. & Q. R. Co., 73 Ia. 389; Atwood *v.* Bangor, O. & O. T. R. Co., 91 Me. 399; Beattyville & C. G. R. Co. *v.* Maloney (Ky.), 49 S. W. Rep. 545.

[86] St. Louis & S. F. R. Co. *v.* O'Loughlin, 49 Fed. Rep. 440.

in failing to see the animal in time, the company does not exonerate itself by proving that the engineer used due care.[87] The lack of due care is not excused by the fact that the animal was wrongfully on the track.[88] In South Carolina it has been held that much less care is required of the company since the passing of the stock law requiring stock to be enclosed.[89] But in a Georgia case it was held that an instruction that less care is required where the stock law is in force or running through a field than where the land is unenclosed was properly refused as ordinary care is always required, though differing according to circumstances.[90]

Where a dog is killed while trespassing by failure of the engineer to exercise ordinary care, the company is liable.[91] So, a street railway company is liable for carelessly or wantonly killing a dog, though the same degree of care is not required as in the case of a human being;[92] and the motorman cannot rely on the alertness and quickness of the animal, so as to relieve himself of all duty to try to prevent an accident.[93]

[87] Little Rock & M. R. Co. *v.* Chriscoe, 57 Ark. 192.

[88] Toledo, P. & W. R. Co. *v.* Bray, 57 Ill. 514; Rockford, R. I. & St. L. R. Co. *v.* Lewis, 58 id. 49; Cinc. & Z. R. Co. *v.* Smith, 22 O. St. 227.

Where the animal is wrongfully on the track, there is no strict rule that the engineer must slacken his speed: Bemis *v.* Conn. & P. R. R. Co., 42 Vt. 375. And while cattle running at large are not trespassers, the owner who voluntarily lets them go in perilous places cannot ask the company to slacken speed or drive them off in order to deliver them from such peril: Smith *v.* Chic., R. I. & P. R. Co., 34 Ia. 506.

[89] Joyner *v.* So. Car. R. Co., 26 S. C. 49; Molair *v.* Port Royal & A. R. Co., 29 id. 152; Harley *v.* Eutawville R. Co., 31 id. 151.

[90] Cent. R. Co. *v.* Summerford, 87 Ga. 626.

[91] St. Louis, Ark. & Tex. R. Co. *v.* Hanks, 78 Tex. 300. Cf. Tex. & Pac. R. Co. *v.* Scott, 4 Tex. App. (Civ. Cas.) 476.

Dogs are personal property for the negligent killing of which a company is liable: St. Louis S. W. R. Co. *v.* Stanfield, 63 Ark. 643; Jones *v.* Ill. Cent. R. Co., 75 Miss. 970; Salley *v.* Manchester & A. R. Co. (S. C.), 32 S. E. Rep. 526.

[92] Furness *v.* Union R. Co., 8 Kulp (Pa.) 103; Meisch *v.* Rochester Elec. R. Co., 72 Hun (N. Y.) 604.

[93] Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, where it was also said that a company should have a sufficient number of employees on its

But where the whistle was sounded when the dogs were first seen, a few feet in front of the engine, it was held that they were entitled only to the consideration due trespassers and that the company was not liable.[94] And the *prima facie* presumption of negligence arising from injuries to persons and property has been held not to apply to the killing of dogs.[95]

If the injury to an animal could have been prevented by proper care, the mere slackening of speed will not relieve the company from liability.[96] The fact that reversing the engine hurts the machinery is no excuse for not slackening the speed; otherwise, if the lives of persons on the train are endangered.[97] A train can ordinarily be slackened sufficiently within a distance of two hundred yards and the burden is on the defendant to show special circumstances rendering it unsafe and impracticable to do so.[98] It is no defence that the speed was slackened to the statutory rate at the moment of collision, when it was unlawful just before.[99] It is negligent to run the train at night at such a rate of speed that stock cannot be seen by the headlight in time to prevent injury; but if the injury results from unusual causes, such as fog, falling snow, rain, etc., there is no negligence if due care is used otherwise.[100] And if a train is followed so closely by another

cars to operate them in a careful manner, so as to prevent injury to persons and animals on the track.

[94] Fink *v.* Evans, 95 Tenn. 413.

[95] Jemison *v.* Southwestern R. Co., 75 Ga. 444; Wilson *v.* Wil. & Man. R. Co., 10 Rich. L. (S. C.) 52. Contra, Jones *v.* Bond, 40 Fed. Rep. 281.

[96] Pontiac Pac. Junc. R. Co. *v.* Brady, Montr. L. Rep., 4 Q. B. 346.

This decision has been modified by subsequent legislation exonerating the company from all liability for killing straying animals: Can. Pac. R. Co. *v.* Cross, Rap. Jud. Quebec, 3 B. R. 170.

[97] E. Tenn., Va. & Ga. R. Co. *v.* Selcer, 7 Lea (Tenn.) 557. And see Pryor *v.* St. Louis, K. C. & N. R. Co., 69 Mo. 215.

[98] Gulf, C. & S. F. R. Co. *v.* Ellis, 54 Fed. Rep. 481.

[99] Ill. Cent. R. Co. *v.* Jordan, 63 Miss. 458.

[100] Cent. R. & Bkg. Co. *v.* Ingram, 98 Ala. 395; Louisv. & N. R. Co. *v.* Kelton, 112 id. 533; Killiker-Krebs Bdg. & Manufg. Co. *v.* Birmingham

that it would be dangerous for the engineer of the former train to stop before striking the animal, the company will be held to have been negligent.[101] Where the driver of a tramway car whistled and afterwards ran into a cab and horse, injuring them, the fact that he had intended to stop the car but could not do it on account of the steepness and greasiness of the street, he having seen the cab with its wheel on the rail when it was fifty yards away, does not excuse the company.[102] And where the engineer ran too fast down grade around a curve to be able to stop, this shows negligence.[103]

In general, running at too high a rate of speed under the circumstances or at more than the statutory rate, if there is one, is negligence.[104] Where the owner of stock allows it to run at large contrary to law and it is injured by a railway train in a place where there is no obligation to fence, the company has been held responsible if the injury arose from the gross negligence of its employees but not if it arose merely from the violation of a city ordinance limiting the rate of speed: the latter is evidence of negligence but not negli-

R. & Elec. Co., 100 id. 424; Memphis & Charleston R. Co. *v.* Lyon, 62 id. 71; Ala. Midland R. Co. *v.* McGill (Ala.), 25 South. Rep. 731.

[101] Louisv. & N. R. Co. *v.* Kelton, supra.

[102] M'Dermaid *v.* Edinburgh Tramway Co., 12 Rettie (Sc. Ct. Sess.) 15.

[103] Cent. R. Co. *v.* Russell, 75 Ga. 810.

[104] E. Tenn., V. & G. R. Co. *v.* Deaver, 79 Ala. 216; Birmingham R. & Elec. R. Co. *v.* City Stable Co. (Ala.), 24 South. Rep. 558; Ford *v.* St. Louis, I. M. & S. R. Co. (Ark.), 50 S. W. Rep. 864; Atlantic & Gulf R. Co. *v.* Burt, 49 Ga. 606; Lake Erie & W. R. Co. *v.* Norris, 60 Ill. App. 112; St. Louis, V. & T. H. R. Co. *v.* Morgan, 12 id. 256; Cleveland, C., C. & St. L. R. Co. *v.* Ahrens, 42 id. 434; Chic., B. & Q. R. Co. *v.* Haggerty, 67 Ill. 113; Chic., R. I. & P. R. Co. *v.* Reidy, 66 id. 43; Courson *v.* Chic., M. & St. P. R. Co., 71 Ia. 28; Bowman *v.* Chic. & A. R. Co., 85 Mo. 533; Windsor *v.* Hannibal & St. J. R. Co., 45 Mo. App. 123; Un. Pac. R. Co. *v.* Rassmussen, 25 Neb. 810; Clark *v.* Boston & M. R. Co., 64 N. H. 323; Greeley *v.* Fed. St. & P. V. P. R. Co., 153 Pa. St. 218; Jones *v.* No. Car. R. Co., 70 N. C. 626; Molair *v.* Pt. Royal & A. R. Co., 31 S. C. 510; Houston & T. C. R. Co. *v.* Terry, 42 Tex. 451.

And see Proctor *v.* Wilmington & W. R. Co., 72 N. C. 579; Rockford, R. I. & St. L. R. Co. *v.* Linn, 67 Ill. 109; St. Louis, A. & T. R. Co. *v.* Felton, 4 Tex. App. (Civ. Cas.) 60.

gence *per se*.[105] And the fact that the train had no air-brakes is not of itself sufficient to make the company liable.[106] But the failure to equip the cars with suitable brakes may make the company liable for negligence in running over an animal where the use of such brakes might have prevented the accident.[107] And the failure to apply the brakes may, of course, be gross negligence.[108] Apart from statute, the rate of speed is not governed by definite rules and a charge which makes it the duty of an engineer on approaching a crossing to diminish the speed of the train, without regard to attendant circumstances, is erroneous.[109] So, where cattle were killed that had taken shelter near a trestle during the night, and it did not appear that the train was running with unusual speed and was not proved that when the cattle were first seen the train could have been arrested in time, an instruction that if the train was running so that it could not be stopped within half a mile, this of itself was negligence, was held erroneous.[110] In determining the rate of speed, such rate being otherwise reasonable, the company is not bound to consider the increased risk to cattle running at large in the vicinity and lessen their speed accordingly.[111] It is not sufficient to show that the train was running at an unlawful rate of speed: the company is not liable unless the injury resulted there-

[105] Windsor *v.* Hannibal & St. J. R. Co., 45 Mo. App. 123.

[106] Grundy *v.* Louisville & N. R. Co. (Ky.), 2 S. W. Rep. 899.

[107] Forbes *v.* Atlantic & N. C. R. Co., 76 N. C. 454.

[108] Toledo, W. & W. R. Co. *v.* McGinnis, 71 Ill. 346, and cases cited supra.

[109] E. Tenn., V. & G. R. Co. *v.* Deaver, 79 Ala. 216.

That no rate of speed is negligence *per se*, see Windsor *v.* Hannibal & St. J. R. Co., supra; Wallace *v.* St. Louis, I. M. & S. R. Co., 74 Mo. 594; Young *v.* Hannibal & St. J. R. Co., 79 id. 336.

That the rate of speed is not ordinarily to be decreased on approaching crossings, see Connyers *v.* Sioux City & P. R. Co., 78 Ia. 410; Robinson *v.* Flint & P. M. R. Co., 79 Mich. 323; Zeigler *v.* Northeastern R. Co., 7 S. C. 402; Bunnell *v.* Rio Grande W. R. Co., 13 Utah 314.

[110] Doggett *v.* Richmond & D. R. Co., 81 N. C. 459.

[111] Central Ohio R. Co. *v.* Lawrence, 13 O. St. 66.

from.[112] Where, by the unlawful speed of a train, animals in station grounds are stampeded and run on the track, breaking fences, etc., and are run down and killed, the unlawful speed is the proximate cause of the injury.[113] And where a cow was killed at a railway crossing by a train running at an unlawful rate of speed and would not have been killed otherwise, the company was held not to be exonerated from liability by the fact that she was being chased by a dog at the time and that this might have contributed to her running on the track and being killed.[114]

The duty of ringing the bell or blowing the whistle as a warning is largely dependent on statutory rule. Disregard of the statute in this respect is evidence of negligence on the part of the company.[115] The general duty of trying to frighten the animal off the track, where that is possible, has been already considered. The failure to give the statutory signal is equally culpable whether the injury results from

[112] Harlan *v.* Wabash, St. L. & P. R. Co., 18 Mo. App. 483; Western & Atlantic R. Co. *v.* Main, 64 Ga. 649; Ohio & M. R. Co. *v.* Craycraft, 5 Ind. App. 335; Louisville, N. O. & T. R. Co. *v.* Caster (Miss.), 5 South. Rep. 388.

That the burden is on the company to show that the injury did not so result, see Jones *v.* Ill. Cent. R. Co., 75 Miss. 970.

[113] Story *v.* Chic., M. & St. P. R. Co., 79 Ia. 402.

The liability in Iowa under such circumstances is confined to stock "running at large": Strever *v.* Chic. & N. R. Co., 106 Ia. 137.

[114] Jeffs *v.* Rio Grande W. R. Co., 9 Utah 374.

[115] Chic., St. L. & P. R. Co. *v.* Fenn, 3 Ind. App. 250; Orcutt *v.* Pac. Coast R. Co., 85 Cal. 291; Great Western R. Co. *v.* Geddis, 33 Ill. 304; St. Louis, I. M. & S. R. Co. *v.* Hendricks, 53 Ark. 201; Barr *v.* Hannibal & St. J. R. Co., 30 Mo. App. 248; Kendrick *v.* Chic. & A. R. Co., 81 Mo. 521; Wallace *v.* St. Louis, I. M. & S. R. Co., 74 id. 594; Mo. Pac. R. Co. *v.* Stevens, 35 Kan. 622; South. Kan. R. Co. *v.* Schmidt, 44 id. 374; E. Tenn., V. & G. R. Co., *v.* Watson, 90 Ala. 41; Ga. R. & Bkg. Co. *v.* Clary, 103 Ga. 639; Galveston, H. & S. A. R. Co. *v.* Balkam (Tex. Civ. App.), 20 S. W. Rep. 860; Lonergan *v.* Ill. Cent. R. Co., 87 Ia. 755; Ill. Cent. R. Co. *v.* Person, 65 Miss. 319; Eddy *v.* Evans, 58 Fed. Rep. 151; Robertson *v.* Halifax Coal Co., 20 Nov. Sco. 517; Tyson *v.* Grand Trunk R. Co., 20 U. C. Q. B. 256.

actual collision or from the fright of an animal.[116] Under certain circumstances, however, such failure will be excused where the result of ringing the bell or blowing the whistle would be to frighten or increase the fright of an animal and thereby cause injury.[117]

The rule as to signalling on approaching a crossing has been held to apply to public crossings only;[118] and only when they are at grade.[119] It has been held also that its purpose is to warn persons, not animals. "If it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule to 'stop, look and listen.' To apply rules to dumb animals which were intended only for reasonable beings brings us dangerously near to the realm of absurdity."[120] The statute has been also held not to be intended for the protection of one passing along a street parallel to the track with no intention of crossing it;[121] or ploughing in a field near the road.[122] On the other hand, it has been held that the intention was to guard against injury from the fright of teams near the crossing as well as from actual collision, and to make the company liable where the plaintiff was travelling on a highway parallel to the railroad.[123] It is for the legislature, not

[116] Voak *v.* North. Cent. R. Co., 75 N. Y. 320; Mo., K. & T. R. Co. *v.* Magee (Tex.), 50 S. W. Rep. 1013; Grand Trunk R. Co. *v.* Rosenberger, 9 Can. Sup. Ct. 311.

[117] Louisville, N. A. & C. R. Co. *v.* Stanger, 7 Ind. App. 179; Akridge *v.* Atlanta & W. P. R. Co., 90 Ga. 232; Jenson *v.* Chic., St. P., M. & O. R. Co., 86 Wis. 589.

And see § 133, infra.

[118] Ravenscraft *v.* Mo. Pac. R. Co., 27 Mo. App. 617; Locke *v.* St. Paul & Pac. R. Co., 15 Minn. 350; Annapolis & Balt. S. L. R. Co. *v.* Pumphrey, 72 Md. 82.

[119] Jenson *v.* Chic., St. P., M. & O. R. Co., 86 Wis. 589.

[120] Fisher *v.* Pa. R. Co., 126 Pa. St. 293. And see Toudy *v.* Norfolk & W. R. Co., 38 W. Va. 694.

[121] Louisville, E. & St. L. C. R. Co. *v.* Lee, 47 Ill. App. 384; E. Tenn., Va. & Ga. R. Co. *v.* Feathers, 10 Lea (Tenn.) 103.

[122] Williams *v.* Chic. & A. R. Co., 135 Ill. 491.

[123] Ransom *v.* Chic., St. P., M. & O. R. Co., 62 Wis. 178.

for the jury, to say what signals should be adopted.[124] If the engineer could not sound the cattle-alarm and signal to the brakeman at the same time, this might be an excuse for failure to do the former.[125] It is not sufficient to show that the signal was not given: it must also be shown that such failure was the cause of the injury to the animal.[126] Such was formerly the rule in Missouri;[127] but now, by statute, on proof of failure to give the signal, the burden is shifted on the defendant, who may then show that the accident was not caused by such failure.[128] Where the plaintiff and his driver were drunk and the horses, frightened by the train, ran into the engine, it was held that the failure to give the statutory signal was not the proximate cause of the accident, but the fright of the horses and the inability to control them by reason of intoxication.[129]

133. Liability for Frightening Animals.—A railway company is liable for injuries resulting from the fright of animals caused by unnecessary noises in the management of trains, such as carelessly blowing off steam, etc.[130] The same rule

[124] Hollender *v.* N. Y. Cent. & H. R. R. Co., 14 Daly (N. Y.) 219.

[125] Mobile & G. R. Co. *v.* Caldwell, 83 Ala. 196.

[126] Chic. & Alton R. Co. *v.* Hanley, 26 Ill. App. 351; St. Louis, V. & T. H. R. Co. *v.* Hurst, 25 id. 181; Ill. Cent. R. Co. *v.* Phelps, 29 Ill. 447; Louisville, N. A. & C. R. Co. *v.* Ousler, 15 Ind. App. 232; Leavitt *v.* Terre Haute & I. R. Co., 5 id. 513; Pratt *v.* Chic., R. I. & P. R. Co. (Ia.), 77 N. W. Rep. 1064.

[127] Holman *v.* Chic., R. I. & P. R. Co., 62 Mo. 562; Braxton *v.* Hannibal & St. J. R. Co., 77 id. 455.

And, on an agreed statement of facts, there must be shown to be a connection between the killing and the omission of a duty: Smith *v.* Hannibal & St. J. R. Co., 47 Mo. App. 546.

[128] Barr *v.* Hannibal & St. J. R. Co., 30 Mo. App. 248. And see Turner *v.* Kan. City, St. J. & C. B. R. Co., 78 Mo. 578.

[129] Butcher *v.* W. Va. & P. R. Co., 37 W. Va. 180.

[130] Fritts *v.* N. Y. & N. E. R. Co., 62 Conn. 503; Wabash R. Co. *v.* Speer, 156 Ill. 245; Chic., B. & Q. R. Co. *v.* Yorty, 56 Ill. App. 242; Ill. Cent. R. Co. *v.* Larson, 42 id. 264; Louisville & N. R. Co. *v.* Upton, 18 id. 605; Terre Haute & I. R. Co. *v.* Brunker, 128 Ind. 542; Rodgers *v.* Balt. & O. S. R. Co., 150 id. 397; Louisville, N. A. & C. R. Co. *v.* Davis,

applies where the fright is caused by an unnecessary obstruction or disfigurement of the highway by engines, cars, timbers, etc.[131] The test in this case is whether their appearance is such as to frighten an ordinarily gentle horse.[132] But it has been said that if the cars project over the crossing itself, the company is liable even if the horse is not gentle.[133] Where a horse was frightened by a derrick projecting over the highway so as naturally to frighten horses, the company was held liable though the derrick was maintained for the purpose of loading freight.[134] Some negligence must, however, be shown: the mere fact of fright is not sufficient to charge the company.[135] It has been held that the obstruc-

7 Ind. App. 222; Andrews *v.* Mason City & Fort D. R. Co., 77 Ia. 669; Mo. Pac. R. Co. *v.* Gill, 49 Kan. 441; Culp *v.* Atchison & N. R. Co., 17 id. 475; Boothby *v.* Boston & M. R. Co., 90 Me. 313; Omaha & R. V. R. Co. *v.* Clarke, 35 Neb. 867, 39 id. 65; Bittle *v.* Camden & A. R. Co., 55 N. J. L. 615; Presby *v.* Grand Trunk R. Co., 66 N. H. 615; Borst *v.* Lake Shore & M. S. R. Co., 4 Hun (N. Y.) 346; Lott *v.* Frankford & S. Pass. R. Co., 159 Pa. St. 471; Mo., K. & T. R. Co. *v.* Traub (Tex. Civ. App.), 47 S. W. Rep. 282; Petersburg R. Co. *v.* Hite, 81 Va. 767; Kalbus *v.* Abbot, 77 Wis. 621; North. Pac. R. Co. *v.* Sullivan, 53 Fed. Rep. 219; Manchester S. J. & A. R. Co. *v.* Fullarton, 14 C. B. N. S. 54.

See, also, as to liability for injuries resulting from the fright of animals, §§ 62-69, supra.

[131] Denver, T. & G. R. Co. *v.* Robbins, 2 Colo. App. 313; Great Western R. Co. *v.* Decatur, 33 Ill. 381; Cleveland, C., C. & I. R. Co. *v.* Wynant, 114 Ind. 525; Grimes *v.* Louisville, N. A. & C. R. Co., 3 Ind. App. 573; Peterson *v.* Chic. & W. M. R. Co., 64 Mich. 621; Tinker *v.* N. Y., O. & W. R. Co., 157 N. Y. 312; Harrell *v.* Albermarle & R. R. Co., 110 N. C. 215; Mo., K. & T. R. Co. *v.* Jones, 13 Tex. Civ. App. 376: Desrousseau *v.* Boston & M. R. Co., 34 Low. Can. Jur. 252.

[132] Kyne *v.* Wilmington & N. R. Co., 8 Houst. (Del.) 185; Tex. & Pac. R. Co. *v.* McManus (Tex. Civ. App.), 38 S. W. Rep. 241, where it is held also that the crossing need not be a public way.

[133] Mo. Pac. R. Co. *v.* Clark (Kan. App.), 49 Pac. Rep. 799.

[134] Jones *v.* Housatonic R. Co., 107 Mass. 261.

[135] Atchison & N. R. Co. *v.* Loree, 4 Neb. 446; Moshier *v.* Utica & S. R. Co., 8 Barb. (N. Y.) 427.

The question of negligence is for the jury, where the evidence is conflicting: Green *v.* Eastern R. Co., 52 Minn. 79; Omaha & R. V. R. Co. *v.* Clarke, 35 Neb. 867, 39 id. 65.

tion of the road by a car is not the proximate cause of an injury caused by the fright of the animal at another train passing during the time of delay.[136] But in a New York case it was held that the delay in moving the obstructing train and the approach of the other train were both concurrent and proximate causes.[137]

The company is liable for the fright of a horse caused by discharging steam from a locomotive run back and forth on its track near a highway for the purpose of "limbering" it.[138] In all such cases it must appear not only that the opening of the valves was unnecessary but that it was done under circumstances from which might be implied a failure to exercise the care of a prudent and reasonable man.[139] Where the engineer and fireman wantonly and maliciously blow the whistle so as to frighten a horse which is being driven near the track, they are acting within the scope of their employment so as to make the company liable for the consequences.[140]

Where the fright of the animal is due to the failure to give proper warning of the approach of the train, the company is liable.[141] But, in a Connecticut case, where the whistle signalled the approach to a grade crossing, it was held that no liability arose from the fact that it was not blown as far back as the law required, and that then the plaintiff would have been warned in time of the train's coming.[142] And where the plaintiff's intestate was at a place where the company was

[136] Stanton *v.* Louisville & N. R. Co., 91 Ala. 382; Selleck *v.* Lake Shore & M. S. R. Co., 58 Mich. 195.

[137] Laible *v.* N. Y. Cent. & H. R. R. Co., 13 N. Y. App. Div. 574.

[138] Terre Haute & I. R. Co. *v.* Doyle, 56 Ill. App. 78.

[139] Omaha & R. V. R. Co. *v.* Clarke, 35 Neb. 867, 39 id. 65. And see Toledo, St. L. & K. C. R. Co. *v.* Crittenden, 42 Ill. App. 469; Glancy *v.* Glasgow & South-Western R. Co., 25 Rettie (Sc. Ct. Sess.) 581.

[140] Tex. & Pac. R. Co. *v.* Scoville, 62 Fed. Rep. 730.

[141] Pollock *v.* Eastern R. Co., 124 Mass. 158; Laible *v.* N. Y. Cent. & H. R. R. Co., 13 N. Y. App. Div. 574; Grand Trunk R. Co. *v.* Sibbald, 20 Can. Sup. Ct. 259; Vézina *v.* Reg., 2 Can. Ex. Ct. 11.

[142] Bailey *v.* Hartford & C. V. R. Co., 56 Conn. 444.

not obliged to signal and a train came suddenly out of a cutting, frightening his horses and killing him, it was held that the company was not liable.[143] Where the engineer of a dummy train, not knowing that the brake had been taken off, reversed on a steep grade and the train backed too rapidly, colliding with a wagon which was on the track by reason of the mules drawing it being suddenly frightened by the backward movement of the train, the occurrence was held to be a pure accident and the company not liable.[144]

The company is not, as a rule, liable for fright produced by noises or sights due to the ordinary operation of trains. "Railroads cannot be operated without noise, and if teams are frightened by the usual noise arising from a prudent and proper management of a train or engine, the railroad company is not liable for an injury resulting from such noise. The making of an unnecessary noise by a railroad company as, in this case, the escaping of steam, is not of itself evidence of negligence. It may or may not be. To be negligence, the noise must have been made under such circumstances and suroundings as to time, place and situation of the parties as to establish a neglect to exercise that degree of care which a reasonable man would have exercised under the circumstances." [145]

[143] New Brunswick R. Co. *v.* Vanwart, 17 Can. Sup. Ct. 35, reversing 27 N. B. 59.

[144] Rome St. R. Co. *v.* McGinnis, 94 Ga. 229.

[145] Omaha & R. V. R. Co. *v.* Brady, 39 Neb. 27, 41.

As illustrations of this rule, see Stanton *v.* Louisville & N. R. Co., 91 Ala. 382; Oxford Lake Line *v.* Steadham, 101 id. 376; Morgan *v.* Cent. R. Co., 77 Ga. 788; Bailey *v.* Hartford & C. V. R. Co., 56 Conn. 444; Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82; Phila., W. & B. R. Co. *v.* Stinger, 78 Pa. St. 219; Ryan *v.* Pa. R. Co., 132 id. 304; Stephens *v.* Omaha & R. V. R. Co., 41 Neb. 167; Phillips *v.* N. Y. Cent. & H. R. R. Co., 84 Hun (N. Y.) 412; Moshier *v.* Utica & S. R. Co., 8 Barb. (N. Y.) 427; Morgan *v.* Norfolk S. R. Co., 98 N. C. 247; Beaumont Pasture Co. *v.* Sabine & E. T. R. Co. (Tex. Civ. App.), 41 S. W. Rep. 190; Cahoon *v.* Chic. & N. R. Co., 85 Wis. 570; Hurd *v.* Grand Trunk R. Co., 15 Ont. App. 58.

It applies to fright caused by a natural discharge of smoke at a neces-

Where horses near a railway crossing are frightened by a whistle signalling to release brakes, the company is not liable unless the engineer should have known that such signal would, under the circumstances, probably frighten them.[146] So, the sounding of the whistle by the engineer when he first sees a team on the track is proper, though the horses be thereby frightened and contribute to the injury.[147] Where the plaintiff acts on the assurance of the engineer and goes ahead, he may recover for injuries resulting from his horse's fright, as the assurance implies control over the engine.[148] And the fact that a horse was frightened by an ordinary movement of the train will not prevent recovery, if the animal was ordinarily well broken, and was permitted by the defendant's negligence to come so near as to be naturally frightened by such ordinary movement.[149] Where a flagman signals a carriage to advance he may, when he discovers a train near the crossing, use any means in his power to stop the horse in order to save life, even if the result of his action is to frighten the horse and cause incidental injury. "An act done upon a sudden emergency, when life is apparently in peril, is not negligence, even though it is mistaken."[150] Where a gate-tender at a railroad crossing let a woman pass on foot under the partly raised gates, in front of which a locomotive was standing, and afterwards raised them higher so as to permit the passage of a restless horse which became frightened and ran over the woman, it was held that, under the circumstances, the gate-tender was not negligent, she being guilty of contributory negligence in not heeding the driver's warning.[151] But where the engineer told the driver

sary time: Lamb *v.* Old Colony R. Co., 140 Mass. 79; Leavitt *v.* Terre Haute & I. R. Co., 5 Ind. App. 513.

[146] Ochiltree *v.* Chic. & N. R. Co., 93 Ia. 628, 96 id. 246.

[147] Schaefert *v.* Chic., M. & St. P. R. Co., 62 Ia. 624.

[148] Keech *v.* Rome, O. & W. R. Co., 13 N. Y. Suppt. 149.

[149] Carraher *v.* San Francisco Bridge Co., 100 Cal. 177.

[150] Floyd *v.* P. & R. R. Co., 162 Pa. St. 29.

[151] Scaggs *v.* Del. & H. Canal Co., 145 N. Y. 201, distinguishing Borst

of a horse that it was safe to cross, and the steam gauge afterwards allowed steam to escape after reaching a certain pressure whereby the horse was frightened, it was held that the company was liable for the resulting injury.[152] In a similar case, where a flagman asserted there was no danger, liability was denied.[153] And, ordinarily, there is no liability for fright caused by the escape of steam from an automatic valve, where the use of such valve is necessary for the safety of the engine;[154] though the fact of there being such a valve has been held to be no answer, as matter of law, to a charge of negligence.[155]

Electric and other street railways are not liable for the frightening of horses by the ordinary operation of their cars.[156] And the mere fact that a horse is frightened at the sight of a car going fast confers no right of action: the actual rate of speed must be shown or that it was not a reasonably prudent rate.[157] The company is liable, however, if unnecessary noise is made for the purpose of frightening the animal, or if there is subsequent misconduct on the part of

v. Lake Shore & M. S. R. Co., 4 Hun (N. Y.) 346, where the company was held liable by reason of a sudden increase of steam after the flagman had beckoned the team to cross. See Duvall *v.* Balt. & O. R. Co., infra.

[152] Louisv., N. A. & C. R. Co. *v.* Schmidt, 147 Ind. 638.

[153] Duvall *v.* Balt. & O. R. Co., 73 Md. 516.

Cf. Borst *v.* Lake Shore & M. S. R. Co., supra.

[154] Louisville, N. A. & C. R. Co. *v.* Schmidt, 34 Ind. 16; Scaggs *v.* Del. & H. Canal Co., 145 N. Y. 201; Wilson *v.* N. Y. Cent. & H. R. R. Co., 58 N. Y. Suppt. 617; Howard *v.* Un. Freight R. Co., 156 Mass. 159. And see Dunn *v.* Wilmington & W. R. Co. (N. C.), 32 S. E. Rep. 711.

[155] Presby *v.* Grand Trunk R. Co., 66 N. H. 615.

[156] Kankakee Elec. R. Co. *v.* Lade, 56 Ill. App. 454; Galesburg Elec. Motor & Power Co. *v.* Manville, 61 id. 490; North Chic. St. R. Co. *v.* Harms, 59 id. 374; Hazel *v.* People's Pass R. Co., 132 Pa. St. 96; McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. Rep. 104; Chapman *v.* Zanesville St. R. Co. (O.), 27 Wy. L. Bull. 70.

The question of negligence and contributory negligence is for the jury: Blakeslee *v.* Consold. St. R. Co., 112 Mich. 63.

[157] Yingst *v.* Lebanon & A. St. R. Co., 167 Pa. St. 438. And see Greeley *v.* Fed. St. & P. V. P. R. Co., 153 id. 218; Smith *v.* Holmesburg, T. & F. Elec. R. Co., 187 id. 451.

the employees after discovering its fright.[158] In a Pennsylvania case it was held that as it is the duty of the gripman of a traction car to ring his bell at all street crossings, if the plaintiff's horses, standing near a crossing, were frightened by the ringing and ran away, the gripman was not chargeable with negligence which would render the company liable.[159] But in a Federal case this general statement was disapproved of, and it was held that it might be negligence to ring the gong too violently near a frightened horse, and that this was a question for the jury.[160] And in a Texas case it was held to be negligence for one operating a street car to continue sounding the bell after he saw, or by the exercise of ordinary care might have seen, that horses attached to a wagon in front were being frightened and rendered unmanageable: it was his duty either to stop the car or cease ringing the bell.[161]

Electric cars have a right of way in a qualified manner and others should carefully observe their movements, but a person owning an unbroken horse is not debarred from reasonable opportunities of exercising it near the cars in

[158] See Doster *v.* Charlotte St. R. Co., 117 N. C. 651; Galesburg Elec. Motor & Power Co. *v.* Manville, supra; North Side St. R. Co. *v.* Tippens, 4 Tex. App. (Civ. Cas.) 226; Ward *v.* Lakeside R. Co., 20 Pa. Co. Ct. 404. The question whether an unusual noise is unnecessary is ordinarily for the jury: Hill *v.* Rome St. R. Co., 101 Ga. 66.

[159] Steiner *v.* Phila. Trac. Co., 134 Pa. St. 199, citing Phila. Trac. Co. *v.* Bernheimer, 125 id. 615. The court said: "Nor does such ringing necessarily tend to frighten horses. If it did, there would be accidents daily."

[160] Lightcap *v.* Phila. Trac. Co., 60 Fed. Rep. 212, affirmed in Phila. Trac. Co. *v.* Lightcap, 17 U. S. App. 605. And see Wachtel *v.* East St. Louis & St. L. Elec. R. Co., 77 Ill. App. 465; Henderson *v.* Greenfield & T. F. St. R. Co. (Mass.), 52 N. E. Rep. 1080.

[161] Citizens' R. Co. *v.* Hair (Tex. Civ. App.), 32 S. W. Rep. 1050. And see Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3; Ellis *v.* Lynn & Boston R. Co., Ibid. 341; Citizens' St. R. Co. *v.* Lowe, 12 Ind. App. 47; Marion St. R. Co. *v.* Carr, 10 id. 200; Muncie St. R. Co. *v.* Maynard, 5 id. 372; Omaha St. R. Co. *v.* Duvall, 40 Neb. 29; Eastwood *v.* La Crosse City R. Co., 94 Wis. 163; Bishop *v.* Belle City St. R. Co., 92 id. 139; East St. Louis & St. L. E. St. R. Co. *v.* Wachtel, 63 Ill. App. 181; Richter *v.* Cicero & P. St. R. Co., 70 id. 196; Lines *v.* Winnipeg Elec. St. R. Co., 11 Ma. 77.

order to get it accustomed to them, and it is the duty of those managing the car to use every effort to avoid injury.[162] And the mere failure of one driving along a street on which is an electric railway to look for approaching cars will not prevent recovery for injuries resulting from the horse's fright.[163] But the company is not liable where horses run away because of weak and insufficient lines or because the driver is so situated that he cannot use ordinary force to control them. And the mere fright does not show that the driver is in peril: the presumption is that he will control the horses.[164] Where the plaintiff's horse became frightened by the breaking of the defendant's trolley wire and the plaintiff, alarmed by the noise and electric flashes, jumped out and was injured, it was held that no presumption of negligence arose from the unexplained breaking of the wire.[165]

Where the engineer of a railroad train sees that an animal near the track is frightened, it is frequently his duty to slacken speed or omit or change the ordinary signal.[166] The rule has been laid down that, if he sees the animal frightened, he should refrain from giving the signal, and should, if necessary, slacken the speed or stop the train; but if he reaches the place where the statutory signal should be given and it is uncertain whether the train can be stopped before reaching the crossing, he must give the signal and

[162] Flewelling *v.* Lewiston & A. H. R. Co., 89 Me. 585.

Cf. Cornell *v.* Detroit Elec. R. Co., 82 Mich. 495, where it was held that the plaintiff taking a horse young and unused to cars to test it was guilty of contributory negligence.

[163] Benjamin *v.* Holyoke St. R. Co., supra.

[164] East St. Louis & St. L. E. St. R. Co. *v.* Wachtel, 63 Ill. App. 181. And see Terre Haute Elec. R. Co. *v.* Yant, 21 Ind. App. 486; Flaherty *v.* Harrison, 98 Wis. 559.

[165] Kepner *v.* Harrisburg Trac. Co., 183 Pa. St. 24. In this case neither the wire, nor any of the sparks emitted, touched the horse, wagon or plaintiff.

[166] St. Louis, I. M. & S. R. Co. *v.* Lewis, 60 Ark. 409; Akridge *v.* Atlanta & W. P. R. Co., 90 Ga. 232; Chic., B. & Q. R. Co. *v.* Dickson, 88 Ill. 431; Gulf, C. & S. F. R. Co. *v.* Box, 81 Tex. 670.

negligence is not imputable therefrom.[167] Although there may be nothing to prevent the driver from turning the team away from the railroad, the engineer is not, as a matter of law, free from negligence in failing to put on the brakes where he observes that the animals have become unmanageable.[168] And the engineer and fireman may be guilty of negligence in failing to see signals made by a person trying to control a frightened horse backing towards a crossing.[169] Where animals had strayed on the track and were frightened by a train while the plaintiff's servant was trying to remove them and got on a bridge where they were injured or killed, there being a space on the side of the track by which they might have passed, it was held that there was no duty on the part of the engineer to wait till they had actually been driven off.[170]

A railway company has been held not to be guilty of negligence in failing to erect fences or screens near its stations in order that animals might not see trains and become frightened.[171] Where the company fails to remove or bury a dead animal it is liable for the consequences, if another animal is frightened thereby.[172]

It has been held that in an action for an injury caused by frightening horses, evidence that other horses had taken fright at the same object is inadmissible, the question what objects are likely to cause fright being one to be determined by the court and jury in each case.[173] But in other cases it is held

[167] Louisville, N. A. & C. R. Co. *v.* Stanger, 7 Ind. App. 179.

[168] Chic., K. & W. R. Co. *v.* Prouty, 55 Kan. 503.

[169] Leavitt *v.* Terre Haute & I. R. Co., 5 Ind App. 513.

[170] Hurd *v.* Grand Trunk R. Co., 15 Ont. App. 58.

[171] Flagg *v.* Chic., D. & C. G. T. J. R. Co., 96 Mich. 30; Simkin *v.* London & N. W. R. Co., 21 Q. B. D. 453.

See Moshier *v.* Utica & S. R. Co., 8 Barb. (N. Y.) 427, as to precautions to be taken where a parallel turnpike has to be kept up.

[172] Baxter *v.* Chic., R. I. & P. R. Co., 87 Ia. 488; Chic. & A. R. Co. *v.* Scranton, 78 Ill. App. 230.

[173] Cleveland, C., C. & I. R. Co. *v.* Wynant, 114 Ind. 525.

that the fright of other animals is a circumstance to be considered by the jury.[174] And the plaintiff's knowledge of that fact has been held to be evidence of contributory negligence.[175]

In order that there may be a recovery against the company, the fright must have been the proximate cause of the injury. If the collision results from the inability of a driver to control his horse, and not from the wrongdoing of the company, there can be no recovery.[176] But where fire was negligently allowed to fall on a horse from an elevated railway, frightening the animal and causing injury to the plaintiff, it was held that the company was liable, although the driver may not have acted most prudently: the latter's act was to be regarded as a continuation of the company's act which was, therefore, the proximate cause of the injury.[177] And where a horse, frightened by the blowing off of steam, ran off and the defendant's yardman sprang in front of it and struck at it, as a result of which it swerved and injured the plaintiff, it was held that fright was the proximate cause of the injury.[178] Where a horse, frightened by the wanton blowing of a whistle, runs away and kills another horse, the owner of the latter may recover from the company.[179] But where a frightened horse jumped over cattle-guards and was injured in a bridge, it was held that fright was not the proximate cause and there was no basis of recovery.[180] Where a company negligently frightened cattle that ran along the road and got into an

[174] Mo. Pac. R. Co. *v.* Hill, 71 Tex. 451; Harrell *v.* Albemarle & R. R. Co., 110 N. C. 215; Gordon *v.* Boston & M. R. Co., 58 N. H. 396. And see § 66, supra.

[175] Pittsb. South. R. Co. *v.* Taylor, 104 Pa. St. 306.

[176] Barringer *v.* N. Y. Cent. & H. R. R. Co., 18 Hun (N. Y.) 398. See Chic. & N. R. Co. *v.* Prescott, 59 Fed. Rep. 237.

[177] Lowery *v.* Manhattan R. Co., 99 N. Y. 158.

[178] Belt *v.* San Antonio & A. P. R. Co. (Tex. Civ. App.), 37 S. W. Rep. 362.

[179] Billman *v.* Indianapolis, C. & L. R. Co., 76 Ind. 166.

[180] Lynch *v.* North. Pac. R. Co., 84 Wis. 348.

orchard through a defective fence and then on the track and were killed, it was held that the damage was not too remote and that the imperfect state of the fence was no answer.[181]

In awarding compensation for lands condemned for the right of way of a railroad, the frightening of stock by trains is speculative and not a proper element to be taken into consideration.[182]

134. Animals Running at Large; Contributory Negligence.— Whether the owner of an animal allowed to run at large may recover for an injury done to it by a train depends on several considerations. The common-law rule requiring the owner to restrain his animals may or may not be in force. There may be a law requiring the company to fence or signal and the injury may be the result of its failure to do so. And, finally, the degree of negligence of the company's employees may be an important factor in the question. The decisions, therefore, vary in the different jurisdictions and no attempt will be made to lay down a general rule applicable to all cases. The obligation of the company to fence its right of way, which will be discussed fully in the next chapter, will be here treated of only incidentally in so far as it is necessarily involved in the decision of the principal question.

The common-law rule with regard to restraining animals is discussed in an earlier portion of this work.[183]

In Alabama, the owner has a right to pasture his animals or let them run at large near a railway and the fact that he does so is not contributory negligence which will bar his recovery for an injury received by them in consequence.[184]

[181] Sneesby *v.* Lancashire & Y. R. Co., 1 Q. B. D. 42.

[182] St. Louis, K. & S. R. Co. *v.* Hammers, 51 Kan. 127.

[183] See Title IV, Chapter I, supra.

[184] Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326; Louisville & N. R. Co. *v.* Cochran, 105 id. 354; Ala. Gt. South. R. Co. *v.* McAlpine, 71 id. 545; Same *v.* Powers, 73 id. 244.

Nor is the fact that when they had strayed away he abandoned pursuit of them at night, knowing that trains frequently passed, contributory negligence: such abandonment of pursuit is simply equivalent to letting them run at large.[185]

In Arkansas, the owner allowing his animals to run at large assumes only the risk of accidents which may not be avoided by ordinary care on the part of the company's employees[186] And the same rule prevails in California.[187]

In Colorado, where an animal is unlawfully at large, the company is liable only where there is gross negligence or wantonness on the part of its employees.[188]

In Connecticut it has been held that the owner must have been guilty of actual negligence and not of a mere technical wrong to be precluded from recovery and that where cattle at large without his fault go on the track and are killed through the company's negligence, the latter is liable.[189] And in Florida the fact that the owner of cattle permits them to run at large is not contributory negligence.[190]

In Illinois the owner of stock is not negligent in letting them run at large in the commons and highways of the country.[191] The fact that he allows them unlawfully to run at large does not relieve the company from liability for injuring them as a result of its failure to fence its right of way in compliance with statute. Whether permitting them to run

[185] Louisville & N. R. Co. *v.* Williams, 105 Ala. 379.

[186] Little Rock & Ft. S. R. Co. *v.* Finley, 37 Ark. 562.

[187] Richmond *v.* Sacramento Val. R. Co., 18 Cal. 351; Needham *v.* San Fran. & S. J. R. Co., 37 id. 409; Orcutt *v.* Pac. Coast R. Co., 85 id. 291.

[188] Denver & R. G. R. Co. *v.* Olsen, 4 Colo. 239; Same *v.* Stewart, 1 Colo. App. 227.

[189] Isbell *v.* N. Y. & N. H. R. Co., 27 Conn. 393.

This case was approved of in Needham *v.* San Fran. & S. J. R. Co., supra, as exposing the "false reasoning of the New York courts."

[190] Savannah, F. & W. R. Co. *v.* Geiger, 21 Fla. 669.

[191] Chic., B. & Q. R. Co. *v.* Cauffman, 38 Ill. 424; Rockford, R. I. & St. L. R. Co. *v.* Rafferty, 73 id. 58; Chic. & A. R. Co. *v.* Engle, 84 id. 397. See § 70, supra.

at large was contributory negligence depended formerly on whether it was the proximate cause of the injury and, if so, whether the owner's negligence was slight and the company's gross, comparatively; and the latter was liable for an injury resulting from its failure to fence, unless it were shown that the owner let his animals run at large under such circumstances that the natural and probable consequence of doing so would be their going on the track and being injured.[192] He may also have been negligent in letting them loose where the company is not obliged to fence.[193] The doctrine of comparative negligence, however, has been recently abolished.[194]

In Indian Territory the owners of stock are not negligent in letting them run at large near a railway.[195]

In Indiana, there is no contributory negligence on the part of the owner who turns his animals loose near a place where the company should have fenced its track.[196] It is otherwise, if they are injured at a place where the company is not obliged

[192] Rockford, R. I. & St. L. R. Co. *v.* Irish, 72 Ill. 404; Ewing *v.* Chic. & A. R. Co., Ibid. 25; Cairo & St. L. R. Co. *v.* Murray, 82 id. 76; Same *v.* Woosley, 85 id. 370; Cleveland, C., C. & St. L. R. Co. *v.* Ahrens, 42 Ill. App. 434; Indiana, I. & I. R. Co. *v.* Dooling, Ibid. 63; Wabash R. Co. *v.* Perbex, 57 id. 62; Atchison, T. & S. F. R. Co. *v.* Cupello, 61 id. 432; Peoria, D. & E. R. Co. *v.* Miller, 11 id. 375.

The case of Peoria, P. & J. R. Co. *v.* Champ, 75 Ill. 577, holding that an owner illegally letting his animals run at large cannot recover against the company for an injury resulting from its failure to fence, appears to be at variance with the other decisions in the State.

[193] Toledo, W. & W. R. Co. *v.* Barlow, 71 Ill. 640. And see the opinion in Headen *v.* Rust, 39 id. 186.

[194] See Cicero & P. St. R. Co. *v.* Meixner, 160 Ill. 320.

[195] Eddy *v.* Evans, 58 Fed. Rep. 151.

[196] Baltimore & O. & C. R. Co. *v.* Evarts, 112 Ind. 533; Toledo, W. & W. R. Co. *v.* Cary, 37 id. 172; Jeffersonville, M. & I. R. Co. *v.* Ross, Ibid. 545; Bellefontaine R. Co. *v.* Reed, 33 id. 476; Indianapolis & Cinc. R. Co. *v.* Guard, 24 id. 222; Louisville, N. A. & C. R. Co. *v.* Cahill, 63 id. 340; Terre Haute & I. R. Co. *v.* Schaeffer, 5 Ind. App. 86.

In Cinc., W. & M. R. Co. *v.* Stanley (Ind. App.), 27 N. E. Rep. 316, it was held that the fact that the company should have maintained better cattle-guards and wing fences does not render it liable.

to fence,[197] unless the injury is wilful.[198] Where the owner is guilty of gross negligence, as where the owner of a blind horse turns it out on a common near the track, he cannot recover, even though the company has failed to fence,[199] or though the animal may lawfully run at large.[200] And where the borrower of a horse rides it on the track when he is drunk, the owner cannot recover, though the company should have fenced: his act implies consent to the destruction of the horse.[201] Where the animal is at large without the owner's fault, as where it has escaped from an enclosure, he may recover for an injury due to the company's negligence.[202]

In Iowa, one unlawfully allowing an animal to run at large cannot recover without showing that the company's employees were not only negligent but guilty of reckless and wanton misconduct.[203] The company is liable, however, for killing animals running at large unlawfully where the accident was due to its failure to fence, unless the owner's act was wilful.[204] And where the right to let animals run at large ex-

[197] Lyons *v.* Terre Haute & I. R. Co., 101 Ind. 419; Wabash, St. L. & P. R. Co. *v.* Nice, 99 id. 152; Cinc., H. & D. R. Co. *v.* Street, 50 id. 225; Jeffersonville, M. & I. R. Co. *v.* Underhill, 48 id. 389; Same *v.* Adams, 43 id. 402; Indianapolis, C. & L. R. Co. *v.* Harter, 38 id. 557; Chic., St. L. & P. R. Co. *v.* Nash, 1 Ind. App. 298.

[198] Chic., St. L. & P. R. Co. *v.* Nash, supra; Jeffersonville, M. & I. R. Co. *v.* Underhill, supra; Detroit, E. R. & Ill. R. Co. *v.* Barton, 61 Ind. 293.

[199] Knight *v.* Toledo & W. R. Co., 24 Ind. 402.

See Hammond *v.* S. C. & P. R. Co., 49 Ia. 450.

[200] Hanna *v.* Terre Haute & I. R. Co., 119 Ind. 316.

[201] Welty *v.* Indianapolis & V. R. Co., 105 Ind. 55.

[202] Louisville, N. A. & C. R. Co. *v.* Ousler, 15 Ind. App. 232; Chic., St. L. & P. R. Co. *v.* Nash, 1 id. 298.

But see Chic., W. & M. R. Co. *v.* Stanley (Ind. App.), 27 N. E. Rep. 316, where a mule that had escaped was held a trespasser.

[203] Van Horn *v.* Burlington, C. R. & N. R. Co., 63 Ia. 67, 59 id. 33.

And see Connyers *v.* Sioux City & P. R. Co., 78 id. 410; McCool *v.* Galena & C. U. R. Co., 17 id. 461.

[204] Spence *v.* Chic. & N. R. Co., 25 Ia. 139; Stewart *v.* Same, 27 id. 282; Fritz *v.* Milwaukee & St. P. R. Co., 34 id. 337; Krebs *v.* Minneapolis & St. L. R. Co., 64 id. 670.

ists, "the owner must be held to take the risk only of such injuries as do not result from the defendant's negligence." [205] The negligence of the owner or his allowing his stock to run on his own land near an unfenced track is not the "wilful act of the owner" which will prevent recovery under § 1289 of the code making the company liable for failure to fence.[206]

In Kansas, where an animal is knowingly allowed to run at large the owner cannot recover for an injury to it unless the company has been guilty of gross negligence,[207] as in failing to fence its track.[208] And it has been held that where an animal was unlawfully at large in the night, the owner could not recover though the railway was unfenced where it should have been fenced.[209] Where an animal breaks loose in spite of the efforts of the owner to confine it, and is killed in an unfenced place, the owner may recover.[210] In counties where no order has been made by the board of county commissioners regulating or prohibiting the running at large of

[205] Van Horn *v.* Burlington, C. R. & N. R. Co., 59 Ia. 33.

See also Searles *v.* Milwaukee & St. P. R. Co., 35 id. 490; Kuhn *v.* Chic., R. I. & P. R. Co., 42 id. 420; Whitbeck *v.* Dubuque & Pac. R. Co., 21 id. 103; Balcom *v.* Dubuque & S. C. R. Co., Ibid. 102; Stewart *v.* Burlington & M. R. Co., 32 id. 561.

[206] Inman *v.* C., M. & St. P. R. Co., 60 Ia. 459; Lee *v.* Minneapolis & St. L. R. Co., 66 id. 131.

[207] Union Pac. R. Co. *v.* Rollins, 5 Kan. 167; Kan. City, Ft. S. & G. R. Co. *v.* McHenry, 24 id. 501.

See the comments on the former case in Mo. Pac. R. Co. *v.* Wilson, infra. And see Prickett *v.* Atchison, T. & S. F. R. Co., 33 Kan. 748, where it was held that the company was liable for ordinary negligence where the stock was permitted to run at large.

[208] Mo. Pac. R. Co. *v.* Bradshaw, 33 Kan. 533; Atchison, T. & S. F. R. Co. *v.* Riggs, 31 id. 622.

[209] Cent. Branch R. Co. *v.* Lea, 20 Kan. 353. So, where he places the animals on the track or purposely exposes them to danger: Mo. Pac. R. Co. *v.* Roads, 33 id. 640.

But the owner is not guilty of culpable contributory negligence in permitting an animal to run unattended near an unfenced track on his own premises which are enclosed by a fence: Atchison, T. & S. F. R. Co. *v.* Gabbert, 34 id. 132. And see the cases cited in the preceding note.

[210] Kan. Pac. R. Co. *v.* Wiggins, 24 Kan. 588.

animals, individuals may permit their stock to run at large on the public highways, and in doing so they are not necessarily guilty of negligence.[211]

In Maryland, if the accident could have been avoided by ordinary care on the part of the company's servants, it is no defence that the plaintiff was negligent in allowing his animals to escape and stray at large unattended.[212]

In Massachusetts, a railway company is not liable for killing a trespassing animal unless the injury is wanton: proof of mere want of ordinary care is insufficient.[213] It is otherwise where the company has failed in its duty as to fencing and the injury is a result of such failure.[214] Where the company is not bound to fence, the due care of the owner of the animal must be proved.[215]

In Michigan, one who turns his cattle at large in a public highway near a railway crossing is guilty of contributory negligence where the company has complied with the statutory requirements as to fences, etc., and speed could not be checked in time to avoid injury. "A man who permits his dumb beasts, which cannot reason or appreciate danger, to roam at large where it is highly probable, if not inevitable, that they will run into dangerous places, ought to be judged by the same rule as when he places himself in the presence of danger and thereby suffers injury which his own prudence might have avoided."[216] Where the company has failed to

[211] Mo. Pac. R. Co. *v.* Wilson, 28 Kan. 637.

[212] Western Md. R. Co. *v.* Carter, 59 Md. 306; Balt. & O. R. Co. *v.* Mulligan, 45 id. 486; Northern Central R. Co. *v.* Ward, 63 id. 362. The rule was formerly different: Balt. & O. R. Co. *v.* Lamborn, 12 Md. 257.

[213] Maynard *v.* Boston & Me. R. Co., 115 Mass. 458; McDonnell *v.* Pittsfield & N. A. R. Co., Ibid. 564.

If the injury was the natural and probable consequence of the owner's negligence, he cannot recover: Amstein *v.* Gardner, 134 id. 4.

[214] Rogers *v.* Newburyport R. Co., 1 Allen (Mass.) 16.

But see § 139, infra, as to qualifications of this rule.

[215] Stearns *v.* Old Colony & F. R. R. Co., 1 Allen (Mass.) 493.

[216] Robinson *v.* Flint & P. M. R. Co., 79 Mich. 323.

And see Niemann *v.* Mich. Cent. R. Co., 80 id. 197.

fence according to statute, the question of contributory negligence does not arise.[217]

In Minnesota, the mere fact that the animals killed were allowed unlawfully to run at large does not necessarily show contributory negligence,[218] nor excuse the company for the result of its failure to fence.[219] Contributory negligence exempts the company where the owner's act proximately affects the question of the exposure of the animals or contributes to the accident;[220] as where he deliberately allows them to run at large unlawfully near unfenced tracks.[221] But where a colt escaped from its owner's premises without his fault, ran upon a railway crossing within town limits and was injured through the company's negligence, it was held not to be wrongfully on the highway as against the company.[222]

In Mississippi, the fact than an animal was trespassing on the track, being at large in a stock-law district, does not preclude the owner from recovering for its being negligently killed.[223] The company is required under such circumstances to exercise ordinary, not the utmost, care, and the owner assumes some of the risks of exposure.[224] The owner may pasture his animals in the commons of incorporated towns where this is lawful and, though such conduct may be dangerous and reprehensible, it does not di-

[217] Grand Rapids & I. R. Co. *v.* Cameron, 45 Mich. 451.

[218] Green *v.* St. Paul, M. & M. R. Co., 55 Minn. 192, 60 id. 134.

[219] Ericson *v.* Duluth & I. R. Co., 57 Minn. 26; Watier *v.* Chic., St. P., M. & O. R. Co., 31 id. 91.

[220] Watier *v.* Chic., St. P., M. & O. R. Co., supra.

[221] Moser *v.* St. Paul & D. R. Co., 42 Minn. 480; Locke *v.* St. Paul & Pac. R. Co., 15 id. 350.

[222] Hohl *v.* Chic., M. & St. P. R. Co., 61 Minn. 321.

[223] Roberds *v.* Mobile & O. R. Co., 74 Miss. 334.

[224] Cantrell *v.* Kansas City, M. & B. R. Co., 69 Miss. 435; Memphis & C. R. Co. *v.* Blakeney, 43 id. 218; New Orleans, J. & G. N. R. Co. *v.* Field, 46 id. 573.

See Raiford *v.* Miss. Cent. R. Co., 43 id. 233.

minish his right to compensation from those injuring the animals.[225]

In Missouri, it is not necessarily contributory negligence in the owner of animals to permit them to roam at large near a railway.[226] And where the plaintiff turned his horse into commons near a track on which he knew there was salt, this was held not to be negligence on his part which would prevent recovery.[227] This rule is especially applicable where the company has neglected to fence.[228] Where no fence is necessary and the stock was unlawfully at large, the company is liable for the gross or wilful negligence of its employees but not for the mere violation of a city ordinance regulating the rate of speed.[229] In another case it was held that where the train was running at an illegal rate of speed, the company was liable for injuring an animal unlawfully at large, if it escaped without the owner's knowledge and the train might have been stopped.[230] In a recent case it was held that permitting an animal to run at large in violation of the stock law is not the proximate cause of the killing of the animal on a public crossing, where the company failed to give the statutory signals. The court said: "Permitting domestic animals to run at large in violation of the stock law is no doubt evidence of negligence when considered only as an abstract question, but the negligence of the plaintiff available to defendant in a

[225] Chic., St. L. & N. O. R. Co. *v.* Jones, 59 Miss. 465.

[226] Schwarz *v.* Hannibal & St. J. R. Co., 58 Mo. 207; Tarwater *v.* Same, 42 id. 193; Turner *v.* Kan. City, St. J. & C. B. R. Co., 78 id. 578; Hill *v.* Mo. Pac. R. Co., 121 id. 477; Nolon *v.* Chic. & A. R. Co., 23 Mo. App. 353.

See Hannibal & St. J. R. Co. *v.* Kenney, 41 Mo. 271.

[227] Brown *v.* Hannibal & St. J. R. Co., 27 Mo. App. 394.

[228] Donovan *v.* Hannibal & St. J. R. Co., 89 Mo. 147; Stanley *v.* Mo. Pac. R. Co., 84 id. 625; Boyle *v.* Same, 21 Mo. App. 416.

See Patton *v.* West End N. G. R. Co., 14 Mo. App. 589.

[229] Windsor *v.* Hannibal & St. J. R. Co., 45 Mo. App. 123.

And, generally, the company is liable for a wanton injury, even though the owner was negligent: Clem *v.* Wabash R. Co., 72 id. 433.

[230] Bowman *v.* Chic. & A. R. Co., 85 Mo. 533.

suit like this must be contributive—*i. e.*, the direct and proximate cause of the injury of which plaintiff complains. It will not do to say that the act of permitting plaintiff's cow to escape and run at large was negligence directly contributing to the injury merely because if she had been kept in the enclosure she would not have got upon the crossing, for the same kind of logic would prove the plaintiff guilty of negligence by the simple act of owning the cow. In a legal sense it must be the direct and proximate, and not the remote, cause of the injury; or, in other words, it must have been near in the order of causation . . and must have contributed, to some extent, directly to the injury, and must have been not a mere technical or formal wrong contributing either incidentally or remotely or not at all to the injury." [231]

In Montana, an owner of stock is not guilty of contributory negligence in turning it out to graze on the public domain near a railway.[232]

Under the Nebraska statute, the fact that the owner of animals unlawfully permitted them to run at large is no defence to an action against the company for damages resulting from its failure to fence.[233]

In New Jersey it has been held that the owner of animals that break out of his pasture, stray on the track and are killed through the negligence of the company's employees, cannot recover by reason of his contributory negligence in permitting them to stray.[234]

In New York, prior to the fencing statutes, where animals

[231] Kirkpatrick *v.* Mo., K. & T. R. Co., 71 Mo. App. 263, 267. See Sullivan *v.* Hannibal & St. J. R. Co., 72 Mo. 195.

[232] McMaster *v.* Montana Un. R. Co., 12 Mont. 163.

[233] Burlington & Mo. River R. Co. *v.* Brinkman, 14 Neb. 70; Same *v.* Franzen, 15 id. 365; Chic., B. & Q. R. Co. *v.* Sims, 17 id. 691.

So, where he negligently allowed them to escape: Burlington & M. R. R. Co. *v.* Webb, 18 id. 215.

[234] Case *v.* Cent. R. Co. of N. J., 59 N. J. L. 471; Price *v.* N. J. R. & T. Co., 31 id. 229. And see Vandegrift *v.* Rediker, 22 id. 185.

were trespassers, the plaintiff could not maintain an action for their death even if caused by the gross negligence of the company.[235] But under the statute the simple negligence of the owner in permitting animals to run at large in the highway or to trespass will not prevent his recovery, where the injury to them results from the failure of the company to fence its track.[236] It is otherwise where the owner does some positive act increasing the danger, or voluntarily permits his animals to stray on the track.[237]

In North Carolina, it is held that the fact that the plaintiff allowed an animal to stray and go on the track is not sufficient negligence to bar recovery.[238] And it is not contributory negligence to put cattle in an enclosure of forty acres through which a railway runs; and the fact that the stock law is in force in the place makes no difference.[239]

In North Dakota, the fact that an animal is a trespasser without the owner's fault does not relieve the company of the obligation to use reasonable care to prevent injury.[240] Where the plaintiff's colt, turned loose to feed on his land, was killed while trying to cross the track on a private crossing built by the company for the plaintiff's use in driving stock, it was held not to be a trespassing animal but one lawfully on the crossing.[241]

In Ohio, where animals are at large without the omission

[235] Tonawanda R. Co. *v.* Munger, 5 Denio (N. Y.) 255.

[236] Corwin *v.* N. Y. & E. R. Co., 13 N. Y. 42; Munch *v.* N. Y. Cent. R. Co., 29 Barb. (N. Y.) 647. And see Potter & Parlin Co. *v.* N. Y. Cent. & H. R. R. Co., 22 Misc. (N. Y.) 10. But see Marsh *v.* N. Y. & E. R. Co., 14 Barb. 364; Clark *v.* Syracuse & U. R. Co., 11 id. 112.

See, also, the cases cited in § 139, infra.

[237] Brady *v.* Rensselaer & S. R. Co., 1 Hun (N. Y.) 378, citing Corwin *v.* N. Y. & E. R. Co., supra.

[238] Bethea *v.* Raleigh & A. R. Co., 106 N. C. 279; Roberts *v.* Richmond & D. R. Co., 88 id. 560; Farmer *v.* Wilmington & W. R. Co., Ibid. 564.

[239] Horner *v.* Williams, 100 N. C. 230.

[240] Bostwick *v.* Minneapolis & P. R. Co., 2 N. D. 440.

[241] Bishop *v.* Chic., M. & St. P. R. Co., 4 N. D. 536.

of reasonable care on the part of the owner, he is not guilty of contributory negligence.[242]

In Oregon, it has been held that the owner cannot let stock roam wherever their instincts incline them, though he may depasture them on the "common unfenced range."[243] And the negligence of a herder who leaves sheep at night between a river and a railway track beyond which is their pasture prevents recovery for their loss.[244] But the plaintiff's negligence in driving loose a herd of eleven horses that had never before seen an engine will not prevent recovery, if there was gross negligence on the part of the company's employees.[245] Where the owner is not bound to keep his stock in an enclosure, he is not guilty of contributory negligence in letting them run at large.[246]

In Pennsylvania, an owner of cattle suffered to go at large and killed on a railway track, without wantonness or such gross negligence as amounts to it, has no recourse to the company or its servants;[247] and this is also the case where they have escaped from a properly fenced enclosure without his knowledge.[248]

In South Carolina it has been held that the owner of a horse running at large is not guilty of contributory negligence.[249] But, since the passage of the stock law, as was said before, less care is required of the company than formerly.[250]

[242] Marietta & Cinc. R. Co. *v.* Stephenson, 24 O. St. 48. And see the comments in Sloan *v.* Hubbard, 34 id. 583. See, also, Cranston *v.* Cinc., H. & D. R. Co., 1 Handy (O.) 193; Pittsburgh, Ft. W. & C. R. Co. *v.* Methven, 21 O. St. 586.

[243] Hindman *v.* Oreg. R. & Nav. Co., 17 Oreg. 614.

[244] Keeney *v.* Oreg. R. & Nav. Co., 19 Oreg. 291.

[245] Holstine *v.* Oreg. & Cal. R. Co., 8 Oreg. 163.

