**CIHM
Microfiche
Series
(Monographs)**

**ICMH
Collection de
microfiches
(monographies)**

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1997

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

- ☐ Coloured covers / Couverture de couleur
- ☐ Covers damaged / Couverture endommagée
- ☐ Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- ☐ Cover title missing / Le titre de couverture manque
- ☐ Coloured maps / Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- ☐ Bound with other material / Relié avec d'autres documents
- ☐ Only edition available / Seule édition disponible
- ☐ Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- ☐ Blank leaves added during restorations may appear within the text. Whenever possible, these have been omitted from filming / Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☒ Additional comments / Commentaires supplémentaires: Part of inside front cover hidden by library pocket and label. Various pagings.

L'institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☒ Coloured pages / Pages de couleur
- ☐ Pages damaged / Pages endommagées
- ☐ Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- ☒ Pages discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- ☐ Pages detached / Pages détachées
- ☒ Showthrough / Transparence
- ☐ Quality of print varies / Qualité inégale de l'impression
- ☐ Includes supplementary material / Comprend du matériel supplémentaire
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image / Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.
- ☐ Opposing pages with varying colouration or discolourations are filmed twice to ensure the best possible image / Les pages s'opposant ayant des colorations variables ou des décolorations sont filmées deux fois afin d'obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below /
Ce document est filmé au taux de réduction indiqué ci-dessous.

10x	12x	14x	16x	18x	20x	22x	24x	26x	28x	30x	32x
						✓					

The copy filmed here has been reproduced thanks to the generosity of:

National Library of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol $\rightarrow$ (meaning "CONTINUED"), or the symbol ∇ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

Bibliothèque nationale du Canada

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole $\rightarrow$ signifie "A SUIVRE", le symbole ∇ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)

APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 286 - 5989 - Fax

20/- less 10%.

Vols. I. to XCVII. Now Ready. 1785 to 1854.

The price for each Volume is £1 5s., cloth, net,
or £1 8s., half brown calf, net.

THE REVISED REPORTS

A PUBLICATION OF THE

REPORT

AS A

The following,

Adolphus &
Anstruther
Arnold
Ball Court
Ball & B
Barnewall
Barnewall
Barnewall
Beavan
Bingham
Bingham
Blackston
Bligh
Bligh, N.
Bosanquet
Broderip
Campbell
Carrington
Carrington
Carrington
Chitty
Clark & J
Collyer
Common
Cooper, G.
Cooper to
Cooper to
Cooper P.
Cox
Craig & P
Crompton
Crompton
Crompton
Daniell
Danson &
Davison
De Gex
De Gex,
Gordon
Dow
Dow & C.
Dowling, P. C.
Dowling & Lownd
Dowling & Ryland's K.B
Dowling & Ryland's N.P.

CANADA

NATIONAL LIBRARY

BIBLIOTHÈQUE NATIONALE

COURTS

ILITY.

is 1 to 97 of

Merivale
Moody and Malkin
Moody and Robinson
Moore, C. P.

Wilson's Ex. Eq.
Young
Young and Collyer
Young and Jervis

SF
285
045

To N.L!

78

May, 1908.

LAW BOOKS

PUBLISHED BY

SWEET & MAXWELL, LIMITED,
3, CHANCERY LANE, LONDON.

ENCYCLOPÆDIA OF THE LAWS OF ENGLAND, With FORMS AND PRECEDENTS

(INCLUDING CONTENTIOUS FORMS)

BY THE MOST EMINENT AUTHORITIES.

SECOND EDITION.

In 15 Volumes, price £1 ls. net each.

For full Prospectus and Names of Contributors apply to
SWEET & MAXWELL, LTD., 3, CHANCERY LANE, LONDON.

Admiralty.—WILLIAMS and BRUCE's Admiralty Practice. 3rd Edit. By C. F. JEMMETT and G. G. PHILLIMORE. 32s. 1902.

Agency.—BOWSTEAD'S (W.) Digest of the Law of Agency. 3rd Edit. 18s. 1907.

Annual Practice.—By T. SNOW, M.A., CHARLES BURNET, B.A., and F. A. STRINGER. 25s. net.

Arbitration and Award.—RUSSELL'S (F.) Treatise on Power and Duty of an Arbitrator; with Forms and Statutes. 9th Edit. 30s. 1905.

Attachment.—CABABÉ on Attachment of Debts, Receivers, and Charging Orders. 3rd Edit. 6s. 1900.

Bailments.—WYATT PAINE on Bailments, including Carriers, Pledges, Hire-Purchase, Liens, &c. 25s. 1901.

Bankruptcy.—WILLIAMS Law and Practice in Bankruptcy. 9th Edit. By E. W. HANSELL. 30s. 1908.

MANSON'S Short View of Bankruptcy Law. 7s. 6d. 1904.

WACE on Bankruptcy Law and Practice. 27s. 6d. net. 1904.

Bills of Exchange.—BYLES on Bills of Exchange. 16th Ed. By M. B. BYLES and W. J. B. BYLES. 25s. 1899.

Building Contracts.—HUDSON on Building and Engineering Contracts. 3rd Edit. 2 vols. By A. A. HUDSON. £2 12s. 6d. 1907.

Building Societies.—DAVIS'S (H. F. A.) Law of Building and Freehold Land Societies in England, Scotland and Ireland, &c. 4th Edit. By J. E. WALKER. 21s. 1893.

Burials.—BAKER'S Law of Burials. 6th Edit. By E. L. THOMAS. 25s. 1901.

Charities.—TUDOR'S Law of Charities and Mortmain. 4th Ed. By L. S. BRISTOWE, C. A. HUNT, and H. C. BURDETT, Barristers-at-Law. 2l. 5s. net. 1906.

Choses in Action.—Warren's Law relating to Choses in Action. By W. R. WARREN. 16s. 1899.

Colonial Law.—Colonial Laws and Courts. By A. WOOD RENTON and G. G. PHILLIMORE. 15s. net. 1907.

Common Law.—CHITTY'S Forms of Practical Proceedings in the King's Bench Division of the High Court of Justice. 13th Edit. By T. W. CHITTY, H. CHITTY, and P. E. VIZARD. 36s. 1902.

BROOM'S Commentaries on the Common Law. 9th Edit. By W. F. A. ARCHIBALD and H. A. COLEFAX. 1896.

SMITH'S Leading Cases in Various Branches of the Law, with Notes. 11th Edit. By T. WILLES CHITTY, J. H. WILLIAMS, and H. CHITTY. 2 vols. 3l. 10s. 1903.

Companies.—LINDLEY. A Treatise on the Law and Practice of Joint Stock and other Companies. By Right Hon. Lord LINDLEY. 6th Edit. By His Honour Judge LINDLEY. 2 vols. 3l. 10s. 1902.

KELKE'S Epitome of Company Law for Students. 6s. 1904.

Compensation.—MAYER'S Code of the Law of Compensation under the Land Clauses Acts and other Statutes relating to the Compulsory Purchase or Injurious Affecting of Land. By SYLVAIN MAYER. 38s. 1903.

Employers' Liability and Workmen's Compensation. 3rd Edit. By C. Y. C. DAWBARN. 21s. 1907.

Contracts.—CHITTY'S (J., jun.) Treatise on the Law of Contracts. 14th Ed. By J. M. LELY. 30s. 1904.

Elements of the Law of Contract. 2nd Edit. By A. T. CARTER. 7s. 6d. 1907.

The Specific Performance of Contracts. By W. D. RAWLINS, K.C. 5s. net. 1899.

Conveyancing.—DAVIDSON'S Concise Precedents in Conveyancing. 18th Edit. By M. G. DAVIDSON. 25s. 1904.

Introduction to Conveyancing. By Sir H. W. ELPHINSTONE. 6th ed. 15s. 1906.

KEY and ELPHINSTONE'S Precedents and Forms in Conveyancing. 8th Ed. 3l. 10s. 1905.

Student's Precedents in. By JAMES W. CLARK, M.A. 3rd Edit. 6s. 1905.

THE
LAW OF HORSES,

INCLUDING THE LAW OF

Innkeepers, Veterinary Surgeons, &c.

BY

GEORGE HENRY HEWITT OLIPHANT,

OF TRINITY COLLEGE, CAMBRIDGE, B.A., AND INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

SIXTH EDITION.

BY

CLEMENT ELPHINSTONE LLOYD, B.A., Oxon.,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

AND THE VETERINARY PORTION REVISED BY

T. C. BARTON, M.R.C.V.S.,

WITH CANADIAN NOTES BY

CHARLES MORSE, D.C.L.,

DEP. REG. OF THE EXCHEQUER COURT OF CANADA.

*"Thou that mayst fortune to be of myne opinion and condycion to love
horses, take heede that thou be not beguiled as I have been a hundred times
and more."—Bale of Husbandry by Sir A. Fitzherbert, Justice of the Court of
Common Pleas.*

LONDON:

SWEET & MAXWELL, LIMITED, 3, CHANCERY LANE.

TORONTO:

THE CARSWELL CO., LIMITED, 30, ADELAIDE STREET, EAST.

1908.

SF 285
04

205950

1908

"Caveat emptor."—*Leg. Mos.*

"Equi donati dentes non inspiciuntur."—*D. Hieron. in Præm. Epist. ad Ephes.*

"Primus Ericthonius currus et quatuor ausus
Jungere equos."—*Virg. Georg.*

"Tu qui cæteris cavere didicisti, in Britannia ne ab essedariis decipiaris
caveto."—*Cic. Ep. Lib. 7, Ep. 6.*

"Seu quis, Olympiæ miratus præmia palmæ,
Pascit equos
Corpora præcipuè matrum legat."—*Virg. Georg.*

PREFACE

TO THE FIRST EDITION.

THE object of the present Treatise is to lay before the profession and the public, in as short and convenient a form as possible, the Law of Contracts concerning Horses, whether it be in buying, selling, hiring, or in any other manner dealing with them; to ascertain the liabilities incurred by parties either on "the road," through negligent driving, or in "the field," by riding over the lands of another; also to explain the present state of the law with regard to Racing, Wagers, and Gaming, in connection with the recent alterations effected by the Act of Victoria. The Appendix contains some very late cases, a few important Statutes, and other information which may be found useful for general reference. An attempt has been made, by a judicious division of the subject, and the introduction of marginal notes, to make the text as accessible as possible.

G. H.

TEMPLE: *May* 15th, 1847.

PREFACE

TO THE SIXTH EDITION.

As was indicated in the preface to the Fifth Edition of this work, the modification of the law relating to the sale of goods by the Sale of Goods Act, 1893, necessitated very extensive alterations in the chapters dealing with the sale and warranty of Horses, but that Act has proved so effectual in its operation that the number of reported cases on those and analogous subjects since the last edition is comparatively few.

The liability of the hirer and lender of Horses respectively has, however, been the subject of several very important cases in the Court of Appeal, and these have necessitated very considerable alterations in, and additions to, the text. There have also been a number of decisions affecting other portions of the work, the most important of which are, perhaps, those which involve the liability of a master for the negligent driving of his servant, and it is believed that these have all been duly incorporated.

The chapter on Diseases, &c., of Horses, much of which had ceased to be in conformity with modern veterinary science, except in so far as its purely legal aspect is concerned, has been thoroughly revised, and for the most part re-written, by Mr. " C. Barton, M.R.C.V.S.

It will be observed that Part III. of the original work, dealing with Racing, Wagers, and Gaming, has been omitted from the present edition. The reason for this omission is that the subject had so greatly increased in bulk, and incidentally in scope, that it appeared to overweight a book the primary object of which is to give an exposition of the law as applied to Horses.

In the opinion of the editor, the law relating to Gaming and Wagering would, in its present state of development, be more appropriately dealt with in a separate treatise.

CLEMENT E. LLOYD.

TEMPLE : *June*, 1908.

PREFATORY NOTE

BY THE CANADIAN EDITOR.

THE scope of the Canadian annotations is confined to Cases and Statutes directly relating to Horses and Cattle. This will explain the sparseness of such annotations in the more general portions of the work. For the sake of convenience a digest of the Canadian Statute Law is given in the form of an Appendix.

C. MORSE, D.C.L.

OTTAWA : *May* 1st, 1908.

TABLE OF CONTENTS.

	PAGE
TABLE OF CASES	xiii.
TABLE OF STATUTES	xxxv.
TABLE OF CANADIAN CASES	xxxvii.
INTRODUCTION	xli.

PART I.

CONTRACTS CONCERNING HORSES, &c.

CHAPTER I.

BUYING, SELLING AND EXCHANGING : THE REQUISITES OF THE STATUTE OF FRAUDS : DELIVERY AND PAYMENT, AND THE LAW AS TO SUNDAY DEALING	1 34
---	------

CHAPTER II.

HORSEDEALERS, REPOSITORIES AND AUCTIONS	35—53
---	-------

CHAPTER III.

FAIRS AND MARKETS OVERT : HORSE STEALING, AND THE RECOVERY OF STOLEN HORSES	54—66
--	-------

CHAPTER IV.

WHAT DISEASES OR BAD HABITS CONSTITUTE UNSOUNDNESS OR VICE	67—115
---	--------

CHAPTER V.

WARRANTY : SALE AND WARRANTY BY AN AGENT : AND PATENT DEFECTS	116—147
--	---------

TABLE OF CONTENTS.

CHAPTER VI.

WARRANTY DISTINGUISHED FROM REPRESENTATION.	PAGE 148—155
---	-----------------

CHAPTER VII.

FRAUDULENT CONTRACTS	156—171
--------------------------------	---------

CHAPTER VIII.

BREACH OF WARRANTY	172—181
------------------------------	---------

CHAPTER IX.

PLEADING, EVIDENCE AND DAMAGES	182—215
--	---------

CHAPTER X.

INNKEEPERS, VETERINARY SURGEONS, FARRIERS, HORSE- BREAKERS, TRAINERS, &c.	216—238
--	---------

CHAPTER XI.

LIVERY STABLE KEEPERS, AGISTERS, AND THE HIRING AND BORROWING HORSES	239—281
---	---------

CHAPTER XII.

CARRYING HORSES	282—311
---------------------------	---------

PART II.

NEGLIGENCE IN THE USE OF HORSES, &c.

CHAPTER I.

THE CRIMINAL AND CIVIL LIABILITIES OF PARTIES FOR INJURIES INFLICTED OR INCURRED IN DRIVING, ALSO THE RULE OF THE ROAD, AND NEGLIGENT DRIVING BY A SERVANT	312—367
---	---------

TABLE OF CONTENTS.

xi

CHAPTER II.

	PAGE
FEROCIOUS AND VICIOUS ANIMALS	368—382

CHAPTER III.

THE LIABILITIES OF PARTIES HUNTING OR TRESPASSING UPON THE LANDS OF ANOTHER	383—393
--	---------

APPENDIX OF STATUTES.

2 & 3 Philip & Mary, c. 7 (Sale of Horses)	400
31 Eliz. c. 12 (Sale of Horses)	402

APPENDIX OF CANADIAN STATUTES.

(A) Dominion	407
(B) Provincial	408

INDEX	415
-----------------	-----

TABLE OF CASES.

A.	PAGE
ABBOTT <i>v.</i> Freeman, 35 L. T. 783	
C. A.	339
Abraham <i>v.</i> Bullock, 86 L. T. 796 ; 50 W. R. 626—C. A.	272, 273
Acebal <i>v.</i> Levy, 10 Bing. 378 ; 38 R. R. 469.....	25
Adam <i>v.</i> Richards, 2 H. Bla. 573 ; 3 R. R. 508	178, 185
Adams <i>v.</i> Glasgow and South Western Rail. Co., 2 Ct. of Sess. Cas., 4th ser., 215	333
— <i>v.</i> Grave, 1 Cr. & M. 380	40
— <i>v.</i> Masters, 24 L. T. 502	388
Addison <i>v.</i> Gandasequi, 4 Taunt. 574 ; 13 R. R. 689.....	135
Ainsley <i>v.</i> Brown, N. P. 1845.....	71, 103
Aldridge <i>v.</i> Great Western Rail. Co., 33 L. J., C. P. 161.....	300
Alebury <i>v.</i> Walby, 1 Stra. 231	190
Alexander <i>v.</i> Gibson, 2 Camp. 555 ; 11 R. R. 797...51, 136, 137, 196 — <i>v.</i> Laidley, N. P. 1847 ...	342
Allday <i>v.</i> Great Western Rail. Co., 34 L. J., Q. B. 5	295
Allen <i>v.</i> Bennett, 3 Taunt. 169 ; 12 R. R. 633	23
— <i>v.</i> Denstone, 8 C. & P. 760 ...	140
— <i>v.</i> Pink, 4 M. & W. 140 ; 51 R. R. 503	16, 195
— <i>v.</i> Sharpe, 2 Ex. 352 ; 76 R. R. 621	35
— <i>v.</i> Smith, 9 Jur., N. S. 23... 1284	225
Anderson <i>v.</i> Croa ^v 6 F. & F. 153	
Ct. of Sess.....	45
Andrews <i>v.</i> Belfi ^r , 2 C. B., N. S. 779	119
Angus <i>v.</i> McLachlan, 23 Ch. D. 330 ; 52 L. J., Ch. 587 ; 48 L. T. 863 ; 31 W. R. 641	221, 228
Anon., 3 Salk. 157	1
Anthony <i>v.</i> Halstead, 37 L. T. 433... 131, 152	128.
Applebee <i>v.</i> Perey, L. R., 9 C. P. 617 ; 43 L. J., C. P. 365 ; 30 L. T. 785 ; 22 W. R. 704	373

	PAGE
Arbon <i>v.</i> Fussell, 3 F. & F. 152.....	260
Archer <i>v.</i> Baynes, 5 Ex. 629 ; 82 R. R. 792	19
Armistead <i>v.</i> White, 20 L. J., Q. B. 524	219
Armstrong <i>v.</i> Mitchell, 88 L. T. 870 ; 67 J. P. 329	382
— <i>v.</i> Stokes, L. R., 7 Q. B. 598 ; 41 L. J., Q. B. 253 ; 26 L. T. 872	135
Armsworth <i>v.</i> South Eastern Rail. Co., 11 Jur. 758 ; 81 R. R. 918 ...	366
Ashby <i>v.</i> White, 1 Sm. L. C., 11th ed. 240	390
Ashcroft <i>v.</i> Morrin, 1 Man. & G. 450 ; 61 R. R. 559	18
Ashendon <i>v.</i> London, Brighton and South Coast Rail. Co., 5 Ex. D. 190 ; 42 L. T. 586	297
Ashworth <i>v.</i> Heyworth, L. R., 4 Q. B. 316 ; 38 L. J., M. C. 91 ; 20 L. T. 439.....	56
Atterbury <i>v.</i> Fairmanner, 8 Moore. 32	197
Attwood <i>v.</i> Emery, 26 L. J., C. P. 73	30
— <i>v.</i> Small, 6 C. & F. 232 ; 49 R. R. 115	161
Austin <i>v.</i> Manchester, Sheffield and Lincolnshire Rail. Co., 21 L. J., C. P. 179 ; 10 C. B. 454 ; 84 R. R. 645.....	277, 288
Avards <i>v.</i> Dance, 26 J. P. 437.....	442

B.

Bach <i>v.</i> Owen, 5 T. R. 109	15, 183, 181, 199
Baglehole <i>v.</i> Walters, 3 Camp. 156 ; 13 R. R. 778	167
Bagneley <i>v.</i> Hawley, L. R., 2 C. P. 625 ; 36 L. J., C. P. 328	117
Bailey <i>v.</i> Forrest, 2 C. & K. 131 ; 80 R. R. 829.....	112
— <i>v.</i> Merrell, 3 Bulst. 95 ...	143, 159, 162

TABLE OF CASES.

	PAGE		PAGE
Bailey <i>v.</i> Sweeting, 9 C. B., N. S. 843; 30 L. J., C. P. 150; 9 W. R. 273	19	Beal <i>v.</i> South Devon Rail. Co., 5 H. & N. 875	277, 296
Balrd <i>v.</i> Graham, 14 Ct. of Sess. 615	134	— <i>v.</i> White, 12 A. & E. 670	190
Baker <i>v.</i> Berkley, 3 C. & P. 32	385	Beamon <i>v.</i> Ellice, 4 C. & P. 586... ..	361, 363
— <i>v.</i> Dening, 8 A. & E. 94	23	Beard <i>v.</i> London General Omnibus Co., [1900] 2 Q. B. 530; 60 L. J., Q. B. 895; 83 L. T. 362; 28 W. R. 658—C. A.	355, 356
— <i>v.</i> Firmlinger, 28 L. J., Ex. 130	191	Beaumont <i>v.</i> Brengerl, 5 C. B. 301; 75 R. R. 731	11
Balvey <i>v.</i> Parker, 2 B. & C. 44; 3 D. & R. 220; 26 R. R. 260	8	Beck <i>v.</i> Dyson, 4 Camp. 198; 16 R. R. 774	372, 373
Baldrey <i>v.</i> Bates, 1 T. L. R. 558 ...	139	Behn <i>v.</i> Burness, 3 B. & S. 751; 32 L. J., Q. B. 204	124, 153
Baldway <i>v.</i> Onster, 1 Ventr. 71 ...	227	Benham <i>v.</i> United Guarantee Co., 7 Ex. 753; 86 R. R. 821	148
Baldwin <i>v.</i> Casella, L. R., 7 Ex. 325; 41 L. J., Ex. 167; 26 L. T. 707; 21 W. R. 16	373	Benjamin <i>v.</i> Storr, L. R., 9 C. P. 400; 43 L. J., C. P. 162; 30 L. T. 362; 22 W. R. 631	328
Balfe <i>v.</i> West, 22 L. J., C. P. 175 ...	132	Bennett <i>v.</i> Brumfit, L. R., 3 C. P. 28; 37 L. J., C. P. 35; 17 L. T. 213	23
Bannerman <i>v.</i> White, 10 C. B., N. S. 844	153	— <i>v.</i> Henderson, 2 Stark. 550	191, 193
Bardell <i>v.</i> Splinks, 2 C. & K. 646 ...	163	— <i>v.</i> Mellor, 5 T. R. 273; 2 R. R. 593	279
Barker <i>v.</i> Furlong, [1892] 2 Ch. 172; 60 L. J., Ch. 368; 64 L. T. 411; 39 W. R. 621	39	Bernasconi <i>v.</i> Anderson, M. & M. 183	192
— <i>v.</i> Pott, 4 H. & N. 759... ..	153, 185	Bernina, The, 12 P. D. 58	333
— <i>v.</i> Windle, 6 El. & B. 675... ..	153	Besezzi <i>v.</i> Harris, 1 F. & F. 92	368, 380
Barley <i>v.</i> Walford, 9 Q. B. 197; 72 R. R. 218	160, 187	Best <i>v.</i> Hayes, 32 L. J., Ex. 129.....	40
Barnard <i>v.</i> How, 1 C. & P. 366... ..	239, 240	— <i>v.</i> Osborne, 2 C. & P. 74; R. & M. 296	67, 98, 125, 141
Barnes <i>v.</i> Lucille, 96 L. T. 680; 23 T. L. R. 389—D.	372	Bevan <i>v.</i> Waters, 3 C. & P. 520; 33 R. R. 692	237, 246
— <i>v.</i> Ward, 9 C. B. 392; 82 R. R. 375	328	Bexwell <i>v.</i> Christie, Cowp. 396	48, 50
Barrington <i>v.</i> Turner, 3 Lev. 28.....	385	Bianchi <i>v.</i> Nash, 1 M. & W. 545 ...	184
Barrow <i>v.</i> Armand, 8 Q. B. 609; 70 R. R. 568	208	Biddle <i>v.</i> Bond, 6 B. & S. 225; 34 L. J., Q. B. 137	40
Barry <i>v.</i> Croskey, 2 J. & H. 21	159	Bigg <i>v.</i> Whisking, 14 C. B. 195.....	44
Bartholomew <i>v.</i> Freeman, 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743	181	Bill <i>v.</i> Bament, 9 M. & W. 36; 60 R. R. 658	20
— <i>v.</i> Markwick, 33 L. J., C. P. 145	185, 191	Binns <i>v.</i> Pigot, 9 C. & P. 208; 62 R. R. 745	226
Barwick <i>v.</i> English Joint Stock Bank, L. R., 2 Ex. 259.....	133	Bird <i>v.</i> Boulter, 4 B. & Ad. 443; 38 R. R. 285	25, 41
Bassett <i>v.</i> Collis, 2 Camp. 523; 11 R. R. 786	102	— <i>v.</i> Sharp, N. P. 1853	335
Batchelor <i>v.</i> Fortescue, 11 Q. B. D. 474—C. A.	329	Birnie <i>v.</i> Marshall, 35 L. T. 373.....	388
Bather <i>v.</i> Day, 2 H. & C. 14; 32 L. J., Ex. 171; 8 L. T. 205 ...	221, 223	Bissil <i>v.</i> New York Central Railroad Co., 25 New York, 442	283
Baxendale <i>v.</i> Great Eastern Rail. Co., L. R., 4 Q. B. 244; 38 L. J., Q. B. 137	292	Bize <i>v.</i> Dickason, 1 T. R. 285; 4 R. R. Preface viii.	185
Bayley <i>v.</i> Gouldsmith, Peake, 56 ...	184	Black <i>v.</i> Baxendale, 1 Ex. 410	311
Baylis <i>v.</i> Lawrence, 11 Ad. & E. 926; 52 R. R. 537	71	Blackman <i>v.</i> Simmons, 3 C. & P. 138	379
Payntine <i>v.</i> Sharp, 1 Lutw. 90	379	Blackmore (or Blakenore) <i>v.</i> Bristol & Exeter Rail. Co., 27 L. J., Q. B. 167; 8 E. & B. 1035	274
Beach <i>v.</i> Parmeter, 23 Penn. St. 196	343		

TABLE OF CASES.

XV

PAGE	PAGE
296	Blades <i>v.</i> Higgs, 9 Jur. N. S. 1040 ;
190	10 C. B., N. S. 713 ; 30 L. J., C. P.
363	347 ; 11 H. L. C. 621 ; 34 L. J.,
	C. P. 286.....386, 389
	Blake <i>v.</i> Midland Rail. Co., 21 L. J.,
	Q. B. 235 366
356	— <i>v.</i> Thirst, 2 H. & C. 20 328, 334
11	Blakenmore <i>v.</i> Lancashire and York-
	shire Rail. Co., 1 F. & F. 76 369
373	Blenkinsop <i>v.</i> Clayton, 7 Taunt. 597 ;
	18 R. R. 602..... 14, 15
153	Bliss <i>v.</i> Snow, N. P. 1853 201
148	Blower <i>v.</i> Great Western Rail. Co.,
	L. R. 7 C. P. 655 ; 41 L. J., C. P.
	268 ; 27 L. T. 883..... 283
	Bloxam <i>v.</i> Sanders, 4 B. & C. 941 ;
	28 R. R. 519 28, 29
328	Bloxsome <i>v.</i> Williams, 1 Taunt. 135 ;
	3 B. & C. 232 ; 27 R. R. 337 33, 34
23	Blyth <i>v.</i> Banpton, 3 Bing. 472 24
91,	— <i>v.</i> Birmingham Waterworks
93	Co., 2 Jur., N. S. 333 312
79	Boden <i>v.</i> Roscoe, [1894] 1 Q. B. 608 ;
	63 L. J., Q. B. 767 ; 70 L. T. 450 ;
	42 W. R. 445 390
92	Bolden <i>v.</i> Brogden, 2 M. & R. 113... 69, 71,
33	83, 84, 94
8,	Boorman <i>v.</i> Brown, 3 Q. B. 11 ; 61
40	R. R. 287 187
1	— <i>v.</i> Nash, 9 B. & C. 145 ; 32
6	R. R. 607 190, 202, 208
0	Booth <i>v.</i> Mistor, 7 C. & P. 66 353
4	Bordenave <i>v.</i> Gregory, 5 East, 111... 183,
0	184
1	Boss <i>v.</i> Litton, 5 C. & P. 407 345
6	Bowdell <i>v.</i> Parsons, 10 East, 359 ... 184
4	Bower <i>v.</i> Peat, 1 Q. B. D. 321 ; 45
0	L. J. Q. B. 446 ; 35 L. T. 321 ... 330
1	Bowes <i>v.</i> Shand, 2 App. Cas. 455 ;
0	46 L. J., Q. B. 561 ; 36 L. T. 857 ;
6	25 W. R. 730 119
1	Bowyer <i>v.</i> Cook, 4 C. B. 236 384
0	Boydell <i>v.</i> Drummond, 11 East, 142 ;
6	10 R. R. 450 17
1	Bradley <i>v.</i> Bardsley, 14 M. & W. 873
0	— <i>v.</i> Lea, 14 Allen, 20 214
6	Brady <i>v.</i> Giles, 1 M. & R. 496 ; 42
1	R. R. 816 265, 267
0	— <i>v.</i> Oastler, 3 H. & C. 112 ; 33
6	L. J., Ex. 300 208
1	— <i>v.</i> Todd, 9 C. B., N. S. 592 ;
0	30 L. J., C. P. 223 ; 4 L. T. 212 ;
6	9 W. R. 483 136, 140
1	Bray <i>v.</i> Mayne, 1 Gow, 1 ; 21 R. R.
0	786 257, 279
6	Brickhead <i>v.</i> Archbishop of York,
1	Hob. 198, 233 190
0	Briddlon <i>v.</i> Great Northern Rail. Co.,
6	28 L. J., Ex. 51..... 309

PAGE
Bridge <i>v.</i> Grand Junction Rail. Co.,
3 M. & W. 241 ; 69 R. R.
390..... 322, 325, 333, 316
— <i>v.</i> Parsons, 32 L. J., M. C.
95..... 437
Briggs <i>v.</i> Baker, N. P. 1845..... 74
Bringlee <i>v.</i> Morice, 1 Mod. 210 ; 3
Salk, 271..... 278
Bristol (Earl of) <i>v.</i> Wilmore, 1 B. &
C. 521 ; 25 R. R. 488 169, 170
Bristow <i>v.</i> Halford, N. P. 1853 17
British Empire Shipping Co. <i>v.</i>
Somes, 28 L. J., Q. B. 220—Ex.
Ch. ; 30 L. J., Q. B. 229—H. L.... 227,
236
Broadwater <i>v.</i> Blot, Holt's Rep. 547 ;
17 R. R. 667 243
Broodwood <i>v.</i> Granara, 10 Ex. 417
..... 219,
224
Brock <i>v.</i> Copeland, 1 Esp. 203 ; 5
R. R. 730 380
Broemmenburgh <i>v.</i> Haycock, Holt's
Rep. 630 ; 17 R. R. 682 85
Brooks <i>v.</i> Hassall, 49 L. T. 569 138
Broomfield <i>v.</i> Smith, 1 M. & W. 542
..... 200
Brotherton <i>v.</i> Wood, 6 Moore, 31 ... 187
Brown <i>v.</i> Arundell, 10 C. B. 51 ; 16
L. T., O. S., 126 ; 81 R. R.
457 40
— <i>v.</i> Elkington, 8 M. & W. 132
..... 87,
112
— <i>v.</i> Giles, 1 C. & P. 118 ; 28
R. R. 739 378, 390
— <i>v.</i> Turner, 13 C. B., N. S. 485
..... 389
Browne <i>v.</i> Brandt, [1902] 1 K. B.
696 ; 71 L. J., K. B.
367 ; 86 L. T. 625 ; 50
W. R. 654—D..... 217
— <i>v.</i> Frye, cited 2 Camp. 107
..... 196
Brownlow <i>v.</i> Metropolitan Board of
Works, 2 F. & F. 601 323
Brunsdon <i>v.</i> Humphrey, 14 Q. B. D.
141 ; 53 L. J., Q. B. 476 ; 51 L. T.
529 ; 32 W. R. 914—C. A. 361
Bryant <i>v.</i> Wardell, 2 Ex. 482..... 281
Buchanan <i>v.</i> Parushaw, 2 T. R.
746 43
Buckingham <i>v.</i> Reeve, N. P. 1857... 131,
198
Budd <i>v.</i> Fairmanner, 5 C. & P. 78 ;
1 M. & Sc. 74 ; 34 R. R. 619 151
Buddle <i>v.</i> Green, 27 L. L. Ex. 33 ... 26
Burgess <i>v.</i> Clements, 4 M. & S. 306 ;
16 R. R. 473 218
Burkim <i>v.</i> Bilezikidgi, 53 J. P. 760... 318
Burnard <i>v.</i> Haggis, 14 C. B., N. S.
45 ; 32 L. J., C. P. 189 252, 256
Burns <i>v.</i> Poulson, L. R. 8 C. P. 563 ;
42 L. J., C. P. 302..... 357

	PAGE		PAGE
Bushell <i>v.</i> Wheeler, 15 Q. B. 442	10, 14	Chandler <i>v.</i> Broughton, 1 Cr. & M.	263, 353
Butler <i>v.</i> Hunter, 7 H. & N. 826	328, 331	229	
Butterfield <i>v.</i> Burroughs, 3 Salk. 211	143	Chanter <i>v.</i> Hopkins, 4 M. & W. 309	
— <i>v.</i> Forrester, 11 East. 60		51 R. R. 550	120, 130, 179, 185, 199
10 R. R. 433	322, 327	Chaplin <i>v.</i> Hawes, 3 C. & P. 554	33
Buttermere <i>v.</i> Hayes, 5 M. & W. 456	199	R. R. 705	343
Buxton <i>v.</i> North Eastern Rail. Co.		— <i>v.</i> Rogers, 1 East. 192	6
L. R., 3 Q. B. 549	37	R. R. 249	14
L. J., Q. B. 258	18 L. T.	Chapman <i>v.</i> Allen, Cro. Car. 271	239, 243
795	16 W. R. 1194		
— <i>v.</i> Rust, L. R., 7 Ex. 1	41	<i>v.</i> Gwyther, L. R., 1 Q. B.	
L. J., Ex. 1	25 L. T. 502	463	35 L. J., Q. B.
L. R., 7 Ex. 279	— Ex. Ch. 19, 22, 23	142	14 L. T. 477
Byrne <i>v.</i> Bowlle, 33 L. J., Ex. 13	341	— <i>v.</i> Withers, 20 Q. B. D.	
Bywater <i>v.</i> Richardson, 3 A. & E.	43,	824	57 L. J., Q. B. 457
508	3 N. & M. 748	40 R. R. 349	126
	125		
		Chapman <i>v.</i> South Eastern Rail. Co.	
		21 Q. B. D. 524	57 L. J., Q. B.
		597	37 W. R. 8
		— C. A.	392
		Chase <i>v.</i> Westmore, 5 M. & S. 189	
		17 R. R. 301	27, 236
		Cheshire <i>v.</i> Bailey, [1905] 1 K. B.	
		237	74 L. J., K. B. 176
		92 L. T.	
		142	53 W. R. 322
		— C. A.	272, 273
		Chesterman <i>v.</i> Lomb, 2 A. & E. 129	
		41 R. R. 397	180, 198, 210, 211
		Chew <i>v.</i> Jones, 10 L. T., O. S. 231	
		89 R. R. 770	250, 252, 257
		Child <i>v.</i> Hearn, L. R., 9 Ex. 176	43
		L. J., Ex. 100	22 W. R. 864
		22 W. R. 864	390
		Childery <i>v.</i> Viall, 29 L. J., Ex. 380	205
		Chippendale <i>v.</i> Lancashire and	
		Yorkshire Rail. Co., 23 L. J.,	
		Q. B. 22	288
		Christie <i>v.</i> G. Eggs, 2 Camp. 79	11
		R. R. 666	251
		Clare <i>v.</i> Mynard, 6 A. & E. 523	210, 212,
			213, 214
		Claridge <i>v.</i> South Staffordshire	
		Tramway Co., [1892] 1 Q. B. 422	
		61 L. J., Q. B. 503	279
		Clark <i>v.</i> Chambers, 3 Q. B. D. 327	
		47 L. J., Q. B. 427	38
		L. T. 454	324, 325, 329, 330
		— <i>v.</i> Glasgow Assurance Co., 1	
		Maag. H. of L. Cas. 668	207
		— <i>v.</i> Rochester and Syracuse	
		Canal Co., 14 New York, 570	283
		Clarke <i>v.</i> Gray, 6 East. 561	188
		— <i>v.</i> Roe, 4 Ir. C. L. R. 7	242
		— <i>v.</i> Smythies, 2 F. & F. 83	53
		Clay <i>v.</i> Wood, 5 Esp. 42	8 R. R.
		827	343
		Clayards <i>v.</i> Dethick, 12 Q. B. 439	
		76 R. R. 305	325, 326
		Cleveland <i>v.</i> Spier, 16 C. B., N. S.	
		399	330
		Cloverton <i>v.</i> Uffernel, 3 T. L. R.	
		509	373

TABLE OF CASES.

xvii

	PAGE
<i>Clothier v. Webster</i> , 31 L. J., C. P. 310	332
<i>Clough v. London and North Western Rail. Co.</i> , L. R., 7 Ex. 26; 41 L. J., Ex. 17; 25 L. T. 708	168
<i>Coates v. Stephens</i> , 2 M. & Rob. 157; 62 R. R. 783 ... 67, 68, 69, 70, 71, 83, 84, 94, 202	
<i>Cochrane v. Moore</i> , 25 Q. B. D. 57; 59 L. J., Q. B. 377; 63 L. T. 153; 38 W. R. 588—C. A.	2, 118
— <i>v. Rymill</i> , 40 L. T. 744; 27 W. R. 776	38
<i>Coggs v. Bernard</i> , 141. Raym. 915; 1 Sm. L. C., 11th ed. 173	277, 278, 282, 287
<i>Colchester, Mayor of, v. Brooke</i> , 7 Q. B. 339; 68 R. R. 458 ... 318, 325, 346	
<i>Coleman v. Riches</i> , 16 C. B. 104 ...	133
<i>Coles v. Trecothick</i> , 9 Vesey, 249 a; 7 R. R. 167	25
<i>Colget v. Norris</i> , 2 T. L. R. 471—C. A.	373
<i>Collen v. Gardner</i> , 21 Beav. 513 ...	138
— <i>v. Wright</i> , 8 E. & B. 657	45
<i>Collier v. Chaplin</i> , N. P. 1865	317
<i>Collins' Case</i> , Godb. 346	217
— <i>v. Rodway</i> , N. P. 1845	233
<i>Colquitt v. Kirkman</i> , 47 Ga. 555 (1873)	239
<i>Coltherd v. Panchoon</i> , 2 D. & R. 10	131
<i>Combe v. London and North Western Rail. Co.</i> , 31 L. T. 613	287, 306
<i>Commerce, The</i> , 3 Rob. Adm. Cas. 287	342
<i>Consolidated Co. v. Curtis</i> , [1892] 1 Q. B. 495; 61 L. J., Q. B. 325; 40 W. R. 426	39
<i>Coombs v. Bristol and Exeter Rail. Co.</i> , 27 L. J., Ex. 269, 401	303
<i>Cooper v. Andrews</i> , Hob. 41	4, 27
— <i>v. Barton</i> , 3 Camp. 5, n.; 13 R. R. 736, n.	252, 257
— <i>v. Hood</i> , 28 L. J., Ch. 212 ...	20
— <i>v. Smith</i> , 15 East, 103; 13 R. R. 397	24
— <i>v. Willematt</i> , 1 C. B. 672; 68 R. R. 798	258
<i>Coppin v. Craig</i> , 7 Taunt. 243; 17 R. R. 508	52
<i>Corbett v. Packington</i> , 6 B. & C. 258	213
<i>Cormack v. Gillis</i> , cited 7 East, 480	175
<i>Cornfoot v. Fowke</i> , 6 M. & W. 358; 55 R. R. 655	133, 141
<i>Corman v. East, Counties Rail. Co.</i> , 4 H. & N. 781	338
<i>Cornwell v. Sanders</i> , 3 B. & S. 206 ...	388

	PAGE
<i>Cort v. Ambergate Rail. Co.</i> , 20 L. J., Q. B. 465	191
<i>Cotterill v. Turley</i> , 8 C. & P. 698 ...	322, 345
— <i>v. Wood</i> , 8 C. B., N. S. 568	337, 338, 345
<i>Coughlin v. Gillison</i> , [1839] 1 Q. B. 145; 68 L. J., Q. B. 147; 79 L. T. 627; 47 W. R. 1-3—C. A.	275
<i>Coupe' Co. v. Maddick</i> , [1891] 2 Q. B. 413; 60 L. J., Q. B. 676 ...	253, 255, 256
<i>Couston v. Chapman</i> , L. R. 2 H. L. (Sc. C.) 250	172
<i>Cowper v. Andrews</i> , Hob. 41	27, 28
<i>Cox v. Burbridge</i> , 13 C. B., N. S. 430; 32 L. J., C. P. 89; 11 W. R. 435	339, 371, 376
— <i>v. Walker</i> , cited 6 A. & E. 523	210, 212, 213
<i>Coxon v. Great Western Rail. Co.</i> , 29 L. J., Ex. 165; 5 H. & N. 274	304
<i>Crane v. L. Dock Co.</i> , 33 L. J., Q. B. 224; 10 L. T. 372; 12 W. R. 745	54
<i>Croft v. Allison</i> , 5 B. & Ald. 590; 23 R. R. 407	356
<i>Crosier v. Tomkinson</i> , 2 Ld. Ken. 439	223
<i>Cross v. Andrews</i> , Cro. Eliz. 622 ...	219
— <i>v. Bartlett</i> , 3 M. & P. 542	180
<i>Crouch v. Great Western Rail. Co.</i> , 11 Ex. 742; 26 L. J., Ex. 418	283, 302
— <i>v. London and North Western Rail. Co.</i> , 23 L. J., C. P. 73	282
<i>Crowder v. Anstin</i> , 3 Bing. 368; 11 Moore, 283; 2 C. & P. 208; 28 R. R. 646	50
<i>Cundy v. Lindsay</i> , 3 App. Cas. 459; 47 L. J., Q. B. 481; 38 L. T. 573	54
<i>Curtis v. Hannay</i> , 5 Esp. 83	173, 209
— <i>v. Mills</i> , 5 C. & P. 489	380
— <i>v. Rickards</i> , 1 M. & Gr. 47 ...	19
— <i>v. Thomas</i> , 33 L. T. 664—V. C. H.	44
— <i>v. Williamson</i> , L. R., 10 Q. B. 57; 44 L. J., Q. B. 27; 31 L. T. 678	635
<i>Cusack v. Robinson</i> , 30 L. J., Q. B. 261	8, 9

D.

<i>Dale v. Humfrey</i> , El. Pl. & El. 1004	22
<i>Dallman v. King</i> , 5 Scott, 382; 44 R. R. 661	179

b

	PAGE		PAGE
Dalton v. South Eastern Rail. Co., 27 L. J., C. P. 227	363, 366	Dixon v. Yates, 5 B. & Ad. 313; 39 R. R. 489	26
Danube and Black Sea Rail. Co. r. Xenos, 31 L. J., C. P. 284— Ex. Ch.	31	Dobell v. Stevens, 3 B. & C. 625; 27 R. R. 411	159
D'Arc v. London and North Western Rail. Co., L. R., 9 C. P. 325; 30 L. T. 763	295	Dorwell v. Burford, 1 Mod. 24	318
Davies v. Mann, 10 M. & W. 546; 62 R. R. 698	325, 346	Donatty v. Crowder, 11 Moore, 479 Donovan v. Laing, [1893] 1 Q. B.	240
Davis v. Artlingstall, 49 L. J., Ch. 609; 42 L. T. 507; 29 W. R. 137	37	Doonan v. Midland Rail. Co., 2 App. Cas. 792; 34 L. T. 317.....	268, 270
— v. Barrett, 6 Bing. 716.....	256	Dorrington v. Edwards, 2 Rol. 188 Drury v. De la Fontaine, 3 B. & C.	147
— v. Jones, 25 L. J., C. P. 91 ...	22	232	33
— v. Osweil, 7 C. & P. 804	205	Dublin, &c., Rail. Co. v. Shuttery, 3 App. Cas. 1155; 36 L. T. 365.....	322
— v. Phillips, Mills & Co., 24 T. L. R. 4	16	Duckworth v. Johnson, 4 H. & N. 653	366
Davy v. Chamberlayne, 4 Esp. 229. Dawes v. Harness, L. R., 10 C. P. 166; 44 L. J., C. P. 194	262	Duncan v. Cafe, 2 M. & W. 244..... — v. Topham, 8 C. B. 225; 79 R. R. 470	52
Dawson v. Chamney, 5 Q. B. 165; 13 L. J., Q. B. 33; 7 Jur. 1037	221, 222	Dunlop v. Grote, 2 C. & K. 153; 80 R. R. 834	30
— v. Collis, 10 C. B. 523...172, 175, 179, 201		— v. Higgins, 12 Jur. 295; 1 H. L. C. 381	19
— v. Midland Rail. Co., L. R., 3 Ex. 8; 42 L. J., Ex. 49; 21 W. R. 56	391	— v. Waugh, Peake, N. P. C. 167.....	151, 159
Day v. Bather, 2 H. & C. 14; 32 L. J., Ex. 171	219	Durrell v. Evans, 31 L. J., Ex. 337... Dyer v. Cowley, 17 L. J., Q. B. 360	16, 25
Dean v. Branthwaite, 5 Esp. 35..... — v. Keate, 3 Camp. 4; 13 R. R. 735	260	— v. Hargrave, 10 Ves. 507; 8 R. R. 36.....	143
— v. Morley, 33 Iowa, 120.....	258	— v. Pearson, 3 B. & C. 38; 27 R. R. 286.....	54
Deane v. Clayton, 7 Taunt. 489..... Derry v. Peek, 15 App. Cas. 337; 58 L. J., Ch. 864; 61 L. T. 265; 38 W. R. 33	86 380	Dykes v. Blake, 4 B. N. C. 463; 44 R. R. 761	30
De Schwanberg v. Buchanan, 5 C. & P. 343	160, 161	E. Eastwood v. Bain, 26 L. J., Ex. 74	193
Dewar v. Tasker, 23 T. L. R. 259— C. A.	152	Eaves v. Dixon, 2 Taunt. 343	88, 197
Dicas v. Hides, 1 Stark. 247	217	Eden v. Blake, 13 M. & W. 614; 67 R. R. 757	36, 42
Dickenson v. Foilett, 1 M. & Rob. 299	87, 88	— v. Parkinson, Doug. 732 a ...	128, 129
— v. Gapp, cited 1 M. & Scott, 78	151	Edwards v. Brewer, 2 M. & W. 375 — v. Hodding, 5 Taunt. 815; 15 R. R. 662	29
— v. Naul, 4 B. & Ad. 638	39	— v. Pearson, 6 T. L. R. 220 Egerton v. Matthews, 6 East, 307; 8 R. R. 489.....	51 23
Dickson v. Great Northern Rail. Co., 18 Q. B. D. 176; 56 L. J., Q. B. 111; 55 L. T. 868—C. A. ...	287, 299	Eicholz v. Bannister, 17 C. B., N. S. 708; 34 L. J., C. P. 105; 12 L. T. 76; 13 W. R. 96	117, 118
— v. Zizinia, 10 C. B. 602.....	128	Elliott v. Longden, 17 T. L. R. 648 — v. Pybus, 10 Bing. 512; 38 R. R. 532.....	374 190
Dimes v. Petley, 15 Q. B. 276; 19 L. J., Q. B. 449	346		
Dingle v. Hare, 7 C. B., N. S. 145...180, 214 Dixon v. Birch, L. R., 8 Ex. 135; 42 L. J., Ex. 135; 28 L. T. 36.....	218		

	PAGE		PAGE
Elliot <i>v.</i> Thomas, 3 M. & W. 170 ; 49 R. R. 558	199	Fell <i>v.</i> Knight, 8 M. & W. 269 ; 58 R. R. 608.....	217
— <i>v.</i> Von Glenn, 18 L. J., Q. B. 221	153	Felthouse <i>v.</i> Bindley, 31 L. J., C. P. 204	19
Ellis <i>v.</i> Chinnock, 7 C. & P. 169 ; 48 R. R. 778	212	Fenn <i>v.</i> Harrison, 3 T. R. 760 ...	111, 202
— <i>v.</i> Loftus Iron Co., L. R. 10 C. P. 10 ; 44 L. J., C. P. 24 ; 31 L. T. 483 ; 23 W. R. 246.....	376, 377	Fennell <i>v.</i> Ridler, 5 H. & C. 406 ; 29 R. R. 278	33
— <i>v.</i> Mortimer, 4 B. & P. 257 ...	4	Feret <i>v.</i> Hill, 23 L. J., C. P. 185 ...	160, 162
— <i>v.</i> Sheffield Gas Co., 23 L. J., Q. B. 42	330	Ferguson <i>v.</i> Carrington, 9 B. & C. 59 ; 3 C. & P. 457.....	169, 170
Elmore <i>v.</i> Kingscote, 5 B. & C. 583 ; 29 R. R. 341	18	Ferrier <i>v.</i> Peacock, 2 F. & F. 717 ...	163
— <i>v.</i> Stone, 1 Taunt. 458 ; 10 R. R. 578	11, 12, 13	Field <i>v.</i> Adams, 12 A. & E. 649 ; 54 R. R. 657	390
Elphick <i>v.</i> Barnes, 5 C. P. D. 321 ; 19 L. J., C. P. 698 ; 29 W. R. 139 ; 44 J. P. 651	4, 124	Fleider <i>v.</i> Starkie, 1 H. Bl. 17 ; 2 R. & R. 700	131, 172, 180, 181
Elton <i>v.</i> Brogden, 4 Camp. 281 ... 71, 83, 94		Filburn <i>v.</i> People's Palace, &c., Co., 25 Q. B. D. 258 ; 59 L. J., Q. B. 171 ; 38 W. R. 706—C. A.	369
— <i>v.</i> Jordan, 1 Stark., N. P. C. 127 ; 18 R. R. 754	71, 84, 95	Finley <i>v.</i> Quirk, 9 Minn. 194	72
Elvin <i>v.</i> Chapman, N. P. 1853	342	Flrth <i>v.</i> Ackroyd, N. P. 1853.....	327
Emanuel <i>v.</i> Dane, 3 Camp. 299	174	Fitzmaurice <i>v.</i> Bayley, 9 H. of L. Cas. 78	17
Emmerson <i>v.</i> Heelis, 2 Taunt. 48 ; 11 R. R. 520	25, 36, 44	Fletcher <i>v.</i> Bowsher, 2 Stark. 561 ; 20 R. R. 735	159
Englehart <i>v.</i> Farrant, [1897] 1 Q. B. 240 ; 66 L. J., Q. B. 122 ; 75 L. T. 617 ; 45 W. R. 179—C. A.	352, 354	— <i>v.</i> Rylands, L. R., 1 Ex. 265 ; L. R., 3 H. L. 330 ; 37 L. J. Ex. 161 ; 19 L. T. 220	369, 380
Eskridge <i>v.</i> Glover, 5 Stew. & Port. (Amer.) 264	3	Flurena <i>v.</i> Thornhill, 2 W. Bl. 1078	213
Essex (Earl of) <i>v.</i> Capel, N. P. 1809	383, 384, 385	Ford <i>v.</i> Sykes, N. P. 1853	118
Evans <i>v.</i> Botterill, 33 L. J., M. C. 50.....	389	Foreman <i>v.</i> Great Western Rail. Co., 38 L. T. 851	292, 300, 301
Everard <i>v.</i> Hopkins, 2 Bulst. 332 ...	232	Forth <i>v.</i> Simpson, 13 C. B. 680 ; 18 L. J., Q. B. 266 ; 78 R. R. 493 ...	238
Everett <i>v.</i> Collins, 2 Camp. 515 ; 1 R. R. 785	31, 32	Foster <i>v.</i> Smith, 18 C. B. 156	150, 154
F.		Fowler <i>v.</i> Lock, L. R., 7 C. P. 272 ; 41 L. J., C. P. 99 ; 26 L. T. 476 ; L. R., 9 C. P. 751, n. ; 43 L. J., C. P. 294, n. ; 30 L. T. 800 ; L. R., 10 C. P. 90 ; 31 L. T. 844 ; 23 W. R. 415	273, 274
Fairbank's Exors. <i>v.</i> Humpherys, 18 Q. P. D. 54	45	Fowles <i>v.</i> Great Western Rail. Co., 22 L. J., Ex. 76 ; 7 Exch. 699 ...	301
Fairman <i>v.</i> Budd, 7 Bing. 575.....	196	France <i>v.</i> Gaudet, L. R., 6 Q. B. 199 ; 40 L. J., Q. B. 121	205
Falmouth (Earl of) <i>v.</i> Penrose, 6 B. & C. 387	185	Francis <i>v.</i> Wyatt, 3 Burr. 1498 ...	57, 235, 239, 240
Farebrother <i>v.</i> Simmonds, 5 B. & Ald. 333 ; 24 R. R. 399.....	24, 25, 41	Franklin <i>v.</i> Lamond, 4 C. B. 637 ; 16 L. J., C. P. 221 ; 72 R. R. 671.....	49
Fawcett <i>v.</i> York and North Midland Rail. Co., 16 Q. B. 610 ; 15 Jur. 173 ; 20 L. J., Q. B. 222 ; 83 R. R. 630	391, 392	— <i>v.</i> South Eastern Rail. Co., 3 H. & N. 211.....	363
Fearon <i>v.</i> Mitchell, L. R., 7 Q. B. 690 ; 41 L. J., M. C. 176 ; 27 L. T. 33	56, 57	Freeman <i>v.</i> Baker, 2 N. & M. 446 ; 39 R. R. 651	148, 158
		Frend <i>v.</i> Dennett, 27 L. J., C. P. 311	159
		Fuller <i>v.</i> Abrahams, 3 B. & Bing. 116 ; 23 R. R. 626	163
		Furley <i>v.</i> Bates, 33 L. J., Ex. 43... ..	27

	PAGE		PAGE
Fyson <i>v.</i> Chambers, 9 M. & W.		Goodman <i>v.</i> Kennell, 3 C. & P. 167...	360
460	26	— <i>v.</i> Taylor, 5 C. & P. 410...	334
G.		Goodwin <i>v.</i> Cheveley, 4 H. & N.	
Gallagher <i>v.</i> Great Western Rail.		631; 28 L. J., Ex. 298; 7 W. R.	
Co., Ir. R., 8 C. L.		631	378
326	300	Goram <i>v.</i> Sweeting, 2 Wms. Sannd.	
— <i>v.</i> Humphrey, 6 L. T.		200	148
684; 10 W. R. 664	329	Gordon <i>v.</i> Great Western Rail. Co.,	
Ganly <i>v.</i> Ledwidge, 10 Ir. R., C. L.		8 Q. B. D. 44; 51 L. J.,	
33 (Q. B.)	54	Q. B. 58; 45 L. T. 509:	
Gapp <i>v.</i> Giandonati, N. P. 1857.....	252	30 W. R. 230	301
Gardiner <i>v.</i> Gray, 4 Camp. 45; 16		— <i>v.</i> Rolt, 4 Ex. 365; 18 L. J.,	
R. R. 764.....	147	Ex. 432	361
Gardner <i>v.</i> Grace, 1 F. & F. 359 ...	324	— <i>v.</i> Silber, 25 Q. B. D. 491:	
— <i>v.</i> Hart, 44 W. R. 527—D.	375	59 L. J., Q. B. 507; 63	
Garment <i>v.</i> Barrs, 2 Esp. 673.....	95	L. T. 283; 39 W. R.	
Gates <i>v.</i> Bill, [1902] 2 K. B. 38; 71		111	224
L. J., K. B. 702; 87 L. T. 288; 50		— <i>v.</i> Strange, 1 Ex. 477; 74	
W. R. 546—C. A.	331	R. R. 727	31
Gaunt <i>v.</i> Smith, N. P. 1856.....	244	Gore <i>v.</i> Gibson, 13 M. & W. 626; 67	
Geddes <i>v.</i> Pennington, 5 Dow, 164... 131,		R. R. 762.....	171
132, 197, 198, 202		Graham <i>v.</i> Ewart, 26 L. J., Ex. 97	386
Gedge <i>v.</i> Minne, 2 Bulst. 62	383	— <i>v.</i> Musson, 5 Bing. N. C.	
Gee <i>v.</i> Lucas, 16 L. T. 357	150	603; 50 R. R. 807.....	25
Gelber <i>v.</i> Berkley, Skin. 648	227	Grand Trunk Rail. Co. of Canada <i>v.</i>	
Gelley <i>v.</i> Clerk, Cro. Jac. 188...219, 220, 239		Jennings, 13 App. Cas. 800; 58	
George (The) and Richard, L. R., 3		L. J., P. C. 1; 59 L. T. 679; 37	
Adm. 466; 24 L. T. 717	362	W. R. 430	366
Gething <i>v.</i> Morgan, Times, May 2,		Grange <i>v.</i> Silcock, 77 L. T. 340; 46	
1857	372	W. R. 221; 61 J. P. 709—D.	374
Gibbon <i>v.</i> Standon, 16 L. T. 497 ...	274	Granger <i>v.</i> Dacre, 12 M. & W.	
Gibbons <i>v.</i> Pipper, 1 Ld. Raym...38	335	431	191
Giblin <i>v.</i> McMullen, L. R., 2 P. C.		Gray <i>v.</i> Cox, 4 B. & C. 115; 28 R. R.	
317	277	769	129
Gibson <i>v.</i> Carruthers, 8 M. & W. 346	169	— <i>v.</i> Gutteridge, 3 C. & P. 40; 31	
— <i>v.</i> Holland, L. R., 1 C. P. 1:		R. R. 343	51, 52
35 L. J., C. P. 5; 14		— <i>v.</i> Pullen, 32 L. J., Q. B. 169...	330,
W. R. 86	20	331	
— <i>v.</i> Pepper, 2 Salk. 637.....	317	Great Northern Rail. Co. <i>v.</i> Swaf-	
Gilbert's Case, 1 Mood. C. C. 186 ...	60	field, L. R., 9 Ex. 132; 43 L. J.,	
Gilbertson <i>v.</i> Richardson, 5 C. B.		Ex. 89; 30 L. T. 562	302
502	365	Great Western Rail. Co. <i>v.</i> Glenister,	
Gill <i>v.</i> Manchester, &c., Rail. Co.,		29 L. T. 422; 22 W. R. 72	301
L. R., 8 Q. B. 186; 42 L. J., Q. B.		Great Western Rail. Co. <i>v.</i> McCarthy,	
89; 28 L. T. 587	305	12 App. Cas. 218; 56 L. J., P. C.	
Gilliat <i>v.</i> Gilliat, L. R., 9 Eq. 60:		33; 56 L. T. 582; 35 W. R. 429...	300,
39 L. J., C. 142	50	301	
Gimson <i>v.</i> Woodfall, 2 C. & P. 41 ...	63	Greathead <i>v.</i> Morley, 3 M. & G. 139:	
Gladman <i>v.</i> Johnson, 36 L. J., C. P.		60 R. R. 679	386
153	373	Green <i>v.</i> Bartlett, 8 L. T. 503.....	53
Godwin <i>v.</i> Francis, L. R., 5 C. P.		— <i>v.</i> Baverstock, 14 C. B., N. S.	
295; 39 L. J., C. P. 121; 22 L. T.		204; 32 L. J., C. P.	
338	24	181	50
Gompertz <i>v.</i> Bardett, 22 L. J., Q. R.		— <i>v.</i> Goddard, 2 Salk. 640	389
99	185	— <i>v.</i> Greenbank, 2 Marsh. 485:	
— <i>v.</i> Denton, 1 Cr. & M. 207	177	17 R. R. 529	186, 187
		Greenland <i>v.</i> Chaplin, 5 Exch. 243;	
		82 R. R. 655	323
		Greenway <i>v.</i> Marshall, N. P. 1845...	182

TABLE OF CASES.

xxi

	PAGE		PAGE
Gregory <i>v.</i> Piper, 9 B. & C. 591; 4 M. & R. 500; 33 R. R. 268	265	Hands <i>v.</i> Burton, 9 East, 349.....	194
— <i>v.</i> West Midland Rail. Co., 33 L. J., Ex. 155	293, 298	Hanson <i>v.</i> Mayer, 6 East, 621; 8 R. R. 572	28
Grier <i>v.</i> Sampson, 27 Penn. St. 183	343	— <i>v.</i> Roberdean. Peake. N. P. C. 163	49, 51
Grieve <i>v.</i> Milton, N. P. 1850	327	Hanway <i>v.</i> Boulthbee, 4 C. & P. 350; 1 M. & Rob. 15	381
Griffiths <i>v.</i> Lee, 1 C. & P. 110.....	302	Hardaere <i>v.</i> Stewart, 5 Esp. 103 ...	37
— <i>v.</i> Perry, 28 L. J., Q. B. 204	31, 208	Hardeastle <i>v.</i> Bielby, [1892] 1 Q. B. 709; 61 L. J., M. C. 101	332
Grill <i>v.</i> General Iron Screw Colliery Co., L. R., 1 C. P. 612	277	— <i>v.</i> South Yorkshire Rail. Co., 28 L. J., Ex. 139	328
Groncott <i>v.</i> Williams, 32 L. J., Q. B. 237	244	Hardingham <i>v.</i> Allen, 5 C. B. 793; 75 R. R. 839	43, 52, 186, 194, 195
Gundry <i>v.</i> Feltham, 1 T. R. 337; 1 R. R. 215	383, 384, 385	Harington <i>v.</i> Hogart, 1 B. & Ad. 577; 35 R. R. 382	52
Gunnis <i>v.</i> Eehart, 1 H. Bla. 289; 2 R. R. 769.....	41	Harman <i>v.</i> Reeve, 25 L. J., C. P. 257 ..	7
Guthing <i>v.</i> Lynn, 2 B. & Ad. 232 ...	27, 188	Harper <i>v.</i> Mareks, [1894] 2 Q. B. 319	369
Gutsole <i>v.</i> Mathers, 1 M. & W. 495 ..	187	— <i>v.</i> Williams, 4 Q. B. 219, 232; 62 R. R. 334	133, 206
Gwilliam <i>v.</i> Twist, [1895] 2 Q. B. 84; 64 L. J., Q. B. 474; 72 L. T. 579; 43 W. R. 566	354, 355	Harris <i>v.</i> Fiat Motors, Ltd., 22 T. L. R. 556—D.	353
		— <i>v.</i> Midland Rail. Co., 25 W. R. 63.....	295, 300
		— <i>v.</i> Mobbs, 3 Ex. D. 268; 39 L. T. 164; 27 W. R. 154	319
		— <i>v.</i> Nickerson, L. R., 8 Q. B. 286; 42 L. J., Q. B. 171; 28 L. T. 410; 21 W. R. 635	48
		Harrison <i>v.</i> London, Brighton and South Coast Rail. Co., 29 L. J., Q. B. 209; 31 L. J., Q. B. 113—Ex. Ch.....	296, 297, 301
		— <i>v.</i> Luke, 14 M. & W. 139	184
		Hart <i>v.</i> Baxendale, 16 L. T. 390.....	311
		Hartley <i>v.</i> Herriman, 1 B. & A. 620 ..	372
		Harvey <i>v.</i> Archbold, 3 B. & C. 626 ..	192
		— <i>v.</i> Young, Yelv. 20	162
		Hase <i>v.</i> London General Omnibus Co., 23 T. L. R. 616	340
		Hawkes <i>v.</i> Smith, Car. & M. 72	302
		Hawkins <i>v.</i> Cooper, 8 C. & P. 473 ...	332
		— <i>v.</i> Rutt, Peake. N. P. C. 248	31
		Hawse <i>v.</i> Crow, R. & M. 414	170
		Hawthorn <i>v.</i> Hammond, 1 C. & K. 407	217
		Hay, Ex parte, 3 T. L. R. 24	375
		Haycraft <i>v.</i> Creasy, 2 East, 92; 6 R. R. 380	164, 165
		Head <i>v.</i> Diggon, 3 M. & R. 97.....	45
		— <i>v.</i> Tattersall, L. R., 7 Ex. 7; 41 L. J., Ex. 4; 25 L. T. 631.....	125, 178
		Heffer <i>v.</i> Martyn, 36 L. J., Ch. 372...	51
Hadley <i>v.</i> Baxendale, 23 L. J., Ex. 179	204		
— <i>v.</i> Taylor, L. R., 1 C. P. 53....	328		
Haigh <i>v.</i> Royal Mail Steam Packet Co., 52 L. J., Q. B. 640; 49 L. T. 802; 48 J. P. 230—C. A.	363		
Halbron <i>v.</i> International Horse Agency, Ltd., [1903] 1 K. B. 270; 72 L. J., K. B. 90; 88 L. T. 232; 51 W. R. 62	37		
Hale <i>v.</i> Rawson, 27 L. J., C. P. 191 ..	207		
Hales <i>v.</i> London and North Western Rail. Co., 32 L. J., Q. B. 292	309		
Halestrap <i>v.</i> Gregory, [1895] 1 Q. B. 561; 64 L. J., Q. B. 415; 72 L. T. 292; 43 W. R. 507	244		
Hall <i>v.</i> Condor, 2 C. B., N. S. 40 ...	117		
— <i>v.</i> Johnson, 13 W. R. 411 ...	361, 362		
— <i>v.</i> Knox, 33 L. J., M. C. 1	389		
Hamlin <i>v.</i> Great Northern Rail. Co., 1 H. & N. 410	205		
Hammack <i>v.</i> White, 11 C. B., N. S. 588	335, 336, 341		
Hammond <i>v.</i> Bussey, 20 Q. B. D. 79; 57 L. J., Q. B. 58	204		
Handyside <i>v.</i> Wilson, 3 C. & P. 530; 33 R. R. 695	342		
Handford <i>v.</i> Palmer, 2 B. & Bing. 359	278		
Handley <i>v.</i> M'Laine, 10 Bing. 488...	18		

	PAGE		PAGE
Hegan <i>v.</i> Eighth Avenue Rail. Co., 15 N. Y. 380	344	Holyday <i>v.</i> Morgan, 28 L. J., Q. B. 9	68, 106, 144
Heilbut <i>v.</i> Hickson, L. R., 7 C. P. 438; 41 L. J., C. P. 228	209	Hooper <i>v.</i> Kenshole, 2 Q. B. D. 127; 46 L. J., M. C. 160; 36 L. T. 111	56
Helyer <i>v.</i> Hawke, 5 Esp. 72	140, 202	Hopkins <i>v.</i> Tanqueray, 28 L. J., C. P. 162	50, 149, 163
Hemming <i>v.</i> Parry, 6 C. & P. 580	126	— <i>v.</i> Ware, L. R., 4 Ex. 268; 38 L. J., Ex. 147	31
Herbert <i>v.</i> Markwell, 45 L. T. 649; 46 J. P. 358	219	Hote <i>v.</i> Milner, Peake, N. P. C. 58, n.	182
Heugh <i>v.</i> London and North Western Rail. Co., L. R., 5 Ex. 51; 39 L. J., Ex. 48; 21 L. T. 676	303	Horne <i>v.</i> Midland Rail. Co., L. R., 8 C. P. 131; 42 L. J., C. P. 54	204
Hibblewhite <i>v.</i> M'Morine, 5 M. & W. 462	27	Horsfall <i>v.</i> Thomas, 1 H. & C. 90	161
Hickman <i>v.</i> Haynes, L. R., 10 C. P. 598; 44 L. J., C. P. 358; 32 L. T. 873; 23 W. R. 871	22	Hotson <i>v.</i> Brown, 9 C. B., N. S. 445	179
Hicks <i>v.</i> Newport, &c., Rail. Co., 4 B. & S. 403, n.	366	Houldsworth <i>v.</i> City of Glasgow Bank, 5 App. Cas. 317	177
Higgins <i>v.</i> Senior, 8 M. & W. 845; 58 R. R. 884	133	Hounsell <i>v.</i> Smyth, 7 C. B., N. S. 731	328
Higgins <i>v.</i> Burton, 26 L. J., Ex. 342	169	Howard <i>v.</i> Castle, 6 T. R. 634; 3 R. R. 296	50
Higgs <i>v.</i> Thrale, N. P. 1850	127	— <i>v.</i> Sheward, L. R., 2 C. P. 148; 36 L. J., C. P. 42	138, 141
Hill <i>v.</i> Balls, 2 H. & N. 299; 27 L. J., Ex. 45	120, 215	Howe <i>v.</i> Palmer, 3 B. & Ald. 324	11, 12
— <i>v.</i> Gray, 1 Stark. N. P. C. 434; 18 R. R. 802	48, 164	— <i>v.</i> Smith, 27 Ch. D. 89; 53 L. J., Ch. 1055; 50 L. T. 573; 32 W. R. 802	14
— <i>v.</i> South Staffordshire Rail. Co., L. R., 18 Eq. 194; 43 L. J., Ch. 566	206	Jett <i>v.</i> Haswell, 4 Camp. 118	186
Hilliard <i>v.</i> Orbell, N. P. 1834	177	— <i>v.</i> Baxendale, 2 H. & N. 575; 27 L. J., Ex. 93	287, 302
Hinchcliffe <i>v.</i> Barwick, 5 Ex. D. 177; 49 L. J., Ex. 495; 42 L. T. 492	125	— <i>v.</i> Lombard, L. R., 1 H. L. 324	193
Hinde <i>v.</i> Whitehouse, 7 East, 568; 8 R. R. 676	17, 41	— <i>v.</i> Roberts, 6 Ex. 697; 86 R. R. 438	379
Hiorf <i>v.</i> Bott, L. R., 9 Ex. 86; 43 L. J., Ex. 81; 30 L. T. 25; 22 W. R. 414	38	Hughes <i>v.</i> Macfie, 33 L. J., Ex. 177	324
Hoare <i>v.</i> Great Western Rail. Co., 37 L. T. 186; 25 W. R. 83	301	— <i>v.</i> Quentin, 3 C. & P. 703	365
Hobbs <i>v.</i> London and South Western Rail. Co., L. R., 10 Q. B. 117; 44 L. J., Q. B. 52; 32 L. T. 352; 23 W. R. 520	303	Humble <i>v.</i> Hunter, 12 Q. B. 310; 76 R. R. 315	136
Hodgman <i>v.</i> West Midland Rail. Co., 33 L. J., Q. B. 233	303	Hume <i>v.</i> Oldacre, 1 Stark. N. P. C. 351; 18 R. R. 779	385
Hoghton's (Sir Henry) Case, cited 5 B. & C. 556	260	Humphrey <i>v.</i> Dale, 27 L. J., Q. B. 390	199
Hole <i>v.</i> Sittingbourne Rail. Co., 6 H. & N. 488; 30 L. J., Ex. 81	330	Hunt <i>v.</i> Wyman, 100 Mass. 198	126
Holleran <i>v.</i> Bagnell, L. R., 4 Ir. 740 — C. P. D.	362	Huntley, Marchioness of <i>v.</i> Bedford Hotel Co., 56 J. P. 53—C. A.	219
Holmes <i>v.</i> Hoskins, 9 Ex. 753; 96 R. R. 959	7, 10	Hurst <i>v.</i> Orbell, 8 A. & E. 107; 35 R. R. 284	186
— <i>v.</i> Mather, L. R., 10 Ex. 261; 44 L. J., Ex. 176; 33 L. T. 361	336	Hyams <i>v.</i> Webster, L. R., 2 Q. B. 264; L. R., 4 Q. B. 138—Ex. Ch.	330
— <i>v.</i> Onion, 2 C. B., N. S. 790	260	Hyman <i>v.</i> Nye, 6 Q. B. D. 685; 44 L. T. 919; 55 J. P. 554	250
— <i>v.</i> Sixsmith, 7 Ex. 802; 86 R. R. 838	170		

I.

Illidge <i>v.</i> Goodwin, 5 C. & P. 190; 38 R. R. 798	322
Inchbald <i>v.</i> Western Neilgherry Coffee Co., 11 L. T. 345	207
Ireland <i>v.</i> Johnson, 1 Bing. N. C. 162	187
Irons <i>v.</i> Smallpiece, 2 B. & Ald. 551; 21 R. R. 395	2

TABLE OF CASES.

xxiii

	PAGE
Irvine <i>v.</i> Watson, 5 Q. B. D. 102 : 49 L. J., Q. B. 239 ; 41 L. T. 51 : 5 Q. B. D. 414—C. A.	136
Irving <i>v.</i> Motley, 7 Bing. 551.....	169
Ismay <i>v.</i> Blake, 66 L. T. 530 ; 56 J. P. 486.....	309
J.	
Jackson <i>v.</i> Cummins, 5 M. & W. 350 ; 52 R. R. 737 ...	237, 258, 246
— <i>v.</i> Smithson, 15 M. & W. 563 ; 71 R. R. 763.....	379
Jacobs <i>v.</i> Latour, 2 M. & P. 205.....	237
James <i>v.</i> Morgan, 1 Lev. 111	207
Janson <i>v.</i> Brown, 1 Camp. 41 ; 10 R. R. 626	381
Jardine <i>v.</i> Stonefield Laundry Co., 14 Rettie, 849	344, 345
Jeffery <i>v.</i> Walton, 1 Stark N. P. C. 267	274
Jeffrey <i>v.</i> St. Pancras Vestry, 63 L. J., Q. B. 618	328
Jendwine <i>v.</i> Slade, 2 Esp. 572 ; 5 R. R. 754	150, 159
Jennings <i>v.</i> Rundall, 8 D. & R. 325 : 4 R. R. 680.....	256
Joel <i>v.</i> Morrison, 6 C. & P. 501 : 40 R. R. 814	356, 358
Johnson <i>v.</i> Dodgson, 2 M. & W. 653 ; 46 R. R. 733	16, 23, 199
— <i>v.</i> Hill, 3 Stark. N. P. C. 172 ; 23 R. R. 764.....	226
— <i>v.</i> Johnson, 3 B. & P. 162 : 6 R. R. 736.....	2
— <i>v.</i> Midland Rail. Co., 4 Ex. 367 ; 80 R. R. 611.....	287
— <i>v.</i> Pye, 1 Sid. 258	170
— <i>v.</i> Stear, 33 L. J., C. P. 130	205
Jones <i>v.</i> Bright, 3 M. & P. 155 ; 5 Bing. 533 ; 30 R. R. 728	116, 121, 129, 167
— <i>v.</i> Cowley, 4 B. & C. 445 : 6 D. & R. 533.....	126
— <i>v.</i> Dowle, 9 M. & W. 19 ; 60 R. R. 652	198, 199
— <i>v.</i> Gibbons, 22 L. J., Ex. 348	184
— <i>v.</i> Hart, 2 Salk. 440	232
— <i>v.</i> Jackson, 29 L. T. 399	219
— <i>v.</i> Just, L. R., 3 Q. B. 197 ; 37 L. J., Q. B. 89 ; 18 L. T. 208	130, 147, 209, 210
— <i>v.</i> Liverpool, Corporation of, 14 Q. B. D. 890 ; 54 L. J., Q. B. 345 ; 33 W. R. 551.	261, 268, 269, 271
— <i>v.</i> Osborn, 2 Chit. 484.....	216

	PAGE
Jones <i>v.</i> Owen, 24 L. T. 587	378
— <i>v.</i> Page, 15 L. T. 619	252
— <i>v.</i> Pearle, 1 Stra. 557	226
— <i>v.</i> Perry, 2 Esp. 482	372
— <i>v.</i> Powell, 5 B. & C. 650 ; 8 D. & R. 416 ; 29 R. R. 352	247
— <i>v.</i> Scullard, [1898] 2 Q. B. 565 ; 67 L. J., Q. B. 895 ; 79 L. T. 386	266-268, 271
— <i>v.</i> Thirloe, 8 Mod. 172.....	226, 227
— <i>v.</i> Tyler, 1 A. & E. 522 ; 40 R. R. 354.....	221
— <i>v.</i> Victoria Graving Dock Co., 2 Q. B. D. 314 ; 46 L. J., Q. B. 219 ; 32 L. T. 347	24
— <i>v.</i> Williams, 46 L. J., M. C. 270 ; 36 L. T. 559 ; 25 W. R. 501.	388
Jordan <i>v.</i> Norton, 4 M. & W. 155 ; 51 R. R. 508	10, 21, 142
Joseph <i>v.</i> Adkins, 2 Stark. N. P. C. 76 ; 19 R. R. 677	62
Josling <i>v.</i> Irvine, 6 H. & N. 512.....	208
Judge <i>v.</i> Cox, 1 Stark. 285 ; 18 R. R. 769	372
Judson <i>v.</i> Etheridge, 1 Cr. & M. 743	246
Justice <i>v.</i> Gosling, 21 L. J., C. P. 94	316, 317

K.