[246] Moses *v.* So. Pac. R. Co., 18 Oreg. 385. As to whether the common-law rule as to restraining animals is in force in Oregon, see § 70, supra.

[247] N. Y. & E. R. Co. *v.* Skinner, 19 Pa. St. 298.

[248] North Pa. R. Co. *v.* Rehman, 49 Pa. St. 101.

[249] Murray *v.* So. Car. R. Co., 10 Rich. L. (S. C.) 227.

[250] See Joyner *v.* So. Car. R. Co., 26 S. C. 49, and cases cited in § 132, supra.

In Tennessee, where the statutes recognize the running out of stock on the common as lawful, the fact that the owner of an animal allowed it to be out of his enclosure cannot be relied on by the company, either to defeat the action or in mitigation of damages.[251]

In Texas, where animals are unlawfully at large the company is liable only for gross negligence.[252] Thus, when mules were at large in violation of an ordinance, the company, in the absence of gross negligence, was held not liable for their being killed by an engine running at an unlawful rate of speed.[253] Where a fence is not required the company is not liable for killing animals running at large unless the employees failed to use ordinary care.[254] And where animals are unlawfully at large, failure to fence does not make the company liable unless its negligence caused the accident.[255]

In Vermont, the owner of stray cattle cannot recover against the company without proof of its negligence, even when it has neglected the statutory duty of fencing.[256]

In Washington it is not contributory negligence for the owners of animals to let them run at large.[257] Nor is it in West Virginia, though the owner takes the risk of unavoidable accidents.[258]

[251] Memphis & C. R. Co. *v.* Smith. 9 Heisk. (Tenn.) 860.

[252] Internat. & G. N. R. Co. *v.* Dunham, 68 Tex. 231; Same *v.* Cocke, 64 id. 151; Houston & T. C. R. Co. *v.* Nichols (Tex. Civ. App.), 39 S. W. Rep. 954.

[253] Mo., K. & T. R. Co. *v.* Russell (Tex. Civ. App.), 43 S. W. Rep. 576.

[254] Houston & T. C. R. Co. *v.* Jones (Tex. Civ. App.), 40 S. W. Rep. 745.

[255] Evans *v.* Sherman, S. & S. R. Co. (Tex. Civ. App), 37 S.W. Rep. 93.

[256] Jackson *v.* Rutland & B. R. Co., 25 Vt. 150.

[257] Timm *v.* North. Pac. R. Co., 3 Wash. Ty. 299.

But one camping for the night and leaving his horses loose in an unfenced field, without taking any steps to prevent their going on the track, cannot recover, if they are killed: Dickey *v.* North. Pac. R. Co., 19 Wash. 350.

[258] Washington *v.* Balt. & O. R. Co., 17 W. Va. 190; Layne *v.* O. River R. Co., 35 id. 438; Blaine *v.* Chesapeake & O. R. Co., 9 id. 252; Baylor *v.* Balt. & O. R. Co., Ibid. 270.

In Wisconsin, the contributory negligence of the owner has been held to be a defence to his action, though the company has failed either to erect or maintain fences.[259] But under the present statute the company is liable for injuries caused to cattle by its failure to fence, where there is no evidence that the owner drove them on the right of way or abandoned them where they were certain to go on the track.[260]

In Canada, there is no responsibility on the part of the company as to straying animals killed by trains.[261]

It will be observed from these cases that, as a general rule, where the owner of animals has taken every reasonable means of securing them and, without his fault, they escape and run at large and are killed by the company's negligence, he will not be held guilty of contributory negligence so as to bar recovery.[262] To "suffer to be at large" implies per-

[259] Curry *v.* Chic. & N. R. Co., 43 Wis. 665. And see Jones *v.* Sheboygan & F. de L. R. Co., 42 id. 306; Lawrence *v.* Milwaukee, L. S. & W. R. Co., Ibid. 322; McCall *v.* Chamberlain, 13 id. 637; Galpin *v.* Chic. & N. R. Co., 19 id. 604.

But the contributory negligence must be shown to have directly caused the injury: Sika *v.* Chic. & N. R. Co., 21 id. 370.

[260] Heller *v.* Abbot, 79 Wis. 409.

[261] Can. Pac. R. Co. *v.* Cross, Rap. Jud. Quebec, 3 B. R. 170.

This case did not follow the decision in Pontiac Pac. Junc. R. Co. *v.* Brady, Montr. L. Rep., 4 Q. B. 346, owing to a change made by subsequent legislation.

[262] Isbell *v.* N. Y. & N. H. R. Co., 27 Conn. 393; Louisville, N. A. & C. R. Co. *v.* Ousler, 15 Ind. App. 290; Chic., St. L. & P. R. Co. *v.* Nash, 1 id. 298; Kan. Pac. R. Co. *v.* Wiggins, 24 Kan. 588; Hohl *v.* Chic., M. & St. P. R. Co., 61 Minn. 321; Bowman *v.* Chic. & A. R. Co., 85 Mo. 533; Bostwick *v.* Minneapolis & P. R. Co., 2 N. D. 440; Marietta & Cinc. R. Co. *v.* Stephenson, 24 O. St. 48 [see Sloan *v.* Hubbard, 34 id. 583];—cited supra.

See, also, to the same effect, Toledo, P. & W. R. Co. *v.* Johnston, 74 Ill. 83; Dennis *v.* Louisville, N. A. & C. R. Co., 116 Ind. 42; Ohio & M. R. Co. *v.* Craycraft, 5 Ind. App. 335; Chic., St. L. & P. R. Co. *v.* Fenn, 3 id. 250; Story *v.* Chic., M. & St. P. R. Co., 79 Ia. 402; Moriarty *v.* Cent. Ia. R. Co., 64 id. 696; Pearson *v.* Milwaukee & St. P. R. Co., 45 id. 497; Mo. Pac. R. Co. *v.* Roads, 33 Kan. 640; Parker *v.* Lake Shore & M. S. R. Co.,

mission on the owner's part.[263] Where a teamster left a mule in a stable with the door open, as usual, in order that it might go to water, and it escaped and was killed, it was held not to be "permitted to run at large." [264] And where cows left in a highway for the purpose of milking them, with intent to put them in an enclosure, afterwards stray away they are not "suffered to be at large." [265] The fact that the plaintiff kept his hogs in an insecure enclosure so that they escaped was held not to prevent recovery, where even a lawful fence would not have prevented their going on the track.[266] And the fact that an animal escaped from a car through the plaintiff's negligence, ran several miles and was then killed by another train, was held not to be the proximate cause of the injury nor to defeat the action.[267]

The mere knowledge of the owner of animals that the land into which he turns them is not fenced or is insufficiently fenced from the railway has been held in many cases to amount to contributory negligence.[268] So, where the plain-

93 Mich. 607; Nelson *v.* Great North. R. Co., 52 Minn. 276; Cox *v.* Minneapolis, S. S. M. & A. R. Co., 41 id. 101; Pittsb., Cinc. & St. L. R. Co. *v.* Howard, 40 O. St. 6; Chic. & N. R. Co. *v.* Goss, 17 Wis. 428.

Contra, North Pa. R. Co. *v.* Rehman, 49 Pa. St. 101, cited supra; Fisher *v.* Farmers' Loan & Trust Co., 21 Wis. 73; Munger *v.* Tonawanda R. Co., 4 N. Y. 349.

[263] Ohio & Miss. R. Co. *v.* Jones, 63 Ill. 472; Parker *v.* Lake Shore & M. S. R. Co., supra; Marietta & Cinc. R. Co. *v.* Stephenson, 24 O. St. 48.

[264] Doran *v.* Chic., M. & St. P. R. Co., 73 Ia. 115.

And the fact that the plaintiff had a horse which was in the habit of opening the gate of the barn-lot and did so on the night in question and let out a team which was killed, was held not to amount to such contributory negligence as would defeat the plaintiff's recovery: Pacific R. Co. *v.* Brown, 14 Kan. 469.

[265] Bulkley *v.* N. Y. & N. H. R. Co., 27 Conn. 479.

[266] Leavenworth, T. & S. R. Co. *v.* Forbes, 37 Kan. 445.

[267] Louisville & N. R. Co. *v.* Kelsey, 89 Ala. 287.

[268] Chic., St. L. & P. R. Co. *v.* Nash, 1 Ind. App. 298; Indianapolis & C. R. Co. *v.* Wright, 13 Ind. 213; Dayton & Mich. R. Co. *v.* Miami Co. Infirmary, 32 O. St. 566; Sandusky & C. R. Co. *v.* Sloan, 27 id. 341; Peterson *v.* North. Pac. R. Co., 86 Wis. 206; Trow *v.* Vermont Cent. R. Co., 24 Vt. 487.

tiff knew of a storm that had prostrated many fences;[269] where animals were turned loose in a place where the person in charge knew a forest fire had passed and he made no effort to discover whether the pasture fences had been injured;[270] and where the plaintiff's tenant knew that the plaintiff's horse used to pass over a cattle-guard, and yet voluntarily turned it out near the crossing.[271] It has even been held that one habitually turning his horses on the company's right of way could not recover for an injury to them, though the company was in fault in not maintaining a fence. "To habitually turn animals loose upon a railroad track or right of way is . . . something more than contributory negligence." [272] But, as a general rule, where the company has neglected to perform its statutory duty of erecting or maintaining fences, gates, or cattle-guards, it cannot defeat the defendant's action by setting up his knowledge of that fact as a proof of contributory negligence on his part.[273] Where the owner of an animal knowingly let it enter a field where was a gate left open for several months by the company through which it passed on the track and was injured, he was held not guilty of contributory negligence unless

[269] Carey *v.* Chic., M. & St. P. R. Co., 61 Wis. 71.

Otherwise where the storm is subsequent to the turning in of the animal: Williams *v.* Mo. Pac. R. Co., 74 Mo. 453.

[270] McCann *v.* Chic., St. P., M. & O. R. Co., 96 Wis. 664.

[271] La Flamme *v.* Detroit & M. R. Co., 109 Mich. 509.

[272] Fort Wayne, C. & L. R. Co. *v.* Woodward, 112 Ind. 118.

[273] McCoy *v.* Cal. Pac. R. Co., 40 Cal. 532; Macon & W. R. Co. *v.* Baber, 42 Ga. 300; Terre Haute & I. R. Co. *v.* McCord, 56 Ill. App. 173; Toledo, St. L. & K. C. R. Co. *v.* Burgan, 9 Ind. App. 604; Wilder *v.* Me. Cent. R. Co., 65 Me. 332; Schubert *v.* Minneapolis & St. L. R. Co., 27 Minn. 360; Wilson *v.* St. L., I. M. & S. R. Co., 87 Mo. 431; Cressey *v.* North. R. Co., 59 N. H. 564; Horn *v.* Atlantic & St. L. R. Co., 35 id. 169; Cleveland, C., C. & I. R. Co. *v.* Scudder, 40 O. St. 173; Gulf, C. & S. F. R. Co. *v.* Cash, 8 Tex. Civ. App. 569; Congdon *v.* Cent. Vt. R. Co., 56 Vt. 390; Mead *v.* Burlington & L. R. Co., 52 id. 278; Dunsford *v.* Mich. C. R. Co., 20 Ont. App. 577.

That the question is for the jury, see Johnson *v.* Chic., M. & St. P. R. Co., 29 Minn. 425; Evans *v.* St. Paul & S. C. R. Co., 30 id. 489.

the natural and probable consequence of his action would be the animal's going on the track.[274] A distinction has been made in such cases between letting at large mules, which are liable to stroll off, and cattle which are less liable to do so.[275]

The meaning of the expression "running at large" in statutes making the owners of animals liable for their trespasses has been already discussed.[276] In addition to the cases cited, some further ones, dealing with the question of contributory negligence only, will be considered here. In the following instances the animals have been held to be "running at large": where a horse has escaped control, although it has on a halter and bridle;[277] where a team harnessed to a wagon escaped control;[278] where a sucking colt strayed away from a mare led by the plaintiff;[279] where a herdsman in following one of the herd which has strayed gets so far from the main body that he is unable to prevent their loitering or stopping at a highway crossing when he sees a train approaching;[280] where cattle roam on a highway without restraint, though on the owner's premises;[281] where a boy drove cattle across a track without noticing that a steer was left behind;[282] where mules had escaped from a stable at night in an unknown manner.[283] And where the plaintiff's son, as it was getting dark, was taking three horses along a road that crossed a railway, riding one, leading another, and

[274] Lake Erie & W. R. Co. *v.* Beam, 60 Ill. App. 68.

[275] See Macon & W. R. Co. *v.* Baber, 42 Ga. 300, and Cent. R. & Bkg. Co. *v.* Davis, 19 id. 437.

[276] See § 77, supra.

[277] Welsh *v.* Chic., Burlington & Q. R. Co., 53 Ia. 632.

[278] Inman *v.* Chic., M. & St. P. R. Co., 60 Ia. 459.

[279] Smith *v.* Kan. City., St. J. & C. B. R. Co., 58 Ia. 622. And see Southern Kansas R. Co. *v.* McKay (Tex. Civ. App.), 47 S. W. Rep. 479, as to cows returning to their sucking calves over a track.

[280] Thompson *v.* Grand Trunk R. Co., 22 Ont. App. 453.

[281] Johnson *v.* Minneapolis & St. L. R. Co., 43 Minn. 207.

[282] Valleau *v.* Chic., M. & St. P. R. Co., 73 Ia. 723.

[283] Molair *v.* Port Royal & A. R. Co., 29 S. C. 152.

driving the third, and the latter, being from sixty to one hundred feet in front, tried to cross the track and was killed by the train, it was held that it was not "in charge" of any person and the plaintiff could not recover.[284]

In the following instances the animals were held not to be "running at large": where stock is in charge of a herder;[285] where cattle, driven by their owner, escape and run on the track;[286] where horses were attached to a sleigh on a prairie with a drunken driver;[287] where a bull was pastured in a fenced field with the railway running through it unfenced.[288]

Where the driver or rider of animals fails to look or listen on approaching the crossing, in cases where he might have done so, he will be held guilty of contributory negligence;[289] and the owner will be held responsible for the conduct of his servant in this respect.[290] But the mere fact that a person on horseback, driving cattle to a crossing, did not ride forward and look out has been held not to be conclusive evidence of negligence on his part.[291] And where the company's employees by the use of ordinary care could have avoided injuring the animal, recovery will not be defeated by the owner's negligence in failing to look out.[292] Nor do

[284] Markham *v.* Gr. West. R. Co., 25 U. C. Q. B. 572. And see Cooley *v.* Grand Trunk R. Co., 18 id. 96.

[285] Keeney *v.* Oreg. R. & Nav. Co., 19 Oreg. 291.

[286] Smith *v.* Chic., R. I. & P. R. Co., 34 Ia. 96.

[287] Grove *v.* Burlington, C. R. & N. R. Co., 75 Ia. 163.

[288] Gooding *v.* Atchison, T. & S. F. R. Co., 32 Kan. 150.

As to the meaning of "confined in the night-time" under the Kansas statute, see Kan. Pac. R. Co. *v.* Landis, 24 Kan. 406.

[289] Hager *v.* South. Pac. R. Co., 98 Cal. 309; Louisv., N. A. & C. R. Co. *v.* Stommel, 126 Ind. 35; Schaefert *v.* Chic., M. & St. P. R. Co., 62 Ia. 624; Rheiner *v.* Chic., St. P., M. & O. R. Co., 36 Minn. 170; Kimes *v.* St. Louis, I. M. & S. R. Co., 85 Mo. 611; Gunn *v.* Wis. & M. R. Co., 70 Wis. 203.

[290] Louisv., N. A. & C. R. Co. *v.* Stommel, supra.

[291] Tuthill *v.* North. Pac. R. Co., 50 Minn. 113. And see Bates *v.* Fremont, E. & M. V. R. Co., 4 S. D. 394.

[292] Wooster *v.* Chic., M. & St. P. R. Co., 74 Ia. 593.

But in Hager *v.* South. Pac. R. Co., supra, it was held that the owner

ordinary care and diligence necessarily require that a landowner through whose pasture a railway passes should keep a lookout at a crossing or an attendant to watch the cattle.[293] And one lawfully crossing a railroad at grade with a drove of cattle is not bound to give a signal to an approaching train: if necessary, it is the duty of the company to employ a person to give signals.[294]

Where a mule was fast in a trestle and the owner, when he had ample time to do so, failed to find the bridge watchman and give him notice, and the animal was killed, the company was held not liable therefor.[295] Nor can the owner recover when he was present and could have driven his animal from the track but did not do so.[296] But the driver of a team when the wagon was stalled on the track was held not guilty of contributory negligence because he tried to extricate the team instead of going round a curve to stop any train that might be approaching.[297] Otherwise, where he failed to unhitch the horses, as he might have done.[298] Nor has he the right to rely on the company's duty of giving signals, if he might by reasonable exertion have got the animal off the track.[299] Where he was using reasonable diligence in trying to recapture an animal running upon a crossing, he may recover.[300]

A rider is not bound to abandon a crossing unless its use is necessarily dangerous to an ordinarily careful man, but in crossing he should use due care to avoid danger. Evidence

could not recover for an injury in such a case unless it was wilful and deliberate.

[293] White *v.* Concord R. Co., 30 N. H. 188.

[294] Reeves *v.* Delaware, L. & W. R. Co., 30 Pa. St. 454.

[295] Ga. R. & Bkg. Co. *v.* Parks, 91 Ga. 71.

[296] Moody *v.* Minneapolis & St. L. R. Co., 77 Ia. 29.

[297] Chic. & Alton R. Co. *v.* Hogarth, 38 Ill. 370. And see Snook *v.* Clark, 20 Mont. 230.

[298] Frost *v.* Milwaukee & N. R. Co., 96 Mich. 470.

[299] Milburn *v.* Kan. City, St. J. & C. B. R. Co., 86 Mo. 104.

[300] Clark *v.* Boston & M. R. Co., 64 N. H. 323.

of the existence of another crossing near is admissible to show contributory negligence.[301]

The fact that the owner had previously taken his animals over the company's right of way will not prevent his recovery.[302] It is otherwise where he knowingly permits them to be on the crossing;[303] or allows them to linger by the track till they become unmanageable;[304] or rushes his cattle over, after warning, even though the statutory signals were not given;[305] or rides his mule away from the road and on to and along the track.[306]

The fact that the animals were running at large in a lane whence they might trespass is not evidence of contributory negligence;[307] nor is it negligent for the owner, superintending land on the sides of a highway, to permit his dog to patrol the land in order to keep off trespassers, as a result of which it is run over owing to the negligence of a street railway company;[308] nor is the owner of cattle killed in a pasture guilty of contributory negligence simply because the pasture was made after the road.[309]

There is no contributory negligence necessarily in trying to escape the danger by an act in itself dangerous.[310] And where the plaintiff's decedent, in endeavoring to prevent his horse's escape, was thrown on the track and killed, the fact that he incurred great risk from his own horse and took it was held not to show contributory negligence.[311] But where

[301] Harper *v.* Mo., K. & T. R. Co., 70 Mo. App. 604.
[302] Toledo, St. L. & K. C. R. Co. *v.* Jackson, 5 Ind. App. 547; Louisville, E. & St. L. R. Co. *v.* Hart, 2 id. 130.
[303] Connyers *v.* Sioux City & P. R. Co., 78 Ia. 410.
[304] Coughtry *v.* Willamette St. R. Co., 21 Oreg. 245.
[305] Ohio & Miss. R. Co. *v.* Eaves, 42 Ill. 288.
[306] Nashv., C. & St. L. R. Co. *v.* Spence, 99 Tenn. 218.
[307] Orcutt *v.* Pac. Coast R. Co., 85 Cal. 291.
[308] Meisch *v.* Rochester Elec. R. Co., 72 Hun (N. Y.) 604.
[309] Harmon *v.* Columbia & G. R. Co., 32 S. C. 127.
[310] Lincoln Rapid Transit Co. *v.* Nichols, 37 Neb. 332.
[311] Butler *v.* Milwaukee & St. P. R. Co., 28 Wis. 487.
See Flagg *v.* Chic., D. & C. G. T. J. R. Co., 96 Mich. 30.

a horse, in charge of a servant, became frightened at the noise of cars in a freight yard, backed over a wall and was killed, it was held that the owner could not recover, where the servant voluntarily assumed the risk: such an assumption of danger is not identical with contributory negligence, as it may be consistent with the exercise of due care.[312]

Where an animal is left unfastened or unattended in a dangerous place, the owner is guilty of contributory negligence.[313] But where a herder, after rounding up his sheep a mile and a quarter from the railroad, after some of them had lain down, went home with his dog, this was held not to be such contributory negligence as would relieve a company from liability.[314] So, the fact that the plaintiff had permitted his horse to follow him on to the defendant's track is not such an abandonment as will prevent recovery, where the animal afterwards followed him to a safe distance on the highway and was then frightened and ran back on the unfenced track.[315] On the other hand, where cattle were turned on a highway, unattended except by a dog, to cross two railway tracks eighty yards apart and the dog drove them between the tracks to the owner's knowledge, he mak-

[312] Miner *v.* Conn. Riv. R. Co., 153 Mass. 398.

[313] Deville *v.* South. Pac. R. Co., 50 Cal. 383; Higgins *v.* Wilmington City R. Co., 1 Marv. (Del.) 352; Louisville & N. R. Co. *v.* Eves, 1 Ind. App. 224; Chic., K. & W. R. Co. *v.* Totten, 1 Kan. App. 558; Weingartner *v.* Louisville & N. R. Co. (Ky.), 42 S. W. Rep. 839; Dolan *v.* Newburgh, D. & C. R. Co., 120 N. Y. 571; Gray *v.* Second Ave. R. Co., 65 id. 561; Bowman *v.* Troy & B. R. Co., 37 Barb. (N. Y.) 516; Edwards *v.* Phila. & R. R. Co. (Pa.), 23 Atl. Rep. 894; Olson *v.* Chic., M. & St. P. R. Co., 81 Wis. 41; Gunn *v.* Wis. & M. R. Co., 70 id. 203; McCandless *v.* Chic. & N. R. Co., 45 id. 365; Tower *v.* Providence & W. R. Co., 2 R. I. 404; Sinkling *v.* Ill. Cent. R. Co., 10 S. D. 560. See Brady *v.* Rensselaer & S. R. Co., 1 Hun (N. Y.) 378.

See as to obstructing an electric car track, Winter *v.* Federal St. & P. V. Pass. R. Co., 153 Pa. St. 26, cited in § 68, supra.

[314] McCoy *v.* So. Pac. R. Co. (Cal.), 26 Pac. Rep. 629.

[315] Toledo, St. L. & K. C. R. Co. *v.* Jackson, 5 Ind. App. 547. And see Southworth *v.* Old Colony & N. R. Co., 105 Mass. 342.

ing no effort to drive them over the further track, it was held that he could not recover for one of the cattle killed because of the engineer's failure to keep a proper lookout.[316] And where the plaintiff drove four horses across the track without halter or reins and they were run into and killed, he was held guilty of contributory negligence.[317]

An owner who allowed his stock to graze near the track in the charge of a fourteen-year-old girl was held not guilty of contributory negligence as a matter of law.[318] So, where a boy was in charge of a cow which ran away and got on the track by reason of defective cattle-guards.[319] Nor was a hackman negligent in having left his team in the care of a fellow hackman, where it was afterwards frightened by a train and ran away.[320]

Driving a horse at a forbidden rate of speed is negligence on the part of the driver if it contributes directly to the accident.[321] And it is negligence for the driver of a fire-department truck to approach a street on which cars run without having his horses under such control that he can stop them, even though he has, by ordinance, the right of way.[322]

It is contributory negligence, as a rule, to take animals near the track or near cars under circumstances when they are liable to be frightened;[323] though this does not always

[316] Bunnell *v.* Rio Grande W. R. Co., 13 Utah 314.
[317] Grand Trunk R. Co. *v.* Bourassa, 19 Leg. N. (Can.) 131.
[318] Hutchinson *v.* Chic., M. & St. P. R. Co., 9 S. D. 5.
[319] Phillips *v.* Can. Pac. R. Co., 1 Ma. 110.
[320] Fritts *v.* N. Y. & N. E. R. Co., 62 Conn. 503.
[321] Weller *v.* Chic., M. & St. P. R. Co., 120 Mo. 635.
[322] Garrity *v.* Detroit Citizens' St. R. Co., 112 Mich. 369.
[323] Manchester, S. & L. R. Co. *v.* Woodcock, 25 L. T. N. S. 335; Louisville & N. R. Co. *v.* Schmidt, 81 Ind. 264; Un. Pac. R. Co. *v.* Hutchinson, 39 Kan. 485; Whitney *v.* Me. Cent. R. Co., 69 Me. 208; State *v.* Cumberland & P. R. Co. 87 Md. 183; Cornell *v.* Detroit Elec. R. Co., 82 Mich. 495; Moore *v.* Kan. City & I. R. T. R. Co., 126 Mo. 265; Pittsb. South. R. Co. *v.* Taylor, 104 Pa. St. 306; Phila., W. & B. R. Co. *v.* Stinger, 78 id. 219; Hargis *v.* St. Louis, A. & T. R. Co., 75 Tex. 19; New Brunswick R. Co. *v.* Vanwart, 17 Can. Sup. Ct. 35.

necessarily prevent recovery.[324] The driver of horses going near electric cars takes the risk of his horses being frightened by the ordinary signals of the car.[325] But he is not guilty of contributory negligence, as a matter of law, in driving on a street traversed by such cars, though the space between the track and a retaining wall is narrow.[326]

Voluntary drunkenness is no excuse for contributory negligence and the drunkenness of the owner of an animal or his servant will, in many cases, bar recovery.[327]

Conversely, the owner of animals at large it liable to the company for an injury caused to a train by collision, where he has been negligent in his care of his stock.[328]

The rule of comparative negligence formerly prevailed in Illinois. If the plaintiff's negligence was slight and the defendant's gross in comparison, the former could recover; otherwise, not.[329] And an instruction which authorized the jury to find for the plaintiff if they found the defendant to have been guilty of a greater degree of negligence than the former was held erroneous.[330] This is not the rule in

[324] Nashua Iron & Steel Co. *v.* Worcester & N. R. Co., 62 N. H. 159; Wabash R. Co. *v.* Speer, 156 Ill. 245.

And see Herrick *v.* Sullivan, 120 Mass. 576; Stamm *v.* South. R. Co., 1 Abb. N. Cas. (N. Y.) 438; Carraher *v.* San Francisco Bridge Co., 100 Cal. 177; Flewelling *v.* Lewiston & A. H. R. Co., 89 Me. 585; Louisville, N. A. & C. R. Co. *v.* Davis, 7 Ind. App. 222.

[325] East St. Louis & St. L. E. St. R. Co. *v.* Wachtel, 63 Ill. App. 181.

[326] Gibbons *v.* Wilkesbarre & S. St. R. Co., 155 Pa. St. 279.

[327] See Welty *v.* Indianapolis & V. R. Co., 105 Ind. 55; Cleveland, C., C. & St. L. R. Co. *v.* Ducharme, 49 Ill. App. 520; Butcher *v.* W. Va. & P. R. Co., 37 W. Va. 180.

[328] Hannibal & St. J. R. Co. *v.* Kenney, 41 Mo. 271; Sinram *v.* Pittsburgh, F. W. & C. R. Co., 28 Ind 244; Annapolis & E. R. Co. *v.* Baldwin, 60 Md. 88.

[329] Chic., B. & Q. R. Co. *v.* Dickson, 88 Ill. 431; Rockford, R. I. & St. L. R. Co. *v.* Irish, 72 id. 404; Toledo, W. & W. R. Co. *v.* McGinnis, 71 id. 346; Chic. & N. R. Co. *v.* Harris, 54 id. 528; Ill. Cent. R. Co. *v.* Middlesworth, 43 id. 64; Same *v.* Goodwin, 30 id. 117.

And see Fisher *v.* Farmers' Loan & Trust Co., 21 Wis. 73; Galpin *v.* Chic. & N. R. Co., 19 id. 604.

[330] Wabash R. Co. *v.* Jones, 5 Ill. App. 607.

Missouri;[331] but a plaintiff there may recover though guilty of some negligence, if the defendant by the use of ordinary care could have avoided the injury: it is only where the plaintiff's negligence contributes directly to the injury that he is precluded.[332] The doctrine has now been abolished in Illinois.[333]

As a rule, the burden of showing contributory negligence is on the defendant: its absence need not be averred or proved by the plaintiff.[334] But where a complaint alleged that the plaintiff was without fault, the defendant was held entitled to the benefit of evidence of contributory negligence though he had not pleaded it.[335] And there are cases holding that due care or the absence of contributory negligence on the part of the plaintiff must be alleged and shown.[336] But where an injury is alleged to be wilfully done, it is not necessary to allege that the plaintiff's carelessness did not contribute thereto.[337]

135. Notice; Action; Parties; Pleading.—In order to maintain an action the statutory provisions as to notice of the claim, if there are any, must have been complied with.[338] It has been held that the notice need contain nothing but a statement of the claim and of the fact of the injury;[339] that

[331] Brooks *v.* Hannibal & St. J. R. Co., 35 Mo. App. 571.

[332] Moore *v.* Kan. City & I. R. T. R. Co., 126 Mo. 265.

[333] See Cicero & P. St. R. Co. *v.* Meixner, 160 Ill. 320.

[334] Joyner *v.* So. Car. R. Co., 26 S. C. 49; Whittier *v.* Chic., M. & St. P. R. Co., 24 Minn. 394; Cairo & St. L. R. Co. *v.* Woosley, 85 Ill. 370.

[335] Long *v.* Southern R. Co., 50 S. C. 49.

[336] Jeffersonville, M. & I. R. Co. *v.* Lyon, 72 Ind. 107; Stearns *v.* Old Colony & F. R. R. Co., 1 Allen (Mass.) 493.

[337] Indianapolis, P. & C. R. Co. *v.* Petty, 30 Ind. 261.

[338] Kan. Pac. R. Co. *v.* Ball, 19 Kan. 535; South & North Ala R. Co. *v.* Reid, 66 Ala. 250; Cole *v.* Chic. & N. R. Co., 38 Ia. 311; Ryan *v.* Same (Wis.), 77 N. W. Rep. 894.

[339] Mackie *v.* Cent. R. of Ia., 54 Ia. 540.

The misnomer of the defendant was held not to invalidate the notice in Martin *v.* Cent. Ia. R. Co., 59 Ia. 411.

a letter notifying the company of the killing of the stock and another letter stating the amount of damages claimed are sufficient statutory notice;[340] that a claim of payment is a sufficient demand for payment;[341] that the commencement of an action within a given time amounts to a presentation of the claim;[342] that service of notice on a station-agent is sufficient.[343] The posting of a notice by the company of the killing of stock, as required by statute, may be in any public place at the station and proof that notice was not posted at the usual places makes out a *prima facie* case for the plaintiff.[344]

Trespass does not lie against a company for the destruction of animals, unless done by its direction or with its assent; the conductor, engineer or subordinate agent who has charge of the train at the time of the accident is not, for this purpose, the representative of the corporation. The proper remedy is case.[345]

An action against a company on its common-law liability for negligently killing an animal is transitory and may be

[340] Jacksonville, T. & K. W. R. Co. *v.* Harris, 33 Fla. 217.

The demand is not made void by being for too large a sum: Mo. Pac. R. Co. *v.* Abney, 30 Kan. 41.

[341] Ft. Scott, W. & W. R. Co. *v.* Holman, 45 Kan. 167.

[342] South & North Ala. R. Co. *v.* Bees, 82 Ala. 340. See Wood & G. Mfg. Co. *v.* Whitcomb (Wis.), 77 N. W. Rep. 175.

[343] Smith *v.* Chic., M. & St. P. R. Co., 60 Ia. 512; Schlengener *v.* Same, 61 id. 235.

And see, in general, Ill. Cent. R. Co. *v.* Tilman, 98 Tenn. 573; Ala. Gr. South. R. Co. *v.* Killian, 69 Ala. 277; Same *v.* Roebuck, 76 id. 277; South & North Ala. R. Co. *v.* Brown, 53 id. 651; Mobile & O. R. Co. *v.* Malone, 46 id. 391; St. Louis & S. F. R. Co. *v.* Kinman, 49 Kan. 627; Mo. Pac. R. Co. *v.* Gill, Ibid. 441; Un. Trust Co. *v.* Kendall, 20 id. 515; Cent. Branch R. Co. *v.* Ingram, Ibid. 66; Keyser *v.* Kan. City, St. J. & C. B. R. Co., 56 Ia. 440; Mendell *v.* Chic. & N. R. Co., 20 id. 9.

[344] St. Louis, I. M. & S. R. Co. *v.* Wright, 57 Ark. 327.

[345] Selma, R. & D. R. Co. *v.* Webb, 49 Ala. 240; Price *v.* N. J. R. & T. Co., 31 N. J. L. 229; Sharrod *v.* London & N. W. R. Co., 4 Exch. 580.

See State *v.* Judge, 33 La. Ann. 954.

brought in any county through which the railroad passes.[346] A common-law action may be maintained in one State for the killing of an animal in another State;[347] and where the statutes of two States give similar remedies, an action may be maintained in either State.[348]

The repeal of a provision in a company's charter requiring the owner of stock killed by the negligence of the company to sue for damages within six months does not impair the obligation of the charter.[349]

Where animals were killed at different times, this constitutes different causes of action, and such causes cannot be united to give jurisdictional value.[350] Where animals were killed at the same time, this constitutes but one cause of action.[351] And where a cow and a heifer standing a few feet apart were killed by a passing train, the objection that they were not killed at the same time was held untenable, as the difference in time was inappreciable.[352]

Plaintiffs must be joint owners of stock in order to sue jointly: otherwise, they cannot recover.[353] Where the statute enables an owner or special owner to sue, the hirer of stock who agrees to return them in good condition may sue without making the owner a party.[354] And a custodian under such an arrangement as to be accountable for an animal

[346] Toledo, W. & W. R. Co. *v.* Milligan, 52 Ind. 505; Detroit, E. R. & Ill. R. Co. *v.* Barton, 61 id. 293.

For cases on procedure in Justices' Courts, see 1 Rap. & Mack Dig. Ry. Law 354-368.

[347] St. Louis, A. & T. R. Co. *v.* Holden, 3 Tex. App. (Civ. Cas.) 391.

[348] Boyce *v.* Wabash R. Co., 63 Ia. 70.

[349] Louisv. & N. R. Co. *v.* Williams (Ky.), 45 S. W. Rep. 229.

[350] Jeffersonville, M. & I. R. Co. *v.* Brevoort, 30 Ind. 324; Louisville, N. A. & C. R. Co. *v.* Quade, 101 id. 364.

[351] Indianap. & Cinc. R. Co. *v.* Elliott, 20 Ind. 430; Binicker *v.* Hannibal & St. J. R. Co., 83 Mo. 660; Pucket *v.* St. Louis, I. M. & S. R. Co., 25 Mo. App. 650.

[352] Lafayette & I. R. Co. *v.* Ehman, 30 Ind. 83.

[353] St. Louis, A. & T. H. R. Co. *v.* Linder, 39 Ill. 433.

[354] St. Louis, I. M. & S. R. Co. *v.* Biggs, 50 Ark. 169.

is treated as an owner.[355] Thus, one in possession of an animal taken up as an estray may recover for its death owing to the defendant's negligence;[356] even though, while attempting to comply with the law, he failed to post the animal in the proper manner.[357] Where the plaintiff had possession of a mule that he had not paid for, but considered his, and paid for after it was killed, it was held that he had a special property in the mule and could recover its full value.[358] It was held in Tennessee that the assignee of a cause of action against a company for killing stock may sue in the name of the party whose property was injured, for the assignee's use.[359] In Mississippi it was held that an action for the killing of animals, being *ex delicto*, cannot be brought in the name of one for the use of another.[360] A father cannot recover damages for the killing of stock owned by his son, though the latter is a minor.[361] One whose horse was frightened by the negligence of the company and ran over a third person who recovered damages against him, may recover from the company.[362]

The company is not liable for stock killed by one of its locomotives which was at the time being used by its servant without authority, for his own purposes and outside of the

[355] New York, C. & St. L. R. Co. *v.* Auer, 106 Ind. 219.

Where the plaintiff, a constable, had seized a horse under a distress warrant, and it escaped to the railway and was killed owing to the defendant's negligence, *semble*, the plaintiff had sufficient property in the horse to entitle him to sue: Simpson *v.* Great Western R. Co., 17 U. C. Q. B. 57.

[356] Peoria, P. & J. R. Co. *v.* McIntire, 39 Ill. 298.

[357] Chic. & N. R. Co. *v.* Shultz, 55 Ill. 421.

[358] St. Louis, I. M. & S. R. Co. *v.* Taylor, 57 Ark. 136.

[359] E. Tenn., V. & G. R. Co. *v.* Henderson, 1 Lea (Tenn.) 1.

An assignee may sue in his own name: Galveston, H. & S. A. R. Co. *v.* Freeman, 57 Tex. 156.

[360] Kan. City, M. & B. R. Co. *v.* Cantrell, 70 Miss. 329.

[361] Morris *v.* St. Louis, K. C. & N. R. Co., 58 Mo. 78.

[362] Nashua I. & S. Co. *v.* Worcester & N. R. Co., 62 N. H. 159.

line of his employment.[363] The engineer is liable over to the company for an injury resulting from his gross negligence.[364] In a New York case it was held that the engineer and fireman and the company were all responsible, either jointly or severally, for an injury resulting from negligence in conducting the train.[365]

The question as to liability where the road has been leased or is operated by two companies is one largely dependent on statutory regulations. In Indiana, the corporation owning the railroad is liable for damages by another company running trains in its own name, and may be sued alone.[366] A company is liable for an injury by the train of another company in its exclusive use and possession.[367] In Missouri, a company running its trains over part of another company's road is liable for killing an animal thereon.[368] Where two companies jointly operate a given train, either is or both are liable for the value of a horse negligently killed thereby.[369] In New York, all trains permitted by a company are treated as its trains and it is liable even where the engine doing the injury belonged to another company.[370] In Canada a company is liable for an injury by a train of another company to which it had granted running powers over its track.[371]

Where the road has been leased, the lessee operating it in its own name is not liable for killing stock in Indiana;[372]

[363] Cousins *v.* Hannibal & St. J. R. Co., 66 Mo. 572; N. Y., T. & M. R. Co. *v.* Sutherland, 3 Tex. App. (Civ. Cas.) 177.

[364] Chic. & R. I. R. Co. *v.* Hutchins, 34 Ill. 108.

[365] Suydam *v.* Moore, 8 Barb. (N. Y.) 358.

[366] Indianapolis & M. R. Co. *v.* Solomon, 23 Ind. 534; Ft. Wayne, M. & C. R. Co. *v.* Hinebaugh, 43 id. 354.

[367] Huey *v.* Indianap. & V. R. Co., 45 Ind. 320.

[368] Farley *v.* St. Louis, K. C. & N. R. Co., 72 Mo. 338.

[369] Moling *v.* Barnard, 65 Mo. App. 600.

[370] Dolan *v.* Newburgh, D. & C. R. Co., 120 N. Y. 571.

[371] Can. Pac. R. Co. *v.* Falardeau, 16 Queb. L. Rep. 298.

[372] Pittsb., C. & St. L. R. Co. *v.* Hannon, 60 Ind. 417; Cinc., H. & D. R. Co. *v.* Bunnell, 61 id. 183.

nor does the lessee take the franchise subject to liability for the killing of stock before the lease.[373] In Iowa, where two companies operate trains on one road, one as owner and the other as lessee, each is liable only for the stock killed by its own trains.[374] In South Carolina, a company leasing its road is still liable for the killing of stock by the negligence of its lessees.[375] In Texas, where a railroad is without authority of law leased to another company, both companies are liable for injuries thereon.[376] But a company is not liable for stock killed where the road and cars are in possession of and managed by independent contractors in the construction of the road.[377]

An action cannot be brought against a company where stock was run over after the company had ceased to own or control the road and its franchises had passed to other corporations.[378] But in Indiana it has been held that the mere appointment of a receiver does not relieve the company from liability: the receiver operates the road subject to that liability.[379] In Texas, however, it has been held that a company is not liable for the killing of an animal on its track where the road was at the time being operated by a receiver, unless its property has been since returned to it without sale.[380] In Missouri, a trustee under a mortgage in possession of and operating the road has been held liable.[381] The

[373] Pittsburg, C. & St. L. R. Co. *v.* Kain, 35 Ind. 291.

[374] Stephens *v.* Davenport & St. P. R. Co., 36 Ia. 327; Clary *v.* Ia. Midland R. Co., 37 id. 344.

See Liddle *v.* Keokuk, Mt. P. & M. R. Co., 23 Ia. 378, distinguished in Stewart *v.* Chic. & N. R. Co., 27 id. 282.

[375] Harmon *v.* Columbia & G. R. Co., 28 S. C. 401.

[376] Internat. & G. N. R. Co. *v.* Dunham, 68 Tex. 231.

[377] Houston & G. N. R. Co. *v.* Van Bayless, 1 Tex. App. (Civ. Cas.) 247.

[378] Western R. Co. *v.* Huse, 70 Ala. 565; Same *v.* Davis, 66 id. 578.

[379] Ohio & Miss. R. Co. *v.* Fitch, 20 Ind. 498; McKinney *v.* Ohio & M. R. Co., 22 id. 99; Louisville, N. A. & C. R. Co. *v.* Cauble, 46 id. 277.

[380] Dayhoff *v.* Internat. & G. N. R. Co. (Tex. Civ. App.), 26 S. W. Rep. 517.

[381] Farrell *v.* Un. Trust Co., 77 Mo. 475.

effect of fencing statutes in determining who is the proper defendant will be discussed in the next chapter.[382]

A general averment of negligence is sufficient, though it should appear that such negligence was the proximate cause of the injury.[383] Nor need gross negligence be averred.[384] But where the answer alleges gross negligence in the plaintiff, the particular act or omission in which such gross negligence consisted should be averred.[385] Where the statute makes the fact of injury *prima facie* evidence of negligence, an averment that the animal was injured by the defendant's train sufficiently alleges negligence.[386] Where the plaintiff sues for an intentional and wilful injury, he cannot recover on the ground that the engineer was negligent in not stopping the train.[387] Under a charge of negligence, evidence of failure to keep a proper lookout is admissible.[388] But if the declaration states that the injury was due to negligence after seeing the animals, the plaintiff cannot recover if the evidence shows the negligence was before seeing them.[389] And in a complaint for negligently and carelessly running the train, evidence cannot be given of negligence in permitting grass or water at or near the track.[390] So, a complaint that the defendant negligently ran over a cow refers to negligence in operating the train, and evidence of negligence in permitting bushes to grow near the track so as to conceal cattle

[382] See § 143, infra.

[383] Jeffersonville R. Co. *v.* Martin, 10 Ind. 416; Stanton *v.* Louisville & N. R. Co., 91 Ala. 382; Mack *v.* St. Louis, K. C. & N. R. Co., 77 Mo. 232; Berkley *v.* Chic., R. I. & P. R. Co. (Mo. App.), 3 West. Rep. 765; Jacksonville, T. & K. W. R. Co. *v.* Jones, 34 Fla. 286; Hawker *v.* Balt. & O. R. Co., 15 W. Va. 628.

[384] Chic., B. & Q. R. Co. *v.* Carter, 20 Ill. 390.

[385] Jeffersonville, M. & I. R. Co. *v.* Dunlap, 29 Ind. 426.

[386] St. Louis, I. M. & S. R. Co. *v.* Brown, 49 Ark. 253.

[387] Indiana, B. & W. R. Co. *v.* Overton, 117 Ind. 253.

[388] Omaha & R. V. R. Co. *v.* Wright, 49 Neb. 456.

[389] Hawker *v.* Balt. & O. R. Co., 15 W. Va. 628; Wallace *v.* San Antonio & A. P. R. Co. (Tex. Civ. App.), 42 S. W. Rep. 865.

[390] Milburn *v.* Han. & St. J. R. Co., 21 Mo. App. 426.

is inadmissible.[391] The word "reckless" applied to killing implies no more than a want of that degree of care required by law of the defendant's employees.[392] "Wilfully and willingly killed" means that the killing was intentional.[393]

A declaration charging negligence in not signalling, as directed by statute, and in running at a high rate of speed, as prohibited by the common law, was held bad for duplicity.[394] So, where negligence in running the train and also in failing to fence was charged.[395] But both grounds are traversed by filing the general issue.[396] And in a Missouri case it was held that as negligence in fact may consist of a number of negligent acts preceding the injury and leading up and contributing to it, the plaintiff, in stating a cause of action therefor, is not obliged to select one of these acts and rely upon it. Accordingly, a petition which alleged in one count a number of negligent acts on the part of the company conducing to the injury complained of was held to state but a single cause of action.[397] A claim for stock killed after suit commenced cannot be united with a claim for stock killed before the commencement of the suit.[398]

The petition, on motion, should be required to state the day, hour and place of injury and the course and character of the train with as much definiteness as possible.[399]

A conflict between the values given in the sworn statement and the petition, in an action for double damages, does

[391] Choate *v.* Southern R. Co. (Ala.), 24 South. Rep. 373.
[392] Louisville & N. R. Co. *v.* Barker, 96 Ala. 435.
[393] Chic., St. L. & P. R. Co. *v.* Nash, 1 Ind. App. 298; Same *v.* Same (Ind.), 24 N. E. Rep. 884.
[394] Louisville, E. & St. L. R. Co. *v.* Hill, 29 Ill. App. 582.
[395] Harris *v.* Wabash R. Co., 51 Mo. App. 125.
[396] Chic., B. & Q. R. Co. *v.* Magee, 60 Ill. 529.
[397] Hill *v.* Mo. Pac. R. Co., 121 Mo. 477, affirming 49 Mo. App. 520.
[398] Toledo, P. & W. R. Co. *v.* Arnold, 49 Ill. 178.
[399] Little Rock & F. S. R. Co. *v.* Smith (Ark.), 50 S. W. Rep. 502.

not, in the absence of proof of fraud, prevent the recovery of double damages.[400] Although the complaint alleges the value of the animal to be at the jurisdictional amount, the cause should be at once dismissed where the jury find the value to be less than that amount.[401]

In an action against two companies, their relation to one another need not be averred.[402]

The fact that the plaintiff negligently permitted his stock to stray, whereby the train or engine was damaged, cannot be set up by way of counter-claim.[403]

136. Evidence.—It is not proposed here to discuss at length the law of Evidence as it has been applied in the numberless actions that have been brought against railroad companies to recover damages for injuries to animals. There are some principles of importance, however, that, being peculiar to cases of this kind, require some statement and comment in this place.[404]

It has been held in nearly all the cases that it is incumbent on the plaintiff, in a common-law action against the company for negligence, to prove such negligence: the mere fact of the injury to the animal is not *prima facie* evidence of negligence.[405] In many of the cases cited in the note the decision

[400] Valleau *v.* Chic., M. & St. P. R. Co., 73 Ia. 723.

[401] Louisville, N. A. & C. R. Co. *v.* Johnson, 67 Ind. 546.

[402] Indianap., C. & L. R. Co. *v.* Warner, 35 Ind. 515.

[403] Terre Haute & I. R. Co. *v.* Pierce, 95 Ind. 496; Lake Shore & M. S. R. Co. *v.* Van Auken, 1 Ind. App. 492; Simkins *v.* Columbia & G. R. Co., 20 S. C. 258.

And see Louisv. & N. R. Co. *v.* Simmons, 85 Ky. 151; Centr. Branch Un. Pac. R. Co. *v.* Walters, 24 Kan. 504; Jenkins *v.* New Orleans, O. & G. W. R. Co., 15 La. Ann. 118.

See, in general, on the subject of Pleading, 1 Rap. & Mack Dig. Ry. Law 246-278.

[404] For a large collection of cases on the law of evidence as applied to suits of this kind against railway corporations, the reader is referred to 1 Rap. & Mack Dig. Ry. Law 278-319.

[405] See Denver & R. G. R. Co. *v.* Henderson, 10 Colo. 1; Ga. R. & Bkg.

rests partly on the ground that the company was shown not to be in fault so far as the presence of the animals on the track was concerned, there being either a lawful fence or none being required. By statute now in many of the States, the fact of injury or death is made *prima facie* evidence of negligence, sometimes only in cases where the company has failed to fence properly, sometimes irrespective of any such obligation.[406] Such statutes are in force in Alabama,[407]

Co. *v.* Anderson, 33 Ga. 110; Chic. & N. R. Co. *v.* Barrie, 55 Ill. 226; Jeffersonville, M. & I. R. Co. *v.* Huber, 42 Ind. 173; Eddy *v.* Lafayette, 49 Fed. Rep. 798; Comstock *v.* Des Moines V. R. Co., 32 Ia. 376; Schneir *v.* Chic., R. I. & P. R. Co., 40 id. 337; Day *v.* New Orleans Pac. R. Co., 36 La. Ann. 244; Knight *v.* New Orleans, O. & G. W. R. Co., 15 id. 105; Locke *v.* St. Paul & P. R. Co., 15 Minn. 350; Mobile & O. R. Co. *v.* Hudson, 50 Miss. 572; Wasson *v.* McCook, 70 Mo. App. 393; Warren *v.* Chic., M. & St. P. R. Co., 59 id. 367; Brown *v.* Hannibal & St. J. R. Co., 33 Mo. 309; Burlington & M. R. R. Co. *v.* Wendt, 12 Neb. 76; Walsh *v.* Virginia & T. R. Co., 8 Nev. 110; Atchison, T. & S. F. R. Co. *v.* Walton, 3 N. M. 530; Terry *v.* N. Y. Cent. R. Co., 22 Barb. (N. Y.) 574; Scott *v.* Wilm. & R. R. Co., 4 Jones L. (N. C.) 432; Pittsb., Cinc. & St. L. R. Co. *v.* McMillan, 37 O. St. 554; Same *v.* Heiskell, 38 id. 666; Bettye *v.* Houston & C. T. R. Co., 26 Tex. 604; Lyndsay *v.* Conn. & P. R. R. Co., 27 Vt. 643; Orange, A. & M. R. Co. *v.* Miles, 76 Va. 773; Talbott *v.* W. Va., C. & P. R. Co., 42 W. Va. 560; McMillan *v.* Ma. & N. R. Co., 4 Ma. 220.

See, as to presumptions and burden of proof in general, 1 Rap. & Mack Dig. Ry. Law 301, 307, 311.

[406] See 11 Am. & Eng. R. R. Cas. N. S. 849, 851 n.

[407] E. Tenn., V. & G. R. Co. *v.* Bayliss, 74 Ala. 150; Ala. Gr. South. R. Co. *v.* McAlpine, 80 id. 73; South & North Ala. R. Co. *v.* Bees, 82 id. 340; Nashville, C. & St. L. R. Co. *v.* Hembree, 85 id. 481; Louisville & N. R. Co. *v.* Kelsey, 89 id. 287; Savannah & W. R. Co. *v.* Jarvis, 95 id. 149; Chattanooga S. R. Co. *v.* Daniel (Ala.), 25 South. Rep. 197.

In Montgomery & E. R. Co. *v.* Perryman, 91 Ala. 413, the rule was held not to apply to a case where the statutory signals could not have been given, as where a standing freight-car broke loose and ran over a cow. But this decision was overruled in Birmingham Mineral R. Co. *v.* Harris, 98 id. 326.

That the plaintiff is not required to prove affirmatively that the train was run by the defendant, see South & North Ala. R. Co. *v.* Pilgreen, 62 id. 305.

Arkansas,[408] California,[409] Colorado,[410] Florida,[411] Georgia,[412] Indiana,[413] Iowa,[414] Kentucky,[415] Maryland,[416] Mississippi,[417] Missouri,[418] New Hampshire,[419] North Caro-

[408] Little Rock & Ft. S. R. Co. *v.* Finley, 37 Ark. 562; Same *v.* Henson, 39 id. 413; Same *v.* Jones, 41 id. 157; St. Louis, I. M. & S. R. Co. *v.* Taylor, 57 id. 136; St. Louis & S. F. R. Co. *v.* Thomason, 59 id. 140.

The statute makes the fact of "killing" *prima facie* evidence that it was done by the train, and this does not extend to other forms of injury. But when it is proved that the injury was done by the train, then the same presumption of negligence arises against the company as in cases of killing: St. Louis, I. M. & S. R. Co. *v.* Hagan, 42 id. 122.

In St. Louis & S. F. R. Co. *v.* Sageley, 56 id. 549, it was held that, where a dead animal is found near a railroad track, there is no legal presumption that it was killed at all or, if killed, that it was killed on the track or by a train.

[409] McCoy *v.* Cal. Pac. R. Co., 40 Cal. 532; Orcutt *v.* Pac. Coast R. Co., 85 id. 291.

[410] Atchison, T. & S. F. R. Co. *v.* Cahill, 11 Colo. App. 245; Denver & R. G. R. Co. *v.* Henderson, 10 Colo. 1.

But the burden is on the plaintiff where it is shown that the road was properly fenced or that no fence was required: Ibid.

[411] Jacksonville, T. & K. W. R. Co. *v.* Wellman, 26 Fla. 344; Same *v.* Garrison, 30 id. 567.

Otherwise where the road is properly fenced: Savannah, F. & W. R. Co. *v.* Rice, 23 id. 575.

[412] Ga. R. & Bkg. Co. *v.* Monroe, 49 Ga. 373; Same *v.* Bird, 76 id. 13; Same *v.* Wilhoit, 78 id. 714.

[413] Where the road is not fenced: Indianapolis & C. R. Co. *v.* Means, 14 Ind. 30.

[414] Brentner *v.* Chic., M. & St. P. R. Co., 68 Ia. 530.

[415] Ky. Cent. R. Co. *v.* Lebus, 14 Bush (Ky.) 518; Louisville & N. R. Co. *v.* Simmons, 85 Ky. 151; Grundy *v.* Louisville & N. R. Co. (Ky.), 2 S. W. Rep. 899.

[416] Keech *v.* Baltimore & W. R. Co., 17 Md. 32; Northern Central R. Co. *v.* Ward, 63 id. 362.

[417] Vicksburg & M. R. Co. *v.* Hamilton, 62 Miss. 503; New Orleans & N. R. Co. *v.* Bourgeois, 66 id. 3; Louisville, N. O. & T. R. Co. *v.* Smith, 67 id. 15; Kansas City, M. & B. R. Co. *v.* Doggett, Ibid. 250; Roberds *v.* Mobile & O. R. Co., 74 id. 334.

[418] Where the company failed to fence: Wymore *v.* Hannibal & St. J. R. Co., 79 Mo. 247; Turner *v.* St. Louis & S. F. R. Co., 76 id. 261.

[419] Where the owner is not at fault: Smith *v.* Eastern R. Co., 35 N. H. 357; White *v.* Concord R. Co., 30 id. 188.

lina,[420] South Dakota,[421] and Tennessee.[422] In all these States the presumption is, of course, one that may be overcome by evidence on behalf of the defendant. In Maryland the statute was held not applicable where the team killed was at the time under the control of a driver, but only where the animals were straying or not under control when they were injured.[423] But in North Carolina the statutory presumption of negligence was held not to be rebutted where the animal was hitched to a wagon, but to apply as well where it was under control as where it was running at large.[424]

The South Carolina cases go further than the above cases and hold that, quite apart from any statute, where a forcible injury by the company is shown, the burden of disproving negligence is on the defendant.[425] This rule was followed also in Wisconsin, though it was held not to apply where there was no evidence that the cattle killed were lawfully on the highway, as they were presumed to be unlawfully there.[426] And in South Carolina the rule has been held not to apply where the animal killed is a dog.[427]

[420] Randall *v.* Richmond & D. R. Co., 107 N. C. 748.

Otherwise, where the action is not brought within six months from the time of killing: Jones *v.* No. Car. R. Co., 67 id. 122.

[421] Bates *v.* Fremont, E. & M. V. R. Co., 4 S. D. 394; Keilbach *v.* Chic., M. & St. P. R. Co. (S. D.), 78 N. W. Rep. 951.

The Dakota statute was held to create no new liability but simply to change the order of proof: Huber *v.* Chic., M. & St. P. R. Co., 6 Dak. 392.

[422] Horne *v.* Memphis & O. R. Co., 1 Coldw. (Tenn.) 72.

[423] Annapolis & B. S. L. R. Co. *v.* Pumphrey, 72 Md. 82.

[424] Randall *v.* Richmond & D. R. Co., 104 N. C. 410, 107 id. 748. Shepherd, J., dissenting, considered that the words "cattle and live stock" were used exclusively as applicable to animals straying on the road-bed and not under the direction and control of the owner.

[425] Danner *v.* So. Car. R. Co., 4 Rich. L. (S. C.) 329; Murray *v.* Same, 10 id. 227; Fuller *v.* Pt. Royal & A. R. Co., 24 S. C. 132; Walker *v.* Columbia & G. R. Co., 25 id. 141; Joyner *v.* So. Car. R. Co., 26 id. 49; Mack *v.* South Bound R. Co., 52 id. 323.

[426] Galpin *v.* Chic. & N. R. Co., 19 Wis. 604.

[427] Wilson *v.* Wil. & M. R. Co., 10 Rich. L. (S. C.) 52. And see Jemison

What evidence is sufficient to show that the animal was killed by a train depends altogether upon the circumstances in each case, and no general rules can be laid down. The presence of the dead animal on or near the track, marks of blood, hairs, signs of dragging, etc., are all matters to be considered in deciding the question, it being one that may be settled by purely circumstantial evidence.[428] A statute is constitutional which prohibits the burning, mutilating, hauling off, or burying by a railroad company of stock killed by trains.[429]

Where the evidence of negligence or contributory negligence is doubtful, it should be left in the hands of the jury.[430] Evidence is admissible as to the manner in which the engine

v. Southwestern R. Co., 75 Ga. 444. But see Jones *v.* Bond, 40 Fed. Rep. 281, where the presumption under the Mississippi statute was applied to the case of a dog.

[428] As illustrations of this, see St. Louis, I. M. & S. R. Co. *v.* Parks, 60 Ark. 187; Little Rock & F. S. R. Co. *v.* Wilson (Ark.), 50 S. W. Rep. 995; Van Slyke *v.* Chic., St. P. & K. C. R. Co., 80 Ia. 620; Daugherty *v.* Chic., M. & St. P. R. Co., 87 id. 276; King *v.* Chic., R. I. & P. R. Co., 88 id. 704; Jacksonville, T. & K. W. R. Co. *v.* Garrison, 30 Fla. 557; Louisville & N. R. Co. *v.* Lancaster (Ala.), 25 South. Rep. 733; Union Pac. R. Co. *v.* Bullis, 6 Colo. App. 64; Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 108; Louisville, N. A. & C. R. Co. *v.* Hixon, 101 Ind. 337; Mayfield *v.* St. Louis & S. F. R. Co., 91 Mo. 296; Blewett *v.* Wyandotte, K. C. & N. R. Co., 72 id. 583; Perkins *v.* St. Louis, I. M. & S. R. Co., 103 id. 52; Gilbert *v.* Mo. Pac. R. Co., 23 Mo. App. 65; Vaughan *v.* Kansas City, S. & M. R. Co., 34 id. 141; Jackson *v.* St. Louis, I. M. & S. R. Co., 36 id. 170; Internat. & G. N. R. Co. *v.* Hughes, 81 Tex. 184; San Antonio & A. P. R. Co. *v.* Leal, 4 Tex. App. Civ. Cas. 213; Mo. Pac. R. Co. *v.* Earle (Tex. App.), 14 S. W. Rep. 1068; Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. Rep. 347.

See, also, 1 Rap. & Mack Dig. Ry. Law 294.

[429] Bannon *v.* State, 49 Ark. 167.

[430] Kansas City, M. & B. R. Co. *v.* Watson, 91 Ala. 483; Same *v.* Doggett, 67 Miss. 250; Kent *v.* Louisville, N. O. & T. R. Co., Ibid. 608; Chic. & A. R. Co. *v.* Hill, 24 Ill. App. 619; Mo. Pac. R. Co. *v.* Vandeventer, 28 Neb. 112; Sleeper *v.* Worcester & N. R. Co., 58 N. H. 520; Atlantic Coast Elec. R. Co. *v.* Rennard (N. J.), 42 Atl. Rep. 1041; Sheldon *v.* Chic., M. & St. P. R. Co. (S. D.), 62 N. W. Rep. 955.

And see 1 Rap. & Mack Dig. Ry. Law 321-327.

that caused the injury was operated;[431] the direction in which it was running;[432] the speed at which it was going;[433] the distance on the track that was visible.[434] Failure to give signals is *prima facie* evidence of negligence.[435] But the law does not presume the injury to have been caused by the failure to signal.[436] And evidence as to whether the stock would probably have been frightened off the track by signals has been held immaterial where there was a statutory duty to signal.[437] Evidence that after the accident sign-posts had been put up and whistles blown at the crossing is inadmissible.[438] So, of evidence that the company after the accident took up planks at the crossing and replaced them by new ones.[439] An opinion of an engineer, as an expert, that a whistle was blown unnecessarily is inadmissible.[440]

Imperfect light and fog at the time of the accident are circumstances that the jury may take into consideration in determining negligence.[441] The escape of electricity from a street railway company's plant to the injury of a horse being driven along the street is presumptive evidence of negligence.[442]

Where it is sought to lessen damages by showing that some of the injured cattle would not have died but for want

[431] Briggs *v.* St. Louis & S. F. R. Co., 111 Mo. 168.

[432] Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 108.

[433] Toledo, P. & W. R. Co. *v.* Deacon, 63 Ill. 91; Chic., B. & Q. R. Co. *v.* Haggerty, 67 id. 113. See Voak *v.* North. Cent. R. Co., 75 N. Y. 320.

[434] Sheldon *v.* Chic., M. & St. P. R. Co. (S. D.), 62 N. W. Rep. 955; Chic. & A. R. Co. *v.* Legg, 32 Ill. App. 218; Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. Rep. 347.

[435] Persinger *v.* Wabash, St. L. & P. R. Co., 82 Mo. 196. And see § 132, supra.

[436] Chic. & A. R. Co. *v.* Hanley, 26 Ill. App. 351.

[437] Kendrick *v.* Chic. & A. R. Co., 81 Mo. 521.

[438] Louisville & N. R. Co. *v.* Bowen (Ky.), 39 S. W. Rep. 31.

[439] Payne *v.* Troy & B. R. Co., 9 Hun (N. Y.) 526. And see Hudson *v.* Chic. & N. R. Co., 59 Ia. 581.

[440] Chic. & E. R. Co. *v.* Cummings (Ind. App.), 53 N. E. Rep. 1026.

[441] St. Louis, I. M. & S. R. Co. *v.* Vincent, 36 Ark. 451.

[442] Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219.

of proper care, it devolves upon the company to show such want of proper care.[443]

It has been held in a Georgia case that where the company had the fireman in court, no inference was to be drawn against it because it did not call him, as the plaintiff might have done so;[444] but, ordinarily, the fireman should be called to rebut the presumption of negligence.[445] The report of an employee of the company as to the killing, if admissible as evidence for the company, is not so unless it was his duty to make such report and it was made contemporaneously; nor should oral testimony be stricken out on the ground that the report is better evidence.[446]

Where the statute provided that, in case of injury, the body of the animal should belong to the company, unless the owner took the same in part payment of damages, the admission of the company's agent that he had ordered the animal to be killed and the beef to be sold for the company's benefit was held to be *prima facie* an admission of negligence.[447]

Evidence that other animals had been killed at the same crossing is ordinarily inadmissible.[448] But evidence to show that other horses had been caught in the same way in the crossing is admissible on the question of notice.[449]

The fact that the company had not exercised proper care at other times and places is not admissible in evidence.[450]

[443] Gulf, C. & S. F. R. Co. *v.* Hudson, 77 Tex. 494.

[444] Davis *v.* Cent. R. Co., 75 Ga. 645.

[445] E. Tenn., V. & G. R. Co. *v.* Culler, 75 Ga. 704.

[446] Jacksonville, T. & K. W. R. Co. *v.* Wellman, 26 Fla. 344.

In Ohio & M. R. Co. *v.* Atteberry, 43 Ill. App. 80, the report of a section foreman to the company and his opinion as to the cause of the injury were held not to be competent testimony.

[447] McCauley *v.* Mont. Cent. R. Co., 11 Mont. 483.

[448] Hudson *v.* Chic. & N. R. Co., 59 Ia. 581; Croddy *v.* Chic., R. I. & P. R. Co., 91 id. 598; North Chic. St. R. Co. *v.* Hudson, 44 Ill. App. 60; Ga. R. & Bkg. Co. *v.* Walker, 87 Ga. 204.

[449] Toledo, St. L. & K. C. R. Co. *v.* Milligan, 2 Ind. App. 578.

[450] Miss. Cent. R. Co. *v.* Miller, 40 Miss. 45.

So, in an action for injuries caused by frightening a horse, evidence

Evidence of the liability of a horse to be frightened by moving trains is admissible on the question of contributory negligence.[451] Where a horse was frightened by an electric shock, the words spoken by the driver in endeavoring to control it were held admissible in evidence; also, testimony of his previous experience in a similar case, to account for his words and conduct.[452] Evidence of the general reputation of a mare among horsemen and turfmen, with reference to her being rattle-headed or disposed to break when racing, was held not admissible.[453] Evidence of the conduct of horses in general is admissible to show how a particular horse would be likely to act.[454]

Witnesses who are familiar with the kind of animals sued for are competent to testify as to their value, without having ever seen them,[455] and without being experts.[456] But statements made as to the pedigree of a heifer killed, as that she was a thoroughbred, are not competent evidence where it does not appear that the party making the statements was dead or beyond the process of the court, and, on the same principle, a paper purporting to give such pedigree is not admissible.[457]

In order to recover, the plaintiff must give some evidence

that the motorman had been careful in meeting other horses under similar circumstances is inadmissible: Sunderland *v.* Pioneer Fireproof Constr. Co., 78 Ill. App. 102.

[451] Folsom *v.* Concord & M. R. Co. (N. H.), 38 Atl. Rep. 209.

[452] Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219.

[453] Cincinnati, H. & I. R. Co. *v.* Jones, 111 Ind. 259.

[454] Folsom *v.* Concord & M. R. Co., supra.

[455] Smith *v.* Indianapolis & St. L. R. Co., 80 Ind. 233; Atchison, T. & S. F. R. Co. *v.* Gabbert, 34 Kan. 132.

Information obtained by the plaintiff from persons in another State acquainted with the class of the animal killed, is admissible: Gulf, C. & S. F. R. Co. *v.* Wedel (Tex. Civ. App.), 42 S. W. Rep. 1030.

[456] Ala. G. S. R. Co. *v.* Moody, 92 Ala. 279.

As to the opinions of witnesses and experts, in general, see 1 Rap. & Mack Dig. Ry. Law 283, etc.

[457] Hamilton *v.* Wabash, St. L. & P. R. Co., 21 Mo. App. 152.

of the value of the animal.[458] Evidence of the excellence of its sires is admissible.[459] And the defendant may show its cost to the plaintiff when he purchased it a short time before.[460] So, where the plaintiff testified that the animal was worth seventy-five dollars, it was held error to refuse to permit the defendant to introduce in evidence to contradict him an assessment list of his property, signed and verified by him, in which he returned the animal for taxation as worth five dollars.[461] The appraisement secured by the owner is evidence of the true value; but this may be explained or rebutted.[462] And in an action by an administratrix against the company it was held that her appraisement was not evidence of the value of the horses killed, as against the estate.[463] Proof of actual sales of similar animals is admissible to show the value of those killed.[464]

137. Damages.—Where an animal has been killed, its market value is recoverable by the plaintiff, deducting the value of the carcass, if that has been used by him.[465] Where there was no evidence of the value of the carcass, it was held that the price received for the hide should be deducted.[466] The owner is entitled to a reasonable time in which to dispose of the dead body to the best advantage: what is such reasonable time is a question for the jury to decide.[467] Where,

[458] Southern R. Co. *v.* Varn, 102 Ga. 764; St. Louis, A. & T. R. Co. *v.* Pickens, 4 Tex. App. (Civ. Cas.) 54.

[459] Ohio & M. R. Co. *v.* Stribling, 38 Ill. App. 17; Richmond & D. R. Co. *v.* Chandler (Miss.), 13 South. Rep. 267.

[460] Jacksonville, T. & K. W. R. Co. *v.* Jones, 34 Fla. 286.

[461] Fordyce *v.* Hardin, 54 Ark. 554.

[462] E. Tenn., V. & G. R. Co. *v.* Bayliss, 74 Ala. 150.

[463] Morrison *v.* Burlington, C. R. & N. R. Co., 84 Ia. 663.

[464] Sinclair *v.* Mo., K. & T. R. Co., 70 Mo. App. 588.

[465] Ga. Pac. R. Co. *v.* Fullerton, 79 Ala. 298; Boing *v.* Raleigh & G. R. Co., 91 N. C. 199; Roberts *v.* Richmond & D. R. Co., 88 id. 560; Case *v.* St. Louis & S. F. R. Co., 75 Mo. 668.

[466] Godwin *v.* Wilmington & W. R. Co., 104 N. C. 146.

[467] Toledo, P. & W. R. Co. *v.* Parker, 49 Ill. 385; Ill. Cent. R. Co. *v.*

however, he does not discover the carcass until it is swollen, he need not use due diligence to dispose of it in order to recover the full value.[468] And in some jurisdictions it has been held that the owner is not bound to make use of the carcass and that the damages are not to be diminished by its value, unless he derives a benefit therefrom or elects to appropriate it to himself.[469]

Where there is no market value at the particular place where the animal is killed, the value at the nearest market is ordinarily the measure of damages.[470] Where the animal is badly wounded and the owner kills it to put it out of suffering, he may recover its full value.[471] Where it escaped from a car and was killed by another train, the cause of action being negligence outside of the contract of transportation, it was held that the plaintiff might recover the full value and was not limited to the *maximum* amount stated in the contract, though the contract of affreightment was admissible as evidence on the question of value.[472]

In a leading text-book on this subject it is said that, "there is a divergence of view as to the right to interest on damages

Finnigan, 21 id. 646. As to the constitutionality of a statute prohibiting the mutilation of a carcass by the company, see Bannon *v.* State, 49 Ark. 167, cited in § 136, supra.

[468] Rockford, R. I. & St. L. R. Co. *v.* Lynch, 67 Ill. 149.

[469] Indianapolis, P. & C. R. Co. *v.* Mustard, 34 Ind. 50; Ohio & Miss. R. Co. *v.* Hays, 35 id. 173; Burger *v.* St. Louis, K. & N. R. Co., 52 Mo. App. 119 (reversed in 123 Mo. 679 on another ground).

The contrary doctrine is said, in Ga. Pac. R. Co. *v.* Fullerton, supra, "to be better sustained by reason and authority" and the Indiana cases are said to be based upon a statute expressly declaring the rule therein laid down. And see the Illinois and North Carolina cases cited supra.

[470] Tex. & Pac. R. Co. *v.* McDowell, 7 Tex. Civ. App. 341; St. Louis, A. & T. R. Co. *v* Pickens, 4 Tex. App. (Civ. Cas.) 54.

Where there is no evidence to the contrary, the court will not set aside the verdict on a mere supposition that the basis of estimation was not the market value: Jacksonville, T. & K. W. R. Co. *v.* Wellman, 26 Fla. 344.

[471] Atchison, T. & S. F. R. Co. *v.* Ireland, 19 Kan. 405.

[472] Louisville & N. R. Co. *v.* Kelsey, 89 Ala. 287.

resulting from the killing of animals by the negligence of railroad companies. Under the statutes of Missouri, Colorado, Georgia, Kansas and Illinois, interest is not allowed. It is otherwise in Minnesota, Arkansas and Alabama from the time of the injury, and in Wisconsin from the commencement of the action." [473] But in Georgia the jury may add to the value of the animals a sum equal to the interest on such value, finding and returning it, however, as damages, not as interest.[474] In Ohio, also, interest is allowed from the date of the accident,[475] and in Utah from the time of instituting the suit.[476] In Iowa it has been held that where the statute makes the company liable for double the damages the owner of the animal has sustained, interest on the value of it is not recoverable.[477] And in Kansas and Texas it has been held that no interest can be recovered in a statutory action unless the statute provides for it.[478] But in the later Texas cases this rule is not followed and interest is allowed.[479]

The constitutionality of statutes giving double damages for stock killed through the negligence of railroad companies has been generally sustained:[480] though there are decisions that deny it.[481] A statute absolutely allowing double damages

[473] 1 Suth. Dams., 2d ed., § 355.

See Meyer *v.* Atlantic & P. R. Co., 64 Mo. 542; Toledo, P. & W. R. Co. *v.* Johnston, 74 Ill. 83; Varco *v.* Chic., M. & St. P. R. Co., 30 Minn. 18; St. Louis, I. M. & S. R. Co. *v.* Biggs, 50 Ark. 169; Ala. G. S. R. Co. *v.* McAlpine, 75 Ala. 113; Ga. Pac. R. Co. *v.* Fullerton, 79 id. 298.

See also the New York and Michigan cases cited in § 144, infra.

[474] Western & A. R. Co. *v.* Brown, 102 Ga. 13.

[475] Balt. & O. R. Co. *v.* Schultz, 43 O. St. 270.

[476] Woodland *v.* Un. Pac. R. Co. (Utah), 26 Pac. Rep. 298.

[477] Brentner *v.* Chic., M. & St. P. R. Co., 68 Ia. 530.

[478] Atchison, T. & S. F. R. Co. *v.* Gabbert, 34 Kan. 132; Houston & T. C. R. Co. *v.* Muldrow, 54 Tex. 233.

[479] Houston & T. C. R. Co. *v.* Jones (Tex. Civ. App.), 40 S. W. Rep. 745; Gulf, C. & S. F. R. Co. *v.* Wedel (Tex. Civ. App.), 42 id. 1030; Tex. & Pac. R. Co. *v.* Scrivener (Tex. Civ. App.), 49 id. 649.

[480] See 1 Rap. & Mack Dig. Ry. Law 93.

[481] See Atchison & N. R. Co. *v.* Baty, 6 Neb. 37; Denver & R. G. R. Co. *v.* Outcalt, 2 Colo. App. 395.

for failure to give notice has been held unconstitutional as it does not consider the question of negligence nor of the owner's knowledge.[482] Most of these statutes make the liability of the company dependent on its failure to fence the track and will, accordingly, be considered in the next chapter.[483] A statute providing that the company shall be liable for twice the value of the animal killed by it when it fails to record a description of the animal and to mark its hide as required therein, was held to be penal in its nature: an action thereunder is subject to one year's limitation.[484] The owner cannot recover more than twice the amount of damages actually named by him in his statutory notice and affidavit.[485] It has been held not to be absolutely settled in practice whether double damages should be assessed by the jury or only single ones to be doubled by the court.[486]

Where the animal is injured the measure of damages is the difference in its value before and after the injury, with compensation for the care and attention required in its treatment, and for the loss of its use during the continuance of the injury.[487] The qualities of the animal are as much matters of value as its strength or action and, if they are impaired by the defendant's wrongful conduct, the owner is entitled to

[482] Jolliffe *v.* Brown, 14 Wash. 155.

That a statute making a company liable for a loss not due to its negligence may not be unconstitutional, see Louisville & N. R. Co. *v.* Belcher, 89 Ky. 193.

[483] See § 144, infra.

[484] Atchison, T. & S. F. R. Co. *v.* Tanner, 19 Colo. 559.

[485] Manwell *v.* Burlington, C. R. & N. R. Co., 80 Ia. 662.

[486] Memphis & L. R. Co. *v.* Carlley, 39 Ark. 246, citing Sedgwick on Meas. of Dams. But see Wood *v.* St. Louis, K. C. & N. R. Co., 58 Mo. 109, cited in § 144, infra.

[487] St. Louis, I. M. & S. R. Co. *v.* Biggs, 50 Ark. 169; Brown *v.* Wilmington City R. Co. (Del.), 40 Atl. Rep. 936; Cent. R. & Bkg. Co. *v.* Warren, 84 Ga. 329; Atlanta & W. P. R. Co. *v.* Hudson, 62 id. 679; Gillett *v.* Western R. Corp., 8 Allen (Mass.) 560; Keyes *v.* Minneapolis & St. L. R. Co., 36 Minn. 290; Pittsb., C., C. & St. L. R. Co. *v.* Kelly, 12 O. Circ. Ct. 341; Gulf, C. & S. F. R. Co. *v.* Keith, 74 Tex. 287.

compensation.[488] It is the owner's duty to use reasonable efforts to prevent loss and reduce the damage as much as possible, and where the stock are available after the injury, he cannot abandon them and then claim their full value.[489] He can recover only to the extent of the injury, and need not surrender the injured animal to the company.[490] Compensation for the care of an animal between the time of its injury and death cannot be recovered in addition to the value of the animal.[491]

Damages for the non-thriving of cattle owing to the construction of a railroad through the pasture in which they are feeding are not too remote to be recovered.[492] But where no recovery is sought for lack of business, the fact that the owner is a dairyman cannot be considered in assessing damages for killing cows.[493] Nor can the plaintiff recover for a severe nervous shock and mental pain and anxiety caused by her horse's being frightened by the company's unlawful act and running away.[494]

Exemplary damages are allowed, if the animal was injured or killed through gross negligence or wilfulness.[495]

Statutes allowing a reasonable attorney's fee to be recovered in an action brought against a railroad company for an injury to or the death of an animal have been held in some jurisdictions to be constitutional,[496] and, in others, to be un-

[488] English *v.* Mo. Pac. R. Co., 73 Mo. App. 232.

[489] Harrison *v.* Mo. Pac. R. Co., 88 Mo. 625.

[490] Jackson *v.* St. Louis, I. M. & S. R. Co., 74 Mo. 526.

[491] Cully *v.* Louisv. & N. R. Co. (Ky.), 41 S. W. Rep. 21.

[492] Balt. & O. R. Co. *v.* Thompson, 10 Md. 76, cited in § 131, supra.

[493] Parrin *v.* Mont. Cent. R. Co. (Mont.), 56 Pac. Rep. 315.

[494] Kalen *v.* Terre Haute & I. R. Co., 18 Ind. App. 202.

[495] Vicksburg & J. R. Co. *v.* Patton, 31 Miss. 156; Indianapolis, P. & C. R. Co. *v.* Mustard, 34 Ind. 50.

[496] Peoria, D. & E. R. Co. *v.* Duggan, 109 Ill. 537; Central Branch Un. Pac. R. Co. *v.* Nichols, 24 Kan. 242; Kan. Pac. R. Co. *v.* Mower, 16 id. 573; Jacksonville, T. & K. W. R. Co. *v.* Prior, 34 Fla. 271; Briggs *v.* St. Louis & S. F. R. Co., 111 Mo. 168; Perkins *v.* St. Louis, I. M. & S. R. Co., 103 id. 52; Ill. Cent. R. Co. *v.* Crider, 91 Tenn. 489. And see 49

constitutional as an attempt to grant special advantages to one class of litigants at the expense of another.[497] And a statute providing for a board to assess damages in stock cases and for taxing an attorney's fee, if either party refuses to abide by the assessment, was held unconstitutional, as the legislature had no right to substitute the board for the court without consent nor to tax the fee as a penalty in such a case.[498] Attorney's fees are not recoverable where the loss is chargeable to common-law negligence, but only in a statutory action.[499]

Statutes making the company absolutely liable in damages without regard to negligence on its part are unconstitutional.[500] So, also, are statutes that order the value of the animals to be fixed by appraisement or by an arbitrary schedule without regard to the right of the parties to trial by jury or to the actual value.[501] It is otherwise where the appraisement is made only *prima facie* evidence of the value of the animals.[502] A statute making the killing of cattle by a

Am. & Eng. R. R. Cas. 515 n, where the weight of authority is said to be in favor of the constitutionality of such statutes.

[497] South & North Ala. R. Co. *v.* Morris, 65 Ala. 193; Wilder *v.* Chic. & W. M. R. Co., 70 Mich. 382; Lafferty *v.* Same, 71 id. 35; Jolliffe *v.* Brown, 14 Wash. 155.

[498] St. Louis, I. M. & S. R. Co. *v.* Williams, 49 Ark. 492.

[499] Chic., M. & St. P. R. Co. *v.* Phillips, 14 Ill. App. 265; Wabash, St. L. & P. R. Co. *v.* Neikirk, 13 id. 387.

And they are not recoverable when a judgment against the plaintiff is reversed, unless he recovers at the subsequent trial: Rabbermann *v.* Pierce, 77 Ill. App. 405.

[500] Denver & R. G. R. Co. *v.* Wheatley, 7 Colo. App. 284; Cateril *v.* Un. Pac. R. Co., 2 Ida. 539; Bielenberg *v.* Mont. Un. R. Co., 8 Mont. 271; Oregon R. & N. Co. *v.* Smalley, 1 Wash. 206; Jensen *v.* Un. Pac. R. Co., 6 Utah 253.

[501] St. Louis, I. M. & S. R. Co. *v.* Williams, supra; Rio Grande Western R. Co. *v.* Vaughn, 3 Colo. App. 465; Denver & R. G. R. Co. *v.* Outcalt, 2 id. 395; Un. Pac. R. Co. *v.* Bullis, 6 id. 64; Denver & R. G. R. Co. *v.* Thompson (Colo. App.), 54 Pac. Rep. 402; Graves *v.* North. Pac. R. Co., 5 Mont. 536; Dacres *v.* Oregon R. & N. Co., 1 Wash. 525.

[502] Ill. Cent. R. Co. *v.* Crider, 91 Tenn. 489.

railroad company in certain counties a misdemeanor and subjecting the president, superintendent and other officers of such company to indictment if they refuse to pay or refer to arbitration the claim for compensation, has been held unconstitutional.[503] A statute conferring jurisdiction upon justices of the peace in actions against railroad companies for the killing of stock, without regard to the value of the animal killed or the amount claimed, is constitutional.[504]

A release of the right of way and of damages sustained by the work does not release damages for injuries to cattle caused by the running of trains.[505]

[503] State *v.* Divine, 98 N. C. 778.
[504] Steele *v.* Mo. Pac. R. Co., 84 Mo. 57.
[505] Cleveland, C., C. & I. R. Co. *v.* Crossley, 36 Ind. 370.

TITLE VII.

INJURIES TO ANIMALS BY RAILWAYS.

CHAPTER II.

LIABILITY UNDER THE STATUTES REGULATING FENCES.

138. General liability for failure to fence.
139. To what owners the company is liable.
140. Crossings; gates.
141. Cattle-guards.
142. Where fences are necessary; station grounds.
143. Action; parties; pleading.
144. Evidence; damages.

138. General Liability for Failure to Fence.—At the common law it is not necessary that railway companies should erect and maintain fences in order to keep animals off their tracks, though they are bound to use every reasonable care to prevent such straying.[1] In many of the States this rule still prevails and the company, in the absence of negligence, is not liable for injuring or killing an animal on an unfenced track.[2] In other States, though the company is not obliged by law to fence, the absence of a fence where one might have been

[1] Buxton *v.* North Eastern R. Co., L. R. 3 Q. B. 549; Vandegrift *v.* Delaware R. Co., 2 Houst. (Del.) 287; Campbell *v.* N. Y. & N. E. R. Co., 50 Conn. 128.

[2] See Locke *v.* St. Paul & Pac. R. Co., 15 Minn. 350; Day *v.* New Orleans Pac. R. Co., 36 La. Ann. 244; Jones *v.* Western N. C. R. Co., 95 N. C. 328; New York & Erie R. Co. *v.* Skinner, 19 Pa. St. 298; Pa. R. Co. *v.* Riblet, 66 id. 164; Layne *v.* Ohio River R. Co., 35 W. Va. 438; Gulf, C. & S. F. R. Co. *v.* Ellidge, 49 Fed. Rep. 356; Chic., R. I. & P. R. Co. *v.* Woodworth (Ind. Ty.), 35 S. W. Rep. 238.

erected is regarded as negligence.[3] But in a Washington case it was held that where a statute made the company liable except where there was a fence and there was no statute making it the company's duty to have a fence, the statute was unconstitutional as exacting a penalty from one guilty of no fault.[4]

Where railroad companies are required by statute to fence their tracks, one of the principal objects in view appears to have been the protection of passengers and employees travelling on the trains.[5]

The statute applies, however, to freight trains as well as to passenger trains.[6] So far as intruders on the track are concerned, fences are required for the protection of animals, not of reasonable beings.[7] And the failure to fence does not make the company liable for injuries caused by animals passing from the track to adjacent fields;[8] nor for the death of stock caused by falling down an unfenced embankment on to

[3] See Edwards *v.* Hannibal & St. J. R. Co., 66 Mo. 567; Hindman *v.* Oreg. R. & N. Co., 17 Oreg. 614; New York, C. & St. L. R. Co. *v.* Zumbaugh, 11 Ind. App. 107; Welsh *v.* Chic., B. & Q. R. Co., 53 Ia. 632.

In Missouri the failure to fence in unenclosed land will not make the company amenable unless the land is shown to be prairie land: Cary *v.* St. Louis, K. C. & N. R. Co., 60 Mo. 209.

And in Oregon it has been held that a statute prescribing a fence which shall be deemed sufficient makes fencing a duty and may make the liability absolute: Sullivan *v.* Oreg. R. & N. Co., 19 Oreg. 319.

In an Ohio case it was held that where the company fails to fence, it takes the risk of animals running on the track and must use ordinary care in such a case: Kerwhacker *v.* Cleveland, C. & C. R. Co., 3 O. St. 172.

[4] Oreg. R. & N. Co. *v.* Smalley, 1 Wash. 206.

[5] See Toledo & W. R. Co. *v.* Fowler, 22 Ind. 316; New Albany & S. R. Co. *v.* Maiden, 12 id. 10; Jeffersonville, M. & I. R. Co. *v.* Nichols, 30 id. 321; Mo. Pac. R. Co. *v.* Harrelson, 44 Kan. 253; Neversorry *v.* Duluth, S. S. & A. R. Co. (Mich.), 73 N. W. Rep. 125; Dickson *v.* Omaha & St. L. R. Co., 124 Mo. 140; Atchison, T. & S. F. R. Co. *v.* Reesman, 60 Fed. Rep. 370.

Otherwise in England: Buxton *v.* North Eastern R. Co., L. R. 3 Q. B. 549.

[6] Indianapolis & C. R. Co. *v.* Snelling, 16 Ind. 435.

[7] Nolan *v.* N. Y., N. H. & H. R. Co., 53 Conn. 461.

[8] Clark *v.* Hannibal & St. J. R. Co., 36 Mo. 202; Cannon *v.* Louisville, E. & St. L. C. R. Co., 34 Ill. App. 640.

the track;[9] nor for injuries to animals falling into wells o pits dug in the company's right of way without their knowl edge or consent.[10] And where the animal went on the track caught its foot in a hole and broke its leg, the injury was con sidered too remote and the company was held not liable.[11] But where an animal frightened by a train runs on an un-fenced track and is injured, the failure to fence is the prox-imate cause of the injury.[12]

It is impracticable here to consider all the statutes of the various States on the subject of fences. Such matters will be treated of only as are of more or less general importance.

The liability of the company for an injury resulting from its failure to perform its statutory duty of fencing is one that exists irrespective of further negligence on its own part or contributory negligence on the part of the plaintiff.[13]

[9] Sinard *v.* Southern R. Co., 101 Tenn. 473.

[10] Ill. Cent. R. Co. *v.* Carraher, 47 Ill. 333.

The statute was said to be "designed to protect the travelling community from accidents occasioned by stock getting upon the road and also to prevent damage to such stock. They were not required to fence their right of way to prevent cattle from falling into wells, pits or morasses."

See, also, Jones *v.* Western N. C. R. Co., 95 N. C. 328, where, however, there was no statute in question.

[11] Nelson *v.* Chic., M. & St. P. R. Co., 30 Minn. 74.

[12] Maher *v.* Winona & St. P. R. Co., 31 Minn. 401.

[13] McKinney *v.* Ohio & M. R. Co., 22 Ind. 99; Louisville, N. A. & C. R. Co. *v.* Whitesell, 68 id. 297; Williams *v.* New Albany & S. R. Co., 5 id. 111; Lafayette & I. R. Co. *v.* Shriner, 6 id. 141; Chic. & E. R. Co. *v.* Brannegan, 5 Ind. App. 540; Terre Haute & I. R. Co. *v.* Schaefer, Ibid 86: Cary *v.* St. Louis, K. C. & N. R. Co., 60 Mo. 209; Miles *v.* Hannibal & St. J. R. Co., 31 id. 407; Smith *v.* St. Louis, I. M. & S. R. Co. 91 id. 58; Talbot *v.* Minneapolis, St. P. & S. S. M. R. Co., 82 Mich. 66; Central Branch Un. Pac. R. Co. *v.* Nichols, 24 Kan. 242; Becker *v.* New York, L. E. & W. R. Co., 10 N. Y. Suppt. 413; Walsh *v* Virginia & T. R. Co., 8 Nev. 110; Cinc., N. O. & T. P. R. Co. *v* Stonecipher, 95 Tenn. 311; Gulf, C. & S. F. R. Co. *v.* Keith, 74 Tex. 287 Same *v.* Hudson, 77 id. 494; Same *v.* Cash, 8 Tex. Civ. App. 569 Norfolk & W. R. Co. *v.* Johnson, 91 Va. 661; Jolliffe *v.* Brown, 14 Wash 155; McCall *v.* Chamberlain, 13 Wis. 637; Heller *v.* Abbot, 79 id. 409

See, also, as to contributory negligence, the cases cited in § 134, supra

Where a fence is unnecessary or where a sufficient one has been erected, negligence must, of course, be shown.[14] The absolute liability imposed by statute applies only where the loss results either wholly or partly from the failure to fence; and where the plaintiff, in consequence of his barn being threatened with fire, turned his horses out and they strayed on the unfenced track and were killed, and it was shown that, even if the company had complied with the statute, the fence would have been destroyed by the fire for which it was not responsible, it was held that it was not liable for the killing of the horses.[15]

The liability of the company for the erection of a fence begins at the same time with the necessity of protection to the land-owners, that is, when it begins to run cars over the road.[16] It cannot claim exemption from building fences on the ground that the road is not completed and that there was a lack of reasonable time, where a train is moved over the road, though it is a construction train carrying material.[17]

Whether the fence is sufficient in the sense of the statute depends somewhat on the wording thereof. It is for the jury to say whether the statute has been complied with.[18] It has been held that the liability for a defect in the fence extends to all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track

[14] St. Louis, A. & T. H. R. Co. *v.* Linder, 39 Ill. 433; Indianapolis & C. R. Co. *v.* McClure, 26 Ind. 370; New Albany & S. R. Co. *v.* McNamara, 11 id. 543; Louisville, E. & St. L. R. Co. *v.* Hart, 2 Ind. App. 130; Cleaveland *v.* Chic. & N. R. Co., 35 Ia. 220; Alger *v.* Miss. & M. R. Co., 10 id. 268; Louisville & F. R. Co. *v.* Milton, 14 B. Mon. (Ky.) 75.

[15] Cook *v.* Minneapolis, St. P. & S. S. M. R. Co., 98 Wis. 624.

[16] Silver *v.* Kansas City, St. L. & C. R. Co., 78 Mo. 528; Cobb *v.* Kansas City, F. S. & M. R. Co., 43 Mo. App. 313; Gordon *v.* Chic., S. F. & C. R. Co., 44 id. 201. See Holt *v.* Melocke, 34 Low. Can. Jur. 309.

[17] Glandon *v.* Chic., M. & St. P. R. Co., 68 Ia. 457; Wichita & Colo. R. Co. *v.* Gibbs, 47 Kan. 274.

[18] Parker *v.* Lake Shore & M. S. R. Co., 93 Mich. 607. And see Welch *v.* Abbot, 72 Wis. 512.

when run over by it.[19] But the company may sometimes escape liability by showing that a lawful fence would not have kept off the animals in question.[20] The fence should be sufficient to turn not merely ordinary stock, but stock even to some extent unruly;[21] though the propensities of exceptionally unruly or breachy beasts need not be guarded against.[22] Where hogs are not permitted to run at large, it has been held that the company is under no obligation to fence against them.[23] But where the statute inflicts a penalty for a failure to fence against "horses, cattle, mules or other animals," hogs are included.[24] And the word "cattle" in the English statute has been held to include pigs.[25] "Cattle" has been also held to include horses,[26] mules,[27] and asses.[28] "Stock" has been held not to include dogs.[29]

It is not necessary that the fence should be so high as never to be covered with snow: snow-drifts are not to be considered defects in the fence.[30] A fence upon one side only of the road is not sufficient.[31] But it has been held that a company is not

[19] Indianapolis, P. & C. R. Co. *v.* Marshall, 27 Ind. 300. And see Halverson *v.* Minneapolis & St. L. R. Co., 32 Minn. 88.

[20] Mo. Pac. R. Co. *v.* Baxter, 45 Kan. 520; Atchison, T. & S. F. R. Co. *v.* Yates, 21 id. 613.

[21] Chic. & Alton R. Co. *v.* Utley, 38 Ill. 410; Pittsb., C. & St. L. R. Co. *v.* Howard, 40 O. St. 6.

The company is liable where a frightened horse runs against and breaks through a railing approaching a bridge, which should have been kept in repair: Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.) 254.

[22] Leggett *v.* Ill. Cent. R. Co., 72 Ill. App. 577; Wabash R. Co. *v.* Ferris, 6 Ind. App. 30.

[23] Kansas City, Ft. S. & G. R. Co. *v.* McHenry, 24 Kan. 501; Atchison, T. & S. F. R. Co. *v.* Yates, 21 id. 613.

[24] Henderson *v.* Wabash, St. L. & P. R. Co., 81 Mo. 605.

[25] Child *v.* Hearn, L. R. 9 Ex. 176.

[26] McAlpine *v.* Grand Trunk R. Co., 38 U. C. Q. B. 446.

[27] Toledo, W. & W. R. Co. *v.* Cole, 50 Ill. 184.

[28] Ohio & Miss. R. Co. *v.* Brubaker, 47 Ill. 462.

[29] Tex. & Pac. R. Co. *v.* Scott, 4 Tex. App. (Civ. Cas.) 476.

[30] Patten *v.* Chic., M. & St. P. R. Co., 75 Ia. 459.

[31] Tredway *v.* S. C. & St. P. R Co., 43 Ia. 527.

required to fence where a pond, embankment, etc., is a sufficient protection.[32]

The company may be responsible, under certain circumstances, for the erection of a barbed-wire fence on which a frightened animal is injured;[33] as well as for a failure to fence resulting in an injury to an animal by running into a barbed-wire fence.[34]

The mere fact that the adjacent owner has built a fence is no excuse for the company's failure to do so.[35] But it has been held that the company may avail itself of the land-owner's fence, if it is a suitable one, and that the fact that no compensation was paid for the right of way will not prevent its joining fences.[36] The fact that the company's fence was joined on to the land-owner's fence creates no legal implication, however, that the latter had assumed any obligation to aid in keeping it up.[37]

It is not sufficient that the company erect a lawful fence: reasonable diligence must be used in keeping it in repair.[38]

[32] Veerhusen *v.* Chic. & N. R. Co., 53 Wis. 689. And see Ryan *v.* Great S. & W. R. Co., 32 L. R. Ir. 15.

[33] Louisville & N. R. Co. *v.* Upton, 18 Ill. App. 605.

[34] Mo. Pac. R. Co. *v.* Gill, 49 Kan. 441. And see Savage *v.* Chic., M. & St. P. R. Co., 31 Minn. 419.

Otherwise, where the company is not required to fence: St Louis, I. M. & S. R. Co. *v.* Ferguson, 57 Ark. 16.

[35] Louisville, N. A. & C. R. Co. *v.* White, 94 Ind. 257; Norfolk & W. R. Co. *v.* McGavock, 90 Va. 507; San Antonio & A. P. R. Co. *v.* Peterson, 8 Tex. Civ. App. 367. And see Atchison, T. & S. F. R. Co. *v.* Gabbert, 34 Kan. 132.

[36] Haxton *v.* Pittsburgh, C. & St. L. R. Co., 26 O. St. 214.

[37] Busby *v.* St. Louis, K. C. & N. R. Co., 81 Mo. 43.

[38] Lemmon *v.* Chic. & N. R. Co., 32 Ia. 151; Chic. & N. R. Co. *v.* Barrie, 55 Ill. 226; Grand Rapids & Ind. R. Co. *v.* Monroe, 47 Mich. 152; Lake Erie & W. R. Co. *v.* Fishback, 5 Ind. App. 403.

In Antisdel *v.* Chic. & N. R. Co., 26 Wis. 145, a high degree of diligence is said to be necessary, not ordinary diligence.

The evidence of negligence in repairing is for the jury: Graves *v.* Chic., M. & St. P. R. Co., 47 Minn. 429.

This involves the duty of continuous inspection.[39] But a company was held not liable where a fence was destroyed by fire after daily inspection had been made and the fact was not known till the stock were killed.[40] In England, a company which erects a fence more than five years after the opening of its road to separate it from the adjoining land is bound to maintain the fence and is liable for an injury to an animal escaping upon the track because of the defective condition of the fence, though the statute provides that the company shall not be compelled to make any further or additional accommodation works after five years from the opening of the railway.[41]

The company is responsible only where it has notice of the defect and reasonable time in which to make repairs.[42] It is liable where a prudent man would have had time in which to discover the defect.[43] Where the land-owner knows that the fence is defective and fails to notify the company, he cannot

[39] Studer *v.* Buffalo & L. H. R. Co., 25 U. C. Q. B. 160.

Whether an inspection every two days is sufficient diligence is for the jury: Evans *v.* St. Paul & S. C. R. Co., 30 Minn. 489.

[40] Toledo, C. S. & D. R. Co. *v.* Eder, 45 Mich. 329.

[41] Dixon *v.* Great Western R. Co., [1897] 1 Q. B. 300, dismissing the appeal from [1896] 2 Q. B. 333.

[42] Hodge *v.* N. Y. Cent. & H. R. R. Co., 27 Hun (N. Y.) 394; Clardy *v.* St. Louis, I. M. & S. R. Co., 73 Mo. 576; Young *v.* Hannibal & St. J. R. Co., 82 id. 427; Aylesworth *v.* Chic., R. I. & P. R. Co., 30 Ia. 459; Davis *v.* Chic., R. I. & P. R. Co., 40 id. 292; Brentner *v.* Chic., M. & St. P. R. Co., 58 id. 625; Ill. Cent. R. Co. *v.* Swearingen, 47 Ill. 206; Chic. & Alton R. Co. *v.* Umphenour, 69 id. 198; Same *v.* Saunders, 85 id. 288; Toledo & Wabash R. Co. *v.* Daniels, 21 Ind. 256; Indianapolis, P. & C. R. Co. *v.* Truitt, 24 id. 162.

But see Studer *v.* Buffalo & L. H. R. Co., 25 U. C. Q. B. 160, where the company was held liable though reasonable time to repair had not elapsed. See also Pittsburgh, C. & St. L. R. Co. *v.* Smith, 38 O. St. 410.

As to reasonable time to discover defects, see Varco *v.* Chic., M. & St. P. R. Co., 30 Minn. 18; Mayfield *v.* St. Louis & S. F. R. Co., 91 Mo. 296; Foster *v.* St. Louis, I. M. & S. R. Co., 44 Mo. App. 11; Galveston, H. & S. A. R. Co. *v.* Walter (Tex. Civ. App.), 25 S. W. Rep. 163.

[43] Lainiger *v.* Kansas City, St. J. & C. B. R. Co., 41 Mo. App. 165. And see Indianapolis & St. L. R. Co. *v.* Hall, 88 Ill. 368.

recover.[44] But one who pastures his stock on another's land is not chargeable with the land-owner's failure to complain of the insecurity of the fence.[45] Where the fence as originally built was defective, no evidence of knowledge by the defendant is necessary.[46]

The duty of keeping fences in repair is not shifted to the owner of stock because the latter, owing to the company's neglect, found it necessary to make temporary repairs.[47] Where a company had maintained a fence for years near its station grounds and had given no notice that it would not be kept up, it was held estopped from exonerating itself.[48] A company negligently burning a pasture fence is liable for the stock that escape.[49] Where the company ran its trains on Sunday, it could not claim exemption from the labor of repairing its fence on that day.[50]

If animals get through a fence by breaches made by strangers, the company is not liable in the absence of negligence.[51] Otherwise, where a gap is made in a fence by persons furnishing supplies to the company.[52] But where a gap was used by

[44] Chic., B. & Q. R. Co. *v.* Seirer, 60 Ill. 295.

But, under the Ohio statute, it was held that where a horse was injured by a defective fence of which the owner knew and the company did not, the latter could not escape responsibility by showing that it had no notice of the actual condition of the fence: Pittsb., Cinc. & St. L. R. Co. *v.* Smith, 38 O. St. 410.

[45] Mo. Pac. R. Co. *v.* Pfrang (Kan. App.), 51 Pac. Rep. 911.

[46] Morrison *v.* Burlington, C. R. & N. R. Co., 84 Ia. 663; Duncan *v.* St. Louis, I. M. & S. R. Co., 91 Mo. 67; Gulf, C. & S. F. R. Co. *v.* Rowland (Tex. Civ. App.), 23 S. W. Rep. 421.

[47] Peoria, D. & E. R. Co. *v.* Babbs, 23 Ill. App. 454; Jeffersonville, M. & I. R. Co. *v.* Sullivan, 38 Ind. 262. See Chic., B. &. Q. R. Co. *v.* Seirer, 60 Ill. 295.

[48] Chic. & E. I. R. Co. *v.* Guertin, 115 Ill. 466.

[49] St. Louis, A. & T. R. Co. *v.* McKinsey, 78 Tex. 298.

[50] Toledo, W. & W. R. Co. *v.* Cohen, 44 Ind. 444.

[51] Case *v.* St. Louis & S. F. R. Co., 75 Mo. 668; Walthers *v.* Mo. Pac. R. Co., 78 id. 617; Toledo & W. R. Co. *v.* Fowler, 22 Ind. 316; Chic. & N. R. Co. *v.* Barrie, 55 Ill. 226; Perry *v.* Dubuque S. R. Co., 36 Ia. 102.

[52] Jacksonville, T. & K. W. R. Co. *v.* Harris, 33 Fla. 217.

the plaintiff for his own convenience in delivering ties sold to the company, the latter was held not liable.[53] And one having a license from a lessee to pasture his sheep cannot recover from the company for an injury caused by an opening in the fence made by the lessee for his own accommodation, unless the opening was made on an agreement by the company to put in a gate, which it has failed to do within a reasonable time.[54] The removal of the company's fence by the defendant is not the proximate cause of the killing of the cattle of a third person which strayed upon the track and the company cannot recover from the defendant what it has been obliged to pay for such killing.[55]

The absence of, or insufficiency of, a fence at the place where the animal went upon the track is the point to be considered in all these cases, and not the condition of the fence at the place where the injury occurred.[56] The proof and presumption with regard to this will be considered later.[57]

[53] Clark *v.* Chic. & W. M. R. Co., 62 Mich. 358.

[54] McCoy *v.* South. Pac. R. Co., 94 Cal. 568. And see Best *v.* Ulster & D. R. Co., 54 N. Y. Suppt. 305.

[55] Louisville & N. R. Co. *v.* Guthrie, 10 Lea (Tenn.) 432.

[56] Toledo, P. & W. R. Co. *v.* Darst, 51 Ill. 365, 52 id. 89; Great Western R. Co. *v.* Hanks, 36 id. 281; Ind., B. & W. R. Co. *v.* Quick, 109 Ind. 295; Louisville, N. A. & C. R. Co. *v.* Goodbar, 102 id. 596; Wabash, St. L. & P. R. Co. *v.* Tretts, 96 id. 450; Wabash R. Co. *v.* Forshee, 77 id. 158; Jeffersonville, M. & I. R. Co. *v.* Lyon, 72 id. 107; Louisville, N. A. & C. R. Co. *v.* Etzler, 3 Ind. App. 562; Mo. Pac. R. Co. *v.* Leggett, 27 Kan. 323; Atchison & N. R. Co. *v.* Cash, Ibid. 587; Foster *v.* St. Louis, I. M. & S. R. Co., 90 Mo. 116; Witthouse *v.* Atlantic & P. R. Co., 64 id 523; Henson *v.* St. Louis, I. M. & S. R. Co., 34 Mo. App. 636; Pearson *v.* Chic., B. & K. C. R. Co., 33 id. 543; Price *v.* Barnard, 70 id. 175; Miller *v.* Wabash R. Co., 47 id. 630; Ehret *v.* Kansas City, St. J. & C. B. R. Co., 20 id. 251; Green *v.* St. Paul, M. & M. R. Co., 60 Minn. 134; Sullivan *v.* Oreg. R. & N. Co., 19 Oreg. 319.

Where stock enters at a place excepted from the operation of the statute and wanders along the track to a place not excepted, because of the failure to erect a suitable cattle-guard, and is killed, the company is liable: Chic. & E. I. R. Co. *v.* Blair, 75 Ill. App. 659.

[57] See § 144, infra.

A State statute making a railroad company liable for injuries resulting from a failure to erect and maintain fences and cattle-guards is not unconstitutional; and the expenses of keeping watch in order to guard cattle from straying on unfenced lands and of diminution in value of the adjoining land by reason of the failure to fence, fall within the regulation of the police power of the State.[58] Such a statute is not repealed by a law prohibiting the permitting of animals to run at large.[59]

In so far as these provisions are for the benefit of the landowner, they may be waived by his agreement to maintain or dispense with a fence, thus exonerating the company from liability.[60] Such a contract binds the tenant of the owner knowing thereof.[61] And it has been held, where duly recorded, to run with the land and to bind tenants and grantees, as such.[62] In another case it was held to bind the lessee of the owner's grantee so far that he could derive no advantage from its breach or claim from the company a higher degree

[58] Minneapolis & St. L. R. Co. *v.* Emmons, 149 U. S. 364.

See, also, as to the constitutionality of such statutes, Pa. R. Co. *v.* Riblet, 66 Pa. St. 164; Ill. Cent. R. Co. *v.* Crider, 91 Tenn. 489; Tex. Cent. R. Co. *v.* Childress, 64 Tex. 346.

[59] Rockford, R. I. & St. L. R. Co. *v.* Irish, 72 Ill. 404; Ohio & Miss. R. Co. *v.* Jones, 63 id. 472; Wabash R. Co. *v.* Perbex, 57 Ill. App. 62; Holland *v.* West End N. G. R. Co., 16 Mo. App. 172.

[60] Enright *v.* San Francisco & S. J. R. Co., 33 Cal. 230; Indianapolis, P. & C. R. Co. *v.* Petty, 25 Ind. 413; Bond *v.* Evansville & T. H. R. Co., 100 id. 301; Whittier *v.* Chic., M. & St. P. R. Co., 24 Minn. 394; Pittsburgh, C. & St. L. R. Co. *v.* Smith, 26 O. St. 124; Ells *v.* Pacific R. Co., 48 Mo. 231; Dolan *v.* Newburgh, D. & C. R. Co., 120 N. Y. 571; Duffy *v.* N. Y. & H. R. Co., 2 Hilt. (N. Y.) 496; Talmadge *v.* Rensselaer & S. R. Co., 13 Barb. (N. Y.) 493.

[61] St. Louis, V. & T. H. R. Co. *v.* Washburn, 97 Ill. 253; Cinc., H. & D. R. Co. *v.* Waterson, 4 O. St. 424. But not where he has no notice: Thomas *v.* Hannibal & St. J. R. Co., 82 Mo. 538.

[62] Indianapolis, P. & C. R. Co. *v.* Petty, supra; Duffy *v.* N. Y. & H. R. Co., 2 Hilt. (N. Y.) 496. But see Gilman *v.* E. & N. A. R. Co., 60 Me. 235.

of care than if the contract had been kept.[63] On the other hand, a parol agreement between the owner and the company to remove or dispense with a fence has been held not to run with the land or to bind the grantee.[64] So it has been held no defence that the party whose cattle were killed was legally bound to fence under a covenant between his assignor and the company.[65] And the company cannot, in any case, escape responsibility to the person whose stock are killed by setting up a contract with the adjacent land-owner or any third party by which the latter agrees to erect or maintain the fence.[66]

And, in general, the company cannot divest itself of its responsibility to its passengers and the public at large by making private contracts with the land-holders along the road by which the latter separately agree to make and keep up fences.[67]

Where the company's obligation to fence arises from con-

[63] Easter *v.* Little Miami R. Co., 14 O. St. 48.

[64] Wilder *v.* Me. Cent. R. Co., 65 Me. 332; St. Louis, A. & T. H. R. Co. *v.* Todd, 36 Ill. 409. And see Corry *v.* Great Western R. Co., 7 Q. B. D. 322.

[65] Shepard *v.* Buffalo, N. Y. & E. R. Co., 35 N. Y. 641.

[66] Indianapolis, P. & C. R. Co. *v.* Thomas, 84 Ind. 194; Cinc., H. & I. R. Co. *v.* Ridge; 54 id. 39; Warren *v.* Keokuk & D. M. R. Co., 41 Ia. 484; Neversorry *v.* Duluth, S. S. & A. R. Co. (Mich.), 73 N. W. Rep. 125; Gilman *v.* European & N. A. R. Co., 60 Me. 235; Silver *v.* Kansas City, St. L. & C. R. Co., 78 Mo. 528; Berry *v.* St. Louis, S. & L. R. R. Co., 65 id. 172; Pittsb., C. & St. L. R. Co. *v.* Allen, 40 O. St. 206; Gill *v.* Atlantic & G. W. R. Co., 27 id. 240. But see Baltimore & O. R. Co. *v.* Wood, 47 O. St. 431.

In a note on Gilman *v.* European & N. A. R. Co., supra, it is said: "But if the animal, in fleeing from the engine, had become so infuriated as to run over and kill the plaintiff or his child, it might be fairly regarded, probably, as too remote a consequence of the negligence to form the basis of a recovery. And so, too, if in consequence of the loss of his engagement and, by reason of such default, he had been driven into bankruptcy and thus lost all his property and business, no one would dream of making the defendant responsible for the loss:" 12 Am. L. Reg. N. S. 560 n.

[67] New Albany & S. R. Co. *v.* Maiden, 12 Ind. 10.

tract, this imposes the same duties and liabilities as a statute would have done.[68] The fact that the liability is under contract does not exempt the plaintiff from his obligation to take ordinary care for the protection of his animals.[69]

139. To What Owners the Company is Liable.—The question whether the fencing laws were intended as a protection to the general public or only to the owners or lawful occupiers of lands adjoining the railway is, to a certain extent, one of statutory interpretation. The rule that the general public, and not merely the adjoining land-owners, are to be considered has been declared in a leading text-book to be the better one,[70] but it is by no means universally followed. It should be noted that by the general public, in this connection, is meant only the owners of animals not belonging on adjacent lands. Passengers and the owners of goods carried on trains are not here referred to: it has been already stated that it was largely for their benefit that the statutes regulating fences were enacted.[71]

In England, a railway company is bound to maintain fences for the protection of the cattle of the "owners or occupiers" of adjoining land, and this would include one having a license from the owner to graze his cattle there.[72] The owner of sheep trespassing on an adjoining close is not within the protection of the statute.[73] But where the company is obliged by statute to keep gates closed, an animal on a highway is

[68] Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. Rep. 347.

The agreement need not be under seal: Vandegrift *v.* Delaware R. Co., 2 Houst. (Del.) 287. A covenant to build a good and sufficient fence, in consideration of the grant of right of way, runs with the land: Lake Erie & W. R. Co. *v.* Griffin (Ind. App.), 53 N. E. Rep. 1042.

[69] Joliet & N. I. R. Co. *v.* Jones, 20 Ill. 221.

[70] See 1 Thompson Negl. 517. Cf. 1 Redf. Rys. (6th ed.) 530. See also, in connection with this section, the cases on contributory negligence cited in § 134, supra.

[71] See § 138, infra. [72] Dawson *v.* Midland R. Co., L. R. 8 Ex. 8.

[73] Ricketts *v.* East & West India Docks Co., 12 C. B. 160.

deemed lawfully there as against it, whether such animal is straying or passing.[74]

In Canada, too, the statute protects only the owner or occupant of adjoining lands and there can be no recovery thereunder unless the animals were rightfully on such lands or on the highway from which they escaped to the track.[75]

The law in England and Canada has thus been summarized: "The obligation on railway companies to fence their line is regulated by statute, and the liability for damage resulting from neglect of their duty in that respect is to be determined by the extent of such obligation. The rule to be gathered from the cases is that, unless the statute clearly imposes a greater obligation on the company, it is responsible only to the adjoining owner between whose land and the railway line the defect in its fence exists by reason of which loss happens. So, if there is a defect in the company's fence at a certain point, and cattle trespassing on the adjoining land at that point get through the defective fence on the track and are killed, the company is not liable to the owner of the cattle. On the other hand, if the statute clearly imposes an unqualified general duty on the company to protect its line at cer-

[74] Dickinson *v.* London & N. W. R. Co., 1 H. & R. 399; Fawcett *v.* York & N. M. R. Co., 16 Q. B. 610; Midland R. Co. *v.* Daykin, 17 C. B. 126.

See Manchester, S. & L. R. Co. *v.* Wallis, 14 C. B. 213; Luscombe *v.* Great Western R. Co., 107 L. T. 161.

[75] Douglass *v.* Grand Trunk R. Co., 5 Ont. App. 585; Daniels *v.* Same, 11 id. 471; Conway *v.* Can. Pac. R. Co., 12 id. 708; Duncan *v.* Same, 21 Ont. 355; Griffith *v.* Same, 15 Leg. News (Can.) 119; Roux *v.* Grand Trunk R. Co., 14 Low. Can. 140; Gillis *v.* Great Western R. Co., 12 U. C. Q. B. 427; McLennan *v.* Grand Trunk R. Co., 8 U. C. C. P. 411; Ferris *v.* Can. Pac. R. Co., 9 Ma. 501; Westbourne Cattle Co. *v.* Ma. & N. R. Co., 6 id. 553; McMillan *v.* Same, 4 id. 220.

But see St. John & M. R. Co. *v.* Montgomery, 21 N. B. 441, where the obligation to fence was held to be general and not merely as against adjoining land-owners.

Where the adjoining land is unoccupied the company need not fence: McFie *v.* Can. Pac. R. Co., 2 Ma. 6.

tain places, and it neglects to do so, the owners of animals which get upon the track through such neglect and are injured may recover against the company, although the animals were not lawfully on the land from which they escaped on to the railway line." [76]

In New York a company is liable for an injury to any animal by its agents or engines, owing to a failure to fence, whether the owner of the animal is an adjoining proprietor or not.[77] It is not liable for injuries to animals caused by themselves by falling into a hole, etc., when they stray on an unfenced track through land not belonging to the plaintiff.[78] But it is liable for injuries to animals caused by themselves when they belong to an adjoining proprietor or one using his land by his license, as the failure to fence is in that case the neglect of a statutory obligation due to the plaintiff.[79] The company is compelled to fence even where it owns the adjoining land, unless there is some physical barrier that will keep animals off.[80]

In Massachusetts it was held in an early case that the fencing statute was designed for the safety of the public and the protection of all domestic animals whether rightfully or wrongfully out of their owner's enclosure, and that the company was, accordingly, liable though the cattle killed had been trespassing on the adjacent land.[81] But in a later case it was said that the above case was decided under a statute of Connecticut and did not decide that the plaintiff's negligence

[76] 15 Can. L. Times, 149. Article by R. M. Macdonald.

[77] Corwin *v.* N. Y. & E. R. Co., 13 N. Y. 42.

So, where an animal was wrongfully in a highway: Waldron *v.* Rensselaer & S. R. Co. 8 Barb. (N. Y.) 390.

See, also, the cases cited in § 134, supra.

[78] Knight *v.* N. Y., L. E. & W. R. Co., 99 N. Y. 25.

[79] Graham *v.* Delaware & H. Can. Co., 46 Hun (N. Y.) 386; French *v.* Western N. Y. & P. R. Co., 72 id. 469.

[80] Klock *v.* N. Y. Cent. & H. R. R. Co., 62 Hun (N. Y.) 291.

[81] Browne *v.* Providence, H. & F. R. Co., 12 Gray (Mass.) 55. See the unfavorable comments on this case in 1 Redf. Rys. (6th ed.) 530.

would not bar recovery. It was held that the Massachusetts statute protected only adjoining land-owners and travellers on the road, and that the company was not liable to the owner of sheep that strayed on another's land and thence through a defective fence that the company was bound to repair on to the track.[82] It is otherwise where the injury is wanton or malicious.[83]

In Missouri, the statute is for the protection of adjoining land-owners only and the company is not liable where the animal killed had passed through the property of others before reaching the track;[84] unless it was on an adjoining field with the consent of the owner thereof.[85] But there is no such thing in that State as a trespass on unenclosed lands and, accordingly, if the field adjoining the unfenced track was not surrounded with a proper fence, the owner of the animal passing through such field to the track may recover.[86] A similar rule exists in Illinois.[87]

In Minnesota it was held that the fact that cattle were trespassing on the land from which they passed to the unfenced track was no defence to an action by the owner. The court said, "Of the cases that consider statutes of this kind, we think those are decided upon the better reason which hold that such statutes are police regulations, designed for the protection of all, and not merely rules for constructing division

[82] Eames *v.* Salem & L. R. Co., 98 Mass. 560.

[83] See McDonnell *v.* Pittsfield & N. A. R. Co., 115 Mass. 564; Maynard *v.* Boston & M. R. Co., Ibid. 458.

[84] Ferris *v.* St. Louis & H. R. Co., 30 Mo. App. 122. And see Brandenburg *v.* St. Louis & S. F. R. Co., 44 id. 224.

[85] Hendrix *v.* St. Joseph & St. L. R. Co., 38 Mo. App. 520.

[86] Kaes *v.* Mo. Pac. R. Co., 6 Mo. App. 397; Duke *v.* Kansas City, F. S. & M. R. Co., 39 id. 105; Dean *v.* Omaha & St. L. R. Co., 54 id. 647; Berry *v.* St. Louis, S. & L. R. Co., 65 Mo. 172; Harrington *v.* Chic., R. I. & P. R. Co., 71 id. 384; Peddicord *v.* Mo. Pac. R. Co., 85 id. 160. So, where the animal passed along a public road: Emmerson *v.* St. Louis & H. R. Co., 35 Mo. App. 621.

[87] Ill. Cent. R. Co. *v.* Arnold, 47 Ill. 173.

fences between adjoining owners, for neglect of which only an adjoining owner may complain." [88]

In Ohio, also, the company's duty to fence is not confined to adjoining owners but extends to the public generally.[89] The same rule exists in Indiana,[90] Wisconsin,[91] and Kansas.[92]

In Maine the statutory obligation of the company to fence is limited to the owners of stock rightfully on the adjoining land, and the owner of a runaway horse which ran into a municipal park and was killed on a track running through the park was not allowed to recover.[93]

In New Hampshire, too, the company is compelled to fence only as against animals rightfully on the adjoining land.[94] This is also the rule in Vermont, [95] and in Nevada.[96]

In Oklahoma the company is liable for failure to fence only to an abutting owner who has constructed a fence on all sides of the land, except on the right of way, and has notified the company to erect one there.[97]

[88] Gillam *v.* Sioux City & St. P. R. Co., 26 Minn. 268.

[89] Pittsburg, C. & St. L. R. Co. *v.* Allen, 40 O. St. 206; Marietta & C. R. Co. *v.* Stephenson, 24 id. 48.

[90] Indianapolis & C. R. Co. *v.* Townsend, 10 Ind. 38.

See Cinc., W. & M. R. Co. *v.* Stanley (Ind. App.), 27 N. E. Rep. 316.

[91] McCall *v.* Chamberlain, 13 Wis. 637; Curry *v.* Chic. & N. R. Co., 43 id. 665.

[92] Mo. Pac. R. Co. *v.* Roads, 33 Kan. 640.

[93] Allen *v.* Boston & M. R. Co., 87 Me. 326,—on the ground that the animal was not rightfully in the park, even though the owner exercised great care to prevent its escape.

[94] Morse *v.* Boston & L. R. Co., 66 N. H. 148; Giles *v.* Boston & M. R. Co., 55 id. 552; Mayberry *v.* Concord R. Co., 47 id. 391; Cornwall *v.* Sullivan R. Co., 28 id. 161; Woolson *v.* Northern R. Co., 19 id. 267.

The company is not liable for the killing of an animal escaping from the highway: Woolson *v.* Northern R. Co., 19 N. H. 267; Towns *v.* Cheshire R. Co., 21 id. 363.

[95] Smith *v.* Barre R. Co., 64 Vt. 21; Bemis *v.* Conn. & P. R. R. Co., 42 id. 375; Morse *v.* Rutland & B. R. Co., 27 id. 49; Jackson *v.* Same, 25 id. 150.

[96] Walsh *v.* Virginia & T. R. Co., 8 Nev. 110.

[97] McCook *v.* Bryan (Okla), 46 Pac. Rep. 506.

In all these cases one lawfully occupying the adjoining land as tenant or under a license is as fully protected as the owner would be.[98]

140. Crossings; Gates.—It is a general rule that railway companies are not required to fence their tracks at highway crossings which the public convenience demands should remain unobstructed for purposes of traffic.[99] This rule applies to highways *de facto* and *de jure;*[100] and to all parts of the road, not merely to that part in actual use by the public.[101] It has been held also that where a railway is located on part of a highway, the remainder of which is still used as such, the company is not bound to fence its right of way.[102] But where there is a travelled road running parallel to the line of rail-

[98] See Veerhusen *v.* Chic. & N. R. Co., 53 Wis. 689; French *v.* Western N. Y. & P. R. Co., 72 Hun (N. Y.) 469; Mo. Pac. R. Co. *v.* Pfrang (Kan. App.), 51 Pac. Rep. 911; McCoy *v.* South. Pac. Co. (Cal.), 26 Pac. Rep. 629.

[99] Mobile & O. R. Co. *v.* Moore, 34 Ill. App. 519; Lafayette & I. R. Co. *v.* Shriner, 6 Ind. 141; McPheeters *v.* Hannibal & St. J. R. Co., 45 Mo. 22.

A company constructing an insufficient crossing is liable, though the fright of the animal contributed to the injury: Hanson *v.* Chic., St. P. & K. C. R. Co., 94 Ia. 409.

[100] Luckie *v.* Chic. & A. R. Co., 76 Mo. 639; Brown *v.* Kansas City, St. J. & C. B. R. Co., 20 Mo. App. 427; Carter *v.* Kansas City, Ft. S. & M. R. Co., 69 id. 295; Soward *v.* Chic. & N. R. Co., 33 Ia. 387; Long *v.* Cent. Ia. R. Co., 64 id. 657; Atchison, T. & S. F. R. Co. *v.* Griffis, 28 Kan. 539; Mo. Pac. R. Co. *v.* Kocher, 46 id. 272.

But not to an abandoned canal intersecting the track: White Water Valley R. Co. *v.* Quick, 30 Ind. 384, 31 id. 127.

[101] Ehret *v.* Kansas City, St. J. & C. B. R. Co., 20 Mo. App. 251.

The fence should extend to the cattle-guard at the crossing: Jeffersonville, M. & I. R. Co. *v.* Avery, 31 Ind. 277.

[102] Louisville, N. A. & C. R. Co. *v.* Francis, 58 Ind. 389; Coy *v.* Utica & S. R. Co., 23 Barb. (N. Y.) 643.

But see Sarver *v.* Chic., B. & Q. R. Co., 104 Ia. 59.

In Missouri the company is not excused from fencing its track under such circumstances: it is not the right of way which the law requires to be fenced, but the "road": Emmerson *v.* St. Louis & H. R. Co., 35 Mo. App. 621.

way but at a sufficient distance from the track to permit of the construction of a fence, the company is not excused from enclosing its road with a good and lawful fence to keep off animals.[103]

A railway company need not erect fences where its track passes through and crosses the streets of cities, towns or villages,[104] even where the streets are unused.[105] But a company is not excused from fencing through a large block of ground, not intersected with streets and alleys, simply because it is within the limits of a city.[106] It has the same right to fence land lying within the corporate limits of a city, but outside of streets or highways, as if the corporation did not exist, unless, possibly, a municipal ordinance controls the right.[107] And where the town exists only on paper the company is liable for failure to fence.[108] It has been held in Missouri that where, within the limits of a town, lands dedicated to public use on a railway are occupied and used for farming purposes, such occupancy does not make it lawful for the company to fence across them.[109]

There appears to be a variance in the decisions as to whether it is the company's duty to erect gates and bars at

[103] Mo. Pac. R. Co. *v.* Eckel, 49 Kan. 794.

[104] Toledo, W. & W. R. Co. *v.* Spangler, 71 Ill. 568; Ewing *v.* Chic. & A. R. Co., 72 id. 25; Chic. & A. R. Co. *v.* Engle, 58 id. 381; Flint & P. M. R. Co. *v.* Lull, 28 Mich. 510; Bowman *v.* Troy & B. R. Co., 37 Barb. (N. Y.) 516; Rippe *v.* Chic., M. & St. P. R. Co., 42 Minn. 34; Ohio, I. & W. R. Co. *v.* Heady (Ind. App.), 28 N. E. Rep. 212; Blanford *v.* Minneapolis & St. L. R. Co., 71 Ia. 310; Ryan *v.* Northern Pac. R. Co. (Wash.), 53 Pac. Rep. 824; Internat. & G. N. R. Co. *v.* Dunham, 68 Tex. 231.

[105] Lathrop *v.* Cent. Ia. R. Co., 69 Ia. 105.

[106] Toledo, W. & W. R. Co. *v.* Howell, 38 Ind. 447.

And see Cleveland & P. R. Co. *v.* McConnell, 26 O. St. 57; Nashville, C. & St. L. R. Co. *v.* Hughes, 94 Tenn. 450; Crawford *v.* N. Y. Cent. & H. R. R. Co., 18 Hun (N. Y.) 108; Iba *v.* Hannibal & St. J. R. Co., 45 Mo. 469.

[107] Coyle *v.* Chic., M. & St. P. R. Co., 62 Ia. 518.

[108] Gerren *v.* Hannibal & St. J. R. Co., 60 Mo. 405.

[109] Elliott *v.* Hannibal & St. J. R. Co., 66 Mo. 683.

private farm crossings as a part of the statutory obligation to fence.[110] In Indiana, the company has been held to be bound to fence at private crossings, but not as against one for whose benefit the crossing is maintained, nor as against one who has undertaken to keep up the fence,[111] nor where a fence would exclude land-owners from their private passage to a highway.[112] But, under a late statute, the erection of gates and keeping them locked are obligations imposed on land-owners, for the violation of which they are liable. The company has no control over the construction and use of farm crossings and is not liable whether there are gates or not, unless the injury was caused by the negligence of its servant,[113] or the company had agreed to fence in consideration of the right of way,[114] or to keep the gates closed and in proper repair.[115]

In Tennessee a railway company is not required to fence at private crossings.[116] It is otherwise in Ohio.[117] In Texas it has been held that there is no implied reservation of power in the legislature to compel a company fencing its track according to previous laws to construct crossings within enclosures for the benefit of land-owners.[118] But an owner who has granted the right of way is entitled to such crossings as are reasonably necessary.[119] In Minnesota it was held that where the right to an open crossing existed by contract between the company and the land-owner, the former might

[110] See 1 Thomp. Negl. 525.

[111] Evansville & T. H. R. Co. *v.* Mosier, 101 Ind. 597; Louisville, N. A. & C. R. Co. *v.* Consol'd. Trunk Line Co., 4 Ind. App. 40. And see Baltimore, O. & C. R. Co. *v.* Kreiger, 90 Ind. 380.

[112] Croy *v.* Louisville, N. A. & C. R. Co., 97 Ind. 126.

[113] Louisville, N. A. & C. R. Co. *v.* Etzler, 119 Ind. 39; Pennsylvania Co. *v.* Spaulding, 112 id. 47.

[114] Chic. & A. R. Co. *v.* Barnes, 116 Ind. 126; Toledo, St. L. & K. C. R. Co. *v.* Burgan, 9 Ind. App. 604.

[115] Evansville & T. H. R. Co. *v.* Mosier, 114 Ind. 447.

[116] Mobile & O. R. Co. *v.* Thompson, 101 Tenn. 197.

[117] Pittsburg & L. E. R. Co. *v.* Cunnington, 39 O. St. 327.

[118] Gulf, C. & S. F. R. Co. *v.* Rowland, 70 Tex. 298.