Kain <i>v.</i> Old, 2 B. & C. 627 ; 26 R. R. 497	2, 3, 22, 127
Kearney <i>v.</i> London, Brighton and South Coast Rail. Co., L. R., 5 Q. B. 411 ; L. R., 6 Q. B. 759— Ex. Ch.	341
Keen <i>v.</i> Henry, [1894] 1 Q. B. 292 ; 63 L. J., Q. B. 211 ; 69 L. T. 671 ; 42 W. R. 214 ; 58 J. P. 262—C. A.	350
Kellett <i>v.</i> Stannard, 4 Ir. Jur. 50 ...	380
Kelner <i>v.</i> Baxter, L. R., 2 C. P. 174 ; 36 L. J., C. P. 94	133
Kemp <i>v.</i> Falk, 7 App. Cas. 573	30
Kendall <i>v.</i> London and South West- ern Rail. Co., L. R., 7 Ex. 373 ; 41 L. J., Ex. 184 ; 26 L. T. 735	284
— <i>v.</i> Marshall, 11 Q. B. D. 356	29
Kenner <i>v.</i> Hardy, 28 Amer. Rep. 615	147
Kent <i>v.</i> Midland Rail. Co., L. R., 10 Q. B. 1 ; 44 L. J., Q. B. 18 ; 31 L. T. 430.....	289
Kenworthy <i>v.</i> Scholfield, 2 B. & C. 945 ; 26 R. R. 600.....	17, 41
Kenyon <i>v.</i> Hart, 13 W. R. 406	389

	PAGE		PAGE
Kibble <i>v.</i> Gough, 38 L. T. 204—		Lee <i>v.</i> Riley, 18 C. B., N. S. 722;	
C. A.	11, 14	34 L. J., C. P. 212; 12	
Kiddell <i>v.</i> Burnard, 9 M. & W. 670;		L. T. 388; 13 W. R. 751...	376
60 R. H. 857	67, 68, 70, 71, 83,	— <i>v.</i> Shore, 1 B. & C. 94; 25 R. R.	
94, 105, 114, 201		317	191
Kilpin <i>v.</i> Ratley, [1892] 1 Q. B. 582;		Leeson <i>v.</i> Smith, 4 N. & M. 304	192
66 L. T. 797; 40 W. R. 479.....	2	Legg <i>v.</i> Pardoe, 9 C. B., N. S. 289...	388
Kling <i>v.</i> Boston, cited 7 East, 481, n.	175,	Legge <i>v.</i> Tucker, 1 H. & N. 500.....	242
201		Leigh <i>v.</i> Patterson, 8 Taunt. 540; 20	
— <i>v.</i> London Improved Cab Co.,		R. R. 552	208
23 Q. B. D. 281; 58 L. J.,		Leroux <i>v.</i> Brown, 16 Jur. 1021	5
Q. B. 456; 61 L. T. 34;		Levy <i>v.</i> Langridge, 4 M. & W. 337...	160
37 W. R. 737; 53 J. P.		— <i>v.</i> Lord Herbert, 7 Taunt. 318	191
788—C. A.	349	Lewis <i>v.</i> Great Western Rail. Co., 5	
— <i>v.</i> Price, 2 Chit. 416	209	H. & N. 867	295
— <i>v.</i> Sears, 2 C. M. & R. 53 ...	187, 193	— <i>v.</i> Great Western Rail. Co., 3	
— <i>v.</i> Spurr, 8 Q. B. D. 104.....	349	Q. B. D. 195; 47 L. J.,	
Kingsford <i>v.</i> Merry, 11 Ex. 577; 26		Q. B. 131; 37 L. T. 744;	
L. J., Ex. 83	169	26 W. R. 255—C. A.	291,
Kington <i>v.</i> Kington, 11 M. & W. 233	31	295, 300, 301, 302	
Kirby <i>v.</i> Great Western Rail. Co., 18		— <i>v.</i> Nicholson, 21 L. J., Q. B.	
L. T. 658.....	297	316	133
Knight's Case, 1 Lewin's C. C. 10 ...	312	— <i>v.</i> Peake, 7 Taunt. 153; 2	
Knight <i>v.</i> Fox, 5 Ex. 725.....	331	Marsh. 43; 17 R. R. 275	71,
Knox <i>v.</i> Whalley, 1 Esp. 159	200	214	
Kornegay <i>v.</i> White, 10 Ala. 255.....	67	— <i>v.</i> Padrick, 29 L. T. 178	21
Kronheim <i>v.</i> Johnson, 7 Ch. D. 60;		Lieckbarrow <i>v.</i> Mason, 2 T. R. 63; 1	
47 L. J., Ch. 132; 37 L. T. 752 ...	23	R. R. 425.....	29, 260
L.		Liddard <i>v.</i> Kain, 2 Bing. 183; 9	
Laing <i>v.</i> Hain, 2 S. M. & P. 395		Moore, 356; 27 R. R. 582	129
(Court of Sess. Sco.).....	43, 51	Limpus <i>v.</i> General Omnibus Co., 1	
Lake Shore Railroad Co. <i>v.</i> Perkins,		H. & C. 526	346, 361
25 Mich. 329	287	Lindley <i>v.</i> Lacey, 5 N. R. 51	22
Lamb <i>v.</i> Palk, 9 C. & P. 629	357	Line <i>v.</i> Taylor, 3 F. & F. 731	372
Lambert <i>v.</i> Harrison, N. P. 1853 ...	318	Little <i>v.</i> Hacket, 9 Davis, Supr. Ct.	
Lamond <i>v.</i> Davall, 9 Q. B. 1030; 16		U. S. 360	333
L. J., Q. B. 136	30	Liverpool Adelphi Loan Association	
Lane <i>v.</i> Cotton, 1 Salk. 18.....	217, 229,	<i>v.</i> Fairhurst, 9 Ex. 422; 96 R. R.	
232, 275		778	170
Laugher <i>v.</i> Pointer, 5 B. & C. 547;		Llandaff and Canton Districts Mar-	
29 R. R. 319	260, 261, 262, 267	ket Co. <i>v.</i> Lyndon, 6 Jur., N. S.	
Lay <i>v.</i> Midland Rail. Co., 34 L. T.		1344; 30 L. J., M. C. 105; 8	
30	324	W. R. 693	56
Laythrope <i>v.</i> Bryant, 2 Bing. N. C.		Lloyd <i>v.</i> Ogleby, 5 C. B., N. S. 667 .	342,
744; 42 R. R. 709.....	16, 23	343, 345	
Layton <i>v.</i> Hurry, 8 Q. B. 811; 70		Load <i>v.</i> Green, 15 M. & W. 216	169
R. R. 661.....	229	Lobb <i>v.</i> Stanley, 5 Q. B. 574 581 ...	23
Leame <i>v.</i> Bray, 2 East, 593.....	342	Lockett <i>v.</i> Nicklin, 2 Ex. 93; 76	
Leather Cloth Co. <i>v.</i> Heironimus,		R. R. 502	22
L. R., 10 Q. B. 140; 41 L. J.,		Loder <i>v.</i> Kekulé, 27 L. J., C. P. 27...	209,
Q. B. 51; 32 L. T. 307.....	19	210	
Leatt <i>v.</i> Vine, 30 L. J., M. C. 207 ...	388	London Chartered Bank of Australia	
Lee <i>v.</i> Bayces, 18 C. B. 599	55, 64	<i>v.</i> Lempriere, L. R., 4 P. C.	
— <i>v.</i> Irwin, 4 Ir. Jur. 372 (Ex.		572	193
Ir.)	238	— General Omnibus Co. <i>v.</i>	
		Booth, 63 L. J., Q. B. 244.	349
		— and Yorkshire Bank <i>v.</i> Bel-	
		ton, 15 Q. B. D. 457; 54 L. J.,	
		Q. B. 568.....	249

TABLE OF CASES.

XXV

	PAGE
Longmate <i>v.</i> Ledger, 6 Jur., N. S. 481	171
Longmead <i>v.</i> Holliday, 6 Ex. 764, 766; 86 R. R. 459.....	160, 233
Lovesey <i>v.</i> Stallard, 30 L. T. 792 ...	388
Lowe <i>v.</i> London and North Western Rail Co., 21 L. J., Q. B. 363	182
Lucas <i>v.</i> Bristow, El. Bl. & El. 907 .	22
— <i>v.</i> Delacour, 1 M. & W. 249 :	
14 R. R. 426	136
Lygo <i>v.</i> Newbolt, 23 L. J., Ex. 108 :	
96 R. R. 727	260, 322, 324
Lynch <i>v.</i> Nurdin, 1 Q. B. 33 : 55 R. R. 191.....	322, 323
Lyons <i>v.</i> Martin, 8 A. & E. 515 ; 3 N. & P. 509 ; 47 R. R. 647	346
M.	
Macdonald <i>v.</i> Longbottom, 6 Jur., N. S. 724.....	22
Mackay <i>v.</i> Commercial Bank of New Brunswick, L. R., 5 P. C. 394 : 43 L. J., P. C. 31	133
Mackenzie <i>v.</i> Cox, 9 C. & P. 632 ; 72 R. R. 762.....	239
Maclean <i>v.</i> Dunn, 4 Bing. 722 ; 29 R. R. 714	24, 51, 182, 183
Mallan <i>v.</i> Radloff, 5 N. R. 54	153
Manby <i>v.</i> Scott, 1 Mod. 136	28
Manchester and Altrincham Rail. Co. <i>v.</i> Fullarton, 14 C. B., N. S. 54 ; 11 W. R. 754	319
Manchester, Sheffield and Lincolnshire Rail. Co. <i>v.</i> Brown, 8 App. Cas. 703 ; 53 L. J., Q. B. 124 : 50 L. T. 281 ; 32 W. R. 207	300
Manchester, Sheffield and Lincolnshire Rail. Co. <i>v.</i> Wallis, 14 C. B. 213	393
Mangan <i>v.</i> Atterton, L. R., 1 Ex. 239 ; 35 L. J., Ex. 161	324
Mann <i>v.</i> Ward, 8 T. L. R. 699.....	322, 324
Manzoni <i>v.</i> Douglas, 6 C. P. D. 145.....	317, 336, 352
Marfell <i>v.</i> South Wales Rail. Co., 8 C. B., N. S. 525 ; 29 L. J., C. P. 315	243, 393
Margetson <i>v.</i> Wright, 7 M. & P. 696 ; 1 M. & Sc. 622 ; 33 L. J., 582.....	108, 144, 145, 146, 147
Marner <i>v.</i> Banks, 17 L. T. 147 ; 16 W. R. 62	258
Marsh <i>v.</i> Jelf, 3 F. & F. 234	36
— <i>v.</i> Keating, 1 Bing. N. C. 198 :	
37 R. R. 75	63
Marshall <i>v.</i> Lynn, 6 M. & W. 118 :	
55 R. R. 534	21

	PAGE
Marson <i>v.</i> Short, 2 Bing. N. C. 118 ; 2 Scott, 242 ; 42 R. R. 544	190
Martin <i>v.</i> North Metropolitan Tramways Co., 3 T. L. R. 600	317
Martindale <i>v.</i> Smith, 1 Q. B. 395 ...	28, 29
Martineau <i>v.</i> Kitching, L. R., 7 Q. B. 436	27
Marvin <i>v.</i> Wallace, 6 E. & B. 726 ; 2 Jur., N. S. 689	10
Marzetti <i>v.</i> Williams, 1 B. & Ad. 415 :	
35 R. R. 329	205
Mash <i>v.</i> Pensham, 1 M. & Rob. 442...	165, 190
Mason <i>v.</i> Keeling, 12 Mod. 333 ...	270, 371
Masters <i>v.</i> Green, 20 Q. B. D. 807 ; 59 L. T. 476	249
Matson <i>v.</i> Baird, 3 App. Cas. 1082 ; 39 L. T. 304 ; 26 W. R. 835	392
Matthews <i>v.</i> London Street Tramways Co., 58 L. J., Q. B. 12 ; 60 L. T. 47 ; 52 J. P. 774.....	333
May <i>v.</i> Burdett, 9 Q. B. 101 : 72 R. R. 189	379, 380
Mayhew <i>v.</i> Wardley, 14 C. B., N. S. 550	387, 388
McCance <i>v.</i> London and North Western Rail. Co., 7 H. & N. 477 ; 31 L. J., Ex. 65 ; 34 L. J., Ex. 39— Ex. Ch.	298, 300, 311
McCarthy <i>v.</i> Young, 6 L. J., Ex. 227 ; 3 L. J., Ex. 227 ; 3 L. J., Ex. 227 ; 3 L. J., Ex. 227	274
McConnell <i>v.</i> Murphy, L. R., 1 C. 203 ; 28 L. T. 713	122
McHole <i>v.</i> Davies, 1 Q. B. D. 59 ; 45 L. J., M. C. 30 ; 33 L. T. 502 ; 24 W. R. 343	57
M'Kean <i>v.</i> M'Iver, L. R., 6 Ex. 36 ; 40 L. J., Ex. 30 ; 24 L. T. 559 ...	302
M'Kenzie <i>v.</i> Hancock, R. & M. 436 ; 27 R. R. 769	210
M'Kone <i>v.</i> Wood, 5 C. & P. 1 : 38 R. R. 787	372
M'Laughlin <i>v.</i> Pryor, 1 C. & Marsh. 354 ; 4 Scott, N. R. 655 ; 4 M. & G. 48 ; 61 R. R. 455 ...	263, 264, 265, 352
McMahon <i>v.</i> Field, 7 Q. B. D. 591 ; 50 L. J., Ex. 552—C. A.	204
M'Manns <i>v.</i> Cricket, 1 East. 106 ; 5 R. R. 518	346
— <i>v.</i> Fortescue, 1907 2 K. B. 1 : 23 T. L. R. 292—C. A.	47
— <i>v.</i> Lancashire and Yorkshire Rail. Co., 4 H. & N. 327— Ex. Ch.	291, 295, 299
Medawar <i>v.</i> Grand Hotel Co., [1891] 2 Q. B. 11 ; 60 L. J., Q. B. 209 ; 64 L. T. 851.....	216

PAGE		PAGE	
Mellish <i>v.</i> Motteux, Penke, N. P. C.	115	Moss <i>v.</i> Sweet, 16 Q. B. 433; 20 L. J.	179, 184,
Mellor <i>v.</i> Leather, 17 Jur. 709	66	Q. B. 167; 16 L. T., O. S.	200
Mesnard <i>v.</i> Aldridge, 3 Esp. 271	43, 44	341; 88 R. R. 560	179, 184,
Metropolitan Coffee Palace Co., Re,		— <i>v.</i> Townsend, 1 Bulst. 207	225, 227
24 Ch. D. 367	45	Mowatt <i>v.</i> Lord Lonsborough, 3	206
Metzler <i>v.</i> Gonnol, 32 L. T. 658	21	E. & B. 307	206
Meux <i>v.</i> Great Eastern Rail. Co.,		Mullet <i>v.</i> Mason, L. R., 1 C. P. 559;	214
[1895] 2 Q. B. 387	279	35 L. J., C. P. 239	214
Mews <i>v.</i> Carr, 26 L. J., Ex. 39	36	Mulliner <i>v.</i> Florence, 3 Q. B. D. 484;	
Michael <i>v.</i> Alestree, 2 Lev. 172; 1		47 L. J., Q. B. 700; 38 L. T. 167	
Vent. 295	317, 376, 379	— C. A.	223, 225, 228
Midland Rail. Co. <i>v.</i> Haykin, 17		Mummery <i>v.</i> Paul, 1 C. B. 322	160,
C. B. 126	393		187, 193
Milan, The, Lush, 388	333	Murley <i>v.</i> Grove, 46 J. P. 360	329
Mileham <i>v.</i> St. Marylebone Borough		Murphy <i>v.</i> Boese, L. R., 10 Ex. 126;	
Council, 1 L. G. R. 412	270	44 L. J., Ex. 40; 32 L. T. 122	25
Miles <i>v.</i> Hutchings, [1903] 2 K. B.		Murray <i>v.</i> Mann, 2 Ex. 538; 76	
714; 71 L. J., K. B. 775;		R. R. 686	53, 133, 160, 168, 241
89 L. T. 420	382	Mischamp <i>v.</i> Lancaster and Preston	
— <i>v.</i> Sheward, 8 East, 7	188	Rail. Co., 8 M. & W. 421; 3 H. &	
Miller <i>v.</i> Beale, 27 W. R. 493 (M. R.)	53	C. 771; 4 H. & C. 582; 58 R. R.	
— <i>v.</i> Kimbray, 16 L. T. 360	373	758—Ex. Ch.	297, 304
— <i>v.</i> Lawton, 15 C. B., N. S. 834	137	Myers <i>v.</i> London and South Western	
Mills <i>v.</i> Armstrong, 13 App. Cas. 1;		Rail. Co., L. R., 5 C. P. 1	309
57 L. J., P. D. & A. 65; 58 L. T.		Mynn <i>v.</i> Jolliffe, 1 M. & Rob. 326; 42	
423; 36 W. R. 870; 52 J. P. 212	333	R. R. 802	51
Milne <i>v.</i> Marwood, 15 C. B. 778	160		
Milnes <i>v.</i> Cowley, 8 Price, 620	163		
Miner <i>v.</i> Bradley, 22 Pick. Rep. 459			
(Amer.)	2		
Mitchell <i>v.</i> Crasweller, 22 L. J., C. P.			
100	357, 358, 359		
— <i>v.</i> Hayne, 2 Sim. & S. 63	40		
Moffatt <i>v.</i> Bateman, L. R., 3 P. C.			
115; 22 L. T. 140; 6 Moore, P. C. C.,			
N. S. 369	317		
Moggridge <i>v.</i> Jones, 3 Camp. 38	200		
Mondel <i>v.</i> Steel, 8 M. & W. 858; 58			
R. R. 890	200		
Monkton <i>v.</i> Pasley, 2 Salk. 639	387		
Moorecock, The, 14 P. D. 64; 58 L. J.,			
P. 73; 60 L. T. 654; 37 W. R. 439			
— C. A.	119		
Moran <i>v.</i> Pitt, 42 L. J., Q. B. 47; 28			
L. T. 554; 21 W. R. 554	63		
Morden <i>v.</i> Porter, 7 C. B., N. S. 641	388		
Morgan <i>v.</i> Ravey, 30 L. J., Ex. 131	219,		
	222, 223		
Morley <i>v.</i> Attenborough, 3 Exch.			
500; 18 L. J., Ex. 148; 77 R. R.			
709	116		
Morris <i>v.</i> Nugent, 7 C. & P. 572; 48			
R. R. 821	381		
Morse <i>v.</i> She, 1 Ventr. 238	288		
Mortimer <i>v.</i> Bell, L. R., 1 Ch. 10;			
35 L. J., Ch. 25	50		
Morton <i>v.</i> Tibbett, 15 Q. B. 428	9		
Mosley <i>v.</i> Fossett, 1 Rel. Abr. 3	220		

TABLE OF CASES.

xxvii

O.	PAGE	PAGE	
Oakley <i>v.</i> Portsmouth, &c. Steam Packet Co., 11 Exch. 623; 21 L. J., Ex. 101.....	283	Parker <i>v.</i> Farebrother, 2 W. R. 370; — <i>v.</i> Great Western Rail. Co., 7 Scott, N. R. 835	37 282
Ogle <i>v.</i> Vane (Earl), L. R., 2 Q. B. 275; L. R., 3 Q. B. 272; 37 L. J., Q. B. 771—Ex. Ch.	22, 208	— <i>v.</i> Wallis, 5 E. & B. 28.....	14
Ohrby <i>v.</i> Ryde Commissioners, 33 L. J., Q. B. 296.....	332	— <i>v.</i> Walsh, 1 T. L. R. 583.....	375
Okell <i>v.</i> Smith, 2 Stark, N. P. C. 107; 18 R. E. 752	175	Parkhurst <i>v.</i> Foster, 1 Salk. 387.....	239
Oliver <i>v.</i> North Eastern Rail. Co., L. R., 9 Q. B. 409; 43 L. J., Q. B. 198	327	Parkinson <i>v.</i> Lee, 2 East, 314; 6 R. R. 429	121, 131
Ollivant <i>v.</i> Bailey, 5 Q. B. 288; 64 R. R. 501.....	172	Parsons <i>v.</i> Gingell, 4 C. B. 550; 16 L. J., C. P. 227	239, 240, 390
Onslow <i>v.</i> Eames, 1 Stark, N. P. C. 81; 19 R. R. 680	115	— <i>v.</i> Sexton, 4 C. B. 905; 16 L. J., C. P. 184	199, 200
Oppenheim <i>v.</i> White Lion Hotel Co., L. R., 6 C. P. 515; 40 L. J., C. P. 93; 25 L. T. 93	219	Parton <i>v.</i> Crofts, 33 L. J., C. P. 189 ..	16
Orchard <i>v.</i> Rackstraw, 9 C. B. 698; 82 R. R. 509	241	Pasley <i>v.</i> Freeman, 3 T. R. 51; 1 R. R. 634	129, 156, 157, 160, 162, 193
Original Hartlepool Co. <i>v.</i> Gibb, 5 Ch. D. 713	346	Pateshall <i>v.</i> Tranter, 3 A. & E. 103; 4 N. & M. 649; 42 R. R. 331	181
Ormrod <i>v.</i> Huth, 14 M. & W. 651 ... 150, 165, 193, 197, 202	121, 202	Patten <i>v.</i> Rea, 26 L. J., C. P. 235 ...	360
Orr <i>v.</i> Fleeming, 2 Macq., H. L. Cas. 14; 1 W. R. 339	371	Patterson <i>v.</i> Gaudesqui, 15 East, 62; 13 R. R. 368	135
Osborn <i>v.</i> Gillett, L. R., 8 Ex. 88; 44 L. J., Ex. 53	64	Paul <i>v.</i> Dod, 2 C. B. 500	208
— <i>v.</i> Meadows, 12 C. B., N. S. 10	389	— <i>v.</i> Hardwick, N. P. 1831.....	86
— <i>v.</i> Thompson, 9 C. & P. 337 ..	192	— <i>v.</i> Summerhayes, 4 Q. B. D. 9; 48 L. J., M. C. 33; 39 L. T. 574; 27 W. R. 215	384
Osborne <i>v.</i> Chocqueel, [1896] 2 Q. B. 109; 65 L. J., Q. B. 534; 74 L. T. 786; 44 W. R. 575—D.	372	Payne <i>v.</i> Cave, 3 T. R. 148; 1 R. R. 679	3, 45
— <i>v.</i> Hart, 23 L. T. 851; 19 W. R. 331	120	— <i>v.</i> Lord Leconfield, 51 L. J., Q. B. 642; 30 W. R. 814 ..	36
Oughton <i>v.</i> Seppings, 1 B. & Ad. 241; 35 R. R. 284	186	— <i>v.</i> Whule, 7 East. 274.....	127, 174, 179, 197
Overton <i>v.</i> Freeman, 21 L. J., C. P. 52	331	Peachey <i>v.</i> Roland, 13 C. B. 182; 93 R. R. 483.....	330
P.		Peck <i>v.</i> North Staffordshire Rail. Co., 10 H. L. Cas. 473; 32 L. J., Q. B. 241; 8 L. T. 768; 11 W. R. 1023	290, 297, 299, 300
Page <i>v.</i> Morgan, 15 Q. B. D. 228; 54 L. J., Q. B. 434; 53 L. T. 126; 33 W. R. 793—C. A.	14	Peer <i>v.</i> Humphrey, 2 A. & E. 495; 41 R. R. 471	63
Paice <i>v.</i> Walker, L. R., 5 Ex. 173; 39 L. J., Ex. 109; 22 L. T. 547 ...	136	Pendlebury <i>v.</i> Greenhalgh, 1 Q. B. D. 36; 45 L. J., Q. B. 3; 33 L. T. 372; 24 W. R. 98—C. A.	332
Palmer <i>v.</i> Grand Junction Canal Co., 4 M. & W. 749; 51 R. R. 805.....	282	Penny <i>v.</i> Wimbledon Urban Council, [1899] 2 Q. B. 72; 68 L. J., Q. B. 704	271
Pardington <i>v.</i> South Wales Rail. Co., 1 H. & N. 392	298	Percival <i>v.</i> Oldacre, 18 C. B., N. S. 338	152
Parfit <i>v.</i> Jepson, 46 L. J., C. P. 529; 36 L. T. 251	50	Perkins <i>v.</i> Stead, 23 T. L. R. 433 ...	271
		Peto <i>v.</i> Hague, 5 Esp. 134	140
		Pettitt <i>v.</i> Mitchell, 5 Scott, N. R. 721 ..	27, 30
		Phillipotts <i>v.</i> Evans, 5 M. & W. 475; 52 R. R. 802	208
		Pickering <i>v.</i> Bask, 15 East, 38; 13 R. R. 364	39, 140
		— <i>v.</i> Dowson, 4 Taunt. 779; 39 R. R. 656, 65.....	128, 167

	PAGE		PAGE
Pickering <i>v.</i> Marsh, 43 L. J., M. C.		Raffles <i>v.</i> Winchellhaus, 33 L. J. Ex.	
143; 22 W. R. 798	375	160	199
Pickford <i>v.</i> Grand Junction Rail. Co.,		Rainbow <i>v.</i> Howkins, [1904] 2 K. B.	
10 M. & W. 399	282	829; 73 L. J. K. B. 641; 91 L. T.	
Pierce <i>v.</i> Corf, L. R., 9 Q. B. 210; 43		53 W. R. 46	46, 48, 49
L. J., Q. B. 52; 29 L. T. 919; 22		Robert <i>v.</i> Cohen, 4 Esp. 213; 6	
W. R. 299	17, 18, 19, 25.	R. R. 85	194
Pike <i>v.</i> London General Omnibus		Ramsay <i>v.</i> Thompson, 9 Rettie, 140	345
Co., 8 T. L. R. 164	334	Rensselaer <i>v.</i> Lancashire & Yorkshire	
Pilmore <i>v.</i> Hood, 5 Blug. N. C. 97;		Rail. Co., 53 L. P. 183	320
50 R. R. 622	164	Randall <i>v.</i> Newson, 2 Q. B. D. 102;	
Pluder <i>v.</i> Button, 7 L. T. 269	124	46 L. J., Q. B. 259; 36	
Platt <i>v.</i> Bromage, 24 L. J., Ex. 63	185	L. T. 164; 25 W. R.	
Plevins <i>v.</i> Downing, 1 C. P. D. 220;		113—C. A.	122, 130, 203
45 L. J., C. P. 695; 35 L. T. 263	191	— <i>v.</i> Raper, E. B. & E. 14; 27	
Pluckwell <i>v.</i> Wilson, 5 C. & P. 375	332	L. J., Q. B. 266	209, 214
334, 342		Randell <i>v.</i> Trimen, 25 L. J., C. P.	
Polwill <i>v.</i> Walter, 3 B. & Ad. 114 ..	160	307	203
Poole <i>v.</i> Longuevil, 2 Wms. Saund.		Randleson <i>v.</i> Murray, 8 A. & E. 109;	
220, n. (7)	248	47 R. R. 513	232
Pope <i>v.</i> Whalley, 6 B. & S. 303; 11		Rawson <i>v.</i> Johnson, 1 East, 203; 6	
Jur., N. S. 444; 34 L. J., M. C.		R. R. 252	183, 191, 199
76; 11 L. T. 769	55	Rayner <i>v.</i> Mitchell, 2 C. P. D. 359;	
Potter <i>v.</i> Faulkner, 31 L. J., Q. B.		25 W. R. 633	359
30	361	Read <i>v.</i> Edwards, 17 C. B., N. S. 245;	
Poulton <i>v.</i> Lattimore, 9 B. & C. 265;		11 L. T. 311	374, 378, 386, 390
32 R. R. 673	172, 180, 200	— <i>v.</i> Fairbanks, 22 L. J., C. P.	
Povey <i>v.</i> Purnell, N. P. 1853	244	206	204
Powell <i>v.</i> Edmunds, 12 East, 6; 11		Readhead <i>v.</i> Midland Rail. Co., L. R.,	
R. R. 316	42	4 Q. B. 379; 36 L. J., Q. B. 181 ..	130,
— <i>v.</i> Salisbury, 2 Y. & J. 394;		251	
31 R. R. 607	279	Reading <i>v.</i> Menham, 1 M. & Rob.	
Power <i>v.</i> Barham, 4 A. & E. 473;		234	262
43 R. R. 406	148, 152, 158	— (Mayor of) <i>v.</i> Clarke, 4 B.	
— <i>v.</i> Welles, Comp. 818	176, 185	& Ald. 269	188
— <i>v.</i> Wells, Dong. 24, n.	174	Reed <i>v.</i> Tate, N. P. 1846	332, 342
Powles <i>v.</i> Hider, 25 L. J., Q. B. 331	350	Reeve <i>v.</i> Palmer, 28 L. J., C. P. 168	199
Prebble <i>v.</i> Boyhurst, 1 Swanst. 329	163	Reeves <i>v.</i> Capper, 5 Bing. N. C. 136;	
Prestwick <i>v.</i> Marshall, 7 Bing. 565	24	50 R. R. 634	29
Price <i>v.</i> Morgan, 2 M. & W. 55	142	R. <i>v.</i> Aldridge, 4 Cox, C. C. 143	58
Prince <i>v.</i> Brunette, 1 Bing. N. C. 438	25	— <i>v.</i> Bailey, 4 Cox, C. C. 390, 397 ..	156
Prior <i>v.</i> London and South Western		— <i>v.</i> Banks, R. & R. 441	60
Rail. Co., 2 T. L. R. 89	286	— <i>v.</i> Birchall, 4 F. & F. 1087	315
Protheroe <i>v.</i> Matthews, 5 C. & P. 581	381	— <i>v.</i> Brooks, 8 C. & P. 295	60, 259
Pym <i>v.</i> Campbell, 6 Ell. & Bl. 370	22	— <i>v.</i> Carlisle, 23 L. J., M. C. 109 ..	157
— <i>v.</i> Great Northern Rail. Co., 2		— <i>v.</i> Cavendish, 8 Ir. R. C. L. 178—	
B. & S. 767; 31 L. J., Q. B. 249;		C. C. R.	313
4 B. & S. 396; 32 L. J., Q. B. 377		— <i>v.</i> Child, C. C. C. 1858	379
—Ex. Ch.	363, 366, 367	— <i>v.</i> Cook, 1847	313
Q.		— <i>v.</i> Cooper, 16 Jur. 750	61
Quarman <i>v.</i> Burnett, 6 M. & W. 499;		— <i>v.</i> Cridland, 7 E. & B. 853	388
55 R. R. 717	261, 262, 267, 268, 269	— <i>v.</i> Critchlow, 26 W. R. 681	388
R.		— <i>v.</i> Crump, 1 C. & P. 651	61
Radley <i>v.</i> London and North Western		— <i>v.</i> Dale, 7 C. & P. 352	59
Rail. Co., 1 App. Cas. 754; 46		— <i>v.</i> Hymock, 49 W. R. 618	375
L. J., Ex. 573	322	— <i>v.</i> Goldsmith, 12 Cox, C. C. 591 ..	65
		— <i>v.</i> Gompertz, 9 Q. B. 824; 72	
		R. R. 458	170
		— <i>v.</i> Haigh, 1857	66

TABLE OF CASES.

XXIX

	PAGE		PAGE
R. v. Harvey, 1 Leach, 467.....	59	Richards v. Porter, 6 B. & C. 437 ...	19
— v. Henson, 1 Dears. & Pearce,		— v. Symons, 8 Q. B. 90 ...	246, 247
C. C. 24	91	Richardson v. Brown, 8 Moore, 338 ;	
— v. Horan, 6 Ir. R., C. L. 293—		1 Bing. 314 ; 25 R. R.	
C. C. R.	65	618	151
— v. Huggins, 2 Ld. Ryms. 1583...	368,	— v. Dunn, 30 L. J., C. P.	
	379	44.....	203
— v. Huntington J.J., 4 Q. B. D.		— v. North Eastern Rail.	
522	376	Co., L. R., 7 C. P. 75 ;	
— v. Ivens, 7 C. & P. 219 ; 48 R. R.		41 L. J., C. P. 60 ; 26	
780	217	L. T. 131.....	287
— v. Janson, 4 Cox, C. C. 82	60, 259	— v. Sylvester, L. R., 9	
— v. Jones, 22 L. T. 217 ; 11 Cox,		Q. B. 34 ; 43 L. J., Q. B. 1	164
C. C. 544	315	Richmond v. Smith, 8 B. & C. 9.....	218,
— v. Kayley, 10 L. T. 339	388		219, 220
— v. Kendall, 30 L. T. 345 ; 12 Cox,		Rickard v. Moore, 38 L. T. 841—	
C. C. 598—C. C. R.,	59	C. A.	12, 14
— v. Kenrick, 5 Q. B. 62.....	156, 157	Ricketts v. East India Docks and	
— v. Kew, 12 C. C. 355.....	315	Birmingham Junction Rail. Co.,	
— v. Kilderby, 1 Summ. 312, n. 2...	232	21 L. J., C. P. 201.....	391
— v. Lewis, 11 Cox, C. C. 484	50	Ridgway v. Wharton, 27 L. J., Ch.	
— v. Luellin, 12 Mod. 445	217	46	17
— v. Murray, 5 Cox, C. C. 509 (Ir.)	315,	Rigby v. Hewitt, 5 Ex. 210 ; 19 L. J.,	
	316	Ex. 291 ; 82 R. R. 652	321, 364
— v. Parker, 32 L. J., M. C. 135.....	389	Rigg v. Earl of Lonsdale, 1 H. & N.	
— v. Patch, 1 Leach, 238.....	60	923	386
— v. Penn, 1 Leach, 521	60, 259	Rimell v. Sampayo, 1 C. & P. 254 ...	259
— v. Phillips, 2 East, P. C. e. 16,		Ring v. Roxbrough, 2 C. & J. 418 ;	
s. 98	61	2 Tyrw. 468	187, 189
— v. Pitman, 2 C. & P. 423.....	59	Rishton v. Whatmore, 8 Ch. D. 467 ;	
— v. Pratt, 1 Mood, C. C. 185.....	60	47 L. J., Ch. 629 ; 26 W. R.	
— v. ——— 24 L. J., M. C. 113	389	827	18, 41
— v. Pywell, 1 Stark, N. P. C. 402 ...	156	Roberts v. Great Western Rail. Co.,	
— v. Read, 6 Cox, C. C. 134	156, 157	4 Jur., N. S. 1240	393
— v. Rymer, 2 Q. B. D. 136 ; 46		— v. Jenkins, 1 Foster (N. H.),	
L. J., M. C. 108 ; 35 L. T. 744 ;		116	67
25 W. R. 415	217	Robertson v. Howard, 3 C. P. D. 280 ;	
— v. Saddlers' Co., 32 L. J., Q. B.		47 L. J., C. P. 480	188
337	160, 162, 168	Robinson v. Great Western Rail. Co.,	
— v. Sheppard, 9 C. & P. 123.....	59, 156	35 L. J., C. P. 123 ; H.	
— v. Silvester, 33 L. J., M. C. 79 ...	32	& R. 97	295
— v. Smith, 1 Mood, C. C. 473	242	— v. Rutter, 24 L. J., Q. B.	
— v. ——— 12 Cox, C. C. 597	65	250	39, 52
— v. Stancilife, 11 Cox, C. C. 318 ...	65	— v. South Western Rail. Co.,	
— v. Swindall, 2 C. & K. 230	313, 314	19 C. B., N. S. 51 ; 34	
— v. Timmins, 7 C. & P. 500	314, 336	L. J., C. P. 234	304
— v. Walker, 1 C. & P. 32 ; 28 R. R.		— v. Walter, 3 Bulst. 270 ...	227
781	314	— v. ——— Pop. 127.....	225
— v. Wheatley, 2 Burr. 1127 ...	156, 157,	Rogers v. Ingham, 3 Ch. D. 351	185
	159	Rohde v. Thwaites, 6 B. & C. 388 ;	
Reese River Silver Mining Co. v.		30 R. R. 363	190
Smith, L. R., 4 H. L. 64 ; 39 L. J.,		Rolin v. Steward, 23 L. J., C. P. 148	205
Ch. 842	164	Rolph v. Crouch, L. R., 3 Ex. 14 ; 37	
Reuss v. Picksley, L. R., 1 Ex. 342,		L. J., Ex. 8.....	214
—Ex. Ch.	23	Rooth v. North Eastern Rail. Co.,	
Reuter v. Sala, 4 C. P. D. 239 ; 18		L. R., 2 Ex. 173 ; 36	
L. J., C. P. 492	28	L. J., Ex. 83	299
Reynolds v. Tilling, Ltd., 20 T. L. R.		— v. Wilson, 1 B. & Ald. 59 ; 18	
57—C. A.	323	R. R. 431.....	244

	PAGE		PAGE
<i>Roots v. Darmer</i> , 4 B. & Ad. 77 ; 38		<i>Scott v. England</i> , 2 D. & L. 520 ;	
R. R. 231.....	44	14 L. J., Q. B. 43 ; 69	
<i>Rosse v. Bramstead</i> , 2 Rol. Rep. 438	226	R. R. 868.....	51
<i>Rourke v. White Moss Colliery Co.</i> ,		— <i>c. London Dock Co.</i> , 13 W. R.	
2 C. P. D. 205	269, 270	410	311
<i>Routledge v. Grant</i> , 4 Bing. 653 ; 29		<i>Searle v. Laverick</i> , L. R. 9 Q. B.	
R. R. 672.....	45	122 ; 43 L. J., Q. B. 43 ; 30 L. T.	
<i>Rowley v. London and North Western</i>		89.....	239, 241
<i>Rail Co.</i> , L. R. 8 Ex. 221 ; 42 L. J.,		<i>Settle v. Garner</i> , N. P. 1857	92
Ex. 153 ; 29 L. T. 180—Ex. Ch.	363,	<i>Seymour v. Greenwood</i> , 7 H. & N.	
	366	355	356, 357
<i>Rushforth v. Hadfield</i> , 7 East, 229 ;		<i>Sharman v. Brandt</i> , L. R. 6 Q. B.	
8 R. R. 520.....	236	720 ; 40 L. J., Q. B. 312 ; 19 W. R.	
		936—Ex. Ch.	21, 25, 41
		<i>Sharp v. Powell</i> , L. R. 7 C. P. 253 ;	
S.		41 L. J., C. P. 95 ; 26 L. T. 436...	364
<i>Sadler v. Henlock</i> , 24 L. J., Q. B.		<i>Sheldon v. Cox</i> , 3 B. & C. 420.....	184, 185
138	328	<i>Shelly v. Ford</i> , 5 C. & P. 313	258
— <i>v. South Staffordshire Tram-</i>		<i>Shelton v. Livins</i> , 2 C. & J. 416 ; 34	
<i>ways Co.</i> , 23 Q. B. D. 17 ; 58 L. J.,		R. R. 746.....	42
Q. B. 179 ; 60 L. T., 344 ; 37 W.		<i>Shepherd v. Bristol and Exeter Rail.</i>	
R. 204—C. A.	327	Co., L. R. 3 Ex. 189 ;	
<i>Salmon v. Ward</i> , 2 C. & P. 211 ; 31		37 L. J., Ex. 113	302
R. R. 664.....	122, 140	— <i>v. Kain</i> , 5 B. & A. 240 ; 24	
<i>Samuel v. Wright</i> , 2 Esp. 263.....	260	R. R. 344.....	148, 158, 166
<i>Sanders v. Teape</i> , 51 L. T. 263 ; 48		<i>Sherrod v. Longden</i> , 21 Iowa, 518...	214
J. P. 757	378	<i>Shipway v. Broadwood</i> , [1899] 1	
<i>Sanderson v. Bell</i> , 2 C. & M. 304 ...	237	Q. B. 369 ; 68 L. J., Q. B. 360 ;	
— <i>v. Collins</i> , [1904] 1 K. B.		80 L. T. 11—C. A.	134
628 ; 73 L. J., K. B. 358 ; 90 L. T.		<i>Shrewsbury v. Blount</i> , 2 M. & G.	
243 ; 52 W. R. 628	254, 255, 256	475 ; 2 Scott, N. R. 588 ; 58 R. R.	
<i>Sandys v. Florence</i> , 47 L. J., C. P.		446	161, 164, 165
598	221	<i>Siegel v. Eisen</i> , 41 Cal. 109.....	344
<i>Sareh v. Blackburn</i> , M. & M. 505 ;		<i>Siewwright v. Archibald</i> , 20 L. J.,	
4 C. & P. 297	380	Q. B. 529.....	16
<i>Sarl v. Bourdillon</i> , 26 L. J., C. P.		<i>Simkin v. London and North Western</i>	
78	19, 24	<i>Rail Co.</i> , 21 Q. B. D. 453 ; 59	
<i>Saunders v. Plummer</i> , Orl. Bridg.		L. J., Q. B. 797 ; 53 J. P. 85	320
227	216, 220, 224	<i>Simmonds v. Humble</i> , 13 C. B., N. S.	
— <i>v. Topp</i> , 4 Exch. 394 ; 80		258	10
R. R. 624	7, 8, 9, 10	<i>Simmons v. Swift</i> , 4 B. & C. 857 ;	
<i>Saunderson v. Jackson</i> , 2 B. & P.		29 R. R. 438	190
238 ; 5 R. R. 580	23	<i>Simon v. London General Omnibus</i>	
<i>Saxby v. Wilkin</i> , 1 D. & L. 281	188	Co., 23 T. L. R. 463	339
<i>Searfe v. Morgan</i> , 2 M. & W. 270 ;		<i>Simons v. Great Western Rail. Co.</i> ,	
51 R. R. 568 ...	227, 236, 237, 238, 246	18 C. B. 805 ; 26 L. J., C. P. 25...	292,
<i>Seattergood v. Sylvester</i> , 19 L. J.,			300
Q. B. 447	64	<i>Simpson v. Potts</i> , N. P. 1847 ..	106, 185
<i>Seetehett v. Eltham</i> , Freem. 534 ...	377	<i>Sims v. Landray</i> , [1894] 2 Ch. 318 ;	
<i>Schneider v. Heath</i> , 3 Camp. 506 ;		63 L. J., Ch. 535 ; 70 L. T.	
14 R. R. 825	163, 167	530 ; 42 W. R. 621 ..	41
— <i>v. Norris</i> , 2 M. & S. 286 ;		— <i>c. Marryat</i> , 17 Q. B. 9 ; 85 R. R.	
15 R. R. 250	23	462	117
<i>Scholefield v. Robb</i> , 2 M. & R. 210 ;		<i>Simson v. London General Omnibus</i>	
62 R. R. 794	67, 71, 86, 93, 197	Co., L. R. 8 C. P. 390 ; 42 L. J.,	
<i>Scotland (Bank of) v. Watson</i> , 1		C. P. 112 ; 28 L. T. 560 ; 21 W. R.	
Dow, 45 ; 14 R. R. 11	141, 202	595	317, 337
		<i>Singleton v. Eastern Counties Rail.</i>	
		Co., 7 C. B., N. S. 287	326

TABLE OF CASES.

xxxii

	PAGE		PAGE
<i>Skrine v. Elmore</i> , 2 Camp. 407; 11 R. R. 754	193, 196	<i>Stacey v. Whitehurst</i> , 13 W. R. 384	387
<i>Slater v. Swan</i> , 2 Stra. 872	346	<i>Standish v. Ross</i> , 3 Ex. 527; 77 R. R. 715	185
<i>Slenth v. Wilson</i> , 9 C. & P. 608, 357, 358, 359	359	<i>Statkey v. Bank of England</i> , [1903] App. Cas. 114	45
<i>Slim v. Great Northern Rail. Co.</i> , 14 C. B. 647	304	<i>Stannion v. Davis</i> , Salk. 404	221
<i>Smart v. Hyde</i> , 8 M. & W. 728	189	<i>Staunton v. Wood</i> , 16 Q. B. 638; 16 L. T. O. 8 486	30
<i>Smeed v. Poord</i> , 28 L. J., Q. B. 178	201	<i>Stend v. Dawber</i> , 10 A. & E. 57; 50 R. R. 327	22
<i>Smethurst v. Mitch</i> , 28 L. J., Q. B. 241	135	<i>Stevens v. Lee</i> , 2 C. L. R. 251	53
<i>Smith v. Bailey</i> , [1891] 2 Q. B. 463; 60 L. J., Q. B. 779; 65 L. T. 331; 40 W. R. 28—C. A.	352, 360	<i>Steward v. Coesvelt</i> , 1 C. & P. 23	132
— <i>v. Chance</i> , 2 B. & A. 755; 21 R. R. 485	191	<i>Stiles v. Cardiff Steam Navigation Co.</i> , 33 L. J., Q. B. 310; 10 L. T. 844; 12 W. R. 1080	373
— <i>v. Cook</i> , 1 Q. B. D. 79; 45 L. J., Q. B. 122; 33 L. T. 722; 24 W. R. 206	245, 371	<i>Stone v. Mar</i> , 6 B. & C. 551; 30 R. R. 420	63
— <i>v. Dearlove</i> , 6 C. B. 132, n. ... 216, 220, 224, 225	225	<i>Storey v. Ashton</i> , L. R., 4 Q. B. 476; 38 L. J., Q. B. 223; 17 W. R. 727	357, 359
— <i>v. Ferrand</i> , 7 B. & C. 19	32	— <i>v. Robinson</i> , 6 T. R. 138; 3 R. R. 137	390
— <i>v. Great Eastern Rail. Co.</i> , 1 L. R., 2 C. P. 4; 36 L. J., C. P. 22; 15 L. T. 246; 15 W. R. 131	372	<i>Strass v. County Hotel Co.</i> , 12 Q. B. D. 27; 53 L. J., Q. B. 25; 49 L. T. 601; 32 W. R. 170	216
— <i>v. Green</i> , 1 C. P. D. 92; 45 L. J., C. P. 28	203, 214	<i>Street v. Blay</i> , 2 B. & Ad. 456; 36 R. R. 626 ... 124, 172, 176, 177, 178, 199, 200, 201	200, 201
— <i>v. Hughes</i> , L. R., 6 Q. B. 597; 40 L. J., Q. B. 221; 25 L. T. 329	161	<i>Strode v. Dyson</i> , 1 Smith, 400 ... 142, 196	142, 196
— <i>v. Kay</i> , 7 H. of L. Cas. 775 ... 159	159	<i>Stuart v. Wilkins</i> , Doug. 18	115, 131
— <i>v. Lawrence</i> , 2 M. & R. 1; 32 R. R. 698	260	<i>Stueley v. Bailly</i> , 31 L. J., Ex. 483 ... 127	127
— <i>v. McNamara</i> , N. P. 1853	318	<i>Sunboif v. Alford</i> , 3 M. & W. 248; 49 R. R. 593	224
— <i>v. Midland Rail. Co.</i> , 57 L. T. 813; 52 J. P. 262	286, 338	<i>Sutton v. Moody</i> , Id. Raym. 250 ... 385	385
— <i>v. Neale</i> , 26 L. J., C. P. 143 ... 19	19	— <i>v. Temple</i> , 12 M. & W. 52; 67 R. R. 255	129, 246, 260
— <i>v. O'Brien</i> , 11 L. T. 316 ... 108, 146	108, 146	<i>Suydam v. Grand St. Rail. Co.</i> , 41 Barb. 365	344
— <i>v. Parsons</i> , 8 C. & P. 199	131	<i>Sweet v. Lee</i> , 3 M. & Gr. 452, 460 ... 23	23
— <i>v. Rolt</i> , 9 C. & P. 696	191, 193, 200	<i>Sweeting v. Turner</i> , L. R., 7 Q. B. 310; 41 L. J., Q. B. 58; 25 L. T. 796; 20 W. R. 185	51
— <i>v. Sparrow</i> , 4 Bing. 88; 29 R. R. 514	33	<i>Swift v. Jewsbury</i> , L. R., 9 Q. B. 301; 43 L. J., Q. B. 561 ... 164, 165	164, 165
<i>Snead v. Watkins</i> , 26 L. J., C. P. 57	224	— <i>v. Winterbotham</i> , L. R., 8 Q. B. 244; 42 L. J., Q. B. 111 ... 133, 164, 165	133, 164, 165
<i>Southote's Case</i> , 4 Rep. 83	288	<i>Swinfen v. Lord Chelmsford</i> , 5 H. & N. 890	192
<i>Southerne v. Howe</i> , 2 Rol. Rep. 5 ... 144	144	<i>Swire v. Francis</i> , 3 App. Cas. 106; 47 L. J., P. C. 18	133
<i>Spartali v. Benecke</i> , 10 C. B. 212; 84 R. R. 532	199	<i>Sykes v. Giles</i> , 5 M. & W. 650; 52 R. R. 870	51, 136
<i>Spice v. Bacon</i> , 2 Q. B. D. 463; 46 L. J., Q. B. 713; 36 L. T. 896 ... 218	218	— <i>v. North-Eastern Rail. Co.</i> , 44 L. J., C. P. 191; 32 L. T. 199; 23 W. R. 473	363
<i>Springwell v. Allen</i> , Aleyn, 91	159	<i>Symonds v. Carr</i> , 1 Camp. 361 ... 128, 188	128, 188
<i>Squire v. Hunt</i> , 3 Price, 68	191		
— <i>v. Wheeler</i> , 16 L. T. 93	218		
<i>Stables v. Eley</i> , 1 C. & P. 614	360		
<i>Stacey v. Livesay</i> , N. P. 1856	244		

T.	PAGE
Taplin v. Florence, 10 C. B. 744 ; 88 R. R. 773	41
Tarling v. Baxter, 6 B. & C. 364 ; 30 R. R. 355	26, 28, 29
Tarrant v. Webb, 25 L. J., C. P. 261	361, 362
Tarry v. Ashton, 1 Q. B. D. 314 ; 45 L. J., Q. B. 260 ; 34 L. T. 97 ; 24 W. R. 581	330
Tate v. Gleed, C. B., H. T. 24 Geo. 3	248
Taylor v. Ashton, 11 M. & W. 413 ; 63 R. R. 635	159, 163
— v. Bullen, 5 Ex. 779 ; 84 R. R. 875	166
— v. Caldwell, 3 B. & S. 823 ...	126
— v. Chester, L. R., 4 Q. B. 309 ; 38 L. J., Q. B. 225	199
— v. Great Northern Rail. Co., L. R., 1 C. P. 385 ; 35 L. J., C. P. 210	283, 309
— v. Greenhalgh, 24 W. R. 711 —C. A.	332
— v. Holt, 3 H. & C. 452	206
— v. Smith, [1893] 2 Q. B. 65 ; 61 L. J., Q. B. 331 ; 67 L. T. 39 ; 40 W. R. 486 ...	14, 18
— v. Wakefield, 6 El. & Bl. 765	9
Tempest v. Fitzgerald, 3 B. & Ald. 680 ; 22 R. R. 526.....	14
— v. Kilner, 2 C. & P. 308 ...	191
Templeman v. Haydon, 19 L. T., O. S. 218	322
Thom v. Bigland, 8 Ex. 725 ; 91 R. R. 730	192
Thomas v. Morgan, 2 C. M. & W. 494 ; 4 D. P. C. 223	1, 2, 373
Thompson v. Bertrand, 23 Ark. 730	67
— v. Davenport, 9 B. & C. 78 ; 32 R. R. 578 ...	49, 132, 135
— v. Havelock, 1 Camp. 527	134
— v. Lacy, 2 B. & Ald. 286 ; 22 R. R. 385	216
— v. Patterson, N. P. 1846	110, 111
Thornett v. Haines, 15 M. & W. 367 ; 15 L. J., Ex. 230 ; 71 R. R. 714	50
Thorogood v. Bryan, 8 C. B. 115...317, 333	
Thorpe v. Thorpe, 1 Ld. Raym. 665 ; 1 Salk. 171	30
Threllall v. Borwick, L. R., 10 Q. B. 210 ; 44 L. J., Q. B. 87 ; 32 L. T. 32—Ex. Ch.	224
Tillett v. Ward, 10 Q. B. D. 17 ; 52 L. J., Q. B. 61 ; 47 L. T. 546 ; 31 W. R. 197	378
Tilling, Ltd. v. James, 94 L. T. 823 ; 32 T. L. R. 599—D.	271
Tolhausen v. Davies, 58 L. J., Q. B. 98—C.A.	329
Tooke v. Hollingsworth, 5 T. R. 215 ; 2 R. R. 573	29
Toomey v. London, Brighton & S. C. Rail. Co., 3 C. B., N. S. 146	338
Torrance v. Bolton, L. R., 8 Ch. 118 ; 42 L. J., Ch. 177	37
Tourret v. Cripps, 48 L. J., Ch. 567 ; 27 W. R. 706	23
Towers v. Barrett, 1 T. R. 133 ...	174, 178, 179, 185, 198
Trent and Mersey Navigation Co. v. Wood, 2 Esp. 127 ; 4 Doug. 287... ..	282
Tucker v. Axbridge Highway Board, 53 J. P. 87	326
Tuff v. Warman, 27 L. J., C. P. 322	322
Turberville v. Stampe, 1 Ld. Raym. 264	360
Turley v. Thomas, 8 C. & P. 103, 66 R. R. 839	344
Turner v. Hockey, 56 L. J., Q. B. 301	39
— v. Stallibrass, [1898] 1 Q. B. 56 ; 67 L. J., Q. B. 52 ; 77 L. T. 482 ; 46 W. R. 81—C. A.	215
Turrell v. Crawley, 18 L. J., Q. B. 155	225
Tyers v. Rosedale, &c. Iron Co., L. R., 8 Ex. 305—Ex. Ch. ; L. R., 10 Ex. 195 ; 44 L. J., Ex. 130 ; 33 L. T. 56	208

U.

Edell v. Atherton, 7 H. & N. 172 ...	133
Underwood v. Nicholls, 25 L. J., C. P. 79	31
Urquhart v. Macpherson, 3 App. Cas. 831	168

V.

Vulpy v. Oakeley, 16 Q. B. 941 ; 83 R. R. 786	208
Vennables v. Smith, 2 Q. B. D. 279 ; 46 L. J., Q. B. 470 ; 36 L. T. 509 ; 25 W. R. 584	274, 349, 351
Vernon v. Keys, 12 East. 632 ; 11 R. R. 499	163, 164
Veterinary College v. Green, 57 J. P. 505	231
Veterinary Surgeons, Royal College of. v. Robinson, [1892] 1 Q. B. 557 ; 61 L. J., Q. B. 146	231
Viears v. Willocks, 8 East, 3 9 R. R. 361	203

TABLE OF CASES.

xxxiii

	PAGE		PAGE
Villiers <i>v.</i> Avey, 3 T. L. R. 812	336	Watts <i>v.</i> Ainsworth, 1 H. & C. 83 ...	19
Vogan <i>v.</i> Oulton, 89 L. T. 435—C. A.	250, 252	Wayde <i>v.</i> Lady Carr, 2 D. & R. 256 ; 25 R. R. 554	313
W.		Weaver <i>v.</i> Bush, 8 T. R. 78.....	389
Wadhurst <i>v.</i> Danne, Cro. Jue. 44...	381	Webb <i>v.</i> Bell, 1 Sld. 410	390
Wagstaff <i>v.</i> Clack, Cambridge Summer Assizes, 1826, M. S.	390	— <i>v.</i> Fairmanner, 3 M. & W. 473 ; 49 R. R. 690	191, 200
Walte <i>v.</i> North-Eastern Rail. Co., E. D. & E. 719	323	— <i>v.</i> Fox, 7 T. R. 397 ; 1 R. R. 472	26
Wakeman <i>v.</i> Robinson, 1 Hing. 213 ; 25 R. R. 618	335	— <i>v.</i> Great Western Rail. Co., 26 W. R. 111	301
Waldock <i>v.</i> Winfield, [1901] 2 E. R. 576 ; 70 L. J., K. B. 925 ; 85 L. T. 232—C. A.	268, 269	Weir <i>v.</i> Barnett, 3 Ex. D. 32	133
Walker <i>v.</i> Holsington, 13 Vt. 608	85, 86	— <i>v.</i> Bell, 3 Ex. D. 238 ; 17 L. J., Ex. 704 ; 38 L. T. 929 ; 26 W. R. 716—C. A.	160
— <i>v.</i> Matthews, 8 Q. B. D. 109 ; 51 L. J., Q. B. 243 ; 46 L. T. 915 ; 30 W. R. 338	65	Wells <i>v.</i> Abrahams, L. R., 7 Q. B. 557 ; 41 L. J., Q. B. 396	63
— <i>v.</i> Mellor, 11 Q. B. 478	200	— <i>v.</i> Hend, 4 C. & P. 568 ; 34 R. R. 819	381
— <i>v.</i> Midland Rail. Co., 55 L. T. 489	221	— <i>v.</i> Hopkins, 5 M. & W. 7 ; 52 R. R. 611	200
— <i>v.</i> Nussey, 16 L. J., Ex. 120 ; 16 M. & W. 302 ; 73 R. R. 507	16	Welsh <i>v.</i> Lawrence, 2 Chit. 262.....	322
Wallace <i>v.</i> Woodgate, 1 C. & P. 275	226, 240	Wentworth <i>v.</i> Outhwaite, 10 M. & W. 452 ; 62 R. R. 661	30
Waller <i>v.</i> Midland Great Western Rail. Co., L. R., 4 D. 376	311	Westbrook <i>v.</i> Gridlth, Moor. 376	216, 227
— <i>v.</i> South-Eastern Rail. Co., 32 L. J., Ex. 205	361, 362	Weston <i>v.</i> Downes, Doug. 23... ..	174, 180, 185
Walley <i>v.</i> Holt, 35 L. T. 631	256	Whatman <i>v.</i> Pearson, L. R., 3 C. P. 422	357
Walter <i>v.</i> Haynes, R. & M. 149	31	Whentley <i>v.</i> Patrick, 2 M. & W. 650 ; 16 R. R. 731	279
Ward <i>v.</i> General Omnibuses Co., 42 L. J., C. P. 265 ; 28 L. T. 850—Ex. Ch.	356	Wheelton <i>v.</i> Hardisty, 27 L. J., Q. B. 211	153, 151
— <i>v.</i> Hobbs, 4 App. Cns. 13 ; 48 L. J., C. P. 281 ; 40 L. T. 73 ; 27 W. R. 114	57, 120, 167, 168, 215	White <i>v.</i> Beeton, 7 H. & N. 42 ; 30 L. J., Ex. 373.....	123
Warlow <i>v.</i> Harrison, 1 E. & E. 295 ; 29 L. J., Q. B. 14—Ex. Ch.	36, 45, 47	— <i>v.</i> Collier, M. & M. 126.....	50
Warner <i>v.</i> Willington, 25 L. J., Ch. 662	19	— <i>v.</i> Garden, 20 L. J., C. P. 166	169
Warwicke <i>v.</i> Noakes, Penke, N. P. 98 ; 3 R. R. 653	31	— <i>v.</i> Great Western Rail. Co., 26 L. J., C. P. 158 ; 67 R. R. 753	296
Washburn <i>v.</i> Cuddeihy, 8 Gray. 430	85, 86	— <i>v.</i> Spettigue, 13 M. & W. 603	63, 64
Waterhouse <i>v.</i> Skinner, 2 B. & P. 417	191	Whitehead <i>v.</i> Anderson, 9 M. & W. 518 ; 60 R. R. 849.....	29
Watkins <i>v.</i> Major, L. R., 10 C. P. 662 ; 41 L. J., M. C. 161 ; 33 L. T. 352 ; 24 W. R. 164	388	Whiteley <i>v.</i> Pepper, 2 Q. B. D. 276 ; 16 L. J., Q. B. 436 ; 36 L. T. 588 ; 25 W. R. 607	330
Watson <i>v.</i> Ambergate, Nottingham and Boston Rail. Co., 15 Jur. 448 ; 89 R. R. 762	299, 311	Whurr <i>v.</i> Devenish, 20 T. L. R. 385	48
— <i>v.</i> Denton, 7 C. & P. 86 ; 48 R. R. 761.....	209, 213	Wiggett <i>v.</i> Fox, 25 L. J., Ex. 188	361, 362
— <i>v.</i> Earl of Charlmont, 12 Q. B. 862	160	Wilkes <i>v.</i> Atkinson, 1 Marsh. 112	183, 191
O.		Wilkins <i>v.</i> Day, 12 Q. B. D. 110 ; 49 L. T. 399.....	319
		Wilkinson <i>v.</i> Evans, L. R., 1 C. P. 407 ; 35 L. J., C. P. 221 ; 14 W. R. 963	19
		Willan <i>v.</i> Carter, N. P. 1853	78
		Williams <i>v.</i> Barton, 3 Bing. 145 ; 24 R. R. 448	26
		— <i>v.</i> Byrnes, 9 Jur., N. S. 363	16, 23

	PAGE		PAGE
Williams <i>v.</i> Evans, 1 L. R., 1 Q. B. 352; 35 L. J., Q. B. 111.....	51	Wood <i>v.</i> Smith, 4 C. & P. 45 ...	122, 124
— <i>v.</i> Hide, Palm. 548	279	Woodin <i>v.</i> Burford, 2 C. R. & M. 391; 4 Tyrw. 264; 39 R. R. 802	142, 196, 202
— <i>v.</i> Hill, Palm. 548	278	Woodward's case, 2 East, P. C. 653	242
— <i>v.</i> Holmes, 22 L. J., Ex. 283	40, 223	Woodward, <i>Re</i> , 54 L. T. 683	247
— <i>v.</i> Jordan, 6 Ch. D. 517; 46 L. J., Ch. 681; 26 W. R. 230	16, 24	Woolf <i>v.</i> Beard, 8 C. & P. 373	321
— <i>v.</i> Lake, 29 L. J., Q. B. 1 16, 23		Woolfe <i>v.</i> Horne, 2 Q. B. D. 355; 46 L. J., Q. B. 534; 36 L. T. 705; 25 W. R. 728	49
— <i>v.</i> Lloyd, Jones on Bailments, 179	278	Worth <i>v.</i> Gilling, L. R., 2 C. P. 1 ...	372
— <i>v.</i> Mason, 28 L. T. 232; 21 W. R. 386	165	Wren <i>v.</i> Pocock, 34 L. T. 697 ...	375, 376
— <i>v.</i> Millington, 1 H. Bl. 81; 2 R. R. 724	36, 39	Wright <i>v.</i> Dannah, 2 Camp. 203; 11 R. R. 693	24, 25, 41
— <i>v.</i> Paul, 6 Bing. 653; 31 R. R. 512	34	— <i>v.</i> Freeman, 48 L. J., C. P. 276; 40 L. T. 134 ...	40, 118
— <i>v.</i> Richards, 3 C. & K. 82	345	— <i>v.</i> Glyn, [1902] 1 K. B. 745	259
— <i>v.</i> Richards, [1907] 2 K. B. 88; 76 L. J., K. B. 589; 96 L. T. 644; 71 J. P. 222; 23 T. L. R. 423—D.	375	— <i>v.</i> Johnson, 1 Sid. 440, 447... ..	190
Williamson <i>v.</i> Allison, 2 East, 446... ..	159	— <i>v.</i> Leonard, 30 L. J., Ch. 365	170
— <i>v.</i> Barton, 7 H. & N. 899; 31 L. J., Ex. 170; 10 W. R. 321... ..	49	— <i>v.</i> London General Omnibus Co., 2 Q. B. D. 271; 46 L. J., Q. B. 429; 36 L. T. 590; 25 W. R. 647	364
Willoughby <i>v.</i> Horridge, 22 L. J., C. P. 90	310	Wrightup <i>v.</i> Chamberlain, 7 Scott, 598; 50 R. R. 855.....	214
Wilson <i>v.</i> Brett, 11 M. & W. 113; 63 R. R. 528.....	277		
— <i>v.</i> Merry, L. R., 1 H. L. 326	331	Y.	
Wiltshire <i>v.</i> Willett, 11 C. B., N. S. 240; 31 L. J., M. C. 8; 5 L. T. 355; 10 W. R. 445	56	York <i>v.</i> Greenhaugh, 2 Ld. Raym. 867; 1 Salk. 338...219, 239, 240	
Winkfield, The. [1902] P. 42; 85 L. T. 668; 50 W. R. 246.....	280	— <i>v.</i> Grindstone, 1 Salk. 388 ...	220
Wise <i>v.</i> Great Western Rail. Co., 1 H. & N. 63; 25 L. J., Ex. 258 ...	298		
Wiseman <i>v.</i> Booker, 3 C. P. D. 184; 38 L. T. 392; 26 W. R. 634	390	Z.	
		Zuntz <i>v.</i> South-Eastern Rail. Co., L. R., 4 Q. B. 539; 38 L. J., Q. B. 209; 20 L. T. 873.....	289

TABLE OF STATUTES.

	PAGE		PAGE
2 & 3 Phil. & M. c. 7	61	17 & 18 Viet. c. 31	282, 288
31 Eliz. c. 12	61	s. 7.....	288, 289, 290,
29 Car. 2, c. 3, s. 4.....	5		291, 292, 293, 296,
s. 17.....	5, 6, 7, 11, 12, 14		297, 298, 300, 303,
c. 7, s. 1	32, 33, 238		304, 308
s. 2	32	c. 60, s. 1	229, 236
29 Geo. 3, c. 49, s. 5	35	19 & 20 Viet. c. 97, s. 2	184
7 & 8 Geo. 4, c. 29, s. 25	58	20 & 21 Viet. c. 51, s. 2	66
s. 57	64	24 & 25 Viet. c. 95	66
9 Geo. 4, c. 14, s. 6	165	c. 96, s. 3.....	60, 259
s. 7	5, 6	s. 10	57
11 Geo. 4 & 1 Will. 4, c. 68.....	289	s. 11	58
1 & 2 Will. 4, c. 32, s. 30.....	388	s. 76	66
s. 31	387	s. 100	64
s. 35	388	c. 97, s. 41	381
3 & 4 Will. 4, c. 42, s. 23.....	189	c. 100, s. 35	316
s. 28	206, 207	25 & 26 Viet. c. 114, s. 2	389
5 & 6 Will. 4, c. 50, s. 56.....	332	26 & 27 Viet. c. 41, s. 1	218, 219
s. 78	313, 344	s. 2	219
c. 59, s. 4	229	28 & 29 Viet. c. 60	371, 374
2 & 3 Viet. c. 47, s. 54.....	235, 313, 316, 364	c. 83, s. 3	252
s. 63	316	s. 7	252
c. 71, s. 27.....	65	30 & 31 Viet. c. 35, s. 9	65
s. 40.....	65	31 & 32 Viet. c. 119, s. 14	306
6 & 7 Viet. c. 86	349, 363	s. 16	307, 308
8 & 9 Viet. c. 20, s. 47.....	392	s. 17	307
s. 68.....	390, 392	s. 18	307
s. 93.....	301	c. 121, s. 6	229
9 & 10 Viet. c. 62	362	32 & 33 Viet. c. 14, s. 19, sub-s.(5)...	35
c. 93	362, 365, 366	s. 28	35, 36
s. 1.....	319, 362	c. 117, s. 1	229
s. 2	362	33 & 34 Viet. c. 97	17, 196
s. 3	362	34 & 35 Viet. c. 56, s. 2	375
10 & 11 Viet. c. 14, s. 13	55, 57	s. 3	375
c. 89, s. 28	235	c. 78, s. 12	307
11 & 12 Viet. c. 29, s. 1	387	c. 87	32
s. 2	387	37 Viet. c. 16, s. 11	35
s. 4	387	37 & 38 Viet. c. 62, s. 1	170
c. 43, s. 5	386	38 & 39 Viet. c. 57, s. 31	229
12 & 13 Viet. c. 92	229, 236	41 & 42 Viet. c. 38, s. 1	225, 227,
s. 2	382		228
13 & 14 Viet. c. 61, s. 11.....	242	43 & 44 Viet. c. 42	361
14 & 15 Viet. c. 99, s. 2	193	c. 47, s. 1	387
c. 100, s. 1	58	s. 2, 3, 4	387

TABLE OF STATUTES.

	PAGE		PAGE
44 & 45 Viet. c. 62, s. 2	230	56 & 57 Viet. c. 71, s. 20	27
s. 3	230	s. 22, sub-s. (2)... ..	61
s. 5	230	s. 28	28, 30
s. 6	230	s. 30	28, 29, 31
s. 7	230	s. 41	29
s. 8	230	s. 44	29
s. 11	230	s. 45	29
s. 12	230	s. 48, sub-s. (1)... ..	30
s. 13	230	(4)... ..	30
s. 14	230	s. 49	30
s. 16	230	sub-s. (1)... ..	182
s. 17	230, 231	(2)... ..	182
45 & 46 Viet. c. 75, s. 1, sub-s. (2)... ..	171	s. 50, sub-s. (1)... ..	182
46 & 47 Viet. c. 61, s. 45	248	(2)... ..	207
s. 46	248, 249	(3)... ..	208
51 & 52 Viet. c. 25, s. 28	308	s. 51, sub-s. (1)... ..	183
s. 59	308	s. 52	181
c. 41, s. 85, sub-s. (1)... ..	342	sub-s. (2)... ..	208
c. 43, s. 116	242, 245	(3)... ..	208
56 & 57 Viet. c. 71	1	s. 53	177
s. 1, sub-s. (1)	1	sub-s. (1)... ..	200
(2)	2	(2)... ..	209
(3)	2	(3)... ..	209
(4)	2	s. 54	118, 206
s. 3	2	s. 58, sub-s. (1)... ..	41
s. 4.....5, 6, 15, 23, 41,		(2)... ..	45
190, 193, 199		(3)	45, 50
sub-s. (1).....	6	(4).....	45, 50
(2).....	6	s. 60	5
(3).....	8	s. 62, sub-s. (1)... ..	2, 121
s. 5	27	57 & 58 Viet. c. 57, s. 22	92, 215, 308,
s. 6	124	376	
s. 7	124, 127	63 & 64 Viet. c. 24	230
s. 10	28	s. 2	231
s. 11	118, 122, 123,	s. 3	231
172, 177		6 Edw. 7, c. 32, s. 1, sub-s. (1)	374
s. 12	117, 118	(2)	375
s. 13	118	(3)	75
s. 14	120, 121, 129	(4)	375
s. 18, pt. 1, 2	26	s. 7	375
p. 4	4, 179	c. 58	361

TABLE OF CANADIAN CASES CITED.

B.

	PAGE
Bacon <i>v.</i> Grand Trunk R. il. Co., 12 Ont. L. R. 196	398
Baker <i>v.</i> Provancher. Q. R., 24 S. C. 137	3
Barber <i>v.</i> Armstrong, 5 Ont. P. R. 153	398
Beauchamp <i>v.</i> Cloran, 11 L. C. J. 287	377
Block <i>v.</i> Stewart, 19 N. S. R. 77 ..	398
Bowman <i>v.</i> Yielding, Dig. Ont. Case Law, 1. col. 23	62
Brosseau <i>v.</i> Brosseau, 1 M. L. R. S. C. 307	376
Brown <i>v.</i> Grand Trunk Rail. Co., 24 U. C. Q. B. 350.....	394, 397
— <i>v.</i> Williams, 6 U. C. Q. B., O. S. 656	398
— <i>v.</i> Wiseman, Q. R., 20 S. C. 304	3

C.

Calder <i>v.</i> Hallett, 5 Terr. L. R. 1 ...	5, 6
Campbell <i>v.</i> Boulton, 2 U. C. Q. B. 202.....	205, 275
Canadian Pacific Rail. Co. <i>v.</i> City of Toronto, 1 Ont. W. R. 255	350
Canadian Pacific Rail. Co. <i>v.</i> Cross, Q. R., 3 Q. B. 170	394
Casey <i>v.</i> Archibald, 3 N. S. R. 4 ...	254
Chase <i>v.</i> McDonald, 25 U. C. C. P. 129	368
Clayton <i>v.</i> Great Western Rail. Co., 23 U. C. C. P. 137.....	394
Conlon <i>v.</i> Conolly, 10 N. S. R. 95 ...	342
Connell <i>v.</i> Town of Prescott, 20 Ont. A. R. 49; 22 S. C. R. 147 ...	253
Cork <i>v.</i> Canada Ice Co., 3 Ont. W. R. 106	313
Craig <i>v.</i> Miller, 22 U. C. C. P. 348...	119

D.

Daigle <i>v.</i> Temiscanata Rail. Co., 37 N. B. R. 219	399
---	-----

PAGE

Daniels <i>v.</i> Grand Trunk Rail. Co., 11 Ont. A. R. 471	398
Davey <i>v.</i> Cartwright, 20 U. C. C. P. 1 ..	55
Davidson <i>v.</i> Grand Trunk Rail. Co., 5 Ont. L. R. 574	397
— <i>v.</i> Reynolds, 16 U. C. C. P. 140	55
Davis <i>v.</i> Williams, 13 U. C. C. P. 365 ..	398
Dennison <i>v.</i> Cunningham, 35 U. C. Q. B. 383.....	398
Dickie <i>v.</i> Campbell, Stevens' N. B. Dig., 3rd ed., p. 404	254
Dillaree <i>v.</i> Doyle, 43 U. C. Q. B. 442.....	8, 242
Dixon et al. <i>v.</i> Dalby, 11 U. C. Q. B. 79.....	205, 224
Doughty <i>v.</i> Dobbs, 3 Ont. W. R. 19 ..	378
Douglass <i>v.</i> Grand Trunk Rail. Co., 5 Ont. A. R. 585	394
Dreger <i>v.</i> Canadian Northern Rail. Co., 15 Man. L. R. 386.....	394
Ducharme <i>v.</i> Charest, Q. R., 23 S. C. 82	3, 68, 119, 120
Duffield <i>v.</i> Grand Trunk Rail. Co., 31 Can. L. J. 667	398
Dunford <i>v.</i> Michigan Central Rail. Co., 20 Ont. A. R. 577	394
Durocher <i>v.</i> Meunier, 9 L. C. R. 8...	222

E.

Elliott <i>v.</i> Doak, 36 N. B. R. 328.....	378
--	-----

F.