[119] Gulf, C. & S. F. R. Co. *v.* Ellis, 70 Tex. 307.

run its trains as if no such right existed, subject only to the duty of looking out for cattle and avoiding injury to them, if discovered.[120] In Illinois, it is the duty of the company at a private farm crossing to place gates and bars to keep animals within the enclosure off the track.[121]

A gate is a part of a fence and the duty of erecting and maintaining fences includes the duty of keeping gates in repair and closed as against stock.[122] The gate must be sufficient to keep out animals,[123] Where the fastenings are insufficient, contributory negligence in the plaintiff or his servant will bar his recovery.[124] But the mere knowledge of the land-owner that they were insufficient and his failure to notify the company of the fact, have been held not to prevent his recovering damages where his animals strayed and were killed as a consequence of such insufficiency.[125] It is otherwise where the owner has changed the gate and hung it so as to suit his own convenience.[126] The fact that the company knew that a gate was out of repair is evidence of negligence.[127] But the fact that it continued to use a fastening in which there was nothing intrinsically or necessarily dangerous, which had been for nine years without mischievous re-

[120] Whittier *v.* Chic., M. & St. P. R. Co., 26 Minn. 484.

[121] Peoria, P. & J. R. Co. *v.* Barton, 80 Ill. 72.

[122] West *v.* Mo. Pac. R. Co., 26 Mo. App. 344; Estes *v.* Atlantic & St. L. R. Co., 63 Me. 308; Mackie *v.* Cent. R. Co. of Ia., 54 Ia. 540; Chic. & A. R. Co. *v.* O'Brien, 34 Ill. App. 155; Wabash R. Co. *v.* Kime, 42 id. 272; Mo. Pac. R. Co. *v.* Hackett, 54 Kan. 316.

In Matson *v.* Baird, 3 App. Cas. 1082, it was held that a railway belonging to private owners was not obliged by statute to make and maintain gates across highways.

[123] Charman *v.* South-Eastern R. Co., 21 Q. B. D, 524.

[124] Haigh *v.* London & North-Western R. Co., 1 F. & F. 646.

[125] Dunsford *v.* Mich. Cent. R. Co., 20 Ont. App. 577; McMichael *v.* Grand Trunk R. Co., 12 Ont. 547; Toledo, St. L. & K. C. R. Co. *v.* Burgan, 9 Ind. App. 604.

[126] Chic., B. & Q. R. Co. *v.* Dannel, 48 Ill. App. 251.

[127] Brooks *v.* London & North-Western R. Co., 33 W. R. 167. And see Fitterling *v.* Mo. Pac. R. Co., 79 Mo. 504.

sults on the gate on which the animal was injured and was of the same kind that was in general use elsewhere, was held not to be evidence of negligence.[128] The question as to fastenings is whether they are reasonably sufficient and, if not, if the stock got on the track and were killed by reason thereof, and also whether such fastenings would be considered safe by a man of ordinary prudence.[129] Where a gate has not a statutory latch, the rule that the company should have a reasonable time in which to discover its condition is not applicable.[130] And, in general, where there was a defect in the construction of the gate, no notice need be shown.[131]

The duty to maintain fences with gates at crossings is wholly independent of the duty to erect and maintain such crossings: the former may exist whether the latter does or not.[132] Where the statute makes it the duty of the company to construct and maintain safe crossings over its track, it is liable to a traveller whose mule takes fright while driven over a bridge across the track and, in consequence of the absence of a railing where one is reasonably required, is thrown from the bridge and injured.[133]

The variance in the decisions on the question of the duty of erecting fences and gates at private crossings extends to the question of responsibility in keeping such gates in repair and closed. It is held in many cases that such responsibility rests with the company.[134] The latter is entitled to a reason-

[128] Great Western R. Co. *v.* Davies, 39 L. T. N. S. 475.
[129] Payne *v.* Kansas City, St. J. & C. B. R. Co., 72 Ia. 214.
[130] Duncan *v.* St. Louis, I. M. & S. R. Co., 91 Mo. 67.
[131] Chic., B. & Q. R. Co. *v.* Finch, 42 Ill. App. 90.
[132] Murphy *v.* Grand Trunk R. Co., 1 Ont. 619.
[133] Georgia R. & Bkg. Co. *v.* Mayo, 92 Ga. 223.
[134] Wabash R. Co. *v.* Perbex, 57 Ill. App. 62; Wait *v.* Burlington, C. R. & N. R. Co., 74 Ia. 207; Morrison *v.* Kansas City, St. J. & C. B. R. Co., 27 Mo. App. 418; Marfell *v.* South Wales R. Co., 8 C. B. N. S 525.

A section hand may recover for injuries to his cattle caused by the company's failure to close a gate, though he know it to be open,—it not being his duty to close it except under orders: May *v.* Chic. & N. R. Co. (Wis.), 79 N. W. Rep. 31.

able time in which to discover that the gate is open or out of repair;[135] and the plaintiff must have been free from negligence in the use thereof:[136] if he persistently keeps the gate open, the company may be released from liability.[137] Reasonable care and diligence only are required on the part of the company:[138] it need not keep a patrol.[139] But it is not relieved from liability by the fact that the animal had escaped from control.[140] Where a horse strayed on another's land and then on the track through a barway in a fence, which had been opened long before, though it did not appear by whom, the company was held liable.[141] Where gates have been erected where a company was not obliged to put them, and are out of order, the company is bound to take more than ordinary precautions to prevent the public, accustomed to rely on the gates, from being injured, and is liable for neglect to do so.[142]

[135] Nicholson *v.* Atchison, T. & S. F. R. Co., 55 Mo. App. 593; Wait *v.* Burlington, C. R. & N. R. Co., supra; Hungerford *v.* Syracuse, B. & N. Y. R. Co., 46 Hun (N. Y.) 339; Chic., B. & Q. R. Co. *v.* Sierer, 13 Ill. App. 261; Lake Erie & W. R. Co. *v.* Beam, 60 id. 68; Ill. Cent. R. Co. *v.* Arnold, 47 Ill. 173.

[136] Magilton *v.* N. Y. Cent. & H. R. R. Co., 11 N. Y. App. Div. 373; Chic., B. & Q. R. Co. *v.* Dannel, 48 Ill. App. 251.

And he is responsible for the negligence of his servants: Ranney *v.* Chic., B. & Q. R. Co., 59 Ill. App. 130.

[137] Manwell *v.* Burlington, C. R. & N. R. Co., 80 Ia. 662. And see Bartlett *v.* Dubuque & S. C. R. Co., 20 id. 188; Tyson *v.* K. & D. M. R. Co., 43 id. 207; Hook *v.* Worcester & N. R. Co., 58 N. H. 251; Richardson *v.* Chic. & N. R. Co., 56 Wis. 347; Indianapolis, P. & C. R. Co. *v.* Shimer, 17 Ind. 295.

[138] Peoria, D. & E. R. Co. *v.* Babbs, 23 Ill. App. 454. And see Mears *v.* Chic. & N. R. Co., 103 Ia. 203.

[139] Chic., B. & Q. R. Co. *v.* Sierer, 13 Ill. App. 261.

[140] Taft *v.* N. Y., P. & B. R. Co., 157 Mass. 297.

[141] Connolly *v.* Cent. Vt. R. Co., 4 N. Y. App. Div. 221. Herrick, J., dissented on the ground that a company "should not be liable to the same extent for an open gate or barway provided for the private use of adjoining proprietors that it is when a portion of the fence is broken down, burned or otherwise destroyed." This case was affirmed in 52 N. E. Rep. 1124.

[142] Fleming *v.* Can. Pac. R. Co., 31 N. B. 318.

Many of the cases hold, however, that where the gate is put in simply for the land-owner's use and convenience he, and not the company, is liable for injuries to animals caused by its being left open;[143] unless it was left open by the company's servants.[144] But this does not change the liability of the company to third persons: as to them it must keep the gate closed.[145] And in many cases the general rule is laid down that the land-owner, and not the company, is responsible for injuries to animals resulting from leaving gates open at private crosings.[146] And the owner, by his agreement to maintain a gate, may, in any case, exonerate the company from all liability to him not caused by gross negligence or an intentional act.[147] Where a gate was left open by a third person, the company, in the absence of negligence, is not liable, at least before it has notice of the fact or reasonable time for ascertaining it: it is not expected to stand perpetual guard over

[143] Diamond Brick Co. *v.* N. Y. Cent. & H. R. R. Co., 58 Hun (N. Y.) 396; Bond *v.* Evansville & T. H. R. Co., 100 Ind. 301; Louisville, N. A. & C. R. Co. *v.* Goodbar, 102 id. 596; Davis *v.* Wabash R. Co., 46 Mo. App. 477; San Antonio & A. P. R. Co. *v.* Robinson (Tex. Civ. App.), 43 S. W. Rep. 76; Great Western R. Co. *v.* Vilaire, 11 U. C. C. P. 509.

[144] Spinner *v.* N. Y. Cent. & H. R. R. Co., 6 Hun (N. Y.) 600, 67 N. Y. 153.

[145] Wabash R. Co. *v.* Williamson, 104 Ind. 154; Galveston, H. & S. A. R. Co. *v.* Wessendorf (Tex. Civ. App.), 39 S. W. Rep. 132.

But now, in Indiana, as was said supra, the company is not liable for any animals going through gates at private farm crossings unless they were injured or killed by negligence: Hunt *v.* Lake Shore & M. S. R. Co., 112 Ind. 69; Pennsylvania Co. *v.* Spaulding, Ibid. 47; Crum *v.* Conover (Ind. App.), 40 N. E. Rep. 644.

In Kansas it has been held that the owner of a trespassing animal has no greater rights than the land-owner: Adams *v.* Atchison, T. & S. F. R. Co., 46 Kan. 161; Rouse *v.* Osborne, 3 Kan. App. 139.

[146] Hunt *v.* Lake Shore & M. S. R. Co., supra; Truesdale *v.* Jensen, 91 Ia. 312; Tyson *v.* K. & D. M. R. Co., 43 id. 207; Hook *v.* Worcester & N. R. Co., 58 N. H. 251; Richardson *v.* Chic. & N. R. Co., 56 Wis. 347; Rouse *v.* Osborne, 3 Kan. App. 139.

[147] Lake Erie & W. R. Co. *v.* Weisel, 55 O. St. 155. And see Tex. & Pac. R. Co. *v.* Smith (Tex. Civ. App.), 41 S. W. Rep. 83.

the gate to keep it closed against the act of a third person.[148] Otherwise, where cattle went through a gate the fastening of which had been negligently left by the company so that a stranger passing through could not and did not shut it.[149] But where the owner of stock left them in a fenced pasture with no one in charge and went to another State, and the animals went through a gate left open by trespassers and were negligently injured by a train, it was held that he was not guilty of contributory negligence and might recover against the company.[150]

A statute allowing land-owners to construct farm crossings across a railroad track and, if the track is fenced, to erect gates, does not repeal a law making railroad companies liable for killing stock on an unfenced, or insufficiently fenced, track.[151]

141. Cattle-Guards.—Railway companies are generally required by statute to construct and keep in repair sufficient cattle-guards wherever the track is intersected by a highway,[152] and, in some cases, wherever the track enters or

[148] Morrison *v.* Kansas City, St. J. & C. B. R. Co., 27 Mo. App. 418. And see Binicker *v.* Hannibal & St. J. R. Co., 83 Mo. 660; Harding *v.* Chic., M. & St. P. R. Co., 100 Ia. 677; Tex. & Pac. R. Co. *v.* Glenn (Tex. Civ. App.), 30 S. W. Rep. 845; Lambert *v.* Grand Trunk R. Co., 28 Low. Can. Jur. 3.

[149] Chisholm *v.* Northern Pac. R. Co., 53 Minn. 122.

[150] Toledo, W. & W. R. Co. *v.* Milligan, 52 Ind. 505.

[151] Louisville, N. A. & C. R. Co. *v.* Hughes, 2 Ind. App. 68; Ohio & Miss. R. Co. *v.* Wrape, 4 id. 108.

[152] Wabash, St. L. & P. R. Co. *v.* Tretts, 96 Ind. 450; Grand Rapids & I. R. Co. *v.* Jones, 81 id. 523; Evansville & C. R. Co. *v.* Barbee, 74 id. 169; Pittsburgh, C. & St. L. R. Co. *v.* Eby, 55 id. 567; Atchison, T. & S. F. R. Co. *v.* Shaft, 33 Kan. 521; McGhee *v.* Guyn, 98 Ky. 209; Younger *v.* Louisville & N. R. Co. (Ky.), 41 S. W. Rep. 25; Lake Shore & M. S. R. Co. *v.* Sharpe, 38 O. St. 150; Miller *v.* Northern Pac. R. Co., 36 Minn. 296; Houston & G. N. R. Co. *v.* Meador, 50 Tex. 77; Hunter *v.* Chic., St. P., M. & O. R. Co., 99 Wis. 613.

But see Layne *v.* Ohio River R. Co., 35 W. Va. 438.

leaves improved or fenced land.[153] But the statutes do not generally require that guards should be constructed at private crossings.[154] In New York it was held that they should be constructed in village streets as well as on country highways, but it was said that, where the street crossed a railway running on another street, cattle-guards were not to be constructed longitudinally along the track so as to impede passage along the street crossing it.[155] A company is not bound to place guards around a cut away from a public street within city limits to prevent animals unlawfully grazing there from falling down the bank.[156] Nor is the company liable where the highway has not been legally laid out.[157] And cattle-guards are not to be constructed where they would be dangerous to the employees of the company.[158] And it was held in a Mississippi case that, where the stock law was in force, it was unnecessary to erect stock gaps and cattle-guards.[159] The company is not obliged to provide places for stock to leave the track.[160] The question of constructing cattle-guards or fences at or near station grounds will be discussed in the next section.

The object of a cattle-guard is to insure the safety of both

[153] Mo. Pac. R. Co. *v.* Morrow, 32 Kan. 217; Kan. City, M. & B. R. Co. *v.* Jones, 73 Miss. 397. And see 2 Rap. & Mack. Dig. Ry. Law, 594. Otherwise, in Georgia: Rossignoll *v.* Northeastern R. Co., 75 Ga. 354.

[154] See Bartlett *v.* Dubuque & S. C. R. Co., 20 Ia. 188; Pennsylvania Co. *v.* Spaulding, 112 Ind. 47; Bond *v.* Evansville & T. H. R. Co., 100 id. 301. Otherwise, in New Hampshire: Chapin *v.* Sullivan R. Co., 39 N. H. 564.

[155] Brace *v.* N. Y. Cent. R. Co., 27 N. Y. 269. See Vanderkar *v.* Rensselaer & S. R. Co., 13 Barb. (N. Y.) 390; Parker *v.* Same, 16 id. 315.

[156] Clary *v.* Burlington & M. R. Co., 14 Neb. 232.

[157] Hunter *v.* Chic., St. P., M. & O. R. Co., 99 Wis. 613.

[158] Pearson *v.* Chic., B. & K. C. R. Co., 33 Mo. App. 543; Chic. & E. I. R. Co. *v.* Modesitt, 124 Ind. 212; Ft. Wayne, C. & L. R. Co. *v.* Herbold, 99 id. 91; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111.

[159] Canton, A. & N. R. Co. *v.* French, 75 Miss. 939.

[160] Gilman *v.* Sioux City & P. R. Co., 62 Ia. 299.

passengers and animals.[161] Such guards are sometimes considered a necessary part of the fence which railway companies are required to construct.[162] But, where a company is liable in double damages for injuries resulting from a failure to fence, it was held that a cattle-guard was not an essential portion of a fence, within the meaning of the statute, and that single damages only were recoverable for a failure to keep such a guard in repair.[163]

A cattle-guard means such an appliance as will be effectual. A pit under the track is not sufficient: the guard should extend across the entire right of way.[164] Where the track is fenced, cross-fences are often a necessary part of the cattle-guard in order to make the enclosure effectual.[165] And where cattle entered the track from an unfenced space between the highway and the cattle-guards and were killed, it was held that the fact that it would have been difficult or expensive to enclose such space was no excuse.[166] The question is not could an animal under any circumstances cross the guard, but rather, will the guard, under all ordinary circumstances, prevent animals from getting on the track?[167] So under the Illinois statute it was held that cattle-guards need be sufficient only to turn ordinary stock under ordinary circum-

[161] Wait *v.* Bennington & R. R. Co., 61 Vt. 268.

[162] New Albany & S. R. Co. *v.* Pace, 13 Ind. 411; Pittsburgh, C. & St. L. R. Co. *v.* Eby, 55 id. 567; Grand Rapids & I. R. Co. *v.* Jones, 81 id. 523; Toledo, St. L. & K. C. R. Co. *v.* Franklin, 53 Ill. App. 632.

[163] Moriarty *v.* Cent. Ia. R. Co., 64 Ia. 696.

[164] Mo. Pac. R. Co. *v.* Manson, 31 Kan. 337; Heskett *v.* Wabash, St. L. & P. R. Co., 61 Ia. 467; Kansas City, M. & B. R. Co. *v.* Spencer, 72 Miss. 491; Grace *v.* Gulf & C. R. Co. (Miss.), 25 South. Rep. 875. And see Louisville, N. A. & C. R. Co. *v.* Porter, 97 Ind. 267.

[165] Edwards *v.* Kansas City, St. J. & C. B. R. Co., 74 Mo. 117.

[166] Fort Wayne, C. & L. R. Co. *v.* Herbold, 99 Ind. 91. And see Nelson *v.* Great Northern R. Co., 52 Minn. 276.

[167] Wait *v.* Bennington & R. R. Co., 61 Vt. 268.

And see, as to sufficiency, Timins *v.* Chic., R. I. & P. R. Co., 72 Ia. 94; Strong *v.* Chic. & N. R. Co., 95 id. 278.

stances.[168] The company is not liable where live-stock jump over a guard sufficient to turn ordinary cattle.[169] A company was held liable for an injury to a cow which escaped through a culvert, though at the ordinary height of the water the culvert was a sufficient barrier: it should have fenced the line in front of the culvert or constructed a barrier.[170] But a company acquiring a right of way over lands has been held not to be bound to plank or cover a culvert or drain so as to prevent cattle from getting fastened therein, and not to be responsible for killing a cow thus fastened, if it was duly diligent.[171]

Where a statute provided that any cattle-guard which should be approved by the commissioner of railroads should be sufficient, it was held not to be necessary that the commissioner should approve every guard in use upon the various railroads, but that a company might use a guard which he approved by name where such name applied to one of a definite description.[172]

A company cannot for an unreasonable time permit its guards to remain filled with snow or ice.[173] In a Vermont case, it was held that the test of the company's liability was not whether the guards were "clear of snow or ice" but whether, in their maintenance, the company was negligent,

[168] Balt. & O. S. W. R. Co. *v.* Abbott, 59 Ill. App. 609; Chic., B. & Q. R. Co. *v.* Evans, 45 id. 79.

[169] Chic., B. & Q. R. Co. *v.* Farrelly, 3 Ill. App. 60; Chic. & A. R. Co. *v.* Utley, 38 Ill. 410. And see, to the same effect, Jones *v.* Chic., B. & K. C. R. Co., 59 Mo. App. 137; Barnhart *v.* Chic., M. & St. P. R. Co., 97 Ia. 654. See, however, Green *v.* St. Paul, M. & M. R. Co., 60 Minn. 134.

[170] Keliher *v.* Conn. River R. Co., 107 Mass. 411.

[171] Memphis & C. R. Co. *v.* Lyon, 62 Ala. 71. And see Whitsky *v.* Chic. & G. T. R. Co., 62 Mich. 245.

[172] La Flamme *v.* Detroit & M. R. Co., 109 Mich. 509.

[173] Indiana, B. & W. R. Co. *v.* Drum, 21 Ill. App. 331; Dunnigan *v.* Chic. & N. R. Co., 18 Wis. 28. And see Chic., B. & Q. R. Co. *v.* Kennedy, 22 Ill. App. 308; Robinson *v.* Chic., R. I. & P. R. Co., 79 Ia. 495; Giger *v.* Chic. & N. R. Co., 80 id. 492.

which must be determined by the jury under all the circumstances in the case, *e. g.*, the location of the road, the position and condition of the guard, the number of animals which might reasonably be apprehended to be at large, the prevailing storms, the nature and character of the weather and all other facts bearing upon the question.[174] In Minnesota, the rule is that, except under extraordinary circumstances, reasonable care does not require the company to remove snow and ice from cattle-guards.[175]

It should be shown that the company had notice of the defect, or by ordinary diligence might have had notice thereof and have repaired the same before the injury was inflicted.[176] Where the company, by agreement with the land-owner, maintains cattle-guards and wing fences, the grantee of the company is chargeable with notice of such guards and fences and is thereby warned that there is some claim of right connected therewith.[177]

The land-owner is not negligent in leaving the whole matter of constructing and repairing cattle-guards to the company which has impliedly contracted to perform the work.[178] And a statute authorizing a land-owner to repair cattle-guards where the company fails to do so, imposes no duty on him and he is not guilty of contributory negligence with regard to damage caused by cattle entering his land.[179] But a land-owner having knowledge that straying animals may pass over defective cattle-guards and destroy his crops cannot re-

[174] Wait *v.* Bennington & R. R. Co., 61 Vt. 268.

[175] Stacey *v.* Winona & St. P. R. Co., 42 Minn. 158; Blais *v.* Minneapolis & St. L. R. Co., 34 id. 57.

[176] Chubbuck *v.* Hannibal & St. J. R. Co., 77 Mo. 591. And see Kansas City, F. S. & M. R. Co. *v.* Grimes, 50 Kan. 655.

[177] Toledo, St. L. & K. C. R. Co. *v.* Fenstemaker, 3 Ind. App. 151.

[178] Texas & St. L. R. Co. *v.* Young, 60 Tex. 201. And see Mo. Pac. R. Co. *v.* Lynch, 31 Kan. 531.

See, as to the contributory negligence of the plaintiff's tenant, La Flamme *v.* Detroit & M. R. Co., 109 Mich. 509.

[179] San Antonio & A. P. R. Co. *v.* Knoepfli, 82 Tex. 270.

cover without using every means an ordinarily prudent person would use to protect them.[180]

An agreement of a company to keep and maintain cattle-guards on each side of a person's land to prevent stock running at large from trespassing, is limited by the time it should operate its road over his land and need not be in writing under the provision of the Statute of Frauds requiring an agreement not to be performed within one year to be in writing.[181]

In some cases, the fact that the animal was in the highway unlawfully or through the owner's negligence has been held not to prevent recovery for an injury resulting from a defective cattle-guard.[182] This was formerly the rule in Canada,[183] but the statute has been changed and now the company is not liable unless the animals got on the track from a "place where they might properly be."[184] And a similar rule is followed in some of the States.[185]

Statutes requiring railroad companies already in existence to construct cattle-guards are constitutional.[186] And a statute requiring a company to put in a cattle-guard when a land-

[180] Ward *v.* Paducah & M. R. Co., 4 Fed. Rep. 862; Mo. Pac. R. Co. *v.* Cox, 2 Tex. App. (Civ. Cas.) 217.

[181] Ark. Midland R. Co. *v.* Whitley, 54 Ark. 199.

[182] White *v.* Utica & B. R. R. Co., 15 Hun (N. Y.) 333; Sheaf *v.* Same, 2 Thomp. & C. (N. Y) 388; Harwood *v.* Bennington & R. R. Co., 67 Vt. 664.

See Hance *v.* Cayuga & S. R. Co., 26 N. Y. 428,—said in 1 Thomp. Negl. 530, to be disregarded in later opinions of the Supreme Court.

[183] Pontiac Pac. Junc. R. Co. *v.* Brady, Montr. L. Rep. 4 Q. B. 346; Huist *v.* Buffalo & L. H. R. Co., 16 U. C. Q. B. 299.

[184] Nixon *v.* Grand Trunk R. Co., 23 Ont. 124; Can. Pac. R. Co. *v.* Cross, Rap. Jud. Quebec, 3 B. R. 170; McKenzie *v.* Can. Pac. R. Co., 14 Leg. News (Can.) 410; Simpson *v.* Great Western R. Co., 17 U. C. Q. B. 57; Whitman *v.* W. & A. R. Co., 6 Russ. & Geld. (Nov. Sco.) 271.

[185] Chapin *v.* Sullivan R. Co., 39 N. H. 564; Hill *v.* Concord & M. R. Co. (N. H.), 32 Atl. Rep. 766; Maynard *v.* Norfolk & W. R. Co., 40 W. Va. 331.

[186] Thorpe *v.* Rutland & B. R. Co., 27 Vt. 140; Gulf, C. & S. F. R. Co. *v.* Rowland, 70 Tex. 298.

owner asserts that it is necessary to prevent the depredation of stock on his farm, is not unconstitutional because it leaves the determination to the owner.[187] But a statute giving damages where all stock pass through cattle-guards and commit depredation is unconstitutional as imposing an absolute liability irrespective of negligence or want of compliance with a statute.[188]

142. Where Fences are Necessary; Station Grounds.—The subject of fencing in cities and villages and at crossings generally has already been considered.[189] Where a statute requires fences to be constructed along "occupied lands" only, this has been held to mean lands adjoining a railway actually or constructively occupied up to the line of the railway by reason of the actual occupation of some part of the section or lot by the person who owns it or is entitled to possession of the whole.[190] A statute has been held to require fencing only where the track runs through or alongside of the land of private individuals;[191] and another statute has been held to apply where land is not under cultivation but is occupied by farmers and forms a part of tracts which were under cultivation.[192] Where a statute requires a company to erect fences where the road passes along enclosed or cultivated fields or unenclosed prairie lands, this requires fences on both sides of the road, but does not extend to timber lands from which timber has been cut, but which are not cultivated.[193]

Where a company was required to fence, except at places where the railroad commissioners deemed it unnecessary, it was held not to be obliged to fence where the track ran parallel to and fifty feet away from another track, though the com-

[187] Birmingham Mineral R. Co. *v.* Parsons, 100 Ala. 662.
[188] Ibid. [189] See § 140, supra.
[190] Davis *v.* Can. Pac. R. Co., 12 Ont. App. 724.
[191] Walsh *v.* Virginia & T. R. Co., 8 Nev. 110.
[192] Stimpson *v.* Un. Pac. R. Co., 9 Utah 123.
[193] Tiarks *v.* St. Louis & I. M. R. Co., 58 Mo. 45.

missioners had not excused it from fencing there.[194] But where the duty to fence was imperative it was held to be no defence that the stock strayed across the unfenced track of another company and that a fence between the tracks would be dangerous to human life.[195]

The question of convenience is an important one to be considered in deciding whether a company has been negligent in failing to fence. Where there was a saw-mill fifty feet from the track and the intervening ground was used by the owners of the mill for piling lumber and loading it on cars and by the public for passing to and from the mill with logs and lumber and piling wood to be sold to the railroad company, it was held that no fence was necessary and the company was not liable for the death of an animal that got upon the track.[196] So, where an action was brought to recover for the loss of a horse and cart by falling into a river through the negligence of the company in not providing cap-logs for its pier, it was held that the company might show that such logs would interfere with the loading of vessels in the course of its business.[197] And, in general, a company is not required to fence at places where a fence would interfere with its own rights in operating its road or transacting its business, nor where the rights of the public in travelling or doing business with the company would be interfered with, nor where a fence would imperil the lives of its employees.[198] And it was held that it need not fence where the result of fencing would be to cut itself off from the use of its own land or leased property or buildings, although the buildings might not be in proper use.[199] The burden of proof is on the com-

[194] Gallagher *v.* N. Y. & N. E. R. Co., 57 Conn. 442.
[195] Kelver *v.* N. Y., C. & St. L. R. Co., 126 N. Y. 365.
[196] Pittsburg, C. & St. L. R. Co. *v.* Bowyer, 45 Ind. 496.
[197] Philadelphia & R. R. Co. *v.* Ervin, 89 Pa. St. 71.
[198] Evansville & T. H. R .Co. *v.* Willis, 93 Ind. 507; Donald *v.* Minneapolis, St. P. & S. S. M. R. Co., 113 Mich. 484.
[199] Jeffersonville, M. & I. R. Co. *v.* Beatty, 36 Ind. 15.

pany to show that it could not fence on account of danger to its employees or inconvenience to the public.[200]

In a Texas case, however, it was held that where a fence would not obstruct a street or highway, the company cannot avoid liability by showing that a fence at that point would cause much inconvenience to its servants in loading and unloading cars and in operating trains.[201] And, by maintaining a fence for years, a company may be estopped to exonerate itself for a failure to repair it on the ground that it would be dangerous to its employees.[202]

It is on the ground of inconvenience and danger that a company is excused from erecting fences in the grounds around its station buildings, with the adjacent tracks and switches.[203] And it is no defence that the accident occurred on station grounds, unless it appears that a fence would interfere with business or public convenience.[204] So, the mere convenience of the company is not a sufficient reason for not fencing parts of its station grounds which are not required

[200] Toledo, St. L. & K. C. R. Co. *v.* Jackson, 5 Ind. App. 547; Indianapolis, D. & W. R. Co. *v.* Clay, 4 id. 282; Cox *v.* M., S. S. M. & A. R. Co., 41 Minn. 101.

[201] Houston & T. C. R. Co. *v.* Simpson, 2 Tex. App. (Civ. Cas.) 591. And see Bradley *v.* Buffalo, N. Y. & E. R. Co., 34 N. Y. 427; Wabash R. Co. *v.* Howard, 57 Ill. App. 66, cited infra.

[202] Chic. & E. I. R. Co. *v.* Guertin, 115 Ill. 466.

[203] Galena & C. U. R. Co. *v.* Griffin, 31 Ill. 303; Terre Haute & I. R. Co. *v.* Grissom, 60 Ill. App. 114; Toledo, St. L. & K. C. R. Co. *v.* Franklin, 53 id. 632; Indianapolis, P. & C. R. Co. *v.* Crandall, 58 Ind. 365; Ind., B. & W. R. Co. *v.* Quick, 109 id. 295; Bechdolt *v.* Grand Rapids & I. R. Co., 113 id. 343; Smith *v.* Chic., R. I. & P. R. Co., 34 Ia. 506; Hooper *v.* Chic., St. P., M. & O. R. Co., 37 Minn. 52; Jennings *v.* St. Joseph & St. L. R. Co., 37 Mo. App. 651; Chic., B. & Q. R. Co. *v.* Hogan, 27 Neb. 801; Hyatt *v.* New York, L. E. & W. R. Co., 64 Hun (N. Y.) 542; Moses *v.* Southern Pac. R. Co., 18 Oreg. 385; Gulf, C. & S. F. R. Co. *v.* Wallace, 2 Tex. Civ. App. 270; Swanson *v.* Melton, 4 Tex. App. (Civ. Cas.) 459; Roberts *v.* Great Western R. Co., 4 C. B. N. S. 506.

[204] Chouteau *v.* Hannibal & St. J. R. Co., 28 Mo. App. 556; Peyton *v.* Chic., R. I. & P. R. Co., 70 Ia. 522. And see Brandenburg *v.* St. Louis & S. F. R. Co., 44 Mo. App. 224.

to be kept open for the convenience of the public in the use of the road.[205] And it was held in New York that the fact that a railroad crossing was at or near the station and that to place a cattle-guard there would inconvenience the company will not excuse it from complying with the positive requirements of the statute.[206] But, ordinarily, cattle-guards need not be constructed at stations.[207] Nor is a company negligent in not placing fences or screens in station grounds to prevent the frightening of horses.[208]

The question of the proper extent of station grounds is one for the jury to determine.[209] But this cannot be done collaterally, where the material facts are undisputed.[210] Station grounds *prima facie* include all the right of way left unfenced between the switches and cattle-guards on either side of the platform, with the switches and side-tracks, unless they are shown to be unreasonable in extent.[211] Land not necessary for station grounds or switch-yards, though used as such, must be fenced.[212] And an indefinite intent to use ground for a public purpose is not sufficient to relieve the company from liability.[213]

[205] Wabash R. Co. *v.* Howard, 57 Ill. App. 66.

[206] Bradley *v.* Buffalo, N. Y. & E. R. Co., 34 N. Y. 427.

[207] Robertson *v.* Atlantic & P. R. Co., 64 Mo. 412; Pearson *v.* Chic., B. & K. C. R. Co., 33 Mo. App. 543; Pierce *v.* Andrews, 13 O. Circ. Ct. 513.

[208] Flagg *v.* Chic., D. & C. G. T. J. R. Co., 96 Mich. 30; Simkin *v.* London & N. W. R. Co., 21 Q. B. D. 453.

[209] Wabash R. Co. *v.* Howard, supra; Pearson *v.* Chic., B. & K. C. R. Co., supra; Dinwoodie *v.* Chic., M. & St. P. R. Co., 70 Wis. 160.

[210] McGrath *v.* Detroit, M. & M. R. Co., 57 Mich. 555,—followed in Rinear *v.* Grand Rapids & I. R. Co., 70 id. 620.

[211] Mills & Le Clair Lumber Co. *v.* Chic., St. P., M. & O. R. Co., 94 Wis. 336.

[212] Atchison, T. & S. F. R. Co. *v.* Shaft, 33 Kan. 521; Chic., R. I. & P. R. Co. *v.* Green, 4 Kan. App. 133; Tex. & Pac. R. Co. *v.* Billingsly (Tex. Civ. App.), 37 S. W. Rep. 27; Rinear *v.* Grand Rapids & I. R. Co., supra.

See Eaton *v.* McNeilly, 31 Oreg. 128, where the fact that the station grounds were larger than the law allowed was held immaterial.

[213] Cox *v.* Minneapolis, S. S. M. & A. R. Co., 41 Minn. 101.

Failure to fence the following places has been held not to constitute negligence on the part of the company:—the engine house, machine shop, car house and wood yard;[214] as much of the track and grounds outside of the switches as was necessary for reaching the side-tracks upon which were coal sheds;[215] grounds at a flag station at which trains were regularly stopped whenever there were pasengers, freight or express to be taken, though no station building was erected thereon;[216] places used for loading or discharging freight;[217] a station used as such only at irregular intervals by picnic parties and for camp meetings.[218]

The company was held liable where the following places were not fenced:—a side-track and platform, where there was no station building and where no tickets were sold or freight billed;[219] a place at some distance from the station where some freight was received and discharged.[220] Evidence that an animal was killed on a branch road, one hundred yards from the station, near a siding, was held not to be conclusive proof that the track could not have been fenced.[221]

It is the duty of the company to maintain suitable guards and fences to prevent an animal from passing from the station grounds to the space on the track outside of such grounds.[222] In Illinois, the company must fence at a station not within the limits of an incorporated town.[223]

[214] Indianapolis & C. R. Co. *v.* Oestel, 20 Ind. 231.
See, also, Peters *v.* Stewart, 72 Wis. 133.
[215] Grondin *v.* Duluth, S. S. & A. R. Co., 100 Mich. 598.
[216] Schneekloth *v.* Chic. & W. M. R. Co., 108 Mich. 1.
[217] Cornell *v.* Manistee & N. E. R. Co. (Mich.), 75 N. W. Rep. 472.
[218] Stewart *v.* Pennsylvania Co., 2 Ind. App. 142.
[219] Anderson *v.* Stewart, 76 Wis. 43. And see Jaeger *v.* Chic., M. & St. P. R. Co., 75 id. 130; Southern Kansas R. Co. *v.* McKay (Tex. Civ. App.), 47 S. W. Rep. 479.
[220] Moser *v.* St. Paul & D. R. Co., 42 Minn. 480.
[221] Gulf, C. & S. F. R. Co. *v.* Weems (Tex. Civ. App.), 38 S. W. Rep. 1028.
[222] Kobe *v.* Northern Pac. R. Co., 36 Minn. 518.
[223] Chic., M. & St. P. R. Co. *v.* Dumser, 109 Ill. 402.

The burden of proof is on the defendant to show that the animal was killed within the station grounds.[224] Where this is shown, there can be no recovery in the absence of evidence showing the want of ordinary care.[225]

143. Action; Parties; Pleading.—It was held in an Illinois case that an action for injuries to stock caused by the failure of a railroad company to maintain fences along the track is transitory in its nature, whether brought under the statute or at common law.[226] But under the Indiana statute such an action is local and must be brought in the county in which the injury occurred.[227] The owner of animals may, as a rule, in such cases elect whether to base his action upon the statute or upon common-law grounds of negligence.[228] An action based on, and claiming double damages under, the fencing statutes of one State cannot be maintained in another State.[229] Where sheep, getting through a defective fence, were killed by a train, the engineer of which had orders to travel at a certain rate of speed per hour, it was held that the remedy was in case, not in trespass.[230]

A railroad company is not liable to its own tenants for the loss of cattle caused by its failure to fence its land.[231] But where, owing to a failure to fence, an animal gets on a track

[224] Wilder *v.* Chic. & W. M. R. Co., 70 Mich. 382.

[225] Internat. & G. N. R. Co. *v.* Dunham, 68 Tex. 231; Swearingen *v.* Mo., K. & T. R. Co., 64 Mo. 73; Robertson *v.* Atlantic & P. R. Co., Ibid. 412; Indianapolis & St. L. R. Co. *v.* Christy, 43 Ind. 143; Cleaveland *v.* Chic. & N. R. Co., 35 Ia. 220.

[226] Ill. Cent. R. Co. *v.* Swearingen, 33 Ill. 289.

[227] Terre Haute & I. R. Co. *v.* Pierce, 95 Ind. 496; Louisville, N. A. & C. R. Co. *v.* Davis, 83 id. 89. The complaint should aver that the animal was killed or injured in the county in which suit is brought: Toledo, W. & W. R. Co. *v.* Milligan, 52 Ind. 505. And see Jacksonville, T. & K. W. R. Co. *v.* Wellman, 26 Fla. 344.

[228] Rockford, R. I. & St. L. R. Co. *v.* Phillips, 66 Ill. 548.

[229] Bettys *v.* Milwaukee & St. P. R. Co., 37 Wis. 323.

[230] Sharrod *v.* London & North-Western R. Co., 4 Exch. 580.

[231] Potter *v.* N. Y. Cent. & H. R. R. Co., 60 Hun (N. Y.) 313.

and causes the derailment of a train, an employee injured may sue the company,—the statute being designed to protect persons on trains as well as cattle owners.[232] He cannot, however, in such a case recover from the owner of the animal.[233]

The question as to who are proper defendants to a common-law action based on negligence has been already discussed,[234] and many of the decisions thereon are applicable to statutory actions based on the failure to fence. In New York the company owning the road is liable for the omission to erect fences and cattle-guards, and not the company having permission to run trains over the road, by lease or otherwise;[235] though this rule does not apply where the charter rights of the latter company are practically equivalent to ownership.[236] In some States both the company owning and the company operating the road are liable.[237] In others, the company owning the road remains liable for the killing of animals by another company on unfenced portions of the road.[238] In Iowa, the rule was formerly similar to that in New York, but by later legis-

[232] Atchison, T. & S. F. R. Co. *v.* Reesman, 60 Fed. Rep. 370. The defence that the injury was caused by the negligence of a fellow-servant was held not applicable, as the duty cast by the statute on the company cannot be delegated by it to its servants.

[233] Child *v.* Hearn, L. R. 9 Ex. 176. [234] See § 135, supra.

[235] Edwards *v.* Buffalo, R. & P. R. Co., 8 N. Y. App. Div. 390; Parker *v.* Rensselaer & S. R. Co., 16 Barb. (N. Y.) 315.

[236] Tracy *v.* Troy & B. R. Co., 55 Barb. (N. Y.) 529, as distinguished in Edwards *v.* Buffalo, R. & P. R. Co., supra. This case was affirmed in 38 N. Y. 433.

[237] East St. Louis & C. R. Co. *v.* Gerber, 82 Ill. 632; Ill. Cent. R. Co. *v.* Kanouse, 39 id. 272; Sinclair *v.* Mo., K. & T. R. Co., 70 Mo. App. 588; Price *v.* Barnard, Ibid. 175; Eaton *v.* Oreg. R. & Nav. Co., 19 Oreg. 391; Oreg. R. & Nav. Co. *v.* Dacres, 1 Wash. 195. See McCall *v.* Chamberlain, 13 Wis. 637; Vermont R. Co. *v.* Paquette, 2 Leg. News (Can.) 390. See, also, 58 Amer. St. Rep. 152 n.

[238] Fontaine *v.* South. Pac. R. Co., 54 Cal. 645; Kansas City, Ft. S. & G. R. Co. *v.* Ewing, 23 Kan. 273. And see Wyman *v.* Penobscot & K. R. Co., 46 Me. 162.

A company that has leased its road is liable to the owner of a field for damages to crops caused by its failure to construct proper cattle-guards: St. Louis, W. & W. R. Co. *v.* Curl, 28 Kan. 622.

lation liability has been extended to lessees operating or running the road.[239] In Indiana, the lessee running the road in its "own name" is not liable for killing stock on an unfenced track; otherwise, where it runs it "in the corporate name of the owner": there it is liable jointly and severally with the owner.[240]

Where the company has gone into the hands of a receiver, he is the proper defendant.[241] Under the Indiana statute an action lies against the company for an injury resulting from its failure to fence though the road is controlled and run by a receiver in bankruptcy.[242] Under the Kansas statute the company may be sued after the receiver is discharged for stock killed while the road was in his hands, where the company might have fenced before he was appointed but failed to do so.[243]

A contractor for the construction of a road is liable as an "agent of the corporation" when he throws down fences by which animals go on the track and are killed.[244] But a company is not liable for stock escaping from unfenced land and killed by the employees of the contractor building the road.[245]

[239] See Clary *v.* Ia. Midland R. Co., 37 Ia. 344; Stephens *v.* Davenport & St. P. R. Co., 36 id. 327; Stewart *v.* Chic. & N. R. Co., 27 id. 282; Liddle *v.* Keokuk, Mt. P. & M. R. Co., 23 id. 378.

[240] Pittsburgh, C. & St. L. R. Co. *v.* Bolner, 57 Ind. 572. And see Cinc., H. & I. R. Co. *v.* McDougall, 108 id. 179; Pittsburgh, C., C. & St. L. R. Co. *v.* Thompson, 21 Ind. App. 355.

"If it is sought to hold the owner of the road liable for its lessee's act, the relation between the roads must be pleaded, with the appropriate facts necessary to create the liability": Lake Erie & W. R. Co. *v.* Rooker, 13 Ind. App. 600.

[241] Brockert *v.* Central Ia. R. Co., 82 Ia. 369; Internat. & G. N. R. Co. *v.* Bender, 87 Tex. 99.

[242] Indianapolis, C. & L. R. Co. *v.* Ray, 51 Ind. 269.

[243] Kan. Pac. R. Co. *v.* Wood, 24 Kan. 619.

[244] Gardner *v.* Smith, 7 Mich. 410. And the fact that the owner turned his sheep into the field while the contractor was throwing down fences was held not to affect the liability of the latter: Ibid.

[245] Gordon *v.* Chic., S. F. & C. R. Co., 44 Mo. App. 201.

A company is liable only for injuries to animals caused by trains on its own line owing to a failure to fence the track and not for injuries caused by the trains on a parallel and contiguous line.[246] But a company owning the central tracks among a number of parallel ones is liable for the death of an animal by one of its trains owing to a failure to fence the exterior tracks.[247]

The plaintiff in an action under the statute should allege that the road was not fenced at the place where the animals entered, and no other negligence need be averred.[248] But the failure to fence should appear from the statement, by implication at least, to have been the cause of the killing.[249] An averment that the animal was killed at an unfenced place is not sufficient, the place of entry being the decisive test.[250] But this defect may be cured by the verdict.[251]

Some of the cases go further and hold that the plaintiff must also negative any statutory exceptions and allege that the animals entered at a place where the company could have

[246] Fouchon *v.* Ontario & Quebec R. Co., 11 Leg News (Can.) 74; Daoust *v.* Can. Pac. R. Co., 15 id. 382.

[247] Kelver *v.* N. Y., C. & St. L. R. Co., 126 N. Y. 365.

See Gallagher *v.* N. Y. & N. E. R. Co., 57 Conn. 442, cited in § 142, supra.

[248] Terre Haute, A. & St. L. R. Co. *v.* Augustus, 21 Ill. 186; Balt., P. & C. R. Co. *v.* Anderson, 58 Ind. 413; Toledo, W. & W. R. Co. *v.* Weaver, 34 id. 298; Kan. Pac. R. Co. *v.* Taylor, 17 Kan. 566; Bigelow *v.* North Missouri R. Co., 48 Mo. 510; Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. Rep. 347; 1 Rap. & Mack Dig. of Ry. Law 257. See Indianapolis & V. R. Co. *v.* Sims, 92 Ind. 496.

Where there is no statute requiring railroad companies to fence, the omission to do so is not *prima facie* evidence of negligence: Stevenson *v.* N. O. Pac. R. Co., 35 La. Ann. 498.

[249] Dryden *v.* Smith, 79 Mo. 525; Bowen *v.* Hannibal & St. J. R. Co, 75 id. 426; Toledo, P. & W. R. Co. *v.* Darst, 52 Ill. 89. And see, as to a cattle-guard, Riley *v.* Chic., M. & St. P. R. Co., 104 Ia. 235.

[250] Louisville, N. A. & C. R. Co. *v.* Quade, 91 Ind. 295.

But see Jeffersonville, M. & I. R. Co. *v.* Chenoweth, 30 id. 366. And see the cases cited in § 144, infra, as to the presumption that the place of killing was the place of entry.

[251] Louisville, N. A. & C. R. Co. *v.* Goodbar, 102 Ind. 596.

fenced and were required by law to do so.[252] This is the rule in Missouri where the plaintiff seeks to recover double damages under the statute, but not where he sues in an ordinary action for single damages only.[253] But most of the cases hold that the fact that the company need not have, or could not have, fenced is a matter of defence only and one that the plaintiff is not required to negative in his statement.[254] The fact that a sufficient length of time had not elapsed, after the fence became defective, to allow the company an opportunity to repair it is also a matter of defence and need not be negatived by the plaintiff.[255]

If the land-owner has received a specific sum for fencing along the line or has agreed to build and maintain a lawful fence, or has received compensation for so doing by way of damages in the condemnation of the land, the burden is on the company to show such fact in defence, and not on the plaintiff to negative it.[256] Where a statute required cattle-guards to be erected at certain points, the petition in an action

[252] Ohio & Miss. R. Co. *v.* Brown, 23 Ill. 94; Chic., B. & Q. R. Co. *v.* Carter, 20 id. 390.

[253] Ward *v.* St. Louis, I. M. & S. R. Co., 91 Mo. 168; Mayfield *v.* St. Louis & S. F. R. Co., Ibid. 296; Radcliffe *v.* St. Louis, I. M. & S. R. Co., 90 id. 127; Tickell *v.* Same, Ibid. 296; Jones *v.* Same, 44 Mo. App. 15; Brassfield *v.* Patton, 32 id. 572; Briscoe *v.* Mo. Pac. R. Co., 25 id. 468.

See Hamilton *v.* Mo. Pac. R. Co., 87 Mo. 85, where it was held that, in an action to recover double damages, the burden is on the company to show any circumstances exempting it from its duty to fence.

[254] Cinc., I., St. L. & C. R. Co. *v.* Parker, 109 Ind. 235; Evansville & T. H. R. Co. *v.* Mosier, 101 id. 597; Jeffersonville, M. & I. R. Co. *v.* Lyon, 72 id. 107; Ohio & M. R. Co. *v.* McClure, 47 id. 317; Lake Erie & W. R. Co. *v.* Rooker, 13 Ind. App. 600; Un. Pac. R. Co. *v.* Dyche, 28 Kan. 200; Internat. & G. N. R. Co. *v.* Dunham, 68 Tex. 231; Blomberg *v.* Stewart, 67 Wis. 455; Cox *v.* Minneapolis, S. S. M. & A. R. Co., 41 Minn. 101.

[255] Busby *v.* St. Louis, K. C. & N. R. Co., 81 Mo. 43; Jeffersonville, M. & I. R. Co. *v.* Sullivan, 38 Ind. 262.

See Perry *v.* Dubuque S. R. Co., 36 Ia. 102; Townsley *v.* Mo. Pac. R. Co., 89 Mo. 31.

[256] Toledo, P. & W. R. Co. *v.* Pence, 68 Ill. 524.

based on a failure to keep a cattle-guard in repair was held demurrable for not alleging that the guard was one that the defendant was required to keep in repair.[257]

General allegations of the continuous operation of the road and the continuous neglect to fence it and that damages resulted therefrom, are sufficient to authorize a recovery for such natural mischiefs as invariably follow the destruction of fences and exposure of lands and cannot easily be itemized.[258] An allegation that the damage was caused by the defendant's failure to maintain a good and sufficient fence will cover any defect in the fence without special mention.[259] But an averment that a barbed-wire fence was so constructed as to create a snare and that stock were injured on the wires was held not to charge that the fence was negligently constructed.[260]

A petition uniting a cause of action for not maintaining fences, for failure to signal and for negligence, has been held bad for duplicity.[261] Otherwise, where a petition alleged a failure to maintain fences with an opening and gates therein, and to maintain cattle-guards: the plaintiff might recover on proof of either charge.[262] But allegations of negligence in such cases may be treated as surplusage and the action regarded as a statutory one for failure to fence.[263]

An allegation that the road was "not fenced according to law" was held insufficient, as stating a mere conclusion of law.[264] Otherwise, where the allegation was that the road was "not securely fenced as required by law." [265]

It has been held that in an action for the death of an ani-

[257] Southern R. Co. *v.* Harrell (Ga.), 30 S. E. Rep. 821.
[258] Grand Rapids & I. R. Co. *v.* Southwick, 30 Mich. 444.
[259] McCoy *v.* Southern Pac. R. Co. (Cal.), 26 Pac. Rep. 629.
[260] Texas M. R. Co. *v.* Hooten (Tex. Civ. App.), 50 S. W. Rep. 499.
[261] Harris *v.* Wabash R. Co., 51 Mo. App. 125.
[262] Woods *v.* Mo., K. & T. R. Co., 51 Mo. App. 500.
[263] Jeffersonville, M. & I. R. Co. *v.* Lyon, 55 Ind. 477.
[264] Indianapolis, P. & C. R. Co. *v.* Bishop, 29 Ind. 202.
[265] Indianapolis, B. & W. R. Co. *v.* Lyon, 48 Ind. 119.

mal owing to a failure to fence, the acts of the plaintiff excusing such neglect are not available under a general denial.[266] A tender of damages pleaded as a distinct defence admits that the company ought to have fenced.[267]

144. Evidence; Damages.—Although the material fact in the plaintiff's case is the entry of his animals on the defendants' track at a place where it should have been fenced, it has been held that, where the evidence shows the injury or killing to have occurred at an unfenced place, it will be presumed that the animals entered on the track at that spot.[268] And, in general, the plaintiff is not bound to show by positive evidence where the animals entered: it will be sufficient if that fact can be inferred.[269] But, in the absence of some kind of evidence, there can be no presumption as to the place of injury.[270] If the place of entry was one which the company was required to fence, and was capable of being fenced, the presumption is that the company had done its duty in regard to fencing it.[271] Where the road was not fenced, it will be presumed that the injury was caused by the failure to fence.[272] Where the statute provides that the failure to fence is *prima facie* evidence of negligence, proof that the train was running

[266] Kingsbury *v.* Chic., M. & St. P. R. Co., 104 Ia. 63.

[267] Taylor *v.* Chic., St. P. & K. C. R. Co., 76 Ia. 753.

[268] Wabash R. Co. *v.* Pickrell, 72 Ill. App. 601; Patrie *v.* Oreg. Short-Line R. Co. (Ida), 56 Pac. Rep. 82; Asher *v.* St. Louis, I. M. & S. R. Co., 89 Mo. 116; Duke *v.* Kansas City, F. S. & M. R. R. Co., 39 Mo. App. 105; Pearson *v.* Chic., B. & K. C. R. Co., 33 id. 543; McGuire *v.* Mo. Pac. R. Co., 23 id. 325. See Brenner *v.* Green Bay, S. P. & N. R. Co., 61 Wis. 114.

[269] Evansville & T. H. R. Co. *v.* Mosier, 101 Ind. 597.

Otherwise, where it is proved that the animals were killed where the company was not obliged to fence: Sullivan *v.* Oreg. R. & Nav. Co., 19 Oreg. 319.

[270] Croddy *v.* Chic., R. I. & P. R. Co., 91 Ia. 598.

[271] Louisville, N. A. & C. R. Co. *v.* Quade, 91 Ind. 295.

[272] Wood *v.* Kansas City, F. S. & M. R. Co., 43 Mo. App. 294; Mayfield *v.* St. Louis & S. F. R. Co., 91 Mo. 296.

at a lawful rate of speed and with proper appliances and that the collision was unavoidable, will overcome the presumption of negligence.[273]

Where the action is brought for common-law negligence, the fact that the road was not fenced cannot be shown.[274] And, conversely, where the petition sets up merely that the injury was caused by the want of a fence, the plaintiff is not entitled to have the question of general negligence adjudicated.[275]

Where the facts are undisputed, the question of the necessity of fencing is one of law for the court.[276] Where the evidence as to such necessity is conflicting, the verdict of the jury will not be disturbed.[277]

Where the fence has been shown to be insecure and not such as good husbandmen generally keep, it need not be shown that the particular part where the stock passed was insecure.[278] Where the evidence fails to show that defects in a fence or crossing had any bearing on the question of the defendant's negligence, evidence of such defects is inadmissible.[279] Evidence of repairs made by the company to a gate after cattle were killed, owing, as alleged, to the bad condition of the gate, is admissible.[280] But evidence of the character and kind of fence subsequent to the injury is not admissible without showing that there had been no change in its con-

[273] Dickey *v.* North. Pac. R. Co., 19 Wash. 350.

[274] Pittsburg, C. & St. L. R. Co. *v.* Stuart, 71 Ind. 500; Dickey *v.* North. Pac. R. Co., supra.

[275] Asbach *v.* Chic., B. & Q. R. Co., 74 Ia. 248.

[276] Hyatt *v.* New York, L. E. & W. R. Co., 64 Hun (N. Y.) 542.

[277] Terre Haute & I. R. Co. *v.* Schaeffer, 5 Ind. App. 86. And see Snook *v.* Clark, 20 Mont. 230.

[278] Louisville, N. A. & C. R. Co. *v.* Spain, 61 Ind. 460.

See, as to evidence of insecurity, McGuire *v.* Ogdensburgh & L. C. R. Co., 18 N. Y. Suppt. 313.

[279] Galveston, H. & S. A. R. Co. *v.* Dyer (Tex. Civ. App.), 46 S. W. Rep. 841.

[280] Page *v.* Great Eastern R. Co., 24 L. T. N. S. 585.

dition since the injury.[281] Where the company claims that the animal was such that a good and lawful fence would be no protection against it, the burden is on the compay to show this.[282]

The bad condition of fences in other places is not a material fact.[283] But evidence of the insufficiency of a similarly constructed cattle-guard some miles away is admissible.[284] So, evidence is admissible that the same make of cattle-guards is in general use among railways and is regarded as being the best-known make.[285] But in an action against a company for injuries to crops resulting from a defective cattle-guard it was held that evidence that another guard, similarly constructed, had proved sufficient, was properly rejected.[286] Evidence that other animals had got on the track owing to the alleged defects in a fence or cattle-guard is admissible.[287]

It is proper to ask competent witnesses whether a particular fence was such a one as good husbandmen usually keep.[288] But the mere opinion of a witness that a bank was a good protection was held not admissible.[289] And it has been held that witnesses cannot testify as to the sufficiency of a cattle-guard: their testimony should be confined to its actual condition, leaving the question of sufficiency for the jury.[290] So,

[281] Brentner *v.* Chic., M. & St. P. R. Co., 58 Ia. 625.

[282] Mo. Pac. R. Co. *v.* Bradshaw, 33 Kan. 533. And see Gulf, C. & S. F. R. Co. *v.* Hudson, 77 Tex. 494, where it was held that a company that has not fenced its road cannot show that the killing would have occurred even if there had been a fence.

[283] Chic., B. & Q. R. Co. *v.* Farrelly, 3 Ill. App. 60.

[284] New York, C. & St. L. R. Co. *v.* Zumbaugh, 11 Ind. App. 107.

[285] Lake Erie & W. R. Co. *v.* Murray, 69 Ill. App. 274.

[286] Downing *v.* Chic., R. I. & P. R. Co., 43 Ia. 96.

[287] New York, C. & St. L. R. Co. *v.* Zumbaugh, supra; Chic. & N. R. Co. *v.* Hart, 22 Ill. App. 207; Lake Erie & W. R. Co. *v.* Murray, supra; Bowen *v.* Flint & P. M. R. Co., 110 Mich. 445; Jebb *v.* Chic. & G. T. R. Co., 67 id. 160.

[288] Louisville, N. A. & C. R. Co. *v.* Spain, 61 Ind. 460.

[289] Veerhusen *v.* Chic. & N. R. Co., 53 Wis. 689.

[290] Kansas City, M. & B. R. Co. *v.* Spencer, 72 Miss. 491; Grace *v.* Gulf & C. R. Co. (Miss.), 25 South. Rep. 875.

the testimony of an expert that, in his opinion, a cattle-guard or barrier was necessary at a particular point, is incompetent.[291] Likewise, the opinion of an expert that a cattle-guard could not have been maintained without injury to employees.[292] In an Illinois case it was held that a witness having no more knowledge of cattle-guards than is possessed by ordinarily intelligent and observant farmers living by a railroad, is not competent to testify as an expert as to the sufficiency of a guard.[293]

It was held in an Indiana case to be no defence that the company had paid the owner for fencing the land as part consideration for the right of way.[294] But, in Georgia, an award of land damages showing that the land-owner received compensation for the increased expense of fencing, incurred by reason of the construction of the railroad, was held admissible in defence, as showing his liability for the consequences of defects in the fences.[295]

A release in a right-of-way deed of all damages by reason of the "location, construction and operation" of the railway over the lands was held not to constitute a defence to an action by the grantor for damages for the killing of stock owing to the failure to build a statutory fence.[296]

A statute making a railroad company liable for all the consequences of its failure to fence is not unconstitutional.[297] Nor is a statute making a company liable in double damages

[291] Amstein *v.* Gardner, 134 Mass. 4.

[292] Chic. & E. I. R. Co. *v.* Modesitt, 124 Ind. 212; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111.

The burden of showing that a cattle-guard or fence would have been dangerous to employees is on the company: Toledo, St. L. & K. C. R. Co. *v.* Jackson, 5 Ind. App. 547.

[293] Lake Erie & W. R. Co. *v.* Helmericks, 38 Ill. App. 141.

[294] New Albany & S. R. Co. *v.* McNamara, 11 Ind. 543.

[295] Georgia R. & Bkg. Co. *v.* Anderson, 33 Ga. 110.

[296] Stoutimore *v.* Chic., M. & St. P. R. Co., 39 Mo. App. 257.

[297] Minneapolis & St. L. R. Co. *v.* Emmons, 149 U. S. 364; Bielenberg *v.* Mont. Un. R. Co., 8 Mont. 271.

for such failure unconstitutional as a denial of the equal protection of the law.[298] Double damages in such a case may be recovered not only for the depreciation in value of the stock resulting from their injuries but also for the value of the care and attention properly bestowed in curing them.[299] The proper practice has been said to be for the jury to find a verdict for single damages and the court may then render judgment for double damages.[300] It has been held that, where jurisdiction is dependent on the amount in dispute, it is governed by the sum claimed as single damages and not by that amount doubled.[301]

The measure of damages is the value of the cattle killed, and not the cost of erecting and maintaining a secure fence.[302] The expense of keeping watch to guard cattle from straying and of the diminution in value of the adjoining land by reason of the failure to fence, falls within the police power of a State.[303] But where the statute limits the damages to injuries caused by the train, expenses incurred in watching or herding cattle before the accident on account of the bad state of the fences are not recoverable.[304] The company is not liable, by reason of its failure to fence, for the loss of flesh of

[298] Minneapolis & St. L. R. Co. *v.* Beckwith, 129 U. S. 26; Mo. Pac. R. Co. *v.* Humes, 115 id. 512; Spealman *v.* Mo. Pac. R. Co., 71 Mo. 434; Tredway *v.* S. C. & St. P. R. Co., 43 Ia. 527.

But, see Atchison & N. R. Co. *v.* Baty, 6 Neb. 37; Denver & R. G. R. Co. *v.* Outcalt, 2 Colo. App. 395.

[299] Manwell *v.* Burlington, C. R. & N. R. Co., 80 Ia. 662.

[300] Wood *v.* St. Louis, K. C. & N. R. Co., 58 Mo. 109.

But see Memphis & L. R. Co. *v.* Carlley, 39 Ark. 246, cited in § 137, supra.

[301] Williams *v.* Hannibal & St. J. R. Co., 80 Mo. 597.

[302] Chic. & A. R. Co. *v.* Barnes, 116 Ind. 126. So, of a cattle-guard: Ind. Cent. R. Co. *v.* Moore, 23 id. 14.

[303] Minneapolis & St. L. R. Co. *v.* Emmons, 149 U. S. 364. And see Raridan *v.* Cent. Ia. R. Co., 69 Ia. 527; Nelson *v.* St. Louis & S. F. R. Co., 49 Kan. 165; Chic., K. & N. R. Co. *v.* Behney, 48 id. 47.

[304] Young *v.* Erie & H. R. Co., 27 Ont. 530; Fouchon *v.* Ontario & Q. R. Co., 11 Leg. News (Can.) 74.

cattle caused by fright when they were on the company's land.[305]

It was held in a Tennessee case that in an action by the company against the owner of the abutting land for removing a fence which it was bound to maintain, it could not recover the value of the stock of a third person for which it had paid, as the killing of such stock was not a direct consequence of the removal of the fence.[306] But, in an Iowa case, where the defendant wrongfully removed a gate which the plaintiff company had erected to keep animals off its right of way over the former's land, and the animal of a third person was injured, and the plaintiff, by reason of its negligence in not replacing the gate, was compelled to pay the value of such animal, it was held that the plaintiff's negligence did not constitute the omission of any duty which it owed the defendant, and that it could recover from the latter the amount paid for the animal.[307]

In Texas it was held that the damages to which one was entitled who was cut off from reaching his cattle on the opposite side of a railroad track by the company's wrongful closing up of gates, were the additional expense of feeding the cattle by another and more circuitous route.[308]

A company failing to construct cattle-guards is liable for resulting injuries to crops by cattle to the extent of the actual value of the crops destroyed.[309] A reasonable compensation should be allowed for the time and labor necessarily expended in trying to save the crops from destruction and the expense of fitting them for market, and the value of the portion saved,

[305] Dooley *v.* Mo. Pac. R. Co., 36 Mo. App. 381.

[306] Louisville & N. R. Co. *v.* Guthrie, 10 Lea (Tenn.) 432.

[307] Chic. & N. R. Co. *v.* Dunn, 59 Ia. 619.

[308] Tex. & Pac. R. Co. *v.* Newton (Tex. Civ. App.), 30 S. W. Rep. 475.

[309] Donald *v.* St. Louis, K. C. & N. R. Co., 44 Ia. 157; St. Louis, W. & W. R. Co. *v.* Curl, 28 Kan. 622; Houston, E. & W. T. R. Co. *v.* Adams, 63 Tex. 200.

if any, should be deducted.[310] But the plaintiff ought not to be allowed compensation beyond the loss that might have been occasioned had no effort to protect his crop been made by him.[311]

Where a company breaks its contract to fence its right of way, the land-owner may recover the cost of erecting a fence, damages for animals killed and for injuries by trespassing animals and loss of pasturage.[312]

In Illinois it has been held that damages for the killing of stock through negligence are compensatory only. To authorize more, circumstances of aggravation must be shown, and interest is not recoverable.[313] In other States interest is recoverable on the value of an animal killed by reason of failure to fence.[314]

The question as to whether or not a reasonable attorney's fee is to be allowed has been already discussed.[315]

[310] Smith *v.* Chic., C. & D. R. Co., 38 Ia. 518.
[311] St. Louis & S. F. R. Co. *v.* Ritz, 33 Kan. 404.
[313] Louisville, N. A. & C. R. Co. *v.* Summer, 106 Ind. 55.
[313] Toledo, P. & W. R. Co. *v.* Johnston, 74 Ill. 83.
[314] Lackin *v.* Delaware & H. Canal Co., 22 Hun (N. Y.) 309; Jebb *v* Chic. & G. T. R. Co., 67 Mich. 160.
See, also, the cases on interest cited in § 137, supra.
[315] See § 137, supra.

TABLE OF CASES.

PAGE

Abbett v. Johnson Co. Commrs 223
Abbott v. Freeman 389
Aberdeen Arctic Co. v. Sutter 24
Abrams v. Milwaukee, L. S. & W. R. Co., 469, 470, 495
Acker v. Anderson Co. 226
Adam v. Richards 78
Adams v. Adams 315
v. Atchison, T. & S. F. R. Co. 674
v. Burton 18
v. Hall 413
v. Natick 195
v. Nichols 295
v. Snyder 81
Adams Exp. Co. v. Jackson 503
Adcock v. Murrell 534
Addison v. Row 24
Agnew v. Corunna 218
Ainsby v. Gt. North. R. Co. 493
Akers v. George 314
Akridge v. Atlanta & W. P. R. Co. 596, 604
Ala. Gt. South. R. Co. v. Chapman 578
v. Killian 630
v. McAlpine 607, 638, 647
v. Moody 586, 589, 644
v. Powers 588, 607
v. Roebuck 630
v. Smith 589
v. Thomas 464, 484, 486
Ala. Midland R. Co. v. McGill 593
Alair v. North. Pac. R. Co. 470
Albany v. Watervliet Turnp. & R. Co. 246
Albee v. Chappaqua Shoe Manufg. Co. 233
Albert v. Bleecker St., etc., R. Co. 252
Alderson v. State 179
Aldrich v. Gorham 203
v. Tripp 225, 226

PAGE

Aldrich v. Wright 134, 135, 568
Alexander v. Dutton 96
v. Gibson 86
v. Pa. R. Co. 499
v. State, 60 Miss 953 173, 184
v. State, 24 Tex. App. 126 178
Alexandria & M. R. Co. v. Miles 577
Alferitz v. Ingalls 102, 108
v. Perkins 113
Alger v. Miss. & Mo. R. Co., 267, 655
Allan v. Mullin 430
Allday v. Great West. R. Co. 474
Allen v. Allen 45
v. Boston & M. R. Co. 567
v. Delano 46
v. Fox 189
v. Hancock 205
v. Leighton 562
v. Smith 458
v. State, 42 Tex. 517 48
v. State, 8 Tex. App 360 178
v. Truesdell 100
v. Wyckoff 558
v. Young 567
Allison v. Brookshire 188
Alpers v. Brown 353
v. San Francisco 353
Alston v. Northwestern Live-Stock Ins. Co. 160
Alvah, The 491
Alvord v. Smith 364
Amer. Cent. Ins. Co. v. Haws 161
Amer. Dist. Tel. Co. v. Walker 430
Amer. Exp. Co. v. People 14
Amer. Preservers Co. v. Drescher 422
Amick v. O'Hara 139
Amory v. Flyn 39, 118
Amstein v. Gardner 612, 695
Anderson v. Bath 195
v. Buckton 347
v. Locke 267
v. Smith 129, 133

PAGE

Anderson v. Stewart 685
v. U. S. 75
v. Worley 307
Andrews v. Cox 46
v. Crandell 450
v. Keith 422
v. Mason City & Ft. D. R. Co. 598
Angell v. Hill, 262, 270
v. Simmons 314
Angus v. Radin 287
Annapolis & Balt. S. L. R. Co. v. Pumphrey 596, 640
Annapolis & E. R. Co. v. Baldwin 628
Anscomb v. Shore 320
Anthony v. Anthony 311
Antisdel v. Chic. & N. R. Co. 657
Aplin v. Porritt 527
Applebee v. Percy 399
Archambault v. Montreal 228
Archer v. Baertschi 323
Arendale v. Morgan 444
Argersinger v. Lever 395
Arkadelphia v. Clark 359
Ark. Midland R. Co. v. Whitley 680
Ark. Teleph. Co. v. Ratteree 254
Ark. Val. Land & Cattle Co. v. Mann 43
Armbruster v. Wilson 304
Armstrong v. Brown 322
v. Chic., M. & St. P. R. Co. 468, 509, 515
v. Reeves 542
v. Traylor 312
Arnold v. Mundy 32
v. Norton 397
Arnot v. Branconier 424
Arthurs v. Chatfield 264
Artman v. Kansas Cent. R. Co. 249
Asbach v. Chic., B. & Q. R. Co. 693
Ashendon v. London, B. & S. C. R. Co. 471, 474
Asher v. St. Louis, I. M. & S. R. Co. 692
Askew v. Peo. 50
Aspegren v. Kotas 140, 158
Atchison & N. R. Co. v. Baty 647, 696
v. Cash 660
v. Loree 598
Atchison, T. & S. F. R. Co. v. Bryan 500
v. Cahill 639
v. Consold. Cattle Co. 504

PAGE

Atchison v. Cupello 609
v. Dill 478
v. Ditmars 493, 495
v. Edward 584
v. Elder 585
v. Gabbert 611, 644, 647, 657
v. Grant 517
v. Griffis 668
v. Ireland 578, 646
v. Jones 584
v. Mason 478
v. Reesman 653, 687
v. Riggs 611
v. Shaft 675, 684
v. Tanner 579, 648
v. Temple 510
v. Walton 638
v. Yates 656
Atkinson v. Chatham 213
v. Mott 260
Atlanta v. Wilson 207
Atlanta & W. P. R. Co. v. Hudson 155, 164, 648
Atlanta Cotton-Seed Oil Mills v. Coffey 164
Atlantic & Gulf R. Co. v. Burt 593
Atlantic Coast Elec. R. Co. v. Rennard 641
Atterbury v. Fairmanner 96
Atwater v. Lowe 286
Atwood v. Bangor, O. & O. T. R. Co. 590
Atzroth v. State 187
Auchmuty v. Ham 407
Augusta v. Hudson 207, 226
Augustus v. Lynde 156
Auld v. Travis 111, 440
Auprix v. Lafleur 385
Austin v. Manchester, S. & L. R. Co. 471
v. Miller 433
Austin & N. R. Co. v. Slator 491
Averill v. Chadwick 567
v. Santa Fé Recrs. 586
Avery v. Maxwell 281
v. Peo. 535
v. Popper 104
Aydlett v. Elizabeth City 313
Ayer v. Norwich 222, 231
Aylesworth v. Chic., R. I. & P. R. Co. 300, 658
Aylmore v. Kahn 111
Ayres v. Chic. & Northwestern R. Co. 499, 521

Babcock v. N. J. Stock Yard Co. 356

PAGE

Babson v. Rockport 194
Backer v. West Chic. Park Commrs. 408
Badali v. Smith 388
Badgley v. St. Louis 256
Badkin v. Powell 317
Bagley v. State 362
Bagshawe v. Goward 116
Bailey v. Belfast 255
v. Davis 441
v. Forrest 93
v. Hartford & C. V. R. Co. 599, 600
Bain v. Strang 427
Baird v. Vaughn 295
Baker v. Berkeley 573
v. Chic., B. & Q. R. Co. 590
v. Kinsey 408
v. Louisville & N. R. Co. 463
v. Mims 164
v. North East Borough 239
v. Robbins 261
v. Williams 358
Balcom v. Dubuque & S. C. R. Co. 611
Baldridge & C. Bridge Co. v. Cartrett 211
Baldry v. Bates 84
Baldwin v. Casella 399
v. Ensign 295
v. Greenwoods Turnp. Co. 205
v. Peo. 180
Ball v. Ray 358
Ballard v. Brown 364
Ballentine v. North Mo. R. Co. 502
v. Webb 355
Balt. & H. Turnp. Co. v. Bateman 209
Balt. & O. R. Co. v. Lamborn 262, 612
v. Mulligan 612
v. Schultz 647
v. Thompson 578, 649
v. Wood 662
Baltimore & O. & C. R. Co. v. Evarts 609
v. Kreiger 670
Baltimore & O. S. W. R. Co. v. Abbott 678
Balt. & R. Turnp. Road v. State 254
Balt. & Y. Turnp. R. v. Crowther 256
Balt., P. & C. R. Co. v. Anderson 689
v. Thomas 581
Bamberg v. So. Car. R. Co. 505

PAGE

Banbury Urban Sanitary Auth. v. Page 356
Banfield v. Whipple 428
Bank of Scotland v. Watson 84
Bankard v. Balt. & O. R. Co. 503, 514
Banks v. State 180
Bannon v. State 641, 646
Bantwick v. Rogers 232
Barber v. Mensch 264
Barclay v. Hartman 403
Bard v. Yohn 413, 428
Baren v. Cain 424
Barnes v. Chapin 288
v. State 171
v. Woodbury 51, 52
Barnhart v. Chic., M. & St. P. R. Co. 678
Barnhill v. Howard 71
Barnum v. Terpening 389, 395
v. Vandusen 349
Barr v. Hannibal & St. J. R. Co. 595, 597
Barret v. Hampton 361
Barrett v. Lightfoot 116
v. Malden & M. R. Co. 408
v. Walworth 221
Barringer v. N. Y. Cent. & H. R. R. Co. 606
Barrington v. Turner 128
Barrows v. Fassett 315
Barse Live Stock Comm. Co. v. Adams 443
Bartholomew v. Wiseman 545
Bartlett v. Budd 25, 26
v. Dubuque & S. C. R. Co. 673, 676
v. Hooksett 225
v. Kittery 219
v. Pittsb., C. & St. L. R. Co. 503
Baskin v. Wayne 109
Bass v. Cantor 425
Bassett v. Collis 94
v. St. Joseph 211
Bates v. Fremont, E. & M. V. R. Co. 623, 640
v. Horner 227
v. McCormick 528, 538
v. Sabin 438
v. Smith 47
Bauer v. Lyons 397
Baughman v. Louisville, E. & St. L. R. Co. 471
Baxter v. Chic., R. I. & P. R. Co. 605
v. Louisv., N. A. & C. R. Co. 510

	PAGE
Bayless v. Lefaivre	117
Baylor v. Balt. & O. R. Co.	618
Baynes v. Chastain	273
Bazell v. State	48
Beall v. Athens Tp.	218
Bean v. Johnson	110
Beatty v. Davis	575
Beattyville & C. G. R. Co. v. Maloney	590
Beauchamp (Earl) v. Winn	571
Beaumont Pasture Co. v. Sabine & E. T. R. Co.	600
Beavers v. State	174
Bechdolt v. Gd. Rapids & I. R. Co.	683
Beck v. Dyson	403
v. U. S.	56
Becker v. New York, L. E. & W. R. Co.	654
Beckett v. Gridley	98
Beckham v. Brown	354
Beckwith v. Shordike	277
Bedden v. Clark	288
Beeson v. Tice	294
Beiling v. Evansville	354
Bélanger v. Quiner	435
Belcher v. Mo., K. & T. R. Co. 498, 504,	517
Béliveau v. Martineau 428,	455
Belk v. Peo.	332
Bell v. Leslie 391,	428
Bellefontaine R. Co. v. Reed	609
Bellefontaine & Ind. R. Co. v. Schruyhart	581
Bellows v. Elmendorf	567
Belt v. San Antonio & A. P. R. Co.	606
Bemis v. Arlington	217
v. Conn. & P. R. R. Co. 585, 591,	667
v. Temple	239
Benford v. Sims	545
Benjamin v. Holyoke St. R. Co. 603,	604
Bennefield v. State	554
Benner Livery & U. Co. v. Busson 324,	449
Bennett v. American Exp. Co.	567
v. Blackmore	156
v. Blezard	128
v. Fifield	225
v. Ford	328
v. Hazen	252
v. O'Brien 419, 420,	424
v. State	171
Benoit v. Troy & L. R. Co. 325,	331
Benson v. Gray	483
Berg v. State	168
Bergeron v. Brassard	444
Berkley v. Chic., R. I. & P. R. Co.	635
Berrill v. Smith	432
Berry v. Marix	447
v. St. Louis, S. & L. R. R. Co. 662,	666
v. San Francisco & N. P. R. Co.	279
v. Shannon	99
Bertelson v. Bower	71
Bertwhistle v. Goodrich	294
Besozzi v. Harris 372,	374
Bessette v. Howard	156
Best v. Flint	83
v. Osborne	95
v. Ulster & D. R. Co.	660
Bethea v. Raleigh & A. R. Co.	616
Betts v. Chic., R. I. & P. R. Co. 490,	515
v. Farmers' Loan & T. Co. 469, 489,	490
Bettye v. Houston & C. T. R. Co.	638
Bettys v. Milwaukee & St. P. R. Co.	686
Bevan v. Waters	442
Beyman v. Black	48
Biegler v. Merch. Loan & Trust Co.	369
Bielenberg v. Mont. Un. R. Co. 650,	695
Bigbee v. Coombs	433
Bigelow v. North Missouri R. Co.	689
v. Reed	326
Bignell v. Clarke	315
Bileu v. Paisley	429
Billman v. Indianapolis, C. & L. R. Co.	606
Bills v. Kaukauna 240,	251
v. Kinson	317
v. N. Y. Cent. R. Co.	483
Bingham v. Salene	569
Binicker v. Hannibal & St. J. R. Co. 631,	675
Binns v. Pigot 457,	459
Binstead v. Buck	58
Bird v. Higginson	569
Birkbeck v. Paget	571
Birket v. Williams	260
Birmingham Mineral R. Co. v. Harris 586, 607,	638
v. Parsons	681
Birmingham R. & Elec. R. Co. v. City Stable Co.	593

PAGE
Bishop v. Banks 355
Belle City St. R. Co. 603
v. Chic., M. & St. P. R. Co. 616
v. Fahay 142
v. Schuylkill 196
Bissel v. Southworth 271
Bissell v. Pearce 109, 111, 440
Bitting v. Maxatawny Tp 198, 251
Bittle v. Camden & A. R. Co. 598
Bixby v. Deemar 505
Black v. Brennan 459
v. Chic., B. & Q. R. Co. 504, 505
v. Elliot 126
v. State 49
v. Vaughan 73
Blackburn v. State 117, 176
Blacklock v. Milliken 276
Blackman v. Simmons 386
Blades v. Higgs 11, 12, 18
Blain v. Manning 111
Blaine v. Chesapeake & O. R. Co. 267, 618
Blair v. Forehand 58, 141, 142
v. Small 304
Blais v. Minneapolis & St. L. R. Co. 679
Blaisdell v. Stone 285
Blakeley v. Baker 244
Blakeslee v. Consold. St. R. Co. 602
Blanchard v. Chic. & A. R. Co. 500
v. Ingram 112
Blanford v. Minneapolis & St. L. R. Co. 669
Blaxton v. Pye 362
Bledsoe v. Thompson 362, 363
Bleil v. Detroit St. R. Co. 210
Blewett v. Wyandotte, K. C. & N. R. Co. 641
Bliss v. Wilbraham 255
Blizzard v. Walker 305
Blomberg v. Stewart 690
Bloor v. Delafield 228, 240
Blower v. Gt. West. R. Co. 460, 506
Blyth v. Topham 152
Board v. St. Louis, I. M. & S. R. Co. 267
Board of Health of Raritan Tp. v. Henzler 356
Boaz v. Cent. R. Co. 496
Boden v. Roscoe 304
Bodger v. Nicholls 74, 340
Bodurtha v. Phelon 88
Boecker v. Lutz 129
Boehl v. Chic., M. & St. P. R. Co. 513
Boggs v. Stanky 105
Boing v. Raleigh & G. R. Co. 645
Bolden v. Brogden 89, 94
Bollard v. Spring 573
Bollinger v. Com. 362
Boltz v. Sullivan 242
Bond v. Evansville & T. H. R. Co. 661, 674, 676
Bonner v. DeLoach 259, 313
Bonney v. Smith 188
Boone City Bank v. Ratkey 102
Boone Co. Commrs. v. Mutchler 208, 214
Booth v. Sanford 124
Boothby v. Boston & M. R. Co. 598
Borer v. State 171
Bormann v. Milwaukee 389
Borst v. Lake Shore & M. S. R. Co. 598, 601, 602
Bost v. Mingues 135
Bostwick v. Minneapolis & P. R. Co. 262, 616, 619
Bott v. Pratt 325
Boulester v. Parsons 387
Boulston's Case 572
Bourne v. Ashley 26
Bourrett v. Palo Alto County 146
Bowden v. Dugan 110
Bowen v. Flint & P. M. R. Co. 694
v. Hannibal & St. J. R. Co. 689
Bower v. Robinson 370
Bowers v. Fitzrandolph 131
v. Horen 136, 145, 166
Bowes v. Boston 216
Bowie v. B. & O. R. Co. 482
Bowles v. Abrahams 298
Bowman v. Brown 319
v. Chic. & A. R. Co. 593, 614, 619
v. Troy & B. R. Co. 626, 669
Bowser v. Toledo 240
Boyce v. Wabash R. Co. 631
Boyd v. Burkett 157
v. State 551
Boyle v. McWilliams 328
v. Mo. Pac. R. Co. 614
v. New York, L. E. & W. R. Co. 588
v. Tamlyn 274
Boylen v. Everett 405
Bozeman v. Fields 102
Brace v. N. Y. Cent. R. Co. 676

	PAGE
Brackenridge v. Fitchburg	251
Bradbury v. Lawrence	425
Bradford v. Dawson	368
v. Floyd	267, 345, 349
v. McKibben	135
v. Mo., K. & T. R. Co.	346, 493
Bradley v. Buffalo, N. Y. & E. R. Co.	683, 684
v. Myers	391
v. Rea	342
Brady v. Ball	286
v. M'Argle	539
v. Rensselaer & S. R. Co.	616, 626
v. Todd	84, 85
v. Williams	433
Branch v. State	536, 548
Brandenburg v. St. Louis & S. F. R. Co.	666, 683
Branigan v. Hendrickson	72
Brantford City, The	492
Brassfield v. Patton	690
Bratfisch v. Mason Tp.	210
Brauer v. Compania de Navign. La Flecha	516, 522
Braun v. State	355
Braxton v. Hannibal & St. J. R. Co.	597
Bray v. Mayne	425
v. Wise	451
Brendlinger v. New Hanover Tp.	243
Brennan v. Friendship	240, 251, 256
Brenner v. Green Bay S. P. & N. R. Co.	692
Brent v. Kimball	129
Brentner v. Chic., M. & St. P. R. Co.	639, 647, 658, 694
Brewer v. State	535
Brice v. Bauer	402
Briggs v. Hunton	445, 446
v. St. Louis & S. F. R. Co.	642, 649
Brightman v. Grinnell	318
Brill v. Flagler	136, 145, 164, 360
Brinckerhoff v. Starkins	32
Brintnall v. Smith	452
Brisco v. State	181
Briscoe v. Alfrey	394
v. Mo. Pac. R. Co.	690
Bristol v. Galway	92
Brittain, John S., Dry-Goods Co. v. Blanchard	103
Britton v. Cummington	202
Broadfoot v. Fayetteville	313
Broadwater v. Blot	434
Brock v. Copeland	383, 389
Brockert v. Cent. Ia. R. Co.	688
Brockway v. Amer. Exp. Co.	464, 487, 496
Broder v. Saillard	358
Broderick v. Higginson	403
Broennenburgh v. Haycock	77, 94
Brogan v. Worton	379
Bronson Agricul. & Breeders' Assn. v. Ramsdell	364
Brooke v. Peo.	48
Brooks v. Acton	217
v. Hannibal & St. J. R. Co.	586, 629
v. Hassall	86
v. London & North-Western R. Co.	671
v. Petersham	249
v. State	48
v. Taylor	390, 416
Brookville & C. Turnp. Co. v. Pumphrey	223
Brophy v. Hyatt	321
Broquet v. Tripp	342
Broughton v. Singleton	558
Brouillet v. Coté	444
Browder v. State	556
Brown v. Bailey	528
v. Bigelow	94, 99
v. Carpenter	144, 293
v. Collins	328
v. Cooper	156
v. Doyle	82
v. Eastern & M. R. Co.	239
v. Elkington	93
v. Ellis	76
v. Giles	277
v. Glasgow	211
v. Green	399, 417
v. Hannibal & St. J. R. Co.	614, 638
v. Hoburger	165
v. Howard	306, 307
v. Kan. City, St. J. & C. B. R. Co.	668
v. Kendall	386
v. Laurens Co.	207, 226
v. Patch	368
v. Renton	538, 539
v. Southbury	257
v. State, 86 Ga. 633	180
v. State, 26 O. St. 176	553, 554
v. State, 88 Tenn. 566	366
v. Sylvester	307
v. Wabash, St. L. & P. R. Co.	578

PAGE

Brown v. Wilmington City R. Co. 648
Browne v. Powell 320
v. Providence, H. & F. R. Co. 665
Bruce v. Fiss, Doer & Carroll Horse Co. 100
v. Prosser 571
v. Smith 26
Brush v. Clarendon Land, I. & A. Co. 434, 435
Bryan v. Eaton 137
Bryant v. Southwestern R. Co 495
Buchanan v. Parnshaw 98
v. Smith 426
Buck v. Davenport Savings Bk. 102
v. Moore 277
v. Young 102
Buckley v. Clark 156, 158
v. Gee 388
v. Leonard 397
Buckmaster v. Cool 260
v. Smith 46
Budd v. Fairmaner 89
v. McLaughlin 81, 340
v. Power 72
Buddington v. Shearer 414
Budge v. Parsons 528, 529, 538
Buford v. Houtz 265, 269
Buis v. Cook 427
Bulkley v. N. Y. & N. H. R. Co. 620
Bullard v. Mulligan 140
Bullington v. Newport News & M. V. Co. 588
Bullock v. Geomble 308
Bulpit v. Matthews 260
Bunch v. Kennington 306
Bundschuh v. Mayer 405, 410
Bunnell v. Davison 440
v. Rio Grande W. R. Co. 585, 594, 627
Burch v. Spencer 83
Burdett v. Allen 312
Bureau Junction v. Long 209
Burge v. Stroberg 87
Burger v. St. Louis, K. & N. R. Co. 579, 646
v. State 171
Burgher v. Chic., R. I. & P. R. Co. 497
Burgman v. State 543, 556
Burgwyn v. Whitfield 267
Burke v. Daley 374
Burlington v. Stockwell 356
Burlington & Mo. River R. Co. v. Brinkman 615

PAGE

Burlington & Mo. River R. Co. v. Franzen 615
v. Shoemaker 584
v. Webb 615
v. Wendt 638
Burnby v. Bollett 82
Burnett v. Oechsner 141
Burnham v. Strother 405, 406
Burns v. Farmington 240
Burrell Tp. v. Uncapher 198
Burton v. Moorhead 393
v. Young 91
Busby v. St. Louis, K. C. & N. R. Co. 657, 690
Bush v. Brainard 148
v. Wathen 386, 406
Buster v. Newkirk 5
Buswell v. Fuller 121
Butcher v. W. Va. & P. R. Co. 597, 628
Butchers & D. Stock Yards Co. v. Louisv. & N. R. Co. 481
Butchers' Union Co. v. Crescent City Co. 352
Butler v. Milwaukee & St. P. R. Co. 625
v. Oxford 224
Butterfield v. Burroughs 77, 93
v. Forrester 250
Button v. Frink 329, 330
Buxendin v. Sharp 376, 391
Buxton v. North Eastern R. Co. 652, 653
Byerly v. Anamosa 207
Byrd v. State 48
Byrne v. Morel 399
Bywater v. Richardson 78

Cabaness v. Holland 74, 79
Cadwell v. Arnheim 329
Cage v. Franklin Tp. 198
Cahoon v. Chic. & N. R. Co. 600
v. Miers 106
Cairncross v. Pewaukee 249
Cairo & St. L. R. Co. v. Murray 609
v. Woosley 609, 629
Caldwell v. Bridal 341
v. Felton 478
v. State 544
v. Trowbridge 102
v. Tutt 452
Caledonia, The 502, 518, 521
Callaghan v. S. P. C. A. 539
Calland v. Nichols 434
Cameron v. Bryan 402
v. State 178

PAGE

Camoys (Lord) v. Scurr 423
Camp v. Flaherty 305
v. Scott 305
Campau v. Langley 309
Campbell v. Bridwell 263
v. Brown 391, 416
v. Evans 309
v. Great West. R. Co. 588
v. Manchester 352
v. N. Y. & N. E. R. Co. 652
v. Page 385
v. State 185
v. Stillwater 211
v. Trimble 413
Can. Pac. R. Co. v. Cross 592, 619, 680
v. Falardeau 633
Canefox v. Crenshaw 136
Cannon v. Louisville, E. & St. L. R. Co. 653
Cantling v. Hannibal & St. J. R. Co. 485, 514
Canton, A. & N. R. Co. v. French 676
Canton, C. & H. Turnp. Co. v. McIntire 209
Cantrell v. Kansas City, M. & B. R. Co. 613
Card v. Case 416
v. Columbia Tp. 198
v. Ellsworth 220
Cardinal v. Edwards 451, 452
Carey v. Chic., M. & St. P. R. Co. 621
Cargill v. Mervyn 278
Carlotta, The 495
Carlton v. Wilmington & W. R. Co. 586
Carpenter v. Cook 269, 270
v. Latta 150
v. Lippitt 130
Carr v. Black 245
v. Lancashire & Y. R. Co. 471
Carraher v. San Francisco Bridge Co. 601, 628
Carrier v. Dorrance 427
Carrington v. Taylor 119, 572
Carroll v. Eivers 349
v. Mo. Pac. R. Co. 467
Carruthers v. Hollis 141
Carskaddon v. Mills 158
Carstens v. Burleigh 468
Carstesen v. Stratford 241, 249
Carter v. Cole 78
v. Harden 81
v. Kan. City, Ft. S. & M. R. Co. 668

PAGE

Carter v. Toussaint 72
Carthage v. Rhodes 66
Carver v. Detroit & S. Plank-Road Co. 254
Cary v. St. Louis, K. C. & N. R. Co. 653, 654
Case v. Allen 110, 111
v. Cent. R. Co. of N. J. 615
v. Cleveland, C., C. & St. L. R. Co. 509, 510
v. St. Louis & S. F. R. Co. 645, 659
v. Stevens 100
Casey v. Suter 425
Castor v. Kan. City, Ft. S. & M. R. Co. 586
Caswell v. Coare 99, 100
v. Johnson 33
Cate v. Cate 322
Cateril v. Un. Pac. R. Co. 650
Catlin v. Valentine 354
Caulkins v. Mathews 152, 261
Cave v. Coleman 86
Cavender v. Fair 444
Cecil v. Preuch 435
Cent. Branch Un. Pac. R. Co. v. Ingram 630
v. Lea 611
v. Nichols 649, 654
v. Walters 637
Central Ohio R. Co. v. Lawrence 594
Cent. R. & Bkg. Co. v. Bryant 469, 497
v. Davis 622
v. Ingram 592
v. Lee 586
v. Pickett 510
v. Russell 593
v. Smitha 469
v. Summerford 591
v. Warren 648
Centralia v. Scott 256
Chadsey v. Greene 77, 92
Chaffee v. Harrington 117
Challand v. Bray 361
Chambas v. Gilbert 351
Chamberlain v. Enfield 224, 255, 404
v. Litchfield 298, 328
v. Smith 421
Chamberlin v. Cobb 420
Chambers v. Matthews 262
v. Warkhouse 58
Champion v. Vincent 135, 163
Champlin v. Penn Yan 237, 239
Chapin v. Sullivan R. Co 676, 680
Chapman v. Allen 440

PAGE
Chapman v. First Nat. Bk. 109
v. Gwyther 78
v. Withers 97
v. Zanesville St. R. Co. 602
Chappell v. State 554
Charlebois v. Raymond 6
Charles v. Neigelsen 109
Charlwood v. Greig 384, 395
Charman v. South-Eastern R. Co. 671
Chartiers Tp. v. Phillips 197
Chase v. Chase 267
v. McDonald 391
v. Putnam 304
Chattanooga v. Norman 298
Chattanooga S. R. Co. v. Daniel 588, 638
Chavez v. Ty 47, 48
Cheek v. Com. 363
Cheesum v. State 361
Chenette v. Teehan 432
Cheney v. Ryegate 256
Cheny v. State 184
Chesapeake & O. R. Co. v. Amer. Exch. Bank 469, 476, 481, 487, 488
Chesnut v. Peo. 49
Chesterman v. Lamb 100
Chew v. Jones 427
Chicago v. Hoy 223
v. Rumpff 354
v. Union Stockyards & T. Co. 361
Chic. & Alton R. Co. v. Barnes 670, 696
v. Engle 608, 669
v. Erickson 344, 501
v. Gasaway 343
v. Grimes 469, 509
v. Hanley 597, 642
v. Hill 641
v. Hogarth 587, 624
v. Kellam 588
v. Legg 642
v. O'Brien 671
v. Saunders 658
v. Scranton 605
v. Umphenour 658
v. Utley 656, 678
Chic. & East. Ill. R. Co. v. Blair 660
v. Guertin 659, 683
v. Katzenbach 477
v. Modesitt 676, 695
v. Peo. 583
v. Pratt 485
Chic. & Erie R. Co. v. Brannegan 654
PAGE
Chic. v. Cummings 642
Chic. & I. R. Co. v. DeBaum 579
Chic. & Northwestern R. Co. v. Barrie 588, 638, 657, 659
v. Dunn 697
v. Goss 620
v. Harris 628
v. Hart 694
v. Prescott 606
v. Shultz 117, 632
v. Van Dresar 478, 489
Chic. & R. I. R. Co. v. Hutchins 633
Chic., Burlington & Q. R. Co. v. Bradfield 589
v. Carter 635. 690
v. Cauffman 608
v. Cox 584
v. Dannel 671, 673
v. Dickson 604, 628
v. Evans 678
v. Farrelly 678, 694
v. Finch 672
v. Haggerty 593, 642
v. Hale 520
v. Hogan 683
v. Kennedy 678
v. Magee 636
v. Seirer 659
v. Sierer 673
v. Sims 615
v. Yorty 597
Chic., K. & N. R. Co. v. Behney 696
Chic., K. & W. R. Co. v. Prouty 605
v. Totten 626
Chic., M. & St. P. R. Co. v. Dumser 685
v. Phillips 590, 650
v. Wallace 461
Chic., R. I. & P. R. Co. v. Green 684
v. Harmon 492, 506, 521
v. Lee 468
v. Reidy 593
v. Witty 469
v. Woodworth 652
Chic., St. L. & N. O. R. Co. v. Abels 471, 510
v. Jones 139, 585, 614
Chic., St. L. & P. R. Co. v. Barnes 151
v. Fenn 595, 619
v. Nash 610, 619, 620, 636
Chic., W. & M. R. Co. v. Stanley 610
Chickering v. Lord 391

PAGE
Child v. Greenhill 28
v. Hearn 289, 656, 687
Childers v. Louisville, N. A. & C. R. Co. 582
Childress v. Yourie 238
Chilton v. Progress P. & P. Co. 368
Chippendale v. Lancashire & Y. R. Co. 477
Chisholm v. North. Pac. R. Co. 675
Choate v. Southern R. Co. 587, 636
Chouteau v. Hannibal & St. J. R. Co. 683
Christy v. Hughes 124
Chubbuck v. Hannibal & St. J. R. Co. 679
Chunot v. Larson 287
Churchhill v. Evans 305
Churchward v. Studdy 8, 11
Cicero & P. St. R. Co. v. Meixner 390, 609, 629
Cinc. & Z. R. Co. v. Smith 586, 591
Cinc., H. & D. R. Co. v. Bunnell 633
v. Street 610
v. Waterson 661
Cinc., H. & I. R. Co. v. Jones 644
v. McDougall 688
v. Ridge 662
Cinc., I., St. L. & C. R. Co. v. Case 499
v. Parker 690
Cinc., N. O. & T. P. R. Co. v. Stonecipher 654
v. Webb 499
Cinc., W. & M. R. Co. v. Stanley 609, 667
Citizens' R. Co. v. Hair 603
Citizens' Rapid Transit Co. v. Dew 166, 591
Citizens' St. R. Co. v. Lowe 603
Clampitt v. Johnson 54
Clardy v. St. Louis, I. M. & S. R. Co. 658
Clare v. Maynard 99, 101
Clarendon Land Inv. & Ag. Co. v. McClelland 268, 276, 349, 350
Claridge v. South Staffordshire Tramway Co. 424
Clark v. Adams 139
v. Armstrong 374, 381
v. Barrington 204
v. Boston & M. R. Co. 593, 624
PAGE
Clark v. Chic. & W. M. R. Co. 660
v. Draper 72
v. Hague 539
v. Hannibal & St. J. R. Co. 653
v. Keliher 135, 138
v. Lebanon 219
v. Lewis 317
v. St. Louis, K. C. & N. R. Co. 469, 514
v. Syracuse & U. R. Co. 616
v. Union Ferry Co. 248
Clarke v. Crowder 574
v. Rochester & S. R. Co. 506
v. State 171
Clary v. Burlington & M. R. Co. 676
v. Ia. Midland R. Co. 634, 688
v. Willey 454
Claunch v. Osborn 279, 288
Clay v. State 184
Clayards v. Dethick 250
Clayton v. Jennings 362
Cleary v. DeVesci 572
Cleaveland v. Chic. & N. R. Co. 590, 655, 686
Clem v. Wabash R. Co. 614
Clement v. Milner 302
Cleveland v. Bangor 203
v. Koch 105, 108
v. Wolff 363
Cleveland & P. R. Co. v. McConnell 669
Cleveland, C. & C. R. Co. v. Elliott 262
Cleveland, C., C. & I. R. Co. v. Crossley 651
v. Scudder 621
v. Wynant 240, 598, 605
Cleveland, C., C. & St. L. R. Co. v. Ahrens 593, 609
v. Ducharme 628
v. Heath 505
v. Patterson 497
Cleveland, P. & A. R. Co. v. Curran 467, 469
Clore v. McIntire 385
Clowdis v. Fresno Flume & Irrign. Co. 338
Coates v. Stephens 90, 94
Cobb v. Kan. City, F. S. & M. R. Co. 655
v. Standish 243
Cochran v. Shepherdsville 246
v. State 172
v. Walker 427, 433
Cochrane v. Frostburg 301, 339

	PAGE
Cock v. Weatherby	20
Cockerham v. Nixon	398
Cockfield v. Singletary	400
Cockrell v. Warner	72
Coffin v. Field	316, 320
v. Vincent	322
Coggins v. State	288
Coggswell v. Baldwin	391
Cogswell v. Murphy	286
Cohen v. Hume	461
v. Manuel	456
Colam v. Pagett	526
Colden v. Eldred	270
Cole v. Chic. & N. R. Co.	629
v. Hall	65
v. Newburyport	238
Coleman v. Bathurst	569
Colget v. Norrish	399
Collingill v. Haverhill	408
Collins v. Fox	318
v. Hatch	298
v. Larkin	311
Collman v. Mills	532
Colp v. Halstead	311, 320
Colquitt v. Kirkman	111, 450
Colt v. Webb	558
Coltherd v. Puncheon	95
Colton v. Wise	420, 421
Colvin v. Sutherland	154
Combe v. London & S. W. R. Co.	490
Comer v. Columbia, N. & L. R. Co.	497
Comly v. Hillegass	364
Com. v. Beale	319
v. Beaman	39, 183
v. Bean	299
v. Brahany	65
v. Brooks	554
v. Chace	22
v. Clancy	362
v. Cramer	548
v. Curry	533
v. Curtis	298
v. Depuy	62
v. Dow	293
v. Edwards	181
v. Gorman	65
v. Hall	565
v. Hazelwood	64
v. Healey	362
v. Hiller	56
v. Leach	547
v. Lewis	538
v. Lufkin	530
v. McClellan	543, 544, 545
v. Maclin	550
v. Magoon	530, 531
Com. v. Markham	66
v. Mason	170
v. Perry	356
v. Porter	544
v. Shelton	361
v. Sowle	555
v. T. J. Megibben Co.	357
v. Thornton	543
v. Tilton	362
v. Turner	528, 538
v. Van Sickle	356
v. Walden	554
v. Whitman	543
v. Wilkinson	565
v. Wood	531
Compania de Navigation La Flecha v. Brauer	476, 516, 522
Comstock v. Des Moines V. R. Co.	638
Conard v. Crowdson	341
Congdon v. Cent. Vt. R. Co.	621
Connell v. McNett	77
Connemara, The	498
Conners v. Loker	315
Connolly v. Cent. Vt. R. Co.	673
Connyers v. Sioux City & P. R. Co.	594, 610, 625
Conradt v. Clauve	125
Conway v. Can. Pac. R. Co.	664
v. Grant	382
Cook v. Atlanta	249
v. Charlestown	215, 216, 225
v. Minneapolis, St. P. & S. S. M. R. Co.	655
v. Montague	216
v. Moseley	87
v. Shattuck	440
Cooke v. Waring	348
Cool v. Crommet	280
Cooley v. Grand Trunk R. Co.	623
Coolidge v. Choate	166, 363
Coombes v. Dibble	365
v. State	174
Coombs v. Topsham	195
Cooper v. Barton	427
v. Raleigh & G. R. Co.	482
Ex parte	66
Cooper-Dean v. Stevens	543
Coor v. Rogers	314
Copeland v. Draper	448
v. Hamilton	80
Corbett v. Chic., St. P., M. & O. R. Co.	484
Coriolanus, The	468
Coristine v. Montreal City Pass. R. Co.	228

PAGE

Corliss v. Smith 399
Cornelius v. Grant 536
Cornell v. Detroit Elec. R. Co. 604, 627
v. Manistee & N. E. R. Co. 685
Corner v. Champneys 138
Corning v. Ashley 111
Cornwall v. Sullivan R. Co. 667
Cornwell v. Fraternal Acc. Assn. of Amer. 568
Corrigan v. Coney Island Jockey Club 80, 370
v. Great Northern and Manchester, S. & L. R. Cos. 474
Corry v. Great Western R. Co. 662
Corson v. Neatheny 361, 363
Corwin v. N. Y. & E. R. Co. 616, 665
Cory v. Dennis 309
v. Little 140
Costello v. Ten Eyck 437
Cotting v. Kansas City Stock-yards Co. 346, 481
Cotton v. New York, L. E. & W. R. Co. 578
v. Reed 83
v. Walpole 402
Couch v. Crawford 188
Coughtry v Willamette St. R. Co. 625
Coup v. Wabash, St. L. & P. R. Co. 461
Coupé Co. v. Maddick 429
Coupland v. Housatonic R. Co. 489, 505, 506
Courson v. Chic., M. & St. P. P. R. Co. 593
Court v. O'Connor 52
v. Snyder 74
Cousins v. Hannibal & St. J. R. Co. 633
Coventry Mut. Live-Stock Ins. Assn. v. Evans 161
Covington Stockyards Co. v. Keith 480, 481
Cowan v. Dalziel 407
Coward v. State 174
Cowles v. Balzer 270
Cox v. Beck 106, 108, 113
v. Burbridge 391
v. McGuire 440
v. Minneapolis, S. S. M. & A. R. Co. 620, 683, 684, 690
Coxe v. Robbins 262

PAGE

Coxon v. Gr. Western R. Co. 464
Coy v. Utica & S. R. Co. 668
Coyle v. Baum 127
v. Chic. & A. R. Co. 343
v. Chic., M. & St. P. R. Co. 669
v. Conway 349
v. McNabb 312
Coyne v. Brady 539
Crafton v. Hannibal & St. J. R. Co. 579
Cragin v. N. Y. Cent. R. Co. 463, 471
Crain v. Petrie 342
Crandall v. Eldridge 150
Crane v. Ellis 275
v. State 359
Cranston v. Cinc., H. & D. R. Co. 617
Crawford v. Crawford 135
v. Hughes 273
v. Internat. & G. N. R. Co. 163
v. Maxwell 275
v. N. Y. Cent. & H. R. R. Co. 669
v. Williams 278
Crawfordsville v. Smith 207
Credit v. Brown 131
Cressey v. North. R. Co. 621
Crisfield v. Neal 102
Crisman v. Masters 275
Crocker v. McGregor 239
v. Mann 302
Croddy v. Chic., R. I. & P. R. Co. 643, 692
Croff v. Cresse 349
Crook v. Peebly 117
Croom v. State 174
Crosby v. Warren 309
Cross v. London Anti-Vivi-section Society 542
v. McFaden 494
Crossan v. N. Y. & N. E. R. Co. 466
Crossman v. Johnson 86
Crouch v. Culbreath 92
Crowe v. Steeper 299
Crowell v. State 49
Crowhurst v. Amersham Burial Board 149
Croy v. Louisville, N. A. & C. R. Co. 581, 670
Croyle v. Moses 79
Crum v. Conover 674
Crumbaugh v. Williams 446
Cryer v. State 551
Cuddeback v. Jewett 578

PAGE

Cullen v. Lord 426
Cully v. Louisv. & N. R. Co. 649
Culp v. Atchison & N. R. Co. 598
Culver v. Streator 143
Cumberland Bank v. Baker 105
Cummings v. Mastin 435
v. Perham 142
v. Riley 405
Cuney v. Campbell 397, 402
Curran v. Midland Gr. West. R. Co. 473, 496, 512
Curry v. Chic. & N. R. Co. 619, 667
Curtis v. Hannay 79
v. Mills 384, 389
Cushing v. Bedford 217
Cutler v. Bonney 454

Dacres v. Oreg. R. & N. Co. 650
Dalby v. Wolf 300
Daly v. Arrol Bros. 388
v. State 268
Dandurand v. Pinsonnault 384
Danforth v. Crookshanks 74, 80
Daniel v. Janes 137
Daniels v. Aholtz 289
v. Grand Trunk R. Co. 664
Danner v. So. Car. R. Co. 640
Daoust v. Can. Pac. R. Co. 689
D'Arcy v. Miller 260, 270
Darden v. Oneal 80
Dargan v. Waddill 358
Darling v. Rodgers 261
v. Westmoreland 239
v. Wilson 106, 107
Darlington v. Ward 357
Darnell v. State 186
Daugherty v. Chic., M. & St. P. R. Co. 641
Davidson v. Cent. Ia. R. Co. 577
Davies v. Mann 245
v. Powell 35, 40
Davis v. Bangor 220
v. Campbell 139
v. Can. Pac. R. Co. 681
v. Cent. R. Co. 643
v. Chic., R. I. & P. R. Co. 658
v. Com. 550
v. Dallas Nat. Bk. 73
v. Davis 268, 274
v. Dudley 193, 194, 207, 242
v. Kallfelz 324
v. Longmeadow 243
v. McNair 566
v. Seymour 418
v. S. P. C. A. 534, 541

PAGE

Davis v. State, 10 Lea (Tenn.) 707 181
v. State, 12 Tex. App. 11 535
v. State, 13 Tex. App. 215 187
v. State, 23 Tex. App. 210 180
v. Tex. & Pac. R. Co. 499
v. Wabash R. Co. 589, 674
v. Walker 346
v. Williams 237
Dawley v. Potter 72
Dawson v. Chamney 454
v. Midland R. Co. 663
v. St. Louis, K. C. & N. R. Co. 509
Dawson's Case 554
Day v. Bather 455
v. New Orleans Pac. R. Co. 638, 652
Dayhoff v. Internat. & G. N. R. Co. 634
Dayton & Mich. R. Co. v. Miami Co. Infirmary 620
DeGraff v. Queen Ins. Co. 160
De La Guerra v. Newhall 307
DeVoin v. Mich. Lumber Co. 426
Dean v. Branthwaite 429
v. Chic. & Northwestern R. Co. 518
v. Keate 424
v. Morey 77
v. Omaha & St. L. R. Co. 666
v. State 555
Deane v. Clayton 137
Deaver v. Bennett 362, 363
Debardeleben v. State 366
Debbs v. State 171
Decatur Bank v. St. Louis Bank 528
Decker v. Fisher 33
v. Gammon 286
v. Holgate 136
Deggs v. State 171
Deirks v. Wielage 307
Delaney v. Errickson 267, 288
Delier v. Plymouth Co. Agricul. Soc. 364
Delk v. State 170, 174
Delta Electric Co. v. Whitcamp 586
Demetz v. Benton 349
Denison v. Lincoln 391
Denison & P. S. R. Co. v. O'Maley 361
Dennis v. Huyck 446
v. Louisville, N. A. & C. R. Co. 587, 619
Denny v. Correll 413
Dent v. Ross 320

PAGE

Denver v. Peterson 232, 247
Denver & R. G. R. Co. v. Henderson 637, 639
v. Nye 583, 588
v. Olsen 608
v. Outcalt 647, 650, 696
v. Stewart 608
v. Thompson 650
v. Wheatley 577, 650
Denver, T. & G. R. Co. v. Robbins 598
Desany v. Thorp 46, 102, 106
Desmond v. Smith 360
Desrousseau v. Boston & M. R. Co. 598
Detroit, E. R. & Ill. R. Co. v. Barton 610, 631
Deville v. South. Pac. R. Co. 626
Devonshire, Duke of, v. Lodge 571
v. O'Connor 569
Dewell v. Sanders 21, 120
Dexter v. McCready 323
Deyo v. Hammond 72
v. Stewart 270
Diamond v. East Hants 240
Diamond Brick Co. v. N. Y. Cent. & H. R. R. Co. 674
Dicas v. Hides 455
Dickens v. State 289
Dickerson v. Rogers 454
Dickey v. North. Pac. R. Co. 618, 693
Dickhaut v. State 566
Dickinson v. Follett 93
v. London & N. W. R. Co. 664
Dickson v. Gt. North. R. Co. 461, 471
v. McCoy 339
v. Omaha & St. L. R. Co. 653
v. Ty 49
Dillard v. Webb 312
Dillaree v. Doyle 45
Dillon v. Raleigh 211
Dilts v. Kinney 415
Dimmit Co. v. Frazier 146
Dimmock v. Allenby 277
Dimock v. Suffield 222
Dinwiddie v. State 549
Dinwoodie v. Chic., M. & St. P. R. Co. 684
Dist. of Col. v. Bolling 251
Divine v. McCormick 82
Dixon v. Dalby 458
v. Great Western R. Co. 658

PAGE

Doak v. Saginaw Tp. 210
Doan v. St. Louis, K. & N. R. Co. 470, 486
Dobson v. State 187
Dockerty v. Hutson 389
Dodge v. Baker 323
Dodson v. Mock 138, 144, 146
Doe dem. Douglass v. Lock 569
Doggett v. Catterns 368
v. Richmond & D. R. Co. 594
Doherty v. Sweetser 330
Dolan v. Newburgh, D. & C. R. Co. 626, 633, 661
Dolfinger v. Fishback 325
Dolph v. Ferris 374, 381, 415, 436
Domnau v. Green 450
Donahoo v. Scott 164
Donald v. Minneapolis, St. P. & S. S. M. R. Co. 682
v. St. Louis, K. C. & N. R. Co. 697
Donathy v. Crowther 450
Donnelly v. Fitch 325, 330
Donohue v. Warren 201
Donovan v. Hannibal & St. J. R. Co. 614
v. Vicksburg 308
Doolan v. Midland R. Co. 473
Dooley v. Mo. Pac. R. Co. 697
v. 17,500 Head of Sheep 286
Doolittle v. Shaw 431, 432
Doran v. Chic., M. & St. P. R. Co. 620
Dorrington v. Edwards 78
Doss v. State 172
Doster v. Charlotte St. R. Co. 603
Douglas v. E. Tenn., V. & G. R. Co. 589
Douglass v. Grand Trunk R. Co. 664
v. Hannibal & St. J. R. Co. 501
v. Moses 99
Dovaston v. Payne 281
Dove v. State 168
Dover v. Winchester 404
Dow v. Portland S. P. Co. 512
Downey v. Taylor 70
Downing v. Chic., R. I. & P. R. Co. 694
Doyle v. Detroit Omnib. Line Co. 325, 331
Dreher v. Fitchburg 199
Drew v. Spaulding 314
Drolet v. Laferrière 96
Drury v. Defontaine 74
Dryden v. Smith 689

PAGE

Drysdale v. Dugas 358
Duckett v. State 176
Duckworth v. Walker 95
Dudley v. Canal Bank 246
v. Flushing Jockey Club 364
v. Love 138
v. McKenzie 321
Duffees v. Judd 270
Duffy v. N. Y. & H. R. Co. 661
Duggan v. Hansen 285, 295
Duke v. Kan. City, F. S. & M. R. Co. 666, 692
Dunbar v. Woodcock 44
Duncan v. Can. Pac. R. Co. 664
v. Pope 531
v. Rodger 400
v. St. Louis, I. M. & S. R. Co. 659, 672
v. Starr 117
v. Toms 541
Dunlap v. Snyder 145, 146, 165
Dunlop v. Waugh 89
Dunn v. Barnwell 226
v. Hannibal & St. J. R. Co. 497
v. State 170
v. Wilmington & W. R. Co. 602
Dunnigan v. Chic. & N. R. Co. 678
Dunning v. Bird 135
Dunsford v. Mich. C. R. Co. 621, 671
Duntley v. Boston & M. R. Co. 470
Dunton v. Reed 321
Durham v. Goodwin 272
v. Musselman 123
Durocher v. Maunier 447
Durrell v. Johnson 398
Duval v. State 178
Duvall v. Balt. & O. R. Co. 602
Dwyer, Re 364
Dyer v. Hutchins 413
v. State 105

Eads v. Marshall 208, 212
Eames v. Salem & L. R. Co. 666
v. Tex. & N. O. R. Co. 580, 585
Earhart v. Youngblood 386
Earl v. Van Alstine 383
Early v. Wilson 431
Earp v. Faulkner 349
East Kingston v. Towle 418
East St. Louis & C. R. Co. v. Gerber 687

PAGE

East St. Louis & St. L. E. St. R. Co. v. Wachtel 603, 604, 628
East Tenn & Ga. R. Co. v. Whittle 461, 482
E. Tenn., Va. & Ga. R. Co. v. Baker 586
v. Bayliss 586, 589, 638, 645
v. Burney 589
v. Culler 643
v. Deaver 593, 594
v. Feathers 596
v. Hale 516
v. Henderson 632
v. Herrman 480
v. Johnston 463, 469, 489
v. Scales 590
v. Selcer 585, 592
v. Watson 586, 589, 595
Easter v. Goyne 109
v. Little Miami R. Co. 662
Eastman v. Rice 314
v. Sanborn 424
Easton v. McNeilly 684
Eastwood v. La Crosse City R. Co. 603
v. Miller 368
Eaton v. Lancaster 446
v. Oreg. R. & N. Co. 687
v. Winnie 348
Eaves v. Dixon 92
Eberhart v. Reister 390
Eck v. Hocker 284
Eddy v. Evans 267, 595, 609
v. Farmers' Mut. Ins. Co. 161
v. Kinney 150
v. Lafayette 638
Edgerly v. Bush 104
v. Concord 225, 226
Edmonds v. State 174
Edmonston v. Wilson 107
Edward v. State 366
Edwards v. Buffalo, R. & P. R. Co. 687
v. Hannibal & St. J. R. Co. 653
v. Irvin 51
v. Kan. City, St. J. & C. B. R. Co. 677
v. Phila. & R. R. Co. 626
Eells v. St. Louis, K. & N. W. R. Co. 470
Egerton v. Furzeman 363
Eggleston v. Columbia Turnp. Co. 221
Ehret v. Kan. City, St. J. & C. B. R. Co. 660, 668
El Dorado County v. Meiss 55

PAGE

El Paso v. Dolan 244
Eley v. Lytle 126
Elgin Co. Road Trustees v. Innes 153
Elliott v. Hannibal & St. J. R. Co. 669
v. Herz 417
v. Kitchens 291
v. Martin 459
v. Osborn 531
Ellis v. Beale 362
v. Chinnock 100
v. Hilton 163
v. Loftus Iron Co. 277, 375
v. Lynn & Boston R. Co. 603
v. Reaves 105
v. State 44
Ells v. Pac. R. Co. 661
Elmore v. Fitzpatrick 46
Elmsley v. Ga. Pac. R. Co. 587
Elton v. Brogden 90, 93
v. Jordan 90, 93, 94
Elwood v. McDill 100
Emerson v. Brigham 82
v. St. L. & H. R. Co. 490
Emmerson v. St. Louis & H. R. Co. 666, 668
v. State 177
Emmerton v. Matthews 82
Engesether v. Ga. North. R. Co. 510
Engle v. Sohn 56
English v. Mo. Pac. R. Co. 256, 649
Enright v. Dodge 106
v. San Fran. & S. J. R. Co. 661
Enrique, The 476
Erbes v. Wehmayer 288
Erdman v. Gottshall 264, 280
Ericson v. Duluth & I. R. Co. 613
Erskine v. Adeane 149
Estes v. Atlantic & St. L. R. Co. 671
Estey v. Cooke 443
Estill v. N. Y., L. E. & W. R. Co. 507
Euripides, The 495
Evans v. Dunbar 508
v. Fitchburg R. Co. 506
v. Mason 431
v. Pratt 368
v. St. Paul & S. C. R. Co. 621, 658
v. Sherman, S. & S. R. Co. 618
Evans-Snyder-Buell Co. v. Turner 102

PAGE

Evansville & C. R. Co. v. Barbee 675
Evansville & T. H. R. Co. v. Mosier 670, 690, 692
v. Willis 682
Everitt v. Davies 533
Evertson v. Frier 430
Ewart v. Graham 569
Ewing v. Chic. & A. R. Co. 609, 669
v. Versailles Tp. 198
Eyers v. Haddem 98

Fairchild v. Bentley 397
v. Rich 418
Fairmount Un. Jt. Stock Agricul. Assn. v. Downey 371
Fake v. Addicks 386, 403
Falardeu v. Couture 417
Falconer v. European & N. A. R. Co. 590
Fales v. Cole 122
Falkland Islands Co. v. Reg. 37
Fallon v. O'Brien 323, 338, 415
Faris v. Lewis 342
Farkas v. Powell 430
Farley v. Chic., M. & St. P. R. Co. 344
v. Picard 388
v. St. Louis, K. C. & N. R. Co. 633
Farmer v. Findlay St. R. Co. 250
v. State 536
v. Wilmington & W. R. Co. 616
Farmers' High Line Canal & R. Co. v. Westlake 202
Farney v. Kerr 110, 442
Farr v. Gt. West. R. Co. 471
Farrar v. Eash 189
v. Greene 195
Farrell v. Oldtown 219
v. Un. Trust Co. 634
Farrer v. Nelson 570
Faulk v. Iowa County 207
Fawcett v. York & N. M. R. Co. 664
Fein v. Ty. 180
v. Wyo. Loan & Trust Co. 440, 444
Feinberg v. Del., L. & W. R. Co. 505
Feltman v. Chinn 441
Fenn v. Harrison 84
Fennell v. Ridler 74
v. Seguin St. R. Co. 148
Fennings v. Granville 24

PAGE
Fenton v. Montgomery 267
Ferguson v. Miami Powder Co. 148
v. Miller 17, 19
Ferrias v. Peo. 533, 544
Ferris v. Can. Pac. R. Co. 664
v. St. Louis & H. R. Co. 666
Ferriss v. Schreiner 451
Ficken v. Jones 281
Field v. Adames 305
v. Bogie 314
Fielder v. Starkin 96
Filburn v. Peo. Palace & Aquar. Co. 373
Fillmore v. Booth 261
Filson v. Crawford 358
Findlay v. Bear 62
Fink v. Evans 592
Finley v. Bradley 268, 274
Finnem v. State 539
Finney v. Curtis 391
Firemen's Fund Ins. Co. v. West Refrg. Co. 162
First Nat. Bk. v. Barse Commn. Co. 440, 443
v. Brown 73
v. Erreca 106
v. Hughes 81
v. Robinson 84
v. Scott 110
v. Western Mort. & Inv. Co. 105, 106, 109
Firth v. Bowling Iron Co. 124, 125, 149
Fishell v. Morris 452
Fisher v. Clark 348
v. Farmers' Loan & Trust Co. 620, 628
v. Kyle 430
v. Pa. R. Co. 596
v. Porter 102
v. Steward 17
Fitch v. Casler 458
Fitchett v. Canary 451
Fitterling v. Mo. Pac. R. Co. 671
Fitzgerald v. Brophy 405
Fitzwater v. Stout 316
Flagg v. Chic., D. & C. G. T. J. R. Co. 605, 625, 684
Flaherty v. Harrison 604
Flansburg v. Basin 396, 413
Flattes v. Chic., R. I. & P. R. Co. 590
Fleeming v. Orr 381, 412
Fleet v. Hegeman 30, 32
Fleming v. Can. Pac. R. Co. 673
Fletcher v. Jacob Dold Packing Co. 75
PAGE
Flewelling v. Lewiston & A. H. R. Co. 604, 628
Flint v. Luhrs 450
Flint & P. M. R. Co. v. Lull 669
Flower v. Adam 250
Flowers v. Franklin 44
Floyd v. P. & R. R. Co. 601
Flushing v. Carraher 358
Fogg v. Nahant 194
Foley v. East Flamborough Tp. 213
Folger v. Hinckley 317
Folmar v. Curtis 312, 313
Folsom v. Concord & M. R. Co. 644
Fondren v. Durfee 92
Fontaine v. South. Pac. R. Co. 687
Fonville v. Casey 46
Forbes v. Atlantic & N. C. R. Co. 594
Ford v. Ford 118
v. McGregor 51
v. Oliphant 108
v. St. Louis, I. M. & S. R. Co. 593
v. Taggart 135
v. Tynte 40
v. Wiley 534, 539
Fordyce v. Hardin 645
v. McFlynn 461, 482, 486, 490
Forget v. Laverdure 358
Forks Tp. v. King 249
Forman v. Proctor 105
Forney v. Geldmacher 234
Forsyth v. Walsh 316
Fort v. Goodwin 264
Ft. Scott, W. & W. R. Co. v. Holman 630
v. Sparks 468
Fort Smith v. Dodson 323
Ft. Wayne, C. & L. R. Co. v. Herbold 676, 677
v. O'Keefe 582
v. Woodward 621
Ft. Wayne, M. & C. R. Co. v. Hinebaugh 633
Ft. Worth & D. C. R. Co. v. Daggett 495, 497, 515
v. Greathouse 506, 521
v. McAnulty 510
v. Williams 465
v. Word 482
Forth v. Simpson 442
Fortune v. Harris 427
Foshay v. Glen Haven 227
Fossett v. State 186

PAGE
Foster v. St. Louis, I. M. & S. R. Co. 582, 658, 660
v. State 185, 186
v. Swope 154
Fouchon v. Ont. & Queb. R. Co. 689, 696
Fowler v. Linquist 208
Fox v. Dunckel 309
v. McGregor 459
v. Mohawk & H. R. Humane Soc. 541
v. Young 426
Frammell v. Little 405
Fraser v. Bell 397
v. Hood 376, 388, 390
Frazee v. Milk 347
Frazer v. Kimler 325
Frazier v. Goar 316
v. Nortinus 267
v. State 174
Fremont, E. & M. V. R. Co. v. Pounder 584
French v. Cresswell 263
v. Vining 126, 163
v. Western N. Y. & P. R. Co. 665, 668
Friedmann v. McGowan 399, 402
Friday v. Floyd 312, 313
Fritsch v. Allegheny 237
Fritts v. N. Y. & N. E. R. Co. 597, 627
Fritz v. Milwaukee & St. P. R. Co. 610
Frost v. Milwaukee & N. R. Co. 588, 624
v. Plumb 432
Frout v. Hardin 308
Fry v. Hubner 263
Fuller v. Pt. Royal & A. R. Co. 640
Fulliam v. Hagens 434
Fulton Co. Commrs. v. Rickel 223
Fultz v. Wycoff 348, 447
Funk v. Paul 107
Furness v. Union R. Co. 591

Gabay v. Lloyd 163
Gage v. Pontiac, O. & N. R. Co. 210
Galena & C. U. R. Co. v. Griffin 683
Galer v. Rawson 232
Galesburg Elec. Motor & Power Co. v. Manville 602, 603
Gallagher v. N. Y. & N. E. R. Co. 682, 689

PAGE
Galpin v. Chic. & N. R. Co. 619, 628, 640
Galveston, H. & S. A. R. Co. v. Armstrong 465
v. Balkam 595
v. Dyer 693
v. Freeman 632
v. Herring 497, 499
v. Houston 465
v. Ivey 496, 497
v. Jackson 479, 480
v. Johnson 515, 516
v. Kelley 522
v. Short 510
v. Tuckett 517
v. Walter 658
v. Warnken 487
v. Wessendorf 674
v. Williams 510
v. Wink 589
Galveston Land & Imp. Co. v. Pracker 154
Galvin v. Parker 412
Gamble v. Mullin 164
Gann v. Chic. Gt. Western R. Co. 499, 502, 519
Gannon v. Wilson 336
Gans v. Williams 44
Garabrant v. Vaugh 118
Garcia v. Gunn 14, 557, 570
Gardiner v. Colyer 573
v. State 171
Gardner v. Hart 406
v. Smith 688
Garment v. Barrs 89
Garrity v. Detroit Citizens' St. R. Co. 627
Garver v. Hawkeye Ins. Co. 162
Gaskill v. State 554
Gates v. Parrott 440
Gay v. State 357
Gearns v. Baker 570
Geddes v. Remington 79
Gee v. Lucas 87
Geer v. Conn. 557, 559
Gelley v. Clerk 457
Gelvin v. Kan. City, S. J. & C. B. R. Co. 518, 519
Gempp v. Bassham 358
Gentry v. Little 322
Ga., M. & G. R. Co. v. Harris 590
Ga. Pac. R. Co. v. Fullerton 645, 646, 647
Ga. R. & Bkg. Co. v. Anderson 637, 638, 695
v. Beatie 475
v. Bird 639
v. Clary 595

PAGE
Ga. R. & Bkg. Co. v. Mayo 672
v. Middlebrooks 589
v. Monroe 639
v. Neely 259
v. Parks 624
v. Spears 475
v. Walker 643
v. Wall 590
v. Wilhoit 590, 639
Gerdes v. State 555
German v. Chic. & Northwestern R. Co. 478
German Ins. Co. v. Fairbank 162
Gerren v. Hannibal & St. J. Co. 669
Gettring v. Morgan 397
Ghen v. Rich 25
Ghent v. State 315
Gholston v. State 180
Gibbons v. Gouverneur 361
v. Van Alstyne 129
v. Wilkesbarre & S. St. R. Co. 628
Gibbs v. Coykendall 435
v. State 180
Giblin v. Nat. Steamship Co. 506
Gibson v. Stewart 237
Gifford v. Hulett 358
Giger v. Chic. & N. R. Co. 678
Gilbert v. Mo. Pac. R. Co. 641
v. Stephens 295, 306
Gilbertson v. Richardson 380
Gilchrist v. Reg. 588
v. Schmidling 309
Giles v. Boston & M. R. Co. 667
Giles Loring, The 495
Gill v. Atlantic & G. W. R. Co. 662
Gillam v. Sioux City & St. P. R. Co. 667
Gillet v. Mason 8, 17, 19
Gillett v. Western R. Corp. 163, 257, 648
Gilliland v. Chic. & A. R. Co. 579
Gillis v. Great Western R. Co. 664
Gillum v. Sisson 138
Gilman v. European & N. A. R. Co. 661, 662
v. Noyes 122
v. Sioux City & P. R. Co. 676
Gilmore v. Federal St. & P. V. Pass R. Co. 253
v. Hannibal & St. J. R. Co. 344
v. Holt 339
v. Newton 188
Gilson v. Fisk 141
Giroux v. Stedman 83
Givens v. Paris 143
Gladman v. Johnson 403
Glancy v. Glasgow & South-Western R. Co. 599
Glandon v. Chic., M. & St. P. R. Co. 655
Glarcock v. Chic. & A. R. Co. 519
Gleckler v. Slavens 75
Glidden v. Moore 382
v. Pooler 81, 101
Godden v. Coonan 158
Godding v. Colo. Springs Live-Stock Co. 438
Godeau v. Blood 396
Godfrey v. Streator R. Co. 246
Godwin v. Wilmington & W. R. Co. 645
Goener v. Woll 292
Goff v. Kilts 17, 19
Goggin v. Kan. Pac. R. Co. 508
Golding v. Stocking 284
Goldrich v. Ryan 83
Goldsmith v. Tower Hill Steamship Co. 520, 521
Gomez v. State 184
Gooch v. Bowyer 155
v. Faucett 366
v. State 171
Good v. Galveston, H. & S. A. R. Co. 508, 510
Goodburn v. Marley 362
Goode v. Martin 402
Goodfellow v. Meegan 435
Gooding v. Atchison, T. & S. F. R. Co. 623
Goodman v. Gay 295
Goodrich v. Peo. 83
v. Willard 440
Goodsell v. Dunning 316
Goodwin v. Toucy 542
Goodwyn v. Cheveley 302
Gordon v. Boston & M. R. Co. 606
v. Chic., S. F. & K. C. R. Co. 655, 688
v. Great Western R. Co. 504
Gorman v. Pac. R. Co. 267
v. Williams 451
Gosselink v. Campbell 309
Gottwald v. Bernheimer 329
Gougeon v. Contant 328
Gould v. Bangor & P. R. Co. 156
v. Schermer 207, 255
Gove v. Watson 433
Gowan v. St. Paul, S. & T. F. R. Co. 272