Falconer <i>v.</i> European and North American Rail. Co., 1 Png. 179 ...	398
Fenson <i>v.</i> Canadian Pacific Rail. Co., 7 Ont. L. R. 254; 8 Ont. L. R. 688	397, 398
Ferris <i>v.</i> Grand Trunk Rail. Co., 16 U. C. Q. B. 474	395, 399
Finn <i>v.</i> Brown, 35 N. B. R. 335....	128, 176
Flannaghan <i>v.</i> Healy, 4 Terr. L. R. 391	26, 38

	PAGE		PAGE
Fleming <i>v.</i> Canadian Pacific Rail. Co., 31 N. B. R. 318	395	Keenan <i>v.</i> Yeats, 28 N. B. R. 148 ...	341
Flett <i>v.</i> Coulter, 2 Ont. W. R. 142...	378	Kennedy <i>v.</i> American Express Co., 22 Ont. A. R. 278	310
G.		Kilmer <i>v.</i> Great Western Rail. Co., 35 U. C. Q. B. 595	391
Grand Trunk Rail. Co. <i>v.</i> Campbell, Q. R., 3 Q. B. 570	399	Kirkland <i>v.</i> Rendennecht, 4 Terr. L. R. 195	275
Grand Trunk Rail. Co. <i>v.</i> Haines, 36 S. C. R. 180	395	Klassen <i>v.</i> Wright, 1 West. L. R. 158	254
Grand Trunk Rail. Co. <i>v.</i> James, 31 S. C. R. 420	398	L.	
Grand Trunk Rail. Co. <i>v.</i> McKay, 34 S. C. R. 81	395	Lacasse <i>v.</i> Delorme, 6 R. L. 210 ...	398
Great Western Rail. Co. <i>v.</i> Vilaire, 11 U. C. C. P. 509	394	Laflamme <i>v.</i> Starnes, Q. R., 18 S. C. 105	377
Groulx <i>v.</i> Canadian Pacific Rail. Co., Q. R. 3 S. C. 31	399	Lahrie <i>v.</i> McMartin, 7 R. L. 185 ...	398
Guimond <i>v.</i> Corporation of Montreal, 4 R. L. 285	369	Landry <i>v.</i> La Compagnie de Chemin de fer du Nord, 9 L. N. 5	394
Gunn <i>v.</i> Burgess, 5 Ont. R. 685	8	Langevin <i>v.</i> Canadian Pacific Rail. Co., Q. R., 5 S. C. 127	399
Guy <i>v.</i> Booth, 4 R. L. 565	62	— <i>v.</i> McMillan, 9 C. L. J. 105	62
H.		Lavoie <i>v.</i> The Queen, 3 Ex. C. R. 96	310
Hall <i>v.</i> Coleman, 3 U. C. Q. B. 39... ..	126	Lebu <i>v.</i> Grand Trunk Rail. Co., 12 Ont. L. R. 590	398
Halliday <i>v.</i> White, 23 U. C. Q. B. 593	119, 243	Levesque <i>v.</i> New Brunswick Rail. Co., 29 N. B. R. 588	391, 394
Hallinger <i>v.</i> Canadian Pacific Rail. Co., 20 Ont. A. R. 244	396	Libby <i>v.</i> Nesbit, 1 Kerr (N. B.) 362	119
Harris <i>v.</i> The King, 9 Ex. C. R. 206	396	Liddiard <i>v.</i> Toronto Rail. Co., 3 Ont. W. R. 852	319
Henderson <i>v.</i> Barnes, 32 U. C. Q. B. 176	222	Livingstone <i>v.</i> Colpitts, 21 C. L. T. (Oce. N.) 102	6
— <i>v.</i> Grand Trunk Rail. Co., 20 U. C. Q. B. 602	397	Lownds <i>v.</i> Robinson, 11 N. S. R. 364	342
Hillyard <i>v.</i> Grand Trunk Rail. Co., 8 Ont. R. 583	394	Lucas <i>v.</i> Pettit, 32 Ont. L. R. 148...	370
Hughes <i>v.</i> Reed, 10 R. J. Q. 362	62	M	
Huot <i>v.</i> Quebec Rail. Light, and Power Co., Q. R., 21 S. C. 427...	394, 397	Mallette <i>v.</i> Whyte, 17 R. J. R. Q. 482	62
Hurd <i>v.</i> Grand Trunk Rail. Co., 15 Ont. A. R. 58	398	Markham <i>v.</i> Great Western Rail. Co., 25 U. C. Q. B. 572	399
I.		Mc.	
Ibbotson <i>v.</i> Henry, 8 Ont. L. R. 625	398,	McAlpine <i>v.</i> Grand Trunk Rail. Co., 38 U. C. Q. B. 446	394, 397
	399	McDonald <i>v.</i> Power, 12 N. S. R. 340	243
J.		McGill <i>v.</i> Harris, 36 N. S. R. 414 ...	120
James <i>v.</i> Grand Trunk Rail. Co., 31 S. C. R. 420; 1 Ont. L. R. 127 ...	397	McIntosh <i>v.</i> Grand Trunk Rail. Co., 30 U. C. Q. B. 601	394
Jasmin <i>v.</i> Canadian-Pacific Rail. Co., 6 L. N. 163	395	McKay <i>v.</i> Cameron, 6 U. C. Q. B. 260	254
Johnson <i>v.</i> The King, 8 Ex. C. R. 360	253	McKelvar <i>v.</i> Canadian Pacific Rail. Co., 14 Man. L. R. 614	394, 397
Jonas <i>v.</i> Gilbert, 5 S. C. R. 356	350		

TABLE OF CANADIAN CASES CITED.

xxxix

	PAGE		PAGE
McLellan <i>v.</i> Grand Trunk Rail. Co., 8 U. C. C. P. 411	394	Rex <i>v.</i> Perras, 9 Can. Cr. Cas. 364	68
McManamy <i>v.</i> Pelletier, Q. R., 24 S. C. 127	55	Richard <i>v.</i> Stevenson, Q. R., 28 S. C. 188	243
McMichael <i>v.</i> Grand Trunk Rail. Co., 12 Ont. R. 547	394	Robertson <i>v.</i> Brown, 1 U. C. Q. B. 345	254
McNichol <i>v.</i> Brucks, 1 West. L. R. 478	8	— <i>v.</i> Toronto Rail. Co., 2 Ont. L. R. 18	319
N.		Robinson <i>v.</i> Provincial Exhibition Commission, 32 N. S. R. 216	350
Nadon <i>v.</i> Pesant, Q. R., 26 S. C. 354	243	Roussel <i>v.</i> Aumais, Q. R., 18 S. C. 474	310
Nash and McCracken, <i>Re</i> , 33 U. C. Q. B. 181	350	S.	
Natrass <i>v.</i> Nightingale, 7 U. C. C. P. 266	209	Sargent <i>v.</i> Allen, 29 U. C. Q. B. 384	398
Nieholls <i>v.</i> Duncan, 11 U. C. Q. B. 333	236	Seett <i>v.</i> McAlpine, 6 U. C. C. P. 302	8
Nixon <i>v.</i> Grand Trunk Rail. Co., 23 Ont. R. 124	398	Shields <i>v.</i> Grand Trunk Rail. Co., 7 U. C. C. P. 111	395
P.		Sincoe Agricultural Society <i>v.</i> Wade, 12 U. C. Q. B. 614	119, 209
Parslow <i>v.</i> Cochrane, 4 Terr. L. R. 312	182	Simpson <i>v.</i> Great Western Rail. Co., 16 U. C. Q. B. 474	399
Patterson <i>v.</i> Fanning, 2 Ont. L. R. 462	377	Smith <i>v.</i> Brownlee, 10 L. N. 405 ...	398
Pearce <i>v.</i> Sheppard, 24 Ont. R. 167	243	— <i>v.</i> Niagara and St. Catherine's Rail. Co., 9 Ont. L. R. 158	395
Phair <i>v.</i> Canadian Northern Rail. Co., 6 Ont. W. R. 137	394	Stout <i>v.</i> Adams, 55 N. B. R. 118 ...	341
Phillips <i>v.</i> Canadian Pacific Rail. Co., 1 Man. L. R. 110	395	Studer <i>v.</i> Buffalo and Lake Huron Rail. Co., 25 U. C. Q. B. 160	394
Platb <i>v.</i> Grand Forks and K. R. V. Rail. Co., 10 B. C. R. 299	394, 397	Styles <i>v.</i> Michigan Central Rail. Co., 18 Can. L. T. 5	398
Ponetiack and Pacific Junction Rail. Co. <i>v.</i> Irish, Q. R., 3 Q. B. 267 ...	394	Swilling <i>v.</i> Arnold, 2 West. L. R. 48	120
Q.		T.	
Quebec Central <i>v.</i> Pellerin, Q. R., 12 K. B. 152	394, 396	Templeton <i>v.</i> Waddington, 14 Man. L. R. 495	222
R.		Thompson <i>v.</i> Grand Trunk Rail. Co., 18 U. C. Q. B. 92 ...	398, 399
Rainnie <i>v.</i> St. John City Rail. Co., 31 N. B. R. 582	313, 337, 398	— <i>v.</i> Grand Trunk Rail. Co., 22 Ont. A. R. 453	395, 398
Ramie <i>v.</i> Walker, 18 N. S. R. 175 ...	313	Thorn <i>v.</i> James, 14 Man. L. R. 373	253
Rathwell <i>v.</i> Canadian Pacific Rail. Co. (1889) 468	394	Turner <i>v.</i> Bradshaw, 6 Que. P. R. 184	8, 55
Reg. <i>v.</i> Duggan, 21 C. L. T. (Oce. N.) 35	369	Tysen <i>v.</i> Grand Trunk Rail. Co., 20 U. C. Q. B. 256	395, 398
— <i>v.</i> Johnston, 38 U. C. Q. B. 549	350	V.	
— <i>v.</i> Russell, 1 B. C. R. (Pt. 1) 256	350	Van Wart <i>v.</i> New Brunswick Rail. Co., 27 N. B. R. 59	395
— <i>v.</i> Slavin, 35 N. B. R. 388	407	W.	
Rex <i>v.</i> Maher, 10 Ont. L. R. 102 ..	350	Walker <i>v.</i> Sharpe, 31 U. C. Q. B. 340	222

TABLE OF CANADIAN CASES CITED.

	PAGE		PAGE
Wardell <i>v.</i> Chisholm, 9 U. C. C. P. 125	398	Westbourne Cattle Co. <i>v.</i> Manitoba and North Western Rail. Co., 6 Man. R. 533	399
Weese <i>v.</i> Peak, 21 C. L. T. (Occ. N.) 13	7	Whitman <i>v.</i> Windor and Annapolis Rail. Co., 18 N. S. R. 271	395, 398
Weir <i>v.</i> Canadian Pacific Rail. Co., 16 Ont. A. R. 432	396	Wilson <i>v.</i> Northern Rail. Co., 28 U. C. Q. B. 274	397
Wells <i>v.</i> Crew, 5 U. C. Q. B., O. S., 209	205, 275	Winterbottom <i>v.</i> London Police Commissioners, 1 Ont. L. R. 549 ; 2 Ont. L. R. 105	369
West <i>v.</i> Boutilier, 18 N. S. R. 297	313		

AGE
399
398
397
369

INTRODUCTION.

It has been found most convenient to arrange under three heads the various subjects treated of in this work. Arrangement
of the subject.

1st. *Contracts concerning Horses, &c.*, which, including the Bargain and Sale of Chattels, comprises the law of buying, selling, and exchanging, the doctrine of unsoundness and vice, the law of warranty and false representation; the privileges and liabilities of innkeepers, livery-stable keepers, farriers, trainers, &c., and hiring, borrowing and carrying horses.

2nd. *Negligence in the use of Horses, &c.*, which includes the criminal and civil liabilities incurred through negligent driving, or keeping ferocious and vicious animals, and the liabilities of parties in hunting or trespassing on the lands of another.

3rd. *Racing, Wagers, and Gaming*, which gives a sketch of their history, rise and progress in this country, and lays down the law on these subjects in connection with the numerous and important alterations made by the "Act to amend the Law concerning Games and Wagers" (a), the "Act for Legalizing Art Unions" (b), and the recent "Act for the Suppression of Betting Houses" (c).

One great peculiarity attending a portion of this work, is the difficult question of warranty in connection with unsoundness. Because at what precise point soundness ends and unsoundness begins has always been a subject of dispute both in and out of the veterinary profession. Giving a
warranty.

(a) 8 & 9 Vict. c. 109.

(b) 9 & 10 Vict. c. 48.

(c) 16 & 17 Vict. c. 119.

Therefore, when a horse warranted sound turns out unsound, great difficulties must frequently arise from the nature of the case. For a warranty is in the nature of an Insurance, and when a man warrants a horse sound he insures that of which he can know very little. It is not like the warranty of manufactured goods, where a man calculates, from the skill and materials employed, the exact amount of responsibility he can take upon himself. When a man warrants a horse he does it at his own risk, and of course that risk is very much greater, when he does it upon his own opinion, than when he warrants after the horse has been pronounced sound by men of veterinary skill. So that if an action is brought on an alleged breach of warranty, he is, in the former case, almost entirely in the hands of the veterinary evidence produced by the purchaser; in the latter case he has men of skill to prove the exact state of the horse at the time of sale. For instance, should the purchaser produce veterinary evidence to prove that the horse has a bone spavin, and that it *must* have existed at the time of sale, the vendor in the latter case would be able to prove by actual examination that no such spavin did *then* exist, and would therefore have a very strong case to go to a jury.

Warranty
should seldom
be given.

But it appears that soundness is a subject on which, from the nature of the case, a warranty should very seldom be given: for there seems no reason why a person who buys a horse should not act as he would in any other transaction where there is risk. For instance, a man buying a house does not merely examine it himself, and then, because he likes it, buys it with a warranty; but he takes his surveyor with him, who points out all its defects, and then he buys it or not according to the opinion he may form of its value after these have been taken into consideration.

And in all cases where a risk is run and an insurance effected, there are regular rules laid down by which such transactions are governed. For where a person insures his life, he submits to a regular medical investigation,

and no company would act in so unbusinesslike a manner as merely to take a person's own warranty that he is sound in health and constitution, and so be put to the proof, in case of his death, that he was not so at the time he gave the warranty.

The best rule for a man therefore to follow in selling a horse is this: Where the horse is of no great value, to refuse a warranty altogether, and such a horse is best sold by auction. Where the horse is of great value, if sound, but that appears doubtful, then to let the purchaser be satisfied by a veterinary examination, and so take the responsibility upon himself. Where, however, the seller is confident that the horse is perfectly sound, and that with a warranty he would fetch a much larger price than without one, he should have him examined and certified as sound, &c., by one or two veterinary surgeons of respectability and experience, and then, knowing on what ground he goes, he may take the risk of warranting him sound.

When to give
a warranty.

The vexation and difficulty experienced in horse-dealing arises in a great measure from the loose manner in which such transactions are conducted, and from the thoughtless manner in which people give warranties; and we generally find that the smaller a man's knowledge may be with regard to horses, the more ready he is to warrant, little knowing the responsibility he is thus fixing upon himself.

The cause of
difficulty in
horse-dealing.

A dealer, who from the nature of his business must be constantly buying and selling horses, has an evident advantage over the persons with whom he deals, who probably do not buy or sell horses half a dozen times in a year, and very few of whom can form a reasonable opinion as to a horse's value. But the dealer, to say the least, is a pretty good judge, and, being well acquainted with the routine of his business, may, generally, go on in as satisfactory and reputable a manner as any other tradesman, so long as he keeps honest. The frequent rascality in horse-dealing transactions arises from parties

The cause of
rascality in
horse-dealing.

making improper use of that superior knowledge which experience alone can supply. Because purchasing a horse is a very different affair from buying a manufactured article; for, in the latter case, there are certain trade prices, and a corresponding quality of goods, which every man expects, and of which any ordinary man can judge; and, therefore, as each party has in general a sufficiently competent knowledge, very few disputes arise.

Veterinary
certificates.

When a horse is free from hereditary disease, is in the possession of his natural and constitutional health, and has as much bodily perfection as is consistent with his natural formation, a veterinary surgeon may safely certify him to be sound. But as there is in most horses some slight alteration in structure, either from disease, accident, or work, a veterinary surgeon in giving his certificate had much better describe the actual state of the horse, and the probable consequences, without mentioning *soundness* or *unsoundness* at all, and so let the purchaser buy him or not as he may be advised. Because in such a case a straightforward statement would be made, and a man in the veterinary profession would not be called upon in an off-hand manner to decide questions which are of the greatest nicety, being full of uncertainty, and upon which no conclusive decision can safely be arrived at. For we find the greater the difficulty, the more likely is a decision (if come to at all) to be the result of a slight preponderance of one over each of many conflicting opinions.

Veterinary
opinion.

We find that a man will sometimes warrant a horse in consequence of a veterinary opinion given in an off-hand manner, either without a sufficient examination of the horse having been made, or sometimes in the face of actual disease; for the giving a warranty seems to be considered quite a trifling matter. Thus, in the case of *Hall v. Rogerson*, tried at the Newcastle Spring Assizes, 1847 (a), it appeared that a witness, who was a veterinary surgeon, had taken off the horse's shoes, and examined his feet, when he found a slight convexity of

(a) *Hall v. Rogerson*, Appendix.

sole. The owner then asked him if he would be *justified* in warranting the horse as it had been warranted to him; the witness asked him if he was satisfied the horse went sound; he replied, "Perfectly so:" he then said he was *justified*. On cross-examination, the witness said, "I pointed out a slight disease in the sole, but thought he would have been *justified* in warranting him; if I had taken the precaution to see him go, things might have been different." So that a veterinary surgeon finding that a horse has a disease in the sole, and without taking the precaution to see him go, tells the owner he is *justified* in warranting. Now the use of the word *justified* shows that neither of the parties fully knew the amount of liability incurred by giving a warranty, and it seems as if they had considered it rather an affair of conscience or honour than of legal responsibility.

That the veterinary profession feel the greatest difficulty in dealing with the question of unsoundness when called upon for a certificate on that point, will appear from part of an article on "Soundness as opposed to Lameness," by Mr. Percival, M.R.C.S., editor of the *Veterinarian*; he writes, "Reluctantly as we enter on this difficult and much debated question, we feel it our duty to make some observations on the subject, though these observations will be rather of a general than of a particular nature, and have especial reference to soundness, regarded as the converse of, or opposite, state to lameness. No person buys or sells a horse without feeling some concern as to the soundness of the animal; the purchaser is apprehensive lest his new horse should from any cause turn out unserviceable or unequal to that, for the performance of which he has bought him; the vendor is apprehensive, either lest the animal, in other hands, should not prove that sound and effective servant he conceived or represented him to be, or lest some unrepresented or concealed fault or defect he is aware the animal possesses may now, in his new master's hands, be brought to light."

Difficulties
felt by the
veterinary
profession.

"Soundness, as opposed to actual or decided lameness (or as synonymous with good health), is a state too well understood to need any definition or description; when we come, however, to draw a line between soundness and lameness in their distinguished form—to mark the point at which one ends and the other begins—we meet a difficulty, and this difficulty increases when we find ourselves called on to include, under our denomination of unsoundness, that which is *likely* or *has a tendency* to bring forth lameness. It will be requisite, therefore, for us to say, not simply that every *lame* horse is unsound, but to add these words, *or who has that about him which is likely on work to render him lame*. This will, it is true, open the door to difference of opinion and equivocation. There may, as we have seen, spring up two opinions concerning the *presence* even of lameness. There will in more cases be two opinions concerning that which is accounted to be the precursor of lameness, or may have a tendency at some period proximate or remote to produce it; all which differences are best got rid of by reference to the ablest veterinary advice. There will be less diversity of opinion among professional men than among others, and the more skilful and respectable the professional persons are, the greater will be the probability of a happy unison in their views of the case" (a).

Conflicting
certificates as
to soundness.

Mr. Godwin, M.R.C.S., Veterinary Surgeon to the Queen, makes the following sensible remarks on the certificates given by veterinary surgeons to the vendors and purchasers of horses. He says, "It is to be regretted that the members of the veterinary profession have not been taught to adopt some rules for rendering the certificates they are required to give upon examining horses as to soundness, at least somewhat similar in the construction and expression of their opinions, so as to render them more intelligible to the persons who have to pay for them. I am quite aware of the impossibility of

(a) *The Veterinarian*, vol. xviii. p. 365.

attempting to reduce professional opinions to one common standard ; but I think that our leading practitioners might meet together, and agree upon some general principles for their guidance, that would make their certificates less liable to the censure and ridicule they both merit and incur. The occurrence is by no means uncommon for a buyer to send a horse to be examined by a veterinary surgeon, and not feeling satisfied with the opinion he obtains, to send him to another ; and then comparing the certificates of the two, and finding them diametrically opposite in their statements, he finally trusts himself to the warranty of the dealer, purchases the horse, and at the end of six months has had to congratulate himself upon the possession of a sound animal, and the escape he has had in avoiding *two unsound certificates* " (a).

(a) *The Veterinarian*, vol. xix. p. 88.

THE LAW OF HORSES.

PART I.

CONTRACTS CONCERNING HORSES, ETC.

CHAPTER I.

BUYING, SELLING AND EXCHANGING; THE REQUISITES OF THE STATUTE OF FRAUDS; DELIVERY AND PAYMENT, AND THE LAW AS TO SUNDAY DEALING.

Bargain, Sale and Exchange.

A BARGAIN or mutual agreement or understanding as to terms between the parties, is implied in every contract for a sale or exchange (*a*). Bargain.

A sale is a transfer of goods for money, and an exchange is a transfer of goods for other goods by way of barter, and in either case the same rules of law are, generally speaking, prescribed for regulating the transaction (*b*). Sale and exchange.

Previously to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), a contract of sale was termed either an "executed" or "executory" contract according to whether its effect was to transfer the property or right of possession in its subject-matter, or merely to agree to do so (*c*). But by section 1 of that Act the expressions "sale" and "agreement to sell" are substituted for those terms. The enactment in question is as follows:—

(1) "A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

(*a*) See 2 Steph. Com. 14th ed. 3 Salk. 157.

(*b*) 2 Bl. Com. 446, 447; *Anon.*, (c) Benj. on Sales, 5th ed. 3.

There may be a contract of sale between one part-owner and another.

(2) "A contract of sale may be absolute or conditional.

(3) "Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) "An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

An executed contract of sale was also called "a bargain and sale," and by s. 62 of Act of 1893 (the Interpretation Clause), "sale" includes a bargain and sale as well as a sale and delivery.

Transfer of
property by
gift.

In order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the *thing* to the donee. So, where the plaintiff claimed two colts under a verbal gift made to him by his father twelve months before his death, which however remained in his father's possession until his death, it was held, that the property in them did not pass to the donee.

Entire con-
tract.

If a man buy a horse and a pony together for 100*l.*, the contract entire, as there is no means of determining the price of each (*e*).

Severable
contract.

But if he should purchase them both together, agreeing to pay 80*l.* for the pony, and 70*l.* for the horse, the contract would be severable; and if the seller's title to the pony should fail, the buyer would be obliged to keep and pay for the horse (*e*).

Verbal
contract.

Where a bargain is made by word of mouth, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination (*f*).

Written
contract.

But if the contract be in the end reduced into writing,

(*d*) *Irons v. Smallpiece*, 2 Barn. & Ald. 551; 21 R. R. 395. See also *Cochrane v. Moore*, 25 Q. B. D. 57; 59 L. J., Q. B. 377; 63 L. T. 153; 38 W. R. 588—C. A. And cf. *Kilpin v. Ratley*, [1892] 1 Q. B. 582; 66 L. T. 797; 40 W. R. 479.

(*e*) See *Miner v. Bradley*, 22

Pick. Rep. 459 (Amer.); *Johnson v. Johnson*, 3 B. & P. 162; 6 R. R. 736; Story on Sales, 4th ed. 193, 194, 225.

(*f*) *Kain v. Old*, 2 B. & C. 634; 26 R. R. 497. See also Sale of Goods Act, 1893, s. 3.

no
si
a
pa
ra
ex
di
de
da
fir
we
by

po
ce
tio
a l
if
up
a f
the
to
the
an
wa

(*Q*
26
Goo
(*Q*

C
sho
app
sale
und
Q. B.
"
a ho
(190
W
easi
defe
cove
but
the
eigh
resil
Bro

nothing which is not found in the writing can be considered as part of the contract (g).

Where one of the parties has the option of completing a contract or agreement at a particular day, the other party has a right of rescission at any time before the ratification by the first (h). Thus, where A. proposed to exchange horses with B. and give him a specific sum as difference, and B. reserved to himself the privilege of determining upon it by a certain day, and before that day arrived, A. gave notice to B. that he would not confirm the proposed contract, it was held that no action would lie to recover the difference agreed to be paid by A. (i).

Right of
rescission.

Where an arrangement is made that the person proposing to purchase shall have the right of trial during a certain time, the other party cannot conclude the negotiation until the time allotted has elapsed. Thus A., having a horse to sell, agreed to let B. have him for 30 guineas, if he liked him, and that he should take him a month upon trial. B. accordingly took him, and kept him about a fortnight, and then told A. he liked the horse but not the price. A. desired him, if he did not like the price, to return the horse, but B. kept him ten days longer, and then returned him. A., however, refused to receive him, and brought an action on the contract for 30 guineas. It was held by the Court of Common Pleas that he could

Right of trial.

(g) *Kain v. Old*, 2 B. & C. 634; 1 R. R. 679; Story on Sales, 4th ed. 119.

26 R. R. 497. See also Sale of Goods Act, 1893, s. 3.

(i) *Esbridge v. Glover*, 5 Stew. & Port. (Amcr.) 264.

Canadian Cases.—A certain lameness or halting, which was shown when the horse was at rest for a time, and which did not appear when the trial was made by the purchaser at the time of the sale, is a defect which affords ground for setting aside the sale under Art. 1522 of the Civil Code of Quebec. *Bulcer v. Provancher*, Q. R. 24 S. C. 137 (1903).

"Tic" or "rot" is a defect for which a contract for the sale of a horse may be set aside. *Ducharme v. Charest*, Q. R. 23 S. C. 82 (1902).

Redhibitory
vice.

Where communication between buyer and seller may be had easily and promptly, and, in the case of the sale of a horse, the defect complained of is one which would have been quickly discovered if a proper trial of the animal had been made promptly, but the buyer did not make any complaint until sixteen days after the sale, and even then did not tender the animal back, but allowed eight days more to elapse before bringing suit, the action for rescission of the sale was not instituted with reasonable diligence. *Brown v. Wiseman*, Q. R. 20 S. C. 304 (1900).

not maintain such action (*j*). So where a horse was sold by A. to B. upon condition that it should be taken away by the latter and tried by him for eight days, and returned at the end of that period if he did not think it suitable for his purposes; and the horse died on the third day after it was placed in B.'s stable, without default of either party; it was held by Denman J., that A. could not maintain an action for the price, and for goods sold and delivered (*k*).

Buying a
horse under
10*l*.

Where a horse is bought for any price or consideration under the value of 10*l*., and there is not an actual payment and delivery at the time of sale, and the contract is to be performed within a year, the bargain may be bound by any of the following five methods (*l*): 1st. An agreement to deliver the horse on a certain day, a day also being agreed upon for payment of the price; and, in default, the buyer may have an action for the horse, or the seller for his money; 2ndly. The payment of the whole price, and then if the seller do not deliver the horse, the buyer may sue him, and recover it; 3rdly. Part payment of the purchase-money, and then the buyer may sue for and recover the horse, or the seller may sue for the residue of the price; 4thly. An earnest (*m*) may be given, and even the smallest sum is sufficient, and in such case the remedies are reciprocal; 5thly. An actual delivery of the horse, and even if there be none of the purchase-money paid, no earnest given, or no day set for payment, the seller may at any time sue the buyer and recover his money.

Where
neither party
can be off.

Where the price is under 10*l*., and the seller states what he asks for his horse, and a buyer says he will give it, the bargain is struck, and neither of them is at liberty to be off, provided that immediate possession of the horse or the money be tendered by either side (*n*).

Striking a
bargain.

Anciently, among all the northern nations, shaking of hands was held necessary to bind a bargain, a custom which we still retain in many verbal contracts. A sale thus made was called a *hand sale*, "*venditio per mutuum*

(*j*) *Ellis v. Mortimer*, 1 N. R. 257.

(*k*) *Elphick v. Barnes*, 5 C. P. D. 321; 49 L. J. C. P. 698; 29 W. R. 139; 44 J. P. 651. As to when the property in goods delivered on approval, or on "sale or return," or other similar terms,

passes to the buyer, see further the provisions of s. 18, r. 4 of the Sale of Goods Act, 1893.

(*l*) *Sheppard's Touch*. 225.

(*m*) *Earnest*, post, p. 14.

(*n*) *Cooper v. A draws*, Hob. 41; *Noy's Max.* c. 42; 2 Bl. Com. 447.

manuum complexionem" (.). This method of striking a bargain is very much practised in the north of England at the present day, both in horsedealing and other transactions; and whatever efficacy it may be supposed to have from custom in small dealings, it certainly does not bind the bargain where the horse is worth 10*l.* or upwards, or where the agreement is not to be performed within a year.

Where the contract for the sale or exchange of a horse is not to be performed within a year, the agreement itself or some memorandum or note of it must be in writing, and be signed by the party to be charged or his agent, within the 4th section of the Statute of Frauds (*p*). Contract not to be performed within a year.

The words of the 4th section of the Statute of Frauds applicable to a contract of this description are as follows: Statute of Frauds, s. 4.
"And be it enacted, that *no action* (*q*) shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The 17th section of the Statute of Frauds was the foundation of the law governing the transfer of goods and chattels worth 10*l.* or upwards, and among other things the buying and selling of horses of that value. Buying a horse at 10*l.* or upwards.

That statute was further extended by 9 Geo. 4, c. 14, s. 7, commonly called Lord Tenterden's Act. But those enactments were repealed by section 60 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and such contracts are now governed by the provisions of section 4 of that Act, sub-sections (1) and (2) of which are substantially a reproduction of section 17 of the Statute of Frauds and section 7 of Lord Tenterden's Act respectively. Sale of Goods Act, 1893, s. 4.

(*o*) 2 Bl. Com. 448.

(*q*) *Leroux v. Brown*, 16 Jur. 1021.

(*p*) 29 Car. 2, c. 3.

Canadian Cases.—Plaintiff's agent took a verbal order for goods from defendant who stipulated as a term of payment that he should, in a certain event, have six months' credit. Plaintiff's agent signed a memorandum containing all but this term of the contract. Defendant subsequently wrote cancelling the order. This led to further correspondence. In none of the letters was any reference made to the term allowing six months' credit. The Sale of Goods Ordinance (C. O. N. W. T. c. 39, s. 6—substantially a re-enactment of section 17 of Statute of Frauds) was pleaded. Held, that it was open to defendant to prove that the credit term was part of the contract; and as it did not appear in any of the documents Statute of Frauds.

The words of sub-sections (1) and (2) of the 4th section of the Sale of Goods Act, 1893, are as follows:

(1) "A contract for the sale of any goods of the value of 10*l.* or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) "The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Contract
within the
section.

Where an action was brought on a verbal contract, under which the plaintiff agreed to sell to the defendant a certain mare and foal, and at his own expense to keep this and another mare and foal which belonged to the defendant for a certain fixed time, and the defendant agreed to purchase the first-named mare and foal and to fetch them away at the end of the term thus fixed, and to pay the plaintiff the sum of 30*l.*; it was held, that this contract was one within section 17 of the Statute of Frauds as extended by section 7 of Lord Tenterden's Act, and which could not therefore be enforced, inasmuch as though it did not very distinctly appear on the face of the contract that the plaintiff's mare and foal were worth more than 10*l.*, yet that they might and would have been

Acceptance
and receipt.

submitted to constitute the note or memorandum in writing, the plaintiff was not entitled to recover. (2) That a letter cancelling the contract for the purchase of goods cannot be taken to constitute an acceptance of the goods. *Calder v. Hallett*, 5 Terr. L. R. 1 (1900).

Action for the price of forty head of horses, "sold and delivered to the defendant at \$23 a head." There was no agreement in writing nor part payment to bind the bargain. By s. 6 (3) of the North West Territories Sales of Goods Ordinance, in order to establish a binding contract, the plaintiff had to prove an acceptance and an actual receipt by the defendant of at least a part of the goods. The plaintiff said he was to keep the horses until paid for, but he had no direct agreement not to give them until paid for. The horses which the defendant orally agreed to buy were kept on the plaintiff's ranch separate from the rest of the plaintiff's herd: *Held*, that even if there was an acceptance, there was no actual receipt by the defendant; and the action failed. *Livingstone v. Colpitts*, 21 C. L. T. (Occ. N.) 102 (1900).

shown by parol evidence to be so, and that there could be no doubt of the fact. It was also held, that this contract was not less within the statute because something else, which was merely ancillary to its principal subject-matter, and to which the 17th section of the Statute of Frauds did not apply, was included in it, as the contract was an entire one and the price was indivisible (r).

Therefore to make the sale of a horse at 10*l.* or upwards valid under the 4th section of the Sale of Goods Act, 1893, the buyer must either actually accept and receive it, or give something in earnest to bind the bargain, or something in part payment; or the parties to be charged must either themselves or by their agents make and sign some note or memorandum in writing of the bargain.

Requisites of a sale of goods of more value than 10*l.*

We shall consider—

- 1st. The acceptance and receipt.
- 2nd. The earnest and part payment.
- 3rd. The note or memorandum in writing.
- 4th. The signature by the party to be charged.
- 5th. The signature by an agent.

The Acceptance and Receipt.

To satisfy the statute there must be an acceptance and a receipt of the goods, and the acceptance must be of the goods "so sold," for the enjoyment of something merely engrafted upon the principal subject-matter of the contract will not satisfy the statute (r). The acceptance must be with the intention of taking possession as owner. And the receipt implies delivery, either actual or constructive (s).

In what they consist.

(r) *Harman v. Reece*, 25 L. J., C. P. 257.

v. *Topp*, 4 Exch. 394; 80 R. R. 624; *Holmes v. Hoskins*, 9 Ex. 753; 96 R. R. 959.

(s) See per Parke, B., *Saunders*

Canadian Cases.—The primary creditor sued the primary debtor to recover damages for refusal to accept and pay for a horse bought of the primary debtor from the primary creditor for \$50. At the time of the sale the primary debtor had deposited \$5 in the hands of the garnishee, which was to have been paid over to the primary creditor when the horse was delivered. There was no delivery, no acceptance, no memorandum in writing, and nothing given by way of earnest: *Held*, that there had been no compliance with s. 17 of the Statute of Frauds. The payment to the garnishee was not sufficient to satisfy the statute, the primary creditor, by his action in garnishing this amount, having elected to treat it not as a payment under the contract (in which case it would be the primary creditor's money and not garnishable), but

Acceptance and receipt.

Py s. 4, sub-s. (3), of the Sale of Goods Act, 1893, "there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

General rule.

There is always an acceptance and receipt by the purchaser when the vendor has parted with his lien, because, as was laid down by Holroyd, J., "upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, so long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute" (t).

Acceptance before delivery.

In the case of *Saunders v. Topp* (u), the Court doubted whether in any case there could be an acceptance and receipt before actual delivery. But later cases show that in the case of specific goods the acceptance may precede the actual delivery, and need not be contemporaneous or

(t) *Bailey v. Parker*, 2 B. & C. 261.
44; 3 D. & R. 220; 26 R. R. 260; (u) 1 Exch. 390; 80 R. R. 624.
Cusack v. Robinson, 30 L. J., Q. B.

Property in horse.

as the primary debtor's money. *Worse v. Peak*, 21 C. L. T. (Occ. N.) 43 (1900).

A., having purchased from B. a half-interest in a celebrated brood mare, paid to B. \$50 more than the half-interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was that they were to keep her for breeding purposes, and share the profits equally. During the year, and while in B.'s possession, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was in *gremio* at the time of the sale. In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act, R. S. O., ch. 119, avoided the plaintiff's title as against the execution: *Held*, that the Act did not apply. That A. and B. were tenants in common of the mare; that B.'s possession was the possession of both; that the sheriff's sale only passed B.'s interest in the mare, and that C. by his purchase became co-owner with A.: *Held*, also, that the property in the colt followed that of its dam, and that A. was an owner of an undivided moiety in both. *Gunn v. Burgess*, 5 Ont. R. 685 (1884). And see *Turner v. Bradshaw*, 6 Que. P. R. 184; *McNichol v. Brucks*, 1 West. L. R. 478; *Scott v. McAlpine*, 6 U. C. C. P. 302; *Dillaree v. Doyle*, 43 U. C. Q. B. 442.

subsequent to it (x). For inasmuch as the vendor may lose his lien on the goods without losing the personal possession of them, so may a vendee have accepted and have actually received them within the meaning of the statute without having the personal possession of them; e.g., in a case in which it is agreed between the vendor and the vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the lien of the vendor is gone, and the goods are no longer in his possession as unpaid vendor (y).

The vendor may at any time disaffirm a sale of goods of the value of 10*l.* or upwards, if only contracted to be made by parol, before the vendee does anything to bind the bargain; if, however, the buyer has "taken to" the goods, before the contract is disaffirmed, it will, as it would seem, bind the bargain in favour of the buyer as well as the seller (z).

When vendor may disaffirm sale.

Where, however, an article is selected by the buyer, very slight evidence of its acceptance, *when received*, would be sufficient to show an acceptance, coupled with a receipt. As where the defendant verbally agreed to buy some sheep which he had selected from the plaintiff's flock, and directed them to be sent to his field, which was accordingly done. Two days afterwards he sent his man to remove them from the field to his farm, which was some miles distant, and on their arrival he counted them over and said, "It is all right." It was held that this was evidence for the jury of his acceptance of the sheep so as to satisfy the Statute of Frauds, notwithstanding he afterwards repudiated the purchase, and sent the sheep back to the plaintiff (a). And Alderson, B., remarked on the case as follows: "The previous selection of the sheep is very material, to show the nature of the acceptance when the sheep were received. The defendant says, 'It is all right.' If he had never seen the sheep, and there had been no previous acceptance, his saying 'It is all right' would have had no effect; but when he had previously examined and selected the sheep, it was for the jury to say whether he did not mean, 'These are the sheep which I selected.' Suppose, in the case of a remarkable animal, for instance, a horse with peculiar spots, the vendee had

Where an article is selected.

(x) *Morton v. Tibbett*, 15 Q. B. 428; *Cusack v. Robinson*, 30 L. J., Q. B. 261.

(z) *Taylor v. Wakefield*, 6 E. & B. 765.

(y) *Cusack v. Robinson*, 30 L. J., Q. B. 261.

(a) *Saunders v. Topp*, 4 Exch. 390; 80 R. R. 624.

Question for
the jury.

Constructive
possession by
vendee.

Seller may
become agent
for buyer.

said, 'All right,' there could be no doubt he would mean 'This is the horse I bought' (b).

It is a question for the jury whether or not there has been an acceptance and actual receipt (c).

It has been stated above (d) that there may be an acceptance and receipt by the vendee before the goods are actually delivered by the vendor. Thus, after the defendant had verbally agreed to purchase of the plaintiff a horse, but before there had been any actual delivery plaintiff requested defendant to lend it to him to take certain journeys. To this the defendant assented, and the horse remained with plaintiff for a fortnight, when it was sent to the defendant, who, however, refused to receive it; the jury found that the bargain for the purchase of the horse was complete before the proposal to borrow it was made, and that the defendant, as owner of the horse, gave plaintiff permission to keep it. It was thereupon held that there was evidence of an acceptance and receipt of the horse to satisfy the Statute of Frauds (e). But the constructive possession by the vendee must be clearly such, as that by it the vendor would lose his lien on the goods (f).

In all cases of this description there may be such a change of character in the seller as to make him the agent of the buyer, so that the buyer may treat the possession of the seller as his own (g); and the question for the jury will be, whether the seller held the subject-matter of the sale as owner, or merely as keeper for the buyer. Thus, when A. agreed to purchase of B. a carriage then standing in B.'s shop, A. at the same time desiring that certain alterations might be made on it, the alterations having been made the carriage was, at A.'s request, placed in the back shop. A. called at the shop on a Saturday, and requested B. to hire a horse and man for him, and to send the carriage to his house on the following day, in order that he might take a drive in it. A. had previously intimated his intention to take the carriage out a few times, in order that, as he was going to take it abroad, it might pass the custom-house as a second-hand carriage.

(b) *Saunders v. Topp*, 4 Exch. 395; 80 R. R. 624. See also *Simmonds v. Humble*, 13 C. B., N. S. 258.

(c) *Bushell v. Wheeler*, 15 Q. B. 442; *Jordan v. Norton*, 4 M. & W. 160; 51 R. R. 508.

(d) See ante, p. 8.

(e) *Marrin v. Wallace*, 6 E. & B. 726; 2 Jur., N. S. 689.

(f) *Holmes v. Hoskins*, 9 Exch. 753; 96 R. R. 959.

(g) *Cattle v. Swarder*, 30 L. J., Ex. 310.

The carriage was accordingly sent to and used by A. on the Sunday, A. paying for the hire of the horse and man. A. afterwards refused to take or pay for the carriage. It was held that there was a sufficient acceptance and receipt of the carriage by A. before the Sunday, within the 17th section of the Statute of Frauds (h).

In some cases great difficulty arises in deciding whether there has been such an acceptance and receipt as constitutes a constructive delivery under the statute; and we shall see by the following cases that some very nice distinctions have been drawn: *Elmore v. Stone* (i) is a leading case on the subject, and, though its authority was doubted by Bynley, J., in *Howe v. Palmer* (k), it will be seen that it may be distinguished from that and all the following cases.

What has been held sufficient as an acceptance and receipt.

In *Elmore v. Stone* (i) an action was brought for the price of two horses, and a question arose whether there had been a delivery of them under the Statute of Frauds. The plaintiff was a livery-stable keeper and horsedealer. He asked 180 guineas for two horses, which the defendant at first refused to give, but afterwards sent word that "the horses were his, but that as he had neither servant nor stable the plaintiff must keep them at livery for him;" the plaintiff assented, and removed them out of the sale stable into another. The defendant afterwards refused to take them, and set up for his defence the 17th section of the Statute of Frauds. It was there held that if a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, it is a sufficient delivery of the goods within the Statute of Frauds, and that it is no objection to a constructive delivery of goods that it is made by words parcel of the parol contract of sale; and Mansfield, C. J., said, "A common case is that of a sale of goods at a wharf or a warehouse, where the usual practice is to deliver the key of a warehouse or a note to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place. After the defendant in

(h) *Beaumont v. Brengeri*, 5 Kibble v. Gough, 38 L. T. 204—C. B. 301; 75 R. R. 731. C. A.

(i) *Elmore v. Stone*, 1 Taunt. 458; 10 R. R. 578. See also (k) *Howe v. Palmer*, 3 B. & Ald. 324.

this case had said that the horses must stand at livery, and the plaintiff had accepted the order, it made no difference whether they stood at livery in the vendor's stable, or whether they had been taken away, and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses, but as any other livery-stable keeper might have them to keep. Under many events it might appear hard if the plaintiff should not continue to have a lien upon the horses which were in his own possession, so long as the price remained unpaid; but it was for him to consider that before he made his agreement. After he had assented to keep the horses at livery, they would, on the decease of the defendant, have become general assets; and so, if he had become bankrupt, they would have gone to his assignees. The plaintiff could not have retained them, though he had not received the price."

What has
been held
insufficient.

But where a purchaser verbally agreed at a public market with the agent of the vendor to purchase twelve bushels of tares (then in the vendor's possession, constituting part of a larger quantity in bulk), to remain in the vendor's possession till called for, and the agent on his return home measured the twelve bushels and set them apart for the purchaser, it was held by the Court of King's Bench that this did not amount to an acceptance by the latter, so as to take the case out of the 17th section of the Statute of Frauds. And Bayley, J., said, "*In Elmore v. Stone* (l) the buyer directed expense to be incurred, and the directing of that expense was considered evidence of an acceptance on his part. That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. There is this distinction between that case and this, that there an expense was incurred on account and by the direction of the buyer; here there is none. But I must say, however, that I doubt the authority of that decision. This case is clearly within the statute" (m).

However, the case of *Elmore v. Stone* (l) seems to have been properly decided, because the plaintiff, being a livery-stable keeper as well as a horsedealer, the buyer, by ordering him to keep the horses at livery, directed expense to be incurred; and the plaintiff, by consenting to keep

(l) *Elmore v. Stone*, 1 Taunt. 458; 10 R. R. 578.

(m) *Howe v. Palmer*, 3 B. & Ald.

324. And see *Richard v. Moore*, 38 L. T., N. S. 811—C. A.

them at livery, relinquished his possession as owner, and held them only as *livery-stable keeper*.

In the case of *Carter v. Toussaint* (n), which was a sale upon credit, the purchaser had exercised various acts of ownership over the horse, which were held to be no acceptance within the statute. It appeared that the horse was sold by a parol contract for 80*l.*, but no time was fixed for the payment of the price. The horse was fired in the purchaser's presence, and with his approbation, and it was agreed that the horse should be kept by the vendor for twenty days without any charge being made for it. At the expiration of that time the horse was sent to grass by the direction of the purchaser, and by his desire entered as the horse of the vendor. Abbott, C. J., and Bayley and Holroyd, JJ., distinguished this case from *Elmore v. Stone* (o), on the ground that there the plaintiff was both a *livery-stable keeper* and a *horse-dealer*; but that here he was not; and held that there was no acceptance of the horse by the purchaser within the 17th section of the Statute of Frauds.

Various acts
of ownership.

The following case was a ready-money transaction, and the agreement was that the horse should be taken away and the money paid on a certain day; on that ground there was held to have been no acceptance within the statute, although the purchaser had exercised various acts of ownership over him. It seems A. entered into a parol agreement to purchase a horse of B. for ready money, and to take him away at a time agreed upon. Shortly before the expiration of that time A. returned and ordered the horse to be taken out of the stable, when he and his servant mounted, galloped and leaped him; and after they had so done, his servant cleaned him, and A. himself gave directions that a roller should be taken off and a fresh one put on, and that a strap should be put upon his neck, which was consequently done: A. then requested that he might remain in B.'s possession a week longer, at the expiration of which time he promised to fetch him away and pay for him; to this B. assented. The horse died the day before A.'s return, and he refused to pay the price. It was held by the Court of King's Bench that this was a ready-money bargain, and, as the purchaser could have no right to take away the horse till he had paid the price, that there was no acceptance

A ready-
money trans-
action.

(n) *Carter v. Toussaint*, 2 B. & Ald. 855; 1 D. & R. 515; 24 R. R. 589.
(o) *Elmore v. Stone*, 1 Taunt. 458; 10 R. R. 578.

of the horse within the meaning of the Statute of Frauds (*p*).

Criterion for determining whether goods are accepted or not.

The conduct of the buyer after the receipt of the goods will often be the criterion for determining whether he has accepted them (*q*); as, *e.g.*, where he makes an unreasonable delay in notifying his rejection (*r*), or deals with them in an unreasonable manner (*s*). And there are cases which show that, without any act of ownership, the act of examination of the goods, involving as it does an admission of the existence of the contract, is evidence to go to the jury of an acceptance by the buyer (*t*).

Where a buyer offers to resell.

Where a person who has contracted for the purchase of a horse or any other goods, offers to resell them as his own, it is a question for the jury whether or not a delivery to and acceptance by himself has been proved (*u*). Where, however, the defendant offered goods which he had refused to accept, for resale in the market, stating at the same time that he had not accepted them, and that he would have to make other arrangements before he could sell, it was held that there had been no acceptance (*x*).

Where goods are agreed to be resold.

An agreement for the resale of goods by the vendee is sufficient evidence of a delivery and acceptance, as against *him*, to leave to the jury (*y*).

The Earnest and Part Payment.

Two kinds of earnest.

The civil law called the earnest "*Arrha*" and this it interprets to be "*emptiois-venditionis, contractæ argumentum*" (*z*). It recognized two kinds of earnest,—symbolical and pecuniary; the one being a transfer of something by way of pledge or assurance, and the other being a payment of part of the purchase-money (*a*). A similar distinction is made in the Statute of Frauds (*b*),

(*p*) *Toupest v. Fitzgerald*, 3 B. & Ald. 680; 22 R. R. 526.

(*q*) *Parker v. Wallis*, 5 E. & B. 28.

(*r*) *Bushell v. Wheeler*, 15 Q. B. 442; 81 R. R. 675.

(*s*) *Parker v. Wallis*, 5 E. & B. 21.

(*t*) *Kibble v. Gough*, 38 L. T., N. S. 204—C. A.; *Page v. Morgan*, 15 Q. B. D. 228; 54 L. J., Q. B. 434; 53 L. T. 126; 33 W. R. 793—C. A. See also *Nicholson v. Bowser*, 28 L. J., Q. B. 97; and *cf. Taylor v. Smith*, [1893] 2 Q. B. 65; 61

L. J., Q. B. 331; 67 L. T. 39; 40 W. R. 486.

(*u*) *Blenkinsop v. Clayton*, 7 Taunt. 597; 18 R. R. 602.

(*x*) *Rickard v. Moore*, 38 L. T. 841—C. A.

(*y*) *Chaplin v. Rogers*, 1 East, 192; 6 R. R. 249.

(*z*) 2 Bl. Com. 447.

(*a*) Code Civile, 1590; Vinnius, Com. in Inst. l. 3, tit. 324. See also *Howe v. Smith*, 27 Ch. D. 89, 100, 101; 53 L. J., Ch. 1055; 50 L. T., 573; 32 W. R. 802.

(*b*) 29 Car. 2, c. 3, s. 17.

and in s. 4 of the Sale of Goods Act, 1893, *ante*, p. 6. Thus the buyer must "give something in earnest to bind the bargain," or "give something in part payment."

A symbolical earnest may be anything used by the parties to bind the bargain. Therefore, a saddle, bridle, horsewhip or currycomb may be used for the purpose. Symbolical.

A pecuniary earnest consists of a current coin or sum of money given in part payment, and its efficacy does not depend upon its value being proportioned to that of the article contracted for. Pecuniary.

Where the earnest, whether symbolical or pecuniary, is delivered to the vendor, it should be kept by him, and not be returned to the purchaser. For where the purchaser of a horse or other goods draws the edge of a shilling over the hand of the vendor, and returns the money into his own pocket, which in the north of England is called "striking off a bargain," it is neither an earnest nor a part payment within the statute (c). Earnest should be retained by the vendor.

Where an earnest was given on a contract of sale, the old rule was, that if the buyer repented of his bargain, he might refuse to fulfil it, upon forfeiting to the seller the whole earnest money deposited. But if the failure to comply with the contract was on the part of the vendor, he was bound to make fourfold restitution to the vendee (d). The old rule.

But under the statute the earnest binds the bargain, and therefore the property passes in the same way as where there is a part payment. And under such circumstances an action for the price may be supported (e). Thus in an exchange of horses, when it was agreed that the plaintiff should pay the defendant four guineas to boot on the 17th December following, and also that the plaintiff should keep the colt till the September following, and the defendant "to make the agreement more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain," it was held that the payment of the halfpenny vested the property of the colt in the defendant (f). Effect of earnest under s. 4 of the Sale of Goods Act, 1893.

Where there was a part payment for some animals, which were deposited with a third party till the full amount was paid, and two of them died, the loss was held to fall on the purchaser (g). Effect of part payment.

(c) *Blenkinsop v. Clayton*, 7 Taunt. 579; 18 E. R. 602.

(d) *Bracton*, lib. 2, cap. 27, fol. 62.

(e) *Dyer v. Cowley*, 17 L. J.,

Q. B. 360.

(f) *Bach v. Owen*, 5 T. R. 409.

(g) *Dyer v. Cowley*, 17 L. J.,

Q. B. 360.

Oral contract to treat previous payment as part payment.

Where, upon an oral contract for the supply of goods, it was a term of the contract that a sum of money which had been overpaid to the vendor upon a previous sale of goods by him to the purchaser should be retained by the vendor on account of the price of the goods contracted to be supplied; it was held that there was not a part payment which would satisfy the provisions of s. 4, sub-s. (1), of the Sale of Goods Act, 1893, *ante*, p. 6 (*h*).

Cheque sent by post returned.

So where the plaintiff agreed with the defendants to buy from them certain goods above the value of 10*l.*, and sent them a cheque for 10*l.* in part payment: and the plaintiff sent not only the cheque for 10*l.*, but also a second cheque for the balance to the defendants on the same day, but the defendants at once returned the cheques, alleging that there was no concluded contract; it was held that as the cheques were not accepted by the defendants, there was no payment within the meaning of the section, and that the Post Office was not the defendants' agent to accept payment on their behalf so as to take the case out of the Act (*i*).

The Note or Memorandum in Writing.

Written agreement.

If there has been either an agreement in writing, or a parol agreement which is afterwards reduced into writing, by the parties, that writing alone must be looked to, to ascertain the terms of the contract (*j*).

No particular form required.

No particular form is necessary to constitute a good note or memorandum in writing; and a sold note (*k*) or a bill of parcels is sometimes sufficient, where it can be proved that it has been recognized by the other party (*l*). However, there are certain requisites which must be contained within the instrument, to satisfy the statute.

Names of the contracting parties.

The note or memorandum in writing must state who are the contracting parties (*m*). But it is not necessary that they should appear actually on the face of the

(*h*) *Norton v. Davison*, [1899] 1 Q. B. 401; 68 L. J., Q. B. 265; 80 L. T. 139; 47 W. R. 275—C. A.; following *Walker v. Nussey*, 16 L. J., Ex. 120; 16 M. & W. 302; 73 R. R. 507.

(*i*) *Davis v. Phillips, Mills & Co.*, 24 T. L. R. 4—Channell, J.

(*j*) Per Lord Abinger, C. B., *Allen v. Pink*, 4 M. & W. 144; 51 R. R. 503.

(*k*) *Parton v. Crofts*, 33 L. J., C. P. 189; *Sievwright v. Archi-*

bald, 20 L. J., Q. B. 529.

(*l*) See *Johnson v. Dodgson*, 2 M. & W. 653; 46 R. R. 733; *Durrell v. Evans*, 31 L. J., Ex. 337.

(*m*) *Williams v. Lake*, 29 L. J., Q. B. 1; *Williams v. Byrnes*, 9 Jur., N. S. 363; *Champion v. Plummer*, 1 N. R., B. & P. 252; 8 R. R. 795; *Loythroap v. Bryant*, 2 Bing. 244; 42 R. R. 709; *Williams v. Jordan*, 6 Ch. D. 517; 46 L. J., Ch. 681.

memorandum; if, from the memorandum taken in connection with surrounding circumstances, it clearly appear who they are, this is sufficient (*n*).

It must also state the terms upon which the contract is made, because the word bargain means the terms upon which the parties contract. As, for instance, in *Bristow v. Halford* (*o*), the memorandum of agreement on the sale of a race-horse was to the effect that the defendant should purchase the horse for 300*l.* paid down, 100*l.* in three months, 100*l.* on the horse winning the Goodwood Cup, and 1,000*l.* on his winning the St. Leger Stakes, for which the defendant undertook to enter him.

Terms of the contract must be stated.

But though it does not state the terms upon which the contract is made, it will be sufficient to satisfy the statute, if it distinctly refers to and recognizes another document, which does contain them (*p*). The connection between the documents must appear on the face of them, for it cannot be supplied by parol evidence (*q*), which can only be used to show what the writing is which is referred to, and which is not admissible to supply any defects or omissions in the written evidence (*r*).

May be collected from more than one document.

An "agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandize," is exempted from stamp duty (*s*).

The Stamp Act.

If at an auction the purchaser's name be signed to a catalogue, it must be connected with or refer to the conditions of sale, to make the contract valid (*t*). And it is not sufficient where they are merely in the room but not *actually attached* to the catalogue, or clearly referred to in it; and if during the sale they get separated, the signatures made after the separation are unavailable (*u*).

Catalogue at a sale.

Where, at a sale of horses, there was a catalogue which contained the number of the lot, the description of the mare to be sold, and the conditions; and a sales ledger containing the same information with regard to lot and description, together with the name of the purchaser and

(*n*) Chitty on Contracts, 14th ed. 80.

(*o*) *Bristow v. Halford*, before Lord Campbell, C. J., West, C. P. Feb. 1, 1853.

(*p*) *Ridgway v. Wharton*, 27 L. J., Ch. 46.

(*q*) *Boydell v. Drummond*, 11 East, 142; 10 R. R. 450; *Cuddick v. Skidmore*, 27 L. J., Ch. 153; *Pierce v. Corf*, L. R. 9 Q. B. 217;

43 L. J., Q. B. 52.

(*r*) *Boydell v. Drummond*, 11 East, 142; 10 R. R. 450; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78.

(*s*) 33 & 34 Vict. c. 97, Sch. "Agreement" (3).

(*t*) *Hinde v. Whitehouse*, 7 East, 568; 8 R. R. 676.

(*u*) *Kenworthy v. Scholfield*, 2 B. & C. 945; 26 R. R. 600.

the price at which the mare was sold, but having no reference to the catalogue which contained the conditions of sale; it was held that the catalogue and conditions of sale were not sufficiently connected with the sales ledger to make a memorandum within the statute.

The Court was also of opinion that a letter, which the purchaser subsequently wrote admitting the purchase, did not constitute a sufficient memorandum, because it neither stated a price nor referred to the sales ledger where the price was stated (v).

Price when
agreed upon.

The price when agreed upon is a material part of the bargain, and must be stated in the memorandum. Thus, where on the 13th June a verbal contract was made for the sale of a horse, warranted five years old, for 200 guineas, and in order to take the case out of the Statute of Frauds, the plaintiff gave in evidence the following letter, written by the defendant on the 18th of June: "Mr. Kingscote begs to inform Mr. Elmore, that if the horse can be proved to be five years old, on the 13th of this month, in a perfect satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. K. will most decidedly not have him." Lord Chief Justice Abbott was of opinion that this was not a sufficient note or memorandum in writing within the Statute of Frauds, and nonsuited the plaintiff. The Court of King's Bench confirmed the nonsuit, on the ground that the *price agreed to be paid constitutes a material part of the bargain*; because if it were competent to a party to prove by parol evidence the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent (x); but it has been held that a written order for goods, "on moderate terms," is sufficient (y).

Where no
price is agreed
upon.

If, however, no price is fixed and agreed upon, a note or memorandum which does not state any will be sufficient, and the law will infer that a reasonable price was to be paid (z); on the principle that if I take up wares from a tradesman, without any agreement as to price, the law concludes that I contracted to pay their real value (a).

(v) *Pierce v. Corf*, L. R., 9 Q. B. 210; 43 L. J., Q. B. 52; 29 L. T. 919. And see *Rishton v. Whatmore*, 8 Ch. D. 467; 47 L. J., Ch. 629; 26 W. R. 827.

(x) *Elmore v. Kingscote*, 5 B. & C. 583; 29 R. R. 341. See also *Taylor v. Smith*, [1893] 2 Q. B. 65;

61 L. J., Q. B. 331; 67 L. T. 39; 40 W. R. 486.

(y) *Ashcroft v. Morrin*, 4 M. & G. 450; 61 R. R. 559.

(z) *Handley v. McLaine*, 10 Bing. 488.

(a) 2 Bl. Com. 30.

The omission of the particular mode or time of payment does not necessarily invalidate the agreement (b).

A person who transacts a proposal by letter must be considered as renewing his offer every moment, until the time at which the answer is to be sent, and then the contract is completed by the acceptance of the offer. For if the law were otherwise, no contract could ever be completed by post (c). And if a letter be given in evidence with the direction torn off, the jury will do well to presume *prima facie*, that it was addressed to the person who produces it (d).

Contract by letter.

Where an intending purchaser wrote to the seller saying, "If I hear no more about the horse, I consider the horse is mine at 50*l.* 15*s.*," and the seller did not answer the letter, the purchaser would have been bound to his offer, if the seller had chosen to accept it; but the fact of the seller not having answered the letter will not bind him, as the purchaser had no right to put upon him the burden of the choice of writing a letter of refusal or being bound by the agreement proposed (e).

If letters taken together contain a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. And of course therefore the Court may look at all the letters which have passed, for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute (f).

Must express all the terms of the agreement.

A letter signed by the party to be charged after the transaction has taken place, which states (or plainly refers to other documents which state) and admits the terms of the contract, is a good memorandum under the statute, even if such letter contain an attempted repudiation by the writer of his liability under the contract (g).

(b) *Sarl v. Bourdillon*, 26 L. J., C. P. 78.

(c) *Dunlop v. Higgins*, 12 Jur. 295.

(d) *Curtis v. Richards*, 1 M. & G. 47, per Tindal, C. J.

(e) *Felthouse v. Bindley*, 31 L. J., C. P. 204.

(f) *Archer v. Baynes*, 5 Ex. 629; 82 R. R. 792; *Richards v. Porter*, 6 C. B. 433; *Warner v. Wellington*, 25 L. J., Ch. 662; *Smith v. Neale*, 26 L. J., C. P. 143; *Watts v. Ainsworth*, 1 H. & C. 83;

Wiley v. Sweeting, 9 C. B., N. S. 30 L. J., C. P. 150; 9 W. R. 213; *Pierce v. Wyf*, L. R., 9 Q. B. 214; 43 L. J., Q. B. 52; 29 L. T. 919.

(g) *Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; *Wilkinson v. Evans*, L. R., 1 C. P. 417; *Buxton v. Rust*, L. R., 7 Ex. 1; 41 L. J., Ex. 1; 25 L. T. 502, affirmed L. R., 7 Ex. 279; *Leather Cloth Co. v. Heironimus*, L. R., 10 Q. B. 140; 44 L. J., Q. B. 54; 32 L. T. 307.

Where A. sold a particular bay mare to B. through C., who was acting as agent to B., and C. wrote to B. stating that he had bought "the bay mare" for forty guineas, and followed it up by other letters reiterating the terms of sale, and requesting payment; whereupon B. wrote to C. alluding to the mare which C. bought for him, and promising payment; it was held that B.'s letter, though sent to his own agent, was, coupled with C.'s letters, a sufficient memorandum of the sale as against B. (*h*).

Mutual
assent.

But as mutual assent is necessary to constitute a binding contract, it is held that where it is sought to establish an agreement by means of letters, such letters will not amount to an agreement unless the answer be *ex simplice*, without the introduction of any new term (*i*). Thus, in the following case an action of *assumpsit* was brought for the price of a mare sold and delivered, to which the defendant pleaded *non assumpsit*. It appeared that the defendant having seen and ridden a mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted; therefore as she lays out, turn her out my mare." The plaintiff agreed to sell her for the twenty guineas. The defendant afterwards wrote again to him, "My son will be at the 'World's End' (a public-house) on Monday, when he will take the mare and pay you; send anybody with a receipt, and the money shall be paid; only say in the receipt *sound, and quiet in harness*." The plaintiff wrote in reply, "she is warranted sound, and quiet in *double harness*; I never put her in single harness." The mare was brought to the "World's End" on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days and then returned her as being unsound. The learned judge stated to the jury that the question was, whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and that the son had not authority to take her away. It was held by the Court of Exchequer, on motion to enter a verdict for the plaintiff, that there was no

(*h*) *Gibson v. Holland*, L. R., 1 C. P. 1; 35 L. J., C. P. 5; 14 W. R. 86. (i) *Cooper v. Hood*, 28 L. J., Ch. 212.

complete contract in writing between the parties; that therefore the direction of the learned judge was right. Also that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent, and consequently that the plaintiff was not entitled to recover (*k*). And where the plaintiff sent his horse to a livery stable for sale, and the defendants bid 75*l.* for him, but no final agreement was come to, and the plaintiff left the horse at the livery stable to see if the defendants would buy the animal, arranging with the livery-stable keeper that he was to have no commission on the sale unless 75*l.* or more were paid; and the horse proving slightly unsound, the defendants wrote to the livery-stable keeper offering 70*l.* for him, and the livery-stable keeper having transmitted their letter to the plaintiff, he (the plaintiff) wrote to the livery-stable keeper as follows: "As the horse is with you he shall go at 70*l.* clear to me. I will pay no expenses; you must get what you can of Mr. B. (one of the defendants); I cannot allow anything off the 70*l.*" It was held, that as the plaintiff, by his answer to the defendants' offer, stipulated that they should bear expenses to which he as vendor was *primâ facie* liable, he had added a new term to those proposed, and, in the absence of an acceptance of that term, there was no complete contract between the parties (*l*).

On the other hand, however, two letters may be sufficiently identical to constitute a contract, although the letter of proposal may mention a term which is omitted to be mentioned in the letter of acceptance (*m*).

The terms of a written contract for the sale of goods, falling within the operation of the statute, cannot be varied or altered by parol; and where a contract for the bargain and sale of goods was made, stating a time for the delivery of them, it was held by the Court of Exchequer that an agreement to substitute another day for that purpose must, in order to be valid, be in writing (*n*). So, also, where the day appointed for the delivery of goods was subsequently discovered to be a Sunday, and it was then by word of mouth agreed between the parties that the delivery should be made on the "Monday or Tuesday" following: it was

Terms cannot
be varied by
parol.

(*k*) *Jordan v. Norton*, 4 M. & W. 656.
155; 51 R. R. 508.

(*l*) *Lewis v. Pedrick*, 29 L. T.
178.

(*m*) *Metzler v. Gounod*, 32 L. T.

(*n*) *Marshall v. Lynn*, 6 M. &
W. 118; 55 R. R. 534; and see
Noble v. Ward, L. R., 1 Ex. 117;
L. R., 2 Ex. 135—Ex. Ch.

held by the Court of Queen's Bench, that the enlargement of time having materially varied the contract, and in fact substituted a new one, an action for non-delivery could not be maintained (o). But forbearance on the part of the plaintiff is not a variation of the contract (p).

But may be explained.

But though the terms of a written contract cannot be contradicted, altered or varied by parol evidence, yet such evidence is admissible to define what the written contract has left undefined (q); e.g., where it contains no date (r), or where its terms can only be given precision when explained by the sense which mercantile usage has put upon them (s), or where the subject-matter of the contract can only be ascertained by the admission of a conversation with reference to it (t). So, too, where goods are ordered by letter, which does not mention any time for payment, and such letter amounts to a valid contract within the statute, parol evidence is admissible to show that the goods were supplied on credit (u).

Matters antecedent to the writing.

But a matter antecedent to and dehors the writing may in some cases be received in evidence, as showing the inducement to the contract; such as a representation of some particular quality or incident of the thing sold. But the buyer is not at liberty to show such a representation, unless he can also show that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist (x).

Condition precedent.

Parol evidence is also admissible of a condition, on which the written agreement depends, such evidence being as to facts distinct from, but collateral to, the written agreement (y).

Memorandum made after action.

In order to sustain an action, there must be a *good contract* in existence at the time of action brought. Therefore, a memorandum in writing of a contract after action brought does not satisfy the statute (z).

(o) *Stead v. Dawber*, 10 A. & E. 57; 50 R. R. 327; and see *Hickman v. Haynes*, L. R., 10 C. P. 598; 44 L. J., C. P. 358; 32 L. T. 873; 23 W. 1 71.

(p) *Ogle v. Earle* (Earl), L. R., 3 Q. B. 272—Ex. Ch.; 37 L. J., Q. B. 771.

(q) Per Erle, C. J., *Lucas v. Bristow*, El. Bl. & El. 913.

(r) *Davis v. Jones*, 25 L. J., C. P. 91.

(s) *Lucas v. Bristow*, El. Bl. & El. 907; *Dale v. Humfrey*, El. Bl.

& El. 1034.

(t) *Macdonald v. Longbottom*, 6 Jur., N. S. 724; *Chadwick v. Burnley*, 12 W. R. 1077. See also *Burton v. Rust*, L. R., 7 Ex. 280, 281—Ex. Ch., per Willes, J.

(u) *Lockett v. Nicklin*, 2 Ex. 93; 76 R. R. 502.

(x) *Kain v. Old*, 2 B. & C. 634; 26 R. R. 497.

(y) *Pym v. Campbell*, 6 El. & Bl. 370; *Lindley v. Lacey*, 5 N. R. 51.

(z) *Bill v. Bament*, 9 M. & W. 36; 60 R. R. 658.

The Signature by the Party to be Charged.

Section 4 of the Sale of Goods Act, 1893, requires that there should be a note or memorandum of the contract in writing, signed *by the party to be charged*; and the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it, the question being always open to the jury, whether the party not having signed it regularly at the foot, meant to be bound by it as it then stood or whether he left it so unsigned, because he refused to complete it (a).

What is necessary.

The Christian name of the signature may be set out at length or denoted by the initial, or left out altogether (b); but it seems that the surname must be written at length, and that the mere initials will not suffice (c). A mark by a person unable to write may suffice if sufficiently identified (d). An unsigned postscript commencing, "I had quite omitted to tell you and Martin," on a separate piece of paper, enclosed in the same envelope with, but not referred to by, a letter signed with initials, is not sufficient to satisfy the statute (e).

As to initials.

If a man be in the habit of printing instead of writing his name, he may be said to sign by his printed as well as his written name (f). And an invoice with "Bought of Norris & Co." printed on it, which was filled up in the body with the handwriting of Norris, was held to be, for the purpose of the statute, signed by Norris (g).

Where a man prints his name.

The statute requires that the note should be signed by the party to be charged; accordingly it is no objection that it is not also signed by the other party, and consequently that there is no remedy against him (h). But a note in writing, signed by one party, will be insufficient, unless it also specifies the name of the other party (i). A

Names of parties how to be shown.

(a) Per Lord Abinger, C. B., *Johnson v. Dodyson*, 2 M. & W. 659; 46 R. R. 733.

(b) *Lobb v. Stanley*, 5 Q. B. 574, 581.

(c) *Sweet v. Lee*, 3 M. & G. 452, 460; 6 R. R. 546.

(d) *Baker v. Dening*, 8 E. & E. 94; *Bennett v. Brumfit*, L. R., 3 C. P. 28; 37 L. J., C. P. 35; 17 L. T. 213.

(e) *Kronheim v. Johnson*, 7 Ch. D. 60; 47 L. J., Ch. 132; 37 L. T. 752.

(f) *Saunderson v. Jackson*, 2

B. & P. 238; 5 R. R. 580.

(g) *Schneider v. Norris*, 2 M. & S. 286; 15 R. R. 250. And see *Tourret v. Cripps*, 48 L. J., Ch. 567; 27 W. R. 706.

(h) *Allen v. Bennett*, 3 Taunt. 169; 12 R. R. 633; *Egerton v. Matthews*, 6 East, 307; 8 R. R. 489; *Laythorp v. Bryant*, 2 Ring. N. C. 744; *Reuss v. Pickley*, L. R., 1 Ex. 342—Ex. Ch.; *Buxton v. Rust*, L. R., 7 Ex. 279—Ex. Ch.

(i) *Williams v. Luke*, 29 L. J., Q. B. 1; *Williams v. Byrnes*, 9

signature by the defendant, however, in the plaintiffs' order-book on the fly-leaf, at the beginning of which were written the plaintiffs' names, will do (k). And where the defendant accepted an offer to buy, by telegram, giving signed instructions to the telegraph clerk, this was held to be a sufficient signature (l). If, on the other hand, the note in writing is signed by the seller only, it will plainly be insufficient to charge the buyer (m).

Signature for another purpose.

It is no objection to the signature that it was not made to satisfy the statute, but in obedience to some other statute; so long as it is by the party to be charged, and attests the document which contains the terms of the agreement, it is sufficient (n).

The Signature by an Agent.

What is necessary.

The statute requires some note or memorandum in writing, to be signed by the party to be charged, or *his agent thereunto lawfully authorized*, leaving us to the rules of common law as to the mode in which the agent is to receive his authority. Now, in all other cases a subsequent sanction is considered the same thing in effect as assent at the time. *Omnis ratihabitio retrotrahitur, et mandato æquiparatur*; and the subsequent sanction of a contract, signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes (o).

An agent must be a third person, and not the other contracting party (p).

Who may be an agent.

An infant or married woman may be an agent, their acts in that capacity not being affected by their disabilities of infancy and coverture respectively (q).

Jur., N. S. 363; *Williams v. Jordan*, L. R., 6 Ch. 517; 46 L. J., Ch. 681; 26 W. R. 230.

(k) *Sarl v. Bourdillon*, 26 L. J., C. P. 78.

(l) *Godwin v. Francis*, L. R., 5 C. P. 295; 39 L. J., C. P. 121; 22 L. T. 338.

(m) *Champion v. Plummer*, 1 B. & P., N. R. 252; 8 R. R. 795; *Cooper v. Smith*, 15 East, 103; 13 R. R. 397.

(n) *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314; 46 L. J., Q. B. 219; 32 L. T. 347.

(o) Per Best, C. J., *Maclean v. Dunn*, 4 Bing. 727.

(p) *Sharman v. Brandt*, L. R., 6 Q. B. 720; 40 L. J., Q. B. 312; *Wright v. Dannah*, 2 Camp. 203; 11 R. R. 693; *Farebrother v. Simmons*, 5 B. & Ald. 333; 24 R. R. 399.

(q) *Paley's Principal and Agent*, 2; *Prestwick v. Marshall*, 7 Bing.

An agent may be constituted either by express appointment or by implication of law arising from the circumstance in which parties are placed (*r*).

How constituted.

The authority of the agent to sell for his principal may be conferred by word of mouth (*s*); for it is now clearly settled that the agent need not be authorized in writing (*t*).

Need not be authorized in writing.

In general an *auctioneer* may be considered as the agent and witness of both parties; but a difficulty arises in the case where the auctioneer sues as one of the contracting parties. The case of *Wright v. Dannah* (*u*) seems to be in point; namely, that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record (*x*).

Auctioneer.

An entry made in the sale book by the auctioneer's clerk who attends the sale, and as each lot is knocked down names the purchaser aloud, and on the sign of assent from him makes a note accordingly in the book, is a memorandum in writing by an agent within the statute (*y*). The book in which the entry is made must, however, be sufficiently connected with the conditions of sale (*z*).

Auctioneer's clerk.

A memorandum drawn up by the agent of both parties by the authority of the defendants, in their presence, and recognized by them at the time, though unsigned by themselves, yet with their names inscribed on the document by him, will bind them and satisfy the statute (*a*). But a memorandum written in the buyer's book, drawn up and signed by a person who is the agent of the seller only, although this was done at the request of the buyer, will not bind him (*b*).

Clear recognition of contract by parties sufficient.

Delivery and Payment.

The right of property and the right of possession are distinct from each other; the right of possession may be

Rights of property and possession.

565; *Prince v. Brunette*, 1 Bing. N. C. 438.

(*r*) 2 Steph. Com. 14th ed. 80.

(*s*) *Accebal v. Lery*, 10 Bing. 378; 38 R. R. 469.

(*t*) Per Lord Eldon, *Coles v. Trecothick*, 9 Vesey, 249 a; 7 R. R. 167; *Emmerson v. Heelis*, 2 Taunt. 48; 11 R. R. 520.

(*u*) *Wright v. Dannah*, 2 Camp. 203; 11 R. R. 693.

(*x*) *Farebruther v. Simmons*, 5 B. & Ald. 335; 24 R. R. 399; *Shar-*

man v. Brandt, L. R. 6 Q. B. 720.

(*y*) *Bird v. Boulter*, 4 B. & Adol. 443; 38 R. R. 285.

(*z*) *Pierce v. Corf*, L. R., 9 Q. B. 310; and see *Repositories and Auctions*, post, p. 41.

(*a*) *Darrell v. Evans*, 31 L. J., Ex. 337.

(*b*) *Graham v. Musson*, 5 Bing. N. C. 603; 50 R. R. 807. And see *Murphy v. Boese*, L. R., 10 Ex. 126; 44 L. J., Ex. 40; 32 L. T. 122.

in one person, the right of property in another (c). For by the law of England, possession is not proof of property (d). It is, at the same time, presumptive proof of ownership, and may be acted on as such (e).

Property may pass without delivery.

It is clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. Even in this case, however, if the contract show that there is no intention to pass the property until something be done by the seller, either in order to prepare the goods for delivery, or for the purpose of ascertaining the price, the sale is not perfected, and the property does not pass until that thing is done (f).

Condition as to price ascertainable.

Where, in an agreement of sale, a condition as to the price is annexed, and the fulfilment of it is ascertainable, such condition would appear to be good; as where the plaintiff purchased a horse for 55*l.*, and the defendant warranted him sound, and agreed to give back 1*l.* if the horse did not bring the plaintiff 4*l.* or 5*l.* profit (g).

Effect where not ascertainable.

But if such condition is not ascertainable, of course it cannot be enforced, and then it becomes an immaterial part of the agreement. Thus, where a horse was sold to the plaintiff for 100 guineas, "and 10*l.* more if the horse suited him," Lord Tenterden said, "If the buyer had kept the horse, I do not see how the seller could have maintained any action to recover the 10*l.* The buyer might have said, 'the horse does not suit me, but I choose to keep him nevertheless'" (h). So, also, where the plaintiff agreed to purchase a horse for 63*l.*, and "if the horse was lucky, he would give the defendant 5*l.* more, or the buying of another horse," it was held that this part of the agreement was too vague to be legally enforced, and did not amount in point of law to a promise. Thus, Lord Tenterden said, "The remaining part of the consideration, that if the horse proved lucky the plaintiff

(c) *Tarling v. Baster*, 6 B. & C. 364; 30 R. R. 355; *Sale of Goods Act*, 1893, s. 18, r. 1.

(d) See per Best, C. J., *Williams v. Barton*, 3 Bing. 145; 24 R. R. 448.

(e) *Webb v. Fox*, 7 T. R. 397; 4 R. R. 472; *Fyson v. Chambers*, 9 M. & W. 460.

(f) See per Parke, J., *Dixon v. Yates*, 5 B. & Ad. 340; 39 R. R. 489; *Buddle v. Green*, 27 L. J., Ex. 33; *Sale of Goods Act*, 1893, s. 18, rr. 1, 2.

(g) *Blyth v. Bampton*, 3 Bing. 472.

(h) *Care v. Coleman*, 3 M. & R. 3; 32 R. R. 709.

Possession under inchoate agreement.

Canadian Case.—Damages may be recovered for the conversion of horses prematurely taken possession of before the right of the vendee to possession accrues under an inchoate agreement for sale. *Flannaghan v. Healy*, 4 Terr. L. R. 391 (1900).

should give 5*l.* more, or the buying of another horse, is much too loose and vague to be considered in a Court of law. Who is to say under what circumstances a horse shall be said to have proved 'lucky'? The price at which the horse sold would not determine it. Suppose a year passed before the advanced price was obtained, it might then still be a question, whether the bargain had been lucky or not. But admitted that this could be ascertained, how could the contract to give 5*l.*, or the buying of another horse, be enforced? It is at the option of the contracting party to do either; and what could be made of an action for not buying another horse? The party sued might say he was ready to buy, but too much was asked" (i).

The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee (k). Thus, in *Noy's Maxims* it is said, "If the horse dies in my stable between the bargain and the delivery, I may have an action of debt for my money, because, by the bargain, the property was in the buyer" (l). By contract, however, the risk may be in the vendee, even though the vendor may have both the property in and the possession of the goods (m).

The risk after sale.

A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract (n).

Goods to be delivered on a future day.

Where there is a sale of an ascertained article, and no provision is made to the contrary, the delivery and payment are to be contemporaneous acts (o).

Delivery and payment contemporaneous acts.

(i) *Guthing v. Lynn*, 2 B. & Ad. 234.

(k) Per Bayley, J., *Tarling v. Barber*, 6 B. & C. 364; 30 R. R. 355; see also *Furley v. Bates*, 33 L. J., Ex. 43; *Custle v. Playford*, L. R., 7 Ex. 98; *Sale of Goods Act*, 1893, s. 20.

(l) *Noy's Maxims*, 208.

(m) *Martineau v. Kitching*, L. R. 7 Q. B. 436.

(n) *Hibblewhite v. McMorine*, 5 M. & W. 462; *Sale of Goods Act*, 1893, s. 5.

(o) *Pettitt v. Mitchell*, 3 Sco. N. R. 740; *Chase v. Westmore*, 5 M. & S. 189; 17 R. R. 301; *Cowper v.*

Time not the essence of a contract.

Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract (*p*).

Where nothing is said about the time of delivery.

Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them, whenever they are demanded, *upon payment of the price*, but not before (*q*).

Relative position of the parties.

A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in these goods may be in the vendee (*r*). Thus it is said, in Noy's Maxims (*s*), "If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he is delivered; yet the property of the horse is, by the bargain, in the bargainee or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment." And if the buyer in such case take away the horse before the price is paid, the seller may have an action of *Trespas*, or an action of *Debt* for the money, at his choice (*t*).

Seller's lien for the price.

The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, because payment or a tender of the price is a condition precedent on the buyer's part, for until he makes such payment or tender he has no right to the possession (*u*).

Lien in case of an exchange.

In the case of an exchange of two horses for one, a delivery of one of the two would not preclude the owner's lien on the other till the delivering of the one horse for which the two were to be exchanged (*x*).

Andrews, Hob. 41; Noy's Maxims, cap. 42; 2 Bl. Com. 447; Year Book, Easter Term, 5 Edw. 4, fol. 20; Sale of Goods Act, 1893, s. 28.

(*p*) Sale of Goods Act, 1893, s. 10; see also *Martindale v. Smith*, 1 Q. B. 395, per Cur.; *Reuter v. Sala*, 4 C. P. D. 249, per Cotton, L. J.

(*q*) *Bloxam v. Sanders*, 4 B. & C. 941; Sale of Goods Act, 1893,

s. 28.

(*r*) *Turling v. Baxter*, 6 B. & C. 364.

(*s*) Noy's Maxims, 208.

(*t*) *Manby v. Scott*, 1 Mod. 137; 1 Dyer, 30 a, pl. 203.

(*u*) *Bloxam v. Sanders*, 4 B. & C. 948; 28 R. R. 519; Sale of Goods Act, 1893, s. 39.

(*x*) See *Hanson v. Meyer*, 6 East, 621; 8 R. R. 572.

And whatever conditional or temporary arrangement be made as to possession, so long as it is consistent with an intention to retain a special right to detain the goods, the seller will not forfeit his lien. Thus, if A. purchase a horse of B., which is not to be delivered until the price be paid, but B. in the meantime allows A. to take the horse for a day or a week to drive, the lien of B. is not determined, but merely suspended during the time for which he allows A. to take the horse (y).

Conditional possession.

If goods are sold upon credit, and nothing is agreed upon as to the time of delivering them, the buyer is immediately entitled to the possession, and the right of possession and the right of property vest at once in him (z).

Buyer's right of possession where goods are sold on credit.

But his right of possession is not absolute; it is liable to be defeated if he becomes bankrupt before he obtains possession (a).

How it may be defeated.

The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid, but default of payment does not rescind the contract (b).

Seller's lien during possession.

The seller of goods has not only a lien on them for the price, whilst they are in his possession, but when the price is unpaid he may, after he has parted with the possession of the goods, and whilst they are *in transitu*, retake them in the event of the bankruptcy or insolvency of the buyer (c).

His right of stoppage *in transitu*.

Stoppage *in transitu*, as its name imports, can only take place whilst the goods are on their way to the buyer; and the rule to be collected from the cases is, that they are *in transitu* so long as they are in the hands of the carrier as such (d), and also so long as they remain in any place of deposit connected with their transmission (e).

When goods are held to be *in transitu*.

(y) See Story on Sales, 4th ed. 292; *Reeves v. Copper*, 5 Bing. N. C. 136; 50 R. R. 634.

(z) *Blorum v. Sanders*, 4 B. & C. 948; 28 R. R. 519.

(a) *Ibid.*; *Tooke v. Hollingsworth*, 5 T. R. 215; 2 R. R. 573; *Ex parte Chalmers*, L. R., 8 Ch. App. 289.

(b) See per Cur., *Martindale v. Smith*, 1 Q. B. 395; *Turling v. Baxter*, 6 B. & C. 362; 30 R. R. 355;

Ex parte Chalmers, 8 Ch. App. 289; Sale of Goods Act, 1893, s. 41.

(c) *Lickbarrow v. Mason*, 2 T. R. 63; Sale of Goods Act, 1893, ss. 39, 44.

(d) *Whitehead v. Anderson*, 9 M. & W. 518; 60 R. R. 819.

(e) *Edwards v. Brewer*, 2 M. & W. 375; 46 R. R. 626; *Kendal v. Marshall*, 11 Q. B. D. at p. 365, per Brett, M. R. See also Sale of Goods Act, 1893, s. 45.

Effect of
stoppage *in*
transitu.

A contract of sale is not generally rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*. But where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages (*f*).

Goods to be
delivered be-
fore payment.

In a contract for the sale of goods, "the goods to be delivered at the works forthwith, and to be paid for within fourteen days from the date of the contract," the delivery of the goods is a condition precedent to the right of the seller to claim the payment of the purchase-money. The use of the word "forthwith" shows that the goods ought to have been, and that the parties intended that they should be, delivered at some time within the fourteen days (*g*).

When time of
delivery is
not fixed to a
day.

When there are no special indications of the limit of time in a contract, that it should be performed "directly" means that it should be performed not "within a reasonable time" but "speedily," or at least "as soon as practicable" (*h*); and "as soon as possible" means "without unreasonable delay," regard being had to the ability of the person contracting, and the orders he has already in hand (*i*).

Goods to be
paid for be-
fore delivery.

If there be an express contract between the parties that the goods shall be paid for before delivery, an action may be brought for the money before the goods are delivered. Thus, if A. undertakes to pay 100*l.* on the 1st of January for a horse purchased by him, and B. agrees to deliver it on the 1st of April following, B. may in the meantime maintain an action against A. for the money, without delivering or offering to deliver the horse (*k*).

Renunciation
of contract.

Where two parties enter into a contract which is to be performed at a future day, and before the day of performance arrives one of them gives the other notice that he

(*f*) Sale of Goods Act, 1893, s. 48, sub-ss. (1), (4); see also *Wentworth v. Outhwaite*, 10 M. & W. 452; 62 R. R. 664; *Kemp v. Falk*, 7 App. Cas. at p. 581, per Lord Blackburn; *Lamond v. Darvall*, 9 Q. B. 1030; 16 L. J., Q. B. 136.
(*g*) *Stanton v. Wood*, 16 L. T., O. S. 436; Sale of Goods Act, 1893, s. 28.

(*h*) *Duncan v. Topham*, 8 C. B. 225; 79 R. R. 470.

(*i*) *Attwood v. Emery*, 26 L. J., C. P. 73.

(*k*) See *Pettitt v. Mitchell*, 5 Sco. N. R. 740; *Thorpe v. Thorpe*, 1 Lord Raym. 665; 1 Salk. 171; *Dunlop v. Grote*, 2 C. & K. 153; 80 R. R. 834; Sale of Goods Act, 1893, s. 49.

does not hold himself bound by it, the other is at liberty to treat such renunciation as a breach of the contract, without waiting for the arrival of the day which is fixed for its performance (*l*).

If the buyer is directed to send the price by post, or if it has been the usual practice between the parties to do so (*m*), and the letter containing the money properly directed (*n*) and posted (*o*) is lost, the debt is extinguished, and the seller must bear the loss (*p*). Price directed to be sent by post.

Where the defendant, in answer to a letter demanding payment, sent a post-office order, in which the plaintiff was described by a wrong Christian name, and the plaintiff kept it, but did not cash it, although he was informed at the post office he might receive the money at any time by signing it in the name of the payee, it was held by the Court of Exchequer that this was no evidence of payment (*q*). Post-office order.

Where there is a sale of specific chattels, and a bill is given in payment, though the vendor has then lost his lien in the strict sense of the word, yet, if afterwards an insolvency happens, and the bill is dishonoured, then the vendor has a right somewhat analogous to that which a vendor has over goods *in transitu*, and if they are still in his hands, he has a right to withhold the delivery of the goods (*r*). Dishonoured bill.

If a creditor employs an agent to receive money from a debtor, and the agent, instead of so doing, writes off a debt due from himself to the debtor, his debtor is not thereby discharged, unless indeed there is a subsequent ratification by the creditor of the act of his agent (*s*). Writing off debt by agent to agent.

If a creditor is offered cash in payment of his debt, or a cheque upon a banker from an agent of his debtor, and he prefers the latter, this does not discharge the debtor if the cheque be dishonoured; although the agent fails with a balance of his principal in his hands to a larger amount (*t*). The creditor must, however, present the cheque within a reasonable time (*u*). Banker's cheque.

(*l*) *Danube, &c., Co. v. Xenos*, 31 L. J., C. P. 284—Ex. Ch.

(*m*) *Warwicke v. Noakes*, Peake, N. P. 98; 3 R. R. 653.

(*n*) *Walter v. Haynes*, R. & M. 149.

(*o*) *Hawkins v. Rutt*, Peake, N. P. 248.

(*p*) *Kington v. Kington*, 11 M. & W. 233.

(*q*) *Gordon v. Strarje*, 1 Ex.

477; 74 R. R. 727.

(*r*) Per Crompton, J., *Griffiths v. Perry*, 28 L. J., Q. B. 204. See also Sale of Goods Act, 1893, s. 39, sub-s. (2).

(*s*) *Underwood v. Nichols*, 25 L. J., C. P. 79.

(*t*) *Everett v. Collins*, 2 Camp. 515; 11 R. R. 785.

(*u*) *Hopkins v. Ware*, L. R., 4 Ex. 268; 38 L. J., Ex. 147.

Bill of
exchange.

If a creditor prefers a bill of exchange accepted by a stranger to ready money from his debtor, he must abide the hazard of the security he takes (x).

Debt paid to
a third party.

By the order of the creditor, a debt may be paid to a third party, who, if he take payment in any other way than in money, or if he give the debtor further time, without the knowledge of the creditor, he does it at his peril (y).

Sunday Dealing.

Law of King
Athelstan.

By a law of King Athelstan, all "merchandizing on the Lord's Day" is prohibited, and it is thus laid down: "*Dic autem Dominico nemo mercaturam facito; id quod si quis egerit, et ipsa merce, et 30 præterea solidis mulcator*" (z).

Statute of
Charles 2.

And by 29 Car. 2, c. 7, s. 1, which is "An Act for the better Observation of the Lord's Day," it is enacted "that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity only excepted), and every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of 5s.; and that no person or persons whatsoever shall publicly cry, show forth or expose to sale any wares, merchandizes, fruit, herbs, goods or chattels whatsoever upon the Lord's Day or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried or showed forth, or exposed to sale."

By the 34 & 35 Vict. c. 87 (continued by the Expiring Laws Continuance Act), s. 1, no prosecution or other proceeding shall be instituted for the contravention of this Act, but with the consent in writing of the chief officer of the police of the police district in which the offence is committed, or of two justices of the peace, or of the stipendiary magistrate having jurisdiction in the place where such offence is committed.

Farmers not
within
statute.

A farmer has been held not to be within s. 1 of the 29 Car. 2, c. 7, on the ground that he is not "a tradesman, artificer, workman, or *ejusdem generis* with any of these" (a).

(x) See per Lord Ellenborough, 15.
Everett v. Collins, 2 Camp. 516;
11 R. R. 785.

(z) 2 Inst. cap. 31, p. 220.

(a) *R. v. Silvester*, 33 L. J.,
M. C. 79.

A *horsedealer* cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. The law on this subject was laid down by the Court of King's Bench in *Fennell v. Ridler* (b) on a motion for a new trial, and Bayley, J., delivered the following judgment: "This was an action upon the warranty of a horse. The plaintiffs were *horsedealers*, and the horse was bought and the warranty given on a *Sunday*; and the only question was, whether, under the 29 Car. 2, c. 7, the purchase was illegal, and the plaintiffs precluded from maintaining the action. That the purchase of a horse by a *horsedealer* is an exercise of the business of his ordinary calling no one can doubt. The Act does not apply to *all persons*, but to such only as have some *ordinary calling*. In *Drury v. De la Fontaine* (c) Lord Mansfield, C. J. (after the Court had taken time to consider), laid it down, that if any man in the exercise of his ordinary calling make a contract on a *Sunday*, that contract would be void (and the case before him was a private contract for the purchase of a horse), but he showed that that case was not within the statute, because no one of the parties was in the exercise of the business of his ordinary calling. His expression, that the contract would be *void*, probably meant only that it would be void so as to prevent a party who was privy to what made it illegal from suing upon it in a Court of law, but not so as to defeat a claim upon it by an innocent party; and so it was considered by this Court in *Bloxsome v. Williams*" (d).

Sale by a
horsedealer.

Where neither parties are *horsedealers*, a contract between them for the sale of a horse is good, though made on Sunday; and this was recognized by Bayley, J., in the last case, as having been distinctly laid down by Lord Mansfield in *Drury v. De la Fontaine*.

By an ordi-
nary person.

Where a bargain for some cattle was made, and the price agreed on, on a Saturday evening, subject to the defendant's approval of the beasts upon inspection next morning; and accordingly on Sunday the defendant inspected and approved them, and afterwards kept them for some time and promised to pay for them; it was held, that although the original contract was on Sunday, yet as

Subsequent
ratification of
a contract.

(b) *Fennell and another v. Ridler*, 5 B. & C. 406; 29 R. R. 278.

J., Smith v. Sparrow, 4 Bing. 88; 29 R. R. 514.

(c) *Drury v. De la Fontaine*, 3 B. & C. 232; but see per Parke,

(d) *Bloxsome v. Williams*, 1 Taunt. 135; 3 B. & C. 232; 27 R. R. 337.

Breach of
warranty
given on a
Sunday.

they continued in the possession of the defendant, who afterwards promised to pay for them, this subsequent promise was sufficient on a *quantum meruit*, or as a ratification of the agreement of the Saturday (e).

But a party cannot sue on a breach of warranty if he take it on a Sunday from a person he *knows* to be a *horse-dealer*. However, where an innocent party brings an action on the breach of a warranty given to him by a *horsedealer* on a Sunday, it is not competent for the defendant to set up his own breach of the law as an answer to the action; and this was so held in the case of *Bloxsome v. Williams* (f), where an action was brought on the warranty of a horse, and an objection was taken that it had been given on a Sunday. It appeared that the defendant was a coach proprietor and *horsedealer*, and that the plaintiff's son was travelling on a Sunday in the defendant's coach, and while the horses were changing he made a verbal bargain with the defendant for the horse in question, for the price of thirty-nine guineas; the latter warranted the horse to be sound, and not more than seven years old. The horse was delivered to the plaintiff on the following Tuesday, and the price was then paid; there was nothing in evidence to show that the plaintiff's son *knew* at the time when he made the bargain that the defendant exercised the trade of a *horse-dealer*. The horse was unsound, and seventeen years old. It was objected, on the part of the defendant, that the plaintiff could not recover, on the ground that the bargain having been made on a *Sunday* was void within the 29 Car. 2, c. 7, s. 2. The learned Judge overruled the objection, and the plaintiff obtained a verdict for the price of the horse. The Court of King's Bench discharged a rule for a new trial, and Bayley, J., said, "In this case there was no note in writing of the bargain, and on the Sunday all rested in parol, and nothing was done to bind the bargain. The contract, therefore, was not valid until the horse was delivered to and accepted by the defendant. The terms on which the sale was afterwards to take place were only specified on the *Sunday*, and those terms were incorporated in the sale made on the subsequent day."

(e) *Williams v. Paul*, 6 Bing. (f) See note (d), ante. 653; 31 R. R. 512.

CHAPTER II.

HORSEDEALERS, REPOSITORIES AND AUCTIONS.

Horsedealer.

A *horsedealer*, strictly, is a person who by his traffic "distributes" horses (a). And by the repealed statute 29 Geo. 3, c. 49, s. 5, he was clearly defined to be a person who "seeks his living by buying and selling horses" (a). Definition of a horse-dealer.

The Judges at Serjeants' Inn held the proprietor of Aldridge's Repository to be a horsedealer. When the case came before the Court of Exchequer, Parke, B., with whom Alderson, B., agreed, said, "I am by no means prepared to say that the decision of the Judges, as to the construction of the word 'horsedealer' in these statutes, was wrong; if I were forced to give an opinion, it might be in accordance with theirs" (b). The proprietor of Aldridge's.

The duty which was formerly payable by a horsedealer has been repealed by the 37 Vict. c. 16, s. 11, which provides that duties on licences for exercising or carrying on the trade of Horsedealers shall cease to be payable. No duty payable by horsedealer.

By s. 19, sub-s. (5) of the Customs and Inland Revenue Act, 1869 (32 & 33 Vict. c. 14), it shall not be necessary for a licence to be taken out by any horsedealer who shall have made entry of his premises in accordance with s. 28 of that Act, for any servant employed by him at such premises in the course of his trade, other than a servant employed to drive a carriage with any horse let to hire for any period exceeding twenty-eight days; provided that such horsedealer shall have complied with all the provisions contained in the said section. Exemption from licence for servants.

By s. 28, "every person who exercises or carries on the trade of a horsedealer or of a livery-stable keeper, or who lets any horse for hire, or who keeps any horse to be used for drawing any public stage or hackney carriage, may, if Entry of premises.

(a) *Allen v. Sharp*, 2 Exch. 357; 76 R. R. 621.

(b) *Allen v. Sharp*, 2 Exch. 352, 366; 76 R. R. 621.

he shall think fit, deliver to an officer of inland revenue acting in the parish or place in which his premises are situated an entry in writing, signed by such person, containing a description of the premises and of the purpose for which he uses or intends to use them; and every person who shall have delivered any such entry shall cause to be legibly painted upon some conspicuous part of the premises so entered, or upon a board affixed thereto, his Christian name and surname, with the addition of such other words as shall denote the particular trade or business, or trades or businesses (if more than one), carried on by him; and such person shall also allow any officer of inland revenue at any reasonable time to inspect the entered premises; and if any person who shall have delivered any such entry as aforesaid shall neglect to comply with the provisions of this section, or any of them, he shall forfeit a penalty of twenty pounds."

Repositories and Auctions.

An
auctioneer.

An *auctioneer* is solely the agent of the seller of the goods, until the sale is effected, and then he becomes also the agent of the buyer for particular purposes (c). For when he signs the printed particulars of sale, he signs them as the agent of the purchaser (d). But as soon as the auction is over, the auctioneer loses his distinctive attributes; and to sales afterwards effected by him, the rules of ordinary sale alone are applicable (e).

Extent of
authority.

The owner may at any time before the contract is complete, revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of the employment and revocation, the auctioneer is entitled to be indemnified by the owner; but if an auctioneer not having authority from the owner to sell property without reserve, undertakes to do so, he is liable on his undertaking (f).

Not to
warrant.

An auctioneer intrusted with goods for sale by public auction has no implied authority to warrant them (g).

(c) Story on Sales, 4th ed. 79; *Williams v. Millington*, 1 H. Bl. 81; 2 R. R. 724; *Emmerson v. Heelis*, 2 Taunt. 38; 11 R. R. 520.

(d) See per Rolfe, B., *Eden v. Blake*, 13 M. & W. 619; 67 R. R. 757.

(e) *Mews v. Carr*, 26 L. J., Ex. 39; *Marsh v. Jelf*, 3 F. & F. 234.

(f) *Warlow v. Harrison*, 1 E. & E. 295; 29 L. J., Q. B. 14—Ex. Ch.

(g) *Payne v. Lord Leconfield*, 51 L. J., Q. B. 642; 30 W. R. 814.

If an auctioneer has notice that property intrusted to him for the purpose of sale does not belong to his principal, and yet continues to sell, he is personally liable for the produce of the sale (h); and in such case the true owner of the property is entitled to recover the real value of the property sold, and not merely what it fetched at the auction, as that sum could not be assumed to be its real value (i).

To sell for true owner.

The true owner of goods who instructs an auctioneer to sell them is not bound to indemnify the auctioneer, if while acting on his instructions, he is sued and cast in damages on a claim by a third person of which the true owner had no notice. In *Halbron v. International Horse Agency and Exchange, Ltd.* (j), the defendants instructed the plaintiff, an auctioneer carrying on business in Paris, to advertise for sale a mare which they represented to him was a thoroughbred mare entered and described in the English Stud Book under the name of Pentecost. The plaintiff accordingly advertised the mare for sale as so named and described. A Frenchman, the owner of a thoroughbred mare also called Pentecost, brought an action in France against the plaintiff, alleging that he had suffered damage through the defendant's mare being advertised under that name, and recovered damages. In an action by the plaintiff against the defendants for an indemnity, it was found as a fact that the representation made by the defendants as to the identity of the mare was true. But it was held that the defendants were not liable, the damages recovered from the plaintiff not being due to any wrongful act on their part.

True owner not bound to indemnify against mistaken claim of third party.

An action lies against an auctioneer employed to conduct a sale for negligence in his management of it. As where the seller had to make the purchaser compensation, in consequence of the property having been improperly described by the auctioneer who had been employed to prepare particulars, and sell the property (k).

Liable to an action for negligence.

Where an auctioneer, by an unauthorized sale, deprives another of his property permanently, or for an indefinite

Or for conversion.

(h) *Hardacre v. Stewart*, 5 Esp. 103; *Davis v. Artingstall*, 49 L. J., Ch. 609; 42 L. T. 507; 29 W. R. 137.

(i) *Davis v. Artingstall*, supra.

(j) [1903] 1 K. B. 270; 72 L. J.,

K. B. 90; 88 L. T. 232; 51 W. R. 62

(k) *Parker v. Farebrother*, 2 W. R. 370; and see *Torrance v. Bolton*, L. R., 8 Ch. 118; 42 L. J., Ch. 177.

time, he is liable to an action for conversion (*l*). The case of *Cochrane v. Rymill* (*m*) is an instance of wrongful conversion by an auctioneer. In that case the plaintiff by agreement let some cabs on hire to one Peggs, who took them to the defendant, who was an auctioneer, and obtained an advance on them. The defendant by Peggs' instructions, and without any notice of the plaintiff's property in the goods, subsequently sold them by auction, and having repaid himself for his advance, commission, and expenses, handed over the balance to Peggs; and it was held by the Court of Appeal (affirming the judgment of Lord Coleridge, C. J.), that the plaintiff was entitled to recover damages from the defendant for conversion of the goods, and Bramwell, L. J., in the course of his judgment said, "It is, no doubt, a very hard case for the defendant, who has acted innocently throughout in the matter; but setting aside the hardship of the case, the law applicable to it is quite clear. Here is Peggs, a man who is not the true owner of these goods, but appearing to act as such, but who has no power whatever to sell, takes them to the defendant and gets a loan from him on them. The defendant keeps them and finally sells them in such a way as to pass the property in them to the buyers, and if that is not a conversion, then I think there can be no such thing. Supposing a man were to come into an auction yard holding a horse by the bridle and to say, 'I want to sell my horse: if you will find a purchaser I will pay commission.' And the auctioneer says, 'Here is a man who wants to sell a horse; will anyone buy him?' If he then and there finds him a purchaser and the seller himself hand over the horse, there could be no act, on the part of the auctioneer, which could render him liable to an action for conversion. But, looking at this case, there is a clear dealing with the property and exercising dominion over the chattel, and a delivery of it by the defendant to another person to do what he likes with it."

(*l*) *Hiorst v. Bott*, L. R., 9 Ex. 86, 89; 43 L. J., Ex. 81; 30 L. T. 25; 22 W. R. 414. (*m*) 40 L. T. 744; 27 W. R. 776.

Conversion.

Canadian Case.—Damages may be recovered for the conversion of horses prematurely taken possession of before the right of the vendor to possession accrues under an inchoate agreement for sale. *Flannagan v. Healy*, 4 Terr. L. R. 391 (1900). See *infra*, p. 62.

But where the plaintiffs were the holders of a bill of sale including certain horses and harness: and the grantor of the bill of sale, without the plaintiff's knowledge, took the horses and harness to the defendant's repository for sale by auction and they were entered in the catalogue, the defendant knowing nothing of the bill of sale; but before the auction the grantor of the bill of sale sold the horses and harness by private contract in the defendant's yard, and the purchase-money was paid to the defendant, who deducted his commission and paid the balance to the seller, the horses and harness being delivered to the purchaser; it was held that the defendant was not guilty of conversion (n). For the defendant had received the horses and harness from the grantor of the bill of sale, and had delivered them back to the person to whom the grantor of the bill of sale had given a delivery order; he had not claimed to transfer the title, and he had not purported to sell; all the dominion he exercised over the chattels was to re-deliver them to the man, the person from whom he had received them had told him to re-deliver them (o).

Selling horses comprised in bill of sale.

Where a horse is sent to a common repository, for the sale of horses, an authority to sell is implied, although no authority was ever given in fact, and the owner will be bound by a sale to a *bona fide* purchaser, although made without his express consent (p).

Horse sent to a repository.

Where a horse is sold at a repository, the possession is in the auctioneer, and it is he who makes the contract. If the horse should be stolen he may maintain an indictment, and he has such a special property as to maintain an action against the buyer for *goods sold and delivered* (q), but not in a case where the right of a third person intervenes, and is established (r). But where, as in the north of England, there is a sale by auction of horses and cattle on the owner's premises, it is doubtful whether the auctioneer has such an interest in them as to recover the price (s).

Auctioneer's possession.

(n) *National Mercantile Bank v. Ryndall*, 44 L. T. 767 C. A.

(o) *Ibid.*, per Bramwell. L. J. See also *Turner v. Hockey*, 56 L. J., Q. B. 301; *Barker v. Furlong*, [1892] 2 Ch. 172; 60 L. J., Ch. 368; 64 L. T. 411; 39 W. R. 621; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; 61 L. J., Q. B. 325; 40 W. R. 426.

(p) See *Pickering v. Bush*, 15 East, 38, 45; 13 R. R. 364.

(q) *Williams v. Millington*, 1 H. Bl. 85; 2 R. R. 724; *Robinson v. Rutter*, 24 L. J., Q. B. 250.

(r) *Dickenson v. Naul*, 4 B. & Ad. 638.

(s) See per Wilson, J., *Williams v. Millington*, 1 H. Bl. 86; 2 R. R. 724.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)

APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

An auctioneer
can set up
ju tertii.

An auctioneer can set up the *jus tertii*, if he defends the action upon the right and authority of the third person, to a claim for the proceeds of a sale of goods, which he has been employed to sell by auction by a person who had gained possession of them by an illegal distress (*t*).

Interpleader
by auctioneer

An auctioneer may interplead where he has sold goods, and the proceeds of the sale are claimed by a third party (*u*); and it seems that he is entitled to do so notwithstanding that he claims a lien on the proceeds of the sale for his commission, for in such cases he claims no interest in the corpus of the property (*x*). But where the claims are not co-extensive, an auctioneer has no right to interplead. In the case of *Wright v. Freeman* (*y*) the defendant, the proprietor of a horse repository, sold there by public auction a horse to the plaintiff, warranted quiet to ride and in harness, but subject to a condition, by which, if considered by the buyer incapable of working from any infirmity or disease, it might be returned on the second day after the sale, and the matter determined by veterinary surgeons according to the terms provided for in such condition. The horse was returned accordingly by the plaintiff, who demanded to have back the money he had paid for the purchase, and this being refused, he brought an action against the defendant for damages for breach of the warranty, and the party who had placed the horse at the repository for sale, claimed of the defendant the proceeds of the sale, stating that the horse had left the repository perfectly sound; it was held that the defendant was not entitled to an interpleader order.

Goods privileged
from
distress.

Goods sent to an auctioneer to be sold on premises occupied by him are privileged from distress for rent (*z*); although he may sell in a place let to him merely for the occasion, or by a person without authority, or the occupation has been acquired by the auctioneer by any act of trespass (*a*).

His right to
remain on the
premises.

An auctioneer, who is employed to sell goods by public auction, has not such an *interest* as will make the licence

(*t*) *Biddle v. Bond*, 6 B. & S. 225; 34 L. J., Q. B. 137.

(*u*) *Best v. Hayes*, 32 L. J., Ex. 129.

(*x*) *Ibid.*, per Martin, B. In this case the Court of Exchequer refused to follow the decision in Chancery in *Mitchell v. Hane* (2 Sim. & S. 63; 25 R. R. 151), where it was held that an auctioneer, in

such a case, could not file a bill of interple

(*y*) 4 J., C. P. 276; 40 L. T., 134; *ibid.* 58—C. A.

(*z*) *Adams v. Grare*, 1 C. & M. 380; *Williams v. Holmes*, 22 L. J., Ex. 283; 91 R. R. 802.

(*a*) *Brown v. Arundell*, 10 C. B. 54; 16 L. T. (O. S.) 126; 84 R. R. 457.

to enter the premises irrevocable. Therefore, where the owner of the premises revoked his consent to the auctioneer remaining there, it was held that he had no right to continue there, though he had incurred expenses in allotting the goods, and though he remained only to complete the sale by delivering the goods to the purchasers (b).

After a sale is effected, the auctioneer may in general be considered as the agent and witness of both the parties to a contract; but a difficulty arises in the case where the auctioneer sues as one of the contracting parties (c), because the agent, whose signature is to bind the defendant, must not be the other contracting party upon the record (d). However, an entry made in a sale book by the auctioneer's clerk who attends the sale, and as each lot is knocked down names the purchaser aloud, and on a sign of assent from him makes a note accordingly in the book, is a memorandum in writing by an agent within section 4 of the Sale of Goods Act, 1893; for the clerk is not identified with the auctioneer (who sues), and in the business which he performs of entering the names, &c., he is impliedly authorized by the persons attending the sale to be their agent (e).

Auctioneer or clerk agent of both parties.

But if the purchaser's name be signed to a catalogue, it must be connected with or refer to the conditions of sale to make the contract valid (f); and it is not sufficient if they are even in the same room, so long as they are not actually attached to the catalogue, or clearly referred to in it; and if during the sale they get separated, the signatures made after separation are unavailing (g).

Purchaser's name signed to a catalogue,

It is a useful and proper general rule that an auctioneer, by parol explanation at the time of sale, shall not be suffered to vary from the terms of the printed particulars. This rule is attended with no hardship, because it would be easy to obviate any difficulty in case the article sold be different from the description; *Gunnis v. Echart* (h),

Printed particulars of a sale.

(b) *Taplin v. Florence*, 10 C. B. 744; 84 R. R. 773.

(c) *Wright v. Dannah*, 2 Camp. 203; 11 R. R. 693.

(d) *Farebrother v. Simmonds*, 5 B. & A. 333; 24 R. R. 399. And see *Sharman v. Brandt*, L. R., 6 Q. B. 720; 40 L. J., Q. B. 312; 19 W. R. 936—Ex. Ch.

(e) *Bird v. Boulter*, 4 B. & Ad. 443; 38 R. R. 235. See also *Sims v. Landray*, [1894] 2 Ch. 318; 63

L. J., Ch. 535; 70 L. T. 530; 42 W. R. 621.

(f) *Hinde v. Whitehouse*, 7 East, 568; 8 R. R. 676.

(g) *Kenworthy v. Scholfield*, 2 B. & C. 945; 26 R. R. 600. See also *Pierce v. Curf*, L. R., 9 Q. B. 210; 43 L. J., Q. B. 52; 29 L. T. 919; 22 W. R. 299; *Rishton v. Whatmore*, 8 Ch. D. 467; 47 L. J., Ch. 629; 26 W. R. 827.

(h) 1 H. Bl. 289; 2 R. R. 769.

Powell v. Edmunds (i), and many other cases, show the principle to be, that a written instrument signed with the purchaser's name is the instrument at which we are to look to see what is the contract between the parties (k).

An incorrect catalogue.

But when the contract is not in writing, a mistake in the catalogue may be explained by the auctioneer. Thus where an auctioneer brought an action to recover the price of an article under the value of 10*l.*, which had been sold by him, and described in the written catalogue of sale as being of silver; it was held that evidence was receivable to show, that before the article was put up for sale, the auctioneer without making any alteration in the catalogue, stated publicly from his box, in the hearing of the defendant, that the catalogue was incorrect, and that the article would only be sold as plated, subsequently to which the defendant bid for it (l).

A limited warranty.

By the conditions of sale at repositories and public auctions a specified short time is usually allowed, within which the purchaser must give notice of any breach of warranty; and if he neglects to do so, he has no remedy unless such condition has been rendered inoperative by fraud or artifice. This subject was fully considered by the Court of King's Bench in the following case:—A horse was bought by private contract at a repository, warranted sound. At the time of sale there was a board fixed on the wall of the repository having certain rules painted upon it, one of which was that a warranty of soundness then given, should remain in full force until noon of the day following, when the sale should become complete and the seller's responsibility terminate, unless a notice and veterinary surgeon's certificate of unsoundness were given in the meantime. The rules were not particularly referred to at the time of this sale and warranty. The horse proved unsound, but no complaint was made till after twelve on the following day. The unsoundness was of a nature not likely to be immediately discovered. Some evidence was given to show that the defendant knew of it, and the horse was shown at the time under circumstances favourable for concealing it. After verdict for the plaintiff, it was held that there was sufficient proof of the plaintiff having had notice of the rules at the time of sale to render them binding on him; also

(i) 12 East, 6; 11 R. R. 769.

(k) *Shelton v. Livius*, 2 C. & J. 614; 67 R. R. 757.

416; 37 R. R. 746.

(l) *Eden v. Blake*, 13 M. & W.

that the rule in question was such as a seller might reasonably impose, and that the facts did not show such fraud or artifice in him, as would render the condition inoperative; and Littledale, J., observed, "The warranty here was as if the vendor had said, 'After twenty-four hours I do not warrant'; such a stipulation is not unreasonable" (m).

If a horse sold at a public auction be warranted sound and six years old, and it be one of the conditions of sale that it shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness. Therefore, where a horse sold with such warranty was discovered to be twelve years old ten days after sale, and was then offered to the seller, who refused to take him, it was held by the Court of King's Bench that an action might be maintained by the buyer against the seller, and Lord Kenyon said, "The question turns on the meaning of this condition of sale, and I am of opinion that it must be confined solely to the circumstance of unsoundness. There is good sense in making such a condition at public sales, because, notwithstanding all the care that can be taken, many accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited. But the circumstance of the age of the horse is not open to such difficulty" (n).

Where it applies only to soundness.

By the rules of some repositories every horse sold, warranted quiet in harness, is, in cases of dispute, to be tried by an impartial person; and the expense of trial, in case the horse does not answer his warranty, is to fall on the seller. The keeper of the repository has a specific lien on the horse until such expense be paid (o).

Trial of a horse warranted quiet in harness.

Where the auctioneer declares that the conditions of a sale by auction are as usual, there is a sufficient notice of them to purchasers (p), where they are printed and posted up in a conspicuous part of the auction-room. Thus, where an action on the case was brought on the warranty of a horse, it appeared that the horse was sold by auction at the defendant's repository, and warranted sound. The

Notice of the conditions of sale.

(m) *Bywater v. Richardson*, 1 A. & E. 508; 3 N. & M. 748; 40 R. R. 349; *Mesnard v. Aldridge*, 3 Esp. 271.

(n) *Buchanan v. Parnshaw*, 2 T. R. 746.

(o) *Hardingham v. Allen*, 5 C. B. 797; 75 R. R. 839.

(p) By the law of Scotland, a purchaser at a public auction cannot be allowed to plead that he was ignorant of the articles and conditions of sale. See *Laing v. Hain*, 2 S. M. & P. 395. (Court of Sess. Sco.)

sale took place on the Wednesday. At the time of the sale, the auctioneer announced that the conditions of the sale were as usual. These conditions of sale were proved to be contained in a printed paper pasted up under the auctioneer's box, and by one of them all horses purchased there, in case of any unsoundness being discovered, were required to be returned before the evening of the second day after the sale. The horse in question was not returned till the Saturday. When returned by the plaintiff, he was informed that it was too late, as he ought, pursuant to the conditions of sale, to have returned him on the evening of Friday. It was contended that there was no evidence of notice of the conditions of sale sufficient to bind the plaintiff. But Lord Kenyon (in summing up) said: "In this case it is proved that printed particulars of the sale are pasted up in the public sale room under the auctioneer's box. In the case of carriers, who advertise that they will not be liable for goods lost above the value of 5*l.*, unless entered as such, the posting up of a bill in the coach office to that effect has been held to be sufficient. I therefore think the same mode being adopted here gives the same degree of notice to all persons who come to this sale, and that it is a sufficient notice of the conditions under which the horses are sold." "With respect to the main point, when parties enter into a special agreement, they must adhere to the terms of it. Here there is a condition that the party purchasing must return the horse within two days, which he has not done; I therefore think the plaintiff must be nonsuited" (q).

Notice of
particulars.

But when property is sold in lots described in particulars of sale, a vendee is only affected with notice of what concerns the lots which he purchases, and is not to be taken as having read all the particulars of all the lots (r).

Goods put up
in lots.

Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale (s). But the making by the parties of a written contract or memorandum embodying several sales is relevant to prove an intention that the whole transaction shall be one entire contract (t).

(q) *Mesnard v. Aldridge*, 3 Esp. 271.

(r) *Curtis v. Thomas*, 33 L. T. 664, V.-C. Hall.

(s) Sale of Goods Act, 1893, s. 58, sub-s. (1). See also *Emmer-*

son v. Heelis, 2 Taunt. 38; 11 R. R. 520; *Roots v. Dormer*, 4 B. & Ad. 77; 38 R. R. 231.

(t) *Dykes v. Blake*, 4 B. N. C. 463; 44 R. R. 761; *Bigg v. Whisking*, 14 C. B. 195.

"A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid" (u). The reason for this is that the auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding, and that is signified on the part of the seller by knocking down the hammer. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to (x).

Where a bidder may retract.

An auctioneer warrants his authority to sell, and if he sells without authority, although by innocent mistake, he is liable in damages to the purchaser for loss of bargain. This rule was applied in Scotland in a case where a horse was sold by an auctioneer by mistake, and the purchaser informed of the mistake on the same day; but Lord Young dissented from the judgment of the majority of the Court, being of opinion that in any contract an excusable mistake, immediately rectified before any damage is done, should not be binding (y).

Warranty of authority to sell.

Where a horse is to be sold "without reserve," and the vendor buys it, the highest *bonâ fide* bidder is entitled to recover damages from the auctioneer. In the case of *Warlow v. Harrison* (z), the sale was stated to be "without reserve" and one of the printed conditions was, "any lot ordered for this sale, and sold by private contract by the owner or advertiser 'without reserve,' and bought by the owner, to be liable to the usual commission of 5l. per cent." There was also the usual condition that the highest bidder should be the buyer. After a *bonâ fide* bid by a third person, the owner advanced on the bidding, and the lot was knocked down to him. The Court of Queen's Bench held that the owner could not claim the lot as sold to the auctioneer, against whom an action was brought, and that they were not called upon to say whether there was any, or what, remedy on the conditions of sale against the vendor, who violated the condition

Sale "without reserve."

(u) Sale of Goods Act, 1893, s. 58, sub-s. (2).

(x) *Payne v. Cave*, 3 T. R. 148; 1 R. R. 679; and see *Routledge v. Grant*, 4 Bing. 653; 29 R. R. 672; *Head v. Diggon*, 3 M. & R. 97.

(y) *Anderson v. Croall*, 6 F. 153—Ct. of Sess. As to the effect of an innocent mistake by an

agent, see further *Collen v. Wright*, 8 E. & B. 657; *Re Metropolitan Coffee Palace Co.*, 24 Ch. D. 367; *Fairbank's Exors. v. Humphreys*, 18 Q. B. D. 54; *Starkey v. Bank of England*, [1903] App. Cas. 114.

(z) 29 L. J., Q. B. 14; 1 E. & F. 295—Ex. Ch. See also Sale of Goods Act, 1893, s. 58, sub-ss. (3), (4), post, p. 50.

that the article should be *bonâ fide* sold "without reserve," but they were clear that the bidder had no remedy against the auctioneer, whose authority to accept the offer of the bidder had been determined by the vendor before the hammer had been knocked down. But in the Exchequer Chamber, to which this case was carried, three Judges held that the purchaser was entitled to recover damages, for they thought that the highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be "without reserve," and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or it be the last bid on which the property is knocked down. They did not doubt that the owner at any time before the contract is legally complete might revoke the auctioneer's authority. As to the conditions, they held that the owner could not be the buyer; and that the auctioneer ought not to have taken his bid, but to have refused it, stating as his reason that the sale was "without reserve." Inclining to differ from the Queen's Bench, they rather thought the bid of the owner was not a revocation of the auctioneer's authority. The other two Judges agreed, but founded their judgment upon the evidence that the auctioneer had not authority to sell except "without reserve," and thought that there ought to be a count added by way of amendment, stating an undertaking by the auctioneer that he had authority to sell "without reserve," and a breach of that undertaking.

Implied
authority to
sell without
reserve.

An auctioneer has an implied authority to sell without reserve, and if he does so notwithstanding that the owner has placed a reserve price on the article put up for sale, he is liable to the highest bidder in the event of the reserved price not being reached, provided that the limitation of his authority has not been communicated to the buyer. This appears to be the conclusion arrived at in *Rainbow v. Hawkins* (a). In that case the defendant, an auctioneer, was instructed by the owner of a pony to sell it at a public auction with a reserve price of 25*l*. When the pony was put up for sale the name of the vendor was disclosed; but the defendant inadvertently stated that the sale was without reserve. The pony was knocked down to the plaintiff for fifteen guineas. The defendant

(a) [1904] 2 K. B. 322; 73 L. J., K. B. 641; 91 L. T. 149; 53 W. R. 46.

immediately afterwards discovered his error, and thereupon put the pony up for sale again, when it was bought in for seventeen guineas. No note or memorandum of the sale to the plaintiff was made. The plaintiff brought an action against the defendant claiming (1) delivery of the pony or damages for its detention; (2) alternatively, damages for breach of warranty of authority by the defendant. It was held, as to (1), that the action failed by reason of the absence of a written memorandum of the sale; as to (2), that an auctioneer has an implied authority to sell without reserve, and if he does so the vendor cannot set up against the buyer a limitation of that authority not made known to the buyer. There was, therefore, in the circumstances a contract binding on the vendor on which he could (but for the absence of a written memorandum) have been successfully sued by the plaintiff; and there had been no breach of warranty of authority by the defendant.

In delivering the judgment of the Court in this case, Kennedy, J., distinguished it from *Warlow v. Harrison* (b) by saying that there "the auctioneer never made a contract, as he refused to accept the plaintiff's bid, although it was the best genuine one, and therefore he never did effect a contract between his principal and the plaintiff. Here the answer to the plaintiff's claim on the ground of breach of warranty or representation of authority is that there was none. The defendant's principal was as much bound as if he had made the bargain himself, but the action fails for a totally different reason, namely, the want of a signed contract."

Warlow v. Harrison
distinguished.

But where at a sale by auction at a reserve price on the article sold, the fact that there is a reserve is known, the offer of the auctioneer to sell, the bidding, and the knocking down of the article to the highest bidder are all subject to the condition that the reserve price should be reached, and the fact that the auctioneer inadvertently knocks down the article to a bidder who has bid a less price than the reserve gives the latter no right of action against the auctioneer, either for breach of duty in refusing to sign a memorandum or otherwise complete the contract, or for breach of warranty of authority to accept the bid (c).

Sale subject
to reserve.

(b) 1 E. & E. 309.—Ex. Ch.
(c) *McManus v. Fortescue*,
[1907] 2 K. B. 1; 23 T. L. R.

292—C. A. See the remarks of
Collins, M. R. and Fletcher
Moulton, L. J. on *Rainbow v.*

Liability of
auctioneer for
failing to sign
memorandum.

This case disposes of the question whether an auctioneer who is instructed to sell at a reserve price, which is known to the public, and knocks down an article to the highest bidder at a price which is less than the reserved price is liable to an action for breach of duty in refusing to sign a memorandum of the contract. But the question is still an open one as to whether an auctioneer who has private instructions to sell only at a reserve price and by mistake puts an article up without reserve, is liable for failing to make such a memorandum (*d*).

Effect of advertisement.

Where an auctioneer advertised in the London papers that a sale by auction would take place on a particular day in a country town, and also circulated catalogues specifying the articles to be sold; and a person attended the sale intending to buy certain articles specified in the catalogue, but on the day of sale they were withdrawn by the auctioneer; it was held that there was no implied contract by him to indemnify the intended purchaser against the expense and inconvenience that he had incurred, as the advertising was a mere declaration of intention to sell (*e*).

Warranty of
ownership.

A statement that a horse is the property of the vendor, made by himself or agent, is a sufficient warranty of the ownership, and an assertion by an auctioneer that all the horses in a sale are the *bonâ fide* property of the person whose stud he has advertised as selling, would vitiate the purchase of a horse belonging to another party, made on the faith of that representation, such horse having been put into the sale without notice; because the purchaser would probably give a much higher price for a horse belonging to the stud in question, than for one without a character (*f*).

Rescission of
contract on
the ground of
misrepresentation
of
ownership.

This, apparently, was the ruling principle for the conclusion arrived at by Lord Alverstone, C. J., in *Whurr v. Devenish* (*g*). In that case, a horse was sent to be sold by auction, and was entered in the catalogue as the property of a particular person. Before the sale the owner sold the horse by private treaty, and the auctioneer was informed of this, but was requested to

Howkins, supra, [1907] 2 K. B. 635.
at pp. 6, 7.

(*d*) See *Rainbow v. Howkins*,
supra.

(*e*) *Harris v. Nickerson*, L. R.,
8 Q. B. 286; 42 L. J., Q. B.
171; 28 L. T. 410; 21 W. R.

(*f*) *Bezwell v. Christie*, Cowp.
397. See also *Hill v. Gray*,
1 Stark. N. P. C. 434; 18 R. R.

802.
(*g*) 20 T. L. R. 385.

go on with the sale by auction, the original owner acquiescing in this being done, and the sale by auction took place in his presence, the auctioneer putting up the horse "as described in the catalogue." There was evidence that the fact of the horse being entered in the catalogue as the property of the person there named, who as well known, might fetch a higher price than if sold by a person who was not known. The purchaser at the sale by auction having learned of the previous sale, brought an action against the original owner of the horse for the rescission of the contract. It was held that the statement in the catalogue was a material representation, as it was to a certain extent a guarantee as to the character of the sale; that the defendant had held out the auctioneer as being his agent, and allowed the plaintiff to act on the faith of it; and that the latter was therefore entitled to rescind the contract.

Where an auctioneer sells a commodity without saying on whose behalf he sells it, in such case the purchaser is entitled to look to him personally for the completion of the contract (h), and the same rule, according to the general law of principal and agent, applies to purchasers (i).

Auctioneer not disclosing his principal.

An auctioneer is not in the position of an ordinary agent, but may be personally liable for non-delivery of goods, even though he sells for a disclosed principal, and although a condition of sale, by which goods are to be cleared out by the purchaser within a given time, has not been complied with, at all events where such condition is not a condition precedent (k).

Liability for non-delivery.

When a horse is bid up by a puffer, the seller, in the absence of any notification that the sale is subject to a right to bid on his behalf, cannot recover the price, as the sale is void; and in such case it is immaterial whether the sale was under the usual condition that the highest bidder shall be the purchaser, or "without reserve," or subject to a reserved price.

Puffing.

The rule that a sale by auction is vitiated by the secret employment of a puffer was fully recognized in a series of

(h) *Hanson v. Roberdeau*, 1 Penke, 163; *Franklin v. Lamond*, 4 C. B. 637; 16 L. J., C. P. 221; 72 R. R. 671.

(i) As to principal and agent, see the rule in *Thompson v. Davenport*, 9 B. & C. 86; 32 R. R. 578. See also *Williamson v. Barton*, 7

H. & N. 899; 31 L. J., Ex. 170; 10 W. R. 321.

(k) *Woolfe v. Horne*, 2 Q. B. D. 355; 46 L. J., Q. B. 534; 36 L. T. 705; 25 W. R. 728; *Rainbow v. Hawkins*, [1904] 2 K. B. 322; 73 L. J., K. B. 641; 91 L. T. 149; 53 W. R. 46.

decisions previously to the Sale of Goods Act, 1893 (*h*), and by s. 58, sub-ss. (3), (4) of that Act is now declared in the following terms:—

(3) "Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer."

(4) "A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller. When a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction."

Effect of previous private warranty.

The law is so jealous of the rights of *bonâ fide* bidders, that it has been held as doubtful whether a previous private warranty to a person who became an unsuccessful bidder would not avoid the sale to a third party; for it was like puffing, and in a sale by auction all have a right to suppose that they are bidding upon equal terms (*m*).

Agreement not to bid against each other.

An agreement made by two persons not to bid against each other, but that one of them should bid up to a certain sum, and that the lot should subsequently be divided between them, is not illegal, and therefore furnishes no ground for opening the biddings, or annulling the sale (*n*).

Mock auctions.

A mock auction with sham bidders, for the purpose of selling goods at prices grossly above their worth, is an offence at common law, and the persons aiding and abetting such a proceeding may be indicted for a conspiracy with intent to defraud (*o*).

Purchaser may transfer his bargain.

A purchaser at an auction can, before payment, make a complete bargain and sale of the article which he has

(*l*) See *Berwell v. Christie*, Cowp. 396; *Howard v. Castle*, 6 T. R. 634; 3 R. R. 296; *Crowder v. Austin*, 3 Bing. 368; 11 Moore, 283; 28 R. R. 646; *White v. Collier*, M. & M. 126; *Thornett v. Haines*, 15 M. & W. 367; 15 L. J., Ex. 230; 71 R. R. 714; *Green v. Barstock*, 14 C. B., N. S. 204; 32 L. J., C. P. 181; *Mortimer v. Bell*, L. R., 1 Ch. 10; 35 L. J.,

Ch. 25; *Gilliat v. Gilliat*, L. R., 9 Eq. 60; 39 L. J., Ch. 142; *Parfitt v. Jepson*, 46 L. J., C. P. 529; 36 L. T. 251.

(*m*) *Hopkins v. Tanqueray*, 23 L. J., C. P. 162.

(*n*) *In re Carew's Trusts*, 26 Beav. 187.

(*o*) *Reg. v. Lewis*, 11 Cox, C. C. 484.

bought to a third party, so as to maintain an action for goods bargained and sold (p).

Where a party refuses to take goods he has purchased, they should he resold, and he will be liable to the loss, if any, upon the resale (q).

Where party refuses to take goods.

Thus, in Scotland, where some horses were sold by public auction without stipulation as to credit, and the purchaser allowed two days to elapse without tendering the price, it was held that the seller, who had never parted with the possession, was entitled on the third day to resell them without any communication with the original purchaser, and to sue the original purchaser for the difference in the prices, and for the keep of the horses between the periods of sale and resale, and the expenses of the resale (r).

Goods resold without communicating with purchaser.

An auctioneer, employed to sell goods for ready money, is the agent of the vendor to receive the price (s); but where the goods are sold on credit, it depends upon the extent of his authority, which, in the absence of any proof of general authority, must depend upon the conditions of sale; and where the only authority given to the auctioneer by these conditions is to receive the deposit money, the vendor reserves to himself or his agent the power to receive the remainder of the purchase-money (t).

Auctioneer proper party to receive the price.

And in any case where he has authority to receive the purchase-money, he has no authority to receive it by means of a bill of exchange (u).

Has no authority to receive a bill of exchange.

Where, by the terms of a sale by auction, a deposit is to be made with the auctioneer, he becomes the stakeholder of both parties, and must retain possession of it (x); and if he accepts a less sum than that which is to be paid by the conditions of sale, he cannot afterwards object that too little is paid (y).

He is stakeholder for both parties.

If he parts with the deposit without authority from the

Effect of this attribute.

(p) *Scott v. England*, 2 D. & L. 520; 69 R. R. 868. See also *Heffer v. Martyn*, 36 L. J., Ch. 372.

(q) See *Maclean v. Dunn*, 4 Bing. 729; 29 R. R. 714; Story on Sales, 4th ed. 314.

(r) *Laing v. Hain*, 2 S. M. & P. 396. (Court of Sess. Sec.)

(s) *Sykes v. Giles*, 5 M. & W. 650; 52 R. R. 870; *Williams v. Evans*, L. R., 1 Q. B. 352; 35 L. J., Q. B. 111.

(t) *Sykes v. Giles*, 5 M. & W. 650; 52 R. R. 870; *Mynn v. Jolliffe*, 1 M. & Rob. 326; 42 R. R. 802.

And see *Alexander v. Gibson*, 2 Camp. 555; 11 R. R. 797.

(u) *Sykes v. Giles*, 5 M. & W. 652; 52 R. R. 870. And see *Williams v. Evans*, L. R., 1 Q. B. 352; 35 L. J., Q. B. 111.

(x) *Edwards v. Hoddling*, 5 Taunt. 815; 15 R. R. 662; *Gray v. Gutteridge*, 3 C. & P. 40; 31 R. R. 343. And see *Sweeting v. Turner*, L. R., 7 Q. B. 310; 41 L. J., Q. B. 58; 25 L. T. 796; 20 W. R. 185.

(y) *Hanson v. Roberdeau*, 1 Peake, N. P. 163.

vendee, he may be sued for it. Thus, when the auctioneer received the deposit, and signed the agreement that he would complete the sale, and the vendee found the title to the estate sold defective, it was held that he might bring an action for *money had and received* against the auctioneer for the deposit, though the latter had paid it over to the vendor without any notice from the purchaser not to do so, and before the defect of title was ascertained (z); for in strict law the auctioneer, being a stakeholder, is not entitled to notice of the contract being rescinded (a).

As to interest. An auctioneer, being a mere stakeholder, is not liable for interest on the deposit to the vendor (b).

Auctioneer's
lien.

An auctioneer has a lien upon the goods sold by him, and a right of lien upon the price when paid, for his commission and charges (c). With this object he may bring an action in his own name for the price of the goods sold by him. Accordingly, where the defendant pleaded to a declaration for the price of a horse sold and delivered by the plaintiff, who was an auctioneer, that the plaintiff sold the horse as auctioneer, agent and trustee for K., and that defendant had paid K. before action brought, this plea was held on demurrer to be a bad plea (d).

When the
price vests
in the vendor.

Where a horse is sold at a repository on certain conditions, one of which, for instance, may be a power to return the horse within a certain time, if he does not answer his warranty; it has been held that the price which the auctioneer has received does not vest in the vendor until the conditions have been complied with (e).

Price ob-
tained by
principal's
fraud.

Where an agent on a sale receives as the price of an article money obtained by the fraud of his principal, it is not *money received to the use of the principal*, but to the use of the purchaser of the chattel. Thus, a horsedealer employed an auctioneer to sell a horse for him, and to make certain representations which amounted to gross fraud. The horse was sold and paid for, but before the money was paid over the fraud was discovered and the money returned to the purchaser. The horsedealer brought an action against the auctioneer to recover the money so received by him. But it was held by the Court of Queen's Bench that

(z) *Gray v. Gutteridge*, 3 C. & P. 40.

(a) *Duncan v. Cafe*, 2 M. & W. 244.

(b) *Harrington v. Hogart*, 1 B. & Ad. 577; 35 R. R. 382.

(c) *Coppin v. Craig*, 7 Taunt. 243; 17 R. R. 508; *Robinson v. Rutter*, 24 L. J., Q. B. 250.

(d) *Robinson v. Rutter*, *supra*.

(e) *Hardingham v. Allen*, 5 C. B. 796; 75 R. R. 839.

he could not recover, as the principle of *Murray v. Mann* (f) applied with the greatest force to this case. And it was said that it would be a discredit to the law of England if the innocent agent of the plaintiff's fraud were bound to pay the money over to him. For if he did so after notice he would be liable to an action at the suit of the purchaser (g).

Where an auctioneer entrusted with a sale is the *causa causans* of the sale, he is entitled to his commission, even though before the actual sale the vendor withdrew the property from sale by him (h). Thus, by the terms of an agreement between the parties, an auctioneer was to be entitled to a commission, if the estate should be sold by him. The estate was not actually sold by him, but the vendor, after the auctioneer had advertised the sale, and had put up the property for sale by auction, wrote to the plaintiff, and withdrew the property from sale for the present. In the meantime, and before the sale was withdrawn, the vendor and the afterwards purchaser were in negotiation for the purchase of the property. In an action by the auctioneer against the vendor for his commission, it was held by the Court of Common Pleas, that under these circumstances the auctioneer must be held to be the *causa causans* of the sale, and therefore entitled to his commission (i).

Auctioneer's
commission.

(f) 2 Exch. 538; 76 R. R. 686.

(g) *Sterens v. Leigh*, 2 C. L. R. 251.

(h) *Clark v. Smythies*, 2 F. & F.

83. And see *Miller v. Beale*, 27 W. R. 403, M. R.

(i) *Green v. Bartlett*, 8 L. T. 503.

CHAPTER III.

FAIRS AND MARKETS OVERT; HORSE STEALING AND THE RECOVERY OF STOLEN HORSES.

Fairs and Markets Overt.

Sales at fairs
and markets
overt.

THE general rule of law is, that all sales and contracts of anything vendible in fairs or markets *overt* (that is, open), shall not only be good between the parties, but also be binding on all those that have any right of property therein. And for this purpose, the *Mirror* informs us, were tolls established in markets, viz. to testify the making of contracts, for every private contract was discountenanced by law; insomuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses (a).

The general
rule of law.

The general rule of the law of England is, that a man who has no authority to sell cannot, by making a sale, transfer the property to another. And the only exception to this rule is the case of sales in market overt (b), when the purchaser's title is good against all the world (c).

This exception, however, only applies to *bonâ fide* sales commenced and perfected in market overt; that is, where the goods sold are actually in the market, and where both the sale and delivery of them take place therein (d).

When market
overt is held.

Market overt in the country is only held on the special days provided for particular towns by charter or prescription, but in London every day, except Sunday, is market day (a).

Where market
overt is held.

The market place, or spot of ground set apart by custom, or established under powers conferred by a modern Act of Parliament (e), for the sale of particular

(a) 2 Bl. Com. 449.

(b) See per Abbott, C. J., *Dyer v. Pearson*, 3 B. & C. 42; 27 R. R. 286.

(c) *Cundy v. Lindsay*, 3 App. Cas. 459; 47 L. J., Q. B. 481; 38

L. T. 573.

(d) *Crane v. London Dock Co.*, 33 L. J., Q. B. 224; 10 L. T. 372; 12 W. R. 745.

(e) *Gandy v. Ledwidge*, 10 Ir. R. C. L. 33 Q. B.

goods, is also in the country the only market overt, but in the city of London, by the custom of London, every shop (*except a pawnbroker's*) in which goods are exposed publicly for sale is market overt, but for such things only as the owner professes to trade in (*f*). So that Smithfield is not a market overt for clothes, nor Cheapside for horses (*g*).

Without the city of London, market overt is an open, public, and legally constituted market (*h*). Therefore a mere repository for horses is not market overt (*i*).

By the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), s. 13, every person, other than a licensed hawkers, is prohibited from selling or exposing for sale within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market.

The object of the Act was evidently to protect the interests of the market; to restrain anyone from setting up within the limits a rival market; and the substantial meaning of section 13 is, that whenever it appears that the seller sells in a shop which is private and permanent he is to be within the exception, but whenever a man does not sell in his private shop, but sets up a private market of his own, the section imposes a penalty; and whether or not the place of sale is the seller's own private dwelling-place or shop is a question which must be decided upon a consideration of all the elements of the case (*k*). The section includes horses under the word *article*, when sold by a licensed auctioneer by auction in

What held to be market overt without the city of London.

Horse "an article" within 10 & 11 Vict. c. 14.

(*f*) 2 Bl. Com. 449.

(*g*) Moore, 360.

(*h*) See Com. Dig. *Market*; *Lee v. Bayes*, 18 C. B. 601; per Jervis, C. J.

(*i*) *Lee v. Bayes*, 18 C. B. 601.

(*k*) *Pope v. Whalley*, 6 B. & S. 303; 11 Jur., N. S. 444; 34 L. J., M. C. 76; 11 L. T. 769.

Canadian Cases.—A horse is a "chattel within the meaning of the Exemption Act (23 Vict. P. Can.); c. 25, s. 4, sub-s. 6, and not liable to seizure for debt. *Davidson v. Reynolds*, 16 U. C. C. P. 140 (1865). See *Davey v. Cartwright*, 20 U. C. C. P. 1 (1869).

A contractor who uses a horse in his business is not a carter, and cannot as such oppose the seizure of the horse in execution. *McManamy v. Pelletier*, Q. R. 24 S. C. 127 (1903).

The law of Quebec does not allow the privilege of protection from seizure of two horses or two oxen except to a farmer, the cultivation of whose farm is his principal occupation. *McManamy v. Pelletier*, Q. R. 24 S. C. 127. And see *Turner v. Bradshaw*, 6 Que. P. R. 184 (1904).

Construction. "Chattel."

"Carter."

"Farmer."

the yard belonging to a dwelling-house not his own, and within the prescribed limits (l).

Dwelling-
place or shop.

Where an auctioneer sold sheep, cattle and horses at a building called the "Agricultural Hall," of which he was proprietor, and which was capable of holding one hundred head of cattle, and which was, moreover, contiguous to a yard capable of holding 1,400 sheep, it was held, that these premises were not the auctioneer's dwelling-place or shop, notwithstanding that his dwelling-house was only separated from the hall by the yard (m). And "under that state of facts," said Cockburn, C. J., "it is impossible to say that the sale took place in the dwelling-place of the respondent; for the place is entirely separated from his dwelling-house; and assuming (contrary to my opinion) that a distinction was intended by the use of the phrase 'dwelling-place,' instead of 'dwelling-house,' which occurs in some of the other statutes, and that 'dwelling-place' may apply to somewhat larger and more extensive premises than the term 'dwelling-house' would apply to; yet I do not think that in any sense of the term can those premises be said to be the dwelling-place of the respondent, separated as they are from the place in which he lives. Then, is it his shop? I am of opinion that it is not. It cannot, in any proper sense of the term, be called a shop. I agree that there may be cases in which the term 'shop,' in its popular sense, would not be applicable to the premises in which things were sold or exposed for sale, and yet, by a liberal and rational construction of the Act, the premises might be considered as within the exception of 'shop.' Take, for instance, the place of business of a horsedealer who has stables in which he keeps horses for sale, either as his own or on commission. Although tolls are payable for the sale of horses in the market, it would be, perhaps, too much to say that the horsedealer is not at liberty to sell horses on his own premises, as not being within the exception of 'shop' in the statute. I think we might say that, on fair construction, the horsedealer's premises were 'a shop'

(l) *Llandaff and Canton Districts Market Co. v. Lyndon*, 6 Jur., N. S. 1344; 30 L. J., M. C. 105; 8 W. R. 693. See also *Wiltshire v. Willett*, 11 C. B., N. S. 240; 31 L. J., M. C. 8; 10 W. R. 445; 5 L. T. 355; *Hooper v. Kenshole*, 2 Q. B. D. 127; 46

L. J., M. C. 160; 36 L. T. 111; *Ashworth v. Heyworth*, L. R., 4 Q. B. 316; 38 L. J., M. C. 91; 20 L. T. 439.

(m) *Fearon v. Mitchell*, L. R., 7 Q. B. 690; 41 L. J., M. C. 170; 27 L. T. 33.

within that term as used in section 13. But each case must depend on its particular circumstances. Although, as I have said, the premises of a horsedealer might come within the exception, it is a very different thing when we have to deal with an extensive area like the present, which is, in fact, nearly as extensive as the market place itself. It is true that the auction itself took place in a building, but the sheep and other things, the subject of the sale, were exposed for sale in this large yard and kept there. To say that this could be a 'shop' within the meaning of this section would be, as it appears to me, quite unreasonable. I own my individual opinion is rather strong against an auctioneer's premises being a 'shop' at all within the meaning of the section, but it is not necessary to determine that. Assuming that an auctioneer's premises might be a shop for the purpose of selling, so as to come within the exception, it seems to me impossible to say that these extensive premises, being in the open air and capable of holding so many hundred sheep, can in any sense of the term be brought within the description of a shop" (n).

A horse which brings goods to market to be sold is, as well as the goods themselves, exempt from distress, for the sake of public utility (o).

Where a statute prohibited persons from sending animals affected with a contagious disease to market, and inflicted penalties on any person so sending them, it was held that the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of their purchase (p).

Where a horse at a fair is exempt from distress.

Sale of diseased animals in market.

Horse Stealing.

By 24 & 25 Vict. c. 96, s. 10, it is enacted, that "Whoever shall steal any horse, mare, gelding, colt or filly, or Stat. 24 & 25 Vict. c. 96.

(n) *Fearon v. Mitchell*, L. R., 7 Q. B. 294, 295. See also *M'Hole v. Davies*, 1 Q. B. D. 59; 45 L. J., M. C. 30; 33 L. T. 502; 24 W. R. 343.

(o) See *Francis v. Wyatt*, 3

Burr. 1502, and the authorities there cited.

(p) *Ward v. Hobbs*, 4 App. Cas. 13; 48 L. J., C. P. 281; 40 L. T. 73; 27 W. R. 114.

any bull, cow, ox, heifer or calf, or any ram, ewe, sheep or lamb, shall be guilty of felony: " and by section 11, it is enacted, that "whosoever shall wilfully kill any animal with intent to steal the carcase, skin or any part of the animal so killed, shall be guilty of felony" (g).

Description in
an indict-
ment.

In an indictment for horse stealing under 7 & 8 Geo. 4, c. 29, s. 25, the phraseology of which section has been followed in this respect by 24 & 25 Vict. c. 96, s. 10, it was held, that the animal, whether a horse, mare, gelding, colt or filly, might be described as a "horse," although the statute specified the particular species and gender (r); and the construction thus given to the former statute would probably make it unnecessary to amend in a like case an indictment under the present statute. Now, upon any similar objection being taken, not covered, as in this case, by an express decision, the indictment might be amended under 14 & 15 Vict. c. 100, s. 1.

When the
offence is
complete.

If a horse in a close is taken with intent to steal him, but the thief is caught before he get out of the close, the offence is complete (s). And where the prisoner went into the stable of an inn, and, pointing to a mare, said to the ostler, "That is my horse, saddle him," and the ostler did so, and the prisoner tried to mount the mare in the inn yard, but failing to do so directed the ostler to lead the mare out of the yard for him to mount, and the ostler led her out, but before the prisoner had time to mount her a person who knew the mare came up and the prisoner was secured; it was held, that if the prisoner caused the mare

(g) Repealing but substantially re-enacting 7 & 8 Geo. 4, c. 29, s. 25.

(r) *Ree v. Aldridge*, 4 Cox, C. C. 143.

(s) 1 Hale, 508.

Horse steal-
ing.

Canadian Cases.—See Criminal Code of Canada, s. 345, which declares that "all tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen." Sect. 347 defines the crime of theft. Sect. 348, sub-s. 2, provides that "any servant, contrary to the orders of his master, taking from his possession any food for the purpose of giving the same, or having the same given to any horse or other animal belonging to, or in the possession of his master, shall not, by reason thereof, be guilty of theft." By s. 349 it is declared that any person who takes or carries away, without lawful authority, any property under lawful seizure and detention by any peace officer or public officer in his official capacity, is guilty of theft. This would apply to the case of a pound breach where the animal was in the custody of an official pound-keeper. The punishment of the indictable offence of horse stealing is imprisonment for a term not exceeding fourteen years. Sect. 369.

to be led out of the stable intending to steal her, that was a sufficient taking to constitute a felony (*t*).

If the owner of goods gives up the possession of his goods, at the same time intending to part with the entire property in them, it is no larceny, although he may be defrauded in the bargain (*u*).

Property
given up.

A person selling a horse at a fair should take care how he delivers his horse to a stranger without receiving payment for him, because whatever false statements and pretences the stranger may make use of, if the seller part with him on a promise being made that he shall be paid for him at a certain place, and the horse is ridden off without his receiving the money, he cannot get him back again, neither can he indict the stranger for tricking him, but his only remedy is an action for the price, which it might be useless to bring against so worthless a party. Thus, where a man was indicted for obtaining a filly by false pretences, it appeared that the prisoner, pretending to be a gentleman's servant, that he lived at Brecon, and that he had bought twenty horses at Brecon Fair, got possession of a filly there from a person who had her on sale, saying that if the prosecutor would take a horse he delivered to him to the Cross Keys he would meet him and pay the money. The prisoner never made his appearance, and the horse left was good for nothing. It was held, that as the prosecutor parted with the filly because the prisoner promised to pay him, and not on account of any of the false pretences charged, the prisoner was entitled to an acquittal (*x*).

Delivery of a
horse to a
stranger.

Where W. let a horse on hire to C., who fetched the horse every morning from W.'s stable and returned it after the day's work was done, and the prisoner went to C. one day just as the day's work was done and fraudulently obtained the horse by saying, falsely, "I have come for W.'s horse; he has got a job on and wants as quickly as possible;" and the same evening the prisoner was found three miles off with the horse by a constable, to whom he stated it was his father's horse and that he was sent to sell it. This was held as against W. to be a larceny, though as against C. it would have been an obtaining by false pretences (*y*).

(*t*) *Rex v. Pitman*, 2 C. & P. 423.

(*u*) Per Coleridge, J., *Reg. v. Sheppard*, 9 C. & P. 123.

(*x*) *Rex v. Dale*, 7 C. & P. 352; *R. v. Hurree*, 1 Leach, 467.

(*y*) *Reg. v. Kendall*, 30 L. T. 345; 12 Cox, C. C. 598, C. C. R.

Delivery on trial.

If, instead of delivering a horse on the completion of a bargain, the owner allows the party to ride him by way of trial, and he rides away in pursuance of an intention to defraud, the property is unchanged, and the felony is complete (z).

Goods taken without consent.

If the owner does not consent to the goods being taken, and the person when he bargains for them does not intend to pay for them, but means to get them into his possession, and dispose of them for his own benefit without paying for them, it is a larceny (a).

Appropriation of a hired horse.

If a horse was hired for the day by a person intending at the time of hiring to appropriate it, and it was accordingly taken away and sold, a felony was committed at common law, because the owner did not intend to relinquish his property in the horse, but only the temporary possession (b). So where the prisoner hired a horse with the intention of converting it to his own use, and afterwards offered it for sale, but no sale took place, it was held, nevertheless, that he was guilty of larceny (c). But where a horse was hired for a particular purpose the selling him after that purpose was accomplished did not constitute a new felonious taking (d). But the difficulties which arose in cases of this nature were obviated by 24 & 25 Vict. c. 96, s. 3, by which the fraudulent appropriation of property by bailees is declared to be larceny, and may therefore be the subject of an indictment for larceny.

Larceny without proof of sale.

If goods are delivered to a person on hire, and he takes them away *animo furandi*, he is guilty of larceny, although no actual conversion of them by sale or otherwise is proved. Thus, where A. hired a horse and gig with the felonious intention of converting them to his own use, and afterwards offered them for sale, but no sale took place; it was held nevertheless that he was guilty of larceny (e).

Taking with an intent to use.

A taking with the bare intent to use goods, though unlawfully, will be only a trespass if the jury are satisfied that such was the original intention. Thus, where two persons took two horses from a stable, rode them to a

(z) See Dickinson, Q. S. 220.

(a) *Gilbert's Case*, 1 Mood. C. C. 186.

(b) *Rex v. Pear*, 1 Leach, 521; *Rex v. Patch*, *ibid.* 238; *Rex v. Pratt*, 1 Mood. C. C. 185.

(c) *R. v. Janson*, 4 Cox, C. C.

82, overruling *R. v. Brooks*, 8 C. & P. 295.

(d) *Rex v. Banks*, R. & R. 441.

(e) *Reg. v. Janson*, 4 Cox, C. C. 82, overruling *Reg. v. Brooks*, 8 C. & P. 295.

place at a distance, and there left them, proceeding on foot, and the jury found that they took the horses merely to forward them on their journey, and not to make any further use of them, this was held not to be a larceny (*f*). And if a person stealing other property takes a horse, not with the intent to steal it, but only to get off more conveniently with the other property which he has stolen, such taking of the horse is not a felony (*g*).

Where a man is found in possession of a thing after a lapse of six or seven months from the time when it was lost, and there is no other evidence against him but that possession, he ought not to be called on to account for it. Thus, where a mare, which had been lost in December, was not found in the prisoner's possession till the June or July following, it was held that his possession was not sufficiently recent to put him on his defence (*h*).

Possession six months after loss.

Recovery of Stolen Horses

Although as a general rule the purchaser of stolen goods in market overt acquires a title to them, this is not the case with regard to stolen horses. For a purchaser gains no property in a horse which has been stolen, unless he buys it in a fair or market overt, according to the directions of the statutes of Philip and Mary (*i*), and Elizabeth (*k*).

Sale in market overt.