PAGE
Grace v. Gulf & C. R. Co. 677, 694
v. McElroy 363
v. Willets 32
Gracie v. Hedderwick 380, 412
Graham v. Chautauqua Co. Commrs. 51
v. Delaware & H. Can. Co. 581, 665
v. Frazier 76
v. Payne 382
v. Smith 58
v. Spettigue 302
v. Winchell 441
Grand Rapids & I. R. Co. v. Cameron 613
v. Jones 675, 677
v. Monroe 657
v. Southwick 691
Grand Trunk R. Co. v. Bourassa 627
v. Rosenberger 596
v. Sibbald 584, 599
v. Vogel 469
Grange v. Silcock 139
Grannan v. Westchester Racing Assn. 370
Grant v. Barclay 130
v. Hannibal & St. J. R. Co. 589
v. Ricker 412
v. State 178
Graves v. Chic., M. & St. P. R. Co. 657
v. Moses 424
v. North. Pac. R. Co. 650
Gray v. Henry County 359
v. North British R. Co. 493, 518
v. Second Ave. R. Co. 626
v. Tompkins 329
Grayson v. Lynch 349, 350
v. Whatley 361
Great Northern R. Co. v. Morville 471
v. Swaffield 485
Great Western R. Co. v. Davies 672
v. Decatur 598
v. Geddis 595
v. Hanks 660
v. Hawkins 489
v. McCarthy 470, 474
v. Thompson 577
v. Vilaire 674
Greeley v. Fed. St. & P. V. P. R. Co. 593, 602
Green v. Doyle 288
PAGE
Green v. Duckett 320
v. Eastern R. Co. 598
v. Kan. & T. Coal Co. 151
v. St. Paul, M. & M. R. Co. 613, 660, 678
Greenawalt v. Wilson 443
Greenby v. Brooks 342
Greencastle v. Martin 318
Greenwood v. Callahan 252
Gregg v. Gregg 263, 264
v. Wyman 432
Gregory v. Adams 244
v. Chic. & Northwestern R. Co. 462
v. Munn 48
v. West Midland R. Co. 473
Gresham v. Taylor 286, 308
Grey v. Bartholomew 30
Gribble v. Sioux City 252
Gridley v. Dorn 361
Gries v. Zeck 399, 400, 416
Grieve v. Ill. Cent. R. Co. 514
Griffin v. Martin 270, 297, 301
Griffith v. Can. Pac. R. Co. 664
Griggs v. Fleckenstein 323, 333
v. Macon 66
Grigsby v. Stapleton 340
Grimes v. Eddy 345
v. Louisville, N. A. & C. R. Co. 598
Grimmell v. Chic. & N. R. Co. 587
Grinnell v. Cook 442, 457, 458, 459
v. Taylor 405
Grise v. State 525, 544
Groat v. Gile 70
Grogan v. Big Muddy Coal & Coke Co. 233
Grondin v. Duluth, S. S. & A. R. Co. 685
Groucott v. Williams 151
Grove v. Burlington, C. R. & N. R. Co. 623
Grundy v. Louisville & N. R. Co. 594, 639
Grymes v. Shack 8, 36, 38
Guilfoos v. N. Y. Cent. & H. R. R. Co. 156
Guimond v. Montreal 325
Guinn v. Wabash, St. L. & P. R. Co. 504
Gulf, C. & S. F. R. Co. v. Baird 464
v. Baugh 500
v. Box 604
v. Cash 621, 654
v. Cole 520
v. Eddins 465

PAGE

Gulf, C. & S. F. Co. v. Ellidge 652
v. Ellis, 54 Fed. Rep. 481 592
v. Ellis, 70 Tex 307 670
v. Ellison 493, 498
v. Gann 495, 498
v. Gasscamp 249
v. Godair 480, 517
v. Gray 498
v. Hudson 643, 654, 694
v. Hughes 520
v. Hume 494, 499, 504, 510, 521
v. Johnson 586
v. Keith 648, 654
v. Kemp 522
v. McAulay 501, 519
v. McCarty 518
v. McCorquodale 499
v. Martin 520
v. Ritter 583
v. Rowland 659, 670, 680
v. Short 464
v. Simmons 495
v. Stanley 508, 510, 516
v. Thompson 465
v. Trawick 481
v. Vaughn 465
v. Wallace 683
v. Washington, 267, 586, 641, 642, 663, 689
v. Wedel 644, 647
v. Weems 685
v. Wilhelm 497
v. Wilson 465
v. Wood 478, 494
v. Wright 508
Gulf, W. T. & P. R. Co. v. Griffith 465
v. Staton 517
Gulliver v. Blauvelt 245
v. Cosens 320
Gump v. Showalter 459
Gunderson v. Richardson 341
Gundry v. Feltham 121, 573
Gundy v. Biteler 105
Gunn v. Wis. & M. R. Co. 623, 626
Gunter v. Cobb 295
Guyer v. Reg. 563

Hafner v. McCaffrey 95
Hagan v. Casey 278
Hagebush v. Ragland 419
Hager v. South. Pac. R. Co. 623
Hagerstown v. Witmer 299, 322
Haggarty v. St. Louis Ice Manufg. & S. Co. 568

PAGE

Hahn v. Kordula 417
Hahnke v. Friederich 402
Haigh v. Bell 298
Haigh v. London & North-Western R. Co. 671
Hale v. Mo. Pac. R. Co. 487
v. Smith 428
v. Wigton 441
Hall v. Atkinson 417
v. Colyer 95
v. Corcoran 432
v. Gildersleeve 116
v. Harding 305
v. Huber 328
v. Miller 188
v. Pickard 432
v. Renfro 505
v. Robinson 574
v. Rogerson 96
v. State, 41 Tex. 287 174
v. State, 22 Tex. App. 632 178
v. Warner 455
Halliday v. St. Louis, K. C. & N. R. Co. 464
Hallyburton v. Burke Co. Fair Assn. 389
Halty v. Markel 436
Halverson v. Minneapolis & St. L. R. Co. 656
Hamby v. Samson 61
Hamil v. Cox 321
Hamilton v. Mo. Pac. R. Co. 690
v. Pandort 495
v. Wabash, St. L. & P. R. Co. 644
v. West. N. C. R. Co. 520
Hamlin v. Mack 303, 318
Hammack v. White 328
Hammond v. Melton 380, 393
v. S. C. & P. R. Co. 610
Hance v. Cayuga & S. R. Co. 680
Hanch v. Ripley 109, 111
Handford v. Palmer 424
Hankins v. Ottinger 364, 365
Hanna v. Terre Haute & I. R. Co. 610
Hannah v. Shepherd 300
Hannam v. Mockett 40
Hannibal v. Campbell 242
Hannibal & St. J. R. Co. v. Husen 344, 346
v. Kenney 614, 628
Hanrahan v. Cochran 339
Hanscom v. Burmood 316
Hanson v. Chic., St. P. & K. C. R. Co. 668
v. Hartse 83
v. Millett 44

PAGE
Hanway v. Boultbee 132
Harbeston v. Kan. City, Ft. S. & M. R. Co. 582
Harby v. Wells 446
Hardcastle v. South Yorkshire R. Co. 241
Hardeman v. State 172
Hardenburgh v. Lockwood 297, 301
Hardesty v. Fleming 54
Hardiman v. Wholley 288, 380
Hardin v. Newell 438
Harding v. Chic., M. & St. P. R. Co. 675
Hardwick v. Brookover 352
Hardy v. Anderson 89
v. Lemons 422
Hare v. Fuller 423
Hargis v. St. Louis, A. & T. R. Co. 627
Harkey v. Jones 103
Harlan v. Wabash, St. L. & P. R. Co. 579, 595
Harless v. Adams 363
Harley v. Eutawville R. Co. 591
Harmon v. Callahan 163
v. Columbia & G. R. Co. 625, 634
Harned v. Mo. Pac. R. Co. 509
Harnett v. Miles 23, 561
Harper v. Marcks 527
v. Mo., K. & T. R. Co. 579, 625
Harpers v. Great North of Scotland R. Co. 339
Harrell v. Albemarle & R. R. Co. 598, 606
v. State 168
Harriman v. Fifield 317
Harrington v. Chic., R. I. & P. R. Co. 666
v. Miles 63
v. Snyder 422
v. State 175, 176
Harris v. Brummell 141
v. Eaton 136, 138
v. Elder 20
v. First Nat. Bk. 76
v. Fisher 399, 409
v. Great Barrington 202
v. Hatfield 349
v. Midland R. Co. 461, 514
v. Mobbs 236
v. North Ind. R. Co. 489, 496, 498
v. Pence 71
v. Slater 34
v. Wabash R. Co. 636, 691
PAGE
Harris v. White 361, 364, 365
v. Woodruff 442
Harrison v. Adamson 267, 288
v. Brown 281
v. Chic., M. & St. P. R. Co. 586, 587
v. Duke of Rutland 574
v. Marshall 423
v. Mo. Pac. R. Co. 649
Harryman v. Titus 117
Hart v. Chic. & Northwestern R. Co. 470, 486
v. Pa. R. Co. 470
v. State 571
v. Washn. Park Club 327, 371
Hartford v. Brady 280
Hartley v. Harriman 398
Hartley State Bank v. McCorkell 188
Hartman v. Keown 442
Harvey v. Com. 20
v. State 49
v. Terre Haute & I. R. Co. 423, 470
Harwell v. State 50
Harwood v. Bennington & R. R. Co. 680
Hasbrouck v. Bouton 43
Hassa v. Junger 271
Hastings v. N. Y., O. & W. R. Co. 478
Hatch v. Marsh 347
Hathaway v. Tinkham 396
Haughey v. Hart 152
Havey v. Petrie 74
Hawke v. Dunn 368
Hawken v. Shearer 151
Hawker v. Balt. & O. R. Co. 590, 635
Hawkins v. Great Western R. Co. 476
v. State 117
Hawks v. Locke 349
Hawley v. Smith 456
Haworth v. State 556
Haws v. Fire Assn. of Phila. 161
Hawthorn v. State 286
Haxton v. Pittsb., C. & St. L. R. Co. 657
Hay v. Bennett 293
Hayes v. Smith 392, 399, 412
v. South Wales R. Co. 518
v. State 50
Hayman v. Hewitt 324
Hays v. Richie 76
Haywood v. State 9, 10, 36, 38
Hazard v. Council Bluffs 240
Hazel v. People's Pass R. Co. 602

PAGE
Hazelbaker v. Goodfellow 43
Head v. Tattersall 97
Headen v. Rust 609
Healey v. Gray 457
Healy v. Jordan 303
Heap v. Burnley Union 358
Heaps v. Jones 452
Heard v. State 186
Hebbard v. Berlin 224
Hecht v. Harrison 191
Heilbron, Ex parte 354
Heiligman v. Rose 166
Hein v. Fairchild 203
Heisrodt v. Hackett 143
Heister v. Fawn Tp. 196
Hellen v. Noe 309
Heller v. Abbot 619, 654
v. Chic. & G. T. R. Co. 463, 468
Hemphill v. Boston 245
Hendershott v. West. Un. Tel. Co. 127, 166
Henderson v. Barnes 427
v. Greenfield & T. F. St. R. Co. 603
v. Hart 71
v. Wabash, St. L. & P. R. Co. 656
Henderson & C. Gravel-Road Co. v. Cosby 209
Hendrick v. Boston & A. R. Co. 487, 515, 521
Hendrie v. Kalthoff 66
Hendrix v. St. Joseph & St. L. R. Co. 666
Hennigan v. McVey 373
Henry v. Dennis 124, 148
v. Richardson 116
v. Salisbury 89
v. State 178
Henson v. St. Louis, I. M. & S. R. Co. 660
Herold v. Meyers 148, 272
Herr v. Lebanon 196
Herrick v. Gary 347
v. Sullivan 628
Herron v. West. Un. Tel. Co. 75
Heskett v. Wabash, St. L. & P. R. Co. 677
Hess v. Lupton 124, 148
Hester v. Windham 156
Hewison v. New Haven 222
Hexamer v. Southal 447
Hey v. Philadelphia 197
Heyman v. P. & R. R. Co. 505
Heyward v. Boston & A. R. Co. 467
Heyward's Case 103
46

PAGE
Hickman v. Hickman 73
v. Thomas 459
Hickok v. Buck 422
Hides v. Littlejohn 355
Higgins v. Boston 195
v. Wilmington City R. Co. 590, 626
Higgs & Thrale 93
Hill v. Applegate 390
v. Ball 74
v. Boston, H. T. & W. R. Co. 470
(Viscount) v. Bullock 41
v. Concord & M. R. Co. 680
v. Mo. Pac. R. Co. 614, 636
v. New River Co. 235
v. Owen 454
v. Rome St. R. Co. 603
v. State, 43 Ala. 335 553
v. State, 104 Ala. 64 306
v. State, 57 Wis. 377 168
v. Tionesta Tp. 249
v. Walker 573
Hillsboro v. Ivey 354
Hillyard v. Grand Trunk R. Co. 154
Hilton v. Adams 454
v. Green 571, 573
Hinckley v. Emerson 129
v. Somerset 202
Hindman v. Oreg. R. & Nav. Co. 617, 653
v. Timme 237
Hine v. Munson 266, 314
v. Wooding 266, 275
Hirst v. Molesbury 363
Hitchcock v. Tower 314
Hite v. Blandford 349
Hoag v. Orange Mountain Land Co. 155
Hobart v. Young 86
Hobbs v. Bland 99
v. First Nat. Bk. 108
Hoboken Land & Imp. Co. v. Lally 494
Hobson v. State 522, 553
Hockersmith v. Hanley 76
Hodge v. Bennington 205
v. N. Y. Cent. & H. R. R. Co. 658
v. State, 98 Ala. 10 63
v. State, 11 Lea (Tenn.) 528 535
Hodgman v. West Midland R. Co. 478
Hoffman v. Oates 77, 95
Hogarth v. Jackson 24
Hoge v. Norton 190

PAGE

Hohl v. Chic., M. & St. P. R. Co. 613, 619
Holcomb v. Keliher 51
Holden v. Shattuck 294, 297
v. Torrey 302, 320
Holder v. Chic., St. L. & N. O. R. Co. 582
Holladay v. Marsh 271, 297, 301
Holland v. West End N. G. R. Co. 661
Hollenbeck v. Johnson 279
Hollender v. N. Y. Cent. & H. R. R. Co. 597
Holliday v. Morgan 93
Holman v. Chic., R. I. & P. R. Co. 597
Holmes v. Mather 332
v. Tyson 89
Holsapple v. Rome, W. & O. R. Co. 472
Holst v. Roe 65
Holstine v. Oreg. & Cal. R. Co. 617
Holt v. Melocke 655
Holtz v. Peterson 75
Home Constr. Co. v. Church 586
Homer v. Thwing 430
Honeyman v. Or. & C. R. Co. 461
Hook v. Worcester & N. R. Co. 673, 674
Hooker v. McAllister 441
Hooper v. Chic., St. P., M. & O. R. Co. 683
v. Kittredge 316
v. State 172
Hoops v. Ipava 359
Hoover v. Epler 442, 443
v. Peters 83
Hopkins v. Butte & M. Comml. Co. 125
v. Crowe 541
v. Ott 314
v. Rush River 244
v. Tanqueray 88
Hopkins Fine Stock Co. v. Reid 108
Horn v. Atlantic & St. L. R. Co. 621
v. Raine 574
v. State 48
Hornbein v. Blanchard 405
Horne v. Meakim 448
v. Memphis & O. R. Co. 640
Horner v. Williams 616
Horry v. Glover 45
Horseman v. State 175
Horstick v. Dunkle 198
Horton v. Taunton 194, 202

PAGE

Hotchkin v. Philipsburg 249
Houfe v. Fulton 199, 200, 201, 202, 203
House v. Fort 77, 89, 93
v. Metcalf 239
Houston v. State, 13 Ark. 66 185
v. State, 98 Wis. 481 351
Houston & G. N. R. Co. v. Meador 675
v. Van Bayless 634
Houston & T. C. R. Co. v. Carruth 586
v. Davis 509
v. Jones 618, 647
v. Muldrow 647
v. Nichols 618
v. Simpson 683
v. Terry 593
v. Williams 517
v. Wilson 515
Houston, E. & W. T. R. Co. v. Adams 697
Hovey v. Bromley 427
Howard v. Babcock 419
v. Bartlett 311
v. Burns 110
v. Emerson 83
v. Louisville, N. O. & T. R. Co. 586
v. North Bridgewater 242
v. Sheward 84, 85
v. Un. Freight R. Co. 602
Howarth v. McGugan 228
Howe v. Whited 442
Howe Mach. Co. v. Pease 457
Howes v. Newcomb 110
Howison v. White 400
Howlett v. Haswell 80
Howman v. Angus 347
Hubbard v. Preston 145
Hubbell v. Yonkers 206
Huber v. Chic., M. & St. P. R. Co. 640
Hubert v. Bedell 416
Hubotter v. State 182
Hudson v. Chic. & N. R. Co. 642, 643
v. Foott 569
v. North. Pac. R. Co. 515, 518
v. Roberts 404
Huey v. Indianap. & V. R. Co. 633
Huffman v. State 171
v. Walterhouse 459
Hughes v. Boyer 429
v. Fond du Lac 236
v. Hannibal & St. J. R. Co. 151, 152

PAGE
Hughes v. Quentin 163, 433
v. Ty. 168
Huist v. Buffalo & L. H. R. Co. 680
Hulett v. Smith 453
Hull v. Hull 46
v. Kansas City 211
Humbert v. Larson 96
Hummell v. Wester 329
Humphrey v. Douglass 140
Hungerford v. Syracuse, B. & N. Y. R. Co. 673
Hunt v. Gray 94
v. Lake Shore & M. S. R. Co. 674
v. Pownal 205
v. State, 55 Ala. 138 184
v. State, 3 Ind. App. 383 537
v. Wyman 421
Hunter v. Chic., St. P., M. & O. R. Co. 675, 676
Huntly, Marquis of, v. Nichol 569
Huntoon v. Trumbull 335
Hurd v. Grand Trunk R. Co. 600, 605
v. Lacy 153, 154
v. Rutland & B. R. Co. 265
Huse v. Estabrooks 102
Hussey v. King 390
v. The Saragossa 511
Huston v. Plato 96, 100
Huston Bros. v. Wabash R. Co. 483
Hutchinson v. Chic., M. & St. P. R. Co. 627
v. Chic., St. P., M. & O. R. Co. 486
v. Hutchinson 189
Hutto v. State 48
Hutton v. Murphy 163
Hyatt v. New York, L. E. & W. R. Co. 581, 683, 693
Hyde v. Davis 96
v. Pryor 117
Hyer v. Chamberlain 578

Iba v. Hannibal & St. J. R. Co. 669
Ibbottson v. Henry 294, 317
Ibottson v. Peat 120, 572
Idol v. Jones 8, 17
Illidge v. Goodwin 326
Ill. Cent. R. Co. v. Adams 469, 492
v. Arnold 666, 673
v. Baker 588
v. Beebe 463, 467, 468
PAGE
Ill. Cent. R. Co. v. Brelsford 505
v. Burns 586
v. Carraher 152, 654
v. Crawford 583
v. Crider 649, 650, 661
v. Finnigan 645, 646
v. Goodwin 628
v. Hall 490
v. Hayes 494, 501
v. Jordan 592
v. Kanouse 687
v. Larson 597
v. Middlesworth 628
v. Noble 586
v. Person 595
v. Peterson 496
v. Phelps 597
v. Simmons 501, 519, 521
v. Swearingen 658, 686
v. Teams 490
v. Tilman 630
v. Waters 500
v. Wren 589
Ill. Live-Stock Ins. Co. v. Kirkpatrick 160
v. Koehler 159, 161
Ilott v. Wilkes 385
Independence v. Trouvalle 298
Ind., B. & W. R. Co. v. Drum 678
v. Overton 635
v. Quick 660, 683
Ind. Cent. R. Co. v. Moore 696
Ind., I. & I. R. Co. v. Dooling 609
Indianapolis & Cinc. R. Co. v. Caldwell 260
v. Elliott 631
v. McClure 260, 655
v. Guard 609
v. Means 639
v. Oestel 685
v. Snelling 653
v. Townsend 667
v. Wright 620
Indianapolis & M. R. Co. v. Solomon 633
Indianapolis & St. L. R. Co. v. Christy 686
v. Hall 658
v. Jurey 506
Indianapolis & V. R. Co. v. Sims 689
Indianapolis, B. & W. R. Co. v. Lyon 691
v. McBrown 582
v. Strain 488, 521

PAGE

Indianapolis, C. & L. R. Co.
v. Harter 610
v. Ray 688
v. Warner 637
Indianapolis, D. & W. R. Co.
v. Clay 683
Indianapolis, P. & C. R. Co.
v. Allen 469
v. Bishop 691
v. Crandall 683
v. Marshall 656
v. Mustard 646, 649
v. Petty 629, 661
v. Shimer 673
v. Thomas 662
v. Truitt 658
Indianapolis Union R. Co. v. Boettcher 600
Ingalls v. Green 110
v. Vance 110
Ingallsbee v. Wood 457
Ingraham v. Union R. Co. 87
Ingram v. Sumter Music House 80
Inman v. C., M. & St. P. R. Co. 611, 622
Insurance Co. v. Seaver 370
Internat. & G. N. R. Co. v. Anderson 501
v. Bender 688
v. Cocke 618
v. Dimmit County Pasture Co. 479, 516
v. Dunham 618, 634, 669, 686, 690
v. Garrett 509
v. Hughes 583, 641
v. Hynes 503
v. Lewis 493
v. McRae 495
v. Mahula 465
v. Parish 475, 521
v. Ritchie 502
v. Tisdale 503
Receivers v. Wright 500
Inter-State Galloway Cattle Co. v. McLain 104
Inyo County v. Erro 55
Iowa, The 477
Ireland v. Higgins 8, 58
v. Smith 360
Irving v. Britton 363
Irwin v. Mattox 116
Isabella, The 495
Isbell v. N. Y. & N. H. R. Co. 608, 619
Isham v. Dow 126
Ismay v. Blake 493

PAGE

Ivey v. State 184
Ivory v. Deer Park 206

Jack v. Hudnall 286
v. Ontario & Simcoe R. Co. 299
Jackson v. Bellevieu 200
v. Castle 234
v. Cummins 439, 440, 442
v. Greenville 254
v. Harrison 126
v. Hasseall 109, 452
v. Morris 313
v. Nelson 369
v. Robinson 419
v. Rutland & B. R. Co. 618, 667
v. St. Louis, I. M. & S. R. Co. 641, 649
v. Smithson 394
v. State 56
v. Wetherill 89
Jackson Tp. v. Wagner 196
Jacksonville, T. & K. W. R. Co. v. Garrison 639, 641
v. Harris 630, 659
v. Jones 635, 645
v. Prior 649
v. Wellman 639, 643, 646, 686
Jacobs v. Latour 442, 444
Jacobsmeyer v. Poggemoeller 400
Jacobson v. Christensen 103
Jacquay v. Hartzell 121, 146
Jaeger v. Chic., M. & St. P. R. Co. 685
James v. Wood 15, 566
Janney v. Howard 71
Janson v. Brown 128, 129
Jarvis v. St. Louis, I. M. & S. R. Co. 356
Jebb v. Chic. & G. T. R. Co. 694, 698
Jeffersonville R. Co. v. Martin 577, 635
Jeffersonville, M. & I. R. Co.
v. Adams 610
v. Avery 668
v. Beatty 682
v. Brevoort 631
v. Chenoweth 689
v. Dunlap 581, 582, 635
v. Huber 638
v. Lyon 629, 660, 690, 691
v. Nichols 653
v. Ross 609
v. Sullivan 659, 690
v. Underhill 610

PAGE

Jeffery v. St. Pancras Vestry 232, 239
Jeffrey v. Bigelow 340, 342
Jeffryes v. Evans 570, 572
Jeffs v. Rio Grande W. R. Co. 595
Jemison v. Southwestern R. Co. 58, 592, 640, 641
Jenkins v. Ballantyne 58, 141
v. New Orleans, O. & G. W. R. Co. 637
v. Turner 397
Jennings v. Rundall 430
v. St. Joseph & St. L. R. Co. 683
v. Sparkman 102
v. Wayne 292
Jensen v. Un. Pac. R. Co. 650
Jenson v. Chic., St. P., M. & O. R. Co. 596
Jewett v. Gage 295
v. Kan. City, C. & S. R. Co. 586
Jinks v. State 177
Job v. Harlan 400
Johanson v. Howells 125
Johnson v. Ala. & V. R. Co. 484
v. Bailey 189
v. Chic., M. & St. P. R. Co. 621
v. Daw 312
v. Hill 457, 459
v. Hocker 49
v. Holyoke 256
v. McConnell 130
v. Minneapolis & St. L. R. Co. 622
v. Mocabee 300
v. Patterson 137, 138, 140
v. State, 37 Ala. 457 545, 555
v. State, 4 Sneed (Tenn.) 614 362
v. State, 36 Tex. 375 171
v. Superior 200
Johnston v. Kirchoff 323
v. Northwestern Live-Stock Ins. Co. 159
v. State 62
Johnstone v. Abercrombie 528, 538
v. Richm. & D. R. Co. 470
Joiner v. Winston 265
Joliet v. Seward 234, 254
v. Shufeldt 209
Joliet & N. I. R. Co. v. Jones 663
Joliff v. Bendell 92
Jolliffe v. Brown 648, 650, 654
Jones v. Belt 327
v. Bond 592, 641

PAGE

Jones v. Bright 30
v. Carey 389
v. Chic., B. & K. C. R. Co. 678
v. Clouser 313
v. Dashner 316
v. Housatonic R. Co. 238, 598
v. Ill. Cent. R. Co. 60, 591, 595
v. No. Car. R. Co. 593, 640
v. Owen 379
v. Perry 402
v. Richardson 70
v. Ross 101
v. St. Louis, I. M. & S. R. Co. 690
v. Scullard 449
v. Sheboygan & F. de L. R. Co. 619
v. Snow 236
v. State, 3 Tex. App. 498 171
v. State, 3 Tex. App. 228 535
v. Western N. C. R. Co. 652, 654
v. Williams 570
v. Workman 102
Jordan v. Boone 454
v. Kent 365
Jordin v. Crump 137
Jordt v. State, 4 O. 348 181
v. State, 31 Tex. 571 180
Joy v. Bitzer 342
Joyner v. So. Car. R. Co. 590, 591, 617, 629, 640
Judd v. Claremont 255
v. Fargo 239
v. Wabash, St. L. & P. R. Co. 585, 589
Judge v. Cox 403
Judson v. Etheridge 449
Julienne v. Jackson 293

Kaes v. Mo. Pac. R. Co. 666
Kalbus v. Abbot 598
Kalen v. Terre Haute & I. R. Co. 649
Kankakee Elec. R. Co. v. Lade 602
Kan. & A. V. R. Co. v. Ayers 500, 508, 509
Kansas City, Ft. S. & G. R. Co. v. Ewing 687
v. McHenry 611, 656
Kan. City, F. S. & M. R. Co. v. Grimes 679
Kan. City, M. & B. R. Co. v. Cantrell 632

PAGE

Kan. City, M. & B. R. Co. v. Doggett 639, 641
v. Higdon 462
v. Holland 475
v. Jones 676
v. Spencer 677, 694
v. Watson 588, 589, 641
Kansas City, St. Jos. & C. B. R. Co. v. Simpson 470
Kansas City, Sp. & M. R. Co. v. Kirksey 580
Kansas City Stockyards Co. v. Hawkins 519
Kan. Pac. R. Co. v. Ball 629
v. Landis 623
v. Mower 649
v. Nichols 461, 463
v. Reynolds 478
v. Taylor 689
v. Wiggins 611, 619
v. Wood 688
Kanter v. The Italia 495
Karr v. Parks 417
Kaspar v. Dawson 358
Kearns v. Sowden 252
Keck v. Halstead 145
Keeble v. Hickeringill 119, 572
Keech v. Baltimore & W. R. Co. 639
v. Rome, O. & W. R. Co. 601
Keeley v. Shanley 236
Keenan v. Cavanaugh 264
v. Gutta Percha, etc. Mfg. Co. 399, 405
Keeney v. Gd. Trunk R. Co. 500
v. Oreg. R. & Nav. Co. 296, 617, 623
Keightlinger v. Egan 386, 398
Keilbach v. Chic., M. & St. P. R. Co. 640
Keith v. Easton 215
v. Ky. Cent. R. Co. 481
Keliher v. Conn. River R. Co. 678
Kellar v. Garth 429
v. Shippee 432
Keller v. Fink 290
Kellerman v. Kansas City, St. J. & C. B. R. Co. 470
Kelley v. Fond du Lac 201
v. Milwaukee 300
v. Rhoads 57
Kellogg v. King 575
v. Lovely 105
Kells v. Northwestern Live-Stock Ins. Co. 160
Kelly v. Alderson 403
v. Tilton 384

PAGE

Kelsey v. Glover 205
Kelver v. N. Y., C. & St. L. R. Co. 682, 689
Kemp v. State 174
Kendall v. London & S. W. R. Co. 512
Kendrick v. Chic. & A. R. Co. 595, 642
Kennedy v. Amer. Exp. Co. 520
v. Ashcraft 430
v. Cecil Co. Commrs. 209
v. City of New York 203
v. Sowden 309
v. Whittie 70
Kenneson v. Framingham 352
Kennett v. Durgin 284, 285
v. Engle 396
Kennon v. Gilmer 404
Kensler v. Jennings 364, 367
Kent v. Louisville, N. O. & T. R. Co. 641
Kentucky Cent. R. Co. v. Lebus 585, 639
Kenyon v. Hart 574
Kepner v. Harrisburg Trac. Co. 604
Kerr v. O'Connor 286, 400, 414
v. Seaver 142
Kertschacke v. Ludwig 400
Kerwhacker v. C., C. & C. R. Co. 262, 653
Keshan v. Gates 385
Kessler v. Lockwood 410
Keyes v. Minneapolis & St. L. R. Co. 163, 648
Keyser v. Kan. City, St. J. & C. B. R. Co. 630
Kidd v. Reynolds 66
Kiddell v. Burnard 90
Kieffer v. Hummelstown 199
Killiker-Krebs Bdg. & Manufg. Co. v. Birmingham R. & Elec. Co. 592, 593
Kimball v. Dahoney 421
v. Rutland & B. R. Co. 461
Kimes v. St. Louis, I. M. & S. R Co. 579, 623
Kimmish v. Ball 345
Kinard v. Columbia, N. & L. R. Co. 582
Kincaid v. Kan. City, C. & S. R. Co. 480
Kinder v. Gillespie 295
King v. Cave 95
v. Chic., R. I. & P. R. Co. 641
v. Hayes 143, 542

PAGE

King v. Kline 135
v. Price 76
v. Woodbridge 478
Kingsbury v. Chic., M. & St. P. R. Co. 692
v. Dedham 215, 225
Kingsley v. Bloomingdale Tp. 210
v. Johnson 87
Kinmouth v. McDougall 384, 390
Kinney v. McDermot 74
v. Roe 116
Kinnick v. Chic., R. I. & P. R. Co. 483, 506
Kinsman v. State 549
Kiowa County v. Dunn 56
Kirk v. Norfolk & W. R. Co. 580, 585
Kirkpatrick v. Mo., K. & T. R. Co. 615
Kissam v. Jones 448
Kitchen v. Union Tp. 197
Kitchens v. Elliott 298, 391
Kitson v. Ashe 368
Kittredge v. Elliott 397
Klein v. State 319
Klenberg v. Russell 391
Klieforth v. State 568
Kline v. Green 452
Klipper v. Coffey 252
Klock v. N. Y. Cent. & H. R. R. Co 665
Knapp v. Charles Mix Co. 51
Knauer v. Louisville 353
Knickerbocker Ice Co. v. De Haas 404
Knight v. Abert 151, 263
v. Goodyear India Rubber, etc., Co. 233
v. New Orleans, O. & G. W. R. Co. 638
v. New York, L. E. & W. R. Co. 581, 665
v. Toledo & W. R. Co. 610
Knott v. Digges 141
Knour v. Wagoner 140, 141
Knowles v. Blake 302
v. Mulder 391
Knox v. Gr. North. R. Co. 473, 479
v. Tucker 262, 270
Kobe v. Northern Pac. R. Co. 685
Kodiac, The 560
Koestel v. Cunningham 400, 417
Kolb v. Klages 396
Koney v. Ward 389
Kornegay v. White 90
Kramer v. Chic., M. & St. P. R. Co. 508

PAGE

Krause v. Com. 169
Krebs v. Minneapolis & St. L. R. Co. 610
Kreider v. Fanning 110
Kroll v. Ernst 440, 443
Krum v. Anthony 150
Kuhn v. Chic., R. I. & P. R. Co. 252, 611
v. Walker Tp. 250
Kumba v. Gilham 237
Kyne v. Wilmington & N. R. Co. 598

La Borde v. Ingraham 420
La Duke v. Exeter Tp. 240
La Flamme v. Detroit & M. R. Co. 621, 678, 679
La Riviere v. Pemberton 150
La Salle v. Wright 251
Lacey v. Palmer 366
Lachner Bros. v. Adams Exp. Co. 514, 516
Lackin v. Delaware & H. Canal Co. 698
Lacon v. Page 208
Ladoga v. Linn 235
Ladue v. Branch 306
Lafayette & I. R. Co. v. Ehman 631
v. Shriner 654, 668
Lafferty v. Chic. & W. M. R. Co. 650
v. Hannibal & St. J. R. Co. 582
Laflin v. Svoboda 284
Laherty v. Hogan 392
Laible v. N. Y. Cent. & H. R. R. Co. 599
Lainiger v. Kan. City, St. J. & C. B. R. Co. 658
Laird v. Otsego 231
Lake v. Milliken 219
Lake Erie & W. R. Co. v. Beam 622, 673
v. Fishback 657
v. Griffin 663
v. Helmericks 695
v. Murray 694
v. Norris 590, 593
v. Rooker 688, 690
v. Weisel 674
Lake Shore & M. S. R. Co. v. Nat. Live-Stock Bk. 485, 511
v. Perkins 463
v. Sharpe 675
v. Van Auken 637
Lakings v. Phenix Ins. Co. 161

PAGE
Lamb v. Old Colony R. Co. 601
v. State 177
Lambeck v. Grand Rapids & I. R. Co. 210
Lambert v. Grand Trunk R. Co. 675
v. Nicklass 440, 444
Lanchbury v. Bode 446
Lane v. Lewiston 232, 247
v. Minn. State Agricul. Soc. 385
v. State 536
v. Wheeler 206
Lange v. Wagner 124
Langkop v. Mo. Pac. R. Co. 290
Langlois v. Drouin 331
Langworthy v. Green Tp. 210
Larimore v. Chic. & A. R. Co. 465
Larkin v. Taylor 261
Lathrop v. Cent. Ia. R. Co. 669
Latta v. Fowlkes 105
Laugher v. Pointer 429
Lavender v. State 182
Laverone v. Mangianti 393
Lavoie v. Reg. 477
Lawlor v. French 392, 408
Lawrence v. Aberdein 163
v. Combs 272
v. Jenkins 149
v. King 294
v. Milwaukee, L. S. & W. R. Co. 619
v. State 171
Laws v. No. Car. R. Co. 267
Lawson v. Alliston 238
v. Chic., R. I. & P. R. Co. 588
Lax v. Darlington 243
Laxton v. Jefferies 561
Lay v. Cardwell 103
Layne v. Ohio River R. Co. 267, 586, 618, 652, 675
Lazarus v. Moran 109
v. Phelps 288
Le Forest v. Tolman 415
Leach v. Elwood 141
v. French 427
Learned-Letcher Lumber Co. v. Fowler 434
Leavenworth, T. & S. R. Co. v. Forbes 620
Leavitt v. Jones 43
v. Terre Haute & I. R. Co. 597, 601, 605
v. Thompson 308
Leavy v. Kinsella 442
Lebanon & P. Turnp. Road Co. v. Purdy 241
Leconfield, Lord, v. Dixon 569
Ledbetter v. State 47, 185
Lee v. Burk 349
v. Marsh 485
v. Minneapolis & St. L. R. Co. 611
v. Raleigh & G. R. Co. 494
v. Riley 287
v. State 175
v. Union R. Co. 226
v. Vanmeter 110
Leggett v. Ill. Cent. R. Co. 656
Lehigh Co. v. Hoffort 196
Lehman v. Brooklyn City R. Co. 334
Lemmon v. Chic. & N. R. Co. 657
Lemoine v. Cook 416
Lenoir v. Mandeville 96
Lentz v. Stroh 146
Leonard v. Fitchburg R. Co. 488
v. Owen 44
v. Whitcomb 489
v. Wilkins 129
Lescallett v. Com. 366
Lessels v. Farnsworth 452
Lettis v. Horning 409
Leuw v. Dudgeon 469, 475
Levy v. N. Y. City 301, 339
Lewis v. Bracken 342
v. Bulkley 164
v. Burlington Ins. Co. 164
v. Davis 44
v. Fermor 540
v. Peake 93
v. Richmond & D. R. Co. 466
v. Smith 125
v. Springville Bkg. Co. 484
v. Tyler 440
Liddard v. Kain 78
Liddell v. Lofthouse 368
Liddle v. Keokuk, Mt. P. & M. R. Co. 634, 688
Lightcap v. Phila. Trac. Co. 603
Limburger v. Barker 55
Linck v. Scheffel 386, 404
Lincoln v. Boston 234
Lincoln Rapid Transit Co. v. Nichols 625
Lindon v. Hooper 317, 319
Lindsley v. Chic., M. & St. P. R. Co. 506, 512
Line v. Mills 426
v. Taylor 396, 405
Lines v. Winnipeg Elec. St. R. Co. 603

PAGE
Lingonner v. Ambler 307
Linnehan v. Sampson 380, 390, 404
Linney v. State 187
Lipe v. Blackwelder 140
Lippincott v. Lasher 359
Liston v. Cent. Ia. R. Co. 584
Little v. Lathrop 262
v. McGuire 267, 272, 290
v. Madison 237, 238
v. Swafford 302
v. Woodworth 87
Little Rock & Ft. S. R. Co. v. Dicks 579
v. Finley 265, 586, 608, 639
v. Henson 590, 639
v. Holland 590
v. Jones 639
v. Miles 467
v. Odom 466
v. Smith 636
v. Trotter 587
v. Turner 590
v. Wilson 641
Little Rock & M. R. Co. v. Chriscoe 591
Littledale v. Scaith 24
Littlefield v. Biddeford 423
Littleton v. Richardson 224
Littman, In re 535
Livermore v. Batchelder 129
Liverpool New Cattle Market Co. v. Hudson 354
Llano Cattle Co. v. Faught 54
Lloyd v. Lloyd 574
v. New York City 240
v. Waterford & L. R. Co. 473
Lobee v. Standard Live-Stock Ins. Co. 160
Loberg v. Amherst 228
Locke v. St. Paul & Pac. R. Co. 262, 596, 613, 638, 652
Lockridge v. Fesler 447
Lockwood v. Barnes 74
v. State 48
Loesch v. Koehler 143, 166, 542
Loeser v. Chic., M. & St. P. R. Co. 506
Logan v. Gedney 265
Logue v. Link 388
London & East Counties L. & D. Co. v. Creasey 377
London & North-Western R. Co. v. Hughes 517
London, Brighton & S. C. R. Co. v. Truman 361
Lonergan v. Ill. Cent. R. Co. 595
Long v. Cent. Ia. R. Co. 668
PAGE
Long v. Portland 361
v. Southern R. Co. 629
v. State, 43 Tex. 467 186
v. State (Tex. Cr.), 46 S. W. Rep. 821 185
Long Point Co. v. Anderson, Re 36
Longyear v. Buck 65
Loomis v. Terry 384
Lorance v. Hillyer 267
Lord v. Saco 243
v. Wormwood 262, 272, 281
Lord Advocate v. Young 572
Lord Derby, The 382, 416
Lott v. Frankford & S. Pass. R. Co. 598
v. State 554
Louisville v. Wible 353
Louisville & F. R. Co. v. Milton 655
Louisville & N. R. Co. v. Barker 636
v. Belcher 648
v. Bell 467, 508
v. Bolton 356
v. Bowen 589, 642
v. Brinckerhoff 589
v. Cochran 265, 607
v. Cooper 464
v. Dies 489, 490
v. Eves 626
v. Guthrie 660, 697
v. Kelsey 470, 620, 638, 646
v. Kelton 592, 593
v. Lancaster 641
v. Owen 471
v. Posey 586
v. Rice 586
v. Robinson 520
v. Schmidt 627
v. Simmons 267, 637, 639
v. Simpson 356
v. Sowell 470
v. Stone 586, 587
v. Upton 597, 657
v. Wathen 511
v. Williams, 105 Ala. 379 608
v. Williams (Ky.), 45 S. W. Rep. 229 631
v. Wynn 505
Louisville & W. R. Co. v. Hall 578
Louisville, Cinc. & L. R. Co. v. Hedger 463, 469, 512
Louisville, E. & St. L. R. Co. v. Hart 625, 655
v. Hill 636
v. Lee 596

PAGE

Louisville, N. A. & C. R. Co. v. Cahill 609
v. Cauble 634
v. Consol'd Trunk Line Co. 670
v. Davis 252, 597, 628, 686
v. Etzler 660, 670
v. Francis 668
v. Godman 486
v. Goodbar 660, 674, 689
v. Hixon 641
v. Hughes 675
v. Johnson 637
v. Ousler 597, 610, 619
v. Porter 677
v. Quade 631, 689, 692
v. Schmidt 602
v. Spain 693, 694
v. Stanger 596, 605
v. Steele 508
v. Stommel 623
v. Summer 698
v. White 657
v. Whitesell 654
v. Widman 509
Louisville, N. O. & T. R. Co. v. Bigger 506
v. Caster 595
v. Phillips 580
v. Smith 590, 639
v. Tate 590
Love v. Ross 98, 99, 101
Loveland v. Gardner 157
Low v. Pew 70
Lowe v. Guard 157
v. State 179
v. Woods 450
Lower Macungie Tp. v. Merkhoffer 197
Lowery v. Manhattan R. Co. 606
Lowndes v. Dickerson 33
Lowry v. St. Louis & H. R. Co. 582
Lucas v. State, 62 Ala. 26 176
v. State, 33 Tex. Cr. 290 168
v. Trumbull 430
Lucia v. Meech 435
Luckie v. Chic. & A. R. Co. 668
Lukens v. Freiund 126
Lundeen v. Livingston Elec. Light Co. 213
Lundy v. State 173
Luscombe v. Great Western R. Co. 664
Lyman v. Gipson 114
Lynch v. Grayson 349
v. McNally 388, 393

PAGE

Lynch v. North. Pac. R. Co. 590, 606
v. Nurdin 327
v. Richardson 392, 448
Lynde v. Parker 110
Lyndsay v. Conn. & P. R. R. Co. 638
Lynn v. State 141
Lyons v. Martin 304
v. Merrick 273
v. Stills 98
v. Terre Haute & I. R. Co. 610
v. Van Gorder 114

McAdams v. Sutton 414
McAlister v. Chic., R. I. & P. R. Co. 484
McAllester v. Haden 361
McAlpine v. Grand Trunk R. Co. 656
McAneany v. Jewett 142
McArthur v. Garman 109
McAuley v. Harris 436
McBeath v. Wabash, St. L. & P. R. Co. 509
McBride v. Com. 178
v. Hicklin 295, 321
v. Lynd 260
v. State 363
McCahill v. Kipp 326
McCall v. Chamberlain 265, 619, 654, 667, 687
McCambley v. Staten Island M. R. Co. 254
McCance v. London & North-Western R. Co. 470, 472
McCandless v. Chic. & N. R. Co. 626
McCann v. Chic., St. P., M. & O. R. Co. 621
v. Consold. Trac. Co. 236, 239
McCarn v. Internat. & G. N. R. Co. 465
McCarthy v. Guild 417
v. Portland 254
McCarty v. Blevins 46
v. State 168
McCaskill v. Elliott 395
McCauley v. Mont. Cent. R. Co. 643
McClain v. Garden Grove 207
McClintock v. Emick 80, 86
McClure v. Sheek's Heirs 49
McConico v. Singleton 558
McConnell v. Aernam 308
McCook v. Bryan 667

PAGE

McCool v. Galena & C. U. R. Co. 610
McCorkell v. Karhoff 82
McCormick v. Tate 260, 271
McCornack v. Sornberger 127
McCoy v. Cal. Pac. R. Co. 621, 639
v. Hock 440
v. K. & D. M. R. Co. 505, 506
v. So. Pac. R. Co. 626, 660, 668, 691
McCracken v. Webb 75
McCrossin v. Davis 117
McCullough v. Wabash West. R. Co. 480
McCune v. B., C. R. & N. R. Co. 507
McDaniel v. Chic. & Northwestern R. Co. 488
v. State, 5 Tex. App. 475 549
v. State, 33 Tex. 419 168
McDaniels v. Robinson 457
M'Dermaid v. Edinburgh Tramway Co. 593
McDonald v. Bennett 449
v. Dickenson 228
v. Jodrey 120, 133
v. Savoy 256
v. Snelling 331
v. Toledo Consol. St. R. Co. 213, 602
v. Yarmouth Tp. 236
McDonnell v. Pittsfield & N. A. R. Co. 281, 612, 666
McElroy v. State 300
McEwan v. Cuthill 325
McFadden v. Mo. Pac. R. Co. 476
McFarland v. McGill 87
v. Newman 89
v. Swihart 157
McFarlane v. Hulton 368
McFie v. Can. Pac. R. Co. 590, 664
McGarry v. N. Y. & H. R. Co. 395, 399
McGhee v. Edwards 109, 110, 111
v. Guyn 675
McGill v. Compton 150
McGlinchey v. Fidelity & Cas. Co. 334
McGrath v. Detroit, M. & M. R. Co. 684
McGrew v. Forsythe 89
v. State 50, 171
McGuire v. Mo. Pac. R. Co. 692
v. Ogdensburgh & L. C. R. Co. 693

PAGE

McGuire v. Ringrose 382
McHugh v. Mayor 398
McIlvaine v. Lantz 276
McInaney v. Hildreth 368
McIntosh v. State 182
v. Waddell 325
McIntyre v. Carmichael 400
v. Lockridge 303
McJunkin v. Mathers 312
McKay v. South. Bell Teleph. & Teleg. Co. 246
McKeage v. Pope 436
McKee v. McKee 299
McKeen v. Converse 313, 423
McKenzie v. Can. Pac. R. Co. 680
v. Hancock 100
v. Lewis 448
v. State 48
McKinne v. State 544
McKinney v. Ohio & M. R. Co. 634, 654
McKnight v. Toronto 357, 358
M'Kone v. Wood 405
McKowan v. Harmon 270
McLain v. Huffman 361, 362
v. Lloyd 437
McLaughlin v. Kemp 410
v. Piatti 71
McLaurine v. State 555
McLean v. Rutherford 423
v. Warnock 436
McLennan v. Grand Trunk R. Co. 664
McMahan v. State 535
McMahon v. Field 124, 250
v. Kelly 329
McManaway v. Crispen 313
McManus v. Lancashire & Y. R. Co. 461, 473
McMaster v. Montana Un. R. Co. 586 589, 615
McMichael v. Grand Trunk R. Co. 671
McMillan v. Andrews 118
v. Ma. & N. R. Co. 638, 664
McNally v. Lancashire & Y. R. Co. 473
McNeer v. Boone 152
McNeill v. Brooks 422
McPhail v. State 174
McPheeters v. Hannibal & St. J. R. Co. 267, 668
McPherson v. James 260, 303, 306
McQuaid v. Ross 81
McQuillen v. Crommellin Iron Ore Co. 155
McSloy v. Smith 295, 314
McWillie v. Goudron 328

PAGE
Macauley v. City of New York 203
Macdonald v. Lye 380, 412
Mack v. St. Louis, K. C. & N. R. Co. 635
v. South Bound R. Co. 640
Mackenzie v. Cox 424
Mackie v. Cent. R. of Ia. 629, 671
Mackler v. Schuster 307
Macomber v. Nichols 230, 231
Macon v. Dykes 223
Macon & W. R. Co. v. Baber 621, 622
v. Lester 259
Madison v. State 172
Maggi v. Cutts 255, 404
Magilton v. N. Y. Cent. & H. R. R. Co. 673
Magner v. Peo. 557, 564
Maher v. Winona & St. P. R. Co. 654
Mahle v. State 185
Mahler v. Holden 118
Mahon v. Crowe 422
Mahoney v. Dwyer 382
Maier v. Freeman 113
Ex parte 560, 565
Maize v. Bowman 46, 445
Major v. Herndon 44
Mallory v. Griffey 220
Malone v. Knowlton 287
Manchester, S. & L. R. Co. v. Wallis 664
v. Woodcock 627
Manchester S. J. & A. R. Co. v. Fullarton 598
Manderschid v. Dubuque 207
Manger v. Shipman 373
Mann v. Weiand 390, 397
v. Williamson 267, 274
Manning v. Mitcherson 3, 38
Mansfield v. Baddeley 390
v. Cole 434
Manwell v. Burlington, C. R. & N. R. Co. 648, 673, 696
Manzoni v. Douglas 328
Marble v. Ross 384, 389, 390
v. Worcester 214
Marcau v. Vanatta 386, 391
Marfell v. South Wales R. Co. 672
Margetson v. Wright 77
Marietta & Cinc. R. Co. v. Stephenson 262, 263, 295, 617, 619, 620, 667
Marion St. R. Co. v. Carr 603
Markham v. Gr. West. R. Co. 623
Marsel v. Bowman 405
PAGE
Marsh v. Hand 285
v. Jones 409
v. Means 542
v. New York & E. R. Co. 616
v. Webber 342
Marshall v. Bingle 425
v. Blackshire 129, 130
v. State 169
v. Yoos 317
Marsland v. Murray 382
Martin v. Blodget 92
v. Cent. Ia. R. Co. 629
v. Cuthbertson 430
v. Elliott 101
v. Foltz 320
v. Reed 296
v. State 174
v. Towle 515
Maslin v. Balt. & O. R. Co. 491, 501
Mason v. Keeling 376, 391
v. Mo. Pac. R. Co. 479
v. Morgan 290, 374, 423
v. Thompson 457
Mason Stable Co. v. Lewis 453
Mass. S. P. C. A. v. Boston 542
Massey v. State 50
Matson v. Baird 671
Matteson v. Strong 386
Matthews v. Fiestel 135
v. Parker 96
v. St. Paul & S. C. R. Co. 590
v. Schmidt 319
v. State 179
Mattison v. Turner 317
Mattoon v. Rice 83
Mauney v. Ingram 440
Maus v. Broderick 330
Maxwell v. Clarke 228
v. Cooke 335
v. Houston 420
v. Palmerton 128, 145
May v. Burdett 394
v. Chic. & N. R. Co. 672
Mayberry v. Concord R. Co. 667
Mayes v. State 186
Mayfield v. St. Louis, & S. F. R. Co. 641, 658, 690, 692
v. Spiva 109
Mayhew v. Wardley 574
Maynard v. Boston & Me. R. Co. 612, 666
v. Buck 426
v. Maynard 81, 101
v. Norfolk & W. R. Co. 680
Mayor of Colchester v. Brooke 31
Mayor v. Meigs 67

PAGE
Mead v. Burlington & L. R. Co. 621
Meade v. Watson 274
Mears v. Chic. & N. R. Co. 673
Meegan v. McKay 288, 296, 391
Meeker v. North. Pac. R. Co. 584
Meibus v. Dodge 382, 417
Meier v. Shrunk 339, 390
Meisch v. Rochester Elec. R. Co. 591, 625
Mella v. Baston 335, 338
Melody v. Reab 319
Melsheimer v. Sullivan 382
Memphis v. C. R. Co. v. Blakeney 613
v. Lyon 593, 678
v. Scott 589
v. Smith 618
Memphis & L. R. Co. v. Carlley 648, 696
v. Kerr 587
Mendell v. Chic. & N. R. Co. 630
Meneley v. Carson 145, 166
Meracle v. Down 387
Merch. & Mech's. Sav. Bk. v. Fraze 81
Meredith v. Reed 380
Merrick v. Work 316
Merrill v. Claremont 225
v. Hampden 219
Merrils v. Goodwin 17
Merritt v. Claghorn 454
v. Hill 265, 288
v. O'Neil 316
v. Peo. 564
Metcalf v. Hess 454
Metropolitan Sav. Bk. v. Manion 358
Meuly v. Corkill 437
Meunier *dit* Legacé v. Cardinal 321
Mexican C. R. Co. v. Lauricella 586
Mexican Nat. R. Co. v. Savage 481
Meyer v. Atlantic & P. R. Co. 647
v. Berlandi 111
v. Cook 105, 108
v. Jones 353
v. Krauter 89
Meyers v. Wabash, St. L. & P. R. Co. 475
Micheaux v. State 170
Mich. South. & N. I. R. Co. v. Fisher 261
v. McDonough 463, 503
PAGE
Middleton v. Flanagan 377
v. Stone 421
Midland R. Co. v. Daykin 664
v. Freeman 343
Milburn v. Hannibal & St. J. R. Co. 589, 635
v. Kan. City, St. J. & C. B. R. Co. 624
Miles v. Hannibal & St. J. R. Co. 654
Millcreek Tp. v. Brighton Stockyards Co. 437
Millen v. Fandrye 121, 277
Miller v. Boone Co. 207
v. Bourbonnière 382
v. Crabbe 110
v. Horton 351
v. Kimbray 403
v. Law 99
v. McDonald 92
v. Marston 449
v. Northern Pac. R. Co. 675
v. Rochester Vulc. Pav. Co. 248
v. Smith 101
v. U. S. 363
v. Wabash R. Co. 660
v. Webster City 359
Milligan v. Wedge 338
v. Wehinger 264, 271
Millon v. Salisbury 427
Mills v. Farmers' Ins. Co. 160, 162
v. N. Y. & H. R. Co. 348
v. Stark 281
Mills & Le Clair Lumber Co. v. Chic., St. P., M. & O. R. Co. 684
Milman v. Shockley 130
Milne v. Nimmo 324
Milwaukee v. Davis 240, 251
Miner v. Conn. Riv. R. Co. 626
Minneapolis & St. L. R. Co. v. Beckwith 696
v. Emmons 661, 695, 696
Minter v. State 172
Misner v. Knapp 364
Miss. Cent. R. Co. v. Miller 590, 643
Mo., K. & T. R. Co. v. Belcher 498
v. Byrne 469, 480
v. Carter 478, 507
v. Chittim 516
v. Cook 468
v. Darlington 515
v. Haber 345, 346

PAGE

Mo. K. & T. R. Co. v. Jones 598
v. Magee 596
Receivers v. Olive 503
v. Russell 618
v. Traub 598
v. Woods 481, 514
Mo. Pac. R. Co. v. Abney 630
v. Baxter 656
v. Bradshaw 611, 694
v. Childers 510
v. Clark 598
v. Cornwall 469
v. Cox 680
v. Earle 641
v. Eckel 584, 669
v. Edwards 482, 516, 521
v. Fagan 506, 507
v. Finley 343
v. Gedney 588, 589
v. Gill 598, 630, 657
v. Hackett 671
v. Hall 514
v. Harrelson 653
v. Harris 461, 498, 508
v. Heath 506
v. Hill 606
v. Humes 696
v. Ivy 487
v. Kingsbury 486
v. Kocher 668
v. Leggett 660
v. Lynch 679
v. Manson 677
v. Morrow 676
v. Paine 509, 510, 519, 520
v. Pfrang 659, 668
v. Roads 611, 619, 667
v. Scott 512
v. Shumaker 296
v. Stevens 595
v. Tex. & Pac. R. Co. 497, 506
v. Tietken 467
v. Vandeventer 641
v. Wilson 590, 611, 612
Mitchell v. Carolina Cent. R. Co. 513
v. Chase 405
v. Georgia R. Co. 475
v. Williams 65
v. Wolf 264
Mitchil v. Alestree 336
Mitford v. Reynolds 543
Mittelstadt v. Morrison 234
Mizell v. State 187
Mobile & B. R. Co. v. Kimbrough 587

PAGE

Mobile & G. R. Co. v. Caldwell 589, 590, 597
Mobile & O. R. Co. v. Bogle 468
v. Francis 497
v. Gunn 588
v. Hudson 267, 638
v. Malone 590, 630
v. Moore 668
v. Thompson 670
v. Williams 265
Moeschke v. State 83
Moffat v. Gt. West. R. Co. 479
Molair v. Port Royal & A. R. Co. 590, 591, 593, 622
Moling v. Barnard 633
Molk v. Daviess County Agricul., etc., Assn. 370
Molton v. Cheeseley 14
v. State 173
Mondego, The 491
Money v. Fisher 86
Monroe v. Lattin 449
Montgomery v. Breed 295
v. Handy 273
v. Koester 402
v. State 186
Montgomery & E. R. Co. v. Perryman 638
Monypenny v. Sells 109
Moody v. Minneapolis & St. L. R. Co. 624
Mooers v. Larry 425
v. North. Pac. R. Co. 586
Moore v. Abbot 195
v. Cass 419
v. Emerson 98
v. Great Northern R. Co. 506
v. Kan. City & I. R. T. R. Co. 627, 629
v. Robbins 316
v. State 117, 171
v. White 276
Moreland v. Mitchell Co. 240
More's Est., In re 45
Morewood v. Wakefield 141
Morey v. Brown 142
Morgan v. Abergavenny (Earl) 40
v. Beaumont 361
v. Cent. R. Co. 600
v. Hudnell 287, 290
v. Jackson 571
v. Miller 71
v. Norfolk S. R. Co. 600
v. State 186
Moriarty v. Cent. Ia. R. Co. 619, 677
Morley v. Greenhalgh 539

PAGE
Morrill v. Jones 56
Morris v. Armit 424, 428
v. Cohn 289
v. Del., L. & W. R. Co. 491
v. Dimes 571
v. Fraker 265, 266
v. Nugent 131, 144, 147
v. Phelps 253
v. St. Louis, K. C. & N. R. Co. 632
Morrison v. Bennett 369
v. Burlington, C. R. & N. R. Co. 645, 659
v. Cornelius 148
v. Kan. City, St. J. & C. B. R. Co. 672, 675
v. M'Ara 327
v. Mitchell 284
v. Shelby Co. 249
v. State 168
Morrow v. Hannibal & St. J. R. Co. 579
v. Sweeney 158
Morse v. Boston & L. R. Co. 356, 667
v. Glover 141
v. Nixon 133, 144
v. Patterson 43
v. Pitman 96
v. Reed 316
v. Richmond 215, 227
v. Rutland & B. R. Co. 667
Morsman v. Rockland 203
Morton v. Gloster 432
Moser v. St. Paul & D. R. Co. 613, 685
Moses v. Port Townsend S. R. Co. 482
v. So. Pac. R. Co. 263, 617, 683
v. State 354
Mosher v. Jewett 302, 311
Moshier v. La Crosse County Agricul. Soc. 371
v. Utica & S. R. Co. 598, 600, 605
Mosier v. Beale 287
Moss v. Augusta 143
v. Burlington 207
v. Pardridge 418
Moulton v. Aldrich 324
v. Moore 284
v. St. Paul, M. & M. R. Co. 470
v. Sanford 195
Mount Vernon v. Hoehn 208
Mowers v. Fethers 455
Mowery v. Salisbury 66

PAGE
Moye v. Wrightsville & T. R. Co. 590
Moynahan v. Wheeler 391
Mueller v. Ross Tp. 251
Mulherrin v. Henry 415
Mullaly v. Peo. 60, 68
Mullen v. Glens Falls 222, 232
v. Western Union Beef Co. 347
Muller v. McKesson 388, 393
Mullett v. Bradley 3, 4, 28
v. Mason 342
Mulliner v. Florence 459
Munch v. N. Y. Cent. R. Co. 616
Muncie St. R. Co. v. Maynard 603
Munger v. Tonawanda R. Co. 620
Munn v. Reed 386
Munson v. Porter 452
Murdock v. Warwick 193, 205
Murgoo v. Cogswell 116, 121
Murley v. Grove 245
Murphy v. Grand Trunk R. Co. 672
v. Kaufman 430
v. McGraw 86, 99, 100, 163
v. Manning 529, 534
v. Mich. Cent. R. Co. 210
v. Preston 391, 400
Murray v. Brown 414
v. Guse 112
v. So. Car. R. Co. 264, 617, 640
v. U. S. 177
v. Young 391
Murry v. Meredith 99
Musquez v. State 174
Mutchler, In re 168
Myers v. Baltimore Co. Commrs. 56
v. Dodd 271
v. State 50
Mynard v. Syracuse, B. & N. Y. R. Co. 505
Myrick v. Mich. Cent. R. Co. 464

Nafe v. Leiter 316
Nance v. Barber 73
Nashua Iron & Steel Co. v. Worcester & N. R. Co. 628, 632
Nashville & Chat. R. Co. v. Thomas 590
Nashville, C. & St. L. R. Co. v. Heggie 487
v. Hembree 577, 589, 590, 638
v. Hughes 669
v. Sadler 582
v. Spence 625

PAGE

Nat. Bk. of Commerce v. Morris 104
National Fertilizer Co. v. Lambert 353
National Horse Importing Co. v. Novak 99
Nauman v. Ullman 77, 96
Neal v. Wilcox 456
Neale v. Croker 458
Needham v. Dial 83
v. San Fran. & S. J. R. Co. 608
Neel v. State 420
Nehr v. State 293
Nelson v. Beck 446
v. Chic., M. & St. P. R. Co. 654
v. Great North. R. Co. 620, 677
v. St. Louis & S. F. R. Co. 696
Neversorry v. Duluth, S. S. & A. R. Co. 653, 662
Nevin v. Great Southern & W. R. Co. 470, 489
New Albany & S. R. Co. v. McNamara 655, 695
v. Maiden 653, 662
v. Pace 677
New Brunswick R. Co. v. Vanwart 600, 627
New Market Co. v. Embry 439
New Orleans v. Lozes 84
New Orleans & N. E. R. Co. v. Bourgeois 589, 639
v. Burkett 590
v. Thornton 577, 584
New Orleans, J. & G. N. R. Co. v. Field 613
New York & E. R. Co. v. Skinner, 617, 652
New York Cent. R. Co. v. Lockwood 467, 469
New York, C. & St. L. R. Co. v. Auer 632
v. Zumbaugh 653, 694
New York Game Assn. v. Durham 564
New York, L. E. & W. R. Co. v. Estill 507, 516
New York, T. & M. R. Co. v. Sutherland 633
Newark & S. O. H. C. R. Co. v. Hunt 351
Newby v. Chic., R. I. & P. R. Co. 486
Newell v. Clapp 341
Newhouse v. Hatch 316

PAGE

Newkirk v. Milk 347
Newlin Tp. v. Davis 197
Newman v. Pa. R. Co. 493
v. Vicksburg & M. R. Co. 589
Newport News & M. V. R. Co. v. Mercer 502, 519
v. U. S. 487
Newton v. Ferrill 259
v. Gordon 400
v. Joyce 358
v. Pope 420
Nichols v. Athens 220, 235
v. Balch 420
Nicholls v. Hall 349
Nicholson v. Atchison, T. & S. F. R. Co. 673
v. Temple 46
Nicolls v. Duncan 442
Niemann v. Mich. Cent. R. Co. 612
Nierenberg v. Wood 286, 413
Nightengale v. State 168
Nixon v. Grand Trunk R. Co. 680
Noble v. Chase 275
v. St. Joseph & B. H. St. R. Co. 333
Noblesville Gas & Imp. Co. v. Teter 252
Noel v. Duchesneau 388
Nolan v. N. Y., N. H. & H. R. Co. 653
v. San Antonio Ranch Co. 54
Noles v. Marable 423
Nolin v. Franklin 359
Nolon v. Chic. & A. R. Co. 614
Norfolk & W. R. Co. v. Harman 479
v. Johnson 654
v. McGavock 657
v. Sutherland 484
Norris v. Kohler 330
v. Litchfield 204
v. Parker 78
v. Warner 398, 402
North v. McDonald 307
v. Smith 412
North Amer. Comml. Co. v. U. S. 28
North Chic. St. R. Co. v. Harms 602
v. Hudson 643
North Manchester Tri-County Agric. Assn. v. Wilcox 120, 371
North Manheim Tp. v. Arnold 221