By the statutes of Philip and Mary, and Elizabeth, it is enacted, that the horse which is for sale shall be openly exposed in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the bookkeeper of such fair or market; that toll be paid if any be due, and if not, one penny to the bookkeeper, who shall enter down the price, colour, and marks of the horse, with the names, additions and abode of the vendee and vendor, the latter being properly attested (*l*).

Statutory regulations.

(*f*) *Ree v. Phillips*, 2 East, P. C. c. 16, s. 98.

(*g*) *Ree v. Crump*, 1 C. & P. 658.

(*h*) Per Maule, J., *Reg. v. Cooper*, 16 Jur. 750.

(*i*) 2 & 3 Ph. & M. c. 7, post, Appendix. By s. 22, sub-s. (2) of

the Sale of Goods Act, 1893, nothing in that section shall affect the law relating to the sale of horses.

(*k*) 31 Eliz. c. 12, post, Appendix.

(*l*) 2 Ph. & M. c. 7, and 31 Eliz. c. 12.

Recovery
when sold
under these
regulations.

The sale of a horse under these statutory regulations does not take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate where the horse shall be found, and within forty days more proves it to be his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt (*m*).

Owner must
prove the
horse was
stolen.

Unless, however, it is proved that the horse was stolen a magistrate has no authority to restore it; and, therefore, where a complaint was made to a magistrate by A. the owner, that his horse had been stolen by B., without actual proof of its having been stolen, it was held that an officer, although armed with a warrant against B., was not justified under the 31 Eliz. c. 12, s. 4, in taking the horse out of the possession of the *bonâ fide* purchaser from B. (*n*).

Sale out of
market overt.

Where horses or other stolen goods are sold out of market overt, the owner's property is not altered, and he may take them wherever he finds them (*o*).

Recovery
when not sold
under these
regulations.

We have seen that the sale of a stolen horse, even in market overt, is void if certain statutory regulations have not been observed, and in such case the owner does not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him (*o*). But, in a case (*p*) in which no evidence was given of a compliance with the statutory regulations, a *bonâ fide* purchaser of a horse from a person who had bought it, (as the second purchaser knew) at a fair, without any evidence that he knew that it was obtained dishonestly, although it had been purchased on credit,

(*m*) 31 Eliz. c. 12, s. 4; Kel. 48.

(*n*) *Joseph v. Adkins*, 2 Stark. N. P. C. 76; 19 R. R. 677.

(*o*) 2 Bl. Com. 449.

(*p*) *North v. Jackson*, 2 F. & F. 198.

Market overt.

Canadian Cases.—The purchaser at public auction (not in market overt) of a stolen horse obtains no title thereto. *Bowman v. Yielding*, M. T. 3 Vict. (Dig. Ont. Case Law, vol. i., col. 23).

To the same effect is the Quebec case of *Lungevin v. McMillan*, 9 L. C. J. 105 (1865). It is to be noted, however, that Art. 1489 of the Quebec Civil Code provides that "If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it." See also *Hughes v. Reed*, 10 R. J. R. Q. 362; *Mallette v. Whyte*, 17 R. J. R. Q., at p. 482; and *Guy v. Booth*, 4 R. L. 565.

and not paid for, was held entitled to maintain *trover* against the original owner for retaking it.

The onus of showing that the formalities required by the statute have been observed lies on the buyer. In *Moran v. Pitt* (q) the defendant's mare, which he had turned out in a public park, was found out of the park and was sold at public auction by the "pinner"; and after an intermediate sale she was sold in market overt by the plaintiff and subsequently taken possession of by the defendant. No proof was given that the formalities required by the statute had been complied with; and the Court of Queen's Bench, in the absence of such proof, declined to infer that such formalities had been observed, and held that the plaintiff could not maintain an action for the mare against the defendant, the true owner.

Proof of compliance with statute.

It has been held, that where a party has good reason to believe that his horse has been stolen, he cannot maintain *trover* against the person who bought it of the supposed thief, unless he has done everything in his power to bring the thief to justice (r). But where the owner of the stolen property had prosecuted the felon to conviction, and before that time had given notice of the felony to the defendant, who had purchased *bonâ fide*, but not in market overt, and the defendant after such notice had sold the property in market overt, it was held that the owner might recover from the defendant the value of his property in *trover* (s).

Rule that owner must first endeavour to bring the thief to justice.

Though the decisions themselves in the cases of *Gimson v. Woodfull* and *Peer v. Humphrey* have not been expressly overruled, yet the general rule upon which they rest can now only be taken with some modifications. It is a true principle, that where a criminal and consequently an injurious act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony (t). But this rule of public policy applies only to proceedings between the plaintiff and the felon himself, or at the most the felon and those with whom he must be sued (u), and

To be taken with modification.

(q) 42 L. J., Q. B. 47; 28 L. T. 554; 21 W. R. 525.

(r) *Gimson v. Woodfull*, 2 C. & P. 41.

(s) *Peer v. Humphrey*, 2 A. & E. 495; 41 R. R. 471.

(t) Although this is the rule, it becomes a different question when we have to consider how it is to

be enforced: per Cockburn, C. J., *Wells v. Abrahams*, L. R., 7 Q. B. 554 at p. 557; 41 L. J., Q. B. 306.

(u) *White v. Spettigue*, 13 M. & W. 603, 606, per Pollock, C. B.; 67 R. R. 753; *Stone v. Marsh*, 6 B. & C. 551; 30 R. R. 420; *Marsh v. Keating*, 1 Bing. N. C. 198; 37 R. R. 75; per Crowder, J., *Lee*

Where the
action is
against a
third party.

Evidence of
conversion.

Order for
restitution.

Or action of
trover.

therefore it is not applicable where the action is against a third party, who is innocent of the felony.

Thus, it was held that an action of *trover* was maintainable to recover the value of goods which had been stolen from the plaintiff, and which the defendant had innocently purchased, although no steps had been taken to bring the thief to justice (*w*). Thus, too, in a case where A. had *bonâ fide* purchased a stolen horse at a public auction (not being a market overt), and had sent it for sale to a repository for horses kept by B., and there it was found by the owner, who demanded it of B. in the presence of A., and B. refused to give it up without the authority of A.; it was held, in an action of *trover* against A. and B., that in this case it was necessary in the first instance to prosecute the felon, and that there was sufficient evidence of a joint conversion; inasmuch as, though a servant or agent, who has received goods from his master or principal, may, on the demand made by the true owner of the goods, give a qualified refusal to deliver them up, without being liable to an action of *trover*; yet when a bailee sets up or relies upon the title of his bailor, in answer to such demand, his refusal is evidence of a conversion by him (*x*).

If goods be stolen from any common person, and he prosecutes the offender to conviction, he will be entitled, under 24 & 25 Vict. c. 96, s. 100 (*y*), to an order of restitution from the Court before whom the trial took place, and this notwithstanding any intervening sale in market overt (*z*).

Or the goods may be recovered in *trover* from the purchaser of them in market overt, on a conversion by him subsequent to the conviction of the felon, without any order for restitution having been made. For the effect of 24 & 25 Vict. c. 96, s. 100 (*z*), is to revest the property in stolen goods in the original owner upon conviction of the felon (*a*).

The *bonâ fide* purchaser of stolen beasts 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 their keep while the beasts were in his

v. Bayes, 18 C. B. 602; and see *Osborn v. Gillett*, L. R., 8. Ex. 88; 44 L. J., Ex. 53.

(*w*) *White v. Spettigue*, 13 M. & W. 603; 67 R. R. 753.

(*x*) *Lee v. Bayes*, 18 C. B. 599.

(*y*) Taken from 7 & 8 Geo. 4, c. 29, s. 57.

(*z*) 2 Ste. Com. 14th ed. 111.

(*a*) *Scattergood v. Sylrester*, 19 L. J., Q. B. 447.

possession, for they were his own property until, on the conviction, the property reverted in the original owner (b).

This enactment applies to cases of false pretences as well as felony, and the fact that the prisoner parted with the goods to a *bona fide* pawnee will not disentitle the original owner to the restitution of the goods (c). It also applies to property received by a person knowing it to have been stolen or obtained by false pretences. The order of restitution is strictly limited to property identified at the trial as being the subject of the charge; it does not, therefore, extend to property in the possession of innocent third persons, which was not produced and identified at the trial as being the subject of the indictment (d).

Where stolen cattle were sold in market overt at about 10 o'clock in the morning, and later on in the day resold likewise in market overt, both purchases being *bona fide*, it was held that, upon the conviction of the thief, the judge had jurisdiction at the trial to order restitution to the rightful owner (e).

And by the 30 & 31 Vict. c. 35, s. 9, provision is made upon conviction of the thief, and restitution of the goods, for the payment to an innocent purchaser from the thief, out of any moneys taken from the thief on his apprehension, of the price such purchaser has paid for the stolen goods.

Under 2 & 3 Vict. c. 71, the metropolitan police magistrates have power to order that any goods stolen or fraudulently obtained be delivered up to the owner (f).

An action of *replevin* may be maintained for any unlawful taking of goods, as upon a mistaken charge of felony, and is not confined to the case of goods distrained. Thus, where there was a dispute between the defendant L. and the plaintiff as to the ownership of a horse, one H., having obtained possession of it at the plaintiff's request, was charged by L. with stealing it. The defendant C. was a policeman, and the charge having been made to him, he apprehended H. and took possession of the horse. The charge of felony was afterwards dismissed by the police magistrate, but the defendant C. was ordered to give up the horse to the defendant L. The plaintiff

Order of
police
magistrate.

Replevin for
unlawful
taking.

(b) *Walker v. Matthews*, 8 Q. B. D. 169; 51 L. J., Q. B. 243; 46 L. T. 915; 30 W. R. 338. C. C. 594; *Reg. v. Smith*, 12 Cox, C. C. 597.

(c) *Reg. v. Stancliffe*, 11 Cox, 293, C. C. R. (e) *Reg. v. Moran*, 6 Ir. R., C. L.

(d) *Reg. v. Goldsmith*, 12 Cox, 40. (f) See 2 & 3 Vict. c. 71, ss. 27,

brought an action of *replevin* against the defendants C. and L. for taking and detaining his, the plaintiff's, horse, and it was held that, though unusual in such a case, the action was maintainable (g).

Wrongful sale
by agent of
horse en-
trusted to
him.

It was held by Wightman, J., in the case of *R. v. Haigh* (h), that a person who was employed to take a horse to a particular place, and sold it on the way, was rightly indicted under s. 2 of the Fraudulent Trustees Act of 1857 (20 & 21 Vict. c. 54), which section, though repealed together with the rest of the Act by 24 & 25 Vict. c. 95, has been re-enacted and extended by 24 & 25 Vict. c. 96, s. 76.

(g) *Mellor v. Leather*, 17 Jur.
709.

(h) Liverpool Winter Assize,
Dec. 1, 1857.

CHAPTER IV.

WHAT DISEASES OR BAD HABITS CONSTITUTE UNSOUNDNESS AND VICE.

Unsoundness and Vice.

IN buying and selling horses, it is of the utmost importance to ascertain what constitutes *unsoundness*, and what habits are to be considered *vices*. Until comparatively lately there had been much perplexity on these points; no correct rule as to unsoundness has been laid down, and a difference of opinion existed among the Judges whether or not a temporary disease was, during its existence, a breach of a warranty of soundness. The law on these subjects has been in a great measure settled by the Judges of the Court of Exchequer, where Parke, B., laid down a rule with regard to *unsoundness*, by which, so far as the nature of the subject will admit, all future cases will be governed, it being the result of the deliberate consideration of the Court (a). The same learned Judge also in another case expressed an opinion as to what constitutes a *vice* (b), and keeping this in view, a correct estimate may be formed of what will be considered a breach of a warranty of "freedom from vice."

Present state of the law.

It is a difficult matter without the use of negatives to explain, fully and briefly, the meaning of the word "sound," as applied to horses. Best, C. J., in the case of *Best v. Osborne* (c), held that "sound" meant perfect. In *Kiddell v. Burnard* (d), Parke, B., said, "The word 'sound' means what it expresses, namely, that the animal is *sound* and free from disease at the time he is warranted." And in the same case Alderson, B., said,

Definition of soundness.

(a) *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 857; *Coates v. Stephens*, 2 M. & Rob. 157; 62 R. R. 785. These cases have been followed in America in *Kornegay v. White*, 10 Ala. 255; *Roberts v. Jenkins*, 1 Foster (N. H.) 116;

Thompson v. Bertrand, 23 Ark. 730.

(b) *Scholefield v. Robb*, 2 M. & Rob. 210; 62 R. R. 794.

(c) *Best v. Osborne*, R. & M. 290.

(d) *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 857.

"The word 'sound' means *sound*; and the only qualification of which it is susceptible arises from the purpose for which the warranty is given."

A sound horse.

We may define a horse to be "*SOUND*" when he is free from disease, either of a temporary or permanent nature.

Rule as to unsoundness.

The rule as to *unsoundness* is, that if, at the time of 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 (whether such disease be congenital or arises subsequently to its birth), or from accident (*e*), 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* (*f*). When the Court of Exchequer laid down the rule as to unsoundness, Alderson, B., on this point said, "It is, however, right to make to the definition of *unsoundness* addition my brother Parke has made, namely, that the disqualification for work may arise either from disease or accident" (*g*).

The term "practically sound."

The term "practically sound" is one very much employed by veterinary surgeons when examining horses as to soundness. The prefixes "practically" or "usefully" have not any legal value in relation to soundness, but such are used by Veterinarians, as a matter of convenience for

(*e*) *Holyday v. Morgan*, 28 L. J., 857; *Coates v. Stephens*, 2 M. & Rob. 137; 62 R. R. 785.

(*f*) Per Parke, B., *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 671; 60 R. R. 857.

Diseased horse.

Canadian Cases.—Section 38 of chapter 75 of R. S. C., 1906, declares that "Every person who sells or disposes of, or puts off, or offers or exposes for sale, or attempts to dispose of or put off any animal infected with or labouring under any infectious or contagious disease, or the meat, skin, hide, horns, hoofs or other parts of an animal infected with or labouring under any infectious or contagious disease at the time of its death, whether such person is the owner of the animal, or of such meat, skin, hide, horns, hoofs or other parts of such an animal, or not, shall, for every such offence, incur a penalty not exceeding two hundred dollars."

Knowledge on the part of the seller that the animals sold by him were affected with a contagious disease is not essential to the offence declared by s. 38 of the Animal Contagious Diseases Act, R. S. C., 1906, chap. 75. *Rex v. Perras*, 9 Can. Cr. Cas. 364. See the Animal Diseases Acts in the Appendix of Canadian Statutes.

"Tic" or "rot" is a defect which enables the vendee after discovering it to rescind the contract. *Ducharme v. Charest*, Q. R. 23 S. C. 82.

the purpose of advising a client to purchase a horse, that will, in the opinion of the examiner, perform its work as satisfactorily as one that is *absolutely free from disease, or apparently so*, at the time of examination.

A considerable percentage of horses brought to veterinary surgeons for examination as to soundness does not, on critical examination, conform to the word "sound," as defined in a legal sense, nevertheless such animals may prove of equal utility. The use of the prefixes "practically" or "usefully" is not free from objection, and the adoption of such occasionally gives rise to dissatisfaction on the part of the buyer.

It would be opening far too widely a door to dispute and endless wrangling if veterinary surgeons and purchasers of horses were to regard *defects of conformation* as constituting unsoundness, yet the rule regarding the latter is frequently given a wide interpretation.

Defects of conformation.

Almost all veterinarians have horses brought to them for examination *re* soundness, the conformation of which may be far from satisfactory, yet are unable to certify that such are *unsound*, at the same time being aware that the physical defect *predisposes* the animal to become *unsound* at some future date.

The buyer can discern, or ought to know, whether the form of the horse is that which will render him likely to suit his purpose, and he should try him sufficiently to ascertain his natural strength, endurance and manner of going, etc. (h).

The following is a most important case on *unsoundness* in animals:—An action of *assumpsit* was brought on the warranty of three bullocks, and under the direction of Erskine, J., at the trial, a verdict was found for the plaintiff. In refusing a rule for a new trial, Parke, B., said, "The rule I laid down in *Coates v. Stephens* (i) is correctly reported, that is the rule I have always adopted and acted on in cases of *unsoundness*: although, in so doing, I differ from the contrary doctrine laid down by my brother Coleridge in *Bolden v. Brogden* (k):—

Important decision as to unsoundness.

"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 sound. If, indeed, the

(h) Lib. U. K. "The Horse," 361. "Rule as to Unsoundness," ante, p. 68.

(i) *Coates v. Stephens*, 2 M. & Rob. 137; 62 R. R. 785; and see (k) *Bolden v. Brogden*, 2 M. & Rob. 113.

disease were not of a nature to impede the natural usefulness of 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 *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 a saddle or bridle on the animal, it would be different."

All temporary ailments constitute unsoundness.

"An argument has, however, been adduced from the slightness of the disease and the 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 a 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 if they were very inconsiderable, the judge might still certify under the statute of Elizabeth to deprive the plaintiff of costs."

'But on the question of law, I think the direction of the judge in this case was perfectly correct, and that this verdict ought not to be disturbed. Were this matter presented to us now for the first time, we might deem it proper to grant a rule, but the matter has been, we think, settled by previous cases: and the opinion which we now express is the result of deliberate consideration.'

and for specific purposes.

Alderson, B., was of the same opinion, saying, "The word 'sound' means *sound*, and the only qualification of which it is susceptible arises from the purpose for which the warranty is given. If, for instance, a horse is purchased to be used in a given way, the word 'sound' means that the animal is useful for that purpose; and 'unsound' means that he, at the time, is affected with something which will have the effect of impeding that use. If the disease be one easily cured, that will only go in *mitigation of damages*. It is, however, right to make to the definition of *unsoundness* the addition my brother Parke has made, namely, that the disqualification for work may arise either from *disease or accident*; and the doctrine laid down by him on this subject, both to-day and in the case of *Coates v. Stephens* (l), is not new law; it is to be found recognised by Lord Ellenborough and other judges in a series of cases" (m).

(l) *Coates v. Stephens*, 2 M. & Rob. 157; 62 R. R. 785.

(m) *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 857.

The rule as to *unsoundness* applies to cases of disease and accident, which from their nature are only temporary, it not being necessary that the disorder should be permanent or incurable. And this is laid down as law by Lord Ellenborough in *Elton v. Brogden* (n) and *Elton v. Jordan* (o); also by Parke, B., in *Coates v. Stephens* (p), and by the Court of Exchequer in *Kiddell v. Burnard* (q), although Coleridge, J., in *Bolden v. Brogden* (r) was of a different opinion.

Temporary diseases.

A *vice* is a bad habit, and a bad habit to constitute a *vice* must either be shown in the temper of the horse, so as to make him dangerous, or diminish his natural usefulness; or it must be a habit decidedly injurious to his health (s).

Rule as to vice.

The *soundness* or *unsoundness* of a horse is a question peculiarly fit for the consideration of a jury, and the Court will not set aside a verdict on account of there being a preponderance of evidence the other way (t); and they should consider whether the effect said to proceed from the alleged *unsoundness* is such an effect as in the eye of the law renders a horse unsound. It is also a question for them whether a horse warranted sound was at the time of delivery rendered unfit for immediate use to an ordinary person on account of some disease (u).

How unsoundness or vice should be left to a jury.

And in case of *vice* they should consider whether the effect alleged to proceed from a certain habit is such an effect as the law holds to be a vice in a horse.

Diseases, Defects or Alterations in Structure, and Bad Habits.

We shall now consider, in alphabetical order, as the most convenient method, the various diseases, defects or alterations in structure, and bad habits, to which the horse is liable; and with the assistance of decided cases, and guided by the rules which have been laid down by the Courts, an attempt will be made to fix in each instance

(n) *Elton v. Brogden*, 4 Ca 281.

(o) *Elton v. Jordan*, 1 Stark. N. P. C. 127; 18 R. R. 754.

(p) *Coates v. Stephens*, 2 M & Rob. 157; 62 R. R. 785.

(q) *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 857.

(r) *Bolden v. Brogden*, 2 M. & Rob. 113.

(s) *Schulzfeld v. Robb*, 2 M. & Rob. 210; 62 R. R. 794; and see Crib-biting, post.

(t) *Lewis v. Peake*, 7 Taunt. 153; 2 Marsh. 43; 17 R. R. 275; per Patteson, J., *Baylis v. Lawrence*, 11 Ad. & E. 926; 52 R. R. 537.

(u) See Saddle-galls, post; and *Ainsley v. Brown*, there cited.

which of these does, or does not, amount to an *unsoundness* or a *vice*. Such conclusions, however, unless founded on decided cases, are merely stated as opinions formed by the application of the rules already mentioned; and from the difficulty there often is in ascertaining where *soundness* ends and *unsoundness* begins, people in doubtful cases must necessarily be guided in a great measure by circumstances.

Backing,
gibbing, and
setting.

Backing, *gibbing*, and *setting* are closely allied, and are generally the result of bad breaking, at the time when the horse is first put to the collar, and refuses to start. When the habit becomes confirmed, the horse swerves, gibs, backs, or refuses to move (*x*). It is dangerous, and diminishes a horse's natural usefulness, constituting a breach of a warranty of freedom from *vice*. In an American case, where these vices were proved to have appeared in a horse on trial, three or four days after purchase, this was held to be evidence that they existed at the time of purchase (*y*).

A distinction must be drawn between *vice* and mere force of habit. The writer has known horses that have been absolutely useless to their new owners, through refusing to work, etc., owing to some arrangement pertaining to the harness, or harnessing.

For instance, a country grocer bought a horse at a country fair that refused to draw when harnessed, and continued to do so, until the owner disposed of him at a sacrifice. The new owner sought his previous history and ascertained that the animal had always been driven in an "open" bridle.

The adoption of this plan brought the horse to be as good a worker as any other horse, much to the dismay of the grocer.

Again, some horses will only run in "double" harness, when driven either on the "off" or "near" side of the pole, according to the side upon which they have been accustomed to.

Biting and *savaging* constitute *vice*.

The *crystalline lens* is frequently the seat of disease of the horse's eye; it is so called from its resemblance to a piece of crystal, or transparent glass, and on it all the important uses of the eye mainly depend. It is

Biting and
savaging.
Blindness.

(*x*) Lib U. K. "The Horse," 334.

(*y*) *Finley v. Quirk*, 9 Minn. 194.

transparent and elliptical, *convex* on each side, but there is more convexity on the inner than on the outer side. It is inclosed in a delicate transparent *capsule*, and is situated between the *aqueous* and the *vitreous* humours, being received within a hollow in the *latter*, with which it exactly corresponds. It has, from its density and its double convexity, the chief concern in conveying the rays of light which pass through the pupil to the retina, or inner lining of the eyeball. The *lens* is sometimes affected, and either its *capsule* becomes *cloudy* (imperfectly transmitting the light), or the *substance* of the *lens* becomes *opaque*, both of which constitute cataract.

Cataract is a disease in which the crystalline lens, its capsular investment, or both, are implicated in the pathological process. Cataract is common enough in the horse, and a frequent cause of defective vision. It is permanent and incurable, giving rise to either *partial* or *complete* blindness. Cataract.

There are several varieties of cataract, arising from different causes, and it is necessary to bear this in mind, because litigation very often arises through this as a cause of defective vision.

Senile cataract is that form, arising through old age, commonly seen in old worn-out horses. It comes on gradually, and may affect one or both eyes.

Secoudary cataract follows *iritis* and specific ophthalmia.

Traumatic cataract arises when the lens capsule has been wounded by some penetrating instrument.

Concussion cataract is due to a blow on the eye, such as may be produced by the butt-end of a whip, etc. Obviously then, cataract arises through variable causes, but in traumatic cataract the whole lens is generally opaque, whereas in the concussion form it is more of a spotted character. Both these forms may spring into existence within a few hours, and are usually accompanied by inflammation of the iris (*iritis*). All forms of cataract constitute unsoundness.

The ophthalmoscope constitutes the most reliable method of detecting cataract, but the pupil requires dilating with atropine in order to see the cataract properly; likewise the examiner must have experience and patience in the use of this instrument.

The catoptric or candle test is commonly employed. The eye is illuminated with a lighted candle, by placing the animal in a darkened stable. In a healthy eye three

images of the flame are seen, two being upright and the third one inverted. The two first-named move in the direction of the flame, whereas the latter does so in an opposite direction, and if the lens is diseased is either absent or else indistinctly seen. Some cases are so advanced as to be observable with very superficial examination. The converse of this statement is equally applicable, hence the reason why professional opinions are so often at variance.

Although the disease may not have proceeded to blindness, yet if there be the slightest cloudiness of the *lens*, either diffused, or in the form of a minute spot in the centre, with or without lines radiating from that spot, the horse must be condemned.

Specific
ophthalmia.

That *inflammation* of the eye of the horse, which usually terminates in *blindness* of one or both eyes, has the peculiar character of *disappearing* and *remitting*, for a time, once or twice, or thrice, before it fully runs its course. The eye, after an attack of inflammation, regains so nearly its former natural brilliancy, that a man well acquainted with horses will not always recognise the traces of former disease. After a time, however, the inflammation returns, and the result is blindness (2).

Opacity of
the cornea
and cataract.

Blindness is undoubtedly an *unsoundness*; but to constitute a breach of warranty in cases of *cloudiness of the eye, opacity of the cornea, or opacity of the lens (cataract)*, after the sale, there must either be proof of an attack of inflammation *before* sale, or veterinary surgeons must be produced who will distinctly state that, from the appearance of the eye, there *must have been* inflammation before or at the time of sale. The following case is in point:—

A horse was bought by the plaintiff in April, warranted sound and quiet. He was sent on the 18th of June to be examined by a veterinary surgeon, who detected an "*opacity of the crystalline lens*" in the near eye, and pronounced it his decided opinion that the defect *must* have been of long standing, and that in fact it was *chronic*. It might have been produced in six months, and it was a sort of thing which few dealers would have been likely to find out. Another veterinary surgeon had examined the horse, and did not see the defect, but could not swear that it did not then exist. On this evidence a verdict was found for the plaintiff (a).

The time that elapsed—probably two months—between

(2) Lib. U. K. "The Horse," 363.

(a) *Briggs v. Baker*, Cor. Tindal, C. J., Nov. 29, 1845.

the purchase of the horse and its examination by the expert was sufficiently long to have conferred the benefit of the doubt upon the defendant.

No expert can give a *decided* opinion as to the duration of an opacity of the crystalline lens (cataract), and every professional oculist will support the view that such opinion can only be based upon a knowledge of the causes operative in its production; even then, the opinion is hypothetical at the most that can be said.

Attached to the extremities of most of the tendons, and between the tendons and other parts, are little bags (bursæ and synovial sheaths) containing an albuminous substance to lubricate the tendons, so as to prevent friction. From various causes these little bags are liable to enlargement, of which wind-gall, thoroughpin, and bog-spavin, are instances. The hock sometimes becomes considerably increased in size, soft and puffy, and the enlargement is called a *bog-spavin*. When the vein, which passes over the inner aspect of the hock, is distended, it is called a *blood-spavin*. The last-named is not an unsoundness, and as regards bog-spavin, opinion must be based upon the condition of the hock at the time of examination. Unless increased heat, or lameness, be present, such ought not to be looked upon as unsoundness.

Blood and
bog spavin.

Bone-spavin is an affection of the bones of the hock joint, and one of the commonest diseases of bone, frequently giving rise to litigation; therefore it is necessary for one to have a clear understanding appertaining to this disease. One or both hocks may be affected, but when both are enlarged at the seat of spavin, veterinary surgeons find it difficult to say whether the hocks are *spavined*, more especially if the horse has large or coarse joints. Inequality in size does not constitute a reliable guide. The sense of touch, and observation, in an oblique manner from the front, combined with that good/schoolmaster, experience, affords the best means of ascertaining the presence or absence of bone-spavin.

Bone-spavin.

The *spavin*, or *bony tumour*, represents the *legacy* of a preceding attack, or attacks, of inflammatory action around the area of the disease, and the *spavin* or *exostosis* is deposited as Nature's method of repair, consolidating the joints by such deposit, on the external surfaces of the bones; in a young horse it is generally a salutary process, but in aged (say after eight or ten years) and worn-out horses, the destructive process is usually in

Bone-spavin
necessarily
constitutes
unsoundness.

excess of the constructive, consequently lameness becomes permanent and incurable.

The *seat of bone-spavin* is at the *inner side and lower part* of the hock, just at its junction with the cannon bone, and the size of the spavin varies from that of a bean to a child's fist, though size bears no relationship to lameness, or degree of lameness.

Another very important matter to bear in mind is the fact that a hock may be *spavined*, yet show no trace of such externally. This is the so-called "occult" spavin, and hock lameness is, by veterinary surgeons, frequently thus ascribed. In such cases, the grooves on the surfaces of the bones have often been found, post mortem, obliterated by the deposition of inflammatory products, yet not sufficiently defined to reveal the existence of such, during life, by external manipulation.

Bone-spavin, as previously stated, is the product resulting from an *acute* or *chronic* arthritis, and there is no doubt that youth, predisposition from other causes, and concussion, are most important factors in determining its development. The conformation of the hock may have something to do with its formation. Hocks that are weak or narrow at the head of the shank (cannon) bone are believed to favour the existence of bone-spavin. As a rule, it is during the *formative* stage (inflammatory period) that lameness is most marked, though, when chronic or slow arthritis is going on, as in old horses, the lameness is concurrent; progressive; continuous, and sometimes remittent.

It must not be concluded that a horse with a spavined hock or hocks is necessarily lame; in fact, many practical veterinary surgeons look upon a cart-horse with spavined hocks, if about five years (five to eight years), as being equal to a horse without spavin; in fact, some argue that the deposition of new bony material strengthens the hocks and makes them even better fitted for wear. Being an abnormal condition, such hocks are not sound, and as a precautionary measure—for the protection of one's professional reputation, likewise that of the client—it is expedient to reject every horse that has the slightest suspicion of bone-spavin, because, whether it produces lameness or not at the time, it is held to be an unsoundness. The chief trouble that arises in litigations relating to bone-spavin is such as appertain to the existence of it, and whether the spavin originated antecedent or subsequent to purchase.

It is just this conflict of professional opinions that serves to annoy and disturb the deductions of judge and jury, rendering it often a very difficult matter to arrive at a satisfactory conclusion. Necessarily the expert wishes to serve his client to the best advantage, but this ought not to be done at the expense of professional reputation.

If a bone-spavin is present, no matter however small, one is justified in giving an opinion that such has not been laid down under three weeks or a month, whereas a well-developed spavin, free from inflammatory signs, cannot arise under several months; but it must be borne in mind that a fresh inflammation may be artificially— we might add “artfully”—excited, in order to overshadow old-standing disease, with the object of defeating justice. Spavin lameness may be continuous or intermittent, and is denoted by stiffness and a want of free bending of the joint. A great deal more importance is attached to bone-spavin in a horse, say, at three or four years, or before the joints have fully set. This statement applies excepting to the case of old horses. Again the significance of bone-spavin is much greater in a light horse than in a heavy horse, whose work is performed at a slow pace.

Many old horses, which have been put to hard service, especially before they have gained their full strength, have some of the bones of the back or loins *anchylosed*, being united together by bony matter, instead of ligamentous material. The animal turns with difficulty in his stall; he is unwilling to lie down; or when down, unable to rise again, or does so with difficulty; and he has a curious straddling action. Such horses are said to be *chinked in the chine* (b). For *broken-down*, see “Sprain and Thickening of the Back Sinews” (c).

Stiff-back.

Broken-down.

Broken-knees do not constitute *unsoundness* after the wounds are healed, unless they interfere with the action of the joint; and a horse may fall from mere accident, or through the fault of the rider. A broken-knee varies greatly in its severity (d).

Broken-knees.

The term “*broken-wind*” is employed by veterinary surgeons and others to indicate a defective condition of the respiratory functions. Very little is known regarding the causation of this complaint, and pathological data appertaining to it is variable and unsatisfactory. A

Broken-wind constitutes unsoundness.

(b) Lib. U. K. “The Horse,” the Back Sinews,” post.
165. (c) Lib. U. K. “The Horse,”
(c) “Sprain and Thickening of 361.

broken-winded horse has no commercial value, though it may continue to do its work satisfactorily throughout its life. The application of the term is based upon the most significant sign, viz., each *expiratory effort* being "double" or broken in two as it were, whereas the inspiratory acts are performed normally. In addition to this clinical sign, there is a peculiar hollow cough—pathognomonic of broken-wind.

The pathology
of broken-
wind not
understood.

Emphysema of the lungs or fusion of air-cells, associated with thinning of the walls of the stomach, has frequently been found after death in broken-winded horses, and there is no doubt that the prolonged expiratory efforts are linked with the changes first named; but these conditions are said not to be constantly present in broken-wind, hence the difficulty in laying down the pathology of this condition—of which broken-wind is but symptomatic.

Experts find no difficulty in ascertaining whether a horse is broken-winded or not, but low class horse copers very often dispose of such animals at fairs by disguising the cough, through the administration of shot and grease or the use of tar ball, etc.

The most important matter in relation to this respiratory abnormality is that appertaining to the length of time that is necessary for broken-wind to come on. To attempt to disguise this condition constitutes fraud, and to sell such a horse as sound constitutes a breach of warranty.

So far as the writer is aware, there is no information as to the time occupied in the development of broken-wind, but in all probability several weeks or months must elapse. Feeding horses on dusty hay, watering, and then driving on a full stomach, will soon give rise to this complaint. Broken-wind is most decidedly an *unsoundness* (c).

Bronchitis

The division of the windpipe just before it enters the lungs is spoken of as the right and left bronchus, and the numerous tubes into which it immediately afterwards branches out are called the *bronchial tubes*, and inflammation of the membrane lining the tubes is called *bronchitis*. It is *catarrh*, extending to the entrance of the lungs, frequently ending in *pneumonia*. It renders a horse *unsound* whilst the disease exists.

Canker of the
foot or feet.

Canker is a very troublesome disease affecting one or all of the feet, and no surgeon would look at a horse *re* soundness, if it showed the slightest suspicion of this intractable malady. It is not correct to say that it

(c) *Willan v. Carter*, Cor. Martin, B., Lancaster Spr. Ass. 1853.

is incurable, because complete and permanent cure has been effected in numerous instances, but only by those who have taken special means to bring the disease under control. Most veterinary surgeons look upon it as incurable, which it is, with the ordinary treatment at one's disposal.

In slight cases of canker, the frog only is diseased, but as the complaint extends the horny sole and wall of the hoof may become implicated—evidence that the disease has been in existence several months at least. It is a disease that slowly cankers away the sound horn, replacing it with a fungus-like growth, emitting a most disgusting odour, being greasy and bleeding when cut into, and producing pain and lameness. In all probability it is due to a saprophyte, *i.e.*, a fungoid plant.

The term "*capped hock*" is applied to an enlarged or swollen condition of the point of the hock—corresponding to the heel in man. One or both hocks may be "*capped*," and the condition may be either *temporary* or *permanent*, likewise be accompanied by "*acute*" or chronic inflammation.

Capped hocks.

Capped hock arises through a variety of causes, and veterinary surgeons entertain very different views regarding the significance attachable to such, when examining a horse as to soundness. In the majority of instances, it is regarded as nothing beyond a blemish, unless deep-seated, and accompanied by acute inflammatory signs.

In its simplest form, capped hock is merely a thickening of the skin, due to intermittent pressure. In other instances, the subcutaneous bursa is implicated, and a local dropsical swelling appears—capped hock. In neither case is there, as a rule, any lameness.

Capped hock may be either "sudden" or gradual in its onset.

In other cases deeper structures (bone and tendon) are involved; if so, there is pain and lameness, and the animal is necessarily rendered unsound.

The most important points, judged from a legal aspect, regarding "*capped hock*" is that relating to the duration of the abnormality; it can arise within an hour, and horses are often found to have "*capped hock*" on their arrival at destination, after transit by rail or steambond, etc. When developed in this manner—through a bruise on the point of the hock—there is increased heat in the part, swelling; stiffness; or even lameness; which generally persists for several days, sometimes followed by a return of the part to its normal state, though very often leaving a swelling or permanently capped hock as a legacy.

The ordinary causes of "capped hock" are those such as result from pressure on the point of the hock during lying; or resting, kicking at the stall post—especially during the night, night kickers; kicking in harness—usually a vice, likewise from continuous or intermittent pressure, induced in other ways. The presence of capped hock, as an indication of a kicker in or out of harness, can only be regarded as evidence of value, when considered along with other factors.

From the foregoing statements, the bearing of capped hock in relationship to the soundness of the animal can only be estimated in accordance with the structures involved, and the agent operating in its production.

Capped
elbow.

Capped elbow is of frequent occurrence in the horse. In the majority of instances it is due to a bruise, and the chief cause of such bruising is the heel of the shoe pressing upon the point of the elbow when the animal lies down.

A capped elbow may come on in a single night, but as a rule it arises gradually. There is a bursa or lubricating pocket at the point of the elbow, and the injury may start from this. A recent capped elbow is very often lacking in its definite tumour-like formation, so commonly observed in cases of older standing. This does not, however, constitute reliable evidence. In advanced cases, suppuration results. It ought to be regarded as *unsoundness*, because it frequently keeps a horse off work, especially if suppuration starts. It does not produce lameness. The old term "shoe-boil" is occasionally used as expressive of this condition.

Cloudiness of
the cornea.

Cloudiness of the eye is an *unsoundness*, no matter whether a mere speck (nebula) upon the cornea, or as a more extensive opacity (leucoma). Opacity of the cornea may be produced within a few hours, and this fact should be borne in mind, because it often happens that purchasers of horses warranted sound discover some opacity of the cornea after purchase, which, if present at the time of sale, necessarily constitutes a breach of such warranty. The commonest cause of opacity of the cornea is ophthalmia, which frequently arises through some foreign body gaining admission between the eye-lids, or lodging upon the globe of the eye. A particle of chaff often sets up such inflammation. In this case several days generally elapse before the cornea becomes cloudy. Any irritant, chemical or mechanical,

acts pretty much in the same manner. There is a specific form of ophthalmia that leads to opacity of the cornea, either partial or complete, but this is an uncommon disease in Great Britain.

The term *keratitis* is employed to indicate inflammation of the cornea. Keratitis.

A not uncommon cause of cloudy cornea is that resulting from the lash of the whip striking the eye. This is discernible from the shape of the mark upon the cornea. No matter however trifling at first, there is a tendency for the cloudy area to extend, though it often remains stationary. Injuries to the eyelids, or to the ball of the eye, very often end in complete corneal opacity.

When estimating the duration of defective sight, arising out of a degree of opacity of the cornea, the condition of the eye at the time of expert's examination only can be relied upon. The absence of acute inflammation, drooping of the eyelid (ptosis), and a decrease in size of the eye, indicate that the visual defect has been in existence for several months at least.

In *contraction* the foot loses its healthy circular form; it increases in length and narrows in the quarters, particularly at the heel, less noticeable when both fore feet are contracted; the frog is diminished in width; the sole becomes more concave; the heels higher, and lameness, or at least a shortened and feeble action, ensues. It seems there is nothing in the appearance of the feet which would enable a person to decide when *contraction* is, or is not, destructive to the natural usefulness of the animal; but it is indicated by his manner of going, and his capability for work. Lameness usually accompanies the beginning of *contraction*; it is the invariable attendant on rapid *contraction*, but it does not always exist when the *wiring in* is slow or of long standing. *Contraction* may be caused by neglect of paring, by suffering the shoes to remain on too long, by the want of natural moisture on account of the feet being kept too dry, or by the removal of the bars. One of the chief causes of *contraction* of the hoof is the removal of frog pressure through the use of calkins. *Contraction* of the foot or feet is the outcome of diminished functional activity, hence the reason why it follows prolonged lameness.

Contraction of the hoof, when produced by inflammation, or accompanied by disease in the foot, or any alteration in its natural structure, though it may not

Contraction
of the foot or
feet.

When held to
be unsound-
ness.

cause lameness at the time of sale, yet, if lameness be afterwards produced by it, is an *unsoundness*. This was held in the following case, which was tried before Pollock, C. B.:—It appeared that the plaintiff, who was a horsedealer, bought a mare at Lincoln Fair, warranted sound, for 37*l*. On her way up to town, she gradually became dead lame on her off foreleg. She was brought by easy stages to London, and examined by various veterinary surgeons, who at once asserted that her lameness proceeded from a *contraction* of the hoof of the off forefoot, which might have existed, and probably did exist, before sale, though the disease had not developed itself in lameness, and that at all events there *must* have been a strong predisposition to unsoundness. The defendant wrote a letter offering to take her back; however, it was miscarried, and the mare was sold by auction for 25*l*. An action was brought for the balance, and on this evidence the jury gave a verdict for the plaintiff (*f*). Veterinary surgeons make it a rule to reject a horse having a contracted foot. Repeated paring away of the frog (foot-pad) leads to contraction of the hoof, and this in its turn to undue pressure upon the soft structures within the hoof, more especially at the heels. It comes on gradually.

Corns are the
cause of
unsoundness.

In the angle between the bars and the quarters, the horn of the sole has sometimes a red appearance (if a corn is recent), but in course of time the discoloration turns to yellowish green, subsequently darkening in colour. The alteration in colour is the best evidence as to the corn having been in existence some time, and is more spongy and soft than at any other part. The horse flinches when this portion of the horn is pressed upon, and there is temporary, or permanent, lameness. This disease of the foot is termed *corn*, bearing its resemblance to the corn of the human being, that it is produced by pressure (a bruise) and is a cause of lameness, but differing from it in that the horn (answering to the skin of the human foot) is thin and weak, instead of being thickened and hardened. When it becomes infected suppuration follows, which is sometimes succeeded by quittor; the matter either undermining the horny sole, or else is discharged at the coronet. The cause is a bruise on the sole at that part, by the irritation of which, a small quantity of blood is extravasated. The horn is secreted in a less quantity, and is of a more spongy nature, and the extravasated

(*f*) *Greenway v. Marshall*, Ex. Sittings, Dec. 9, 1845.

blood becomes inclosed in it. The portion of the foot in which a corn is situated will not bear the ordinary pressure of the shoe, and any accidental additional pressure from the growing down of the horn or the introduction of dirt or gravel usually causes serious lameness. A corn renders it necessary to wear a thick and heavy shoe, or a bar shoe, to protect the weakened and diseased part.

Corns are seldom found on the hind feet, and generally (though not always) upon the inner quarter of the fore foot. Such constitute *unsoundness*, and veterinary surgeons reject horses with corn.

A *cough*, arising from a variety of causes, is a symptom of frequent occurrence. Cough.

As previously stated, cough is symptomatic of multifarious ailments, and may be either temporary or permanent.

The term 'chronic cough' is applied when the condition is permanent, such as the cough accompanying broken-wind, glanders of the lungs, larynx, &c. In influenza, laryngitis, sore throat, strangles, and simple catarrh, it is of a temporary nature as a rule, though very irresponsive to treatment, even in these diseases.

The law relating to "cough" has been clearly laid down, not only under this heading, but also in connection with "broken-wind," glanders, etc.

Although it was laid down differently by Coleridge, J., *Bolden v. Brogden* (g), it may now be considered as the law that a *cough* at the time of sale, whether permanent or temporary, is a *breach* of a warranty of *soundness*, and the subsequent recovery of the horse is no defence to an action on the warranty (h), but may be proved in *reduction of damages* (i). The law on the subject of temporary diseases was laid down by Lord Ellenborough many years ago, and with regard to a *cough* his Lordship said: "I have always held and now hold that a warranty of soundness is broken if the animal at the time of sale had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a *cough* I say he is unsound, although that may be either temporary, or the *cough* may prove mortal (k). Any infirmity which

Held to be unsoundness, whether temporary or permanent.

(g) *Bolden v. Brogden*, 2 M. & Rob. 113.

(h) *Cotes v. Stephens*, 2 M. & Rob. 157; 62 R. R. 785.

(i) *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 857.

(k) *Elton v. Brogden*, 4 Camp. 281.

renders a horse less fit for present use and convenience is *unsoundness* " (l).

Confirmed
by a later
decision.

In a later case an action was brought on the warranty of a horse, which, immediately on being taken home after sale, was found to have a *cough*. The *cough* became worse, and on the horse being examined by a veterinary surgeon eighteen days afterwards, he was pronounced unsound from *dilated bronchial tube* and chronic inflammation, *cough* being an incident of that disease. However, it appeared that at the time of the trial the *cough* had been cured. Parke, B., in summing up, said to the jury, "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 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*."

"If the *cough* actually existed at the time of the sale as a disease so as actually to diminish the natural usefulness of the horse at that time, and to make him then less capable of immediate work, he was then *unsound*; or if you think the *cough*, which in fact did afterwards diminish the usefulness of the horse, existed at all at the time of sale, you will find for the plaintiff. I am not now delivering an opinion formed on the moment on a new subject, but it is the result of a full previous consideration, as I find I differ from the law as laid down by a learned Judge" (m). The jury found a verdict for the plaintiff (n).

Crib-biting.

Crib-biting is an objectionable habit, arising, in many instances, as the outcome of idleness. Many *crib-biters* also "suck wind," though not necessarily so. Confirmed "*crib-biters*" wear away the front edges of the incisor teeth, but to effect this change the habit must have been in existence for years, more especially if the wear is considerable.

(l) *Elton v. Jordan*, 1 Stark. N. P. C. 127; 18 R. R. 754.

Brogden, 2 M. & Rob. 113.

(m) Coleridge, J., in *Bolden v.*

(n) *Coates v. Stephens*, 2 M. & Rob. 157; 62 R. R. 785.

When accompanied by wind-sucking it certainly does constitute unsoundness, but apart from this it is simply a vice, and not covered by warranty of soundness only.

Feeding off the floor, using a swinging manger, and a total absence of all fittings likely to be laid hold of by the teeth, are the remedial measures commonly adopted to prevent cribbing, but plenty of work is necessary.

Crib-biting which has not yet produced disease or alteration of structure is *not* an *unsoundness*, but is a *vice* under a warranty that a horse is "sound and free from vice." Thus, where an action was brought on the warranty of a horse which had been sold for ninety guineas, the question was whether *crib-biting*, which was the *vice* in question, was such a species of *unsoundness* as to sustain the action. The horse had been warranted sound generally. Some eminent veterinary surgeons were called as witnesses, who stated that the habit of *crib-biting* originated in indigestion, that a horse by this habit wasted the saliva which was necessary to digest his food, and that the consequence was a gradual emaciation. They said that they did *not* consider *crib-biting* to be an *unsoundness*, but that it might lead to *unsoundness*; that it was sometimes an indication of incipient disease, and sometimes produced *unsoundness* where it existed in any great degree. Upon this Burrough, J., said, "This horse was only proved to be an incipient *crib-biter*. I am quite clear that it is not included in a general warranty," and the plaintiff was accordingly nonsuited (o).

When not an unsoundness.

In a later case a horse was bought warranted "sound and free from vice," and an action was brought against the vendor on the ground of its being a *crib-biter* and *wind-sucker* (p). Veterinary surgeons were examined who said that the habit of *crib-biting* was injurious to horses; that the air sucked into the stomach of the animal distended it and impaired its powers of digestion, occasionally to such an extent as greatly to diminish the value of the horse, and render it incapable of work. Some of the witnesses gave it as their opinion that *crib-biting* was an *unsoundness*; it was not, however, shown that in the present instance the habit of *crib-biting* had brought on any disease, or had, as yet, interfered with the power or usefulness of the horse.

Held to be a vice.

(o) *Broennenburgh v. Haycock*, Holt's Rep. 630; 17 R. R. 682; and see *Washburn v. Cuddihy*, 8 Gray,

430; *Walker v. Holsington*, 43 Vt. 608 (American cases).

(p) *Wind-sucker*, post.

Parke, B., told the jury that to constitute *unsoundness* there must either be some alteration in the structure of the animal, whereby it is rendered less able to perform its work, or else there must be some disease. Here neither of those facts had been shown. If, however, the jury thought that at the time of the warranty the horse had contracted the habit of *crib-biting*, he thought that was a *vice*, and that the plaintiff would be entitled to a verdict on that head. The habit complained of might not indeed, like some others (for instance, that of kicking) (*q*), show *vice* in the temper of the animal, but it was proved to be a habit decidedly injurious to its health, and tending to impair its usefulness, and came, therefore, in his Lordship's opinion, within the meaning of the term *vice*, as used on such occasions as the present (*r*). And in the case of *Paul v. Hardwick*, some of the most eminent veterinary surgeons gave evidence that crib-biting was, in their opinion, at all events, a vice within the meaning of a warranty that a horse was free from vice, and the plaintiff had a verdict on that ground (*s*).

Wind-sucking.

Wind-sucking is exceedingly detrimental, and is more than *vice*, representing, as it does, impaired digestive functions, rendering the animal very liable to flatulent colic, &c. Some horses are constantly "wind-sucking," whereas others only do it occasionally. Wind-suckers are not necessarily crib-biters, though commonly associated.

The chief trouble likely to arise in an action relating to crib-biting, wind-sucking, or a combination of these, would, in all probability, be that concerning the existence of such at the time of sale, there being no rule regulating the onset of these vicious, or pernicious, habits.

Curb.

From sudden or over exertion, the ligaments which tie down the tendons in the neighbourhood of joints may be extended, and inflammation, swelling, and lameness ensue, or the sheaths of the tendons in the neighbourhood of joints, from their extent of motion in these situations, may be susceptible of injury. A *curb* is an affection of this kind. It is an enlargement at the back of the hock, about three or four inches below the point of the hock. Any sudden action of the limb of more than

(*q*) Kicking, post.

(*r*) *Scholefield v. Robb*, 2 M. & Rob. 210; 62 R. R. 796.

(*s*) *Paul v. Hardwick*, *Sittings* at Westminster, H. T. 1831, MS.; Chitty on Contracts, 12th ed. 509.

And see the American cases of *Washburn v. Cuddihy*, 8 Gray, 433; *Dean v. Morley*, 33 Iowa, 120; *Walker v. Holsington*, 43 Vt. 608.

usual violence may produce it, and therefore horses are found to "throw out curbs" after a hardly-contested race, an extraordinary leap, a severe gallop over heavy ground, or a sudden check in the gallop. Young horses are particularly liable to spring a curb on one or both hocks, and horses that have "over-bent" or "sickle-shaped" hocks, are regarded by some—though not all—veterinary surgeons, as predisposed to develop curb.

A horse with curb is *unsound*. Curbs do not necessarily produce lameness, and it is the rule for them not to do so, it is considered that horses with curbs may be passed as sound on a "special" warranty being given, that, should the curb cause lameness within a reasonable time (which time should be fixed), the seller should be responsible. This constitutes a limited warranty.

But if a horse throw out a *curb* immediately after sale, it is no breach of a warranty of soundness, even if he had *curby hocks* at the time of sale. Thus, where an action was brought on a breach of warranty of soundness, it appeared that the plaintiff before sale had objected to the horse because he had *curby hocks*. However, he bought him on a general warranty of soundness being given, and about a fortnight after sale the horse sprung a *curb*. At the trial veterinary surgeons were called by the plaintiff, who stated that the term *curby hocks* indicated a peculiar form of the hock, which was considered to render a horse more liable to throw out a *curb*, but did not of itself occasion lameness. Lord Abinger, C. B., told the jury, "that a defect in the form of the horse, which had not occasioned lameness at the time of the sale, although it might render the animal more liable to become lame at some future time, was no breach of the warranty." And, on a motion for a new trial, the Court of Exchequer refused a rule, Alderson, B., saying, "*Dickenson v. Follett* (t) is expressly in point for the defendant, and the law as laid down by me on that occasion has not been questioned in any subsequent case" (u).

Curby-shaped hocks not unsoundness.

Defective conformation does not constitute a breach of warranty.

Cutting, like *speedy-cut*, arises from defective conformation, bad shoeing, and, in young horses, through irregularities in action.

Cutting.

The injury comprises striking the inner side of the fetlock with the opposite hind foot, the inner branch of

(t) *Dickenson v. Follett*, 1 M. & Rob. 299; 42 R. R. 801; and see *Cutting*, post.

(u) *Brown v. Elkington*, 8 M. & W. 132; 58 R. R. 645.

the shoe, as a rule, producing the injury, and, being neither a disease nor a bad habit, cannot be pronounced as a *breach* of a warranty of *soundness* and *freedom from vice*, although it may be a greater detriment to the horse than some kinds of unsoundness or vice, yet, if the wounds occasioned by it did not actually exist at the time of sale, the purchaser has no legal remedy against the buyer. This is a case to which the legal maxim *caveat emptor* particularly applies; the purchaser should examine the horse, and if there appears any probability of *cutting*, a special warranty should be taken against it. It is always a great annoyance, and the effects produced by it are sometimes most serious. Many horses go lame for a considerable period after *cutting* themselves severely; and others have dropped from sudden agony, thus endangering themselves and their riders. Speedy-cutting comprises an injury on the inner side of the hump just below the knee (x).

Held not to
be an un-
soundness.

In the only decided case on the subject, it was held that mere *badness of shape*, though rendering the horse incapable of work, is *not unsoundness*. It appeared that at the time of sale there existed neither lameness nor wound. And Alderson, J., said, "The horse could not be considered unsound in law merely from *badness of shape*. As long as he was uninjured he must be considered sound. Where the *injury* is produced by the badness of his action, that injury constitutes the *unsoundness*" (y).

Dropsy of the
skin.

There are two kinds of dropsy, which must both be considered; namely, *dropsy of the skin* and *dropsy of the heart*. Dropsical swellings often appear between the forelegs and on the chest; they are effusions of fluid underneath the skin. They accompany various diseases, such as those of the heart, kidneys, pleural and pericardial membranes, particularly when the animal is weakened by some exhausting disease, e.g., influenza.

Dropsy of the
heart.

When the *pericardium*, or the heart itself, becomes inflamed, the secretion of the *pericardium* is much increased, and so much fluid accumulates as to obstruct the beating of the heart. This is called *dropsy of the heart*, and each of these diseases is an *unsoundness* (z). In cases of sudden death shortly after purchase, it is advisable to have a post mortem made by a qualified

(x) Lib. U. K. "The Horse," 363, and App., Ed. 1862, p. 523.

Rob. 299; 42 R. R. 801.

(y) *Dickenson v. Follett*, 1 M. &

(z) See *Eaves v. Dixon*, 2 Taunt. 343.

veterinary surgeon, to ascertain whether the disease was of old standing, as indicated by certain lesions.

The glands beneath the jaw are very often enlarged as in strangles, likewise the gland (submaxillary) is occasionally enlarged in glanders. The glands beneath the ears (parotids), as well as those under the thighs, and forearm, are liable to become enlarged through various causes. All glandular enlargements constitute unsoundness.

Enlarged glands and strangles.

When the *hock* is *enlarged*, the structure of this complicated joint is so materially affected that, although the horse may appear for a considerable time to do ordinary work well, he will occasionally fail even as to that, and a few days' hard work is always liable to lame him (*a*). All enlargements of the *hock* render the animal *unsound*. It is most important to have the hock joints sound.

Enlarged hock (Sprung-hock).

For *ewe neck* see *star-gazer* (*b*).

Ewe neck.

Where the coronary band by which the horn of the coronet is secreted is either divided by a cut or a bruise, or eaten through by caustic, there is liable to be a division of the horn as it grows down, either in the form of a permanent sanderack (*c*), or of one portion of the horn overlapping the other. This is not only a very serious defect, and a frequent cause of lameness, but it is exceedingly difficult to remedy (*d*); and constitutes *unsoundness*. Sometimes the horn grows down whole, but the ligament is unable to secrete that which is perfectly healthy, and therefore there is a narrow strip of horn of a different and lighter colour, forming an indentation or furrow, rendering this portion of the hoof weak, and liable to spring into a sanderack.

False quarter.

Fistula of the poll and withers (Saddle-galls).

Inflammation of the feet, or *acute founder*, commonly called "fever in the feet," is an exceedingly common complaint amongst all classes of horses, and arises through variable causes, but the commonest of such are severe concussion (concussion laminitis), absorption of septic material from the womb (parturient laminitis),

Founder.

(*a*) Lib. U. K. "The Horse," 363. See also Lib. U. K., ed. 1862, App. 523; and see Capped Hocks, ante, p. 79.

(*b*) *Star-gazer*, post.

(*c*) *Sanderack*, post.

(*d*) Lib. U. K. "The Horse," 301.

Canadian Note.—The Parliament of Canada and the Legislatures of some of the provinces have passed very stringent Acts for the suppression of glanders and other diseases among horses. See the Appendix of Canadian Statutes relating to horses.

feeding on wheat (dietetic laminitis), and metastasis, or change of congestion from some organ of the body to inflammation of the feet. It is an inflammation or congestion of the sensitive laminae or leaf-like structures covering the coffin or pedal bone, and as these are dovetailed into corresponding horny or insensitive ones on the inner face of the hoof, it follows that the effusion, or product of congestion, leads to a separation of their bond of union, thus allowing the coffin-bone to slip from its bearings, which it does in a downward and forward direction, completely destroying the normal conformation of the hoof. The sole is pushed in front of the bone, and sometimes the latter appears externally. It is a very painful disease, either in acute or chronic forms. Repeated attacks cause a ring-like formation of the hoof wall, and the wall drops—puniced foot. Founder, acute or chronic, constitutes *unsoundness*. Commonly both fore feet are affected, but it may be the hind ones, or the whole feet. Malformation of the hoof, and flatness (loss of concavity) of the sole, along with a "feeling" gait, is the best evidence—secondary to proof—one can have as to the disease having been in existence some months.

Generative
organs, dis-
charge from.

In the mare there is occasionally a chronic discharge from the generative passage, due to a catarrhal inflammation. This renders the animal unsound, and if in existence, at the time of sale, it is a breach of warranty.

Gibbing.
Glanders.

For *gibbing*, see Backing and Gibbing (e).

Glanders. This is a specific disease caused by pathogenic organisms, of extremely minute size, known to bacteriologists as the *bacillus mallei*. Very high powers of the microscope are required in order to demonstrate the presence of these germs, likewise it is necessary to stain the organisms so as to bring them into view. None but experts in this class of work are capable of demonstrating the presence of the glanders organisms. The germs grow very well upon the cut surface of a potato and certain other nutrient media when cultivated under proper conditions. It is a difficult matter to detect the organisms in the lesions, nasal discharge—if such be present—of this disease, and pathologists usually rely upon cultivation and inoculation methods in order to obtain the organisms for microscopical examination.

Unquestionably glanders is a very ancient malady, and its malignant nature was known hundreds of years since.

(e) Backing and Gibbing, ante, p. 72.

It is essentially a disease affecting equines, but can be transferred by inoculation, by ingestion, and by inhalation of dried discharge, to members of the same tribe, to man, and to certain other animals, the ass and the guinea-pig being mostly used for experimental purposes, more especially the last-named. *Glanders* and *farcy* are identically one and the same diseases; only the use of the old term "*farcy*" was, and sometimes still is, employed when the lesions are mostly evident in connection with the absorbent glands, lymphatic vessels, and skin, resulting in the production of glanderous lesions known under the titles of "*farcy buds*," "*buttons*," and "*pipes*," &c.

Many years since it was thought that *farcy* (glanders) was or could be cured, but this view is not correct. It is incurable so far as veterinarians are aware, and now the same regulations apply to *farcy* as to *glanders*, there being no difference. The wide distribution of *glanders* was, in a measure, due to these erroneous opinions. *Glanders* may assume either acute or chronic forms, but it is most frequently observed in its chronic, or slow, condition. It must not be assumed that a glandered horse is incapable of performing its ordinary work, because this is incorrect. A considerable percentage of horses working in cities have *glanders*, yet may not show any clinical evidence of it, though it is an indictable offence to knowingly bring a glandered horse into any public place (f). The same remark applies to pasturage of animals suffering from *glanders*. The primary lesions of *glanders* occur in the lungs, in the form of minute tubercles, and from this situation a general assault upon the body begins. Frequently the disease remains in this dormant condition for years. In the present day, the lesions of *glanders*, or rather the clinical features of the malady, have become somewhat modified, due, no doubt, in a great measure, to better stable accommodation, and better drainage, &c. The swollen condition of the glands beneath the jaws; nasal ulceration; nasal discharge, &c., are nothing like so constantly present as they were, say, twenty or thirty years since.

A horse may be glandered, yet not show the slightest clinical evidence, hence veterinary inspectors cannot make a correct diagnosis without the aid of testing with *mallein*. This is done by first of all ascertaining that the animal's temperature is up to normal standard,

(f) R. v. Henson, Dears & Pearce, C. C. 21.

then injecting, subcutaneously, mallein. If the animal has glanders the temperature usually begins to rise at the ninth, twelfth, or fifteenth hour, accompanied by a painful flat swelling around the seat of the injection (*g*). Compensation is now paid for *re-actors* to mallein, so that in course of time glanders will be gradually brought under control, and not, as hitherto, allowed to become one of the worst scourges affecting horses, to say nothing of the suffering occasionally of man through accidental inoculation. A proprietor, knowingly having glanders in his stud, renders himself liable in the event of the attendants contracting the malady, which is nearly always fatal in man. Being a scheduled disease (gladders-farcy), immediate notification to nearest local authority is expedient.

It seems almost needless to add that a glandered horse is an unsound one.

Diseases of
Animals Act,
1894.

By the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xxxv.), (xxxvi.), the Board of Agriculture may make such orders as they think fit, subject and according to the provisions of the Act, for extending, for all or any of the purposes of the Act, the definition of disease in the Act, so that the same shall for these purposes, or any of them, comprise any disease of animals in addition to those mentioned in the Act, and in like manner for extending the definition of animals in the Act, so that the same shall for the purposes of the Act, or any of them, comprise any kind of four-footed beast, in addition to the animals mentioned in the Act. Accordingly, by the Glanders or Farcy Order, 1894, horses, &c., are to be deemed "animals," and glanders, including farcy, a "disease." And it shall not be lawful to expose a diseased horse in a sale-yard or other public or private place where horses, &c., are commonly exposed for sale. Provisions are also made as to placing a diseased horse in a lair, &c., adjacent to a market or fair, and also with regard to the carriage and pasturing of diseased horses.

Glaucoma.

Glaucoma is a dimness or obscurity of sight, arising from an increase of tension of the globe of the eye. It may be "primary" or "secondary." In the latter it follows upon some other disease of the eye. It is difficult to ascertain, and is only to be discovered by a very attentive examination of the eye. It prevents a horse from appreciating objects, and is therefore an *unsoundness* (*gg*).

(*g*) In some cases the swelling occurs without any rise of temperature, or the converse. Slight

swelling only is not diagnostic.

(*gg*) *Settle v. Garner*, cor. Martin, B., Westminster, Feb. 10, 1857.

Swelled legs, although distinct from *grease*, are apt to degenerate into it. It is an inflammation of the skin of the heel; sometimes of the fore, but oftener of the hind, foot. Many cases of grease are of a parasitic nature, allied to mange. The skin of the heel of the horse differs somewhat from that of any other part. There is a great deal of motion in the fetlock, and to prevent the skin from excoriation or chapping, it is necessary that it should be kept soft and pliable; therefore, in the healthy state of the part, the skin of the heel has a peculiar greasy feel. Under inflammation, the secretion of this greasy matter is stopped, the heel becomes red, dry, and scurfy; and being almost constantly in motion, cracks soon succeed; these sometimes extend, and the whole surface of the heel becomes a mass of soreness. A horse in this condition is unsound.

Grease.

Cracked heels.

The term "grogginess"—certainly a vulgar one—is sometimes used by horse copers as expressive of signs of an incurable disease affecting a small bone—the navicular bone, cartilage, tendon, &c., lodged within the hoof, to which veterinarians apply the term navicular disease.

Grogginess.

Dealers speak of a horse affected in this manner as a "grog," and its action as "groggy," i.e., that it travels short in step, and appears stilty in front.

Needless to say, such a horse is unsound (see Navicular Disease).

Grunting; see Roaring.

Grunting.

Gutta serena, commonly called *glass-eye*, is a species of blindness. The pupil is unusually dilated; it is immovable, bright and glassy. It arises through pressure on, or paralysis of, the optic nerve, or its expansion, the retina, and is usually produced by determination of blood to the head (*h*). It is an *unsoundness* and may come on suddenly.

Gutta serena.

Kicking, either in the stable or in harness, is a bad and dangerous habit, therefore a *vice*. Some horses, particularly mares, from fidgetiness and irritability, get a habit of kicking at the stall; and this, taking place generally at night, disturbs the other horses, producing swelled hocks, or some more serious injury. It shows *rice* in the temper of the animal (*i*), and it is seldom that a confirmed *kicker* can be cured (*j*). Kicking in harness, and then "bolting,"

Kicking
(See Capped
Hock).

(*h*) Lib. U. K. "The Horse," 116. And see Patent Defects, post, chap. V.

336.

(*j*) *Scholefield v. Robb*, 2 M. & Rob. 210; 62 R. R. 794.

(*i*) Lib. U. K. "The Horse,"

are frequently associated. Both are vicious habits of the worst kind, rendering a horse unsafe to drive.

Kidney-dropping.

A *kidney-dropper* will appear quite well at starting, but after travelling a short distance he will come to a dead standstill, and, if not supported, will drop down on the spot. A kidney-dropper is worthless and *unsound* (*ij*).

Lameness.

Lameness, whether temporary or permanent, is an *unsoundness*; because however temporary it may be or however obscure, it lessens the utility of the horse and renders him unsound for the time. How far his soundness may be afterwards affected must depend on the circumstances of the case (*k*).

Temporary lameness an unsoundness.

The law as laid down in *Coates v. Stephens* (*l*) and *Kiddell v. Burnard* (*m*), with regard to temporary diseases, is the same as was formerly held by Lord Ellenborough, and will be seen in the following cases:—A horse, sold warranted sound, was proved to have been lame at the time of sale; this the defendant admitted, but undertook to prove that the lameness was of a temporary nature, and that the horse had afterwards recovered, since which he had been perfectly sound; however, Lord Ellenborough said, "I have always held and now hold, that a warranty of soundness is broken if the animal at the time of sale had any infirmity upon him, which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough I say he is *unsound*, although that may either be temporary or may prove mortal. The horse in question having been lame at the time of sale, when he was warranted to be sound, his condition subsequently is no defence to the action" (*n*). And in another case, on the trial of an action on the warranty of a horse where the evidence was very contradictory, but a witness of the defendant's admitted that he had bandaged one of the forelegs of the horse but not the other, because the one was weaker than the other, Lord Ellenborough said, "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 ulti-

(*ij*) Kidney-dropping is an old term, though one familiar to many horsemen. This condition is probably due to plugging of a blood-vessel (*Thrombosis*).

(*k*) Lib. U. K. "The Horse," 364.

(*l*) *Coates v. Stephens*, 2 M. & Rob. 137; 62 R. R. 785, overruling *Golden v. Brogden*, 2 M. & Rob. 113.

(*m*) *Kiddell v. Burnard*, 8 M. & W. 670; 60 R. R. 857.

(*n*) *Elton v. Brogden*, 4 Camp. 281.

mately prove fatal. Any infirmity which renders a horse less fit for present use and convenience is *unsoundness*" (o). In a previous case it was said to have been held that a warranty that a horse is sound is not false because the horse labours under a temporary injury from an accident at the time the defendant warranted it sound. But the warranty there appears to have been a qualified one, because when bargaining the plaintiff observed that the mare went rather lame on one leg. The defendant replied that it had been occasioned by her taking up a nail at the farrier's, and, except as to that lameness, she was perfectly sound (p).

Laminitis is an inflammation of the sensitive *laminae* of the feet. See Founder. Laminitis.

Some of the lower bars of the palate occasionally swell, and rise to a level with, and even beyond, the edge of the teeth; and the horse feeds badly on account of the inconvenience he suffers from the pressure of the food on the bars (q). This is called *lampas*, and being easily cured, it is only *unsoundness* while it interferes with the horse's usefulness. Lampas.

A diseased liver is of course an *unsoundness*. Liver disease.

All diseases of the lungs constitute *unsoundness*. The principal ones are: pneumonia; glanders; tuberculosis; pleurisy, and actinomycosis. Lung diseases and pleurisy.

Lymphangitis. See Weed. This constitutes *unsoundness*, and its previous existence predisposes to a recurrence. Lymphangitis.

Lymphangitis Epizootica. This is a totally different disease from ordinary lymphangitis or weed. It is a scheduled malady, and was introduced into this country from South Africa during the Boer war. It is infectious, and due to minute vegetable organisms known as cryptococci. It is denoted by the formation of sores upon various parts of the skin, and allied to the skin form of glanders. Horses with this complaint do not re-act to the glanders test, i.e., to mallein. Lymphangitis Epizootica.

At the bend of the knee, as well as in the inside of the hock, or a little below it, there is sometimes a scurfy eruption, called *mallenders*, in the fore leg, and *sallenders* in the hind leg. This skin disease, psoriasis or chronic eczema, is a very troublesome complaint, rendering the animal unsound. It is denoted by a dry and scurfy con-

Mallenders and sallenders.

(o) *Elton v. Jordan*, 1 Stark. 673.

N. P. C. 127; 18 R. R. 754.

(p) *Garment v. Bars*, 2 Esp. 134.

(q) Lib. U. K. "The Horse,"

Mange.

dition at the joints named, being aggravated by the flexion of the joints, and is troublesome to cure.

Mange is a pimpled or lumpy eruption of the skin, followed by blotches covered with scurf; these change into scabs, and occasionally extend over the whole body; it is a contagious disease. A *mangy* horse is decidedly *unsound*. Three forms of *mange* exist, and all are parasitic.

Megrims. See Vertigo.

Nasal
catarrh
or gleet.

A chronic discharge from the nasal cavity or cavities constitutes unsoundness, being symptomatic of some organic change either within the nasal chambers, sinuses of the head, guttural pouches, or disease of the molar teeth, &c.

The physical appearance of the discharge does not afford evidence of any substantial or diagnostic value, as thought by the older observers.

In ordinary catarrhal conditions, the nasal flux is usually of a temporary nature, and veterinary surgeons are only acting within their rights to defer examinations as to soundness until such has subsided. Failure to do so implies neglect.

Navicular
disease.
(See Groggi-
ness).

Navicular disease is an incurable malady affecting a small bone—the *naviculaire*—within the hoof, implicating, in the morbid process, adjacent structures, such as, the cartilage, the *arsa* or lubricating apparatus, and the tendon gliding over the face of the navicular bone. It is a disease that comes on gradually, and the changes, discoverable post mortem, vary considerably, in accordance with the severity of the disease. In plain language, it always runs a chronic or slow course, rendering the animal of no commercial value, owing to the incurability of it. One or both fore feet may be affected, and it appears to be almost entirely confined to the lighter breeds of horses, or at any rate such as are employed for fast work. Vanners are of course frequent sufferers, so are 'bus, tram, and cavalry horses. The causes that determine the existence of navicular disease are but imperfectly understood, though it is generally admitted that concussion is a potent factor. Doubtless many horses are disposed of whilst affected with this disease, even with a warranty. Ulcerative changes commonly appear upon the cartilage covering the articular surface, and as the disease advances the fibres of the tendon—where it glides over the back of the bone—become torn.

There are no positive signs during life indicative of navicular disease, therefore disputes often arise as to its existence or otherwise in some particular animal.

The signs that veterinary surgeons place most reliance upon are: a short, stilty or cat-like step, pointing of the foot in and out of the stable, together with excessive wear of the shoe at the toe. In course of time the hoof becomes contracted, and the action "tied in"; lameness after standing in the stable: and in many instances of navicular disease affecting one foot only, it is quite likely that the cause of the lameness is ascribed to the region of the shoulder. It is absolutely impossible to diagnose navicular disease beyond dispute, except by after-death examination. Its existence can only be conjectured, and with a fair degree of accuracy, but not confirmed by clinical signs. Negative evidence of lameness ascribable to other parts is of assistance, when forming an opinion. It is a breach of warranty to sell a horse with navicular disease as sound. An operation, frequently practised by veterinary surgeons, for the relief of the pain attendant upon this disease, is that known as neurectomy, which comprises the removal of about half an inch of the nerves supplying the foot with sensation. The incision is made in the hollow of the fetlock, on the inner and outer sides, and the portion of nerve seized, and removed through this incision. In median neurectomy the median nerve—at the upper and inner side of the forearm—is divided and about half an inch of it cut out. By this operation the owner is frequently enabled to work his horse for a couple or three years longer, though it is not always so successful. In some instances the owner has sold the animal after it has been un-nerved. To do so, concealing the fact of the operation, constitutes fraud.

As the operation, however successful, is only palliative, the animal subjected to it remains unsound. This was decided in the following case, soon after neurectomy had been first introduced by veterinary surgeons. An action was brought on the warranty of a horse which had been *un-nerved*. Several veterinary surgeons were called, who stated that the operation of *un-nerving* consisted in the section of a nerve leading from the foot up the leg; that it was usually performed in order to relieve the horse from the pain arising from a disease in the foot, the nerve cut being the vehicle of sensation from the foot; that the disease in the foot would not be affected by the

Un-nerved
horse.
(Neurectomy.)
Held to be
unsound.

operation, and would go on increasing or not, according to its character; that horses previously lame from the pain of such a disease would, when *un-nerved*, frequently go free from lameness, and continue so for years; that the operation had been found successful in cavalry regiments, and horses so operated on had been for years employed in active service; but that in their opinion a horse that had been *un-nerved*, whether by accident or design, was *unsound*, and could not be trusted for any severe work (r).

It appeared that the horse in question had not exhibited any lameness. But Best, C. J., told the jury, "that it was difficult to say that a horse in which there was an organic defect could be considered sound; that *sound* meant *perfect*, and a horse deprived of an useful nerve was imperfect, and had not that capacity of service which is stipulated for in a warranty." And the jury returned a verdict for the plaintiff (s).

Not lying down.

It occasionally happens that a horse will seldom or never *lie down* in the stable. He sometimes continues in apparent good health, and feeds and works well; but generally his legs swell, or he becomes fatigued sooner than other horses (t). It is a bad habit, decidedly injurious, tending to impair his usefulness, therefore it is a *vice*.

Opacity of the lens.

Opacity of the crystalline lens of the eye is an *unsoundness*. See Cataract.

Ossification of the lateral cartilages, or sidebone.

The *lateral cartilages* occupy a considerable portion of the external side and back part of the foot, the expansion of the upper part of which they are designed to preserve. These cartilages are subject to degenerative changes, and the result is that the cartilages become calcified, and lose their normal elasticity. This *calcification of the cartilages* frequently accompanies ringbone (u); but it may exist without any affection of the pastern joint. It is oftenest found in horses of heavy draught, but sometimes in harness and saddle horses, being a most serious defect in the last-named animals. It arises not so much from concussion, as from a species of sprain; for the pace of such heavy horses is slow. The cause, indeed, is not

(r) *Best v. Osborne*, R. & M. 290. When this case was decided the operation was termed "neurotomy," and the horse upon which it was performed was termed a "nerved horse."

(s) *Best v. Osborne*, R. & M. 210.

(t) Lib. U. K. "The Horse," 341. See App. to Lib. U. K., Ed. 1862, p. 521.

(u) Ringbone, post.

well understood, but of the effect the instances are very numerous, few heavy draught horses arriving at old age without this change of structure (*x*). There seems to be an inherent tendency towards the deposition of lime salts in the lateral cartilages, more especially with increasing age. It is the lateral cartilages of the front feet that are affected. One or both feet may have sidebone; likewise the cartilage on the inner, outer, or both inner and outer sides implicated. There is an incipient form of sidebone—indurated lateral cartilages. Like ringbone (*y*), it is an *unsoundness*.

Sidebone does not necessarily cause lameness, neither is the size of the growth any criterion as to the existence of such. Many veterinary surgeons make it the rule to pass cart-horses as "practically sound," provided that the heels are strong, well open, and the foot of good conformation in other respects. A considerable percentage of horses do go lame through sidebone, therefore the purchaser is entitled to abatement in the selling price, if he decides to purchase on recommendation only, by his professional adviser. Sidebone comes on gradually, the normal elasticity of the flexible cartilages being replaced by a non-yielding feel at the extreme upper and back part of the hoof, when manipulated with the thumb.

This very disagreeable noise, known by the name of *Overreach*, "*overreach*," &c., arises from the toe of the hind foot striking the heel of the fore foot (*z*). It is not altogether free from danger, as a horse may lame himself by it; or if the fore and hind shoes become locked, he will be suddenly thrown. As to the effects of a neglected tread or *overreach*, see False-quarter (*a*) and Quittor (*b*). This defect, like cutting, arises from causes that can often be remedied, and is therefore *neither* an *unsoundness* nor a *vice*; but if suspected, a special warranty should be taken against it. Over extension of the hind limb is one cause.

The *parotid gland* is placed in the hollow which extends from the root of the ear to the angle of the lower jaw on either side of the face. In strangles, and sometimes in violent cold, it will swell; or an obstruction will arise in some part of the duct, and the accumulating fluid will burst the vessel, and a fistulous sore will be formed, very difficult to heal. Such a disease is an *unsoundness* (*c*).

Parotid gland swelling of, and fistula of the duct.

(*x*) Lib. U. K. "The Horse," 310.

(*y*) Ringbone, post.

(*z*) Lib. U. K. "The Horse," 341.

(*a*) False-quarter, ante, p. 89.

(*b*) Quittor, post.

(*c*) Lib. U. K. "The Horse," 148.

Poll-evil.

The point of juncture between the head and the bone nearest the skull is called the *atlas*, and is often the seat of a very serious and troublesome sore termed *poll-evil*, caused by the horse rubbing and sometimes striking his *poll* against the lower edge of the manger, or hanging back in the stall, and bruising the part with the halter; or from a violent blow on the *poll*, carelessly or wantonly inflicted; the consequence is inflammation, and a swelling appears, hot, tender, and painful. The swelling increases, and matter is formed, which spreads around and burrows into the muscles. It is difficult to cure (*d*). This disease is an *unsoundness*.

Pumiced feet.

The sensible and horny little plates of the foot, which have been elongated and partially separated during the intensity of an attack of inflammation, will not always perfectly unite again, or will have lost much of their elasticity; and the coffin bone, no longer supported by them, is let down and presses upon the sole, which yields to this unnatural weight, and becomes convex or rounded, and thus, coming in contact with the ground, the sole gets bruised and injured (*e*). This is called *pumiced feet*; and constitutes *unsoundness*. See Founder.

Quidding.

A horse will sometimes partly chew his hay, and suffer it to drop from his mouth. This is called *quidding*, and proceeds either from irregular teeth or sore throat, but usually ceases on the removal of the cause (*f*). Its existence renders a horse temporarily unsound.

Quittor.

Quittor is an *unsoundness*. It has been described as being the result of neglected or bad tread, or overreach (*g*); but it may be the consequence of any wound in any part of the foot. In the natural process of ulceration matter is thrown out from the wound; this precedes the actual healing of the part. The matter which is thrown out in wounds of the foot is usually pent up, and increasing in quantity, tunnels its way in every direction. These *pipes* or *sinuses* run in various directions and constitute the essence of *quittor* (*h*). In some cases one of the lateral cartilages is necrosed, and no cure can be effected until the diseased particle has been removed by operation.

Either the fore or hind foot or feet may be the seat of

(*d*) Lib. U. K. "The Horse," 342.
153.

(*e*) Lib. U. K. "The Horse," 291. (*g*) Overreach, ante, p. 99.

(*f*) Lib. U. K. "The Horse," 302. (*h*) Lib. U. K. "The Horse,"

this troublesome disease. A suppurating corn frequently ends in quittor.

It frequently recurs, and when it does so, and there is evidence of an old sore, or sores, upon the coronet, *i.e.*, the band running around the top of the hoof, this constitutes reliable evidence that the animal has been troubled with the same disease at an antecedent date.

Rearing, when unprovoked by bruising, or laceration of the mouth, is an inveterate and dangerous habit (*i*). It is a *vice*. Rearing.

Ringbone commences in one of the pasterns, and usually about the pastern joint; but it may spread and involve not only the pastern bones, but the cartilages of the foot. The pastern first becomes connected together by bone, instead of ligament, and thence results what is called an *anchylosed* or *fixed joint*. The motion of these parts is impeded or lost, and the whole of this part of the foot sometimes becomes one mass of spongy bone. New bony formations are exceedingly common about the pastern joint, but the extent of the exostosis varies considerably. For instance, it may be confined to one side, at the front, or extend all around the joint, completely encircling it. In some cases it is of rheumatic origin; but the causes are variable. It is commonest in the forelimbs. Ringbone.

Ringbone is sometimes spoken of as "true" and "false," depending upon its position; also as "high" and "low." These terms have very little pathological significance, nor yet much utility in a legal sense, because all new growths in the regions of the pastern and fetlock (and elsewhere) necessarily constitute *unsoundness*. Most of these new formations are developed slowly, comprising osteitis and periostitis, *i.e.*, inflammation of bone, and fibrous membrane covering bone. The law respecting bone-spavin (*k*) applies on principle to be exactly applicable to *ringbone*, the slightest appearance of which must be considered an *unsoundness*, whether it produce lameness or not.

Roaring and *whistling* are *abnormal sounds*, produced by some horses when put to severe exertion, and *symptomatic of disease*, either of a *temporary* or *permanent* nature. Lord Mansfield and Lord Ellenborough seemed to think that *roaring* was not necessarily *unsoundness*; but required proof, in each particular case, that it was symptomatic Roaring, whistling, and grunting.

(*i*) Lib. U. K. "The Horse," 337. (*k*) Bone-spavin. ante, p. 75.

of disease, or affected the horse so as to render him less serviceable for a permanency, as, otherwise, it might merely be a bad habit. In practice, *roaring* is always, and properly so, considered an *unsoundness*.

In a case where an action had been brought on the warranty of a horse, which had turned out a *roarer*, Lord Ellenborough said, "It has been held by very high authority (Sir James Mansfield, C.J.), that *roaring* is not necessarily *unsoundness*, and I entirely concur in that opinion. If the horse emits a loud noise, which is offensive to the ear, merely from a bad habit which he has contracted, or from any cause which does not interfere with his general health or muscular powers, he is still to be considered a sound horse (l). On the other hand, if the *roaring* proceeds from any disease or organic infirmity, which renders him incapable of performing the usual functions of a horse, then it does constitute *unsoundness*. The plaintiff has not done enough in showing that this horse was a *roarer*. To prove a breach of the warranty, he must go on to show that the *roaring* was symptomatic of disease." The defendant had a verdict (ll).

When Lord Mansfield and Lord Ellenborough gave their decisions relating to *roaring* and its bearing upon the soundness of horses, they were, obviously, labouring under a delusion regarding the pathological significance of the *roaring* sound. *Roaring*—and its modification, *whistling*—is one of the principal defects that veterinary surgeons seek to disclose during their examination for soundness, because it destroys the commercial value of a horse, and to pass such an animal as sound throws the onus of liability upon the examiner.

The production of this abnormal sound depends upon a variety of causes, but the commonest lesion is that of organic changes in certain muscles of the larynx: in fact, fatty degeneration of these. The term "fatty degeneration" does not mean the deposit of fat, but the *replacement* of the *muscular* fibres by deposition of particles of oil completely invading and destroying the functional power possessed by muscular tissue. A branch of the pneumogastric (left recurrent) nerve supplies the laryngeal muscles with motor-power, hence it is implicated in *roaring*. Such changes are of course only discoverable after

(l) Horses never emit such sounds independently of disease.

(ll) *Barnett v. Collis*, 2 Camp. 522; 11 R. R. 786.

death, but fully seventy per cent. of roarers disclose lesions of this nature.

Under these circumstances roaring comes on gradually—never arises suddenly from this cause; and the cause may be inferred to lie in these changes when there is an absence of either acute disease or morbid growth within the upper portion of the respiratory passage. In every instance roaring or whistling is symptomatic of disease.

Both roaring and whistling are symptomatic of disease.

Sir James Mansfield's ruling regarding a horse emitting a loud noise, though it may be offensive to the ear, from causes that do not interfere with his general health, as being sound, cannot, from the veterinary point of view, be regarded as correct in the present day.

All abnormal sounds proceeding from the respiratory apparatus, whether they interfere with a horse's utility or not, must necessarily render the animal *unsound*. Many hunters make a noise (roun) when following the hounds, or when put to exertion; but the respiratory defect *predisposes* them to come to grief, though this may not actually happen. Such are *unsound*.

A morbid growth in the nasal chamber, region of the larynx, or pharynx, acute inflammation of the larynx, strangles, lead poisoning, and poisoning by Indian vetches, are all occasional causes of roaring.

A horse might be passed as sound one hour, and become a roarer immediately afterwards. It is important to bear this fact in mind, because litigation is frequent in connection with roaring, whistling, and grunting.

For instance, a polypoid growth, situated in juxtaposition to the laryngeal opening (glottis), may become displaced, and occlude (temporarily) the opening, resulting in the production of roaring sound. Again, instances of "intermittent" roaring have been recorded.

The roaring sound varies in its intensity, likewise in the amount of exertion necessary for its production. Very slight exertion will bring it out in some horses, whereas veterinary surgeons very often require severe and sustained exertion to satisfy themselves as to its absence. It is customary to gallop hacks and hunters on heavy land, and to compel cart-horses to draw a good load up a steep hill.

Grunting—a sound sometimes emitted when a feint is made to strike a horse placed in position for such purpose—is often indicative of a roarer, though not necessarily so, being apparently due to nervousness in

Running
away.

Saddle-galls.

Saddle and
collar galls.

some horses. Its presence is sufficient, however, to cause veterinarians to test the animal thoroughly as to soundness in wind, and so free themselves from liability.

Some headstrong horses will occasionally endeavour to bolt with the best rider. Others, with their wonted sagacity, endeavour thus to dislodge the timid or unskilful. Some are hard to hold, or bolt only during the excitement of the chase; others will *run away*, prompted by a vicious propensity, alone. There is no cure; and being a bad and dangerous habit, it is a *vice (m)*. See Kicking.

When the *saddle* has been suffered to press long upon the withers, a tumour will sometimes be formed, hot and exceedingly tender. If neglected, *Fistula of the withers* results, and the matter (pus) burrows deeply between the muscles and ligaments (*n*). It may burrow beneath the shoulder-blade, and appear at the point of the shoulder or the elbow; or the bones of the withers may become carious. On other parts of the back tumours and very troublesome ulcers may be produced by the same cause. If the sore is in such a situation as to prevent the putting on of a saddle or harness, it is a *breach of a warranty of soundness (o)*.

Saddle, collar, and girth galls result from the pressure or friction induced by their improper fit. Many of these sores are of a very troublesome nature, and some horses are much more liable to chafe in the skin than others.

When a horse has been troubled with sores of this nature, there is usually evidence of such in the form of small white patches of hair—the legacy of previous skin trouble. From the veterinary point of view, it is a breach of warranty of soundness to sell a horse predisposed to suffer from saddle or collar galls.

On this point Parke, 1st, expressed an opinion in *Kiddell v. Burnard (p)*, where he said, "If the disease were not of a nature to impede the natural usefulness of 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 *unsoundness*; but even if such a thing as a *pimple* were on some part of the body where it might have that effect, for instance, on a part which would prevent the putting a *saddle* or *bridle* on the animal, it would be different."

(*m*) Lib. U. K. "The Horse," 337.

(*n*) Poll-evil, ante, p. 100.

(*o*) The same principle is applicable to *Bruised Shoulder*. All

forms of fistula of the withers and saddle-galls constitute unsoundness.

(*p*) *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 857.

It is a question for the jury whether the horse in such case is fit for immediate use. Thus, where an action was brought for the price of a horse warranted sound, and the defendant endeavoured to show that he had a tender place on his neck, which, when touched, made him plunge, it being situated where the mane is usually grasped by a person when mounting, and that he was therefore unsafe and unfit for use while it lasted, Wightman, J., summed up and said to the jury, "I take your opinion whether you are satisfied that the horse when put into the defendant's stable was rendered unfit for immediate use to an ordinary person on account of some disease." The jury held that, when delivered, he was quite fit for present use (q).

Question for the jury.

Sanderack, as its name implies, is a crack or split of the hoof downwards, into which sand and dirt are very apt to insinuate themselves. It occurs both in the fore and hind feet, indicating a brittleness of the hoof, which is sometimes natural, but oftener the consequence of mismanagement, or disease, particularly of *false-quarter* (r); where the horn has grown down whole, but leaving a narrow strip of horn of a different and lighter colour, this indicates that there has been a *sanderack*, and that a disposition to it may possibly remain (s). When sanderack occurs it is nearly always upon the inner quarter of the fore feet, and toe of the hind feet. It is due to an imperfect secretion of horn, and may begin upon the inner or outer surfaces of the hoof. *Sanderack* is an *unsoundness*; but as in the case of a curb (t), if a horse, without any indication of having previously had the disease, throw out a *sanderack* immediately after sale, it is *no breach* of a warranty of *soundness*.

Sanderack.

The *scab* is a disease which constitutes a breach of warranty of soundness, and there is a form of declaration in the *Liber Placitandi* (u), in a case where, in consequence of the existence of such disease, an action was brought on a warranty given at Leeds in 1649. It is contagious.

Scab, mange.

Scirrhus Cord is a disease affecting the spermatic cord due to a vegetable fungus, and comes on gradually. Infection probably occurs at the time of castration.

Scirrhus cord.

Seedy-toe consists of a mealy condition of the horn of

Seedy-toe.

(q) *Ainsley v. Brown*, before Wightman, J., Newcastle Spring Assizes, 1845.

(r) *False-quarter*, ante, p. 89.

(s) Lib. U. K. "The Horse," 301.

(t) *Curb*, ante, p. 86.

(u) Lib. Plac. 30.

the sole, especially at the toe, which in advanced cases causes a separation of the wall and sole, giving a hollow sound when the foot is struck. It is an *unsoundness*.

Shivering.

Shivering—allied to chorea or St. Vitus' dance—is an incurable complaint, and one that renders a horse of very little commercial value. Doubtless many "shiverers" are sold under a warranty of soundness, and the defect never discovered until it is too late to sue under a breach of warranty. In some cases shivering is so obscure as to almost defy detection. A mere quivering of the tail is sufficient evidence as to its existence. If severe, a shiverer is unable to back, though it may be a remarkable puller. Shivering is denoted by a quivering of certain muscles, when the region implicated is thrown into action. It is the simplest affair in the world to overlook slight shivering, and a veterinary surgeon cannot be expected to ascertain the existence of obscure cases of shivering at the time of examination for soundness. He must, however, employ all reasonable means to demonstrate the existence of this and other maladies of an occult nature. Pathological knowledge relating to shivering is practically *nil*.

Shoulder, bruised. See *ante*, p. 104, n. (o).

Shying.

Shying on coming out of the stable is a habit which proceeds from the remembrance of some ill-usage or hurt, which the animal has received in coming out of the stable, and can rarely or never be cured (x). When confirmed, it is a bad and dangerous habit, therefore a *vice*.

Shying the
result of
short-sighted-
ness.

Shying sometimes, however, results from defective sight. An unusual convexity in the formation of the cornea of the eye will produce short-sightedness, and if, as is often the case, there is thereby induced a habit of shying, such shying is an *unsoundness*, although there is no disease, although it is the natural result of a congenital malformation of the eye (z). There are other causes of shying, such as nervousness—brought on by sudden fear; cataract, opacity of the cornea, displacement of the corpora nigra, etc.

Sidebone.

Sidebone is the same disease as ossification of the cartilages (see Ossification of the Lateral Cartilages). It is an *unsoundness*, whether it produces lameness or not (a).

Slipping the
collar.

Many horses are very clever at *slipping the collar* at night; they gorge themselves with food, and run the risk

(x) Lib. U. K. "The Horse," 344.

Q. B. 9. See *ante*, p. 68.

(a) *Simpson v. Potts*, Carlisle Spring Assizes, 1847, cor. Rolfe, B.

(z) *Holiday v. Morgan*, 28 L. J.,

of being kicked and lamed by other horses (b). As this may be prevented either by carefully and accurately fixing the collar, or by keeping the animal in a loose box, it cannot, in practice, be considered a *vice*.

Spavin is an *unsoundness*. See Blood and Bog-spavin (c), Spavin, and Bone-spavin (d).

The inside of the leg, immediately under the knee, and extending to the head of the inner splint-bone, is subject to injury from what is termed *speedy-cutting*, which takes place when a horse with high action, and in the fast trot, violently strikes this part either with his hoof, or the edge of his shoe. Sometimes a bony enlargement is the result; at others, great heat and tenderness; and the pain from the blow seems occasionally to be so great that the horse drops as if he were shot (e). *Speedy-cut*, like cutting (f), is the consequence of defective action; therefore, where a horse is sound at the time of sale, and lameness from a *speedy-cut* immediately afterwards is no breach of a warranty of *soundness*. Veterinary surgeons always reject *speedy-cutters* on the ground of *unsoundness*.

A *splint*, like a *bone-spavin* (d), is an excrescence or bony deposit on the leg of a horse, and the danger in both cases is the probability of their interfering with his action: the *bone-spavin*, by preventing the proper flexion of the joint, and the *splint*, by pressing on the sinews of the leg. Lameness may thus be produced by each.

Splint consists of a variable-sized deposit of new bone at the back of the cannon bone, or between the latter and the splint bones, either on the inner or outer side. The deposit may be confined to one small patch—perhaps not larger than a pea—or there may be a group of splints at the back, and sides of the cannon bone. The worst form of splint is, unquestionably, that situated immediately beneath the back of the knee—usually very difficult of detection, but a frequent cause of lameness.

The ordinary forms of splint mostly cause lameness at the time when the splinty deposit is being laid down, *i.e.*, during the inflammatory stage.

Some veterinary surgeons attach very little importance to splint, if the horse is free from lameness, has good action, over four years old, and the splint well placed. This does

(b) Lib. U. K. "The Horse," 344.

(c) Blood and Bog-spavin, ante, p. 75.

(d) Bone-spavin, ante, p. 75.

(e) Lib. U. K. "The Horse," 245.

(f) Cutting, ante, p. 87.

not alter the fact that splint renders the animal an *unsound* one, which of necessity it does. Veterinary surgeons do not as a rule disagree as to the presence or absence of splint, unless "well up" under the knee. Disputes may arise under these circumstances. When a splint is situated in a position that predisposes it to injury, such as upon the front of the cannon, it is particularly liable to provoke a fresh inflammation, if the part receives a blow, &c. Splint has its origin in a local inflammation of bone and bone-skin (periosteum), the splint being the legacy. All classes of horses are liable to splint, but those required for fast work are perhaps the most frequently affected. In heavy horses it has less significance.

The presence of splint and the absence of acute inflammatory signs—though there may be lameness—must be accepted as evidence that the splint has been in existence several weeks at least. Re-absorption of splint—its disappearance spontaneously—is a fact well known to veterinary surgeons.

In an action on the warranty of a horse "to be sound, wind and limb *at this time*," the breach of which was lameness, produced by a *splint*, it was given in evidence that a *splint* might or might not be the efficient cause of lameness, according to its position, its size and extent; that the *splint* in this instance was in a very bad situation, as it pressed upon one of the sinews of the leg, and was calculated to produce, when the horse was worked, inflammation of the sinew and consequent lameness.

Tindal, C. J., said, "It now appears that some *splints* cause lameness and others do not, and that the consequences of a *splint* cannot be apparent at the time, like those of the loss of an eye, or any other blemish or defect visible to a common observer. We therefore think that, by the terms of this written warranty, the parties meant that this was not, at that time, a *splint* which would be the cause of future lameness, and that the jury have found that it was. We therefore think that the *warranty* was broken" (q).

The *back sinews* are enclosed in a sheath of dense cellular substance, to confine them in their situation and to defend them from injury. Between the tendon and the sheath there is a mucous fluid to prevent friction; but

Decision on
the subject.

Sprain and
thickening of
the back
sinews.

(g) *Margetson v. Wright*, 1 M. & Sc. 622; 33 R. R. 582. See also *Smith v. O'Brien*, 11 L. T. 346; and post, Chap. V., Patent Defects.

when the horse has been overworked, or put to sudden and violent exertion, the tendon presses upon the delicate membrane lining the sheath, inflammation is produced, and a different fluid is thrown out, which coagulates, and adhesions are formed between the tendon and the sheath, and the motion of the limb is more difficult and painful. At other times, from violent or long-continued exertion, some of the fibres which tie the tendons down are ruptured. A slight injury of this nature is called a *sprain of the back sinews or tendons*, and when such injury is severe the horse is said to have *broken down* (h).

A *thickening of the back sinews*, which indicates a previous and violent sprain, is an *unsoundness*, because an alteration of structure has taken place, which must impair the natural usefulness of the horse.

When the muscle, whose office it is to raise the neck and elevate the head, is too powerful in its action, the top of the horse's head is pulled back and the muzzle protruded, the horse cannot possibly carry his head well; he is what is technically called a *star-gazer*, heavy in hand, boring upon the bit and unsafe. This is an obvious defect.

Inseparable from this is another sad defect, so far as the beauty of the horse is concerned; he is *ewe-necked*, that is, he has a neck like a ewe, hollowed above, projecting below, and the neck rises low out of the chest, sometimes lower even than the points of the shoulders (i). These being defects in the conformation of a horse are *neither unsoundness nor vice*.

Strangles mostly affects young horses, almost all of which have it once. In its early stage it resembles a common cold, and is accompanied with sore throat. It is *unsoundness only* during the time the horse is ill with it. It is denoted by the formation of an abscess beneath the jaw, or in some other situation, either externally, or internally. In the latter situation it is generally fatal, but, fortunately for horses, such undesirable results are not frequent.

String-halt is a singular and involuntary action of the hind leg (and exceptionally one of the fore-limbs), arising from an irregular communication of nervous energy to some muscle of the thigh, observable when the horse first comes out of the stable, gradually ceasing on exercise. It is probably so called from its resemblance to the sort of

(h) Lib. U. K. "The Horse," 246.

(i) Lib. U. K. "The Horse," 155.

Held to be an
unsoundness.

"halt" produced by a "string" tied to the leg of a pig, and held in the hand of the person driving it.

String-halt constitutes *unsoundness*. In the case of *Thomson v. Patteson* it was held to be so, and as the case has not been reported, it will now be given at some length. It was tried before Cresswell, J., at the Liverpool Summer Assizes, 1846, and was an action of *assumpsit* on the warranty of a horse, the breach of which was *wilrenhaunch* or *string-halt* and spavin.

The plaintiff and defendant were both horsedealers, and it appeared that the plaintiff met the horse in question coming to Chester fair, and at that time there was a kick apparent on one hock. The plaintiff mounted and tried him, but said he had got a *string-halt*; this the defendant denied, saying there was nothing but the previous kick. The horse was eventually bought for 52*l.*, the defendant warranting him "sound, except a kick on the hock." The horse was *string-halted* on both legs.

Veterinary surgeons and other witnesses were called on both sides, who all agreed that there was *string-halt*, but differed in their opinion as to the existence of a spavin. The latter is frequently associated with *string-halt*.

To prove *string-halt* unsoundness, Mr. Howarth, of Manchester, a veterinary surgeon, described it to be a spasmodic affection of the *abductor* muscle of the hind leg, a nerve coming through the trunk being affected. He said that a horse affected by it loses its condition and is not able to do so much work.

Mr. Ellis, of Liverpool, a veterinary surgeon, stated that *string-halt* is a disease of the sciatic nerve, rendering a horse less fit for work and impeding him in backing, and that he had practical experience showing it to be a disease.

Mr. Bretherton, of Liverpool, a veterinary surgeon of twenty-four years' practice, said that *string-halt* is caused by pressure on the sciatic nerve, that it increases by work, and is *unsoundness*. He had seen horses become quite useless from it, but that more aggravated cases were seen in the country that they submitted to the veterinary college. He had seen horses in his father's stables quite useless from it, but that at first it is only observable when the horse is turning round.

The defendant called Mr. Gregson, a veterinary surgeon, who had attended the horse, and did not consider *string-halt* *unsoundness*. But on being questioned by the

Judge he admitted that it frequently gets worse, and that when very bad it impedes the action of the horse, making him less competent for work.

Mr. Taylor, another veterinary surgeon, said that *string-halt* does not impair a horse's condition. He had examined the horse in question and considered him *sound*.

Upon this his Lordship said, "It is a question for the jury whether *string-halt* produces those effects which in the eye of the law renders him *unsound*." And in summing up shortly afterwards his Lordship said to the jury, "You have heard the evidence as to *string-halt*; if you are satisfied that it is a disease calculated to impair the natural usefulness of the horse, you must find for the plaintiff, it being admitted that the horse had it." The jury found a verdict for the plaintiff.

No present day veterinary surgeon would dream of passing a horse as sound with the knowledge that it had *string-halt*. The causes of *string-halt* are variable, but the pathology bearing upon it is extremely meagre, therefore nothing definite can be laid down as to the nature of the disease.

The molar teeth are not uncommonly diseased through caries, &c., and often cause a chronic discharge from the nose. One or more of the molar teeth may be irregular or overgrown, constituting *unsoundness*, as this interferes with the animal's health.

Teeth,
decay of.

For *thickening of the back sinews* see Sprains and Thickening of the Back Sinews (*k*).

Thickening of
the back
sinews.

Thick-wind consists of short, frequent and laborious breathings, especially when the horse is in exercise; the inspirations and expirations often succeeding each other so rapidly as evidently to express distress, and occasionally almost to threaten suffocation. The principal cause, however, of *thick-wind* is previous inflammation, and particularly inflammation of the bronchial passages (*l*). It is an *unsoundness* (*m*). Disease of the heart often leads to distressed breathing.

Thick-wind.

Thinness of the horny sole, which does not afford sufficient protection to the inner or sensible sole, renders a horse more liable to lameness.

Thinness of
sole.

In a case tried at Liverpool before Cresswell, J., it appeared that a horse, whose feet were *thin-soled*, was sold warranted sound. Some time after sale he went lame, and an action was brought on the warranty.

Held not an
unsoundness.

(*k*) Sprain and Thickening of the Back Sinews, ante, p. 108.

(*l*) Broken-wind, ante, p. 77.

(*m*) Lib. U. K. "The Horse," 193.

Witnesses were called for the defendant, who stated that the mere fact of a horse's feet being formed in this manner would not of itself render him *unsound*. And Cresswell, J., in summing up said, "The plaintiff must, in order to recover in this action, make out that the horse was *unsound* at the time of sale; a defective formation, however, not producing lameness at the time of sale, is not, in my opinion, *unsoundness*." His Lordship then referred to the case of *Brown v. Elkington* (n), where Lord Abinger, C. B., held that curby-hocks (o) not producing lameness at the time of sale were not a breach of warranty of soundness, though a curb was afterwards thrown out. And his Lordship then said, "This case shows that the mere fact of the horse in question being *thin-soled* at the time of sale, is not sufficient to constitute a breach of the warranty of *soundness*; and therefore, unless you are of opinion that that peculiar formation had produced, at the time of sale, actual lameness, you will find for the defendant," which the jury accordingly did (p).

Thoroughpin.

In the neighbourhood of the joints are several bags, containing a mucous fluid, for the purpose of lubricating the parts, and these sometimes become inflamed and enlarged, as in wind-galls (q). A similar enlargement is found above the hock just before the gaskin joins the hock at the back. It is called a *thoroughpin*, and unless it be of great size, it is rarely attended with lameness. It constitutes *unsoundness*. Sometimes the swelling is confined to the inner side; to the outer; or both sides are distended by it. As a rule it is at one side only, but can, by pressing, be made to bulge at the opposite side, hence the use of the term, "thro"-pin, from which thorough-pin has been derived. It is not much detriment to a horse, and very rarely interferes with its utility.

Thrombosis.

By the use of the term "thrombosis," pathologists imply a plugging of a blood-vessel, usually by a clot of blood. Any of the blood-vessels, large or small, are liable to be affected in this manner. Horses occasionally suffer from it, the main trunks of the fore and hind limbs being mostly affected. A veterinary surgeon may pass a horse as apparently sound to-day, yet the owner may find

(n) *Brown v. Elkington*, 8 M. & W. 132; 58 R. R. 645. 131; 80 R. R. 829.

(o) *Curby-hocks*, ante, p. 87.

(p) *Bailey v. Forrest*, 2 C. & K. 265.

(q) Lib. U. K. "The Horse,"

it suddenly unable to move, from this cause, on the same day, or at a subsequent date. No liability rests with the veterinary surgeon, this being a disease, with no reasonable means for ascertaining its existence, or development. Thrombosis produces inability of locomotion, sweating, and a loss of control over the movements. For the time being it renders the animal useless, occurring at irregular intervals whilst in harness, or under the saddle. Its existence constitutes a breach of warranty, provided a previous attack or attacks can be proved to have happened prior to sale.

A *thrush* is inflammation of the lower surface of the inner or sensible frog, and the secretion or throwing out of *pus* is invariably accompanied by a slight degree of tenderness of the frog itself, or of the heel, a little above it, which, if neglected, leads to a diminution of the substance of the frog; separation of the horn from the parts beneath, and the production of suppuration, and ultimately other changes in the foot, destructive to its normal functions, and dangerous to the future usefulness of the horse (*r*). A *thrush* is an *unsoundness*. It is usually the result of neglect.

Thrush of foot.

Vertigo means a sudden attack of brain inertia, whereby the animal loses control over its movements. The old term "megrims" is often applied to this condition. It comes on suddenly, and renders a horse dangerous for use, and is an *unsoundness*. A veterinary surgeon has no means of ascertaining its existence at the time of sale.

Vertigo (Megrims).

A great many horses, perfectly quiet in other respects, are *vicious to clean*, and this probably is the consequence of great sensibility in the skin, and of maltreatment at some time or other; and although it may be gradually overcome by kindness (*s*), yet, when it exists in such a degree as to be dangerous, it is a *vice*.

Vicious to clean.

The same may be said of being *vicious to shoe* as when a horse is *vicious to clean*, except that it is much less common; however, when it is dangerous to shoe such a horse, he must be considered to have a *vice*.

Vicious to shoe.

Horses perfectly white or cream-coloured have the *iris white* and the *pupil red*. When horses of other colours, and they are usually pied ones, have a *white iris* and a *black pupil*, they are said to be *wall-eyed*. Vulgar opinion

Wall-eyed.

(*r*) Lib. U. K. "The Horse," 338.

366.

(*t*) See Lib. U. K. "The Horse,"

(*s*) Lib. U. K. "The Horse," App. Ed. 1862, 521.

has decided that a *wall-eyed* horse is never subject to blindness, but this seems altogether erroneous, as there appears to be no difference of structure which can produce this exemption (*n*).

Warts.

Warts are tumours of variable size, arising first from the cuticle, and afterwards connected with the true skin by means of the vessels which supply the growth of the tumours. They are found sometimes on the eyelids, on various part of the skin, and on the sheath, &c. (*x*). Unless, however, they exist to such an extent as to impede any of the natural functions, or in such a situation as to prevent a saddle, bridle, or harness being put on a horse, they do not constitute *unsoundness* (*y*).

Weak-foot.

Weak-foot often arises from disease, but in many instances from the natural construction of the foot. In the slanting of the crust from the coronet to the toe, an angle is formed, amounting probably to not more than forty instead of forty-five degrees; and after the horse has been worked for a year or two, the line, instead of being straight, becomes a little indented or hollow midway between the coronet and the toe. Horses with these feet can never stand much work. They will be subject to corns (*z*), to bruises, to convexity of the sole, to punctures in nailing, to breaking away of the crust, to inflammation of the foot. When it is the result of disease, it is such an alteration of structure as constitutes *unsoundness*.

Weaving.

Weaving is a motion of the head, neck, and body from side to side, like the shuttle of a weaver passing through the web, and hence the name given to this peculiar and incessant action. It indicates an impatient, irritable temper, and a dislike to the confinement of the stable. This, being a bad habit, is a *vice*, when it either injures a horse's health, or renders him objectionable.

Weed.

The term *weed* is applied to a disorder affecting the absorbent glands either under the thigh or else the arm. It is a complaint that comes on suddenly, usually after a day or two's rest, hence the reason why young horses have it on Monday morning (Monday morning disease). It appears to be a congestion of the absorbents, arising through a want of muscular activity to assist in circulating the lymph, secreted by the glands. It is denoted

(*u*) See Lib. U. K. "The Horse," App. Ed. 1862, 93.

(*x*) Lib. U. K. "The Horse," 381.

(*y*) *Kiddell v. Burnard*, 9 M. & W. 670; 60 R. R. 857.

(*z*) Corns, ante, p. 82.

by a painful swelling of the limb. One attack favours another. It usually passes off under proper treatment.

The *wheezzer* utters a sound not unlike that of an asthmatic person when a little hurried. It frequently accompanies bronchitis. *Wheezing* can be heard at all times, even when the horse is at rest in the stable. It is an *unsoundness* (a).

Wheezing.

Whistling constitutes unsoundness. See Roaring.

Whistling.

Wilremhaunch is the Lancashire name for string-halt (b).

Wilremhaunch.

A wind-gall is a pneumatic-like swelling, commonly appearing in the region of the fetlock, but also in other situations. It arises through a distended condition of a bursa, or pouch-like projection, secreting a lubricating fluid, for the play of tendons, &c.

Wind-galls.

It is very rare for swellings of this nature to cause lameness, but they are unsightly, and often indicative of considerable wear. Being abnormal, veterinary surgeons usually reject horses suffering from them. Their presence predisposes the part to injury, hence the forerunner of unsoundness.

In an action which was brought on the warranty of a horse, the breach of which was *wind-galls*, a verdict was found for the plaintiff (c). The *wind-galls* had probably produced lameness, as there appeared not to have been any dispute about the *unsoundness*, but only about the form of action.

Wind-sucking bears a close analogy to crib-biting (d). The horse stands with his neck bent, his head drawn inward, his lips alternately a little opened and then closed, and a noise is heard as if he were sucking (e). It is both unsoundness and vice.

Wind-sucking.

The *yellows*, otherwise the *jaundice*, is the introduction of bile into the general circulation, and which is usually caused by some obstruction in the ducts or tubes, which convey the bile from the liver to the intestines. It exhibits itself by a yellowness of the eyes and mouth, and any part of the skin not covered with hair (f). It is, while it lasts, an *unsoundness*.

Jaundice.

Yellows.

(a) *Onslow v. Eames*, 2 Stark. N. P. C. 81; 19 R. R. 680.

(b) String-halt, ante, p. 109.

(c) *Stuart v. Wilkins*, Doug. 18.

(d) Crib-biting, ante, p. 84.

(e) Lib. U. K. "The Horse," 340.

(f) Lib. U. K. "The Horse," 213.

CHAPTER V

WARRANTY; SALE AND WARRANTY BY AN AGENT; AND PATENT DEFECTS.

Warranty.

Warranty
required in
buying a
horse.

IN buying a horse, as well as in making an exchange, the maxim *caveat emptor* is the rule of law, and a party who has got an unsound horse has in neither case any remedy unless there be evidence either of express warranty or of fraud. For in the general sale of a horse the seller only warrants it to be an animal of the description it appears to be, and nothing more; and if the purchaser makes no inquiries as to its soundness or qualities, and it turns out to be unsound or restive or unfit for use, he cannot recover as against the seller, as it must be assumed that he purchased the animal at a cheaper rate (*a*).

Implied
undertaking
as to title, &c.

According to the Roman law (*b*), and in France (*c*) and Scotland, and partially in America (*d*), there is always an implied contract that the vendor has the right to dispose of the article which he sells.

In England the common law rule was formerly stated to be that on a sale of specific goods there was no implied warranty of title, and that, in the absence of fraud, the seller was not liable for a defect of title unless there was an express warranty or an equivalent to it by declaration or conduct (*e*). It was, however, well settled that in an executory agreement, the seller impliedly warranted his title in the goods which he promised to sell (*f*); and so wide a construction was put upon the circumstances which might be held to be equivalent to an express warranty that Lord Campbell said that the exceptions had well

(*a*) *Jones v. Bright*, 3 M. & P. 175; 30 R. R. 728.

(*b*) Domat, book 1, tit. 2, s. 2, art. 3.

(*c*) Code Civil, chap. 4, s. 1, art. 1603.

(*d*) 1 John's Rep. 274 (Amer.); Story on Sales, 4th Ed. 367. See

Morley v. Attenborough, 3 Exch. 500; per Parke, B.; 77 R. R. 709.

(*e*) *Morley v. Attenborough*, 3 Exch. 500; 18 L. J., Ex. 148; 77 R. R. 709.

(*f*) Benj. on Sales, 4th Ed. p. 622; *Morley v. Attenborough*, supra.

nigh eaten up the rule (g). This dictum was quoted with approval by Erle, C.J., in *Eichholz v. Bannister* (h), and since the decision in that case there can be little doubt but that the exceptions had become the rule, and the old rule had dwindled into the exception (i). This, at all events, appears to be the principle upon which the judgment of the Queen's Bench Division (Lord Coleridge, C.J., and Lord Esher, M.R.) was founded, in *Edwards v. Pearson* (k). In that case a horse which had been stolen was sold by auction, a few days after the theft, at a horse repository, to the defendant, who, almost immediately afterwards, sold it to the plaintiff, who paid him 15*l.* for it. Soon afterwards the owner traced the animal, and the plaintiff gave it up to the police and then demanded back from the defendant the sum he had paid for it, and, being refused, brought an action in the County Court to recover the price. The Judge thought that, though the parties had no idea of any warranty of title, but merely a sale of the horse, there was an implied warranty by the defendant that he had a right to sell it, and gave judgment for the plaintiff accordingly. On appeal to the Divisional Court this judgment was affirmed, the Court being of opinion that the plaintiff intended to buy a horse and not a lawsuit.

But any doubt that may have existed subsequently to the decision in *Eichholz v. Bannister* (l), in relation to the existence of an implied warranty of title on the sale of specific goods, is entirely removed by s. 12 of the Sale of Goods Act, 1893, which enacts as follows:—

“In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

- (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:
- (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- (3) An implied warranty that the goods shall be free

(g) *Sims v. Marryat*, 17 Q. B. 634.
281; 85 R. R. 462.

(h) 17 C. B., N. S. 708; 34 L. J.,
C. P. 105; 12 L. T. 76; 13 W. R.
96.

(i) See Benj. on Sales, 4th Ed.

(k) 6 T. L. R. 220.

(l) *Supra*. See *Hall v. Conder*,
2 C. B., N. S. 40; *Bagueley v.*
Hawley, L. R., 2 C. P. 625; 36
L. J., C. P. 328.

from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

As sub-s. (1) of this enactment uses the term "implied condition" in contrast with implied warranty in sub-ss. (2), (3), the buyer may, on a breach thereof, repudiate the contract under s. 11 (1), (a), *post*, p. 122, and recover the price paid on the ground of a failure of consideration (under s. 54), or may treat the breach as a breach of warranty only under s. 11, sub-s. (1), (a) (m).

Mode of
trying a dis-
puted title.

A dispute respecting the title of different parties to a horse may be decided by an interpleader issue. Thus, a question was tried whether certain race-horses were the property of the plaintiff when they were seized in execution by the sheriff of Cambridgeshire, at Newmarket, under a *fi. fa.*, consequent on a judgment obtained by the defendant against a gentleman named Carew, and a jury found a verdict for the plaintiff (n).

But an interpleader order will not be granted where the respective claims are not co-extensive. Thus, where the defendant, the proprietor of a horse repository, sold there, by public auction, a horse to the plaintiff, warranted quiet to ride and in harness, but subject to a condition by which, if considered by the buyer incapable of working from any infirmity or disease, it might be returned on the second day after the sale, and the matter determined by veterinary surgeons according to the terms provided for in such condition; and the horse was accordingly returned by the plaintiff, who demanded to have back the money he had paid for the purchase, and this being refused he brought an action against the defendant for breach of warranty; and the person who had placed the horse at the repository for sale claimed of the defendant the proceeds of the sale, stating that the horse had left the repository perfectly sound: it was held that the defendant was not entitled to an interpleader order (o).

Sale by
description.

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description (p).

(m) Kerr & Pearson-Gee on the Sale of Goods Act, 1893, p. 80. See also *Eichholz v. Bannister*, ante, p. 117.

(n) *Ford v. Sykes*, before Lord Campbell, C.J., Cambridge Spring

Assizes, 1853. See also *Cochrane v. Moore*, 25 Q. B. D. 57; 59 L. J., Q. B. 377.

(o) *Wright v. Freeman*, 48 L. J., C. P. 276; 40 L. T., N. S. 134.

(p) Sale of Goods Act, 1893,

According to Bowen, L.J. (q): "An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is, in all cases, founded upon the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side. . . . I believe if one were to take all the cases . . . it would be found that in all of them the law is raising an implication from the presumed intention of the parties. . . . In business transactions, . . . what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended, at all events, by both parties, who are business men—not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils and chances."

Implied as distinguished from express warranty

s. 13. See also *Bowes v. Shand*, (q) *The Moorcock*, 14 P. D. 61; 2 App. Cas. 455; 46 L. J., Q. B. 58 L. J., P. 73; 60 L. T. 654; 37 561; 36 L. T. 857; 25 W. R. 730. W. R. 439.

Canadian Cases.—In an action on the warranty of horses, a conversation just before the delivery between the parties when the plaintiff said, "You say these horses are sound?" and the defendant replied, "Yes, they are," coupled with a subsequent refusal to take back the horses "because they were as he warranted them" are sufficient evidence from which the jury may infer that a warranty was given at the sale. *Libby v. Nesbit*, 1 Kerr (N. B.), 362 (1841). And see *Halliday v. White*, 23 U. C. Q. B. 593.

Implied.

Knowledge by the vendor of the purpose for which an animal is purchased will not raise an implied warranty of fitness for such purpose. *County of Simcoe Agricultural Society v. Wade*, 12 U. C. Q. B. 614 (1855).

A representation in a catalogue or advertisement of a sale by auction will not amount to a warranty if the auctioneer at the sale of the animal announces that the seller warranted nothing. *Craig v. Miller*, 22 U. C. C. P. 348 (1872).

"Tie" or "rot" in a horse is a defect for which a contract for the sale of the horse can be set aside. *Ducharme v. Charest*, Q. R. 23 S. C. 82 (1902).

Even where the seller of a horse sells it without warranty, and the purchaser buys it at his own risk, the seller will be held to have warranted it if at the time of sale he knew that the horse had such a defect; for in stipulating that there should be no warranty in these

Fraud.

Implied
conditions as
to quality
or fitness.

It is a rule of the common law that, with regard to the sale of ascertained chattels, there is no implied warranty of quality, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied (*r*). The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned, and except there be deceit, either by a fraudulent concealment or fraudulent misrepresentation, or the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale, no action for unsoundness lies by the buyer against the seller upon the sale of a horse or other animal (*s*). And this rule is recognised and declared by s. 14 of the Sale of Goods Act, 1893, in the following terms:—

“Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

- (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:
- (2) Where goods are bought by description from a

(*r*) *Chanter v. Hopkins*, 4 M. & W. 399; 51 R. R. 650; *Hill v. Balls*, 2 H. & N. 304; 27 L. J., Ex. 45; *Osborne v. Hart*, 23 L. T. 851; 19 W. R. 331; *Ward v. Hobbs*, 4 App. Cas. 13; 48 L. J., C. P. 281; 40 L. T. 73; 27 W. R. 114.
(*s*) *Hill v. Balls*, *supra*.

circumstances, he has been guilty of fraud as against the purchaser. When the seller has refused to cancel the sale of a horse having, to his knowledge, such a defect, and persists in his refusal in his defence to an action, he cannot object that the buyer has not offered the horse back to him before action; the fraud practised leaving the purchaser always in a position to rescind the fraudulent sale. *Ducharme v. Charest*, Q. R. 23 S. C. 82 (1902). And see *McGill v. Harris*, 36 N. S. R. 414; *Swilling v. Arnold*, 2 West. L. R. 48.

seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

The reason laid down for requiring a warranty of soundness in buying a horse is, that it is well known they have secret maladies which cannot be discovered by the usual trials and inspections, and that a warranty prevents the purchaser from being damaged by those latent defects against which no prudence can guard; as it differs from the case of a manufactured article, where a merchant, by providing proper materials and workmanship, may prevent defects (t). And the late Mr. Yonatt said, "A man should have a more perfect knowledge of horses than falls to the lot of most men, and a perfect knowledge of the vendor too, who ventures to buy a horse without a warranty" (u). But the same, *mutatis mutandis*, may very justly be said of a person who ventures to give a warranty on the sale of a horse.

Reason for requiring a warranty.

If a buyer, however, means to protect himself from hidden defects, he must take a warranty, and he is not protected otherwise, unless he can make out fraud (a).

Buyer bound to reject horse if not sound.

By s. 62, sub-s. (1) of the Sale of Goods Act, 1930 "warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

Meaning of warranty.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

It is much better, both for the buyer and seller, when

No particular words necessary.

(t) 1 Rol. Abr. 90; *Jones v. Bright*, 5 Bing. 444; 30 R. R. 728.
 (u) Lib. U. K. "The Horse,"

368.

(x) *Ormrod v. Hust*, 14 M. &

W. 661.

the latter states whether he *professes* to warrant or not; because where nothing has been said on that point, a considerable degree of doubt must frequently rest upon the case, and then it is only by interpreting the expressions used at the time of sale that even an opinion can be formed as to whether a warranty were ever intended. No particular words are necessary to constitute a warranty; if a man says, "This horse is sound," that is a warranty (*y*); and it is not necessary that the seller should say, "I warrant"; it is sufficient if he says that the article is of a particular quality or is fit for a particular purpose (*z*). The general rule laid down by Bayley, J., is, that whatever the vendor represents at the time of sale is a warranty (*a*). Therefore if a person at the time of sale say, "You may depend upon it the horse is perfectly quiet and free from vice," it is a warranty (*b*). Words, however, of expectation and estimate only do not amount to a warranty (*c*).

A condition in a contract of sale as opposed to a warranty is not defined in the Sale of Goods Act, but appears by implication, from ss. 11 and 62 (1), *supra*, to be an essential term, a breach of which entitles the buyer to reject the goods, and treat the contract as repudiated (*d*).

Section 11 of the Sale of Goods Act is as follows:

"(1) In England or Ireland—

- (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.
- (b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the

When condition to be treated as warranty.

(*y*) Per Best, C.J., *Salmon v. Ward*, 2 C. & P. 211; 31 R. R. 664.

(*z*) Per Best, C.J., *Jones v. Bright*, 3 M. & P. 173; 30 R. R. 728. See also *Randall v. Newson*, 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T., 164; 25 W. R. 313—C. A.

(*a*) *Wood v. Smith*, 4 C. & P. 45; 34 R. R. 599.

(*b*) *Cave v. Colman*, 3 M. & R. 2; 32 R. R. 709.

(*c*) *McConnel v. Murphy*, L. R. 5 P. C. 203; 28 L. T. 713.

(*d*) See Kerr & Pearson-Gee on the Sale of Goods Act, 1893, p. 68.

contract. A stipulation may be a condition, though called a warranty in the contract.

- (c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise."

By sub-s. (1) (c) of the above enactment, the buyer must, in the absence of any special term to the contrary, treat the breach of a condition only as a breach of warranty where (1) he has accepted part of the goods under an entire contract, or (2) there has been a sale of specific goods.

With regard to part acceptance under an entire contract, the principle is that the buyer "by not repudiating the contract has affirmed it" (e). "If I bargain for the purchase of ten horses . . . and the seller delivers only nine, I may say to him, 'I will not accept them, my bargain was for ten.' But if, instead of so doing, I take the nine horses and use them, that which at one time was a condition precedent by my conduct has become no condition precedent" (f).

Acceptance
under entire
contract.

With regard to sales of specific goods, "If a specific thing has been sold with a warranty of its quality, under such circumstances that the property passes with the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of

Sale of
specific goods.

(c) *White v. Beeton*, 7 H. & N. 42, per Channell, B.

(f) *White v. Beeton*, 7 H. & N. 42, per Bramwell, B.

the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract), but must have recourse to an action for damages in respect of the breach of warranty" (g).

Goods which have perished.

Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time the contract is made, the contract is void (h).

Goods perishing before sale, but after agreement to sell.

Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk, passes to the buyer, the agreement is thereby avoided (i).

Thus where A. agreed to sell a specific horse to B. upon condition that it should be taken away by B. and tried by him for eight days, and returned at the expiration of that period if B. did not think it suitable for his purposes, and the horse died on the third day after it was placed in B.'s stable, without fault of either party: it was held by Denman, J., that A. could not maintain an action for the price as for goods sold and delivered (k).

A sound price not tantamount to a warranty.

There was at one time a general opinion that a *sound price* given for a horse was tantamount to a *warranty* of soundness; but Lord Mansfield considered the doctrine to be so loose and unsatisfactory that he rejected it, and laid down the following rule: "There must either be an *express warranty* of soundness, or *fraud* in the seller, to maintain an action" (l).

A general warranty.

A general warranty is an unconditional undertaking that a horse or any other article *really* is what the warrantor *professes* it to be.

A qualified warranty.

A warranty may be either *general* or *qualified*. If a person at the time of his selling a horse say, "I never warrant, but he is sound so far as *I know*," it is a *qualified* warranty, and an action for breach of warranty may be maintained upon it by the purchaser, if it can be proved that the seller *knew* of the unsoundness (m).

A limited warranty.

By the conditions of sale at repositories and public

(g) *Per Cur. Behn v. Burness*, 3 B. & S. at p. 755. See also *Street v. Blay*, 2 B. & Ad. 456, 462; 36 R. R. 626. As to remedy for breach of warranty, see post, Chap. VIII.

(h) Sale of Goods Act, 1893, s. 6.

(i) Sale of Goods Act, 1893, s. 7.

(k) *Elphick v. Barnes*, 5 C. P. D. 321; 49 L. J., C. P. 698; 29 W. R. 139.

(l) *Parkinson v. Lee*, 2 East, 323; 6 R. R. 429.

(m) *Wood v. Smith*, 4 C. & P. 45; 34 R. R. 599. See also *Pinder v. Button*, 7 L. T. 269.

auctions, a specified short time is usually allowed, within which the purchaser must give notice of any breach of warranty. If he neglect to do this, he has no remedy, unless such condition has been rendered inoperative by fraud or artifice. And in a case where a warranty was to last till the noon of the following day, when the sale was to become complete, Littledale, J., said, "The warranty here was as if the vendor had said, 'after twenty-four hours I do not warrant'; such a stipulation is not unreasonable" (n).

In the case of *Chapman v. Gwyther* (o) the seller of a horse signed the following warranty:—

"June 5th, 1865. Mr. C. bought of Mr. G. G. a bay horse for ninety pounds. Warranted sound.

90l.

G. G.

"Warranted sound for one month.—G. G."

The Court of Queen's Bench held that the latter words limited the duration of the warranty, and meant that the warranty was to continue in force for one month only; and that the complaint of unsoundness must therefore be made by the purchaser within one month of the sale.

Where a horse was sold by public auction at a repository warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty must be returned before five o'clock of the day after the sale, shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final"; and the horse was not returned within the stipulated time: it was held, on demurrer, in an action on the warranty, that the buyer's only remedy was under the condition, and that he could not maintain the action (p).

The purchaser, however, may return the horse at any time within that specified in the conditions of sale, even though he has notice of the breach of warranty before he removes the horse, and the horse, through an accident having happened to it whilst it was in his possession, but not by his default, becomes depreciated in value (q).

(n) *Bywater v. Richardson*, 1 A. & E. 508; 3 N. & M. 748; 40 R. R. 349; and see *Best v. Osborne*, 2 C. & P. 74.

(o) L. R., 1 Q. B. 463; 35 L. J., Q. B. 142; 14 L. T. 477.

(p) *Hinchcliffe v. Barwick*, 5 Ex. D. 177; 49 L. J., Ex. 40; 42 L. T. 492—C. A.

(q) *Head v. Tattersall*, L. R. 7 Ex. 7; 41 L. J., Ex. 4; 25 L. T., 631. See, in America, *Carter v.*

Warranty.
Where per-
formance of
condition
impossible.

But the mere fact of the contract of sale containing a condition for the return of the horse within a specified short time, in the event of its not answering the warranty given, will not deprive the buyer of his remedy for the breach, if the performance has become impossible without any fault on the part of the seller (*r*).

Where a horse was sold by auction at a repository warranted quiet to ride, and one of the conditions of the contract was to the effect that if the buyer contended that the horse did not correspond with the warranty it must be returned on the second day after the sale, and that the non-return within the time limited should be a bar to any claim on account of any breach of warranty; and the horse was removed by the buyer, and while being ridden on the next day, ran away, fell, and was so injured that it could not safely be returned on the second day after the sale, but the buyer gave notice to the seller on that day that the animal was not according to the warranty, and was unfit to travel: it was held that under these circumstances the non-return of the horse within the period stipulated by the condition was no bar to an action for breach of warranty; Lord Coleridge, C.J., saying that, "the condition as to the return of the horse was subject to the well-known rule that such agreements imply the continued existence of the subject-matter of the agreement. The result of the accident was to disable the animal so completely as to destroy it as a horse for all purposes of draught or riding" (*s*).

A special
warranty.

When there is any suspicious place apparent to the parties, which they discuss, or if the seller knows of some defect and does not wish to answer for any unsoundness which may proceed from it, he should give a warranty specially excepting his liability for any unsoundness which may proceed from the defect in question (*t*); or expressly

Wallace, 35 Hun. 189; *Hunt v. Wyman*, 100 Mass. 198.

(*r*) *Taylor v. Caldwell*, 3 B. & S. 826. See also s. 7 of the Sale of Goods Act, 1893, ante, p. 124.

(*s*) *Chapman v. Withers*, 20

Q. B. D. 824; 57 L. J., Q. B. 457; 37 W. R. 29.

(*t*) *Jones v. Cowley*, 4 B. & C. 445; 6 D. & R. 533; and *Hemming v. Parry*, 6 C. & P. 580.

Rescission
impossible.

Canadian Case.—If the immediate buyer puts it out of his power to rescind the sale by selling to a third party he cannot defend an action for the price of the horse by setting up breach of warranty; although there has been a warranty of soundness at the time of the sale to him. *Hall v. Coleman*, 3 U. C. K. B. (O. S.) 39 (1833).

state what he warrants: as where a mare was warranted to be "a good hunter, and to have one eye" (u). But where the purchaser requires the vendor to be answerable for some defect, he should take a special warranty against the effects which may be likely to proceed from it.

The buyer should always take care to distinguish between a warranty and a representation (x); however, he is safe if he take a *written warranty*, and refuse to believe any representation the seller will not commit to paper. A *written warranty* should comprehend not only soundness, but freedom from vice, and also quietness and age, if necessary. A written warranty.

Also any special terms which may have been agreed upon at the time of sale; for instance, an agreement to take back the horse, in case he does not suit or is unsound, should be made a part of the written warranty or agreement upon which the sale is effected (y). A special agreement.

The following form of receipt and warranty will be found, for general purposes, short and comprehensive:— Form of warranty.

"Received of P. J. D. fifty pounds for a grey gelding, warranted only six years old, sound, free from vice, and quiet to ride or drive either in single or double harness.

50l.

R. F."

Where the whole matter passes in parol, all that has passed may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination; but if the contract be in the end reduced to writing, nothing which is not found in the writing can be considered as a part of the contract (z). Effect of a written warranty.

A warranty may be gathered from letters which have passed between the parties. But where it is sought to impart a warranty into a contract for sale contained in letters, which are ambiguous in their terms, it is competent to the party sought to be charged to give evidence of all the surrounding facts and circumstances, for the purpose of showing that a warranty was not contemplated by the parties (a). Warranty may be gathered from letters.

(u) *Higgz v. Thrale*, before Pollock, C.B., Feb. 18, 1850.

(x) See post, Chap. VI.

(y) *Payne v. Whale*, 7 East, 274.

(z) Per Abbott, C. J., *Kain v. Old*, 2 B. & C. 627; 26 R. R. 497.

(a) *Stucley v. Bailey*, 31 L. J. Ex. 483.

The parties
are bound by
it alone.

The parties are bound by the written warranty alone, unless some fraud can be shown; and even if there be a representation it does not avail. If a man brings me a horse, and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representation; and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case (b).

It cannot be
extended by
implication.

Upon a contract for the sale of goods with a particular express warranty, the Court will not extend such warranty by implication, as the maxim, *expressum facit cessare tacitum*, applies to such case (c). Thus, if a man sell a horse, and warrant him to be sound, the vendor knowing at the time that the purchaser wants him for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of warranty (c).

A warranty
is several
though the
contract be
entire.

When several horses are sold at an entire price, and a warranty is given as to all, the contract of sale is entire, but the warranty is several (d).

A warranty
applies to the
time of sale.

A warranty only extends to the state of a particular commodity at the time of sale, unless the warrantor expressly fixes some future period to which he undertakes to extend it (e). Thus Blackstone says, "A warranty can only reach to things in being at the time of the warranty, and not to things in future; as that a horse is sound at the time of buying him, not that he *will* be sound two years hence" (f). And in a case in the Year Book in the reign of Edward the Fourth, Choke, J., says, "If I sell a horse and warrant him to travel thirty leagues a day, and he fail to do it, I am not liable to an action of deceit, for the warranty is void, because a person only warrants such a thing as *was* at the time of warranty, and not a thing which *is to come*" (g).

(b) Per Gibbs, J., *Pickering v. Dawson*, 4 Taunt. 785; 39 R. R. 656, 657.

(c) *Dickson v. Zizinia*, 10 C. B. 602. See also *Anthony v. Halstead*, 37 L. T. 433.

(d) See Story on Sales, 4th Ed. 240; *Symonds v. Carr*, 1 Camp. 361.

(e) *Eden v. Parkinson*, Doug. 732 a.

(f) 3 Bla. Com. 165.

(g) Year Book, 9 Edw. 4, p. 6.

Application
to time of
sale.

Canadian Case.—Evidence of the value of a chattel (a horse) at the time of the trial, a year after the sale, was properly rejected when offered to prove the value at the time of the sale. *Finn v. Brown*, 35 N. B. R. 335 (1901).

There is no doubt, however, that a *future event* may be warranted if there be an *express* undertaking to that effect (*h*); and it makes no difference whether the warranty be made at *the time of sale* or *before sale*, so long as the sale is made upon the faith of the warranty (*i*). For where a seller informed a buyer that one of two horses he was about to sell him had a cold, but agreed to deliver both at the end of a fortnight sound and free from blemishes, and at the expiration of that time both horses were delivered, but one had a cough and the other a swelled leg, which was apparent at the time of sale, the seller brought an action to recover the price, and a verdict was found for the buyer. The Court of Common Pleas refused to disturb it or grant a new trial, as the warranty did not apply to the time of sale but to a future period (*k*).

Warranting a future event.

On the sale of goods, if the parties agree to the specific chattels, there is no implied warranty on the part of the seller that the goods shall be fit for the *particular purpose* (*l*) for which they are required, but only that they must be merchantable, that is to say, fit for some purpose (*m*).

Buying for a particular purpose.

If a person sell a commodity for a *particular purpose* he must be understood to warrant it *reasonably* fit and proper for such purpose (*n*). 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 cheaper. But if he asks for a horse to carry a lady, or a child, or to drive in a particular carriage, he who knows the qualities of the animal and sells, undertakes on every principle of honesty that it is fit for the purpose indicated; but if it should turn out that the horse was vicious, or had never been in harness, the buyer would be entitled to recover, on proving that the horse was unfit for the purpose for which it was sold, although it might be fit for several other purposes. The selling upon demand for a horse with particular qualities is an affirmation that he possesses those qualities (*o*).

Must be reasonably fit for the purpose.

(*h*) *Eden v. Parkinson*, Doug. 732 a.

(*i*) *Pasley v. Freeman*, 3 T. R. 59; 1 R. R. 634.

(*k*) *Liddard v. Kain*, 9 Moore, 356; S. C., 2 Bing. 183; 27 R. R. 582.

(*l*) Per Parke, B., *Sutton v. Temple*, 12 M. & W. 55; 67 R. R.

255. See also s. 14 of the Sale of Goods Act, 1893, ante, pp. 120, 121.

(*m*) Per Best, C. J., *Jones v. Bright*, 5 Bing. 544; 30 R. R. 728.

(*n*) Per Abbott, C. J., *Gray v. Chor*, 4 B. & C. 115; 28 R. R. 769.

(*o*) Per Best, C. J., *Jones v. Bright*, 30 R. R. 728; 5 Bing. 544;

A carriage-horse.

And in *Chanter v. Hopkins* (p), Parke, B., said, "Suppose a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for; but if I describe it as a particular bay horse, in that case the contract is performed by sending that horse" (q).

Latent undiscoverable defects.

Nor is there any exception as to latent undiscoverable defects. In *Randall v. Newson* (r), the plaintiff ordered and bought of the defendant, a coachbuilder, a pole for his carriage. The pole broke in use, and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence. On motion by the defendant for judgment, the Court (s) ordered judgment to be entered for the defendant, on the ground that the answers of the jury amounted to a finding of a latent defect in the wood of the pole, which no care or skill could discover, and that the principle of the decision in *Readhead v. Midland Rail Co.* (t) extended to the sale of an article for a specific purpose. The plaintiff appealed. And the Court of Appeal held that the limitation as to latent defects introduced by *Readhead v. Midland Rail Co.* (u) does not apply to the sale of a chattel, and that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury on a second trial should be of opinion that the injury to the horses was the natural consequence of the defect in the pole.

Quiet in harness.

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." And the Court of King's Bench held that it was quite clear these were convertible terms, because no horse can be said to be a *good drawer* if he will not pull quietly in harness, and therefore proof that he is merely a good puller will not satisfy the warranty;

3 M. & P. 162. See also *Jones v. Just*, 1 L. R. 3 Q. B. 197; 37 L. J., Q. B. 89; 18 L. T. 208.

(p) 4 M. & W. 406; 51 R. R. 650.

(q) *Chanter v. Hopkins*, 4 M. & W. 406; 51 R. R. 650. See also *Chalmers v. Harding*, 17 L. T. 571.

(r) 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T. 164.

(s) Blackburn and Lush, JJ.

(t) L. R. 4 Q. B. 379.

(u) L. R. 4 Q. B. 379. This case decided that the contract made by a carrier of passengers is to take due care to carry the passengers safely, and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose.

the word *good* must mean "good" in all particulars (x). And where a horse was warranted "sound and quiet in all respects," Lord Abinger, C. B., held it to include the being quiet in harness (y). But where the warranty was as follows, viz., "Received from A. the sum of 60*l.* for a black horse rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon"; it was held that there was no warranty that the horse was quiet to ride and drive (z).

But in setting up a breach of such a warranty, it must be clearly proved that the horse at the time of sale was unfit for the purpose for which he was bought; and if he has gone quietly with persons of ordinary skill, there will be a strong presumption that he answers his warranty. In the following case it appeared that a horse warranted "a thoroughbroke horse for a gig," kicked and broke the gig, &c., the first time he was driven by the purchaser. This was, however, two months after sale, but in the meantime other persons had driven him, and he had always answered his warranty. It was decided that this was no breach, because as the horse had previously behaved as he had been warranted, his bad conduct must be attributed and have been owing to the purchaser's want of skill in driving (a). And in the case of *Buckingham v. Reeve*, Pollock, C. B., said, "A horse put into a new harness and an unaccustomed carriage once or twice might kick, and yet be deserving of a warranty of being quiet in harness" (b).

Unfitness
must be
clearly
proved.

In all cases of warranty as to the quality of the thing sold, as, for instance, where a horse is warranted sound or the like, the warrantor undertakes that it is true at the time of making it; and the law annexes a tacit contract that if it be otherwise than warranted, the vendor shall make compensation to the buyer (c); and the seller will be liable for any latent defect, according to the old law concerning warranties (d), that is, as Lord Mansfield laid down, for all faults, known or unknown to the seller (e), inconsistent with the warranty given.

Warrantor's
liability.

(x) *Coltherd v. Punccheon*, 2 D. & M. 10.

(y) *Smith v. Parsons*, 8 C. & P. 199.

(z) *Anthony v. Halstead*, 37 L. T. 433.

(a) *Geddes v. Pennington*, 5 Dow, 164.

(b) *Buckingham v. Reeve*, N. P. Ex. Dec. 1, 1857.

(c) *Fielder v. Starlin*, 1 H. Bl. 17; 2 R. R. 700.

(d) *Parkinson v. Lee*, 2 East, 321; 6 R. R. 429.

(e) *Stuart v. Wilkins*, Doug. 19.

Sale avoided
by fraud.

But where a horse is sold with a warranty, any fraud at the time of sale will avoid the sale, though it is not on any point included in the warranty (*f*). A sale, however, is not avoided by some immaterial representation in the warranty proving untrue. For Lord Eldon, in delivering judgment in the case of an appeal to the House of Lords, held, where a horse was sold under a warranty of soundness, but with a misrepresentation as to the place from which he was brought, "that if the warranty was answered, a misrepresentation as to the place from which the horse was procured would not suffice to set aside the sale (*g*).

Sale and Warranty by an Agent.

An agent
cannot dele-
gate his
authority.

An agent is always incompetent, without special authority for that purpose, to appoint another person to act in his stead, the maxim of the law being, *delegatus non potest delegare* (*h*).

Nor exceed it.

An agent employed for a particular purpose has no right to exceed his authority. Thus a servant or other person authorized to sell a horse must receive payment for him in money; he cannot exchange him for another (*i*).

Agency deter-
mines by
principal's
death.

An agency determines *ipso facto* by the death of the principal, and is also capable of being revoked by him in his lifetime, with as little ceremony as it was created (*k*).

Difference
between a
remunerated
and an un-
remunerated
agent.

There is a difference between the principal's rights against a remunerated and against an unremunerated agent. The former, having once engaged, may be compelled to proceed to the task which he has undertaken; the latter cannot, for his promise to do so being induced by no consideration, the rule, *ex nudo pacto non oritur actio*, applies. But if he do commence his task, and afterwards be guilty of misconduct in performing it, he will, though unremunerated, be liable for the damage so occasioned; since by entering upon the business, he has prevented the employment of some better qualified person (*l*).

Agent acting
without
proper
authority.

Wherever a party undertakes to do any act as the agent of another, if he does not possess any authority

(*f*) *Steward v. Coesvelt*, 1 C. & C. 78.
P. 23.

(*g*) *Geddes v. Pennington*, 5 105.
Dow, 163.

(*h*) 2 Ste. Com., 14th Ed. 105. (l) See Smith's Merc. Law,
11th Ed. 144; *Balfe v. West*, 22

(*i*) *Thompson v. Davenport*, 9 B. L. J., C. P. 176.

from the principal, and the other does not know it, or if he exceeds the authority delegated to him, he will be personally responsible to the person with whom he is dealing, for or on account of the principal (*m*).

His personal responsibility.

If the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility (*n*). And where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it (*o*).

Where it clearly and expressly appears that a person really acting as agent fairly contracts as such agent in the name of his principal, and professes to make that principal liable, the agent cannot be sued upon the contract (*p*).

Where he cannot be sued on the contract.

But he may be sued so as to make him liable in damages for the loss sustained by the person with whom he has entered into the contract (*p*).

But is liable in damages.

The rule of law is, that, if an agent is guilty of fraud in transacting his principal's business, the principal is responsible (*q*); but the agent must be acting within the scope of his authority and in the course of his employment (*r*).

Principal answerable for fraud.

Nor is there any difference in its effect between a misrepresentation made by an agent, which is collateral to the contract, and one which is embodied in the contract, the fraud of the agent in either case, if committed in the course of his employment, rendering the contract voidable as against the principal, without its being shown that he was privy to it (*s*).

Misrepresentation collateral to contract.

A master sent his servant with a horse to a fair, at

Damage caused by his negligence.

(*m*) Story's Commentaries, 226; *Harper v. Williams*, 4 Q. B. 232; 62 R. R. 334.

P. C. 394; 43 L. J., C. P. 31.

(*n*) *Higgins v. Senior*, 8 M. & W. 845; 58 R. R. 884.

(*r*) *Coleman v. Riches*, 16 C. B. 104; *Udell v. Atherton*, 7 H. & N. 172.

(*o*) *Kelner v. Baster*, L. R., 2 C. P. 174; 36 L. J., C. P. 94.

(*s*) *Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259, 265; *Swift v. Winterbottom*, L. R., 8 Q. B. 244, 254; *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 394, 411, 412; 45 L. J., P. C. 31; and see *Swire v. Francis*, 3 App. Cas. 106; 47 L. J., P. C. 18; *Weir v. Bennett*, 3 Ex. D. 32.

(*p*) *Lewis v. Nicholson*, 21 L. J., Q. B. 316.

(*q*) See per Parke, B., *Murray v. Mann*, 2 Ex. 539; 76 R. R. 686; *Cornfoot v. Fowke*, 6 M. & W. 358; 55 R. R. 655; *Mackay v. Commercial Bank of New Brunswick*, L. R., 5

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)

APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

such a distance that the servant was obliged to put the horse up for the night; and the servant put him up in a stable belonging to a tenant of his master. The horse was glandered, and the tenant brought an action against the master for damages sustained by him in consequence of the loss of horses and cattle by infection. It was held by the Court of Session in Scotland, that placing the horse in the tenant's stable was an act done by the servant in the execution of his duty, and for which the master was liable, upon proof merely of the servant's knowledge of the disease (t).

Surreptitious
dealing with
other
principal.

Avoidance of
contract.

Upon the principle that "No man should be allowed to have an interest against his duty" (u), an agreement to buy a horse subject to its being certified as sound by a veterinary surgeon employed by the buyer to examine it is avoided if, upon such certificate being given, it appears that there has been a surreptitious dealing between the buyer's agent and the seller. *Shipway v. Broadwood* (x) is an instance of the application of this principle. In that case the defendant agreed to purchase a pair of horses from the plaintiff, provided they were passed as sound by a veterinary surgeon who was to be employed by the defendant to examine them. The horses were certified as sound by the veterinary surgeon, and the defendant sent a cheque for the price. The horses were delivered and found to be unsound, and thereupon they were returned and the cheque stopped. In the course of the trial of an action on the cheque it was elicited that the veterinary surgeon had accepted a bribe from the plaintiff. It was held that it was immaterial to inquire what effect the bribe had on the mind of the defendant's agent, that the offer and acceptance invalidated the certificate, and that the plaintiff could not recover under the contract, which depended upon the validity of the certificate.

Undisclosed
principal.

If a person sells goods, supposing at the time of the contract that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal, but agent for a third person, though he may in the meantime have debited the agent

(t) *Baird v. Graham*, 14 Court of Sess. (Sco.) 615.

(u) See *Thompson v. Havelock*, 1 Camp. 527, cited by Clitty L. J., in his judgment in *Shipway v. Broadwood*, [1899] 1 Q. B., at

p. 373, and referred to by him as a great principle which has been applied in cases innumerable.

(x) [1899] 1 Q. B. 369; 68 L. J., Q. B. 360; 80 L. T. 11—C. A.

with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal (y). So that a vendor, who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the principal has *bonâ fide* paid the agent at a time when the vendor still gave credit to the agent and knew of no one else as a principal (z). On the other hand, if at the time of the sale the seller knows that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, then, according to the cases of *Addison v. Gandasequi* (a) and *Paterson v. Gandasequi* (b), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other (c). But the mere knowledge at the time of the contract that there is a principal, if his name be not disclosed, will not prevent the seller from resorting to the principal though he had debited the agent (c). The seller, however, must make his election within a reasonable time. Accordingly, when nine months had elapsed after the discovery of the principal, and no election had been made by the seller, it was held that he could not recover (d). The insertion of the agent's name alone in the contract, though the principal is disclosed at the time, and the subsequent demand of payment from the agent, does not necessarily amount to an election to give credit to the agent, and to him alone, but the principal may be sued (e). The question whether credit was given to the agent or to the principal being for the jury, for whose guidance in resolving it evidence of custom and usage will be admissible (f).

(y) *Thomson v. Davenport*, 9 B. & C. 86, per Lord Tenterden, C. J.

(z) *Armstrong v. Stokes*, L. R., 7 Q. B. 598; 41 L. J., Q. B. 253; 26 L. T. 872.

(a) *Addison v. Gandasequi*, 4 Taunt. 574; 13 R. R. 689.

(b) *Paterson v. Gandasequi*, 15 East, 69; 13 R. R. 368.

(c) *Thomson v. Davenport*, 9 B. & C. 86; 32 R. R. 578.

(d) *Smethurst v. Mitchell*, 28 L. J., Q. B. 241.

(e) *Culder v. Dobell*, L. R., 6 C. P. 486; 40 L. J., C. P. 224—Ex. Ch.

(f) *Curtis v. Williamson*, L. R., 10 Q. B. 57, 59; 44 L. J., Q. B. 27; 31 L. T. 678.

Person described as agent may be proved to be principal.

Where a person describes himself in a written instrument as the agent of an unnamed principal, it is competent for the party with whom he contracts to show that, although described as agent, he is in fact the principal (*g*). But there is a distinction between cases where an agent in effecting a contract for the purchase of goods does not disclose the existence of a principal at all, and cases where he discloses that he has a principal but does not give his name; and it has been held that in the latter class of cases the vendor may have recourse to the principal though he has *bonâ fide* paid the agent for the goods, unless there has been such conduct on the vendor's part, *e.g.*, delay in applying to the principal, as might justify the principal in concluding that the vendor was not looking to his credit but to that of the agent (*h*).

Principal cannot be proved to be an agent.

Although the rule of law is, that where a contract is made by an agent, the principal may come in and take the benefit of it, that doctrine cannot be applied where the agent contracts as principal (*i*). Thus, Lord Ellenborough said, "If one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made" (*h*).

Their respective rights of action on a contract.

The rule of law is, that the agent who makes the contract may bring an action on the contract in respect of his privity, and the principal in respect of his interest (*l*).

Warranty by servant as special agent.

If the agent is appointed only for a particular purpose, and is invested with limited powers, or, in other words, is a special agent; then it is the duty of persons dealing with such agent to ascertain the extent of his authority; and the principal will not be bound by any act of the agent not warranted expressly by, or by fair and necessary implication from, the terms of the authority delegated to him (*m*). Therefore the servant of a private owner

(*g*) *Carr v. Jackson*, 7 Ex. 382. See also *Paice v. Walker*, L. R. 5 Ex. 173; 39 L. J., Ex. 109; 22 L. T. 547.

(*h*) *Irvine & Co. v. Watson & Sons*, 5 Q. B. D. 102; 49 L. J., Q. B. 239; 41 L. T. 51; per Bowen, J. Affirmed, 5 Q. B. D. 414—C. A.

(*i*) *Humble v. Hunter*, 12 Q. B. 315; 76 R. R. 291.

(*k*) *Lucas v. De la Cour*, 1 M. & S. 249; 14 R. R. 426. See also *Humble v. Hunter*, 12 Q. B. 310; 76 R. R. 291.

(*l*) *Sykes v. Giles*, 5 M. & W. 650; 52 R. R. 870.

(*m*) *Brady v. Todd*, 9 C. B., N. S. 592; 30 L. J., C. P. 223; 4 L. T. 212; 9 W. R. 483. See *Alexander v. Gibson*, 2 Camp. 555; 11 R. R. 797.

entrusted to sell a horse on one particular occasion, not at a fair or public mart, is not by law authorized to bind his master by a warranty; and the buyer who takes such a warranty, takes it at the risk of being able to prove that the servant had in fact his master's authority to give it. But the existence of this authority may be inferred, *e.g.*, it was held in an action for the breach of a warranty on the sale of a horse by the servant of a private owner, that a letter from the plaintiff's attorney to the defendant, referring to the alleged warranty and averring a breach of it, and an answer from the defendant merely denying the breach of it, afforded evidence whence the jury were justified in finding that the servant had authority in fact to warrant (n).