PAGE
North Mo. R. Co. v. Akers 518
North Pa. R. Co. v. Com. Nat. Bk. 484
v. Rehman 617, 620
North Side St. R. Co. v. Tippens 603
Northcot v. State 552
Northcott v. Smith 302
Northern Central R. Co. v. Ward 612, 639
Northern Pac. R. Co. v. Cunningham 267
v. Sullivan 598
Northwestern Bank v. Freeman 103, 105
Norton v. Ladd 36
v. Rockey 303, 316
Nowel v. Smith 270
Noyes v. Colby 262
Nuckolls v. Gaut 265
Nugent v. Smith 504, 506

Oakes v. Spaulding 413
Obert v. Barrow 542
O'Brien v. Bound 428
v. Miller 329
Ochiltree v. Chic. & N. R. Co. 601
O'Connell v. Jarvis 287
Odell v. Atlanta 361
O'Donnell v. Pollock 405
Oeflein v. Zautcke 122
O'Grady v. N. Y. Mut. Live-Stock Ins. Co. 159
Ogston v. Aberdeen District Tramways Co. 244
O'Hara v. Miller 405
Ohio & M. R. Co. v. Atteberry 643
v. Brown 670
v. Brubaker 528, 656
v. Cole 581
v. Craycraft 595, 619
v. Eaves 625
v. Fitch 634
v. Hays 646
v. Jones 620, 661
v. McClure 690
v. Simon 356
v. Stribling 588, 645
v. Tabor 470, 488, 491, 508
v. Wrape 641, 642, 675
Ohio, I. & W. R. Co. v. Heady 669
Oil v. Rowley 299, 303, 312
O'Keefe v. Talbot 435
O'Leary, Ex parte 357
Olmsted v. Rich 359

PAGE
Olson v. Chic., M. & St. P. R. Co. 626
v. Chippewa Falls 201, 202, 203
v. Luck 200
Omaha & R. V. R. Co. v. Brady 600
v. Clarke 598, 599
v. Crow 467
v. Wright 586, 635
Omaha St. R. Co. v. Duvall 603
O'Mally v. McGinn 315
Omberg v. U. S. Mut. Assn. 334
O'Neil v. East Windsor 257
v. Quebec 228
v. Windham 228
Onslow v. Eames 95
Opelousas Bd. of Aldermen v. Norman 357
Orange, A. & M. R. Co. v. Miles 638
Oranmore, The 493
Orchard v. Rackstraw 450
Orcutt v. Pac. Coast R. Co. 595, 608, 625, 639
Oregon R. & Nav. Co. v. Dacres 687
v. Smalley 650, 653
Organ v. State 558
O'Riley v. Diss 270
Ormsby v. Un. Pac. R. Co. 508, 520
Orne v. Roberts 400
O'Rorke v. Gt. West. R. Co. 471, 478
O'Rourke v. Monroe 218
Orser v. Storms 45
Ortt v. Minneapolis & St. L. R. Co. 465
Osbond v. Meadows 574
Osborn v. Jenkinson 339
Osborne v. Chocqueel 398
v. Kimball 296
Osgood v. Green 321
Osincup v. Nichols 400
Ouverson v. Grafton 232, 247
Oviatt v. State 551
Owen v. De Winton 245
v. Louisv. & N. R. Co. 481, 508, 510
v. State 177
Owens v. State 178
Oxford Lake Line v. Steadham 600
Oxley v. St. Louis, K. C. & N. R. Co. 468
v. Watts 116
Oxsheer v. Watt 103

PAGE
Ozburn v. Adams 274, 284, 286
Pace v. Potter 268, 273
Pacific Exp. Co. v. Lothrop 515, 516
Pacific R. Co. v. Brown 620
Packard v. Slack 342
Paddock v. Mo. Pac. R. Co. 489
Paff v. Slack 415
Page v. Great Eastern R. Co. 693
v. No. Car. R. Co. 579
v. Olcott 272
v. Sumpter 257
Paget v. Birkbeck 572, 573
Painter v. Baker 415
Palmer v. Andover 193, 194, 199, 200, 250
v. Grand Junc. R. Co. 461
v. North. Pac. R. Co. 586, 587
v. Silverthorn 140
v. Spaulding 316
v. State 366
Paramore v. Western R. Co. 466, 483
Pardington v. South Wales R. Co. 472
Paris v. Hale 295
Park v. Adams Co. 240
v. O'Brien 323
Parke Co. Commrs. v. Sappenfield 208, 212
Parker v. Chase 103
v. Evans 117
v. Jones 294, 297, 315
v. Lake Shore & M. S. R. Co. 619, 620, 655
v. Marquis 437
v. Mise 58, 146, 164
v. Mosher 363
v. Rensselaer & S. R. Co. 676, 687
v. State 182
v. Thompson 284
v. Union Woolen Co. 233
Parks v. Kerstetter 303
Parrin v. Mont. Cent. R. Co. 649
Parrott v. Hartsfield 128, 131
Parsons v. Gingell 448
Partenheimer v. Van Order 417
Partlow v. Haggarty 394
Patee v. Adams 345, 349
Patrie v. Oreg. Short-Line R. Co. 692
Patten v. Chic., M. & St. P. R. Co. 656
Patterson v. Austin 227
v. Devlin 45
v. McVay 115
PAGE
Patterson v. South & North Ala. R. Co. 242, 255
Patteshall v. Tranter 96
Patton v. State 549
v. West End N. G. R. Co. 614
Paul v. Hardwick 77, 94
v. Summerhayes 573
Pavitt v. Leh. Val. R. Co. 493, 501, 511
Payne v. Kan. City, St. J. & C. B. R. Co. 672
v. Troy & B. R. Co. 642
Peak v. Frost 76
Pearce v. Sheppard 436
Pearce's Case 552
Pearl v. Macaulay 326, 330
Pearson v. Chic., B. & K. C. R. Co. 660, 676, 684, 692
v. Milwaukee & St. P. R. Co. 619
v. Zehr 350, 351
Peddicord v. Mo. Pac. R. Co. 666
Pedigo v. Com. 63
Peer v. Ryan 444
Penn v. Buffalo & E. R. Co. 483, 505
Pennsylvania Co. v. Clark 501
v. Greso 467
v. Lindley 676, 695
v. Spaulding 670, 674, 676
Pennsylvania R. Co. v. Henderson 467
v. Raiordon 469, 512
v. Riblet 652, 661
Penton v. Murduck 348
Peo. v. Bd. of Police 145
v. Bolanger 48
v. Borda 356
v. Brunell 526
v. Butler 180
v. Caldwell 51, 53
v. Campbell 60
v. Davy 533
v. Devine 171
v. Fallon 363, 364
v. Fishbough 568
v. Gillespie 141
v. Gillis 172
v. Hall 187
v. Kaatz 171
v. Klock 528
v. Knatt 555
v. Maloney 61, 62
v. Monteith 180
v. Murphy 173
v. Olsen 553
v. O'Neil 565

	PAGE
Peo. v. Pico	180
v. Robbins	562
v. Roberts	56
v. Ross	530, 531
v. Rouse	562
v. Sensabaugh	180
v. Shippee	55
v. Smith, 112 Cal. 333	184
v. Smith, 5 Cow. (N. Y.) 258	547
v. Soto	182
v. Spec. Sessions	534
v. Stanford	178
v. Swasey	187
v. Tighe	60, 141
v. Tinsdale	532
v. Truckee Lumber Co.	356
v. Van De Carr	364
v. Weithoff	363
v. Wiley	174
Peo., Ricks Water Co. v. Elk River M. & L. Co.	356
Peoria v. Walker	248
Peoria & R. I. R. Co. v. McClenahan	580
Peoria, D. & E. R. Co. v. Babbs	659, 673
v. Duggan	649
v. Miller	609
Peoria, P. & J. R. Co. v. Barton	671
v. Champ	589, 609
v. McIntire	632
Perdue v. Harwell	77, 92
Perkins v. Boardman	112
v. Fayette	195
v. Mossman	391
v. St. Louis, I. M. & S. R. Co.	641, 649
Perry v. Dubuque S. R. Co.	659, 690
v. Phipps	131, 144
Persinger v. Wabash, St. L. & P. R. Co.	642
Peters v. New Orleans, J. & G. N. R. Co.	488
v. Stewart	685
Petersburg v. Whitnack	298
Petersburg R. Co. v. Hite	598
Peterson v. Chic. & W. M. R. Co.	598
v. Miss. Vall. Ins. Co.	160
v. North. Pac. R. Co.	620
Peterson, Ex parte	561
Pettigrew v. State	184
Pettit v. May	304
v. N. Y. Cent. & H. R. R. Co.	233
Petzenka v. Dallimore	109
Peyton v. Chic., R. I. & P. R. Co.	683
Pfaffinger v. Gilman	338
Phelon v. Stiles	237
Phelps v. Cousins	275
v. Paris	427
v. Racey	564
Philadelphia & R. R. Co. v. Ervin	682
Phila. Trac. Co. v. Bernheimer	603
v. Lightcap	603
Phila., W. & B. R. Co. v. Lehman	519
v. Stinger	600, 627
Phillips v. Can. Pac. R. Co.	627
v. Covell	270
v. De Wald	325
v. Denver	358, 359
v. Evans	65
v. N. Y. Cent. & H. R. R. Co.	600
v. Nicoll	339
v. People's Pass. R. Co.	589
Philpot v. Bugler	574
Phœnix Ins. Co. v. Grimes	162
v. Public Park Amusement Co.	162
Phythian v. Baxendale	327
Pickard v. Howe	316, 318, 339
Pickens v. Diecker	326
Pickering v. Orange	391, 397
Pickett v. McCord	109
Pierce v. Andrews	684
v. Conners	325
v. Eddy	53
v. Hosmer	276
v. Josselyn	319
Pierret v. Moller	384
Pierson v. Post	5, 6, 8
Pigott v. Lilly	234
Pike v. Eddy	346
Pilon v. Shedden Co.	386
Pim v. Griffith	155
Pinnell v. St. Louis, A. & T. R. Co.	270
Pinney v. Andrus	76
Piollet v. Simmers	236
Pitcher v. Lake Shore & M. S. R. Co.	467
Pitre v. Offutt	505
Pitts v. Millar	539
Pittsburgh & L. E. R. Co. v. Cunnington	670
Pittsburgh, C. & St. L. R. Co. v. Allen	662, 667
v. Bolner	688

PAGE

Pittsburgh, C. & St. L. R. Co. v. Bowyer 682
v. Eby 675, 677
v. Hannon 633
v. Heiskell 638
v. Hollowell 503
v. Howard 620, 656
v. Kain 634
v. McMillan 638
v. Smith 658, 659, 661
v. Stuart 577, 693
v. Troxell 581
Pittsburgh, C., C. & St. L. R. Co. v. Kelly 648
v. Racer 494, 499
v. Thompson 688
Pittsburgh, Ft. W. & C. R. Co. v. Methven 617
Pittsburgh Southern R. Co. v. Taylor 231, 606, 627
Pittston v. Hart 197
Pitzner v. Shinnick 122
Plumley v. Birge 386
Plummer v. Ricker 403, 405
Plymouth Tp. v. Graver 197, 198
Poage v. State 48
Pochin v. Smith 573
Poindexter v. Blackburn 44
Polak v. Hudson 155
Polk v. Lane 275
Pollock v. Eastern R. Co. 599
Pomeranian, The 163
Pontiac Pac. Junc. R. Co. v. Brady 592, 619, 680
Ponting v. Noakes 148
Pope v. Cordell 188
Poppen v. Holmes 309
Popplewell v. Pierce 394
Porritt v. Baker 563
Port Royal & W. C. R. Co. v. Phinizy 589
Porter v. Day 364
v. N. Y., L. E. & W. R. Co. 467
Porterfield v. Humphreys 492, 512
Portland v. Meyer 354
Potter v. Natural Gas Co. 220, 239, 255
v. N. Y. Cent. & H. R. R. Co. 686
Potter & Parlin Co. v. N. Y. Cent. & H. R. R. Co. 323, 616
Potts v. Wabash, St. L. & P. R. Co. 469, 476
Powell v. Chittick 88
v. Kempton Park Racecourse Co. 368

PAGE

Powell v. Knight 533
v. Pa. R. Co. 476
v. Salisbury 152
Power v. Kennedy 28
Powers v. Botts 444
v. Hubbell 449
v. Kindt 288
Powhatan, The 482
Prairie Cattle Co. v. Williamson 52
Prather v. Reeve 275
Pratt v. Chic., R. I. & P. R. Co. 597
v. Ogdensburg & L. C. R. Co. 486, 489
Pratt Coal & Iron Co. v. Davis 578
Prentice v. Taylor 438
Presby v. Grand Trunk R. Co. 598, 602
Prescott v. Connell 248
v. Knowles 415
Presnall v. Raley 156, 296
Pressey v. Wirth 399
Price v. Barnard 660, 687
v. Cataraqui Bridge Co. 213
v. N. J. R. & T. Co. 615, 630
Prickett v. Atchison, T. & S. F. R. Co. 611
Proctor v. Irvin 191
v. Wilmington & W. R Co. 593
Protheroe v. Mathews 128, 129
Prud'homme v. Vincent 385
Pruitt v. Ellington 274
v. Hannibal & St. J. R. Co. 499
Pryor v. St. Louis, K. C. & N. R. Co. 592
Pucket v. St. Louis, I. M. & S. R. Co. 631
Pudney v. Eccles 561
Pueblo Co. Commrs. v. Wilson 54
Puffer v. Orange 241
Purday v. Johnson 542
Purnell v. Miner 424
Puterbaugh v. Reasor 433
Putnam v. Glidden 75
v. N. Y. Cent. & H. R. R. Co. 206
v. Payne 58, 144, 145
v. Wyley 45, 421
Pyeatt v. Powell 105

Quarman v. Barnett 429
Quebec v. Picard 328
Queensmore, The 322

PAGE

Quigley v. Pudsey 131
Quilty v. Battie 409
Quimby v. Woodbury 386
Quinlan v. Sixth Ave. R. Co. 330
Quinn v. Peo. 176

Rabbermann v. Pierce 650
Race v. Hansen 435
v. Snyder 274
Racey, In re 527
Radcliffe v. St. Louis, I. M. & S. R. Co. 690
Radway v. Briggs 242
Rafferty, In re 117
Raiford v. Miss. Cent. R. Co. 613
Rainnie v. St. John City R. Co. 332, 333
Rainwater-Boogher Hat Co. v. O'Neal 73
Ramsden v. Lancashire & Y. R. Co. 248
Ranck v. Howard-Sansom Co. 102
Randall v. Richmond & D. R. Co. 640
Ranger's Case, 547
Rankin v. Bell 49, 73
Ranney v. Chic., B. & Q. R. Co. 673
Ransberger v. Ing 88
Ransom v. Chic., St. P., M. & O. R. Co. 596
v. Getty 434
Ranson v. Kitner 120
Rapier v. London Tramways Co. 358
Raridan v. Cent. Ia. R. Co. 696
Ravenscraft v. Mo. Pac. R. Co. 596
Ray v. Davison 117
v. Manchester 225
v. Tubbs 430
Rayl v. Kreilich 435
Raymond v. Hodgson 390
Read v. Edwards 277
Reck v. Hatboro Mut. Live Stock & P. Ins. Co. 161
Reddick v. Newburn 284
Reed v. Rome, W. & O. R. Co. 520
v. South. Expr. Co. 391
v. State 186
Reedy v. State 536
Reeves v. Delaware, L. & W. R. Co. 624
Regan v. Adams Exp. Co. 480
Reg. v. Aldridge 179
v. Brooks 169

PAGE

Reg. v. Brown 368
v. Bullock 552
v. Carter 168
v. Cheafor 20, 21
v. Cole 168
v. Cory 23
v. Cox 16, 179
v. Crandall 294
v. Edwards 43
v. Fownes 534
v. Gallears 5, 16, 179, 184
v. Garnham 23
v. Giles 366
v. Haigh 169
v. Head 23
v. Henson 340
v. Hey 170
v. Hobbs 368
v. Humphrey 368
v. Jackson 170
v. Jeans 550, 551
v. Leigh 368
v. Leppard 437
v. McCulley 182
v. M'Donagh 539
v. McIntosh 341
v. Matthews 169
v. Muirhead 561
v. O'Donnell 170
v. Osborne 366
v. Parker 526
v. Perrin 400
v. Petch 14
v. Pratt 574
v. Prestney 278
v. Price 570
v. Read 13
v. Revu Pothadu 30
v. Riley 168
v. Robinson 9, 59
v. Roe 11, 183
v. Rymer 459
v. Shickle 23
v. Slade 61
v. Smith 551
v. Spicer 182
v. Strange 183
v. Sutton 175
v. Tivey 553
v. Townley 12, 13
v. Tweedy 169
v. Wallace 547
v. Welch 549
v. Wood 570
Rehler v. W. N. Y. & P. R. Co. 156
Reiche v. Smythe 56
Reid v. State 556

PAGE

Reilly v. Gray 363
v. McIllmurray 442
Reis v. Stratton 135
Remele v. Donahue 286, 414
Renner v. Canfield 126
Rennie v. Frame 439
Renton v. Wilson 538, 540
Renwick v. Von Rotberg 395, 409
Respublica v. Teischer 547
Rex v. Brooks 21
v. Chalkley 182
v. Chapple 528
v. Clay 175
v. Cook 182
v. Corrodice 29
v. Cowell 182
v. Crump 168
v. Edwards 183
v. Haughton 548
v. Haywood 551
v. Howel 362
v. Huggins 414
v. Hughes 551
v. McNamee 170
v. Mann 39
v. Martin 43
v. Mogg 554
v. Mott 528
v. Moyle 528
v. Owens 551
v. Paty 528
v. Pear 168
v. Phillips 168
v. Puckering 183
v. Pywell 80
v. Rawlins 174
v. Rough 10
v. Searing 36
v. Smith, 1 M. C. C. 473 168
v. Smith, Ry. & Moo. 295 176
v. Tunnard 168
v. Welland 179
v. Whitney 528
v. Williams 175
v. Woodward 177
Rexroth v. Coon 8, 18
Reynolds v. Case 109
v. Hussey 397
v. Moore 569
v. Phillips 131
Rheiner v. Chic., St. P., M. & O. R. Co. 623
Rhodes v. Louisv. & N. R. Co. 476
Rhutasel v. Stephens 102
Rhyno v. Madison Co. 51

PAGE

Rice v. Kan. Pac. R. Co. 469, 510
v. Nagle 275
v. Underwood 118
v. Whitby 228
Rich v. Woolley 302
Richards v. Enfield 242
v. Symons 450
Richardson v. Brown 89
v. Carr 139
v. Chic. & A. R. Co. 470, 511
v. Chic & N. R. Co. 673, 674
v. Duncan 188
v. Halstead 307
v. Maitland 571
v. Milburn 272
v. N. E. R. Co. 461, 493
v. Northrup 308
Richmond v. Sacramento Val. R. Co 608
Richmond & D. R. Co. v. Buice 590
v. Burnsed 467
v. Chandler 645
v. Trousdale 498
Richmond Hill Steamship Co. v. Trinity House Corpn. 522
Richter v. Cicero & P. St. R. Co. 603
Ricketts v. East & West India Docks Co. 663
Riddle v. Hudgins 104
v. Webb 86, 93
Rider v. White 396
Riest v. Goshen 249
Riley v. Chic., M. & St. P. R. Co. 689
Rinear v. Gd. Rapids & I. R. Co. 684
Ring v. Cohoes 206
Rio Grande Western R. Co. v. Vaughn 650
Rippe v. Chic., M. & St. P. R. Co. 669
Ritger v. Milwaukee 200
Ritter v. Ewing 416
River Rendering Co. v. Behr 353
Rivers v. Augusta 300
Roberds v. Mobile & O. R. Co. 613, 639
Roberts v. Applegate 88
v. Barnes 114
v. Great Western R. Co. 482, 683
v. Jenkins 91
v. Johnson 113
v. Ogle 299, 309
v. Richmond & D. R. Co. 616, 645

PAGE

Robertson v. Atlantic & P. R. Co. 684, 686
v. Gd. Trunk R. Co. 470
v. Halifax Coal Co. 595
v. Old Colony R. Co. 461
v. State 178
v. Wooley 156
Robin v. Brière 434
Robinson v. Chic., R. I. & P. R. Co. 678
v. Flint & P. M. R. Co. 297, 585, 589, 594, 612
v. Great West. R. Co. 474
v. Kaplan 451
v. Longley 56
v. Marino 395
v. Simpson 328
v. Smith 358
Ex parte 359
Roblee v. Indian Lake 206
Roby v. Reed 141
Rock Island v. Carlin 251
Rock Island & P. R. Co. v. Potter 492
Rockford v. Tripp 209
Rockford, R. I. & St. L. R. Co. v. Irish 609, 628, 661
v. Lewis 591
v. Linn 593
v. Lynch 646
v. Phillips 686
v. Rafferty 577, 608
Rockwell v. Nearing 308
Roderick v. B. & O. R. Co. 494
Rodgers v. Balt. & O. S. R. Co. 597
Roe v. Lucknow 233
Roehers v. Remhoff 382
Rogers v. Duhart 289
v. Georgia R. Co. 586
v. Highland 107
v. Hull 533
v. Newburyport R. Co. 612
v. Rogers 404
Rohrbough v. Barbour Co. Ct. 202
Rome, St. R. Co. v. McGinnis 600
Rompillon v. Abbott 326
Ronan v. Midland R. Co. 469
Rood v. McCargar 312
Rooney, In re 352
Root v. N. Y. & N. E. R. Co. 490
Rooth v. North-Eastern R. Co. 473, 480
v. Wilson 423
Rose v. Hardie 312, 313
Rosedale v. Golding 249

PAGE

Rosema v. Porter 444
Ross v. Green 365
v. Ionia Tp. 218
Rossell v. Cotton 285
Rossignoll v. Northeastern R. Co. 676
Rosted v. Great Northern R. Co. 467
Roswell v. Leslie 416
Rotch v. Hawes 430
Roth v. State 565
Rothwell v. Milner 341
Rounds v. Stetson 316
v. Stratford 235
Rouse v. Osborne 674
Roux v. Grand Trunk R. Co. 664
Rowe v. Bird 286, 414
Rowell v. Lowell 193
Ruckman v. Pitcher 364
Rudi v. Lang 295
Ruggles v. Fay 422, 429
Rumsey v. Nelson 325
Rund v. Fowler 354
Runyan v. Patterson 267
Rushville v. Adams 223, 237
Russell v. Cone 291
v. Fagan 453
v. Tomlinson 414
Rust v. Low 272
Ruter v. Foy 302
Rutter v. Henry 295
Ryan v. Chic. & N. R. Co. 629
v. Great S. & W. R. Co. 657
v. North. Pac. R. Co. 669
v. Pa. R. Co. 600
v. Rochester & S. R. Co. 153

Saffer v. Westchester Elec. R. Co. 587
Sager v. Portsm., S. & P. & E. R. Co. 469
Sahr v. Scholle 542
Saint v. Smith 450
St. Clair Mineral Springs Co. v. St. Clair 210
St. John & M. R. Co. v. Montgomery 664
St. Louis v. Stern 356
St. Louis, Alton & T. H. R. Co. v. Linder 577, 631, 655
v. Russell 589
v. Todd 662
St. Louis & San Francisco R. Co. v. Basham 590
v. Kinman 630
v. Mossman 292
v. O'Loughlir 590

PAGE
St. Louis & San Francisco R. Co. v. Parmer 512
v. Ritz 698
v. Sageley 639
v. Sherlock 475
v. Thomason 581, 639
v. Tribbey 469
St. Louis & Southeastern R. Co. v. Dorman 488
St. Louis, Ark. & Tex. R. Co. v. Felton 593
v. Hanks 591
v. Holden 631
v. McKinsey 659
v. Pickens 645, 646
v. Turner 504, 508, 510
St. Louis Cattle Co. v. Gholson 191
v. Vaught 268
St. Louis, I. M. & S. R. Co. v. Biggs 631, 647, 648
v. Bragg 588
v. Brown 635
v. Deshong 516
v. Ferguson 657
v. Goolsby 349
v. Hagan 639
v. Hendricks 595
v. Lear 466
v. Lesser 470
v. Lewis 604
v. Parks 641
v. Pumphrey 503
v. Spann 475
v. Taylor 632, 639
v. Vincent 642
v. Weakly 470, 514
v. Williams 650
v. Wright 630
St. Louis, K. & S. R. Co. v. Hammers 607
St. Louis, K. C. & N. R. Co. v. Cleary 478
v. Piper 465, 469
St. Louis S. W. R. Co. v. Nelson 467
v. Smith 351
v. Stanfield 591
v. Vaughan 466, 514
v. Williams 509, 514
St. Louis, V. & T. H. R. Co. v. Hurst 597
v. Morgan 593
v. Washburn 661
St. Louis, W. & W. R. Co. v. Curl 687, 697
Salem v. Walker 248
Salisbury v. Green 188
PAGE
Salley v. Manchester & A. R. Co. 591
Salvas v. New City Gas Co. 252
Salzenstein v. Mavis 344
Sammell v. Wright 429
San Antonio & A. P. R. Co. v. Graves 469, 499
v. Knoepfli 679
v. Leal 641
v. Long 580
v. Peterson 657
v. Robinson 674
v. Wright 478, 516
Sanders v. Britton 78
v. Teape 277
Sanderson v. Lawrence 316
Sandow v. U. S. 56
Sandusky & C. R. Co. v. Sloan 620
Sarch v. Blackburn 383, 384, 385, 393
Sargent v. Slack 435
v. Usher 109
Sarver v. Chic., B. & Q. R. Co. 668
Saunders v. Short 72
v. South. Pac. R. Co. 467
Savage v. Chic., M. & St. P. R. Co. 156, 657
Savannah & W. R. Co. v. Jarvis 590, 638
Savannah, F. & W. R. Co. v. Geiger 267, 577, 608
v. Gray 590
v. Rice 590, 639
v. Wideman 590
Sawyer v. Gerrish 109
Saylor v. Montesano 242
Scaggs v. Del. & H. Canal Co. 601, 602
Scannal v. Cambridge 195
Scarfe v. Morgan 445
Scetchet v. Eltham 376
Schaefert v. Chic., M. & St. P. R. Co. 601, 623
Schaeffer v. Jackson Tp. 197
v. P. & R. R. Co. 493
Schaller v. Connors 400
Schee v. Shore 99
Schertz v. Indianapolis, B. & W. R. Co. 583
Schillinger v. Verona 200
Schindler v. State 184
Schlachter v. Wachter 320, 435
Schlengener v. Chic., M. & St. P. R. Co. 630
Schmid v. Humphrey 389

PAGE

Schmidt v. State 341
Schneekloth v. Chic. & W. M. R. Co. 685
Schneider v. Anderson 102
Schneir v. Chic., R. I. & P. R. Co. 638
Schoen v. Atlanta 353
Schoenfeld v. Louisv. & N. R. Co. 506
Scholefield v. Robb 77, 90, 92, 94
Schoonmaker v. McNally 252
Schroeder v. Faires 436
Schubert v. Minneapolis & St. L. R. Co. 621
Schuenke v. Pine River 240
Schwartzchild v. Nat. Steamship Co. 470
Schwarz v. Hannibal & St. J. R. Co. 614
Scott v. Buck 275
v. Grover 270
v. Hogan 444, 445,
v. McAlpine 47
v. Mercer 442
v. Renick 81
v. Wilm. & R. R. Co. 638
v. Wirshing 275
Scrafford v. Gibbons 102
Scribner v. Kelley 238
Seacord v. Peo. 354
Searles v. Milwaukee & St. P. R. Co. 611
Seawell v. Raleigh & A. R. Co. 590
Seebaum v. Handy 443, 451
Seeley v. Peters 260, 265
Seibert v. Mo., Kan. & T. R. Co. 582
Seifried v. Hays 354
Selby v. Wilmington & W. R. Co. 490, 508
Selkirk v. Stevens 558
Sellar v. Clelland 99
Selleck v. Lake Shore & M. S. R. Co. 599
Selma, R. & D. R. Co. v. Webb 630
Selover v. Osgood 260, 270
Selvege v. St. Louis & S. F. R. Co. 345
Sentell v. New Orleans & C. R. Co. 67, 145
Settle v. Garner 93
Seymour v. Cook 458
Shaffner v. Pinchback 364
Shain v. Searcy 369
Shampay v. Chicago 249
Shannon v. Wolf 111

PAGE

Sharp v. Clark 485
v. Powell 246
Sharpe v. Bettis 99
Sharrod v. London & Northwestern R. Co. 630, 686
Shaw v. Craft 391
v. Great S. & W. R. Co. 481
v. Hartford 56
v. McCreary 410
v. Saline Tp. 210
v. York & N. M. R. Co. 471
Shawhan v. Clark 328
Sheaf v. Utica & B. R. R. Co. 680
Sheaffer v. Sensenig 432
Shelby v. Randles 64
Sheldon v. Chic., M. & St. P. R. Co. 641, 642
Shell v. State 547
Shelley v. Ford 432
Shellhammer v. Jones 451
Shepard v. Buffalo, N. Y. & E. R. Co. 662
Shepherd v. Bristol & E. R. Co. 485
v. Hawley 115
Shepherd's Case 552
Sherborn v. Wells 294
Sherfey v. Bartley 384
Sheridan v. Bean 284
v. Midland G. W. R. Co. 477
Sheriff v. James 319
Sherman v. Braman 316
v. Favour 391
Sherrod v. Langdon 342, 343
Sherwood v. Hamilton 212, 213
v. Neal 441
Shewalter v. Ford 77, 92
Shewan v. Drummond 556
Shillitoe v. Claridge 94
Shipley v. Colclough 294
Shipman v. State Live-Stock Sanitary Comn. 351, 352
Shipton v. Lucas 155
Shipway v. Broadwood 97
Shoobert v. De Motta 105, 106
Short v. Bohle 328
v. Matteson 99
Shroaf v. Allen 303
Shubrick v. State 180, 183
Shultz v. Griffith 382, 405, 416
v. Quinn 286
Shuman v. Indianapolis & St. L. R. Co. 588
Sibley v. Aldrich 454
Sides v. Cline 451
Siegrist v. Arnot 448
Siemers v. Eisen 325

PAGE
Siglin v. Coos Bay, R. & E. R. & N. Co. 155
Sika v. Chic. & N. R. Co. 619
Silver v. Kan. City, St. L. & C. R. Co. 655, 662
Simkin v. London & N. W. R. Co. 605, 684
Simkins v. Columbia & G. R. Co. 637
Simmonds v. Holmes 136
Simons v. Casco Tp. 218
Simpson v. Great Western R. Co. 632, 680
v. Griggs 407
v. Potts 96
v. Proctor 354
v. State 64
v. Unwin 563
Simson v. London Gen. Omnib. Co. 380
Sinard v. Southern R. Co. 582, 654
Sinclair v. Mo., K. & T. R. Co. 645, 687
v. Pearson 428
Singleton v. Williamson 305, 319
Sinkling v. Ill. Cent. R. Co. 626
Sinram v. Pittsburgh, F. W. & C. R. Co. 628
Sisk v. Crump 154
Sisson v. Cleveland & T. R. Co. 519
Skinner v. Caughey 443
Slaughter v. Marlow 75
v. Moore 71
v. State 187
Slaughter-House Cases 352
Sleeper v. Worcester & N. R. Co. 641
Slessman v. Crozier 312
Slinger v. Henneman 400
Sloan v. Bain 307
v. Gt. North. R. Co. 492
v. Hubbard 263, 617, 619
Sloop v. St. Louis, I. M. & S. R. Co. 589
Small v. Warr 532
Smart v. Allison 96
Smethurst v. Proprs. Ind. Cong. Church 235
Smillie v. Boyd 382
Smith v. Bailey 232
v. Barre R. Co. 667
v. Bivens 264
v. Borst 79
v. Brownlee 320, 321
v. Buck 400
v. Chic., C. & D. R. Co. 698
Smith v. Chic., M. & St. P. R. Co. 630
v Chic., R. I. & P. R. Co. 591, 623, 683
v. Com. 168
v. Consumers' Ice Co. 163
v. Cook 436
v. Dearlove 457
v. Eastern R. Co. 639
v. French 338
v. Gates 316, 322
v. Green 342
v. Griswold 165
v. Hannibal & St. J. R. Co. 597
v. Holmesburg, T. & F. Elec. R. Co. 602
v. Hunt 571
v. Hurll 400, 413
v. Indianap. & St. L. R. Co. 644
v. Jaques 284
v. Johnson 271
v. Justice 80
v. Kanawha Co. 202
v. Kan. City, St. J. & C. B. R. Co. 622
v. Kiniry 447, 448
v. Lawrence 429
v. Marden 440
v. Mason 51
v. Matteson 339
v. Mich. Cent. R. Co. 495
v. Midland R. Co. 493, 514
v. New Haven & N. R. Co. 490, 506, 516
v. New York Cent. R. Co. 467
v. Oatts 299
v. O'Bryan 77
v. Relah 394
v. People's Mut. L. S. Ins. Co. 160
v. Race 347
v. Robertson 446
v. St. Louis, I. M. & S. R. Co. 654
v. Sherwood Tp. 231, 239
v. Smith 250
v. State, 43 Tex. 433 177
v. State, 21 Tex. App. 133 185
v. State, 24 Tex. App. 290 182
v. Stevens 111
v. Swarthout 79
v. Team 335
v. Walker Tp. 243, 249

PAGE

Smith v. Wallace 324
v. Williams, 56 J. P. 840 137, 138
v. Williams, 2 Mont. 195 267, 274, 275
v. Wright 318
Smitha v. Louisville & N. R. Co. 508, 510
Snap v. Peo. 135
Sneesby v. Lancashire & Y. R. Co. 607
Snook v. Clark 624, 693
Snow v. McCracken 394
Snowden v. Norfolk S. R. Co. 588
v. Waterman 92, 342
Snyder v. Baker 99
v. Patterson 409
S. P. C. A. v. Coursolles 538
v. Graetz 527
v. Lowry 532
v. Shepard 540
Sollers v. Sollers 29
Sosat v. State 136
South & North Ala. R. Co. v. Bees 630, 638
v. Brown 630
v. Henlein 469, 506
v. Jones 589
v. Morris 650
v. Pilgreen 638
v. Reid 629
South Side Pass. R. Co. v. Trich 332
Southern R. Co. v. Harrell 691
v. Varn 645
Southern Kansas R. Co. v. McKay 622, 685
v. Schmidt 595
Southern Pac. R. Co. v. Maddox 471
Southworth v. Old Colony & N. R. Co 626
v. Owenton & S. G. Turnp. Co. 209
Soward v. Chic. & N. R. Co. 668
Sowerby v. Smith 569
Sowles v. Moore 205
Spaight v. McGovern 132
Sparr v. St. Louis 232
Spaulding v. Oakes 413
v. Winslow 195
Spealman v. Mo. Pac. R. Co. 696
Spect v. Arnold 294
Spence v. Chic & N. R. Co. 610
Spencer v. Shelburne 425
Spies v. Rosenstock 367

PAGE

Spigener v. Rives 298
Spillman v. State 63
Spinner v. N. Y. Cent. & H. R. R. Co. 674
Spitler v. Young 309, 321
Spooner v. Manchester 431
Sprague v. Fremont, E. & M. V. R. Co. 267
v. Mo. Pac. R. Co. 508
Spray v. Ammerman 130, 139, 166
Spring Co. v. Edgar 372, 391, 392, 394
Springsteed v. Lawson 91, 94
Sproat v. Direc. of Poor 408
Spruance v. Truax 313
Spruill v. State 176
Squires v. N. Y. Cent. R. Co. 475
v. Whisken 362
Stacey v. Winona & St. P. R. Co. 586, 679
Stackpole v. Healy 281, 297, 301
Stacy v. Knickerbocker Ice Co. 428
v. Phelps 206
Staetter v. McArthur 391, 396
Stafford v. Ingersol 262, 273
Stage Horse Cases 525, 531, 541
Stager v. Harrington 346
Stamm v. South. R. Co. 628
Standard Cattle Co. v. Baird 54
Stanley v. Davenport 232
v. Mo. Pac. R. Co. 614
Stanser v. Bacon 572
Stansfield v. Bolling 150
Stanton v. Louisville & N. R. Co. 599, 600, 635
Starck v. State 168
Stark v. Lancaster 204
Starnes v. Louisv. & N. R. Co. 470
State v. Abbott 182
v. Ackerman 368
v. Alexander 173
v. Allen 554
v. Allison 544
v. Anderson 116
v. Apel 115
v. Avery 531, 535, 553
v. Barnard 549
v. Beekman 547, 548
v. Bliler 367
v. Bogardus 537
v. Bosworth 545
v. Bowers 178
v. Briggs 547
v. Brocker 544
v. Brown 62

PAGE

State v. Bruner 528, 543
v. Buckles 181
v. Buckman 356
v. Bucknam 566
v. Butler (Del.), 43 Atl. Rep. 480 63
v. Butler, 65 N. C. 309 173
v. Butts 536, 556
v. Campbell 553
v. Cardelli 48
v. Carr 174
v. Chapel 560
v. Clark, 65 Ia. 336 306
v. Clark, 86 Me. 194 544
v. Colby 65
v. Cole 184
v. Comfort 543
v. Council 547
v. Crenshaw 528
v. Crichton 540
v. Crow 175, 182, 185
v. Cumberland & P. R. Co. 627
v. Deal 555
v. Divine 651
v. Doe 62, 64
v. Donnegan 180
v. Donohue 277, 391
v. Duckworth 345
v. Dunnavant 180
v. Dycer 366
v. Edmonds 267
v. Ellis 175
v. English 184
v. Enslow 552
v. Everage 171
v. Falk 366
v. Falkinburge 51
v. Farrell 564
v. Faucett 186
v. Fisher 353
v. Fletcher 116
v. Forsythe 361
v. Fox 341
v. Garner 544
v. Gazell 174
v. Geer 559
v. Gilbert 174
v. Giles 528, 544
v. Godet 183
v. Godfrey 536
v. Gray 174
v. Greenlees 555
v. Groves 528
v. Hackfath 530, 531
v. Hall, 3 Ohio N. P. 125 63
v. Hall, 27 Tex. 333 186

PAGE

State v. Hambleton 528, 555
v. Harriman 61
v. Harris 550, 551
v. Haws 186
v. Hayes 169
v. Heath 555
v. Higgins 562
v. Hill, 79 N. C. 656 555
v. Hill, 19 S. C. 435 175
v. Holder 62
v. House 10, 36
v. Howard 66
v. Hull 177
v. Humphrey 169
v. Hunter 319
v. Isaacson 554
v. Isley 531
v. Jackson 555
v. Jenkins 183
v. Johnson, 41 Minn. 111 298
v. Johnson (Wyo.), 54 Pac. Rep. 502 278
v. Judge 630
v. Judy 564
v. Karstendiek 541
v. King 48
v. Kowolski 232
v. Krider 29
v. La Bounty 554
v. Labertew 184
v. Landreth 536
v. Lange 182
v. Langford 61
v. Latham 548, 549, 552
v. Lawn 178, 181
v. Lemon 363
v. Lightfoot 552, 555
v. Linde 553
v. Live Stock Commrs. 118
v. Luce 355
v. Lymus 62
v. Lynch 566
v. McCarron 555
v. McCormack 115
v. McDermott 396
v. McDonald 181
v. McDuffie 549
v. McGuire 566
v. McKee 168
v. McKeon 189
v. McLain 183
v. McMinn 182
v. Manuel 548
v. Marshall 550
v. Martin 171, 177
v. Matthews 186
v. Mease 130
v. Moore, 101 Mo. 316 168

PAGE

State v. Moore (N. J.), 42 Atl. Rep. 1063 142
v. Morris 353
v. Murphy, 8 Blackf. (Ind.) 498 20
v. Murphy, 39 Tex. 46 182
v. Neal 536
v. Newby 552
v. North. Pac. Expr. Co. 558
v. Norton 560
v. O'Neal 187
v. Otis 467
v. Parker 36, 567
v. Patterson 544
v. Peters 562
v. Phipps 553
v. Pierce 555
v. Plunket 180
v. Porter 538
v. Pruett 528
v. Pugh 544
v. Randolph 564
v. Repp 17, 20
v. Rivers 537
v. Roberts 187
v. Roche 531
v. Rodman 561, 565
v. Rorie 363
v. Royster 182
v. Saunders 558
v. Scott, 2 Dev. & Bat. L. (N. C.) 35 555
v. Scott, 64 N. C. 586 169
v. Seagler 173
v. Shannon 574
v. Shaw 51
v. Shevlin 452
v. Slaughter-house & Refg. Co. 355
v. Smith, 1 Cheves (S. C.) 157 551
v. Smith, 21 Tex. 748 555
v. Snell 347
v. Spear 367
v. Spink 544
v. Stelly 186, 187
v. Stone 567, 568
v. Sumner 549
v. Taylor 31, 179
v. Thomas 566
v. Thompson, 95 N. C. 596 170
v. Thompson, 40 Tex. 515 186
v. Thrasher 562
v. Tincher 261
v. Tootle 182
v. Topeka 298

PAGE

State v. Turner 39
v. Vay 143
v. Walker 185
v. Walsh 367
v. Ward, 49 Conn. 429 181
v. Ward, 19 Nev. 297 168
v. Watkins 543
v. Wheeler 547
v. White 177
v. Wilcox 552
v. Williamson 553
v. Woodbury 355
v. Woodruff 168
v. Yates 62, 63
v. York 168
v. Young 318
State Bk v. Lowe 109
Stearns v. McGinty 279
v. Old Colony & F. R. R. Co. 612, 629
v. State 366
Stebbins v. Mayor 143
Steel v. Metcalf 189
Steele v. Burkhardt 253
v. Mo. Pac. R. Co. 651
v. Smith 412
Steers v. Manton 357
Steiner v. Phila. Trac. Co. 603
Stephen v. Omaha & R. V. R. Co. 600
Stephens v. Chappell 91
v. Davenport & St. P. R. Co. 634, 688
v. Gifford 70
v. State 535
Stephenson v. Brunson 118
v. Ferguson 295
Stern v. Hoffman Brewing Co. 288
Stevens v. Bradley 342
v. Curtis 313
v. Navigazione Gen. Ital. 495
Stevenson v. N. O. Pac. R. Co. 689
Stevenson, J. C., The 492, 514, 521
Steward v. Coesvelt 79
Stewart v. Ball 43
v. Benninger 264
v. Burlington & M. R. Co. 611
v. Chic. & N. R. Co. 610, 634, 688
v. Cleveland, C., C. & St. L. R. Co. 478
v. Davis 426, 432
v. Hunter 48, 115, 117
v. Pennsylvania Co. 685
v. Porter Mfg. Co. 222, 239

PAGE

Stiles v. Cardiff Steam Navig. Co. 399
Stimpson v. Un. Pac. R. Co. 681
Stoddart v. Sagar 368
Stollenwerk v. State 178
Stokely v. State 168
Stone v. Clay 362, 365
v. Hubbardston 217
v. Kopka 261
v. Langworthy 255
v. State 552
Storey v. Brennan 362, 364
v. Patton 442
v. Robinson 305
Storms v. White 117
Storrs v. Emerson 77, 92
Story v. Chic., M. & St. P. R. Co. 595, 619
v. Robinson 141
Stott v. Scott 450
Stoutimore v. Chic., M. & St. P. R. Co. 695
Stovall v. Emerson 267, 275
Stratford Turf Assn. v. Fitch 367
Strauser v. Kosier 309
Street v. Blay 98
v. Sinclair 189
v. Tugwell 360
Streett v. Laumier 244, 257
Strever v. Chic. & N. R. Co. 595
Strong v. Chic. & N. R. Co. 677
Strouse v. Leipf 410
Strup v. Edens 324, 329
Stuart v. Crawley 492, 493
Stuber v. Gannon 390
Studer v. Buffalo & L. H. R. Co. 658
Studwell v. Ritch 266
Stufflebeem v. Hickman 289
Stumps v. Kelley 415
Stumps v. St. Louis, K. C. & N. R. Co. 475, 517, 519, 521
Sturges v. Raymond 114
Sturgis v. Kountz 125
Sturtevant v. Merrill 262, 270, 271
Suffolk, The 519
Sullivan v. Clifton 109, 110, 111
v. Hannibal & St. J. R. Co. 615
v. McWilliam 324
v. Oreg. R. & N. Co. 653, 660, 692
v. Scripture 331
Sullivan Co. v. Arnett 163
v. Sisson 208
Sunderland v. Pioneer Fireproof Constr. Co. 644

PAGE

Surface v. Hannibal & St. J. R. Co. 343
Sutherland v. Hutton 435
Sutter v. Omnibus Cable Co. 332
Suttle v. Hutchinson 99
Sutton v. Beach 316, 323
v. Moody 8, 10
Suydam v. Moore 633
Swain v. Security Live-Stock Ins. Co. 160
Swan v. Saunders 39, 527, 533
Swann v. Brown 447
Swans, Case of 44
Swanson v. Melton 683
Swearingen v. Mo., K. & T. R. Co. 686
Sweeney v. Sweet 316
Swift v. Applebone 417
v. Gifford 25
Swigart v. Peo. 362
Swink v. State 177
Sylvester v. Maag 382

Taber v. Jenny 25
Tabor v. Salisbury 111, 441
Taft v. N. Y., P. & B. R. Co. 673
Talbot v. Minneapolis, St. P. & S. S. M. R. Co. 654
Talbott v. W. Va., C. & P. R. Co. 638
Tallahassee v. Fortune 241
Talmadge v. Rensselaer & S. R. Co. 661
Tappen v. State 352
Tarwater v. Hannibal & St. J. R. Co. 614
Tatro v. Bailey 445
Tattersall v. Nat. Steamship Co. Limd. 469, 493
Taunton v. Costar 305
v. Jervis 574
Taylor v. Buford 314
v. Chic., St. P. & K. C. R. Co. 692
v. Gardiner 81, 85
v. Gilbert 102
v. Jackson 573
v. McKerrow 400
v. Newman, 21, 120, 134, 135, 138
v. Robertson 55
v. State 180
v. Welbey 304
Taylor, B. & H. R. Co. v. Montgomery 495
Teater v. Seattle 212
Tellier v. Pelland 385
Tempest v. Fitzgerald 72

PAGE

Ten Hopen v. Walker 136, 164
Tenney v. Lenz 65
Terre Haute, A. & St. L. R. Co. v. Augustus 689
Terre Haute & I. R. Co. v. Brunker 597
v. Doyle 599
v. Grandfield 579
v. Grissom 683
v. McCord 621
v. Pierce 637, 686
v. Schaeffer 609, 654, 693
Terre Haute & L. R. Co. v. Sherwood 468, 469, 514
Terre Haute Elec. R. Co. v. Yant 604
Territory v. Crozier 553
Terry v. N. Y. Cent. R. Co. 638
Tewkesbury v. Bennett 89
Tewksbury v. Bucklin 285
Texas & Pac. R. Co. v. Arnold 514, 516
v. Avery 473, 478
v. Barber 521
v. Barnhart 466, 495
v. Bigham 480
v. Billingsly 684
v. Birchfield 488
v. Glenn 675
v. Klepper 517
v. McDowell 583, 646
v. McManus 598
v. Mitchell 583
v. Newton 697
v. Randle 517, 520
v. Reeder 468
v. Scott 591, 656
v. Scoville 599
v. Scrivener 465, 647
v. Sims 517
v. Smith 674
v. Stribling 496, 497
v. Tom Green County Cattle Co. 466
v. Truesdell 518
v. Turner 482
Texas & St. L. R. Co. v. Young 679
Texas Cent. R. Co. v. Childress 577, 661
Texas M. R. Co. v. Hooten 691
Thayer v. Arnold 262, 270
Thickstun v. Howard 453, 455
Third Munic. of N. O. v. Blance 298
Thomas v. Fredericks 569
v. Hannibal & St. J. R. Co. 661

PAGE

Thomas v. Morgan 403
v. North. Pac. Expr. Co. 485, 567
v. Royster 331
v. Springville City 239
v. State, 30 Ark. 433 554
v. State, 14 Tex. App. 200 536
Thompson v. Anderson 105
v. Corpstein 294
v. Dodge 235
v. Grand Trunk R. Co. 622
v. Harlow 425
v. State, 67 Ala. 106 535
v. State, 51 Miss. 353 555
v. State, 25 Tex. App. 161 50
v. State, 37 Tex. Cr. 654 117
Thomson v. Cartmell 379
Thorpe v. Cowles 105, 106
v. Rutland & B. R. Co. 680
Thurmond v. State 49
Thwaites v. Coulthwaite 364
Tiarks v. St. Louis & I. M. R. Co. 681
Tibbs v. Smith 20
Tickell v. St. Louis, I. M. & S. R. Co. 690
Tifft v. Tifft 412
Tillett v. Ward 282
Timins v. Chic., R. I. & P. R. Co. 677
Timm v. North. Pac. R. Co. 267, 618
Timor, The 495
Tinker v. N. Y., O. & W. R. Co. 222, 598
Titcomb v. Fitchburg R. Co. 656
Tittle v. State 48
Titus v. Northbridge 194, 202, 203, 211
Tobin v. Deal 141, 303
v. London & N. R. Co. 502
Todd v. Rowley 255, 404
Todrick v. Wilson 540
Toledo & W. R. Co. v. Daniels 658
v. Fowler 653, 659
Toledo, C. S. & D. R. Co. v. Eder 658
Toledo, P. & W. R. Co. v. Arnold 636
v. Bray 591
v. Darst 660, 689
v. Deacon 642
v. Johnston 619, 647, 698
v. Parker 645
v. Pence 690
Toledo, St. L. & K. C. R. Co. v. Burgan 621, 670, 671

PAGE

Toledo, St. L. & K. C. R. Co. v. Crittenden 599
v. Fenstemaker 679
v. Franklin 677, 683
v. Jackson 625, 626, 683, 695
v. Milligan 643
Toledo, W. & W. R. Co. v. Barlow 609
v. Cary 609
v. Cohen 659
v. Cole 528, 656
v. Hamilton 495
v. Howell 669
v. Lockhart 501
v. McGinnis 588, 594, 628
v. Milligan 631, 675, 686
v. Spangler 669
v. Thompson 492, 498
v. Weaver 689
Toles v. Meddaugh 284
Tolhausen v. Davies 334
Toms v. Whitby 212
Tonawanda R. Co. v. Munger 262, 281, 297, 301, 577, 616
Topeka v. Hempstead 209
v. Tuttle 224
Totten v. Cole 139
Toudy v. Norfolk & W. R. Co. 596
Tower v. Providence & W. R. Co. 264, 626
v. Tower 142
Towle v. Raymond 442
Town v. Lamphire 264
Towns v. Cheshire R. Co. 667
Townsend v. Wathen 137
Townsley v. Mo. Pac. R. Co. 690
Tracy v. Troy & B. R. Co. 687
Travis v. Carrollton 249
Tredway v. S. C. & St. P. R. Co. 656, 696
Trenholm v. Mills 136
Trenton Pass. R. Co. v. Cooper 642, 644
Trestler v. Dawson 235
Trexler v. Greenwich Tp. 197
Trimble v. Lanktree 75
v. State 173
Trinity & S. R. Co. v. O'Brien 402, 417, 462
Tripp v. Northwestern Live-Stock Ins. Co. 159
Trompen v. Verhage 400
Tronghear v. Dewhirst 74
Troth v. Wills 287
Trow v. Vermont Cent. R. Co. 620

PAGE

Truax v. Chic., St. P., M. & O. R. Co. 245
Truesdale v. Jensen 674
Trumbull v. O'Hara 97
Tucker v. Henniker 204
v. Pac. R. Co. 499
Tumlin v. Parrott 140
Tupper v. Clark 398
Turley v. State 180
Turman v. State 551
Turner v. Buchanan 232, 247
v. Craighead 392
v. Kan. City, St. J. & C. B. R. Co. 597, 614
v. McLaren 130, 400
v. Morgan 574
v. St. Louis & S. F. R. Co. 577, 639
v. Stallibras 439
v. State 49
v. Thomas 152
Tuthill v. North. Pac. R. Co. 623
Tuttle v. Dennis 445
v. Holyoke 242
Ex parte 367
Twigg v. Ryland 399
Tyner v. Cory 136
Tyson v. Grand Trunk R. Co. 595
v. K. & D. M. R. Co. 673, 674
v. Simpson 44

Uhlein v. Cromack 145
Ulery v. Jones 3, 36, 138
Umlauf v. Bassett 434
Underwood v. Birdsell 441
v. Green 354
v. Henderson 295
Unger v. 42d St. & Grand St. Ferry R. Co. 329
Union Co. v. Ussery 300
Union Pac. R. Co. v. Bullis 577, 641, 650
v. Dyche 690
v. Hutchinson 627
v. Langan 468
v. Rainey 488, 489
v. Rassmussen 593
v. Rollins 261, 611
Union Stock Yard & Transit Co. v. Mallory, etc., Co. 434, 437
v. Western Land & Cat. Co. 422
Union St. R. Co. v. Stone 209
Union Trust Co. v. Kendall 630
United Elec. R. Co. v. Shelton 246

PAGE
U. S. v. Boston & A. R. Co. 488
v. Cloete 56
v. E. Tenn., V. & G. R. Co. 487
v. Eleven Horses 56, 446
v. Flanakin 181
v. Gideon 58, 550, 552
v. Harris 487
v. Hopkins 487
v. Jackson 526
v. Magnon 56
v. 196 Mares 446
University of London v. Yarrow 543
Unsell v. State 49
Urton v. Sherlock 344
Usher v. Hiatt 276

Valesco v. State 180
Valleau v. Chic., M. & St. P. R. Co. 622, 637
Valley v. Concord & M. R. Co. 239
Van Bracklin v. Fonda 82
Van Hoosear v. Town of Wilton 164
Van Hoozer v. Cory 70
Van Horn v. Burlington, C. R. & N. R. Co. 610, 611
v. Peo. 64
Van Houten v. Fleischman 333
Van Leuven v. Lyke 287
Van Slyck v. Snell 271
Van Slyke v. Chic., St. P. & K. C. R. Co. 584, 641
Van Steenburgh v. Tobias 413
Van Wagoner v. N. Y. Cement Co. 257
Vance v. Throckmorton 454
Vandegrift v. Delaware R. Co. 652, 663
v. Rediker 262, 615
Vanderkar v. Rensselaer & S. R. Co. 676
Varco v. Chic., M. & St. P. R. Co. 647, 658
Varden v. Mount 308
Varney v. Jackson 451
Vaspor v. Edwards 302, 304, 306
Vaughan v. Kansas City, S. & M. R. Co. 641
Vaughn v. Wabash R. Co. 469, 519, 520
Veerhusen v. Chic. & N. R. Co. 657, 668, 694
Vere v. Lord Cawdor 128
Vermont R. Co. v. Paquette 687
Verrill v. Minot 195

PAGE
Vézina v. Reg. 599
Vicksburg & J. R. Co. v. Patton 267, 649
Vicksburg & M. R. Co. v. Hamilton 639
Vinal v. Spofford 451, 452
Vining v. Millar 110
Vinton v. Vinton 319
Vital v. Tétrault 294, 387
Voak v. North. Cent. R. Co. 596, 642
Vogelgesang v. St. Louis 211
Von Emons v. State 177
Vose v. Whitney 111, 441
Vredenburg v. Behan 372

Wabash R. Co. v. Aarvig 589
v. Ferris 656
v. Forshee 660
v. Howard 683, 684
v. Jones 628
v. Kime 671
v. Lannum 478
v. Perbex 609, 661, 672
v. Pickrell 692
v. Speer 597, 628
v. Williamson 674
Wabash, St. L. & P. R. Co. v. Black 509
v. Krough 588
v. Neikirk 650
v. Nice 610
v. Pratt 495, 515
v. Tretts 660, 675
Wachtel v. East St. Louis & St. L. Elec. R. Co. 603
Waco v. Powell 299
Waco Artesian Water Co. v. Cauble 439
Wadhurst v. Damme 128, 133
Waggoner v. Oursler 102
v. Whaley 55
Wagner v. Goldsmith 325
v. Jackson Tp. 196
Wagoner v. Evans 53
Wagstaff v. Clack 305
Wait v. Bennington & R. R. Co. 677, 679
v. Burlington, C. R. & N. R. Co. 672, 673
Wakeman v. Robinson 328
Walden v. Murdock 73
Waldo v. Beckwith 434
Waldron v. Hopper 335
v. Rensselaer & S. R. Co. 665
Wales v. Ford 285
Walford v. Mathews 385

PAGE
Walker v. Armstrong 361, 369
v. Bloomingcamp 263
v. Columbia & G. R. Co. 640
v. Green 468
v. Herron 350
v. Hoisington 77, 94, 95
v. Keenan 481
v. Matthews 190
v. Sharpe 454
v. State 544
v. Watrous 274
v. Wetherbee 313
Wall v. Garrison 450
Wallace v. St. Louis, I. M. & S. R. Co. 585, 594, 595
v. San Antonio & A. P. R. Co. 635
v. State 555
v. Woodgate 452
Waller v. Midland Great West. R. Co. 518
Wallingford v. Columbia & G. R. Co. 490, 513
Wallis v. Mease 20
Walls v. Long 450, 452
Walsh v. Virginia & T. R. Co. 638, 654, 667, 681
Walters v. Glats 114, 118
Walthers v. Mo. Pac. R. Co. 659
Walton v. London, B. & S. C. R. Co. 327
Ward v. Brown 285
v. Hobbs 74, 340
v. Lakeside R. Co. 603
v. North Haven 206
v. Paducah & M. R. Co. 680
v. Race Horse 560
v. St. Louis, I. M. & S. R. Co. 690
v. State 62
v. Wilmington & W. R. Co. 580
Wardell v. Chisholm 317
Warden v. State 170
Wardrope v. Duke of Hamilton 121
Ware Cattle Co. v. Anderson 435, 436
Warner v. Chamberlain 396, 402, 416
v. Wilson 102
Warren v. Buck 83
v. Chic., M. & St. P. R. Co. 587, 589, 638
v. Keokuk & D. M. R. Co. 662
v. State 36, 37
Warring v. Cripps 302, 304
Washburn v. Cuddihy 77, 94
v. Jones 457
Washington v. Balt. & O. R. Co. 590, 618
v. State 182
Wasmuth v. Butler 325
Wason v. Rowe 86, 88
Wasson v. McCook 638
Waters v. Moss 265
v. Peo. 538
v. Richm. & D. R. Co. 504
v. Wing 245
Watier v. Chic., St. P., M. & O. R. Co. 613
Watkins v. Reddin 232
v. Rist 271
v. Roberts 426
Watson v. Bridge Co. 163
v. Camden & A. R. Co. 336
v. Denton 77, 95
v. State 182
Watts v. Ward 116
Wattson v. Phila. & T. R. Co. 589
Way v. Foster 432
Weathered v. Golden 75
Weatherford v. Lowery 237, 247
Weaver v. Scurry Co. 146
Webb v. McFeat 120, 133
v. Oldfield 542
Webber v. Chicago 371
v. Closson 262, 271
v. Hoag 397, 403
v. Lee 569
Weber v. Hartman 116
v. Whetstone 442, 443
Webster v. Power 108
Weide v. Thiel 270
Weingartner v. Louisville & N. R. Co. 626
Welch v. Abbot 655
v. Bowen 260
v. Great West. R. Co. 474, 500, 520
v. Hannibal & St. J. R. Co. 586
v. Mohr 430
v. Wesson 369
Weller v. Chic., M. & St. P. R. Co. 627
Wellington v. Monroe Trotting Park Co. 370
v. State 574
Wellman v. Susq. Depot 197
Wells v. Head 130
v. Howell 262
v. Littlefield 73
v. State, 11 Neb. 409 181

PAGE

Wells v. State (Tex. App.), 13 S. W. Rep. 889 185
Welsh v. Barnes 452
v. Chic., Burlington & Q. R. Co. 622, 653
v. Pittsb., F. W. & C. R. Co. 469
Welty v. Indianapolis & V. R. Co. 610, 628
Wentworth v. McDuffie 425
Werner v. Winterbottom 388
West v. Blackshear 425
v. Costello 131
v. Mo. Pac. R. Co. 671
v. State 187
v. Ward 122, 158
West Chicago St. R. Co. v. Walsh 391
West Horse & Cattle Ins. Co. v. O'Neill 159
v. Timm 159
West Mahanoy Tp. v. Watson 220
Westbourne Cattle Co. v. Ma. & N. R. Co. 664
Westbrook v. Field 532
Western v. Bailey 4
Western R. Co. v. Davis 634
v. Harwell 466, 470, 478, 489, 508, 513
v. Huse 634
v. Lazarus 586, 589
Western & Atl. R. Co. v. Brown 647
v. Main 595
v. Trimmier 590
Western Md. R. Co. v. Carter 612
Western Union Tel. Co. v. Quinn 253
v. Williford 75
Westfall v. Perry 438
Westgate v. Carr 286
Weymouth v. Gile 284
Whalon v. Blackburn 271
Wheatley v. Harris 58, 121
Wheeler v. Brant 382
v. Friend 367
v. State 174
Wheelock v. Wheelwright 430
Whelden v. Chappel 432
Whilton v. Richmond & D. R. Co. 582
Whipple v. McIntyre 356
Whitbeck v. Dubuque & Pac. R. Co. 611
White v. Ballard 212, 249
v. Cinc., N. O. & T. P. R. Co. 480
v. Concord R. Co. 624, 639

PAGE

White v. Lang 389
v. Riley 210
v. Stelloh 79, 81
v. Storms 43
v. Tallman 312
v. Utica & B. R. R. Co. 680
v. Williams 445
v. Winnisimmet Co. 494
White Water Valley R. Co. v. Quick 668
Whitehead v. Smithers 563
v. Vanderbilt 422
Whiteley v. China 256
Whiteman v. King 305
Whitfield v. Longest 299
v. Paris 143
Whiting v. Coons 449
Whitlock v. Heard 437
v. West 311, 312
Whitman v. W. & A. R. Co. 680
Whitney v. Me. Cent. R. Co. 627
v. Taylor 95
Whitsky v. Chic. & G. T. R. Co. 678
Whittaker v. Helena 248
Whittemore v. Thomas 407
Whittier v. Chic., M. & St. P. R. Co. 629, 661, 671
Whittingham v. Ideson 8, 33 34, 135
Whoram v. Argentine Tp. 242
Wichita & Colo. R. Co. v. Gibbs 655
Wichita & W. R. Co. v. Koch 508, 509
Wickham v. Hawker 569
Wiedeman v. Keller 83
Wigmore v. Buell 302
Wilbur v. Hubbard 418
Wilcox v. Hemming 309, 310, 322
v. Hogan 425
v. State 528
Wild v. Skinner 316
Wilder v. Chic. & W. M. R. Co. 650, 686
v. Me. Cent. R. Co. 621, 662
v. Speer 315
v. Stanley 152
Wildey v. Farmers' Mut. Fire Ins. Co. 160
Wiley v. Slater 384
v. State 180
Wilhelm v. Scott 320
Wilhite v. Speakman 265
Wilkins v. Day 237
Wilkinson v. Parrott 495
v. Tousley 361, 363

PAGE

Willan v. Carter 96
Willard v. Mathesus 266
v. Whinfield 110, 443
Willey v. Belfast 219
Williams v. Chic. & A. R. Co. 596
v. Dixon 133
v. Gt. West. R. Co. 343
v. Hannibal & St. J. R. Co. 696
v. Koehler 325
v. Mich. Cent. R. Co. 262
v. Mo. Pac. R. Co. 621
v. Moray 390
v. New Albany & S. R. Co. 654
v. North. Pac. R. Co. 267
v. Phelps 189
v. Smith 443
v. State, 92 Tenn. 275 366
v. State, 26 Tex. App. 131 178
v. Willard 318
Williamson v. Brandenberg 99, 101
Willis v. Legris 321
v. Providence Telegram Pub. Co. 336
Willoughby v. Horridge 242, 482
Wills v. Barrister 440
v. Walters 267
Wilson v. Atlanta 207
v. Beyers 298, 322
v. Brett 420
v. Dickel 428
v. Lexington 446
v. Mo. Pac. R. Co. 468
v. N. Y. Cent. & H. R. R. Co., 97 N. Y. 87 471, 477
v. N. Y. Cent. & H. R. R. Co., 58 N. Y. Suppt. 617 602
v. Newberry 149
v. St. L., I. M. & S. R. Co. 621
v. Spafford 221, 239
v. State 176
v. Troy 257
v. Turnbull 89, 95
v. Wil. & Man. R. Co. 592, 640
Wilton v. Weston 164, 418
Wiltse v. State Road Bridge Co. 239
Winch v. Thames Conservators 244
Winchell v. Nat. Express Co. 515
Windle v. Jordan 448

PAGE

Windsor v. Hannibal & St. J. R. Co. 593, 594, 614
Wingrove v. Williams 261
Winn v. Morris 75
Winship v. Enfield 204, 224
Winter v. Federal St. & P. V. Pass. R. Co. 253, 626
v. Landphere 106
Winters v. Jacobs 271
Wintz v. Morrison 340, 342
Wirth v. State 351
Wise v. Gt. West. R. Co. 485
Wiseman v. Booker 289
Witherell v. Milwaukee & St. P. R. Co. 585
Witkowski v. Stubbs 85, 446
Witthouse v. Atlantic & P. R. Co. 660
Wolcott v. Hamilton 46
Wolf v. Nicholson 295
v. State 174
Wolfe v. Erie Teleg. & Teleph. Co. 213
Wood v. Ash 43
v. Gilboa 206
v. Kan. City, F. S. & M. R. Co. 692
v. La Rue 139
v. Remick 434, 435
v. St. Louis, K. C. & N. R. Co. 648, 696
v. Smith 87
v. Southern R. Co. 510
v. Vaughan 395
Wood & G. Mfg. Co. v. Whitcomb 630
Woodard v. Myers 110
Woodbridge v. Marks 383, 384
Woodbury v. Robbins 92
Woodin v. Burford 84, 86
Woodland v. Un. Pac. R. Co. 647
Woodman v. Hubbard 432
Woods v. Mo., K. & T. R. Co. 691
Woodyear v. Schaefer 354
Wooldridge v. White 388, 402
Wooley v. Groton 310
Woolf v. Chalker 58, 128, 278, 360, 382, 384, 391, 397
v. Hamilton 369
Woolsey v. Haas 130
Woolson v. Northern R. Co. 667
Wooster v. Chic., M. & St. P. R. Co. 623
Worcester Co. v. Ashworth 414
Workman v. Warder 443
Wormer v. Biggs 302, 307
Wormley v. Gregg 391

PAGE

Worrilow v. Upper Chichester Tp. 196
Worth v. Gilling 395
Worthen v. Love 386
Worthington v. Brent 115
v. Wade 156
Wright v. Clark 120, 293
v. Dawson 324
v. Hetton Downs Co-op. Soc. 343
v. Mahoney 303
v. Pearson 400
v. Ramscot 58, 129
v. Richmond 118
v. Sherman 110
v. State 554
v. Stinson 54
v. Templeton 194, 202, 255
v. Waddell 440
Wyatt v. Rosherville Gardens Co. 372
Wyers v. State 48
Wylie v. Ohio R. & C. R. Co. 105
Wyman v. Penobscot & K. R. Co. 687
v. Turner 317
v. Wentworth 446
Wymore v. Hannibal & St. J. R. Co. 639

Yarmouth v. France 376
Yates v. Higgins 527
Yazoo & M. V. R. Co. v. Brumfield 585, 589

PAGE

Yazoo & M. V. R. Co. v. Smith 590
v. Whittington 589
Yearsley v. Gray 440
Yeazel v. Alexander 344, 347
Yingst v. Lebanon & A. St. R. Co. 602
Yoakum v. Dunn 521
v. State 50, 185
Yoders v. Amwell Tp. 198
Yordy v. Marshall Co. 244
Yorke v. Grenaugh 457
Youmans v. Padden 326
Young v. Cowden 330
v. Erie & H. R. Co. 696
v. Hannibal & St. J. R. Co. 589, 594, 658
v. Harvey 123, 152
v. Hichens 29
v. Kimball 451, 452
v. New Haven 232
v. Rand 316
Younger v. Louisv. & N. R. Co. 675

Zeigler v. Northwestern R. Co. 594
Zimmer v. N. Y. Cent. & H. R. R. Co. 470
Zimmerman v. Brannon 86
Zouch v. Chesapeake & O. R. Co. 470
Zumstein v. Shrumm 238

INDEX.