In *Brady v. Todd* (o), Erle, C.J., in delivering the judgment of the Court, said, "When the facts raise the question, it will be time 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 intrusted 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 powers 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." Previously to this case it had been held that the servant of a private owner employed to sell a horse at a fair, and receive the price, had an implied authority to warrant the horse to be sound, Lord Ellenborough saying, "If the servant was authorized to sell the horse and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual on the sale of horses to require a warranty; and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business with which he is entrusted in the common and usual manner" (p). In that case no special reference was made to the fact that

Warranty by
special agent
at a fair.

(n) *Miller v. Lawton*, 15 C. B., N. S. 831. It should, however, be noted that in this case the sale took place at a fair.

(o) 30 L. J., C. P., at p. 225.

(p) *Alexander v. Gibson*, 2 Camp. 555; 11 R. R. 797.

the horse was sold at a fair, and if the foregoing decision was intended to refer to sales by special agents generally, it must be taken to be overruled by *Brady v. Todd*. In a comparatively recent case, however, the facts contemplated by Erle, C.J., in *Brady v. Todd* as raising an implication of authority to warrant on the part of a special agent did arise, and it was held that a servant entrusted by his master with the sale of a horse at a fair might have an implied authority to warrant (q).

Warranty by
a servant as
general agent.

But whenever a general authority is given by a principal to an agent, this implies and includes a right to do all subordinate acts incident to and necessary for the execution of that authority; then, if notice is not given to the person with whom the agent deals that the principal has limited his authority, the principal is bound (r). In accordance then with this principle of law, a servant employed by a horsedealer as his general agent to carry on his business, has an implied authority to warrant the horses sold by him for his principal as sound without any special authority for that purpose.

The case of *Howard v. Sheward* (s) very clearly illustrates the rule that the agent or servant of a horsedealer has an implied authority to bind his principal or master by a warranty. In that case it appeared that the defendant was a horsedealer, and that the plaintiff, being at a riding-school, asked the proprietor "if he knew of a horse that would be likely to suit him," and that David Sheward, the brother of the defendant, who happened to be present, and who was a horsedealer, and occasionally acted in the sale of horses for the defendant, said he thought the latter had one. After some conversation the horse in question was brought to the riding-school, and there ridden by the plaintiff and approved of by him; and David Sheward, in answer to questions as to the character and soundness of the animal, said, "I'll guarantee the horse is sound." Ultimately the horse—which had, at the plaintiff's request, been previously examined by a veterinary surgeon, who gave a certificate that it was sound—was purchased by the plaintiff for 315*l.*, which sum he paid to the defendant. The horse, proving to be unsound, was re-sold by the plaintiff, and this action was brought to recover the difference in price. On the part of the

(q) *Brooks v. Hassall*, 49 L. T., *Gardner*, 21 Beav. 543.
N. S. 569.

(*) L. R., 2 C. P. 148; 36 L. J.,

(r) Per M. of R., *Collen v.* C. P. 42.

defendant it was contended that the servant of a horsedealer (assuming David Sheward to have been the defendant's servant for this purpose) has no implied authority to warrant on his master's behalf; and evidence was offered to show that it was not the custom with horsedealers to warrant where the horse had been examined by a competent veterinary surgeon and pronounced sound. Erle, C.J., declined to receive the evidence, and said that he should rule that David Sheward had authority to warrant; and the jury, finding that he had done so, and that the horse was unsound, returned a verdict for the plaintiff, damages 127*l.* 10*s.*, and leave was reserved to the defendant to move to enter a nonsuit or for a new trial. The rule was refused. And Willes, J., in the course of his judgment, said, "David Sheward did not negative the fact that this was an ordinary transaction as between his brother and himself. It must be assumed, therefore, that he negotiated the sale as his brother's servant or agent. It was not an isolated instance, though if it had been I do not conceive that it would have made any difference; but it appeared that David Sheward had before assisted the defendant in the sale of horses. Is it, then, part of the business of a horsedealer to warrant horses which he sells? No doubt it is where a sufficient price is given. Upon the whole I think there was clear evidence of authority to warrant. It arose out of the general character of the transaction, and any person dealing with the agent of a horsedealer has a right to assume it."

It was also decided in this case that evidence of the alleged usage amongst horsedealers not to warrant where the horse has been examined by a veterinary surgeon, was not admissible to rebut the inference of authority to warrant.

Alleged usage
not to
warrant.

But a horsedealer will not be bound by a warranty given by his servant on an incidental matter, especially where the contract is not an ordinary transaction of sale and pure use. This statement appears to be justified by the judgment of the Queen's Bench Division in *Baldry v. Bates* (t). In that case the defendant, the keeper of a riding-school, agreed through his servant to send a horse to the plaintiff on trial. The servant warranted that the horse could be safely put into a stable where other horses of the plaintiff's were. At the trial the jury found that at the time the

Warranty by
servant on
incidental
matter.

(t) 1 T. L. R. 558.

horse was suffering from the mange, and that the defendant's servant was aware of it. The judge, on further consideration, found, as a fact, that the defendant was a horsedealer, and, therefore, liable on the warranty given by his servant. On appeal to the Divisional Court it was held (reversing the judgment of Huddleston, B.) that the judge had no power to find any such fact, and that as it had not been found by the jury, the defendant would not be bound by any warranty given by his servant as to the soundness of any horse offered by him for sale; and, further, that as the warranty given had not been given on the soundness of the horse, but on an incidental matter, the servant, even if the defendant had been a horsedealer, would not have been clothed with authority to give such a warranty.

Warranty by
a servant
after sale.

What an agent says as a warranty or representation at the time of sale respecting the thing sold, is evidence against the principal; but not what he has said at another time, whether to the purchaser, or to a stranger, unless it is a statement accompanying an act done in the course of his agency (*u*). And Lord Ellenborough said, "If the servant is sent with a horse by his master, and which horse is offered for sale, and gives the direction respecting his sale, I think he thereby becomes the accredited agent of his master, and what he has said at the time of sale, as part of the transaction of selling, respecting the horse, is evidence; but an acknowledgment to that effect made at another time is not so: it must be confined to the time of actual sale, when he was acting for his master. I think, the master having entrusted the servant to sell, he is entrusted to do all he can to effectuate the sale; and if he does exceed his authority in so doing he binds his master" (*x*).

Warranty by
a servant for-
bid to give
one.

If the servant of a *horsedealer* with express directions not to warrant, do warrant, the master is bound; because the servant having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed (*y*). And if a person keeping *livery stables* and having a horse to sell, directs his servant not to warrant him, and the servant does nevertheless warrant him, the master is liable

(*u*) Per Erskine, J., *Allen v. Denstone*, 8 C. & P. 760; *Peto v. Hague*, 5 Esp. 133.

(*x*) *Helger v. Hauke*, 5 Esp. 72.

(*y*) Per Bayley, J., *Pickering v. Bask*, 15 East, 45; 13 R. R. 364; *Brady v. Todd*, 9 C. B., N. S. 604.

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 (z). So where the owner of a horse sold by a *livery-stable keeper* with a warranty went to the buyer and requested to have the horse back, stating that he did not authorize the warranty of soundness, and the buyer refused to give it up, saying, "I know nothing of you, I bought the horse of Mr. Osborne"; such a refusal was held to be no waiver of the warranty (a).

If the owner of a horse 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 (b).

But if the master, under such circumstances, is unwilling to stand to the warranty given by his servant, he is bound to take back the horse and return the money if it has been paid (b). And on this point Lord Abinger, C. B., said, "Put the ordinary case of a servant employed to sell a horse, but expressly forbid to warrant him sound. Is it contended that the buyer, induced by the warranty to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract? This would be to say, that though the principal is not bound by the false representation of an agent, yet he is entitled to take advantage of that false representation, for the purpose of obtaining a contract beneficial to himself, which he could not have obtained without it" (c).

The general rule, then, in selling a horse by a servant or agent, appears to be the following:—That the master or owner is bound by a warranty given by his *servant* or agent at the time of sale, *without* his consent, and even *against* his express directions, if his servant is his general agent to carry on his business. But the master will not be bound by the warranty of the servant, unless the authority to give that warranty can be proved either to

Warranty by a stranger forbid to give one.

Master unwilling to stand by his servant's warranty.

Rule as to a servant binding his master.

(z) Per Ashurst, J., *Fenn v. Harrison*, 3 T. R. 760. See also *Howard v. Sheward*, L. R., 2 C. P. 148.

(a) *Best v. Osborne*, 2 C. & P. 74.

(b) Per Ashurst, J., *Fenn v. Harrison*, 3 T. R. 761; and *Scotland (Bank) v. Watson*, 1 Dow, 45; 14 R. R. 11.

(c) *Cornfoot v. Fowke*, 6 M. & W. 381; 55 R. R. 655.

Warranty by
a person en-
trusted to
deliver.

have been expressly or impliedly, *i.e.*, by implication of law, granted by the master.

Although a warranty given by a person entrusted to sell *primâ facie* binds the principal, the warranty of a person entrusted merely to deliver the thing sold is not *primâ facie* binding on the principal, but an express authority must be shown: and therefore, where a horse had been sold by A. to B., and A.'s servant, on delivering the horse to B., made certain statements, and signed a receipt for the price of the horse, containing a warranty, it was held, in an action on the warranty, that A. was not bound by the statement or receipt of the servant, as no express authority to give the warranty was shown (*d*). And where, on the purchase of a horse, the vendor had given a warranty of soundness *generally*, and the servant who was sent with the receipt to the agent of the other party inserted at his request, but without a special or general authority from his master, "Warranted sound to the regiment," and the horse was sound when delivered in London, but was in a violent *fever*, of which he soon afterwards died, when he reached Tewkesbury, where the regiment was quartered; it was held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands (*e*).

Agent em-
ployed to take
a warranty.

If an agent is employed to receive a horse, pay for it, and take a warranty, he has no authority to receive it without a warranty (*f*).

Action against
a pretended
agent.

An action in substance for the price of a horse may be brought by the seller against a pretended agent, in the following case. It was stated in the declaration, that in consideration that the plaintiff would send a pony to the defendant he would sell and deliver it to A.; the defendant undertook that he was authorized by A. to purchase it on his behalf; that the plaintiff sent the pony to the defendant, and was willing to sell it to A., but that the defendant had no authority from A. to purchase it (*g*).

Patent Defects.

Not covered
by a warranty.

A general warranty does not cover *patent defects*, being such as are obvious to the buyer. As if a horse warranted

(*d*) *Woodin v. Burford*, 2 Cr. & M. 391; 4 Tyrw. 264; 39 R. R. 802.
(*c*) *Strode v. Dyson*, 1 Smith, 400.

(*f*) *Jordan v. Norton*, 14 M. & W. 155.
(*g*) *Price v. Morgan*, 2 M. & W. 55.

perfect be *minus* a eye or a tail (*h*), or a house, warranted to be in perfect repair, be without roof or windows (*i*), or, "as if one sells purple to another, and saith to him that this is scarlet, this warrant is to no purpose, for that the other may perceive this, and this gives no cause of action to him. To warrant a thing that may be perceived by sight is not good" (*k*).

From these examples the proper principle regarding patent defects may clearly be drawn; they must be such defects as a man, unless he is perfectly incompetent to conduct business, cannot help observing. For where a person sees, or has the opportunity of seeing, goods before purchase, *caveat emptor* is the rule of law; and a man who does not perceive the loss of an eye or tail in a horse, or the absence of the roof or windows from a house, or does not distinguish between purple and scarlet by the light of day, cannot expect the law to give him any assistance, as every man making a bargain is expected to have ordinary perception. Whether a defect is patent or not, or the purchaser has used ordinary care, is a question for the consideration of the jury.

Although the loss of an eye is a breach of a warranty of soundness (*l*), it has been laid down, that "where one buys a horse upon warranting him to have both his eyes, and he have but one eye, he is remediless; for it is a thing which lies in his own *conscience*, and such warranty or affirmation is not material nor to be regarded" (*m*). But this seems to assume that the eye has entirely *disappeared*, or has been so *obviously* damaged, that it *must* lie in the *conscience* of the buyer; and nothing is said with regard to loss of sight, where there is little *apparent* injury to the eyes; for a horse may appear to the majority of people perfect in his eyes, and yet have lost the sight of one or both. Such is the case in *gutta serena*, vulgarly called "glass-eye" (*n*), which is a palsy of the *optic nerve* or *retina*, and being difficult of detection can certainly never be considered a *patent defect*.

This point seems to have been taken in an old case, where it is said, "*Lou jco vend chirall que ad null Ocnlus la null action gist; auterment lou il ad un counterfeit faur*"

(*h*) 2 F. Com. 165; and per Hank, J. Year Book, 13 Hen. 4, p. 1.

(*i*) *Dyer v. Hargrave*, 10 Vesey, 507; 8 R. R. 36.

(*k*) *Bailey v. Merrell*, 3 Bulst.

95.

(*l*) *Butterfield v. Borroughs*, 1 Salk, 211.

(*m*) Year Book, 13 Hen. 4, p. 1; *Bayley v. Merrell*, Cro. Eliz. 389.

(*n*) *Gutta serena*, ante, p. 93.

In what they consist.

How far the loss of an eye is patent.

"Bright eye."

et Bright Eye." "Where I sell a horse that has no eye, there no action lies; otherwise where he has a counterfeit, false and *bright eye*" (o). Thus it appears that a distinction is here made between a horse having no eye at all, and having a counterfeit, false or *bright* one. And probably by *bright eye* is meant *glass-eye* or *gutta serena*; and the words "counterfeit" and "false" may be an attempt of the reporter to explain an expression which he did not understand.

Convexity of eye.

Thus, too, in a case in which a convexity in the formation of the cornea of the eye made a horse short-sighted, and thence induced in him a habit of shying, Lord Campbell said that this was not such a defect as the purchaser was bound to take notice of. "There being an express warranty, he was not bound to examine so closely as to ascertain whether the cornea was so formed as to produce short-sight; the most prudent man could not be expected to do that" (p).

Where the buyer knows the defect.

But if a person purchase a horse *knowing* it to be blind, he cannot sue the seller on a general warranty of soundness, although he had warranted the animal to be sound in every respect (q).

Where defects are discussed.

Where the buyer observes some defects, and they are discussed by both parties before sale, and a warranty is given; if an action is afterwards brought for a breach of the warranty, it is a question for the jury to say whether the horse is sound in the terms of the warranty, saving those manifest and visible defects which were known to the parties. And then if he is sound with these exceptions, they must consider whether the effect which might be produced by any of those defects was contemplated or not, that is, whether under the circumstances of the case the seller undertook that they should not impede the natural usefulness of the horse. This appears in the following case, where an action was brought for a breach of warranty on the sale of a racehorse, the terms of which were, "And the said Mr. Wright (the defendant) doth hereby warrant the said horse to be sound wind and limb at this time." Two subjects, namely, crib-biting (r) and a splint (s) on the off foreleg, were discussed by the parties at the time of the bargain, and after that discussion, the

(o) *Southerne v. Howe*, 2 Rol. Rep. 5.

(p) *Holyday v. Morgan*, 28 L. J., Q. B. 9.

(q) *Margetson v. Wright*, 5 M. & P. 610; 33 R. R. 582.

(r) Crib-biting, ante, p. 84.

(s) Splint, ante, p. 107.

warranty in question was given. The horse soon became lame and afterwards broke down. On the case being tried, the jury returned a verdict for the plaintiff.

Tindal, C.J., in making a rule for a new trial absolute, said, "It is laid down in the older books, that where defects are apparent at the time of a bargain, they are not included in a warranty, however general the terms may be, because they can form no subject of deceit or fraud; and formerly the mode of proceeding for a breach of warranty was by an action of deceit grounded on an express fraud, and the averment in the declaration was *warrantizando vendidit*."

"Although, however, certain exceptions may be grafted on a contract of warranty, yet in this case no fraud or deceit can be attributed to the defendant, as the horse's defect was manifest, the splint not only being apparent, but made the subject of discussion before the bargain was made. If a person purchase a horse, knowing it to be blind, he could not sue the seller on a general warranty of soundness, although he had warranted the animal to be sound in every respect. The splint was known to both the plaintiff and the defendant, and the learned Judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension, if he had left it to them in the terms of the warranty to say whether the horse was, at the time of the bargain, sound wind and limb, saving those manifest and visible defects which were known to the parties; the jury might then have considered whether the effect which might be produced by the splint was contemplated or not" (t).

When the case was again tried the jury found for the plaintiff, as they thought the horse unsound at the time of the contract from the splint, which was in a very bad situation, pressing upon one of the sinews, and which would naturally produce lameness when the horse was put to work (u).

In a later case, in which the defendant sold a horse to the plaintiff with a general written warranty of soundness, but at the same time pointed out a splint which it had, and the horse subsequently became lame from the splint, it was held that the lameness was a breach of the warranty. Pollock, C. B., in his judgment, said, "The

(t) *Margetson v. Wright*, 5 M. & P. 610; 33 R. R. 582.

(u) *Margetson v. Wright*, 1 M. & Sco. 627; 33 R. R. 585.

rule is asked for on the ground that when you point out a splint to a purchaser, you except it out of the warranty; it may be so, if the horse be blind, or have any other patent defect, which is to be seen and is clear; but here it may well be that the defendant warranted that the splint should not grow into a lameness. A person buying a horse is often no judge of horses, and may say, 'I don't want to see the defects or blemishes of the horse, as I really know nothing about them; I want and must have a written warranty.' I do not see why this warranty should not be taken thus: 'I show you this splint, and I warrant the horse perfectly sound notwithstanding.' It may have been excepted in the warranty, but there is no exception at all. I think the defendant is liable on his warranty. This entirely agrees with the decision in *Margetson v. Wright* (x). Some splints cause lameness and others do not. A splint, therefore, is not one of those patent defects against which a warranty is inoperative." Bramwell, B., in the same case, in giving judgment for the plaintiff, based his decision upon the broader ground, that where the warranty is a written one, it cannot be modified by parol evidence to the effect that the defect existed at the time, and was therefore excluded from the warranty (y).

Conclusion to
be drawn
from the
cases.

The conclusion then to be drawn from the cases on this subject appears to be:—that the patent defects, which the warranty does not cover, and to which the doctrine of *caveat emptor* applies, must be so manifest and palpable, as to be necessarily within the knowledge and apprehension of the purchaser, and also such defects as at the time of sale either are, or will inevitably produce, an unsoundness. And as Bramwell, B.'s, opinion, that parol evidence is inadmissible to modify the written warranty to the extent of proving the existence of patent defects at the time of the warranty being given (y), appears to be well founded, the written warranty must be taken to contain all the terms of the contract, and evidence as to patent defects will only be receivable in cases where the warranty is not in writing.

Suspected
defects.

Where the buyer suspects some defect and wishes to examine and try the horse for it, but the seller objects and says, "I will warrant him," he is liable for the defect. For where an action *on the case* was brought when a horse

(x) *Margetson v. Wright*, 1 M. & Sco. 627; 33 R. R. 585.

(y) *Smith v. O'Brien*, 11 L. T. 346.

warranted sound had turned out "*shoulder-tied*," it was contended that an action would not lie, because the defect was visible. But Montague, C.J., said, "This was the ground, that the plaintiff wished to have ridden the the horse, but the defendant said 'I will warrant him sound.'" And Noy, J., said, "That is the distinction, where the defect is visible" (z).

Where there is no opportunity of inspecting the commodity, the maxim *caveat emptor* does not apply; and the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned between them (a). This has been laid down with regard to horses some centuries ago, for we find in the Year Book it is said by Thirning, J., "If I buy a horse of you in a different place from where the horse is, through the confidence I have in you, and you warrant him sound in all his parts, when he is blind, I shall have a good action of deceit against you" (b). Therefore, at the present day, if A. in London were to buy a carriage horse of B. in Yorkshire, warranted sound, and the horse on its arrival were found to have some *patent defect*, such as the want of an ear or tail, A. would not be bound to take it, because being maimed, it could not be said to answer the description of the horse he ordered; and by taking a warranty he has done everything in his power to protect himself (c).

Purchase
without
inspection.

In America, a general warranty was held to extend to patent defects, where access to the horse was prevented by the seller by means of a trick, the buyer being unaware of the defect (d). As to the correctness of this decision there can be no doubt, as it is clear that the maxim *caveat emptor* would be inapplicable to such a case (e).

Inspection
prevented by
fraud.

(z) *Dorrington v. Edwards*, 2 Rol. 188.

(a) *Gardiner v. Gray*, 4 Camp. 145; 16 R. R. 764.

(b) Year Book, 13 Hen. 4, p. 1.

(c) See *Gardiner v. Gray*, 4 Camp. 145; 16 R. R. 764. See

also *Jones v. Just*, L. R., 3 Q. B. 197; 37 L. J. Q. B. 89; 18 L. T. 208.

(d) *Kenner v. Harding*, 28 Amer. Rep. 615.

(e) See *Margetson v. Wright*, 5 M. & P. 610; 33 R. R. 582.

CHAPTER VI.

WARRANTY DISTINGUISHED FROM REPRESENTATION.

Representa-
tion intended
as a warranty.

It is sometimes not very easy to determine whether an action for breach of warranty should be brought against the vendor of a chattel, or whether the proper remedy be by an action for misrepresentation, the rule of law being that every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended (a).

Recommendation of the
seller.

In many cases, however, even the positive recommendation of the seller is not, from the nature of the case, to be regarded as a warranty, but merely as an expression of his belief or opinion on a matter of which he can have no certain knowledge, and on which the purchaser is generally capable of forming an opinion (b); the rule being, *commendatio simplex non obligat*.

Affirmation as
to value.

Therefore a simple affirmation or assertion by the vendor, as to the value or quality of his goods, does not amount to a warranty, unless it be made and received as such, although the purchaser may have bought the goods on the faith of such recommendation (b).

Distinction
between a
warranty and
a representa-
tion.

The distinction between a *warranty* and *representation* is pointed out in a note to the case of *Gorham v. Sweeting* (c), and was also laid down by Best, C.J., in the following case. An action of *assumpsit* was brought on the warranty of a horse; no direct evidence was given of what took place when the contract was made, but letters passed between the plaintiff and defendant, in which the plaintiff writes, "You well remember that you represented the horse to me as five years old;" to which the defendant answers, "The horse is as I represented it." Best, C.J. said, "The question is, whether I and the

(a) 2 Smith's Leading Cases, 11th Ed. 55; *Power v. Barham*, 4 A. & E. 473; 43 R. R. 406; *Shepherd v. Kain*, 5 B. & Ald. 240; 24 R. R. 344; *Freeman v. Baker*, 2 N. & M. 446; 39 R. R. 631.

(b) *Chandelor v. Lopus*, Cro. Jac. 4; Rol. Abr. 101.

(c) *Gorham v. Sweeting*, 2 Wms. Saund. 200 c.; and see per Martin, B., *Benham v. United Guarantee Co.*, 7 Ex. 753; 86 R. R. 821.

jury can collect that a warranty took place; I quite agree that there is a difference between a *warranty* and a *representation*, because a *representation* must be *known* to be wrong. The plaintiff in his letter says, 'You remember you represented the horse to me as five years old.' To which the defendant's answer is, 'The horse is as I represented it.' Now if the jury find that this occurred at the time of sale, and without any qualification, then I am of opinion that it is a *warranty*. If it occurred before, or if it was qualified, then it must be taken to be a *representation* and not a *warranty*." His Lordship then left the question to the jury, telling them "that if they found that the defendant at the sale gave an undertaking to the effect mentioned in the letters, then such undertaking was a *warranty*." The jury returned a verdict for the plaintiff (d).

A representation to amount to a warranty must be shown not only to have been intended to form part of the contract, but also to have been made pending the contract. And therefore where A. sent his horse to Tattersall's for sale, by auction without warranty, and on the day before the sale found B. in the stable examining the horse's legs, and A. said to him, "You have nothing to look for; I assure you he is perfectly sound in every respect"; whereupon B. replied, "If you say so, I am perfectly satisfied." Upon the faith of this representation (admitted to have been made in good faith) B. became the purchaser. It was held that this was no warranty, as this representation was not intended to form part of the contract of sale, nor was it made pending the contract. For the sale being by auction, the negotiations between the parties had not commenced, inasmuch as the contract began only when the horse was put up for sale, and ended when he was knocked down to the highest bidder (e).

Where representation amounts to a warranty.

Where the words "In foal to Warlock" were appended to the name of a mare in a printed catalogue of horses to be sold by auction; and other mares in the same catalogue were described as having been "served" by or "stinted to" certain horses; it was held that, looking to the expressions used with respect to other mares and to the nature of the fact represented, the

(d) *Salmon v. Ward*, 2 C. & P. 211; 31 R. R. 664; and see *Care v. Coleman*, 3 M. & Ry. 3; 32 R. R. 709.

(e) *Hopkins v. Tanqueray*, 23 L. J., C. P. 162. See also *Chalmers v. Harding*, 17 L. T. 571.

Question to
be put to
the jury.

words must be taken as intended by the parties to amount to a warranty (*f*).

The proper question for the jury in a case in which the effect of a statement made during the sale is the point at issue, is whether it is or is not intended to form part of the contract. In the case of *Foster v. Smith* (*g*), an agent sold a mare to C., and having no express authority from the owner to warrant her, refused to do so, but at the time of the sale told C. that "if the mare was not all right she was not his." C. thereupon paid the price, which was received by the owner. The mare proving unsound, C. returned her to the agent, and sued the owner in the County Court for a return of the money. Jervis, C.J., in delivering the judgment of the Court of Common Pleas, said that the proper question to leave to the jury in this case was whether it was part of the contract that the mare should be returned, if she proved unsound: if so, and she were returned, there would be a failure of consideration, and the plaintiff would be entitled to recover back the price.

Rule as to
warranty and
representa-
tion.

The Judges in the Exchequer Chamber laid down a rule with regard to *warranty* and *representation* which appeared to them to be supported so clearly by the early as well as the more recent decisions, that they thought it unnecessary to bring them forward in review. The judgment was pronounced by Tindal, C.J., who said, "The rule, which is to be derived from all the cases, appears to us to be, that where upon the sale of goods the purchaser is satisfied without *requiring a warranty* (which is a matter for his own consideration), he cannot recover upon a mere *representation* of the quality by the seller, unless he can show that the *representation* was bottomed in *fraud*" (*h*).

Mere expres-
sion of
opinion.

In *Jendwine v. Slade* (*i*), where two pictures were sold, described in a catalogue as one by Claude Loraine (*k*), and the other by Teniers (*l*), and they turned out to be copies, Lord Kenyon seemed to think that the *representation* of a fact of which the seller could have *no certain knowledge* must be taken as a mere *expression of opinion*, as these were very old painters, and there was no way of tracing the pictures.

(*f*) *Gee v. Lucas*, 16 L. T. 357.

(*g*) *Foster v. Smith*, 18 C. B. 156.

(*h*) *Ormrod v. Huth*, 14 M. & W.
664.

(*i*) *Jendwine v. Slade*, 1 Esp.
572; 5 R. R. 754.

(*k*) Claude Loraine died in 1682.

(*l*) Teniers died in 1694.

Where a man not knowing the age of a horse, but having a written *pedigree*, which he received with him, said at the time of sale that he sold him *according* to that *pedigree*, *knowing nothing* further than he learnt therefrom, the mark being out of his mouth when he bought him, it was held to be *no warranty*, and that he was not liable to an action on account of the *pedigree* turning out false (m).

Selling according to pedigree.

But a written instrument may consist *partly* of a *warranty* and *partly* of a *representation*. Thus, where the following receipt was given on the purchase of a horse, "Received of Robert Dickenson 100*l.* for a bay gelding got by *Cheshire Cheese*, and warranted sound," and an action was brought on an alleged breach of warranty, on the ground that he was not bred in the manner above described, Dallas, C.J., held that the *warranty* was confined to the *soundness*, and the statement that he was got by *Cheshire Cheese* was a mere *representation* (n). Also, where a receipt on the sale of a colt contained the following words after the date, name and sum, "for a grey four years old colt warranted sound in every respect," and the colt turned out to be only three years old, Tindal, C.J., nonsuited the plaintiff, who had brought an action on that ground, and said, "I am of opinion that the first part of the receipt contains a *representation* and the latter part a *warranty*. In the case of a *representation*, to render liable the party making it, the facts stated must be untrue to his *knowledge*; but in the case of a *warranty* he is liable whether they are within his *knowledge* or not." The Court of Common Pleas discharged a rule *nisi* for setting aside the nonsuit, and Alderson, J., said, "A *warranty* must be complied with whether it is material or not, but it is otherwise as to *representation*. If the word '*warranted*' had been the *last word*, I should have held that it extended to the whole" (o). However, in a previous case, where the plaintiff brought an action to recover the price of a horse sold under the following warranty, "a black gelding, about five years old, has been constantly driven in the plough—*warranted*," it was held that the terms of such warranty applied to the *soundness* of the horse rather than to the nature of his employment (p).

Partly a warranty and partly a representation.

(m) *Dunlop v. Waugh*, 1 Peake, 167.

(n) *Dickenson v. Gapp*, H. T. 1821, cited in *Budd v. Fairmanner*, 1 M. & Sc. 78; 34 R. R. 619.

(o) *Budd v. Fairmanner*, 5 C. & P. 78; 34 R. R. 619.

(p) *Richardson v. Brown*, 8 Moore, 338; 1 Bing. 314; 25 R. R. 648.

So, also, in the case of *Anthony v. Halstead* (q), the following document, viz.: "Received from A. the sum of 60*l.* for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon," was held not to be a warranty that the horse was quiet to ride and drive.

The jury must decide between a warranty and a representation.

It is a question for the jury whether the description of an article in a catalogue, a receipt, or a bill of parcels, amounts to a *warranty*, or is merely a matter of *description*, or intimation of an opinion, and it should be submitted to the jury with all the attendant circumstances. Thus, where a picture had been sold as a Rembrandt, an action was brought on a bill of exchange of which the picture was the consideration, and it appeared doubtful on the evidence whether there had been a *warranty* or only a *representation*; Tindal, C.J., in summing up, said, "The question is, whether you think that a *warranty* was in fact given, and that it was broken? For, if you do, you must find your verdict for such sum as you think to be the *real value* of the picture; but if there was no express warranty, but only a *representation*, then, as there is no evidence that the plaintiff did not *believe* that the picture was not a Rembrandt, he will be entitled to recover the full amount of the bill," which the jury found (r). But in a case where pictures were sold with a bill of parcels, containing the words "four pictures, views in Venice, Canaletti," the jury thought this a *warranty*, and refusing a rule for a new trial, Lord Denman, C.J., said, "It is for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a *warranty* of genuineness or conveyed only a *description* or an expression of opinion. I think that their finding was right; Canaletti (s) is not a very old painter" (t).

Percival v. Oldacre,

So, too, in the case of *Percival v. Oldacre* (u) the plaintiff saw a horse at Bank's, in Gray's Inn Lane, belonging to the defendant, which was for sale. He afterwards saw the defendant, told him that he had seen the horse, and asked him "What about the horse?" The defendant said that

(q) 37 L. T. 433.

(r) *De Schwanberg v. Buchanan*, 5 C. & P. 343.

(s) Canaletti died in 1768, and Claude Lorraine and Teniers (the younger), mentioned in *Jendwine*

v. Slade, died, the former in 1682, the latter in 1694.

(t) *Power v. Barham*, 4 A. & E. 473; 43 R. R. 406.

(u) *Percival v. Oldacre*, 18 C. B., N. S. 338.

he was a good harness horse, and that he had been bought to match for Baron Rothschild for 85*l.*, and that he was only selling him because he would not match. The plaintiff on this went to Bank's, and bought the horse eventually for 65*l.* The horse, on being put in harness, turned out to be a kicker, and kicked the plaintiff's trap to pieces. He was afterwards sent to a stable, and sold for 40*l.*, and the action was brought for the difference. The jury found a verdict for the plaintiff for the 25*l.* claimed. In moving for a new trial it was contended that there was no evidence of warranty, but Erle, C.J., said that Byles, J., who tried the cause, was of opinion that there was evidence to go to the jury of a warranty, and that the verdict therefore ought not to be disturbed.

In the case of *Behn v. Burness* (x) Williams, J., in delivering the judgment of the Exchequer Chamber, gave the following lucid exposition of the legal characteristics of representation as distinguished from warranty. He said, "Properly speaking, a representation is a statement or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Although it is something contained in a written instrument, it is not an integral part of the contract, and consequently the contract is not broken, although the representation proves to be untrue, nor (with the exception of the case of policies of insurance, or at all events marine policies, which stand upon a peculiar and anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, or with a reckless ignorance whether it was true or untrue (y). If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree sanctioned by judicial authority (z), that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, a representation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract on that ground is voidable. Although representations

*Behn v.
Burness.*

Representa-
tion.

(x) *Behn v. Burness*, 32 L. J., Q. B. 201, recognised and approved by Erle, C.J., *Mullan v. Radloff*, 5 N. R. 54.

(y) *Elliott v. Von Glehen*, 18

L. J., Q. B. 221; *Wheelton v. Hardisty*, 27 L. J., Q. B. 241.

(z) *Barker v. Windle*, 6 EL & BL 675, 680.

Construction
of, when in
writing.

are not usually contained in the written instrument of contract, yet they sometimes are, but it is plain that their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in a written statement is a mere representation, or whether it is a substantive part of the contract. This is a question of construction, which the Court and not the jury must determine.

Warranty.

"But with respect to statements in a contract descriptive of the subject matter of it, or of some material incident thereof, the true doctrine established by principle as well as by authority appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract (a), it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it (b), provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, perhaps ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement, for the breach of which a compensation must be sought in damages. Accordingly, if a specific thing has been sold with a warranty of its quality, under such circumstances the property passes by the sale; the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken, unless there is a special stipulation to that effect in the contract (c), but must have recourse to an action for damages in respect of the breach of warranty.

"But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been

(a) *Foster v. Smith*, 18, C. B. L. J., Q. B. 241.
156. (c) *Bannerman v. White*, 10
(b) *Wheelton v. Hardisty*, 27 C. B., N. S. 844.

performed. Still, if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for the breach of which he may bring an action to recover damages."

CHAPTER VII.

FRAUDULENT CONTRACTS.

Where the law does not interfere.

IN many cases, where an attempt is made by one man to overreach another, the law does not interfere; because when it is a mere struggle between mind and mind, caution and wariness, if fairly exercised, may often be held sufficient to obviate the effects of cunning and duplicity (a).

Where several persons combine to cheat.

But where several combine for the purpose of riding and assisting each other in outwitting a single individual, there the parties stand on very different terms, and that which ordinary prudence might otherwise prevent, becomes oftentimes a dangerous and powerful conspiracy, difficult to be detected, and most disastrous in its consequences (a).

Conspiracy to cheat indictable.

Where there is *collusion* between two or more to cheat in the sale of a horse, an *indictment* for a conspiracy may be maintained (b), because it is such an offence as affects the public, and against which no ordinary care or prudence can guard (c).

There must be evidence of concert.

But no indictment lies for a conspiracy without evidence either direct or indirect (d) of concert between the parties to effectuate a fraud. Thus in the case of *Rex v. Pywell* (e), where a false warranty had been given, Lord Ellenborough directed an acquittal, because one of two defendants, though acting in the sale, was not shown to have been aware that a fraud was practised (f).

What evidence has been held insufficient.

So on an indictment against A., B., C., D., E., F., G., and H., for conspiracy to cheat M. by selling a glandered horse as a sound horse, the evidence was that A. having previously cheated M. by selling him a kicking horse, the defendants B., C., D., and E. obtained that horse from M. in exchange for a glandered horse which he subsequently

(a) *Reg. v. Bailey*, 4 Cox, C. C. 397.

(b) *Pasley v. Freeman*, 3 T. R. 58; 1 R. R. 634; *Reg. v. Sheppard*, 9 C. & P. 123.

(c) *Rex v. Wheatly*, 2 Burr. 1127.

(d) *Reg. v. Read*, 6 Cox, C. C. 134.

(e) *Rex v. Pywell*, 1 Stark, N. P. C. 402.

(f) See *Reg. v. Kenrick*, 5 Q. B. 62.

sold. A., accompanied by G., afterwards sold M. another horse, in which transaction the latter was again defrauded. Some evidence was given to show that A. was frequently in company with some of the other defendants, and that he was aware of a previous sale of the glandered horse by them, but there was no other evidence to connect him with its sale to M. It was held by Cresswell, J., that in the absence of any evidence clearly leading to the conclusion that A. was a party to that sale, there was no evidence of a conspiracy to go to the jury against him (g). Where on the sale of two horses the prosecutor was told by both the defendants that certain horses had been the property of a lady deceased, and were then the property of her sister, that they had never been the property of a horse dealer, and were quiet and tractable, all of which was absolutely false, the defendants were found guilty of conspiring to obtain money by false pretences, as they knew that nothing but a full belief of the truth of the above statements would have induced the prosecutor to make the purchase, he having repeatedly informed them that he wanted the horses for his daughter's use (h).

Conspiring to obtain money by false pretences.

An indictment lies for conspiracy, where persons have conspired to induce a creditor by false representations to forego part of his claim. Thus an indictment was held to be good which alleged that S. sold B. a mare for 39l.; that while the price was unpaid, B. and C. conspired by false and fraudulent representations made to S. that the mare was unsound, and that B. had sold her for 27l., to induce S. to accept 27l., instead of the agreed-on price of 39l., and thereby to defraud S. of 12l. (i).

Conspiring to induce a creditor to forego his claim.

If one man alone sell an unsound horse for a sound one, it is a mere private imposition, and no indictment can be maintained, because the buyer should be more on his guard (k). But if it be such an offence, as, if practised by two, would be the subject of an indictment for a conspiracy, the vendor is civilly liable in an action for reparation of damages at the suit of the purchaser, because collusion is not necessary to constitute fraud (l).

Where only one person cheats, an action lies.

Chandelor v. Lopus (m) is a well-known case on the subject of fraudulent representation. It was an action on

Chandelor v. Lopus.

(g) *Reg. v. Read*, 6 Cox, C. C. 1128.

135.

(h) *Reg. v. Kenrick*, 5 Q. B. 63.

(i) *R. v. Carlisle*, 23 L. J., M. C.

109.

(k) *Rea v. Wheatly*, 2 Burr.

1128.

(l) *Pasley v. Freeman*, 3 T. R.

58; 1 R. R. 634.

(m) *Chandelor v. Lopus*, Cro.

Jac. 1.

the case against a jeweller for selling a jewel, affirming it to be a Bezoar stone, when really it was not one. All the Justices and Barons, except Anderson, held "that the bare affirmation that it was a Bezoar stone, without warranting it to be so, was no cause of action; and that, although the seller knew it to be no Bezoar stone, it was not material, because everyone, in selling his wares, will affirm that they are good, or that the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the same time as the sale."

Remarks on
that case.

But the opinion of Anderson is now held to have been a correct one; for he said, "The deceit in selling it as a Bezoar, whereas it was not so, is cause of action." And the following remarks are made upon this case in Smith's *Leading Cases* (n):—"If the plaintiff in this case were to declare upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended (o). If not, he would at all events succeed if he were to sue in tort, laying a *scienter*, since the fact of the defendant's being a jeweller would be almost irresistible evidence that he knew his representation to be false. When *Chandelor v. Lopus* was decided, as the action of *assumpsit* was by no means so distinguishable from *case*, ordinarily so called, as at present,—so the distinction was not clearly recognized, which is now however clearly established, between an action on a warranty express or implied, which is founded on the defendant's promise that the thing shall be as warranted, and in order to maintain which it is unnecessary that he should be at all aware of the fallacious nature of his undertaking, and the action upon the case for false representation, in order to maintain which the defendant must be shown to have been actually and fraudulently cognizant of the falsehood of his representation, or to have made the representation fraudulently, without belief that it was true; actions of the former description then being usually framed in tort, under the name of actions for deceit. However, the main doctrine laid down in *Chandelor v. Lopus* has never since

(n) 2 Smith's *Leading Cases*, 11th Ed. 55.

(o) See *Power v. Barkham*, 4 A. & E. 473; 43 R. R. 406; *Shepherd*

v. Kain, 5 B. & Ald. 240; 24 R. R. 344; *Freeman v. Baker*, 2 N. & M. 446; 39 R. R. 651.

been dispensed, *viz.*, that the plaintiff must either declare upon a contract, or, if he declare in *tort* for a misrepresentation, must aver a *scienter*. That such an action is maintainable when the *scienter* can be proved, though there be no warranty, is now (notwithstanding the dictum in *Chandelor v. Lopus*) well established" (p).

Therefore where a person has been cheated or deceived by fraud or artifice in purchasing a horse, his proper remedy against the vendor is an action for fraudulent misrepresentation or deceit (q). Because such action lies where a man does any deceit to the damage of another (r).

Form of action.

The foundation of this action is *fraud* and *deceit* in the defendant, and *damage* to the plaintiff. *Fraud* without damage or *damage* without fraud gives no cause of action, but where these two *concur* an action lies (s).

Foundation of the action.

Fraud generally consists either in the *misrepresentation* or *concealment* of a material fact. But what does or does not amount to fraud depends very much on the facts of each particular case, on the relative situation of the parties, and on their means of information (t).

In what fraud consists.

To support the action there must always be proof of *moral fraud* (u): because where there is no warranty, the *scienter* or *fraud* is the gist of the action. Thus it was held that an action *on the case* could not be maintained against the defendant for selling a horse as his own, when in truth it belonged to A. B.; because the plaintiff could not prove that the defendant *knew* it to be the horse of A. B., for it appeared that the defendant had bought it in Smithfield Market, but had neglected to get it legally tolled (x).

There must be moral fraud.

Fraud gives a cause of action, if it leads to any sort of damage; but it avoids contracts only where it is the ground of the contract, and where, unless it has been employed, the contract would never have been made (y).

Effect of fraud.

The facts to constitute fraud must be found by the

How the question of fraud is to be decided.

(p) *Dunlop v. Wagh*, 100ke, 137; *Jenlwine v. Slade*, 2 Esp. 572; 5 R. R. 754; *Dobell v. Stevens*, 3 B. & C. 625; 27 R. R. 441; *Fletcher v. Boeshker*, 2 Stark. N. P. C. 561; 20 R. R. 735.

(q) *Ree v. Wheatly*, 2 Burr. 1128.

(r) Com. Dig. tit. Action upon the Case for a Deceit, A. 1.

(s) Per Croke, J., *Bailey v. Merrell*, 3 Bulst. 95. See *Barry v. Croskey*, 2 J. & H. 21.

(t) Jilt. Contr., 14th Ed. 575.

(u) Per Parke, B., *Taylor v. Ashton*, 11 M. & W. 413; 63 R. R. 635; per Lord Wensleydale, *Smith v. Kay*, 7 H. L. Cas. 775.

(x) *Springwell v. Allen*, Ayley, 91, cited in *Williamson v. Allison*, 2 East, 448.

(y) Per Lord Wensleydale, *Smith v. Kay*, 7 H. L. Cas. 775; per Byles, J., *Holton v. Brown*, 9 C. B., N. S. 445.

jury; but whether certain facts as proved amount to fraud is a question of law; and therefore legal fraud may exist, when the jury have found that the intention of the defendant was not fraudulent (z).

Falschood must be followed by damage.

If a person knowingly utters a falsehood with intent to deprive another party of a benefit and acquire it to himself (a), or with intent to induce another party to do an act which results in his loss, and damage naturally flows to the other party from this belief, an action lies (b).

A naked lie no cause of action.

But an action cannot be supported for telling a bare *naked lie*; and that is defined to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every *deceit* comprehends a *lie*; but a *deceit* is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion and does occasion to another person (c).

Presumption that person defrauded was influenced by the misrepresentation.

It is not necessary for the person defrauded to give direct proof that he was influenced by the misrepresentation. And upon this point Lord Denman, C.J., said, "If a fraudulent representation is published, it must be presumed that a party who acts according to such a representation was influenced by it" (d). But this appears to be rather an inference for the Court than a question for the jury, for in the case of *Feret v. Hill* (e), though the jury found that the plaintiff had obtained a lease by fraud and misrepresentation, yet the Court entered a verdict for the plaintiff on the ground that the fraud was collateral, and that it did not go to the root of the contract.

Due caution must always be observed.

In considering the question of fraud, the Courts have endeavoured on the one hand to repress dishonesty, and on the other they have required that, before relieving a party from a contract on the ground of fraud, it should be

(z) See per Platt, B., *Murray v. Mann*, 2 Ex. 539; 76 R. R. 686; *Milne v. Marwood*, 15 C. B. 778; *Polwill v. Walter*, 3 B. & Ad. 114. As to the expression "legal fraud," see *Heir v. Bell*, 3 Ex. D. 238, 343, per Bramwell, L.J.; *Derry v. Peck*, 15 App. Cas. 337, 365, 372, per Lord Herschell.

(a) *Barley v. Wulford*, 9 Q. B. 197; 72 R. R. 218.

(b) *Longueval v. Holliday*, 6 Ex. 766; 86 R. R. 459; and see *Lery*

v. Langridge, 4 M. & W. 337.

(c) Per Buller, J., *Pasley v. Freeman*, 3 T. R. 56; 1 R. R. 634; and *Mummev v. Paul*, 1 C. B. 322.

(d) *Watson v. Earl of Charlmont*, 12 Q. B. 862.

(e) *Feret v. Hill*, 23 L. J., C. P. 185. But see the comments upon this case in *Canham v. Barry*, 24 L. J., C. P. 160; and in *R. v. Saddlers Co.*, per Blackburn, J., 32 L. J., Q. B. 343.

made to appear that in entering into such a contract he exercised a due degree of caution, because *vigilantibus non dormientibus succurrunt jura* (f').

Therefore, to constitute fraud there must be an assertion of something false within the knowledge of the person asserting it, or the suppression of that which is true, and *which it was his duty to communicate*. So if a person purchases an article which is to be manufactured for him, and the manufacturer delivers it with a patent defect which may render it worthless, if the purchaser has had an opportunity of inspecting it, but has neglected to do so, the manufacturer is not guilty of fraud in not pointing out the defect (g).

Not fraud to suppress what there is no duty to communicate.

In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false (h).

Requisites to an action for false representation.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not amount necessarily to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit (i).

But to support an action *ex contractu*, for a breach of warranty, it is not necessary to prove that the representation was false to the knowledge of the seller. It is sufficient that it was false in fact. For where a warranty is given, by which the party undertakes that the article sold shall, in point of fact, be such as is described, no question can be raised upon the *scienter*, upon the fraud or wilful misrepresentation (k).

Or on breach of warranty.

If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agent, he cannot be allowed to say he was deceived by the seller's representations, the rule being *caveat emptor*, and the knowledge of his agent being as binding on him as his own knowledge (l).

Caveat emptor.

(f) See Chit. Contr. 14th Ed. 575; *Shrewsbury v. Blount*, 2 Scott, N. R. 588; 58 R. R. 446.

337; 58 L. J., Ch. 864; 61 L. T., 265; 38 W. R. 33.

(i) *Ibid.*

(g) *Horsfall v. Thomas*, 1 H. & C. 90; *Smith v. Hughes*, L. R., 6 Q. B. 597; 40 L. J., Q. B. 221; 25 L. T. 329.

(k) *Attwood v. Small*, 6 C. & F. 444, 445; 49 R. R. 115.

(l) *Attwood v. Small*, 6 C. & F. 232; 49 R. R. 115.

(h) *Derry v. Peek*, 15 App. Cas.

A visible defect and a nude assertion.

Thus then there are cases of two sorts, in which, though a man is deceived, he can maintain no action. The first class of cases is where the affirmation is that the thing sold has not a *defect* which is a *visible* one; there the imposition and the fraudulent intent are admitted, but there is no *tort*. The second kind of cases is where the affirmation is (what is called in some of the books) a *nude assertion*; such as the party deceived may exercise his own judgment upon. For where it is a mere matter of opinion, he ought to make inquiries into the truth of the assertion, and it becomes his own fault from *laches* if he is deceived (*m*).

Dealing talk.

Assertions of this sort are what is called "*dealing talk*," such as is used more or less by shopkeepers and dealers of every description. For instance, a *horsedealer* tells his customer that a horse worth 40*l.* is "worth a hundred guineas," or that a bad, clumsy goer has "fine action," or is a "clever little horse." And a person who allows himself to be imposed upon by such assertions has no remedy against the vendor. Thus it appears in the following case that J. S., who had a term for years, affirmed to J. D. that the term was worth 150*l.* to be sold, upon which J. D. gave 150*l.* and afterwards could not get more than 100*l.* for it, and then brought his action. It was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. *But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would then have been otherwise (n).*

Collateral fraud does not avoid a deed.

The Court will not set aside a deed on the ground of previous or collateral fraud, unless the party is deceived with regard to the execution of the deed itself, for the representation must be as to matters material, and not collateral only, to the contract (*o*).

A foolish bargain.

If the *folly* of a contract be *extremely* gross, the circumstance will tend, if there be other facts in corroboration, to establish a case for relief on the ground of *fraud*; but

(*m*) 1 Rol. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; *Bailey v. Merrell*, 3 Bulst. 95; and per Grose, J., *Pasley v. Freeman*, 3 T. R. 54; 1 R. R. 634.

(*n*) *Harvey v. Young*, Yelv. 20; cited per Grose, J., *Pasley v. Free-*

man, 3 T. R. 55; 1 R. R. 634.

(*o*) *Ferri v. Hill*, 23 L. J., C. P. 185; *Canham v. Barry*, 24 L. J., C. P. 100. See, too, per Blackburn, J., *R. v. Saddlers Co.*, 32 L. J. Q. B. 337, 343.

mere folly and weakness, or want of judgment, will not defeat a contract, even in equity (*p*).

But a vendor is unquestionably liable to an action of deceit, if he *fraudulently* misrepresents the quality of the thing sold to be other than it is in some particulars, which the buyer had not equal means with himself of knowing (*q*); and the mere possession of the means of knowledge by the vendee does not necessarily, under all circumstances, oust the vendor's liability for a false and fraudulent representation (*r*).

Representa-
tion known to
be untrue.

Certain misrepresentations about a horse on sale at a repository were made by the defendant to the plaintiff, about four o'clock in the afternoon. On the morning of the next day the defendant accompanied the plaintiff to the auction yard, and pointed out the horse, saying, "That is the horse." On his being put up to auction the plaintiff bought him, and he turned out to be unserviceable. It was held that the plaintiff was entitled to recover damages from the defendant, as the jury were satisfied that the defendant *knew* of the falseness of the representations, and that the fact of the sale having been made by an auctioneer made no difference (*s*).

Made before
a sale by
auction.

Where the purchaser and his friend were the only bidders at an auction, the rest of the company being deterred from bidding by the purchaser stating to them that he had a claim against, and had been ill-used by, the late owner of the article, it was held that such purchaser did not acquire any property against the vendor under such sale (*t*).

Made by a
bidder at an
auction.

It signifies nothing whether a man represents a thing to be different from what he *knows* it to be, or whether he makes a representation which he does not *know* at the time to be *true* or *false*, if in point of fact it *turns out* to be *false* (*u*); because there may undoubtedly be a *fraudulent* representation, if made dishonestly, or that which the party does not *know* to be *untrue*, if he does not *know* it to be *true*, or at least has not good grounds for *believing* it to be *true* (*x*).

Representa-
tion not
known to be
true

(*p*) *Milnes v. Cusley*, 8 Price, 620; *Prebble v. Boyhurst*, 1 Swanst. 329.

(*q*) Per Lord Ellenborough, C.J., *Vernon v. Keys*, 12 East, 637; 11 R. R. 499.

(*r*) *Ferrier v. Peacock*, 2 F. & F. 717.

(*s*) *Bardell v. Spinks*, 2 C. & K.

646. But see *Hopkins v. Tanqueray*, 23 L. J., C. P. 162, ante, p. 149.

(*t*) *Fuller v. Abrahams*, 3 B. & Bing. 116; 23 R. R. 626.

(*u*) Per Lord Mansfield, C.J., *Schneider v. Heath*, 3 Camp. 508; 14 R. R. 825.

(*x*) Per Parke, B., *Taylor v.*

A well-grounded belief.

But to render a person liable to an action for false and fraudulent representations, it is not enough to show that the representations are false. If he acted upon a fair and reasonably well-grounded belief that they were true, he is not responsible for them, however unfounded they may turn out to be (y).

Delusion affecting the contract.

It has been held that even the mere *knowledge* that the other party is labouring under a *delusion* which materially affects the contract, when the vendor suffers him to be operated upon by that delusion, makes the contract void (z).

Representation to prevent inquiries.

The seller, however, is undoubtedly liable, where he makes such *misrepresentation* as induces the buyer to forbear making those inquiries, which for his own security and advantage he would otherwise have made (a).

Representation through a third party.

Where a *representation* is made and a fraud practised through the medium of a *third party*, and damage has resulted, the vendor is liable to an action; and this was so held by the Court of Common Pleas upon the following facts:—It appeared that the defendant, who was about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were worth 180l. a month; and B., to the knowledge of the defendant, had communicated the representation to the plaintiff, who in consequence became the purchaser of it, and afterwards found that the receipts had not been worth so much (b).

Representation by a third party.

Where a *third party* makes a fraudulent *representation* with regard to an article about to be sold, he is liable to the purchaser. Thus where the plaintiff was about purchasing a horse from a party who warranted him sound, and who, for the corroboration of his statement, referred him to the defendant, who warranted the horse sound in the wind: Alderson, B., said, "the merits are, whether or not the defendant made a *fraudulent representation*. It is proved that he did. He comes here to defend himself

Ashton, 11 M. & W. 413; 63 R. R. 635; and per Lord Cairns in *Reese River Silver Mining Co. v. Smith*, L. R., 4 H. L. 64, 69; 39 L. J., Ch. 849.
(y) *Shrewsbury v. Blount*, 2 Scott, N. R. 588; 58 R. R. 446.
(z) *Hill v. Gray*, 1 Stark. N. P. C. 434; 18 R. R. 802.
(a) Per Lord Ellenborough, C. J., *Vernon v. Keys*, 12 East, 367; 11

R. R. 499.

(b) *Pilmore v. Hood*, 5 Bing. N. C. 97; 50 R. R. 622. See also *Swift v. Winterbottom*, L. R., 8 Q. B. 244, 253; 42 L. J., Q. B. 111; *Swift v. Jivesbury*, L. R., 9 Q. B. 301; 43 L. J., Q. B. 56—Ex. Ch.; *Richardson v. Sylvester*, L. R., 9 Q. B. 1; 43 L. J., Q. B. 1.

from the charge of having made a fraudulent representation on the occasion of the sale." The jury found a verdict for the plaintiff (c).

An action, however, does not lie for a false representation, whereby a party being induced to purchase the subject-matter of the representation even from a third party, has sustained damage, if the representation appear to have been made *bonâ fide* under a reasonable and well-grounded belief that the same was true, as the rule *caveat emptor* applies (d).

A *bonâ fide* representation.

A person should be careful how he gives credit to any statement made by a third party as to the character and ability of the person with whom he is about to deal; because under 9 Geo. 4, c. 14, s. 6, "no action lies to charge a person upon or by reason of any representation or assurance made or given relating to the character, conduct, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit, money or goods [there]upon, unless such representation, &c. be made in writing, signed by the party to be charged therewith." The signature of an agent will not satisfy this section (e). And one partner signing in the name of and by the express authority of his firm will make himself only liable (f).

Representation as to credit.

It is now well settled that if goods are sold expressly "with all faults," the seller is not bound to disclose latent defects, and is therefore not liable to an action in respect of them, although he was aware of them at the time of sale, unless there be an express warranty against some particular defect, or unless some artifice or fraud was practised to prevent the vendee from discerning such defects; therefore, in effecting such a sale of a horse, it is best for the seller to say nothing, and let the purchaser inspect the horse, and so judge for himself.

Sale of goods "with all faults" excludes latent defects.

So far as the description goes, there is an express warranty against any particular defect, which is excluded by that description. Accordingly, where an advertisement for the sale of a ship described her as a "copper-fastened vessel," adding that the vessel was to be taken

Unless there be an express warranty.

(c) *Mosh v. Densham*, 1 M. & Rob. 442.

(d) *Shrewsbury v. Blount*, 2 M. & G. 475; 2 Scott, N. R. 588; 58 R. R. 446; *Hoycraft v. Treacy*, 2 East, 92; 6 R. R. 380; *Ormerod v. Huth*, 14 M. & W. 664.

(e) *Swift v. Jewsbury*, L. R., 9 Q. B. 301—Ex. Ch., reversing N. R. sub nom. *Swift v. Winterbottom*, L. R., 8 Q. B. 244.

(f) *Williams v. Mason*, 28 L. T. 232; 21 W. R. 386.

"with all faults, without any allowance for any defects whatsoever"; and it appeared that she was only partially copper-fastened; it was held that the vendor was liable on the ground that she was warranted to be copper-fastened, and that, "with all faults" applies to such faults only as a copper-fastened vessel may have (g). But where a vessel which was described as "teak-built" was sold, "to be taken with all faults," "with any allowance for any defect or error whatsoever," and it turned out that she was not "teak-built," it was held that this was a misdescription of the vessel, which came within the term "error," and that the vendor was not liable as for a breach of warranty (h).

At one time Lord Kenyon held that a seller *was bound* to disclose to the buyer all latent defects known to him, and that buying "*with all faults*" without a warranty must be understood to relate only to those faults which the buyer could have discovered, or with which the seller was unacquainted (i).

Or fraud is
used to con-
ceal them.

However, Lord Ellenborough overruled this decision, and said, "I cannot subscribe to the doctrine of that case, although I feel the greatest respect for the judge by whom it was decided. Where an article is sold '*with all faults*,' I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such stipulations is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him '*with all faults*.' Having thus laboriously freed myself from responsibility, am I to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market, when exposed to sale? By acceding to buy the horse '*with all faults*,' he takes upon himself the risk of *latent* or *secret* faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust, if men could not, by using the

(g) *Shepherd v. Kain*, 5 B. & Ald. 240; 24 R. R. 344. 82 R. R. 875.

(i) *Mellish v. Motteux*, Peak. Cas. 115.

(h) *Taylor v. Bullen*, 5 Ex. 779;

strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud, unless the seller by *positive means* renders 'it impossible for the purchaser to detect latent faults' (k).

Therefore, 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 *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 (l).

But it would appear from a case cited by Gibbs, J., in *Pickering v. Dowson* (m), that where a horse has been sold "*with all his faults*," and artificial means have been used to conceal some defect, the vendor would be liable to the purchaser for such conduct.

For instance, the practice of *plugging*, &c., or perhaps the artificially filling up a sandcrack (n) or thrush (o) (such devices being, without doubt, used to deceive the purchaser), would each be a sufficient ground for an action for deceit; because a man may act a *lie* or *fraudulent representation* without speaking a word, and the injury under such circumstances would be *damage* as the result of a *fraudulent representation* coupled with dealing. Thus when a ship was sold "*with all her faults*," but means had been taken *fraudulently* to conceal some defects in her bottom, the vendor was held liable (p).

But where animals are sold "*with all faults*," it makes no difference whether the sale takes place in a public market or privately, provided that there is no fraudulent representation, or concealment of defect. The mere exposure for sale of animals in a public market is not evidence of fraudulent representation. Thus, in *Ward v. Hobbs* (q) the defendant sent for sale, to a public market, pigs which he knew to be infected with a contagious disease; they were exposed for sale subject to conditions that the buyer must take them with all faults, no warranty would be given and no compensation would be made in respect of any fault. No verbal representation

Plugging, &c.

Mere exposure for sale in public market not evidence of fraud.

(k) *Baglehole v. Walters*, 3 Camp. 156; 13 R. R. 778.

(l) *Pickering v. Dowson*, 4 Taunt. 784; 39 R. R. 656, 657.

(m) 4 Taunt. 785.

(n) Sandcrack, ante, p. 105.

(o) Thrush, ante, p. 112.

(p) *Schneider v. Heath*, 3 Camp. 598; 14 R. R. 825; and *Jones v. Bright*, 3 M. & P. 175; 39 R. R. 728.

(q) *Ward v. Hobbs*, 4 App. Cas. 13; 48 L. J., Q. B. 281; 40 L. T. 73; 27 W. R. 114.

was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff, having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also some of those with which they were put. the contagious disease. The plaintiff having to recover damages for the loss which he had sustained; it was held that, although the defendant might have been guilty of an offence against the repealed Contagious Diseases (Animals) Act, 1869, he was not liable to the plaintiff, as his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from the disease. But if the defendant's statement had been followed by a declaration that he believed the animals to be free from disease, he would undoubtedly have been liable to an action for deceit (r).

Contract made voidable by fraud.

Fraud does not make a contract void, but only voidable, at the election of the party defrauded, who has the option of acquiescing in it, or of avoiding it (s). But until the party defrauded disaffirms the contract it remains good (t).

Where fraud is practised upon the buyer.

If a party be induced to purchase an article by fraudulent representations of the seller respecting it, he may treat it as a good contract, or the moment he chooses to declare it void, he may recover the price from the seller (u).

Except where it works injustice.

If, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration (x).

Where he continues to deal with the article.

But if after discovering the fraud the buyer continues to deal with the article as his own, he cannot recover back the money from the seller (y). And the right to repudiate the contract is not afterwards revived by the discovery of another incident in the fraud (y).

(r) *Ward v. Hobbs*, 4 App. Cas. at p. 21, per Lord Cairns, L.C.

(s) *Murray v. Mann*, 2 Ex. 541; 76 R. R. 686; *Urquhart v. Macpherson*, 3 App. Cas. 831.

(t) *Dauers v. Harness*, L. R., 10 C. P. 166; 44 L. J., C. P. 194; *Clough v. London and North Western Rail. Co.*, L. R., 7 Ex. 26,

34; 41 L. J., Ex. 17; 25 L. T. 708.

(u) *Murray v. Mann*, 2 Ex. 541; 76 R. R. 686.

(x) See Broom's Maxims, 4th ed. 293; and per Blackburn, J., *R. v. Suddlers Co.*, 32 L. J., Q. B. 343.

(y) *Campbell v. Fleming*, 1 A. & E. 40; 53 R. R. 194.

A sale of goods effected by the fraud of the buyer is not absolutely void, but the seller may elect to treat it as a valid transaction (z), or has a right to treat the contract as a nullity, and recover the value of the goods in an action of *trover* (a).

Where fraud is practised upon the seller.

If he does not treat the sale as void before the buyer has resold the goods to an innocent vendee (z), or pledged them for a *bond fide* advance (b), the property will pass to the vendee.

Resale by the buyer to an innocent vendee.

But the property will not pass to an innocent vendee, unless the relation of vendor and vendee existed between the original owner of the goods, and the person who has fraudulently obtained them; for, if there be not a sale between these parties there is no contract, which the owner can either affirm or disaffirm (c). Thus where A., who had formerly been B.'s agent, and had been known to the plaintiff as such, after his agency ceased, obtained goods from the plaintiff in the name of B., which he handed over to the defendant, an auctioneer, by whom they were sold: it was held that the plaintiff might maintain *trover* against the defendant, for there was never any sale to A., or any contract between *him* and the plaintiff (d).

All contracts of purchase made with the fraudulent intent to cheat the seller, and dispose of the goods at a swindling price, to raise money, are held void (e).

Contract with intent to cheat the seller.

It would appear that where the buyer purchases goods with the preconceived design of not paying for them, such sale does not pass the property therein (f). Thus where some sheep had been bought under such circumstances, Abbott, C.J., held that if the buyer contracted for, and obtained possession of, the sheep in question, with a *preconceived* design of not paying for them, that would be such a fraud as would vitiate the sale and prevent the property from passing to him (g).

Preconceived design of not paying for goods.

Whether the buyer has obtained possession of the goods with such a preconceived design is a question for the jury (h).

Question for the jury.

(z) *White v. Garden*, 20 L. J., C. P. 166.

Ex. 342.

(a) *Ferguson v. Carrington*, 9 B. & C. 59; 3 C. & P. 457; *Loud v. Green*, 15 M. & W. 216, 221.

(e) *Gibson v. Carruthers*, 8 M. & W. 346.

(b) *Kingsford v. Merry*, 11 Ex. 511.

(f) See *Irring v. Motley*, 7 Bing. 551; *Loud v. Green*, 15 M. & W. 221; 71 R. R. 627; *Ferguson v. Carrington*, 9 B. & C. 59.

(c) *Kingsford v. Merry*, 26 L. J., Ex. 83.

(g) *Earl of Bristol v. Wilsmore*, 1 B. & C. 521; 25 R. R. 488.

(d) *Higgins v. Barton*, 26 L. J.

Resale at a reduced price.

The resale of the goods at reduced prices immediately after the buyer has obtained possession of them is evidence that such prior transaction is fraudulent (*h*).

Unstamped agreement admissible to prove fraud.

A document which purports to be an agreement, and is valid upon the face of it, but which is tendered in evidence to show the transaction with which it is connected to be a fraud, is admissible in evidence, although unstamped (*i*).

Payment by a cheque which is dishonoured.

If a buyer, under terms to pay for goods on delivery, obtains possession of them by giving a cheque, which is afterwards dishonoured, he gains no property in the goods, if, at the time of giving the cheque, he had no reasonable ground to expect that it would be paid (*k*).

Fraud of an infant.

The contract of an infant, however fair and conducive to his interests it may be, is not binding on him, unless it be for necessities. By the common law, however, the contracts of an infant, other than for necessities, were for the most part only voidable. But now, by the 37 & 38 Vict. c. 62, s. 1, all contracts, whether by specialty or by simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, are made absolutely void; provided always that the above enactment "shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as are now by law voidable." And it was no answer at law to a plea of infancy, that the defendant, at the time of entering into the contract, fraudulently represented himself to be of full age (*l*).

Of a married woman.

At common law a husband was not liable for any fraud of the wife, which was directly connected with and dependent upon a contract, any contract made by a married woman being altogether void. But a married woman was "undoubtedly responsible for all torts committed by her on any person, as for any other personal wrongs" (*m*). And as she can now render herself

(*h*) *Ferguson v. Carrington*, 9 B. & C. 59; 3 C. & P. 457.

(*i*) *Holmes v. Searsmith*, 7 Ex. 802; 86 R. R. 838; *Reg. v. Gompertz*, 9 Q. B. 824; 72 R. R. 458.

(*k*) *Hawse v. Crowe*, R. & M. 414; *Earl of Bristol v. Wilsmore*,

1 B. & C. 521; 25 R. R. 488.

(*l*) *Johnson v. Pye*, 1 Sid. 258.

(*m*) *Liverpool Adelpbi Loan Association v. Fairhurst*, 9 Ex. 422; 96 R. R. 778, per Pollock, C.B. See also *Wright v. Leonard*, 30 L. J., C. P. 365.

responsible on her contracts, she is liable on any tort arising out of them (*n*).

Equity will give relief where there is no reasonable equality between the contracting parties, *e.g.*, in a case in which the vendor, being an aged, illiterate, weak-minded man, though not a person absolutely incapable of managing his own affairs, executed a deed of conveyance of his property for a grossly inadequate consideration (*n*).

Where a contracting party is old and weak-minded.

Where a party, when he enters into a contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, he cannot be compelled to perform the contract (*p*).

Drunkenness of a contracting party

If, however, a man buys a horse when so drunk as not to know what he is doing, but keeps it after he is sober, he cannot set up his drunkenness as an answer to an action for the price (*p*).

Goods kept by a party when sober.

(*n*) See s. 1, sub-s. (2) of the Married Women's Property Act, 1882.

N. S. 481.

(*p*) *Gore v. Gibson*, 13 M. & W. 626; 67 R. R. 762.

(*n*) *Longmate v. Ledger*, 6 Jur.

CHAPTER VIII.

BREACH OF WARRANTY.

Buyer neither bound to tender the horse nor give notice.

WHERE a horse has been sold warranted sound, which it can be clearly proved was unsound at the time of sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness. And in a case where there was a breach of warranty, Lord Loughborough said, "No length of time elapsed after the sale will alter the nature of a contract originally false. It is not necessary that the horse should be returned to the seller, or that notice should be given" (a).

Seller not bound to take back the horse.

Where a horse warranted sound turns out unsound, the seller is not bound to take it back again; nor can the buyer, by reason of the unsoundness, resist an action for the price on the ground of breach of warranty, except in case of fraud or express agreement authorising the return, or on a mutual rescission of the contract; but he may give the breach of warranty in evidence in reduction of damages (b).

Unless the contract was executory.

And it would appear that where a contract is executory only, as where a horse is ordered of a party, and he contracts to supply one fit for a certain purpose, the buyer may rescind the contract after he has received the horse, if he does not answer that purpose, provided he has not kept it longer than was necessary for trial, or exercised the dominion of an owner over it, as by selling it.

Street v. Blay

This was decided in *Street v. Blay* (c), and as it is a

(a) *Fidler v. Starkie*, 1 H. Bl. 17; 2 R. R. 700; and see *Poulton v. Lottimore*, 9 B. & C. 265; 32 R. R. 673.

(b) According to the law of Scotland, it appears that there would be an absolute right to return the horse upon the discovery of the breach of warranty, without any specific stipulation to that effect: *Conston v. Chapman*, L. R., 2 H. L. (S. C.), 250, per Lord Chelmsford. See also s. 11,

sub-s. (2) of the Sale of Goods Act, 1893, ante, p. 123.

(c) *Street v. Blay*, 2 B. & Ad. 456; 36 R. R. 626; and see *Dawson v. Collis*, 10 C. B. 523; and *Ollivant v. Bailey*, 5 Q. B. 288; 64 R. R. 501. The principles upon which the judgment in *Street v. Blay* was grounded appear to be fully confirmed by the provisions of s. 11, sub-s. (1) of the Sale of Goods Act, 1893, ante, p. 122.

very important and leading case, it will be given together with a considerable portion of the judgment delivered by Lord Tenterden. The facts of the case were these: The plaintiff, on the 2nd of *February*, sold a horse to the defendant for 48*l.* with a warranty of soundness. The defendant took the horse, and on the same day sold it to one *Bailey* for 45*l.* *Bailey*, on the following day, parted with it in exchange to one *Osborne*; and *Osborne*, in two or three days afterwards, sold it to the defendant for 30*l.* No warranty appeared to have been given on any of the three last sales; the horse was, in fact, unsound at the time of the first sale, and on the 9th of *February* the defendant sent the horse back to the plaintiff's premises, requiring the plaintiff to receive him again as he was then lame; but the plaintiff refused to accept him. The question for consideration was, whether the defendant, under these circumstances, had a *right* to return the horse, and thereby exonerate himself from the payment of the whole price.

After taking time to consider, Lord Tenterden, in delivering the judgment of the Court said, "It is not necessary to decide whether in any case the purchaser of a *specific chattel*, who, having had an opportunity of exercising his judgment upon it, has bought it with a warranty that it is of any particular quality or description, and *actually accepted and received* it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor and exonerate himself from the payment of the price, on the ground that he has never received that article which he stipulated to purchase."

"There is indeed authority for that position. Lord Eldon, in the case of *Curtis v. Hannay* (d), is reported to have said, that he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might *return the horse and bring an action to recover the full money paid*;

Judgment of
the Court of
King's Bench.

Lord Eldon's
opinion dis-
cussed.

(d) *Curtis v. Hannay*, 3 Esp. 83.

but in the latter case the seller had a right to expect that the horse should be returned in the same state as he was in when sold, and not by any means diminished in value. And Lord Eldon proceeds to say, that if it were in a worse state than it would have been in, if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article." "It is to be implied (says Lord Tenterden) that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This *dictum* has been adopted in Mr. Starkie's excellent work on the Law of Evidence (e), and it is there said that a vendee may in such a case rescind the contract altogether by returning the article, and refuse to pay the price or recover it back if paid."

"It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel and has thereby consented to rescind the contract, or has been guilty of a fraud which destroys the contract altogether. In *Weston v. Downes* (f), *Towers v. Barrett* (g), *Payne v. Whale* (h), *Power v. Wells* (i), and *Emanuel v. Dane* (k), the same doctrine was applied to an *exchange* with a warranty as to a sale, and the vendee held not to be entitled to sue in *trover* for the chattel delivered by way of barter for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot by the same means protect himself from the payment of the price on the same ground."

(e) Starkie on Evidence, part iv. p. 645.

(f) *Weston v. Downes*, Doug. 23.

(g) *Towers v. Barrett*, 1 T. R. 133.

(h) *Payne v. Whale*, 7 East, 274.

(i) *Power v. Wells*, Doug. 34, n.

(k) *Emanuel v. Dane*, 3 Camp. 299.

"On the other hand the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action (l); and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid."

Evidence in mitigation of damages.

"It is to be observed, that although the vendee of a *specific chattel*, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of *executory* contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial" (m).

Unfitness for a particular purpose.

"The observations above stated are intended to apply to the purchase of a certain *specific chattel*, accepted and received by the vendee, and the property in which is completely and entirely vested in him."

"But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to show that he may return it where the purchaser has done more than was consistent with the purpose of trial, where he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case; and even supposing it might have been competent for the defendant to return this horse, after having accepted it and taken it into his possession, if he had never parted with it to another, it appears to us that he cannot do so after the re-sale at a profit."

An intermediate profit.

"These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant that the particular chattel was his own; and it may be added that the parties cannot be placed in the same situation by the return of it as if the contract had not been made, for the defendant has derived an inter-

Acts of ownership inconsistent with trial.

(l) *Cormack v. Gillis*, cited 7 East, 480; *King v. Boston*, 7 East, 481, n.; and see *Dawson v. Collis*, 10 C. B. 532.
(m) *Okell v. Smith*, 1 Stark. N. P. C. 107; 18 R. R. 752.

mediate benefit in consequence of the bargain, which he would still retain. But he is still entitled to reduce the damages, as he has a right of action against the plaintiff for the breach of warranty " (u).

Confirmed by
a later case.

In another case, where the question of return was considered, the law laid down by the Court of Queen's Bench was confirmed by the Court of Exchequer. And Bayley, B., said, "One party cannot rescind the contract unless the other party agrees to it. The contract of warranty was open, and entitled the plaintiff to recover damages for the breach of it, but did not entitle him to return the horse, and rescind the contract. In *Street v. Blay* (n), the law on this subject was fully considered by the Court of King's Bench, and it was there laid down that a purchaser has no right to return the article, unless there has been a condition in the original contract authorizing the return, or the vendor has subsequently consented to rescind the contract, or unless the case turn out to be one of fraud. According to *Power v. Welles* (o), if the contract is still open, you cannot maintain an action for *money had and received*; I take the rule to be, that if the contract remains open, so as to give the party a right to recover damages for a breach of warranty, he cannot maintain an action of *indebitatus assumpsit* on the ground of the failure of consideration."

And Lord Lyndhurst said, "There was a proposition in this case to rescind the contract, which the defendant was at first willing to accede to, but the agreement to rescind was never completed, therefore the contract remained open. One party alone could not, by his own act, rescind the contract. The case of *Street v. Blay* (n) seems to have been very much considered. That case shows that you cannot treat a contract as rescinded on the ground of the breach of warranty, except there was an original agreement that the party should be at liberty to rescind in such case, or unless both parties have consented to rescind it. According to that decision,

(n) *Street v. Blay*, 2 B. & Ad. 456; 36 R. R. 626. (o) *Power v. Welles*, Cowp. 818.

Rescinding
contract.

Canadian Case.—Where a chattel sold with a warranty is delivered as agreed upon and is not up to the warranty, that fact, in the absence of fraud, affords no ground for rescinding the contract, but the remedy is for a breach of warranty. *Finn v. Brown*, 35 N. B. R. 335 (1901).

which is the most recent, your remedy was an action for damages" (q).