The references are to the pages.

AGENCY
warranty by a servant or agent, 84.
liability for driving away of animals by agent, 141 n.
city not liable for illegal acts of its officers, 142.
municipal liability for fright caused by acts of officers and agents, 225, 226, 236.
liability of owner of vicious animal for acts of another, 412.

AGISTMENT
See also BAILMENT.
rights and liabilities of agistors, 434-439.
lien of agistors, 439-444.
priority of mortgage lien to agistor's lien, 109.
liability of agistor for trespass of animals, 284, 285.
property in stolen animal may be laid in agistor, 177.

ALABAMA
larceny of dogs in, 62.
rule in, as to restraining animals, 265.
injury by railway company to animal at large, 607.
injury made *prima facie* evidence of negligence, 638.

ALTERING BRANDS AND MARKS
See BRANDS.

"ANIMAL"
cock, 527.
fox, dog, 528.

ANIMUS REVERTENDI
what is, 6-8, 22, 26, 28.

APES
See also MONKEYS.
not the subjects of larceny, 8, 37.

ARKANSAS
rule in, as to restraining animals, 265.
as to lookout on train, 586.
injury by railway company to animal at large, 608.
made *prima facie* evidence of negligence, 639.

The references are to the pages.

ASPORTATION
as an element in larceny, 173.

AT LARGE
See RUNNING AT LARGE; TRESPASSING ANIMALS; WORDS AND PHRASES.

ATTORNEY'S FEE
in an action against a railway company, 649.

BAILMENT
nature of, 419-422.
rights of bailee, 422-424.
liability of bailor of diseased animal, 348.
duties and liabilities of bailee, 424-428.
liability of bailee for trespass of animals, 284, 428.
for viciousness of animals, 406, 428.
for injuries to animals, 424.
for negligence of servants, 428-430.
for driving or riding beyond the agreed point, 430.
actions by bailor and bailee, 432.
bailee may recover for injury to animal, 290, 432.
measure of damages, 433.
agistment, 434-439.
lien of agistors and trainers, 439-444.
breeding, 444.
livery-stable keepers, 446-449.
lien of livery-stable keepers, 449-453.
innkeepers, 453-459.
on a horse-race, whether a wager, 361.
ownership of increase under a bailment, 43, 45.
larceny as bailee, 169.

BARBED-WIRE FENCES
liability for animals injured on, 122, 153-158, 657.

BEARS
See also MENAGERIE.
not the subjects of larceny, 8, 37.
liability of the keepers of, 372.

BEES
property in, 4, 7, 16-20.
as the subjects of larceny, 9, 17, 20, 37.
property in honey, 18, 20.
when a nuisance, 359.
negligence in keeping, 383, 385.

BEHRING SEA ARBITRATION, 7, 26.

The references are to the pages.

BETTING
on a horse-race, whether a wager, 361.
meaning of "game," "gambling device," etc., 362.
selling pools, 363.
on a race out of the State, 365-367.
what is a "place" for betting, 368 and n.
coupon competition not betting, 368.

BICYCLE
relative rights of horse and bicycle, 234, 248.

BIRDS
See also the NAMES OF PARTICULAR BIRDS.
property in game birds, 14.
pigeons, doves, pheasants, partidges, swans, 20-23.
miscellaneous birds, 3, 37-40.
singing birds not the subjects of larceny, 8, 37.
stuffed birds are personal chattels, 41 n.

BLOODHOUNDS
evidence of tracking by, when admissible, 63.

BOARS
wild, not the subjects of larceny, 37.
liability of the keepers of, 373.

BOUNTIES
provisions for payment of, to killers of wild animals, constitutional, 146.

BRANDS
as evidence of ownership, 47-50.
record of, 48.
"road brand" and "range brand," 49.
sale by delivery of, 73.
altering brands and marks, 186.

BREEDING
sale of animal for purposes of, 81.
rights and liabilities of renter of services of a male animal for purposes of, 444-446.
priority of mortgage lien to breeder's lien, 109.

BRIDGES
See HIGHWAYS.

BUFFALO
property in, 36.
not "cattle" within the meaning of statute against cruelty, 528.

The references are to the pages.

BULL
See also CATTLE.
liability for injury to horses by, 374.

CALIFORNIA
taxation of cattle in, 55.
rule in, as to restraining animals, 265.
possession of game in, 565.
injury by railway company to animal at large, 608.
made *prima facie* evidence of negligence, 639.
wager on horse-race in, 367.
distress in, 302 n.
rule in, as to sheep-killing dogs, 130.
rights of chattel mortgagee in, 106.

CANADA
liability in, for the fright of an animal on a defective highway, 212, 228, 233.
betting on races in Ontario, 367.
possession of game in Ontario and Quebec, 566.
injury by railway company to animal at large, 619.
rule in, as to actual contact, 584.
law as to owner of land adjoining railway, 664, 680.
rule in, as to injury from defective cattle-guard, 680.

CANARY BIRDS
property in, 3, 38.
not the subjects of larceny, 38.
action for killing of, by cat, 120, 133.

CARRIERS
nature of contract of carriage, 460-469.
liability of connecting carriers, 464.
rights and liabilities of one accompanying stock, 466.
restriction of liability for losses, 469-479.
conditions that are "just and reasonable" under the Railway and Canal Traffic Act, 472-474.
contract signed under duress or by mistake, 478.
when the carrier's liability begins, 479.
receiving, loading and unloading stock, 480-484.
delivery to consignee, 484.
negligence of shipper in loading, 485, 494.
provision of Revised Statutes of U. S. as to unloading for rest and food, 486-488.
duty to provide suitable cars, 488-491.
air and ventilation, 491.
proper fittings and fastenings, 492.
avoidance of jolting, etc., 493.

The references are to the pages.

CARRIERS—(Continued.)
disinfecting vessels, 493.
rush of business no excuse for lack of care, 493.
improper interference by shipper, 494.
rats and worms, whether "perils of the sea" or "vermin," 494.
duty to feed and water stock, 495-498.
liability for unreasonable delay, 498-504.
excuses for delay, 501, etc.
liability for storm or accident, 504.
injuries due to the nature and condition of the stock, 505-508.
liability with regard to fright, 506.
to an animal in foal, 507.
stipulation as to notice of injury, 508-511.
evidence; burden of proof, 479, 511-516.
evidence of value; expert testimony, 514.
measure of damages, 516-522.
diseased animals, liability for the transportation of, 343-350.

CASE
See TRESPASS.

CATS
property in, 8, 33, 37.
killing, how far justifiable, 34, 132, 135.
measure of damages for killing, 34.
action for killing of birds by, 120, 133.

CATTLE
See also BAILMENT; BRANDS; CARRIERS; RAILWAY COMPANIES; TRESPASSING ANIMALS; VICIOUS ANIMALS.
meaning of "cattle," 181, 289, 400, 528, 640 n, 656.
property in wild cattle, 36.
sale of cattle running on the range, 72-74.
taxation of, 50, etc.
killing trespassing cattle, 135.
driving from the accustomed range, 185.
damages for driving from range, 190.
when cattle are "at large," 294, etc.
transportation of diseased cattle, 343, etc.
jettison of cattle, 476.
whether "dishorning" and "spaying" are cruelty, 539, 540.

CATTLE-GUARDS
See RAILWAY COMPANIES.

CHAMELEONS
not "domestic animals" within the meaning of statute against cruelty, 527.

The references are to the pages.

CHARITIES
prevention of cruelty, restriction of vivisection, etc., are, 542-543.

CHICKENS
See also COCK; HEN.
injury to animals pursuing or killing, 128, 132, 133.
when keeping is a nuisance, 360.

CIVIL LAW
property in wild animals, 2, 5, 7, 10 n, 16, 39.
in the increase of domestic animals, 44.
bailment, 453.
injury by a domestic animal; *actio de pauperie*, 415.
keeping animals near a throughfare, 383.

COCK
See also CHICKENS; HEN.
negligently keeping a savage cock, 385.
when keeping is a nuisance, 360.
is an "animal" within the meaning of statute against cruelty, 527.

COCK-FIGHTING
whether a form of cruelty, 538.

COLORADO
taxation of cattle in, 53.
liability in, for the fright of an animal on a defective highway, 202.
rule in, as to restraining animals, 265.
injury by railway company to animal at large, 608.
rule in, as to actual contact, 583.
injury made *prima facie* evidence of negligence, 639.

CONFINEMENT
See also the NAMES OF PARTICULAR ANIMALS.
of wild animals, 4, 18, 20, 28.

CONIES
See also RABBITS.
property in, 4, 15, 37.

CONNECTICUT
liability in, for the fright of an animal on a defective highway, 205, 222, 233.
rule in, as to restraining animals, 266.
injury by railway company to animal at large, 608.

CONTRIBUTORY NEGLIGENCE
in cases of injuries to animals on highways, 246-254.
caused by runaway horses, 335, 449.
by vicious animals, 385-390.

The references are to the pages.

CONTRIBUTORY NEGLIGENCE—(Continued.)
in cases of injuries caused by diseased animals, 349.
to animals by railway companies, 607-629, 654, 679.

COONS
whether the subjects of larceny, 36, 37-38.

"COW"
meaning of, in an indictment for larceny, 182.

CRANES
as the subjects of larceny, 37.

CROSSINGS
See RAILWAY COMPANIES.

CROWN LANDS
grant or license carries right to capture wild animals, 36.

CRUELTY
See also MALICIOUS MISCHIEF.
in general, 523-526.
whether indictable at the common law, 525.
what animals are protected by the statutes, 38, 526-528.
prohibited acts, 529-540.
defences: intoxication; trespass, etc., 535-537.
injury for sport; pigeon-shooting, 537, 538.
fox-hunting, 538.
cock-fighting, 538.
dishorning cattle; spaying, 539-540.
societies for the prevention of cruelty and their powers, 143, 541.
prevention of cruelty, restriction of vivisection, etc., are charities, 542-543.
indictment for cruelty; what it should charge, 543-545.

CUSTOMS DUTIES
See TARIFF.

CYGNETS
property in, 23, 44.

DAKOTA
See also NORTH DAKOTA; SOUTH DAKOTA.
rule in Black Hills country as to restraining animals, 266.

DAMAGES
for failure to deliver or accept animals sold, 75-76.
to deliver a telegraphic message as to sale, 75 n.
on breach of warranty, 98-101.
for injuring and killing animals, 163-166, 256-257.
for unlawfully taking or detaining animals, 188-191.

The references are to the pages.

DAMAGES—(Continued.)
for the trespass of animals, 278, 308.
for injuries by vicious animals, 416-418.
in cases of bailment, 433, 438.
in actions against carriers, 516-522.
railway companies for negligence, 645-651.
railway companies for failure to fence, 695-698.

DANGEROUS ANIMALS
See VICIOUS ANIMALS.

DEAD ANIMALS
property in, 5, 8, 11, 12, 14, 43.
indictment for larceny of, 183.
liability for fright caused by, 215, 216, 237.
grant of exclusive right to remove, 352-353.
as nuisances, 353, 355.

DEER
property in, 4, 7, 35.
as subjects of larceny, 37.
meaning of "deer" in a statute, 183.

DEFINITIONS
See WORDS AND PHRASES.

DELAWARE
rule in, as to sheep-killing dogs, 130.
wager on horse-race in, 365.

DELIVERY
See CARRIERS; SALE.

DISEASED ANIMALS
liability for sale of, for food, 82-83.
for sale of, in general, 340-343.
for transportation of, 343-347.
for infection by, 347.
of agistor for cattle catching disease, 435, 437.
scienter of owner, 348.
contributory negligence, 349.
power of municipality to exclude or destroy, 351.

DISHORNING
whether a form of cruelty, 539.

DISTRESS
what animals are distrainable, 188, 305.
of animals *damage feasant*, 301-306.

The references are to the pages.

DISTRESS—(Continued.)
what is a sufficient, 303.
rule as to damage, 304.
who may distrain, 305.
election, 306.

DIVISION FENCES
See FENCES.

DOCKING
whether a form of cruelty, 534.

DOGS
See also the NAMES OF STATES.
property in, 57-68, 550.
as the subjects of civil actions, 57-58.
as the subjects of larceny, 8, 9, 37, 57, 59-63.
no crime to obtain by false pretences, 9, 59.
taxation and license of, 64-68.
action for killing, 120, 121, 127-132, 135-140.
proximate results of shooting, 126.
killing, when unlicensed or without collars, 141, etc., 541.
killing a vicious dog, 141, 144.
killing of dogs by railway companies, 591-592, 640 and n.
using, to drive away trespassing animals, 139.
trespass by dogs, 277, 287 n, 288.
when a dog is "at large," 142 n, 292, etc.
ordinance requiring dogs to be registered and collared, 298.
liability for negligence in keeping or controlling, 379, 382, 393-402.
liability for their attacking trespassers, 383-384.
contributory negligence of the plaintiff, 388-391.
scienter in cases of sheep-killing dogs, 397, 399-400.
noisy dogs a nuisance, 360.
limitation as to liability for carriage of, 474.
delivery to wrong person, 485.
escape during transportation, 492.
malicious mischief to, 549.
evidence of the value of, 164-166.
may be brought into court, 405.
evidence of tracking by bloodhounds, when admissible, 63.
"animals," 528.
"chattels," 61, 62, 68.
"domestic animals," 60.
"dumb animal," 549 n.
"goods," 61, 62, 68.
"personal property," 59, 61, 591 n.
"property," 58, etc., 66, 68, 549.

The references are to the pages.

DOGS—(Continued.)
"stock," 656.
"thing of value," 62, 68.

DOMESTIC ANIMALS
nature of property in, 42.
limited estate in, 44.
larceny of, 42, 59, 167, etc.
the increase of, 43-47.
taxation of, 50-57.
meaning of "domestic animals," 1, 34, 38, 39, 42, 60, 526, 527, 528.

DOMITÆ NATURÆ
See also DOMESTIC ANIMALS.
meaning of, 1, 34, 42.

DOVES
property in, 4, 21.
as the subjects of larceny, 21, 37.

DUCKS
wild, as the subjects of larceny, 37.

DUTIES
See TARIFF.

EGGS
property in, 15-16, 19, 43.
indictment for larceny of, 179.

ELECTRIC RAILWAYS
See RAILWAY COMPANIES; STREET CAR COMPANIES.

ELEPHANT
See also MENAGERIE.
liability of the keeper of, 373.
for the fright of a horse at, 238.
for injury to, from a defect in the highway, 244.

ENGLAND
Behring Sea Arbitration, 7, 26.
"betting, place for," 368 and n.
carriers; when restrictions are "just and reasonable," 472.
limitation of liability, 471.
liability on contract to forward, 464.
cock-fighting, 538.
Criminal Code, report of Royal Commissioners on, 2, 9, 38.
diseased animals, movement of, 343 n.
dishorning, 539.

The references are to the pages.

ENGLAND—(Continued.)
dogs, larceny of, 63.
injuries to trespassers by, 383.
game, law as to possession of, 562.
heriot custom, 4 n.
malicious mischief, 546.
railways, law as to fencing of, 663.
whales, property in, 23.

ESCAPE
of wild animals, 2, 3, 6, 19, 24, 28, 146.

ESTRAY
what is an, 114-116.
rights and liabilities of the taker-up, 116-118.
advertisement and sale, 117-118.
indictment for taking and using, 115 n, 116 n.

EVIDENCE
brands as evidence of ownership, 47-50.
carriers, evidence in actions by or against, 479, 511-516.
cattle, evidence in action for driving away, 190.
disposition of animals, 146, 254, 330, 404, 644.
dog may be brought into court, 405.
evidence of value of, 164-166.
evidence of tracking by bloodhound, 63.
expert testimony as to brands, 50.
as to cattle-guards, 695.
as to disease, 350.
as to value, 101, 514.
fright of other animals, 239, 256, 605.
character of objects causing, 239.
larceny cases, evidence in, 184.
malice, 552, etc.
number of stock on range, 73.
ordinance, 405.
ownership, 65, 405, etc.
railway companies, actions against for negligence, 637-645.
for failure to fence, 692-695.
scienter, 397, etc., 402, etc.
selling unwholesome provisions, 83.
skill of driver, 256.
value of animals killed or injured, 164, 256, 544, 644.
veterinary surgeon, testimony of, not privileged, 166.
warranty, breach of, 79.
breeding capacity, 82 n.

The references are to the pages.

EXEMPTION LAWS
meaning of "horse" under, 188.

EXPERT TESTIMONY
See EVIDENCE.

FALCON
See HAWKS.

FARRIER
lien of, 442 n.

FAWNS
not the subjects of larceny, 15.

FEATHERS
property in, 43.

FENCES
See also RAILWAY COMPANIES and the NAMES OF STATES.
liability for injuries resulting from a failure to fence sufficiently or to close a gate 122, 148, etc., 289, 652, etc.
injuries from barbed-wire fences, 122, 153-158, 657.
liability of a town for a failure to fence as against a frightened animal, 194, etc.
liability of a town for a failure to construct barriers, in general, 240, etc.
the common-law rule as to restraining animals, 258-265.
abrogation of the common-law rule, 265-269, 288.
division fences, 191, 269-274, 288.
sufficiency of fence, 274-276.
fencing against animals on a highway, 280, etc.
want of fence as affecting the contributory negligence of the owner of animals, 607, etc.

FERÆ NATURÆ
See also WILD ANIMALS.
meaning of, 1, 9, 16, 22, 31, 34, 36, 37, 39.

FEROCIOUS ANIMALS
See VICIOUS ANIMALS.

FERRETS
not the subjects of larceny, 8, 36, 37.

FISH
property in, 4, 28-30.
as the subjects of larceny, 15, 28, 37.
sale of fish hereafter to be caught, 70.
fish are "game," 562.
oysters are "fish," 33.

The references are to the pages.

FLESH
of animals, larceny of, 5, 43.
sale of flesh for food, 82.

FLESH-MARKS
as evidence, 48.
altering brands and marks, 186.

FLORIDA
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 608.
made *prima facie* evidence of negligence, 638.

FOOD
animals sold for, 82.
sale of unfit food for animals, 126-127.

FOXES
property in, 5.
not the subjects of larceny, 8, 37.
trespass in following, 121, 573.
are "animals" within the meaning of statute against cruelty, 528.

FOX-HUNTING
whether a form of cruelty, 538.

FRAUDS, STATUTE OF
See STATUTE OF FRAUDS.

FRIGHTENING ANIMALS
See also the NAMES OF STATES.
action for, 119, 125, 192, etc., 572.
liability of railway companies for, 597-607.
injuries resulting from accidental fright and a defect in the highway, 192-214.
liability where fright is caused by the defect, 214-229.
character of objects in a highway causing fright, 229-240.
evidence of the fright of other animals admissible, 239, 256, 605.
contributory negligence, 246, etc.
evidence; damages, 254, etc.

GAME
See also GAME LAWS; WILD ANIMALS.
property in, 10-15, 557.

GAME LAWS
See also the NAMES OF STATES.
power to enact, 557.
statutes making exportation from State unlawful, 558.
forbidding internal commerce, 559.

The references are to the pages.

GAME LAWS—(Continued.)
statutes requiring a license, 561.
capture, sale or possession in the close season, 36 n, 562-568.
right to shoot in private lands; transfer and reservation thereof, 568-575.
trespassing in pursuit of game, 573-574.

GATES
See FENCES; RAILWAY COMPANIES.

GEESE
property in, 39.
wild geese as the subjects of larceny, 37, 39.
killing trespassing geese, 135.
killing minks pursuing geese, 134.

"GELDING"
meaning of, in an indictment for larceny, 179.

GEORGIA
liability in, for the fright of an animal on a defective highway, 207, 223.
rule in, as to restraining animals, 259.
injury made *prima facie* evidence of negligence, 639.

HAIR
property in, 43.

HARES
property in, 4, 10.
as the subjects of larceny, 37.

HAWKS
property in, 4, 6.
as the subjects of larceny, 9, 10, 15, 37.

HEN
See also CHICKENS; COCK.
killing trespassing hens, 135.
when keeping is a nuisance, 360.

HERIOT
beast due by heriot custom may be seized without the manor, 4 n.

HIGHWAYS
See also FENCES; FRIGHTENING ANIMALS and the NAMES OF STATES.
injuries on a highway from other causes than fright, 240-246.
contributory negligence, 246-254.
evidence; damages, 254-257.
injuries by animals straying from the highway, 279-284.
pasturing animals in the highway, 296, 301.

The references are to the pages.

HIGHWAYS—(Continued.)
distraining animals in the highway, 304.
damage done in highways by passing animals, 338.

HIRING
See BAILMEMT.

HOG
See also PIG.
meaning of "hog" in an indictment for larceny, 182-183.
one who converts hogs into bacon, etc., liable to taxation as a "manufacturer," 56.
killing trespassing hogs, 135.
when keeping is a nuisance, 356-358.

HONEY
See BEES.

HORSES
See also BAILMENT; FRIGHTENING ANIMALS; TRESPASSING ANIMALS; WARRANTY.
liability for using and injuring, 121, 420, 424, etc.
killing a trespassing horse, 135.
accidentally shooting a horse, 125.
distraining; unlawfully detaining, 188.
injuries to, when unattended, 252.
injury by an unattended horse, 288, 323-328.
by a runaway horse, 323, etc., 328-338.
by the kick of a horse on the highway, 287, 339, 380, 405.
by a vicious horse, 375, 385, 404.
when a horse is "at large," 291, etc.
meaning of "horse" in an indictment for larceny, 179.
in an exemption law, 188.
whether horses are "plant," 376.
relative rights of horse and bicycle, 234, 248.

HUSBAND AND WIFE
doctrine of *scienter* with regard to, 403.
liability as between, 409.

ILLINOIS
taxation of cattle in, 52.
liability in, for the fright of an animal on a defective highway, 208, 223.
rule in, as to restraining animals, 259.
possession of game in, 564.
injury by railway company to animal at large, 608.
rule in, as to actual contact, 583.
as to private farm crossings, 671.
fencing at station grounds, 685.

The references are to the pages.

IMPOUNDING
nature of a pound, 310.
the right to impound, 312-314.
the manner of impounding, 314-318.
rescue, 318.
tender of amends; return of animals, 306, 319.
damages, 320.
sale, 321-323.

INCREASE
of wild animals, property in, 15.
of domestic animals, property in, 43-47.
sale of increase, 46.
mortgage of increase, 105.
pledge of increase, 47.

INDIAN RESERVATION
taxation of cattle on, 53.
driving animals on; effect of statute, 289.

INDIAN TERRITORY
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 609.

INDIANA
larceny of dogs in, 62, 64.
liability in, for the fright of an animal on a defective highway, 207, 223.
rule in, as to restraining animals, 260.
injury by railway company to animal at large, 609.
rule in, as to actual contact, 581.
injury made *prima facie* evidence of negligence, 639.
rule as to owner of land adjoining railway, 667.
fencing at private crossings, 670, 674 n.
what company liable for failure to fence, 688.

INDICTMENT
See CRUELTY; ESTRAY; LARCENY; MALICIOUS MISCHIEF.

INFANCY
a defence to an action on a warranty, 80.

INJURING AND KILLING ANIMALS
See also CRUELTY; FRIGHTENING ANIMALS; HIGHWAYS; MALICIOUS MISCHIEF; RAILWAY COMPANIES, and the NAMES OF STATES.
right of owner to recover for, 119-166.
general liability, 119.
accident, mistake or negligence, 120.
proximate cause, 121-127.

The references are to the pages.

INJURING AND KILLING ANIMALS—(Continued.)
injury through insufficient fence or open gate, 122, 148, etc., 289, 652, etc.
injury by falling into excavations, 122, 150-152.
by sale of unfit food, 126.
killing dogs attacking persons or animals, 127-132.
other attacking animals, 132-134.
wild vermin, 134.
injuries inflicted on trespassing animals, 135-141.
by traps, spring-guns, poison, etc., 136-138.
notice to owner of trespassing animal, 138.
injuries in driving away trespassing animals, 139.
killing unlicensed and dangerous animals, 141-147, 541.
accidental injuries to animals trespassing or running at large, 147-153.
injuries from barbed-wire fences, 122, 153-158, 657.
insurance on animals, 158-163.
measure of damages; evidence of value, 163-166.

INNKEEPER
See also BAILMENT.
liability for animals of guests, 453-459.
injury by dog living in hotel, 406.

INSURANCE
on live-stock, 158-163.
negligence of insurer, 159.
notice to company, 159.
situs of insured stock, 160.

INTEREST
on damages in actions against railway companies, 646, 698.

IOWA
larceny of dogs in, 61 n.
rule in, as to sheep-killing dogs, 130.
payment of bounties for killing wild animals, 146.
liability in, for the fright of an animal on a defective highway, 207.
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 610.
rule in, as to actual contact, 583.
injury made *prima facie* evidence of negligence, 639.
what company liable for failure to fence, 687.

JURISDICTION
in larceny, 175.
in trespass, 286.
in actions against railway companies, 631, 686.

The references are to the pages.

KANSAS
larceny of dogs in, 63.
liability in, for the fright of an animal on a defective highway, 209, 223.
rule in, as to restraining animals, 261.
injury by railway company to animal at large, 611.
rule in, as to actual contact, 584.
as to owner of land adjoining railway, 667.
suing company after discharge of receiver, 688.

KEEPER
of animal, who is, 405, etc., 440.

KENTUCKY
taxation of dogs in, 64.
liability in, for the fright of an animal on a defective highway, 209.
rule in, as to restraining animals, 267.
injury made *prima facie* evidence of negligence, 639.

KILLING ANIMALS
See INJURING AND KILLING ANIMALS.

LARCENY
See also REMOVAL; the NAMES OF ANIMALS, and the NAMES OF STATES.
of wild animals, 2, 5, 8-10, 11-14, 15, 37.
of domestic animals, 43.
of dogs, 57, 59-63.
of milk, wool, eggs, etc., 16, 43, 179.
the felonious intent, 167-171.
the taking, 171-173.
asportation, killing and removal, 173-176.
ownership; want of consent, 176-178.
description in the indictment, 10, 179-184.
meaning of horse, mare, gelding, cattle, sheep, hog, deer, 179-183.
living and dead animals, 183.
evidence, 184.
brands as evidence of ownership, 47-50.
larceny as bailee, 437.

LICENSE
of dogs, 64, etc.
killing an unlicensed dog, 141, 541.

LIEN
priority of the mortgage lien, 109-113.
on trespassing stock, 306, 307.
of agistors and trainers, 439-444.
of a farrier, 442 n.

The references are to the pages.

LIEN—(Continued.)
of the owner of a stallion, 445.
of livery-stable keepers, 449-453.
of innkeepers, 458.
how liens are lost, 113, 443, 451, 459.

LINNETS
are "domestic animals" within the meaning of statute against cruelty, 526.

LIONS
See also MENAGERIE.
not "domestic animals" within the meaning of statute against cruelty, 527.
the right to kill an escaped lion, 147.

LIVERY-STABLE KEEPER
See also BAILMENT.
rights and liabilities of, 446-449.
lien of, 449-453.
priority of mortgage lien, 109.

LIVE-STOCK EXCHANGE
rule restricting recognition of traders, 75.

LIZARDS
not "domestic animals" within the meaning of statute against cruelty, 527.

LOAN
See BAILMENT.

LOST ANIMALS
See also ESTRAYS.
liability of the finder of, 121.

MAINE
distress in, 302.
possession of game in, 566.
rule as to owner of land adjoining railway, 667.
injuring a dog in, 60.
rule in, as to restraining animals, 261.
liability in, for the fright of an animal on a defective highway, 195, 218.
notice of injuries, 243 n.

MALICIOUS MISCHIEF
See also CRUELTY.
whether indictable at common law, 545-547.
forms of, 548-552.
maiming, wounding, disfiguring, 550.
proof of malice, 552-555.

The references are to the pages.

MALICIOUS MISCHIEF—(Continued.)
indictment, 555.
verdict, 556.

MANDAMUS
to compel to pay the proceeds of a sale of estrays, 118.

"MARE"
meaning of, in a statute, 179.

MARKS
See BRANDS; FLESH-MARKS.

MARRIED WOMEN
property of, in the increase of animals, 44.

MARTINS
not the subjects of larceny, 37.

MARYLAND
liability in, for the fright of an animal on a defective highway, 209.
rule in, as to restraining animals, 262.
wager on horse-race in, 366.
possession of game in, 566.
injury by railway company to animal at large, 612.
made *prima facie* evidence of negligence, 639, 640.

MASSACHUSETTS
taxation of horses in, 53.
liability in, for the fright of an animal on a defective highway, 193, 214, 233.
rule in, as to restraining animals, 262.
possession of game in, 565, 566.
injury by railway company to animal at large, 612.
rule as to owner of land adjoining railway, 665.

MASTER AND SERVANT
unlawful taking of game by a servant, 13, 14.
warranty by a servant, 84.
larceny by a servant, 169.
liability for the fright of an animal by a servant's act, 237, 239.
for an injury to an animal through a servant's act, 121, 130, 244, 246.
for the contributory negligence of a servant, 248.
of a bailee for his servant's negligence, 428, 436.
of a livery-stable keeper for his driver's negligence, 448.
for the negligent driving of a servant, 331, 338.
for an injury by an animal in charge of a servant, 281, 412.
for an injury by a servant's animal, 407.
scienter of a servant, 399.

The references are to the pages.

MEASURE OF DAMAGES
See DAMAGES.

MENAGERIE
where taxable, 56.
property in animals escaping from, 2-4
right to kill escaped animals, 147.
contract as to the carriage of, 461.
liability for the fright of animals caused by, 237.

MICHIGAN
taxation of dogs in, 64.
liability in, for the fright of an animal on a defective highway, 210, 217.
rule in, as to restraining animals, 262.
as to the carriage of animals, 462.
possession of game in, 565.
injury by railway company to animal at large, 612.

MILK
larceny of, 43.
sale of, 70, 341 n.

MINNESOTA
priority of liens in, 111.
liability in, for the fright of an animal on a defective highway, 210.
rule in, as to restraining animals, 262.
possession of game in, 565.
rule in, as to lookout on train, 587.
injury by railway company to animal at large, 613.
rule as to owner of land adjoining railway, 666.
open crossings in, 670.

MISSISSIPPI
property in dogs in, 60 n.
rule in, as to restraining animals, 267.
liability in, for the fright of an animal on a defective highway, 224.
injury by railway company to animal at large, 613.
rule in, as to actual contact, 584.
injury made *prima facie* evidence of negligence, 639.

MISSOURI
sheep-killing dogs in, 130.
liability in, for the fright of an animal on a defective highway, 211.
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 614.
rule in, as to actual contact, 582.
injury made *prima facie* evidence of negligence, 639.
rule as to owner of land adjoining railway, 666.

The references are to the pages.

MOCKING-BIRDS
property in, 3.
as the subjects of larceny, 37.

MONKEYS
property in, 3, 36.
not the subjects of larceny, 37.

MONTANA
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 615.

MORTGAGE
of animals, 101-113.
description in, 101-104.
bona fide purchaser takes subject to, 104.
action by mortgagee for negligence, 104.
of the increase of animals, 105-109.
priority of the mortgage lien, 109-113.
recovery for stabling and service of minor, 110 n.
where lien not transferred to purchase price, 113.

MUNICIPAL CORPORATIONS
See AGENCY; FRIGHTENING ANIMALS; HIGHWAYS.

MUSK-CATS
property in, 36.

NEBRASKA
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 615.
rule in, as to actual contact, 584.

NEGLIGENCE
See CARRIERS; CONTRIBUTORY NEGLIGENCE; DOGS; FENCES; FRIGHTENING ANIMALS; HORSES; INJURING AND KILLING ANIMALS; MASTER AND SERVANT; PROXIMATE CAUSE; RAILWAY COMPANIES; TRESPASSING ANIMALS; VICIOUS ANIMALS.

NEVADA
taxation of cattle in, 51.
rule in, as to restraining animals, 267.
as to owner of land adjoining railway, 667.

NEW HAMPSHIRE
liability in, for the fright of an animal on a defective highway, 203, 224.
rule in, as to restraining animals, 262.
injury made *prima facie* evidence of negligence, 639.
rule as to owner of land adjoining railway, 667.

The references are to the pages.

NEW JERSEY
rule in, as to restraining animals, 262.
wager on horse-race in, 367.
injury by railway company to animal at large, 615.

NEW YORK
larceny of dogs in, 50, 61.
priority of liens in, 111.
liability in, for the fright of an animal on a defective highway, 206, 221, 233.
rule in, as to restraining animals, 262.
wager on horse-race in, 365.
possession of game in, 563.
injury by railway company to animal at large, 615.
rule in, as to actual contact, 581.
as to owner of land adjoining railway, 665.
what company liable for failure to fence, 687.

NORTH CAROLINA
sheep-killing dogs in, 130.
liability in, for the fright of an animal on a defective highway, 211.
rule in, as to restraining animals, 267.
wager on horse-race in, 366.
injury by railway company to animal at large, 616.
made *prima facie* evidence of negligence, 639, 640.

NORTH DAKOTA
rule in, as to restraining animals, 262.
injury by railway company to animal at large, 616.

NOTICE
of traps, spring-guns, etc., 136.
that trespassing animals will be shot, 138.
sold, 308.
of sale of an impounded animal, 322.
of an insured animal's disorder, 159.
by the owner of a vicious animal, 385.
of a claim against a carrier, 508-511.
against a railway company, 629.
of a defect in a fence or cattle-guard, 658, 672, 679.

NUISANCES
planting oyster shells, 31.
dangerous animals, 141.
diseased animals, 351.
dead animals, 352, 353, 355.
slaughter-houses, 352, 354.
noise of calves and hogs, 355.

The references are to the pages.

NUISANCES—(Continued.)
noisy dogs, 360.
cocks and hens, 360.
stock-yards and pens, 355.
stables, piggeries, 356-358.
hitching-posts, 359.
stallion kept for service, 359.
bees, 359.
swine running at large, 299.
manufacture of fertilizer, 355.
duty to abate nuisance of animals running at large in the streets, 301 n.

OCCUPATION
title by, 2, 16.

OFFSPRING
See INCREASE.

OHIO
larceny of dogs in, 62.
rule in, as to restraining animals, 262.
possession of game in, 565.
injury by railway company to animal at large, 616.
rule as to owner of land adjoining railway, 667.
fencing at private crossings, 670.

OKLAHOMA
taxation of cattle in, 52.
rule as to owner of land adjoining railway, 667.

ONTARIO
See CANADA.

OREGON
rule in, as to restraining animals, 263.
possession of game in, 566.
injury by railway company to animal at large, 617.
rule in, as to actual contact, 584.

OTTERS
as the subjects of larceny, 10, 36.

OWNER
of animal, who is, 176, 405, etc.

OX
in the ironmonger's shop, case of the, 281-284.

OYSTERS
property in, 30-33.
as the subjects of larceny, 31, 37.

The references are to the pages.

OYSTERS—(Continued.)
as a nuisance, 31.
are "fish," 33.

PARROTS
property in, 3, 38.
not the subjects of larceny, 8, 37.
not "domestic animals" within the meaning of statute against cruelty, 38, 527, 533.

PARTITION FENCES
See FENCES.

PARTNERSHIP
in animals, 34 n, 43.

PARTRIDGES
property in, 4.
as the subjects of larceny, 11, 23, 37.

PEA-FOWL
as the subjects of larceny, 39.

PENNSYLVANIA
larceny of dogs in, 61, 62 n.
liability in, for the fright of an animal on a defective highway, 195, 220.
rule in, as to restraining animals, 263.
possession of game in, 565.
injury by railway company to animal at large, 617.

PHEASANTS
property in, 4.
as the subjects of larceny, 23, 37.

PIG
See also HOG.
meaning of "pig" in an indictment for larceny, 182-183.
when keeping is a nuisance, 356-358.
swine running at large, when a nuisance, 299.

PIGEONS
property in, 7, 20, 22.
as the subjects of larceny, 15, 20, 37.
action for killing, 120, 133, 135 n.
whether pigeon-shooting is a form of cruelty, 537.

PLEDGE
covers the increase of animals, 47.

The references are to the pages.

POISON
liability for selling a poisonous wash, 126.
scattering poison for trespassing animals, 137.
the accidental poisoning of animals, 148, 149.
poisoning is "cruelty," 533.
malicious mischief, 554.

POLECATS
not the subjects of larceny, 37.

POUND
See IMPOUNDING.

PRIVATE ROAD
See also RAILWAY COMPANIES.
liability for injury to animal on, 245.

PROPERTY
See DOMESTIC ANIMALS; WILD ANIMALS; WORDS AND PHRASES.

PROXIMATE CAUSE
in actions for injuring and killing animals, 121-127.
for injuries on highways, 192, etc.
by unattended or runaway horses, 325, 327 n, 332, 334, 336.
against a railway company for negligence, 577.
for the fright of an animal, 606.

PUBLIC LANDS OF THE UNITED STATES
rule in, as to restraining animals, 268.

PURSUIT
See also GAME LAWS.
of wild animals, 2, 5-6, 10, 11, 19, 20.

QUARANTINE
may be established by a State, 344.
payment of expenses of, 352.

QUEBEC
See CANADA.

RABBITS
See also CONIES; GAME LAWS.
property in, 4.
as the subjects of larceny, 12, 14.
damage caused by, 571, 572 n.
not "domestic animals" within the meaning of statute against cruelty, 527.
not "game" or "vermin" within the meaning of certain game laws, 572.

The references are to the pages.

RACING
See also BETTING.
liability for frightening horses by racing in the street, 234.
for injuries caused by racing horses in the street, 339.
of the owner of a race-track for collision, 120, 371.
for running away of spectator's horse, 326, 371.
for the condition of the grounds, 371.
racing and betting, in general, 361-371.
what is a "race meeting," 361 n.
betting on races, 361-368.
racing for a purse or prize, 364.
steeple-chase, 368.
copyright of racing news, 368.
evidence of rules of the turf, 369.
disagreement of judges, 369.
authority of judges, 370.
actions founded on illegal races, 369.
exclusion of persons from races, 370.
taxation of grounds, 371.
lien of the trainer of a race-horse, 442.

RAILING
See FENCES.

RAILWAY COMPANIES
See also CARRIERS and the NAMES OF STATES.
action for negligence, nature of, 630.
failure to fence, nature of, 686.
bushes, duty to remove, 580.
cattle-guards, duty to construct and repair, 675-677.
sufficiency of, 677.
duty to keep snow and ice from, 678.
notice of defect in, 679.
contributory negligence as to, 679, 680.
limitation as to time, 680.
constitutionality of statutes requiring, 680.
contact, whether this must be shown, 581-585.
contributory negligence with reference to animals running at large; rule in the different States, 607-619.
when owner tries to secure animals, 619.
owner's knowledge of insufficiency of fence or gate, 620, 658, 671.
owner's duty to look or listen, 623.
to give notice, 624.
duties of various kinds, 624-626.
leaving animal in a dangerous place, 626.
careless driving, 627.
subjecting animals to fright, 627.

The references are to the pages.

RAILWAY COMPANIES—(Continued.)
contributory negligence; drunkenness no excuse, 628.
liability of owner for collision, 628.
comparative negligence, 628.
burden of showing, 629.
crossings, liability for bad condition of, 578, 672.
fences and gates at, 668, 670.
owner's duty on approaching, 623.
company's duty as to signalling, 596.
damages for killing animals, 645, 696.
interest on, 646, 698.
double, 647, 695.
for injuring animals, 648.
remote, 649.
for injuries to crops, 687 n, 697.
exemplary, 649.
attorney's fee, 649.
release of, 651.
constitutionality of statutes as to, 647, 649, 650, 661, 695.
dogs, liability for killing, 591-592, 640 and n.
duties of trainmen, in general, 585-597.
to passengers, 585.
as to lookout, 586.
where animal is seen, 587.
slackening speed; stopping, 588, 592.
frightening animal away, 589.
inevitable accident, 589.
nature of care required, 590.
as to rate of speed, 592.
as to signalling, 595.
See also the sub-title, "Frightening Animals."
evidence; burden of proof of negligence, 637.
injury made *prima facie* proof of negligence, 638-640.
of killing by the company, 641.
what is and is not admissible, 641-643.
of the fright of other animals, 605.
of the nature and conduct of animals; witnesses, 644.
of value, 644-645.
in actions for failure to fence, 692-695.
excavations, not necessary to keep free from water and ice, 580.
fences; liability for failure to fence, 652-654, 661.
duty irrespective of negligence or contributory negligence, 654.
when liability begins, 655.
sufficiency of, 655-657.
diligence in repairing, 657.

The references are to the pages.

RAILWAY COMPANIES—(Continued.)
fences; notice of defect in, 658, 671.
liability for openings in, 659.
point of entry of animal the test, 660, 692.
waiver by land-owner, 661.
contracts with regard to, 661-663.
to what owners company is liable, 663-668.
where fences are and are not necessary, 668-671, 681-686.
frightening animals by unnecessary noises, 597, 599.
by obstructions, 238, 598.
by failure to signal, 599.
by noises due to ordinary operation of trains, 600-602.
by street railways, 602-604.
duty where frightened animal is seen, 604.
screens; removal of carcasses, 605.
fright must be proximate cause of injury, 606.
where not an element of damage, 607.
gates at private crossings, 669-671.
sufficiency of, 671.
knowledge of insufficiency, 671.
duty to keep gates closed or in repair, 672-675.
headlight, duty to carry a, 581.
stock should be seen in time by, 592.
lookout, where necessary, 586.
negligence, liability for, in general, 577.
must be proximate cause of injury, 577.
in attracting animal to track by food, 579.
in not removing bushes, 580.
See also the sub-titles, "Crossings;" "Duties of Trainmen;" "Fences;" "Frightening Animals."
notice of claim, 629.
of a defect in a fence or cattle-guard, 658, 672, 679.
parties, plaintiffs in an action for negligenece, 631-632.
in an action for failure to fence, 289, 290, 686.
defendants: lessees; receivers, etc., 632-635, 687-689.
passengers, duty to, paramount, 585.
pleading; averments in action for negligence, 635.
for failure to fence, 689.
duplicity, variance, etc., 636, 691.
running at large of animals as affecting owner's recovery, 607-619.
meaning of the expression, 622.
signals; duty with regard to ringing bell and blowing whistle, 595-597, 599, 601, 604.
speed, rules with regard to, 588, 592-595.
station grounds need not be fenced, 683-685.

The references are to the pages.

RAMS
See SHEEP.

RANGE
sale of animals running on the, 72-74.
driving animals from the, 185.
damages for removing cattle from the, 190.
meaning of "range," "accustomed range," 186.

RATS
not "domestic animals" within the meaning of statute against cruelty, 528.
whether included in "dangers" or "perils" of the sea, 494-495.

REMOVAL
See also LARCENY.
of animals; civil remedies; measure of damages, 187-191.
driving animals from the range, 185.

RHODE ISLAND
liability in, for the fright of an animal on a defective highway, 225.
rule in, as to restraining animals, 264.

ROMAN LAW
See CIVIL LAW.

ROOKS
no action lies for disturbing, 39.

RUNAWAY HORSES
See HORSES.

RUNNING AT LARGE
See RAILWAY COMPANIES; TRESPASSING ANIMALS; WORDS AND PHRASES.

SABLE
not the subject of larceny, 36.

SALE
See also WARRANTY.
of animals, 69-101.
of the produce of animals, 70
of the increase of animals, 46.
change of possession, 70-72.
of animals running on the range, 72-74.
validity of, 74, 78.
damages for failure to deliver or accept, 75-76.
on warranty, 76-101.
of animals for a special purpose, as breeding, 80-82.
for food, 82.

The references are to the pages.

SALE—(Continued.)
of an estray, 117, 118.
of trespassing animals, 308.
of impounded animals, 321-323.
of diseased animals, liability for, 340-343.

SCIENTER
rule as to, where animal is vicious, 391-404.
need not be shown in the case of trespassing animals, 286, 295.
rule as to, where animal is diseased, 348.
of husband, 335.
of servant, 399.

SCOTLAND
liability of the owner of an animal in, 380-381.
property in whales in, 23.
cock-fighting, 538.
dishorning, 540.

SEA-GULL
not a "domestic animal" within the meaning of statute against cruelty, 526.

SEA LIONS
property in, 28.

SEALS
property in, 7, 26-28.

SHEEP
meaning of "sheep" in a statute, 182.
trespass by rams, 278.
when they are "running at large," 294.
liability of the bailee of, 427.
slaughtering and converting are not "carrying on manufacture," 56.

SINGING-BIRDS
not the subjects of larceny, 8, 37.

SKIN
of animals, larceny of the, 5, 43.

SLAUGHTER-HOUSE
grant of exclusive right to maintain, 352.
when a nuisance, 354.
meaning of the word, 355.

SOCIETIES FOR THE PREVENTION OF CRUELTY
See CRUELTY.

The references are to the pages.

SOUTH CAROLINA
larceny of dogs in, 61 n.
liability in, for the fright of an animal on a defective highway, 226.
rule in, as to restraining animals, 264.
injury by railway company to animal at large, 617.
rule in, as to actual contact, 582.
injury is *prima facie* evidence of negligence in, 640.

SOUTH DAKOTA
taxation of cattle in, 51.
injury made *prima facie* evidence of negligence, 640.

SPAYING
whether a form of cruelty, 540.

SQUIRRELS
as the subjects of larceny, 37.

STABLE
when a nuisance, 356, 358.

STALLION
See also BREEDING; NUISANCES; WARRANTY.
damages on the sale of a, 76.

STATION GROUNDS
See RAILWAY COMPANIES.

STATUTE OF FRAUDS
acceptance within the meaning of, 72.
agreement to pay for colt after weaning, 74.
as to cattle-guard, 680.

"STEER"
meaning of, in an indictment for larceny, 182.

"STOCK"
meaning of, in a statute, 656.

STREET CAR COMPANIES
See also RAILWAY COMPANIES.
may be enjoined from scattering salt, 244.
contributory negligence in actions against, for injuries, 253.
liability for the conduct of their horses, 333.
frightening animals, 602-604.
in case of a broken wire, 246.

STUFFED BIRDS
are movable personal chattels, 41 n.

The references are to the pages.

SUNDAY
sale of horse on, 74.
removal of frightful object on, 228.
negligently driving on, 432.
transportation of stock on, 504.
hunting on, 562.
repairing fence on, 659.

SWANS
property in, 4, 7, 23.
as the subjects of larceny, 9, 15, 23, 37.
property in cygnets, 23, 44.

SWINE
See also HOG; PIG.
meaning of the word, 183.

TARIFF
admission of animals free of duty under the tariff acts, 56 n.

TAXATION
of domestic animals, 50-57.
situs, 50-56.
of a "manufacturer," 56.
uniformity; "exports," 56.
of dogs, 64-68.

TELEGRAPH COMPANIES
damages for failure to deliver a message promptly, 75 n, 127.
liability for injuries caused by a broken wire, 246, 253.

TENNESSEE
larceny of dogs in, 62.
wager on horse-race in, 366.
injury by railway company to animal at large, 618.
rule in, as to actual contact, 582.
injury made *prima facie* evidence of negligence, 640.
fencing at private crossings, 670.

TEXAS
taxation of cattle in, 52, 54.
dogs in, 66.
payment of bounties for killing wild animals, 146.
liability in, for the fright of an animal on a defective highway, 211, 226.
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 618.
rule in, as to actual contact, 583.
construction of crossings, 670.

The references are to the pages.

TEXAS FEVER
liability for transporting cattle affected with, 344-346.
pasturing cattle that contract, 435.

THEFT
See LARCENY.

TRAINERS
of animals, lien of, 442.

TRESPASS
See also TRESPASSING ANIMALS.
when not the proper remedy, 273 n, 415, 432, 630.
election as to bringing, 306, 307.
for injury by runaway horse, 335.
whether owner liable in, for animal's acts, 375.

TRESPASSING ANIMALS
See also the NAMES OF STATES.
injuring and killing, 135-141.
driving away, 139.
accidental injuries to, 147-153.
whether wounding trespassing animal is indictable as cruelty, 535.
common-law rule as to restraining animals, 258-265.
abrogated, 265-269.
division fences, 269-274.
sufficiency of fence, 274-276.
nature and results of the trespass, 276-279.
rule as to dogs, 277.
injuries by animals straying from the highway, 279-284.
person in charge is the one liable, 284-286.
joint and several liability, 286.
scienter need not be shown, 286-288, 295, 394.
driving animals intentionally on another's land, 288.
liability of lessee or licensee, 285, 289.
where plaintiff is tenant or employee of a railway company, 289.
who may recover, 290.
when animals are "running at large," 290-296. See also WORDS AND PHRASES.
pasturing animals in the highway, 296, 301.
statutes and ordinances regulating running at large, 298-301.
distress, 301-306.
other remedies, 306-309.
lien on trespassing stock, 307.
joining causes of action, 307.
recovering value of crops, 279, 308.
statutes authorizing sale without notice, 308.

The references are to the pages.

TRESPASSING ANIMALS—(Continued.)
damage done in highways by passing animals, 338.
trespass by diseased animals, 347.

TURKEYS
property in, 39.
wild, as the subjects of larceny, 37, 39.
not "wild animals," 39.
killing trespassing, 135.
liability for fright of horse at, 238.

UNSOUNDNESS
See WARRANTY.

VERMONT
liability in, for the fright of an animal on a defective highway, 204, 227.
rule in, as to restraining animals, 264.
injury by railway company to animal at large, 618.
rule as to owner of land adjoining railway, 667.

VETERINARY SURGEON
approval of horse by, 97.
no power of court to order, 101.
failure to send telegram to bring, 127.
provision as to, in insurance policy, 159.
testimony of, not privileged, 166.
owner's responsibility as to employment of, 257.

VICIOUS ANIMALS
destroying, as public nuisances, 141, 144.
liability of owners of, 372-418.
negligence in keeping, 379-385.
liability to trespassers, 383.
notice given by the owner, 385.
contributory negligence, 385-391.
rule as to *scienter*, 391-402.
evidence of *scienter*, 402-404.
who is liable, 405-414.
liability for the acts of another, 412.
of the owners of several animals, 413-414.
action for injuries, 414.
pleading; averments, 415.
amount of damages, 416-418.

VIRGINIA
wager on a horse-race in, 365.

The references are to the pages.

WAGER
See BETTING and the NAMES OF STATES.

WARRANTY
in the sale of animals, 76-101.
patent defects, 76-78.
may be prospective, 78.
negligent treatment by purchaser, 79.
evidence must not relate to remote time, 79.
right of action in a conditional sale, 79.
infancy a defence, 80.
no indictment for deceitful warranty, 80.
animals bought for a special purpose, as breeding, 80-82.
sold for food, 82-83.
by a servant or agent, 84-86.
what amounts to a, 86-88.
what does not amount to a, 88-89.
what constitutes unsoundness, 89-92.
a "vice," 92.
allegation and proof of unsoundness, 92.
specific forms of unsoundness, 93-96.
return on breach of, 96-98.
damages on breach of, 98-101.
court has no power to order examination by veterinary surgeon, 101.
of freedom from disease; damages, 342.
particular defects:
age, 87, 89.
badness of shape, 93.
broken wind, 96.
chest-foundered, 96 n.
cold or cough, 78, 90, 91, 94.
corns, 96 n.
crib-biting, 77, 94.
deafness, 77.
defective sight, 87, 89, 93.
fever, 91.
footrot, 76.
glanders, 92 and n.
kidney disease, 77.
lameness, 90 n, 93, 95.
laminitis, 96.
lung diseases, 96.
moon-eyed, 77.
navicular disease, 96.
nerving, 95.
one eye, 77 n, 93.

The references are to the pages.

WARRANTY—(Continued.)
particular defects—(Continued.)
ossification of cartilages, 96.
pimple, 91.
plunging, 95.
pregnacy, 95.
roaring, 94.
rot, 96.
spavin, 77, 95.
spine disease, 77.
splints, 77.
sterility, 79, 81.
stumbling, 96.
swollen leg, 78.
thick wind, 96.
tick, 96.
want of castration, 95.
whistling, 95.
particular phrases:
"all right," 79, 80, 86, 87.
"all right, except he would sometimes shy," 87.
"appear to be healthy and are doing well," 89.
"can return it," 98.
"considered sound," 88.
"exactly the horse you want," 89.
"fourteen years old," 87.
"gentle," 87, 95 n.
"good drawer," 95.
"good hunter," 95.
"gray four year old colt, warranted sound," 89.
"horse's eyes are as good as any horse's eyes in the world," 89.
"I never warrant, but he is sound as far as I know," 86.
"I will warrant," 78.
"In foal to," 87.
"In good health and condition," 88.
"nice lot of young, sound sheep," 89.
"on trial," 78 n.
"perfectly quiet and free from vice," 86.
"perfectly sound in every respect," 88.
"quiet to drive," 95 n.
"served by," 87.
"sound," 86, 90.
"sound and free from blemish," 78.
"sound and healthy and, with proper handling, a foal getter," 81.
"sound and kind," 86.

The references are to the pages.

WARRANTY—(Continued.)
particular phrases—(Continued.)
"sound and kind in every respect," 95.
"sound and right," 95.
"sound and six years old," 98 n.
"sound, straight, and all right, just such a horse as is wanted," 86.
"stinted to," 87.
"sure foal-getter," 82 n, 84 n.
"sure-footed," 96.
"sure the mare is safe and kind and gentle in harness," 89.
"true to harness," 79.
"well broke," 87.
"will make his mark as a foal-getter," 88.
"with all his faults," 77 n.

WASHINGTON
taxation of stock in, 54.
liability in, for the fright of an animal on a defective highway, 212.
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 618.

WEST VIRGINIA
liability in, for the fright of an animal on a defective highway, 201.
rule in, as to restraining animals, 267.
injury by railway company to animal at large, 618.

WHALES
property in, 23-26.

WILD ANIMALS
See also GAME LAWS and the NAMES OF PARTICULAR ANIMALS.
nature of property in, 1-2.
character of confinement, 4, 18, 20, 28.
escape, 2, 3, 6, 19, 24, 28.
pursuit, 2, 5-6, 10, 11, 19, 20.
animus revertendi, 6-8, 22, 26, 28.
as the subjects of larceny, 2, 5, 8-10, 11-14, 15, 37.
how far the right of national protection extends, 27.
property in game, 10-15, 557.
in the increase of, 15.
in particular beasts and birds, 16-40.
inheritance in, 21, 30, 35, 40.
killing dangerous wild animals, 144.
bounties for, 146.
an escaped wild animal, 146.
liability of the keeper of, 372-374, 377-379.
scienter not necessary, 392.

The references are to the pages.

WILD ANIMALS—(Continued.)
meaning of "wild animals" or "animals *feræ naturæ*," 1, 9, 16, 22, 31, 34, 36, 37, 39.

WISCONSIN
license of dogs in, 65.
liability in, for the fright of an animal on a defective highway, 199, 227.
rule in, as to restraining animals, 265.
injury by railway company to animal at large, 619.
is *prima facie* evidence of negligence in, 640.
rule as to owner of land adjoining railway, 667.

WITNESS
See EVIDENCE.

WOLVES
right to kill; bounties, 144, 146.
liabilities of keepers of, 372.

WOOL
larceny of, 43.
sale of, 70.

WORDS AND PHRASES
See also WARRANTY.
"accident or collision," 582.
"accustomed range," 186.
"across a country," 368.
"agent of the corporation," 688.
"agents, engines or cars," 583.
"all damages so done," 414.
"all earnings whether by premium or otherwise," 108.
"all increase and the increase of the increase," 108 n.
"all other exhibitions," 371 n.
"animal," 527, 528.
"animal of the cow kind," 182.
"*animus revertendi*." See that title.
"apparatus for the purpose of registering bets," 362 n.
"at large," 142 n, 154 n, 281 n, 290-296, 619-620, 622-623.
"baiting animals," 539.
"bee tree," 20.
"beef," 182.
"break into the enclosure," 307.
"carrying on manufacture," 56
"cattle," 181-182, 289, 400, 528, 640 n, 656.
"cattle stealing," 168 n.
"causing, etc., the movement of diseased animals," 343 n.

The references are to the pages.

WORDS AND PHRASES—(Continued.)
"chattels," 61, 62, 68.
"collision," 582.
"colt holden for payment," 109.
"contained in assured's barn," 160.
"contribution toward a prize," 364.
"cow," 182.
"cruelly," 543.
"dangers and accidents of the seas," 495.
"deer," 183.
"defect," 222 n.
"defect in the repair," 226.
"detention," 504.
"device," 328.
"disfigure," 551.
"domestic animals." See that title.
"*domitæ naturæ*," 1, 34, 42.
"dumb animal," 549 n.
"eagles or song birds," 568.
"engines or agents," 581.
"erect and maintain pounds," 311.
"estray," 114.
"exports," 56.
"farm," 53.
"feloniously," 555.
"*feræ naturæ*." See that title.
"fine for forfeiture," 312 n.
"fish," 33.
"forward," 465.
"found lying about any highway," 294 n.
"gambling device," 363.
"game," 362, 363, 562, 572.
"gelding," 179.
"going at large." See "at large," supra.
"goods," 61, 62, 68, 522.
"hog," 182, 183.
"home," 51.
"home-ranch," 52.
"horse," 179, 188.
"implements of gaming," 363.
"in operating such railway," 584.
"in the neighborhood or along the line," 343.
"in the places herein set forth and not elsewhere," 160.
"increase and all appendages thereto," 108.
"increase of the sheep," 108.

The references are to the pages.

WORDS AND PHRASES—(Continued.)
"injured by cars in running over," 583.
"just and reasonable," 472-474.
"keep," 360.
"keeper," 291, 405, 440.
"kept," 53.
"land," 533 n.
"lottery," 363 n.
"maim," 550.
"maliciously," 555.
"manufacturer," 56.
"mare," 179.
"neat cattle," 181.
"obstruction," 220, 224, 225.
"occupation," 2, 16.
"occupied lands," 681.
"offense of a trifling nature," 65 n.
"on premises," 161.
"ordinary fences," 275.
"ordinary stock," 276.
"other beasts," 550.
"other breach of the law," 370.
"owner," 176, 273.
"owner and keeper," 412.
"owners or occupiers," 663.
"passing upon a highway," 327.
"*per impotentiam*," 2, 15.
"*per industriam hominis*," 2.
"perils of the sea," 495.
"permitted to run at large," 620.
"personal goods," 62.
"personal property," 59, 61-63, 591 n.
"pig," 182-183.
"place of injury," 249 n.
"place used for betting," 368 n.
"plant," 376-377.
"products," 46 n.
"property," 58, 66, 68, 549.
"*propter privilegium*," 2.
"race meeting," 361 n.
"range," 186.
"range brand," 49.
"reckless," 636.
"repair," 212.
"resorting thereto," 368.

The references are to the pages.

WORDS AND PHRASES—(Continued.)
"ridgling," 181.
"road brand," 49.
"running at large." See "at large," supra.
"same," 565.
"sheep," 182.
"shooting," 556.
"shows and amusements," 371.
"slaughter-house," 355.
"species bull," 299.
"specifically insured," 162.
"sporting paper," 368.
"stallions," 300.
"steer," 182.
"stock," 306, 656.
"stray beast in a suffering condition," 114 n.
"suddenly assaulted," 131-132.
"suffer to be at large," 619-620.
"take up and use," 171 n.
"thing of value," 62, 68.
"turned loose," 294 n.
"under control," 293 n.
"unlawfully," 544.
"unnecessarily," 544.
"vermin," 495, 572.
"vice," 92.
"wild animals." See that title.
"wilful," 555.
"wilfully," 185.
"wilfully and willingly," 636.
"without a keeper," 291.
"wound," 551, 556.
"yearling," 178.

WORMS
not "perils of the sea," 495.

WYOMING
taxation of cattle in, 54.

YOUNG
See INCREASE.