The remedy for breach of warranty is concisely stated by section 53 of the Sale of Goods Act, 1893, which, in so far as it deals with such remedy, is in the following terms:—

Remedy for breach of warranty.

"(1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

The buyer may elect to treat any breach of a condition on the part of the seller as a breach of warranty under section 11, sub-section (1) (a), *ante*, p. 122, and be compelled to do so under section 11, sub-section (1) (c), *ante*, p. 7

In an additional warranty, the only ground on which goods are returnable is that of *fraud*. And Parke, B., referring to the case of *Street v. Blay* (r), said, "When a horse is warranted sound, and turns out otherwise, the purchaser has no right to return him, unless the warranty was *fraudulent*; his only remedy is an action on the warranty; this has been *lately* settled, but the general impression formerly among the profession, and now amongst all others, is, that the purchaser is to return the horse" (s).

Goods are returnable where there is fraud.

But if the sale of a horse there be an express warranty by the seller that the horse is sound, free from vice, &c., yet if it be accompanied with an undertaking on the part of the seller to take back the horse and repay

Agreement that a horse is to be returned if unsound.

(q) *Gompertz v. Denton*, 1 Cr. & M. 207.

(r) *Street v. Blay*, 2 B. & Ad. 456; 36 R. R. 626.

(s) *Hilliard v. Orbell*, Ex. Sitings, Jan. 11, 1834. See also *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317.

the purchase-money, and on trial he shall be found to have any of the defects covered by the warranty, the buyer must return him as soon as he discovers any of those defects, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller, because in such case a trial means a reasonable trial (t).

Notice of
untruth of
warranty,
before
removal.

*Head v.
Tattersall.*

The right to return a horse sold with a warranty which proves it correct is not taken away by the fact that the buyer, before removing him, might have found out that the warranty was untrue, or by the fact that the horse whilst it is in the buyer's possession is injured without his default, by an accident arising from a defect inherent in the horse (u). Thus, in *Head v. Tattersall* (u), the plaintiff bought a mare, warranted to have been hunted with certain packs of hounds. According to the terms of the sale, the mare, if objected to, was to be returned within a specified time. The plaintiff paid for the mare, but before removing her from the defendant's establishment he was informed by some person that the warranty was incorrect. The mare, whilst she was being taken away by the plaintiff's groom, became restive and received serious injury. The plaintiff returned her within the specified time. The warranty was in fact untrue. The plaintiff brought an action to recover the price of the mare, and it was held that nothing that had happened took away the plaintiff's right to return the mare, and that he was entitled to succeed.

Condition for
return if
unsuitable.

Where a horse is bought on condition that he is to be returned if he does not suit, as the contract for sale is not absolute, the horse may be returned, and an action brought for the price, if paid, as *money had and received* to the use of the plaintiff (x). But the purchaser must not keep him longer than is necessary for trial, nor exercise the dominion of an owner over him, as by selling him (y). Such an action was brought in the following case, to recover ten guineas which the plaintiff had paid to the defendant for a one-horse chaise and harness, on condition that it was to be returned in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire of it. This contract was made by the defendant's servant, but his master did not object to it at the

(t) *Adam v. Richard*, 2 H. Bl. 573; 3 R. R. 508.

(u) L. R., 7 Ex. 7; 41 L. J., Ex. 4; 25 L. T. 631.

(x) *Towers v. Barrett*, 1 T. R. 133.

(y) *Street v. Blay*, 2 B. & Ad. 456; 36 R. R. 626.

time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it; the hire of 3s. 6d. *per diem* was tendered at the same time, which the defendant refused, as well as to return the money. A verdict was found for the plaintiff. And a rule to show cause why a nonsuit should not be entered, on the ground that this action for money had and received would not lie, was discharged (z).

Where goods are bought on condition that they shall be returned, if unsuitable, they will not be returnable on a disapproval which is not *bonâ fide*, or which is merely capricious (a). But in a case in which an order for a carriage had been given and accepted on the express condition that the carriage should meet the approval of the defendant on the score of convenience and taste, it was held, that he was entitled (acting *bonâ fide*, and not from mere caprice) to return it (b).

Where a horse is bought, warranted fit for a particular purpose, and he proves unfit for that purpose, it has been held, that the purchaser may return him and bring an action for the price, if paid (c).

Horse unfit for a particular purpose.

But where, after a warranty of a horse as sound, the vendor, in a subsequent conversation, said, that *if the horse were unsound* (which he denied) *he would take it again and return the money*, it was held that this was no abandonment of the original contract, which still remained open; and that though the horse be unsound, the vendee ought to sue upon the warranty, and could not maintain an action for money had and received, to recover back the price after a tender of the horse (d).

Verbal offer after sale to take back the horse.

If goods delivered on "sale or return" be not returned within a reasonable time, or the return of them be rendered impossible by the act of the buyer, the contract of sale becomes complete, and an action for goods sold and delivered may be maintained by the seller (e).

When the contract becomes complete.

Where a breach of warranty has taken place it is prudent for the buyer, in an ordinary case, to tender the

Where buyer should tender the horse.

(z) *Towers v. Barrett*, 1 T. R. 138.

(a) *Dallman v. King*, 5 Scott, 382; 44 R. R. 661.

(b) *Andrews v. Belfield*, 2 C. B. N. S. 779.

(c) *Chanter v. Hopkins*, 4 M. & W. 400; 51 R. R. 650; but see

Dawson v. Collis, 10 C. B. 523.

(d) *Payne v. Whale*, 7 East, 274.

(e) *Moss v. Sireet*, 16 Q. B. 493; 20 L. J., Q. B. 167; 16 L. T., O. S. 341; 83 R. R. 560. See also s. 18, r. 4, of the Sale of Goods Act, 1893.

horse back to the seller immediately on discovering such breach (*f*); and so entitle himself to be repaid the expenses he has been put to in keeping him (*g*); and if the seller receive him back there will be a mutual rescission of the original contract (*h*).

Sale after
tender.

But where the seller refuses to take back the horse, he should be sold as soon as possible for the best price that can be procured (*i*). And, perhaps, the best course to be pursued under such circumstances is to sell him by public auction, for in that way the true market value, which is the proper measure of damages, can best be discovered (*k*).

Notice
instead of
tender.

If the buyer does not wish to tender the horse, he should at any rate give notice of the breach of warranty, because the not giving notice will be strong presumption against the buyer that the horse, at the time of sale, had not the defect complained of, and will make the proof on his part much more difficult (*l*). And unless the breach in such case is clearly established, the jury will naturally suppose that the horse corresponded with the warranty (*m*).

Length of
time before
notice.

The longer the time before notice, or bringing an action after discovering the breach of warranty, the greater will be the difficulty in making out a good case to a jury (*l*). But where the breach of warranty can be clearly proved, the length of time before notice does not appear material. For the Court of King's Bench, in a case where an unsound horse was sold with a warranty of soundness, decided that the buyer might maintain an action on the warranty, although shortly after the sale he had discovered the unsoundness, and, without giving notice of that fact to the seller, had kept and used the horse for nine months as his own, during which period he had given him physic, and used other means to cure him; he had also cut the horse's tail. The case had been tried at the Hereford Assizes before Parke, J., who directed a nonsuit. However, in the ensuing term a rule was obtained to set that nonsuit aside, and for new trial, the cases

(*f*) Selwyn's N. P., 8th Ed., vol. i., p. 657, tit. Deceit, I. 2, cited in *Chesterman v. Lamb*, 2 A. & E. 129; 41 R. R. 397.

(*g*) *Chesterman v. Lamb*, 2 A. & E. 129; 41 R. R. 397; *Cross v. Bartlett*, 3 M. & P. 542.

(*h*) *Weston v. Downes*, Doug. 24.

(*i*) *Caswell v. Coare*, 1 Taunt. 566; 10 R. R. 606.

(*k*) *Dingle v. Hare*, 7 C. B., N. S. 145.

(*l*) *Fielder v. Starkie*, 1 H. Bl. 17; 2 R. R. 700.

(*m*) *Poulton v. Lottimor*, 9 B. C. 265; 32 R. R. 673.

of *Fielder v. Starkie* (n) and *Caswell v. Coare* (o) being referred to. In showing cause, it was contended that *Fielder v. Starkie* (n) was overruled, or at least qualified, by subsequent cases; but Lord Denman, with the assent of Littledale, Patteson, and Coleridge, JJ., said, "We think that *Fielder v. Starkie* is not overruled. The rule must be absolute" (p).

The seller, on receiving notice of a breach of warranty, should have the horse examined by some skilful person, and so ascertain the exact state of the case. If he find that the warranty is broken, or that there is doubt, he had better either take back the horse, or come to what terms he can with the buyer, as horse causes are decided in a great measure by the strength of veterinary testimony. But if he find that there is really no breach of warranty, the evidence of the party who has examined the horse will place him in a favourable position in case an action should be brought.

Seller should have the horse examined.

In an action for the breach of warranty of a horse, an order may be made under Ord. L., r. 2, for the sale of the horse, as "goods which for some just and sufficient reason it may be desirable to have sold at once" (q).

Sale by order of Court.

(n) *Fielder v. Starkie*, 1 H. Bl. E. 103; 4 Nev. & M. 649; 42 R. R. 17; 2 R. R. 700. 334.

(o) *Caswell v. Coare*, 1 Taunt. 566; 10 R. R. 606. (q) *Bartholomew v. Freeman*, 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743.

(p) *Pateshall v. Tranter*, 3 A. & W. R. 743.

CHAPTER IX.

PLEADING, EVIDENCE AND DAMAGES.

Pleading and Evidence for the Plaintiff.

Executory
and executed
contracts.

WHERE you proceed for a breach of an *executory* contract, you must rest on the contract itself; but when the contract has been *executed*, you proceed on the promise implied by law (a).

Action for
price.

"Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods" (b).

"Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract" (c).

Action for not
accepting.

Where the buyer wrongfully neglects or refuses to accept and pay for the horse he has bought, the seller may maintain an action against him for damages for non-acceptance (d), even though the horse may afterwards have been resold (e); and the statement of claim will set

(a) Per Lord Campbell, *Lowe v. London and North Western Rail. Co.*, 21 L. J., Q. B. 363.

(b) Sale of Goods Act, 1893, s. 49, sub-s. (1).

(c) *Ibid.*, sub-s. (2).

(d) *Ibid.*, s. 50, sub-s. (1).

(e) *Maclean v. Dunn*, 1 M. & P. 761; 4 Bing. 722; 29 R. R. 714; *Hore v. Milner*, Peake, N. P. C. 58, n.

Executory
contract.
Validity.

Canadian Case.—Upon a claim for the hire of horses and vehicles furnished for the use of defendant, the evidence, while not really disclosing that they were furnished for election purposes, raised a strong presumption that they were: *Held*, that when the defendant relies upon a statute to avoid liability upon an executory contract alleged to have referred to or arisen out of an election, nothing should be intended in favour of such a defence, but it must clearly appear that such contract did refer to an election. *Pardow v. Cochrane*, 4 Terr. L. R. 312 (1899).

out facts showing the *consideration* and the *promise*, the *breach*, and the *damage*. Where a certain time or place for delivery has been agreed upon, it is the duty of the vendor to tender the horse, and such tender must be proved (f).

Where by the terms of the contract the defendant was bound to fetch away the horse, the plaintiff should state in the statement of claim that he has not done so, and aver his own readiness and willingness to deliver (g).

Where the purchaser of goods refuses to take them, the vendor by reselling them does not preclude himself from recovering damages for breach of contract. And it was decided by the Court of Common Pleas that "when a party refuses to take goods he has purchased, they should be resold, and that he should be liable for the loss, if any, upon the resale" (h).

Resale of the goods.

An action for the detention of goods may be maintained by any person who has either an absolute or a special property in goods, which are capable of being ascertained, against another, who is in actual possession of such goods either by delivery or finding, and refuses to deliver them (i).

Action for detention of goods.

As this action proceeds on the ground of property in the plaintiff at the time of action brought, it cannot be maintained, if the defendant took the goods tortiously, for by the trespass the property of the plaintiff is divested (i). But if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by action for the detention (k). This would be the proper form of action for the specific restitution of a horse, which has been unlawfully detained by a trainer, veterinary surgeon, livery-stable keeper, or other person, into whose hands it had lawfully come in the first instance.

Where the seller wrongfully neglects or refuses to deliver the horse he has sold to the buyer, the buyer may maintain an action against the seller for damages for non-delivery (l); and where a particular time for delivery has

Action for not delivering.

(f) *Bordenave v. Gregory*, 5 East, 111. 722; 29 R. R. 714.

(g) *Bach v. Owen*, 5 T. R. 409;

Barrow v. Johnson, 1 East, 203; 6 R. R. 252; *Wilks v. Atkinson*, 1 Marsh, 412.

(h) *Maclean v. Dunn*, 1 Bing.

(i) *Selwyn's N. P.*, 12th Ed. 660, 662.

(k) 3 Ste. Com., 14th Ed. 437.

(l) Sale of Goods Act, 1893, s. 51, sub-s. (1).

been agreed upon, the statement of claim will set out facts showing the *consideration* and *promise*, the *breach* and the *damage*, and aver a readiness and willingness to accept and receive the horse and pay the price (*m*). If no particular time has been specified, and the contract be to deliver the horse generally, as where an action of *assumpsit* for not delivering was brought against a party who had sold the plaintiff a mare, and promised, if she proved unsound, to *provide another* or return the money (*n*), there must be a special *request* to deliver, which will come under a general averment of performance of conditions precedent (*o*). But if a place is mentioned, and no time (*p*), or the defendant has incapacitated himself from completing the agreement, as by reselling, &c., a *request* to deliver is unnecessary (*q*).

Specific performance.

"In any action for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree" (*r*).

Goods sold and delivered for payment of the price.

Where the vendor has delivered the horse, and the purchaser neglects or refuses to pay for him; or if a horse or goods be taken in part payment, and the residue is unpaid (*s*); or if the purchaser has the horse on the terms of sale or return, and keeps him an unreasonable time, the vendor may maintain an action for *goods sold and delivered* (*t*).

Action maintainable on rescission of contract by one of the parties.

Where a portion only of a larger bulk of goods to be delivered in pursuance of a written contract by a stated

(*m*) *Bordenave v. Gregory*, 5 East, 111. See Order XIX., r. 14.

(*n*) 3 Wentw. 3; and 2 Chit. Pleading, 6th Ed. 166.

(*o*) *Bach v. Owen*, 5 T. R. 410.

(*p*) See *Jones v. Gibbons*, 22 L. J., Ex. 348.

(*q*) *Bowdell v. Parsons*, 10 East, 359.

(*r*) Sale of Goods Act, 1893, s. 52. This enactment reproduces, with modifications owing to the

Judicature Acts and Orders, s. 2 of 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act, 1856), now repealed.

(*s*) *Sheldon v. Cox*, 3 B. & C. 420; *Harrison v. Luke*, 14 M. & W. 139.

(*t*) *Bayley v. Gouldsmith*, Peake, 56; *Bianchi v. Nash*, 1 M. & W. 545; *Dyer v. Cowley*, 17 L. J., Q. B. 361; *Moss v. Sweet*, 16 Q. B. 493; 16 L. T. O. S., 341; 83 R. R. 560.

time has been delivered, and the purchaser then rescinds the contract, the vendor may maintain an action for goods sold and delivered, although the time fixed for the payment of the goods has not elapsed (u).

And where A. agreed to give a horse warranted sound in exchange for a horse of B. and a sum of money, and the horses were exchanged; but B. refused to pay the money, pretending that A.'s horse was unsound; it was held that A. might recover for a horse sold and delivered (x).

Horse sold and delivered.

Where an article, which has been paid for, does not answer the description of the thing which when bought it purported to be (y); or where a horse is bought warranted sound, &c., and paid for, and on its turning out unsound is returned to the seller, who receives it, there is a mutual rescission of the contract, and the buyer may recover the price paid in an action for money had and received (z). Also, where a horse has been bought warranted sound, to be returned if unsound (a); or if the contract is, that the horse is to be returned if unsuitable (b); or unfit for a particular purpose (c); and circumstances arise in any of these cases which justify the return of the horse, and the horse is tendered, the same form of action lies for repayment of the price. A claim for horse meat and stabling may be added if necessary.

Money had and received for repayment of the price.

Where money is paid with a knowledge of all the facts, but under a mistake of the law, it cannot in general be recovered back (d). But money paid under a mistake of facts, and which the party retaining it has no claim in conscience to retain, is recoverable as money paid without consideration (e), even though the plaintiff cannot be put in statu quo (f).

Under a mistake.

Where a horse is bought, and the price paid, but the buyer, by the terms of the agreement, has the option of

Money had and received for repayment of part of the price.

(u) *Bartholomew v. Markwick*, 33 L. J., C. P. 145.

573; 3 R. R. 508.

(x) *Sheldon v. Cor*, 3 B. & C. 420; 5 D. & R. 277; *Earl of Falmouth v. Penrose*, 6 B. & C. 387; and see 2 Chit. Pleading, 6th Ed. 167.

(b) *Towers v. Barrett*, 1 T. R. 133.

(y) *Gompertz v. Bartlett*, 22 L. J., Q. B. 99.

(c) *Chanter v. Hopkins*, 4 M. & W. 406; 51 R. R. 650.

(z) *Weston v. Downes*, Doug. 24; *Power v. Wells*, Cowp. 818; and *Simpson v. Potts*, Cor. Rolfe. B., Carlisle Spr. Ass. 1847.

(d) *Platt v. Bromage*, 24 L. J., Ex. 63; *Barker v. Pott*, 4 H. & N. 759; *Rogers v. Ingham*, L. R., 3 Ch. D. 351.

(a) *Adam v. Richards*, 2 H. Bl.

(e) *Bize v. Dickason*, 1 T. R. 285; 4 R. R. Preface viii.

(f) *Standish v. Ross*, 3 Ex. 527; 77 R. R. 715.

returning the horse within a certain time, allowing a certain sum for the use of it, the residue of the price may be recovered by him after the horse has been returned or tendered in an action for *money had and received*. Thus, where a pair of horses were bought for 80*l.* and paid for, with liberty to return them within a month, allowing the seller 10*l.* out of the 80*l.*, but that if the buyer kept them beyond the month, he should pay the seller 10*l.* beyond the 80*l.*; it was held, that upon the horses being returned within the month, the buyer had a right to recover the 70*l.* from the seller, in an action for *money had and received* (g).

Money had and received for price of horse wrongfully sold.

If a sheriff wrongfully seize and sell the horse of a third person under an execution, the latter may sue him for *money had and received*; and he will make out a *prima facie* case by merely proving his, the plaintiff's, possession of the horse at the time of seizure. Thus, in the case of *Oughton v. Seppings* (h), a sheriff's officer had wrongfully seized under a *fi. fa.* against A. a horse belonging to B. The horse was sold by the sheriff, and the money paid over to the officer. B. brought an action against the officer, for *money had and received*, to recover the amount. It appeared that the horse had belonged to the husband of B., but that after his death she had provided for his keep; and although no letters of administration were produced, it was held that this was sufficient evidence against a wrongdoer to entitle her to recover in the action.

Money received subject to certain conditions.

Money received by B. on A.'s account, subject to certain conditions, cannot, until those conditions have been complied with, be recovered as *money had and received* to A.'s use (i).

Action on a breach of warranty.

Where a horse or other article has been sold warranted, but is in fact not according to the warranty, the purchaser may of course maintain an action on the warranty; and in such action the statement of claim will set out facts showing the *consideration* and the *warranty*, and state a *purchase*; it will also set out the *breach* and the *damage*.

Liability of an infant.

Although infants are liable for *torts* and injuries of a private nature (k), yet where the substantial ground of

(g) *Hurst v. Orbell*, 8 A. & E. 107; 35 R. R. 284.

(h) *Oughton v. Seppings*, 1 B. & Ad. 241; 35 R. R. 284.

(i) *Hardingham v. Allen*, 5 C. B.

793; 75 R. R. 839.

(k) *Green v. Greenbank*, 2 Marsh. 485; 17 R. R. 529; *Hoelett v. Haswell*, 4 Camp. 118.

action is *contract*, the plaintiff cannot, by suing in *tort*, render a person liable who would not have been liable on his promise. Therefore where the plaintiff declared that, having agreed to exchange mares with the defendant, the defendant by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c., it was held that infancy was a good plea in bar (*l*).

We have seen in Chapter VII. under what circumstances an action lies, where a horse has been sold without a warranty, and also what constitutes fraudulent representation (*m*). Where such an action is brought, the statement of claim, in setting out the material facts, should include the statement of the *wrongful act*, namely, the sale by means of the fraudulent representation (*n*), and with regard to which a *scienter* must be laid; and also the statement of the *damage*.

Action for fraudulent representation.

In an action for breach of contract, a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference, is sometimes necessary. But where the mere statement of the consideration and promise will be sufficiently intelligible without any prefatory allegation, they may be set forth without any preamble.

Statement of facts in an action for breach of contract.

The action for a misrepresentation in the nature of *deceit* seems to be an exception from the general rule, that in actions for words, or special damage arising therefrom, the very words must be set out, but the statement of claim must correctly state the contract (*o*).

Statement of facts in an action for deceit.

The consideration may either be *executed* or *executory*. An *executed consideration* consists of something *past*, or *done* before the making of the promise, and must be shown to have arisen at the defendant's request (*p*).

Statement of the consideration.

An *executory consideration* is something *to be done*, and in the statement of it a greater degree of certainty is required (*q*). But in either case the whole of the consideration, if it be an entire one, should be stated; no part of

(*l*) *Green v. Greenbank*, supra.

(*m*) See ante, pp. 159, 161.

(*n*) *Mummery v. Paul*, 1 C. B. 325.

(*o*) *Gutsole v. Mathers*, 1 M. & W. 495; *Barley v. Walford*, 9 Q. B. 197; 72 R. R. 218. See also 1 Chit. Pleading, 6th Ed. 384; and *Ireland v. Johnson*, 1 Bing. N. C.

162; *Brotherton v. Wood*, 6 Moore, 34; *Boorman v. Brown*, 3 Q. B. 11; 61 R. R. 287.

(*p*) See 1 Chit. Pleading, 6th Ed. 295; and *King v. Sears*, 2 C., M. & R. 53.

(*q*) See 1 Chit. Pleading, 6th Ed. 296; and *Ring v. Rorbrough*, 2 Tyrw. 468; 2 C. & J. 418.

it ought to be omitted (*r*). Thus, where an agent sold a horse belonging to A., and another belonging to B., to C. at an entire price, and warranted them sound; and B.'s horse turning out to be unsound, C. brought his action against B., declaring in the usual form as upon a purchase and warranty of one horse only; Lord Ellenborough, C.J., held that the evidence did not support the declaration, because the contract being entire for the sale of two horses, the plaintiff could not divide it, and declare upon it as upon the sale of one horse only (*s*).

If the horse
turns out
lucky.

But where, in an action of *assumpsit* on the warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 63*l.*; but the consideration as proved was, that the plaintiff would pay that sum, and if the horse was "lucky," would give the defendant 5*l.* on the buying of another horse; it was held to be no variance, as the conditional promise omitted in the declaration was too vague to be legally enforced, and did not amount to a promise in point of law (*t*).

Statement of
the promise
or warranty.

If any one substantive part of a warranty be proved not to be true, there is a breach on which an action may be maintained, and it is sufficient that the plaintiff set out all the substantive and material parts of the contract, the breach of which he complains of, the parts omitted not qualifying in any manner the sense of those parts set out upon which the breaches are assigned. As where the plaintiff declared that in consideration of his redelivery to the defendant of an unsound horse, the defendant promised to deliver to him another horse in lieu, which should be worth 80*l.* and be a young horse, and then alleged a breach in both respects, it was held sufficient, though it was proved that the defendant had also promised that the horse was sound and had never been in harness (*u*).

Condition
annexed to
the promise
or warranty.

And where there was a private sale of a mare at a repository, and a warranty of soundness was given, but there was a notice of the rules of sale, by which no warranty was to remain in force after twelve o'clock the following day, the Court of Exchequer held it sufficient

(*r*) *Clarke v. Gray*, 6 East, 564; see also *Robertson v. Howard*, 3 C. P. D. 280; 47 L. J., C. P. 480. As to an exchange, see *Mayor of Reading v. Clarke*, 4 B. & Ald. 269.

361.

(*t*) *Guthing v. Lyon*, 2 B. & Ad. 232; and see *Sarby v. Wilkin*, 1 D. & L. 281.

(*u*) *Miles v. Sheward*, 8 East, 7; *Clarke v. Gray*, 6 East, 568.

(*x*) *Symonds v. Curr*, 1 Camp.

to declare on the warranty alone without the condition annexed to it. However, Parke, B., said, "If the matter relating to the notice had been by way of proviso upon the warranty, it might perhaps have been necessary to state it in the declaration, but upon that point I give no opinion" (x).

Where the consideration is *executory*, it is necessary for the plaintiff to prove the performance of the consideration on his part, that is to say, the *purchase*, in order to show that he possesses a right of action (y). And as the price has usually been paid when an action is brought on a breach of warranty, the payment, if made, will be included in an averment of performance of conditions precedent (z), but payment is not essential to support the action.

The purchase and the payment.

If the false warranty or misrepresentation be misstated, and the variance be material to the merits of the case, it may be that the judge at the trial will refuse to amend on the ground that the defendant has been misled or taken by surprise. Where an action *on the case* was brought against a third party for a misrepresentation on the sale of a horse, the declaration stated that the defendant warranted the horse to be "sound and a good worker," and it appeared in evidence that he warranted the horse "sound in the wind," an objection was taken that the warranty and misrepresentation alleged in the declaration were not proved; but Alderson, B., said, "I think the declaration is substantially proved, and therefore I shall direct the record to be amended under the recent statute (a). The variance relied upon by the defendant is not material to the merits. The merits are, whether or no the defendant made a fraudulent misrepresentation. It is proved that he did; and the terms of the misrepresentation are not quite accurately stated in the declaration; it is clear that the defendant cannot have been misled by the statement. If he had, I would not amend. But he comes here to defend himself from the charge of having made a fraudulent misrepresentation on the occasion of the sale, and whether he represented the horse to be wholly sound, or merely sound in

Statement of the false warranty or fraudulent representation.

(x) *Smart v. Hyde*, 8 M. & W. 728; 58 R. R. 867.
(y) See Bul. N. P. 146; and *Ring v. Roxbrough*, 2 Tyr. 468; 2 C. & J. 418; and 1 Chit.

Pleading, 6th Ed. 296.

(z) See Order XIX., r. 14.

(a) 3 & 4 Will. 4, c. 42, s. 23. See now Order XXVIII., r. 12.

the wind, makes no difference to the merits." After this amendment a verdict was found for the plaintiff (b).

Statement of
the breach.

A *breach* must always be stated in the statement of claim, so that the cause of complaint may appear (c). If the contract be in the disjunctive, the breach ought to be assigned that the defendant did not do one act or other; as on a promise to deliver a horse by a particular day or pay a sum of money (d). It is a rule in pleading that the breach may in general be assigned in the negative of the words of the contract; and therefore it is not necessary that the particular description of unsoundness should be stated (e).

Statement of
the damage.

In order to recover *special damages* it is necessary that they be explicitly stated in the statement of claim, so that the defendant may be prepared to dispute the facts. But *damages* which necessarily and by implication of law ensue from the non-performance of the contract, need not be expressly detailed, and are recoverable under the common conclusion of the statement of claim (f).

Proof in goods
bargained and
sold.

Where the plaintiff brings an action for the price of his horse as *goods bargained and sold*, he must be prepared to prove such a contract of a sale, made by him to the defendant and completed, as was sufficient in law to vest the property in the defendant. For instance, where the price is 10*l.* or upwards, the plaintiff must prove that some requisite of the 4th section of the Sale of Goods Act, 1893, as to which see *ante*, p. 6, has been complied with (h). And it will be necessary to show that a specific price was agreed upon (i) as part of the contract.

Proof in an
action for not
accepting.

When the plaintiff brings an action for not accepting the horse he has sold to the defendant, and a plea traversing the contract or agreement in the statement of claim is pleaded, the plaintiff must prove the *contract*, that is, the alleged *consideration* and the *promise* (k). And if the defendant contest it in his pleading, the plaintiff must show either a *tender* (l), as the case may

(b) *Mash v. Deansham*, 1 M. & Rob. 442.

(c) *Brickhead v. Archbishop of York*, Hob. 198, 233.

(d) Com. Dig. Pleader, C.; *Wright v. Johnson*, 1 Sid. 440, 447; *Aleberry v. Walby*, 1 Stra. 231.

(e) Com. Dig. Pleader, C. 45; and see 1 Chit. Pleading, 6th Ed. 172.

(f) See *Boorman v. Nash*, 9 B. & C. 152; 32 R. R. 607; Bullen

and Leake's Pleading, 6th Ed. 54; and Damages, post.

(g) Requires no stamp. *Marsan v. Short*, 2 Birg. N. C. 118; 2 Scott, 243; 42 R. R. 544.

(h) *Elliott v. Pybus*, 10 Bing. 512; 38 R. R. 532; *Rohde v. Thwaites*, 6 B. & C. 388; 30 R. R. 363.

(i) *Simmons v. Swift*, 5 B. & C. 857; 29 R. R. 438.

(k) *Beal v. White*, 12 A. & E. 670.

(l) Proof of Tender, post.

be, or that during a reasonable time he was *ready and willing* to deliver it (*u*).

The meaning of *readiness and willingness* is, that the non-completion of the contract was not the fault of the plaintiff, and that he was disposed and able to complete it, if it had not been renounced by the defendant (*n*).

Meaning of readiness and willingness.

Where the plaintiff has otherwise than at the buyer's request delayed delivery beyond the proper time, he cannot enforce acceptance, unless the defendant has entered into a new binding contract (*o*).

Where a horse is bought, and an action is brought for *not delivering* him, a plea traversing the contract or agreement alleged in the statement of claim will put the plaintiff to prove the *contract*, namely, the alleged *consideration* and *promise*; and if the defendant contest it in his pleading, the plaintiff must prove that he was *ready and willing* to accept and pay for it. But where there is a traverse of readiness, if nothing remain for the plaintiff to do, it lies on the defendant to disprove, rather than on the plaintiff to prove, the readiness and willingness to deliver (*p*). But it will not be necessary to prove a tender of the money (*q*). And it is sufficient evidence that the plaintiff was *ready and willing*, if within a reasonable time the horse is demanded by him (*r*), or his servant (*q*).

Proof in an action for not delivering.

Where the plaintiff after delivering the horse brings an action for his price, he must be prepared to prove, if denied, 1st, the *sale*, of which the delivery of the horse to the defendant and an acceptance by him will be sufficient *prima facie* evidence (*s*); 2nd, the *delivery* either to the defendant or his agent, or something which has been done equivalent to a delivery (*t*); and 3rd, the *price* agreed upon for the horse; but if the price forms no part of the contract, or if the contract is merely to be

Proof in goods sold and delivered.

(*u*) *Granger v. Dacre*, 12 M. & W. 431; *Tempest v. Kilner*, 2 C. B. 308.

(*n*) *Cort v. Ambergate Railway Company*, 20 L. J., Q. B. 465; *Baker v. Firminger*, 28 L. J., Ex. 130.

(*o*) *Plerins v. Downing*, 1 C. P. D. 220; 45 L. J., C. P. 695; 35 L. T. 263.

(*p*) *Rawson v. Johnson*, 1 East, 203; 6 R. R. 252; *Waterhouse v. Skinner*, 2 B. & P. 447.

(*q*) *Wilkes v. Atkinson*, 1 Marsh.

412; *Lery v. Lord Herbert*, 7 Taunt. 318; *Tempest v. Kilner*, 2 C. B. 308.

(*r*) *Squire v. Hunt*, 3 Price, 68.

(*s*) *Bennett v. Henderson*, 2 Stark. N. P. C. 550; and see *Smith v. Rolt*, 9 C. & P. 696, and *Roscoe*, N. P., 18th Ed. 549.

(*t*) *Lee v. Shore*, 1 B. & C. 94; 25 R. R. 317; *Smith v. Chance*, 2 B. & A. 755; 21 R. R. 485. See also *Bartholomew v. Markwick*, 33 L. J., C. P. 145, and *Webb v. Fairmanner*, 3 M. & W. 473; 49 R. R. 690.

implied from the delivery to and acceptance by the defendant, the plaintiff must be prepared to show the real and reasonable *value* of the horse by persons of competent experience.

Proof in money had and received.

Where the plaintiff after a breach of warranty sues for repayment of the purchase-money as *money had and received*, he may be compelled by a proper defence to prove the receipt of the money by the defendant, and his own title to recover it as received for him (*u*). He must, therefore, prove the *consideration* and the *performance* of it on his part, namely, the *payment of a particular price (x)*; also the *warranty*, the *breach of warranty*, and *either* an actual *rescission* of the contract or a *power to rescind*, and a consequent *tender* of the horse.

Proof of an account stated.

To support a claim for *money found to be due on an account stated*, it must appear that, at the time of the accounting, which must have been before action brought, a demand existed between the parties respecting which an account was stated, that a balance was then struck and agreed upon, and that the defendant then expressly admitted that a certain sum was then due from him to the plaintiff (*y*).

Proof in an action for breach of warranty.

Where an action is brought on a breach of warranty, and the warranty is denied, the plaintiff must prove the fact of the sale and *warranty* having been given. If the *breach* is traversed the onus lies upon him to prove the *unsoundness* or *vicc*, or whatever is alleged as the subject-matter of the breach (*z*). And of course he must in all cases prove *damage* whether general or special.

Where it is doubtful whether warranty is provable.

Where there is evidence of fraud, it should be alleged in addition to a breach of warranty, where it is doubtful whether a warranty can be proved (*a*). For if a statement of claim discloses a state of facts, upon which an action may be maintained without fraud, fraud need not be proved, though it be alleged; and the plaintiff may recover upon the facts disclosed, though fraud be alleged and disproved (*b*). But where the plaintiff relies on fraud alone and does not succeed, he cannot pick out facts

(*u*) Roscoe, N. P., 18th Ed. 601.

(*x*) *Harvey v. Archbold*, 3 B. & C. 626; *Bernacconi v. Anderson*, M. & M. 183; *Leeson v. Smith*, 4 N. & M. 304.

(*y*) See Chit. Contr., 14th Ed. 70, and the authorities there cited.

(*z*) *Osborn v. Thompson*, 9 C. & P. 337; 1 Tayl. Evid. 337.

(*a*) Bullen & Leake's Pleadings, 7th Ed. 317.

(*b*) *Swinfen v. Lord Chelmsford*, 5 H. & N. 893, 921. Per Parke, B., *Thom v. Bigland*, 8 Ex. 725: 91 R. R. 730.

which would otherwise have entitled him to relief apart from the fraud (c).

Where no warranty exists in the contract, but the contract is induced by false representation, known by the seller to be false, the action is grounded on the fraud, and should be so framed (d); for the knowledge of the defendant is in such case essential to the cause of action (c).

Proof in an action for fraudulent representation.

Where an action is brought for fraudulent representation on the sale of a horse, the plaintiff should be prepared to prove the *wrongful act* alleged to have been committed by the defendant, namely, the *sale* by means of the *fraudulent representation* (f); and it is essential to show that there was a *sale* and also a *misrepresentation* (g); and he must give proof of *damage* whether general or special (h).

A *sale* may in all cases be implied *primâ facie* from evidence of a delivery to, and an acceptance by, the purchaser (i). We have seen, in Chapter I., what is sufficient evidence of a contract for sale, either where the value is under 10*l.*; or the agreement is not to be performed within a year; or the value is 10*l.* or upwards; within the 4th section of the Sale of Goods Act, 1893. Where there is an agreement in writing, it should be put in and proved, and it is not necessary that it should be stamped (k). Where, however, the *bargain and sale* has been made by word of mouth, the plaintiff (l), or some witness of the transaction, must be called.

Proof of the bargain and sale.

Where the *consideration* is set out in the statement of claim as *executory*, it will in point of fact depend upon the same proof as the *contract for sale*. When it is *executed*, the plaintiff must show that it took place before the contract, and that it arose at the defendant's request (m). In the case of a *sale* he must prove *payment of the price*; but where the *consideration* is another horse, or other goods, a *delivery* and *acceptance* must be proved. Where, however, the transaction is *substantially*

Proof of the consideration.

(c) *Hudson v. Lombard*, L. R., 1 H. L. 324; *London Chartered Bank of Australia v. Lempriere*, L. R., 4 P. C. 572; *Noad v. Murme*, 40 L. T. 100.

(d) *Ormerod v. Huth*, 9 C. & P. 337.

(e) *Pasley v. Freeman*, 2 Sm. L. C., 11th Ed. 67.

(f) Per Cresswell, J., *Mummery v. Paul*, 1 C. B. 327.

(g) Per Erle, J., *ibid.*

(h) Per Bramwell, B., *Eastwood v. Bain*, 28 L. J., Ex. 74.

(i) *Bennett v. Henderson*, 2 Stark. 550; and see *Smith v. Rolt*, 9 C. & P. 696.

(k) *Skrine v. Elmore*, 2 Camp. 407; 11 R. R. 754.

(l) 14 & 15 Viet. c. 99, s. 2.

(m) *King v. Sears*, 2 Cr. M. & B. 48.

a sale, the plaintiff may prove that the defendant took another horse in part payment (n).

Proof of
payment of
the price.

The *payment of the price* is usually proved by producing the receipt, which of course must bear a stamp where the sum is 2*l.* or upward (o); and if no receipt was given, or it was unstamped or lost, the plaintiff, or some person who witnessed the transaction, must be put into the box (p).

Appropriation of money
tendered.

Where a claim consists of several items, the party making the tender has a right of appropriation; but if he omits to make any appropriation, the right to appropriate is transferred to the other party (q).

The plaintiff's horse, warranted quiet in harness, was sold for 16*l.* at Aldridge's repository. It was afterwards returned on the ground that it did not answer its warranty, and, on being tried in a break, was found not to be quiet in harness. By the printed regulations of the repository the purchase-money for any horse, carriage, etc., sold there was not to be paid over to the vendor until four days after the sale. And he was also to pay 10*s.* as the expense of trial, when a horse was found not to answer his warranty.

After the trial of the horse, the plaintiff called at the repository and demanded an account of his expenses, when he received the following:—

		£	s.	d.
1847. July 31.	Bay gelding bait . . .	0	1	6
	Auction	0	5	0
July 31 } Aug. 4 }	Bay gelding, three days . .	0	10	6
Aug. 3	To cash price for trial of bay gelding in harness . .	0	10	0
		<hr/> £1 7 0 <hr/>		

The plaintiff, objecting that the charge was exorbitant, laid down 19*s.* 6*d.* on the desk in the defendant's office and demanded his horse. The defendant's clerk told him he could not have it unless he complied with the rules and paid the 1*l.* 7*s.* The plaintiff then went away, leaving the 19*s.* 6*d.* on the desk.

The plaintiff brought an action of *debt for money had*

(n) *Hinds v. Burton*, 9 East, Esp. 213; 6 R. R. 854.
349.

(o) 33 & 34 Vict. c. 97, s. 120.

(p) See *Rambert v. Cohn*, 4

(q) See per Wilde, C.J., *Hardingham v. Allen*, 5 C. B. 797; 75 R. R. 839.

and received with a count in *detinue* for the horse. It was held by the Court of Common Pleas, that as the horse was sold subject to certain conditions, the sum received by the defendant on the sale was not *money had and received* to the use of the plaintiff, until those conditions had been complied with, and the time for returning the horse had elapsed. Also that the evidence did not support a tender, inasmuch as there was no specific appropriation of any part of the 19*s.* 6*d.* to the 10*s.* claimed in respect of the trial of the horse (7).

Where the *promise* or *warranty* has been made by word of mouth, the plaintiff or some party who heard it given must be called to prove it. Where the promise or warranty is to be gathered from letters which passed between the parties, or was formally made in writing, and this in the case of a warranty is usually contained in the same instrument as the receipt, they should be put in and read.

Proof of the promise or warranty.

The buyer may give evidence of a warranty, although in a note of the sale and receipt for the money, given by the seller after the conclusion of a parol contract, there be contained no notice of any warranty. Thus the defendant sold his horse at Aldridge's repository, and said at the time of sale that if he did not work well, and go quietly in harness, the plaintiff was to send him back, and he should have his money returned. The plaintiff bought him and received the following memorandum:—

A warranty not contained in the receipt.

“Bought of G. Pink a horse for the sum of 7*l.* 2*s.* 6*d.*
G. PINK.”

The horse when put into harness was found to be unruly and vicious, and was accordingly returned to the defendant. The price was demanded back, and on its being refused an action was brought to recover it. It was held by the Court of Exchequer, that parol evidence might notwithstanding be given of the warranty (8).

But a warranty contained in a receipt is not always *conclusive* evidence that a warranty has been given. For where some hours after bargain the defendant sent his coachman to pay the plaintiff the money, and the coachman drew out the following receipt, which was signed by the plaintiff, an illiterate man, “Received 10*l.* for a colt warranted sound”: it was held to have been properly left to the jury to find whether the warranty of the colt

Warranty in a receipt not always conclusive.

(7) *Hardingham v. Allen*, 5 C. B. 796; 75 R. R. 839. (8) *Allen v. Pink*, 4 M. & W. 140; 51 R. R. 503.

formed any part of the bargain, or was inserted in the receipt without authority, by an after-thought of the defendant's servant (t).

Written
warranty
requires no
agreement
stamp.

It is not necessary that a written *warranty* should have an *agreement stamp*. This was so decided in the following case, where the plaintiff gave in evidence a written instrument signed by the defendant, which had a receipt stamp, and contained a receipt for the price of the horse, with the words subjoined, "Warranted sound." It was objected that it could not be read in evidence for the purpose of proving the warranty without an *agreement stamp*. But on the authority of Lawrence, J., in *Browne v. Frye* (u), Lord Ellenborough held that such a receipt might be received to prove the warranty, as well as the payment of the price of a horse, with a receipt stamp only (x); and a warranty comes within the exception in the schedule of 33 & 34 Vict. c. 97 (the Stamp Act, 1870), as it is an agreement relating to the sale of goods, wares, and merchandises.

Where
authority to
warrant need
not be
proved.

Where a servant employed to sell and receive the price has given the warranty, it is enough to prove that it was given by him, without calling him or showing that he had any special authority for that purpose (y). But this statement must be taken subject to the qualification that the sale took place at a fair, or that the seller was a horsedealer (see cases cited, *ante*, pp. 136-139).

Where
authority to
warrant must
be proved.

But the warranty of a person merely entrusted to deliver a horse is not *prima facie* binding on the principal, but an express authority must be proved (z). So also where an agent makes an alteration in a warranty given by his principal, a special or general authority must be shown (a).

Proof of a
power to
rescind.

Where a power to rescind is one of the terms of a verbal contract for a horse, some witness to the transaction must be called to prove it (b). Where, however, there is a written contract, and such power appears as one of the terms, it is proved by putting in the document; but if it do not so appear, or if it were given in a subsequent con-

(t) *Fairmaner v. Budd*, 7 Bing. 575.

(u) *Browne v. Frye*, cited in *Skrine v. Elmore*, 2 Camp. 407; 11 R. R. 754.

(x) *Skrine v. Elmore*, 2 Camp. 407; 11 R. R. 754.

(y) *Alexander v. Gibson*, 2

Camp. 555; 11 R. R. 797.

(z) *Woodin v. Burford*, 2 C. & M. 391; 4 Tyrw. 264; 39 R. R. 802.

(a) *Strode v. Dyson*, 1 Smith, 400.

(b) As to unfitness, see *Breach of Warranty*, ante, Chap. VIII.

versation, it is inoperative, and the original contract as proved still remains open (c).

We have seen in the seventh chapter what constitutes a *fraudulent representation*, so as to support an action for deceit. And it may be laid down as a rule, with regard to the proof of the *scienter* or fraud, that where a representation is false to the *knowledge* of the party making it, this is in general conclusive evidence of fraud (d).

Proof of a fraudulent representation.

Where the breach of warranty (e) is *unsoundness*, the plaintiff must prove either an *actual* existence of *unsoundness* at the time of sale, or that from the appearance of the horse afterwards he *must* have been *unsound* when sold. This, however, must be satisfactorily proved, because a mere *suspicion* that the horse was then *unsound* is *not* sufficient (f). Where the breach of warranty is *vice*, the plaintiff must prove the existence at the time of sale of such a bad habit as in the eye of the law constitutes a *vice* (g). And where a horse is warranted fit for some particular purpose, he must be proved to have been unfit for it in ordinary hands (h).

Proof of the breach of warranty.

It is not necessary that the plaintiff should inform the defendant of the nature of the *unsoundness*, and he may refuse to do so if applied to before the trial; and the Court of Common Pleas held that if the defendant wishes to ascertain the nature of the *unsoundness*, he should take out a summons for that purpose (i).

Notice of the nature of the unsoundness.

As there are a variety of particular causes of *unsoundness* (k), the proof of it will vary according to the circumstances of the case.

Evidence as to unsoundness.

There are some cases which merely depend upon evidence as to a certain *fact*; for instance, a horse after sale is discovered to be lame from a curb (l), and a person giving his evidence on the part of the plaintiff must actually have seen the curb, either before or at the time of sale.

Matter of fact alone.

Other cases may be proved *either* by evidence as to a certain *fact*, or *by veterinary opinion*. As where the buyer discovers a spavin (m) after sale, he must either prove its

Either fact or veterinary opinion.

(c) *Payne v. Whale*, 7 East, 274.

Rob. 210; 62 R. R. 794.

(d) *Ormrod v. Huth*, 14 M. & W. 664—Ex. Ch.

(h) *Grddes v. Pennington*, 5 Dow, 164.

(e) See Breach of Warranty, ante, Chap. VIII.

(i) *Atterbury v. Fairmanner*, 8 Moore, 33.

(f) *Eaves v. Dixon*, 2 Taunt. 343.

(k) See Unsoundness and Vice, ante, Chap. IV.

(l) Curb, ante, p. 86.

(g) *Scholefield v. Robb*, 2 M. &

(m) Spavin, ante, p. 107.

existence before or at the time of sale by some one who had then actually seen it, or he must produce veterinary testimony to show that from its present appearance it *must* have then existed.

Both fact and veterinary opinion.

Other cases, again, may be compounded *both of fact and veterinary opinion*; as where a horse has a splint (*n*) and is lame, the question is whether the present lameness (*o*) proceeds from the splint; and if it does, whether the splint actually existed or must have existed before or at the time of sale.

Veterinary opinion alone.

Or a *pure question* of veterinary opinion may arise, as where there is a dispute whether a horse is spavined (*p*) or not; or where the natural appearance of a horse's hock is altered, and it is doubtful whether it is merely a capped hock (*q*), or a material alteration in the structure of the hock joint.

Evidence as to vice.

The proof of an alleged vice (*r*) may depend upon evidence of the *fact* of its having existed before or at the time of sale; or upon proof of the *existence* of a certain habit before or at that time, and then upon *veterinary opinion* as to the effect of it.

Evidence as to unfitness.

The unfitness (*s*) for the purpose for which the horse was bought must be clearly proved; as, for instance, where a horse has been warranted to be a "thorough-broke gig horse," the jury must be satisfied that a person of ordinary skill cannot safely drive him (*t*).

Proof of rescission.

To prove a *rescission*, the plaintiff must either prove that the defendant *accepted* the horse when tendered, or he must show a *rescission* by *mutual agreement*.

Proof of tender.

The plaintiff may prove a *tender* by showing that he sent the horse *back* to the defendant, who refused to accept it (*u*); or that he sent the horse *to livery*, and informed the defendant that he had done so (*x*).

Pleading and Evidence for the Defendant.

Defence for detention of goods.

The ordinary evidence of detention is that the defendant refused to deliver the goods when demanded (*y*). It is no

(*n*) Splint, ante, p. 107.

(*o*) Lameness, ante, p. 94.

(*p*) Spavin, ante, p. 107.

(*q*) Capped Hocks, ante, p. 79.

(*r*) See Unsoundness and Vice, ante, Chap. IV.

(*s*) *Geddes v. Pennington*, 5 Dow, 164. See *Buckingham v.*

Reere, ante, p. 131.

(*t*) Ibid.

(*u*) See *Towers v. Barrett*, 1 T. R. 138.

(*x*) *Chesterman v. Lamb*, 2 A. & E. 129; 41 R. R. 397.

(*y*) *Jones v. Dowle*, 9 M. & W. 19; 60 R. R. 652.

defence to show that the goods were not in his possession when demanded if he had improperly parted with the possession (z), as where he had sold them, or lost them by carelessness (a).

Where goods have been deposited or pledged with the defendant as part of an illegal or immoral agreement, the maxim "*In pari delicto potior est conditio defendentis*" applies, and the plaintiff cannot recover them (b).

In an action for goods bargained and sold the defendant, provided that he plead them specially, may rely on any of the following facts, *viz.*, that the defendant never bought a horse of the plaintiff at all, or that the sale was invalid under the Statute of Frauds (c), or s. 4 of the Sale of Goods Act, 1893; or where he did not see the horse before purchase he may show that it does *not correspond* with its description (d); or where it has been ordered for a particular purpose, for instance, to run in a carriage, he may show that it was *unfit* for that purpose (e); or that it was not the horse which he bargained to purchase, though of the same name (f), or that the contract was made without the proper formalities (g).

Defence for goods bargained, and sold and for not accepting.

In an action *for not delivering* a horse, the defendant may show that he did *not sell* a horse to the plaintiff at all, or that the *sale* was *informal* under the Statute of Frauds (h). And where he contests it in his pleading, he may show that the plaintiff was *not ready and willing* to accept and receive it and pay the price (i). And where no particular time has been specified for delivery, he may show that the plaintiff *never* made any demand (k).

Defence in action for not delivering.

Where there is no ambiguity in the language of a contract, evidence is not admissible to show that, by the usage of the particular trade, persons selling under such contracts are not bound to deliver the goods without payment (l).

Where evidence of the usage of trade is not admissible.

(z) *Jones v. Dacre*, 9 M. & W. 19; 60 R. R. 652.

(a) *Reeve v. Palmer*, 28 L. J. C. P. 168.

(b) *Taylor v. Chester*, L. R., 4 Q. B. 309; 38 L. J., Q. B. 225.

(c) *Johnson v. Dodgson*, 2 M. & W. 653; 46 R. R. 733; *Elliott v. Thomas*, 3 *ibid.* 170; 49 R. R. 558; *Buttermere v. Hayes*, 5 *ibid.* 456.

(d) See *Street v. Blay*, 2 B. & Ad. 456; 36 R. R. 626; *Parsons v. Sexton*, 4 C. B. 905.

(e) *Chanter v. Hopkins*, 4 M. & W. 406; 51 R. R. 650.

(f) *Raffles v. Wichelhaus*, 33 L. J., Ex. 160.

(g) *Freud v. Denuett*, 27 L. J., C. P. 314; *Bradley v. Bardsley*, 14 M. & W. 873.

(h) *Johnson v. Dodgson*, 2 M. & W. 653; 46 R. R. 733; *Elliott v. Thomas*, 3 *ibid.* 170; 49 R. R. 558; *Buttermere v. Hayes*, 5 *ibid.* 456.

(i) *Rawson v. Johnson*, 1 East, 203; 6 R. R. 252.

(k) *Bach v. Owen*, 5 T. R. 410.

(l) *Spartali v. Beuecke*, 10 C. B. 212; 84 R. R. 532; and see *Humphrey v. Dale*, 27 L. J., Q. B. 390.

Defence for
goods sold
and delivered.

Where an action is brought for the price of a horse as *goods sold and delivered*, the defendant, by proper allegations in his statement of defence, may dispute the *sale* and *delivery* in point of fact. Therefore he may show that the *sale* was on *credit* which had not *expired* when the action was brought (*m*); that no absolute *sale* took place; that there was no *delivery* at all (*n*); or that the *delivery* was for the purpose of a reasonable *trial* and that the horse did not *return*; or he may show that the horse was *returned* on the ground of a breach of warranty, pursuant to an agreement embodied in the contract. If his defence is *payment*, of course it must be *specially pleaded*. So also non est want of title (*p*).

Defence to
action on a
bill for the
price.

A breach of warranty cannot properly be pleaded by way of defence *pro tanto*, to an action brought by the seller upon a bill of exchange, or other negotiable security given by the buyer for the price, except where there has been a total failure of consideration, and the buyer has repudiated the contract (*q*). But since the Judicature Acts a breach of warranty may be pleaded by way of counterclaim in such an action (*r*).

Evidence in
reduction of
damages.

However, it is only reasonable and just that when an action is brought by the seller to recover the price or value of a horse or any other goods, that the buyer should be at liberty to show the *breach of warranty* in *reduction of damages* (*s*).

Defence for
residue of the
price.

Where a horse is bought warranted sound, and part of the price is paid, and on turning out unsound, he is found to be worth no more than that sum, it is a good defence to an action for the residue. Thus, in the following case, it appeared that the plaintiff sold to the defendant a horse, warranted sound, for twelve guineas, of which the defendant had paid three. In fact, the horse was not sound; and the defendant refusing to pay any more, an action was brought to recover the residue of the horse's price. It was proved that the horse, at the time of sale to the

(*m*) *Broomfield v. Smith*, 1 M. & W. 542; *Webb v. Fairman*, 3 M. & W. 473; 49 R. R. 690; and see *Paul v. Dod*, 2 C. B. 800.

(*n*) See *Smith v. Rolt*, 9 C. & P. 696.

(*o*) *Street v. Blay*, 2 B. & Ad. 456; 36 R. R. 626; *Moss v. Sweet*, 16 Q. B. 493; 83 R. R. 560.

(*p*) *Walkerv. Mellor*, 11 Q. B. 478.

(*q*) See *Moggridge v. Jones*, 3 Camp. 38; *Knor v. Whalley*, 1

Esp. 159; *Wells v. Hopkins*, 5 M. & W. 7; 52 R. R. 611.

(*r*) Order XIX., r. 3.

(*s*) *Poulton v. Lottimore*, 9 B. & C. 265; 32 R. R. 673; *Mondel v. Steel*, 8 M. & W. 858; 1 D. N. S. 8; 58 R. R. 890; *Parsons v. Serton*, 4 C. B. 908; 16 L. J., C. P. 184. See also s. 53, sub-s. (1) (a) of the Sale of Goods Act, 1893, ante, p. 177.

defendant, was not worth more than 1*l.* 11*s.* 6*d.*, and the defendant afterwards sold it for 1*l.* 10*s.* On these facts Lord Kenyon held that the plaintiff could only recover the value; and more having been paid to him by the defendant, he was nonsuited (*t*).

Where an action is brought to recover back the price paid for a horse, on failure of consideration, as money had and received, the defendant may show that he never received the price, or that he never warranted, or that there was no breach of warranty, or that there was no rescission of the contract, or that there was no power to rescind, or no tender of the horse, or that being sold on trial, it was kept longer than was necessary for such trial (*u*).

Defence for money had and received.

The defendant in an action on a breach of warranty may deny the warranty, or he may show that, at the time of sale, the horse answered his warranty, whether it were soundness, freedom from vice, fitness for a particular purpose, &c. (*x*).

Defence to an action on a breach of warranty.

The defendant may prove that the warranty was added to the form of receipt unknown to him. Thus, in an action brought on the warranty of a horse, the jury gave a verdict for the defendant, being of opinion that the warranty had been surreptitiously introduced into the receipt by the plaintiff before it was signed by the defendant. And Platt, B., said, that if the jury had been of opinion that the words were added afterwards by the plaintiff, it would have been his duty to have impounded the receipt for ulterior purposes (*y*).

Surreptitious warranty.

Where an action is brought on a breach of a warranty of soundness, the subsequent recovery of the horse may be proved in reduction of damages. Evidence may also be given as to the slightness of the disease; because, of course, if the disease be slight, the unsoundness is proportionately so, and so also ought to be the damages (*z*).

Evidence in reduction of damages.

In an action for fraudulent representation on the sale of a horse, the defendant may show that he never made any representation on the sale; or that the representation was honestly made and believed by him at the time, though not true in point of fact; or that the horse at the time of

Defence to an action for fraudulent representation.

(*t*) *King v. Boston*, cited 7 East, 481.

(*u*) *Street v. Blay*, 2 B. & Ad. 456; 36 R. R. 626; and see *Dawson v. Collis*, 10 C. B. 532.

(*x*) See evidence as to Unsoundness, Vice and Unfitness, ante,

pp. 197, 198.

(*y*) *Bliss v. Snow*, Ex. N. 1., May 12, 1853.

(*z*) *Kiddell v. Bernard*, 9 M. & W. 670; 60 R. R. 857. See *Dawson v. Collis*, 10 C. B. 532.

sale *corresponded* with the representation. A statement merely untrue is not sufficient evidence of fraud; there must be wilful deceit with the object of inducing the plaintiff to act upon it (a).

Disputing the warranty.

The defendant may show that he is not bound by the warranty (b), as where it has been given by a person merely entrusted to deliver the horse (c), or by a servant after sale (d). And where the defendant is neither a *horsedealer* nor *stablekeeper* he may prove that the warranty was given by an agent who was expressly *forbid* to warrant (e), and that in consequence he had offered to take back the horse.

Disputing the unsoundness, &c.

The defendant may show that the horse at the time of sale was *sound*, or free from *vices*, or that the defect was *patent* at the time of sale. And this will depend upon the same sort of evidence as we have before described (f). The defendant may also show that the horse was *not unfit* for the purpose for which he was bought; for instance, that he has answered his warranty when used by persons of *ordinary skill* (g).

Subsequent recovery.

But where a horse is proved to have had a disease at the time of sale, his subsequent recovery is *no defence* to an action on a breach of warranty, because where a horse is warranted it is to be presumed he is fit for immediate use (h).

Damages.

General damages.

The damages which *necessarily*, and by *implication of law*, ensue from the non-performance of the *contract*, or the commission of the *wrongful act*, need not be expressly detailed, and are recoverable under the common conclusion of the statement of claim (i).

Special damages.

But damages which *really* took place, but do not *necessarily* arise from the non-performance of the contract, or

(a) *Ormrod v. Huth*, 14 M. & W. 651.

(b) See Warranty, Chap. V.

(c) *Woodin v. Burford*, 2 Cr. & M. 391; 4 Tyrw. 264; 39 R. R. 802.

(d) *Helper v. Hawke*, 5 Esp. 72.

(e) *Fenn v. Harrison*, 3 T. R. 761; and *Scotland (Bank) v. Watson*, 1 Dow, 45; 14 R. R. 11.

(f) Evidence as to Unsound-

ness, ante, p. 197; Patent Defects, Chap. V.

(g) *Geddes v. Pennington*, 5 Dow, 164.

(h) *Cutler v. Stephens*, 2 M. & Rob. 157; 62 R. R. 785.

(i) See *Boorman v. Nash*, 9 B. & C. 152; 32 R. R. 607; Bullen & Leake's Pleadings, 6th Ed. 54.

the commission of the *wrongful act*, and are not implied by law, must be *expressly* stated in the statement of claim; so that the defendant may be prepared to dispute the facts.

The damages must be the legal and natural consequences of the breach of contract, or of the injury which has been inflicted (*k*). Thus the costs of an action brought on a false representation made by a third person of the profits of a business, such third person not having been communicated with before the action was brought, nor having represented himself as agent for the defendants in that action, are not the legal and natural consequences of the breach of contract or of the injury which has been inflicted (*l*). But it is otherwise, when on the third person being communicated with, before action was brought, he said that the plaintiffs might go safely on with their action, and also professed to have authority as agent for the representations which he made (*m*).

Legal and natural consequences of the breach of contract.

This rule illustrates the maxim "*In jure non remota causa sed proxima spectatur*"—it is the proximate only and not the remote consequences of an act that are to be regarded. But as to the degree of remoteness it is said that no distinct line can be drawn. In each case the Court must say, as a matter of law, whether it is on the one side or the other (*n*). In *Hobbs v. London and South Western Railway Co.* (*o*), the plaintiffs took tickets to travel by a midnight train from W. to H. The train did not go to H., and the plaintiffs were taken to E., which was a station further from the plaintiffs' house than H. was. The plaintiffs walked home in the wet from E., there being no conveyance to be had. It was held that damages might be given for the personal inconvenience and discomfort of having so to walk, but not for illness brought on by the dampness of the night. But where an innkeeper contracted to provide stabling for twelve horses for the plaintiff during a particular fair, and failed to do so, it was held that the plaintiff could recover damages for injury caused to the

(*k*) See 1 Chit. Pleading, 6th Ed. 395; also *Vicars v. Wilcocks*, 8 East, 3; 9 R. R. 361; *Smith v. Green*, 1 C. P. D. 92; 45 L. J., C. P. 28; *Randall v. Newson*, 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T. 164; 25 W. R. 313—C. A.

(*l*) *Richardson v. Dunn*, 30

L. J., C. P. 44.

(*m*) *Randell v. Trimen*, 25 L. J., C. P. 307.

(*n*) *Hobbs v. London and South Western Rail. Co.* L. R., 10 Q. B. 117; 44 L. J., Q. B. 52; 32 L. T. 352; 23 W. R. 520—per Blackburn, J.

(*o*) *Ubi supra*.

horses by exposure to the weather while he was engaged in finding other stables for them (*p*).

Judge to direct jury as to rules of damages.

The Judge should direct the jury as to any established rules of measuring the damages applicable to the particular case, and the omission to do so is a ground for a new trial (*q*).

Damages arising from special circumstances.

In accordance with the rule that damages should be estimated by the legal and natural consequences of the breach of contract, or such as may be reasonably supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it, it was laid down in *Hadley v. Baxendale* (*r*), that where a contract is made under special circumstances, which are communicated by one of the contracting parties to the other, the damages resulting from a breach of the contract, which the parties would reasonably be supposed to have contemplated, are the amount of injury which would ordinarily follow from such a breach of contract under the special circumstances. But if the special circumstances are unknown to the party breaking the contract, he, at the most, can only be held to have contemplated the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract. Therefore, in a case where a miller employed a carrier to deliver a broken shaft to an engineer for repair, and the carrier was guilty of an unreasonable delay in delivering it, the result of which was the stoppage of the mill, and a consequent loss of profits, it was held that such a loss of profits should not be taken into consideration by the jury in estimating the damages, as the carrier had not been informed that this would be the result or the probable result of his negligence (*s*).

Damages for wrongful conversion.

In the ordinary case of *trover* for a horse, the plaintiff recovers the value of the horse, and not what the horse might have earned besides (*t*). Special damages may be recovered if *trover* is laid. Therefore, where in *trover* for a horse it was laid as special damage, that the plaintiff

(*p*) *McMahon v. Field*, 7 Q. B. D. 591; 50 L. J., Ex. 552—C. A.

(*q*) *Hadley v. Baxendale*, 23 L. J., Ex. 179; *Smeed v. Ford*, 28 L. J., Q. B. 178.

(*r*) *Hadley v. Baxendale*, 23 L. J. Ex. 179; *Smeed v. Ford*, 28

L. J., Q. B. 178; *Horne v. Midland Rail. Co.*, L. R., 8 C. P. 131; 42 L. J., C. P. 54; *Hammond v. Bussey*, 20 Q. B. D. 79; 57 L. J., Q. B. 58.

(*s*) *Ibid*.

(*t*) Per Jervis, C. J., *Read v. Fairbanks*, 22 L. J., C. P. 206.

was obliged to hire other horses, it seems that the amount of damages should be the value of the plaintiff's horse when taken, and the sum he paid for hire, deducting what would have been the expense of keeping his own horse for the time (*u*).

Where the property in goods has passed under the contract, but the price has not been paid, and the vendor has wrongfully converted and disposed of the goods so as to preclude himself from delivering them, and recovering the price, the vendee can only recover the difference between the value of the goods and the contract price, and cannot recover the full value by suing for the conversion of the goods instead of for the breach of contract (*x*).

Whenever a party is liable for a breach of a contract, either express or implied, the plaintiff is, in general, entitled to *nominal* damages; although the action be framed in *tort* for such breach of contract, and no actual damage be proved (*y*). But in the case of actions framed in *tort* for breach of contract, the damages must be such as are capable of being appreciated or estimated, whereas in such as are not founded on contract the jury may consider the injury to the feelings and many other matters which have no place in actions of contract (*z*).

Damages
in *tort*.

In an action for the recovery of a fixed pecuniary demand, which the defendant has not shown grounds for reducing, by proving a partial failure of consideration, it is obviously in general the duty of the jury to give the plaintiff neither more nor less than the sum specified (*a*).

In actions
for a sum
certain.

(*u*) *Davis v. Oswell*, 7 C. & P. 804; 48 R. R. 850; see further, *France v. Gaudet*, L. R., 6 Q. B. 199; 40 L. J., Q. B. 121.

(*v*) *Chinery v. Viall*, 29 L. J., Ex. 180; *Johnson v. Stear*, 33 L. J., C. P. 130.

(*y*) *Rolin v. Steward*, 23 L. J., C. P. 148; *Marzetti v. Williams*, 1 B. & Ad. 415; 35 R. R. 329.

(*z*) Per Pollock, C. B., *Hamlin v. Great Northern Rail. Co.*, 1 H. & N. 410.

(*a*) Chit. Contr. 14th Ed. 711.

Canadian Case.—A. lent a horse to B. for a special purpose, and while B. was using him consistently with such lending, the horse was accidentally hurt, and consequently left at a public stable, of which B. gave A. immediate notice. A., having seen the horse, refused to take him, and went to B.'s residence (twenty miles from where the horse was left) and demanded him back sound as received: *Held*, that B.'s non-delivery of the horse after such demand did not furnish evidence of a conversion, and that A. could not sustain trover. *Wells v. Crew*, 5 U. C. Q. B. (O. S.) 209 (1836). And see *Campbell v. Boulton*, 2 U. C. Q. B. 202; *Dixon et al. v. Dalby*, 11 U. C. Q. B. 79.

Conversion.

Interest.

However, by 3 & 4 Will. 4, c. 42, s. 28, it is enacted, "that upon all *debts or sums certain*, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, *may, if they shall think fit*, allow interest to the creditor, at a rate not exceeding the current rates of interest, from the time when such debts or sums certain were payable if such debts or sums be payable by virtue of some *written instrument at a certain time*; or *if payable* otherwise, then from the time when *demand* of payment shall have been made in *writing*, so as such demand shall give *notice* to the debtor, that interest will be claimed from the date of such demand until the term of payment: *provided that interest* be payable on all cases in which it is now payable by law."

Effect of 3 &
4 Will. 4,
c. 42, s. 28.

This provision does not extend to actions on contracts which are brought for the recovery of *unliquidated damages* resulting from the breach of such contracts, and ascertainable only by a jury; for instance, actions for not delivering goods, &c. (b). Nor, as it appears, to any case in which the claim is not for a sum certain as contradistinguished from one the amount of which is merely capable of being ascertained (c). Its effect is to leave it discretionary in the jury to allow interest even in the cases specified; in other cases it is to be taken as limiting their discretion, unless there be proof of a written instrument, whereby the sum certain is made payable at a certain time (d), or of a written demand of the money containing a notice that interest from thenceforth will be claimed (e); and in all those cases, in which it was payable by law at the time the Act was passed, to make it compulsory on the jury to give interest.

Sale of Goods
Act. 1893,
s. 54.

Nothing in the Sale of Goods Act, 1893, is to affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

But in all actions which *sound in damages*, the jury seem to have a discretionary power of giving what damages they think proper; for though in contracts the very sum

(b) Chit. Contr. 14th ed. 527. - 452.

(c) *Hill v. South Staffordshire Rail. Co.*, L. R., 18 Eq. 154; 43 L. J., Ch. 566.

(d) *Taylor v. Holt*, 3 H. & C.

(e) *Harper v. Williams*, 4 Q. B. 219; 62 R. R. 334; *Mowatt v. Lord Lonsborough*, 3 E. & B. 307.

specified and agreed upon is usually given, yet, if there be any circumstances of hardship or extreme folly, though not sufficient to invalidate the contract, the jury may consider them, and proportion and mitigate the damages accordingly. Thus, where an action was brought on a promise of 1,000*l.* if the plaintiff should find the defendant's owl; the Court held, though the promise was proved, that the jury might mitigate the damages (*f*).

Where an action was brought in special *assumpsit* on an agreement to pay for a horse a barley-corn a nail, doubling it for every nail in the horse's shoes; and there were thirty-two nails, and this being doubled, every nail in a geometrical progression, came to five hundred quarters of barley; on the cause being tried before Hyde, J., at Hereford, the jury, under his direction, gave the real value of the horse, 8*l.*, as damages; and this contract seems to have been held valid; for it appears by the report that there was afterwards a motion to the Court in arrest of judgment, for a small fault in the declaration, which was overruled, and the plaintiff had judgment (*g*).

A foolish bargain.

An action will lie for the performance of a contract undertaken for a valuable consideration, though its performance turns out to be impossible (unless it has been rendered impossible by the act of the other party), for it is the result of the "heedlessness of the contracting party, if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract" (*h*). But where the law casts a duty on a man which, without fault on his part, he is unable to perform, the law will excuse him for non-performance (*i*).

An impossible contract.

The damages in an action for the price of a horse, as goods bargained and sold, will be the whole sum, and not merely damages for not accepting and paying for it.

In goods bargained and sold.

In an action for not accepting a horse "the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract" (*k*).

In an action for non-accepting.

Where there is an available market for the horse in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price

(*f*) Bac. Abr. Damages (D), 602.

(*g*) *James v. Morgan*, 1 Lev. 111; 1 Keb. 569.

(*h*) Per Williams, J., *Hale v. Rawson*, 27 L. J., C. P. 191.

(*i*) *Clark v. Glasgow Assurance Co.*, 1 Macq. H. of L. Cases, 668; *Inchbald v. Western Neigherry Coffee Co.*, 11 L. T. 345.

(*k*) Sale of Goods Act, 1893, s. 50, sub-s. (2).

and the market or current price at the time when he ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept (*l*).

In an action
for not
delivering.

In an action for *not delivering* a horse according to a contract, the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract (*m*). Where there is an available market for the horse in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price of the horse at the time he ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver (*n*). And this rule applies even though the seller in the interim have *re-sold* the horse, provided that the buyer did not assent to rescind the contract (*o*).

If the buyer, at the request of the seller, forbear to enforce the contract at the time the goods ought to be delivered, but afterwards do so, the measure of damages is the difference between the contract price and the market price when the buyer so enforces the contract, *e.g.*, by buying the goods in the market (*p*). Where there has been a written contract, the vendee cannot enhance the damages by oral proof that the contract price was higher than the market price by reason of the shortness of the time fixed by the contract for delivery (*q*).

Nominal
damages.

Where there is no difference between the contract price and the market price, the *damages* are only *nominal* (*r*). And where goods were paid for by bill, and after a breach of contract by the vendor in not delivering the goods the bill was dishonoured, the purchaser was held entitled to recover only *nominal damages* (*s*).

Damages in
goods sold
and delivered.

In an action for the price as *goods sold and delivered*, the damages will be the price or value of the horse.

(*l*) Sale of Goods Act, 1893, s. 50, sub-s. (3). See also *Phillpotts v. Evans*, 5 M. & W. 475; 52 R. R. 802; *Boorman v. Nash*, 9 B. & C. 145; 32 R. R. 607; *Josling v. Irvine*, 6 H. & N. 512.

(*m*) Sale of Goods Act, 1893, s. 52, sub-s. (2).

(*n*) *Ibid.*, sub-s. (3). See also *Boorman v. Nash*, 9 B. & C. 145; 32 R. R. 607; *Leigh v. Paterson*, 8 Taunt. 540; 20 R. R. 552; *Barrow v. Arnaud*, 8 Q. B. 609; 70 R. R. 568, per Tindal, C. J.; *Valpy v. Oakeley*, 16 Q. B. 941; 83 R. R. 786.

(*o*) *Leigh v. Paterson*, 8 Taunt. 540; 2 Moore, 588; 20 R. R. 552.

(*p*) *Oyle v. Earl Vane*, L. R., 2 Q. B. 275—Ex. Ch.; L. R., 3 Q. B. 272. See *Tyers v. Rosedale &c., Iron Co.*, L. R., 8 Ex. 305—Ex. Ch.; L. R., 10 Ex. 195; 42 L. J., Ex. 185; 29 L. T. 751.

(*q*) *Brady v. Oastler*, 3 H. & C. 112; 33 L. J., Ex. 300.

(*r*) *Valpy v. Oakeley*, 16 Q. B. 941; 83 R. R. 786.

(*s*) *Griffiths v. Perry*, 28 L. J., Q. B. 204.

Where an action for *money had and received* is brought for the repayment of the price, and there is a claim for horsemeat and stabling, the measure of damages is the price paid for the horse; and also the *expense of keep* from the day of sale; as the contract must be taken to have been rescinded from the day it was entered into (*t*). And as to the recovery of interest on the price paid, see 3 & 4 Will. 4, c. 42, s. 28, by which statute a demand in writing and notice of such claim is necessary (*u*).

In money
had and
received.

The damages in the case of a *breach of warranty* must be treated in the same way as an action on a *contract* (*x*).

On breach of
warranty.

The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty (*y*). In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty (*z*).

General rule.

Where the horse has been returned, and no special loss has accrued, the damages consist of the price paid (*a*).

Where the
horse has
been
returned.

Where the horse has not been returned the measure of damages will be the difference between its value with the defect warranted against and the value it would have borne without the defect. It was formerly laid down that the measure of damages would be the difference between the contract price and that for which it would sell with its defect (*b*). But the rule in England is now settled as stated above, and the doctrine is the same in America (*c*). Where the horse has been resold by the purchaser before the breach of warranty has been discovered, the price obtained at the second sale may be left to the jury as a

Where the
horse has
not been
returned.

(*t*) *Cuswell v. Coare*, 1 Taunt. 566; 10 R. R. 606; *King v. Price*, 2 Chit. 416.

27 L. J., Q. B. 266; *Loder v. Kekulé*, 27 L. J., C. P. 27; *Jones v. Just*, L. R., 3 Q. B. 197.

(*u*) See Interest, ante, p. 206.

(*x*) Per Tindal, C. J., *Watson v. Denton*, 7 C. & P. 90; 48 R. R. 764.

(*a*) *Cuswell v. Coare*, 1 Taunt. 566; 11 R. R. 668; *Heilbutt v. Hickson*, L. R., 7 C. P. 438; 41 L. J., C. P. 228.

(*y*) Sale of Goods Act, 1893, s. 53, sub-s. (2).

(*b*) *Cuswell v. Coare*, 1 Taunt. 566; 11 R. R. 668.

(*z*) Ibid., sub-s. (3). See also *Handall v. Raper*, E. B. & E. 84;

(*c*) See per Buller, J., 1 T. R. 136; per Lord Eldon, C. J., *Curtis v.*

Canadian Case.—The purchaser has the right to be placed in the same position as he would have been if the defendant had fulfilled his contract. *Natruss v. Nightingale*, 7 U. C. C. P. 266 (1858). And see *County of Simcoe Agricultural Society v. Wade*, 12 U. C. Q. B. 614 (1855).

Breach.
Damages.

mode of estimating what the real value of the horse, if perfect, would have been; but the difference between this price and the purchase-money cannot be given as specific damage on account of the loss of profit which might have been made on it (*d*).

Where the horse has been tendered.

But after a breach of warranty, the buyer is entitled to recover a reasonable sum of money for the expense of keep, where before re-sale he has tendered the horse to the seller; and the buyer is entitled to keep the horse for such reasonable time as is required to sell him to the best advantage (*e*). What length of time and sum of money is reasonable for the keep is a question for the jury (*f*).

Expense of keep.

The whole subject of keep was fully considered in the case of *Chesterman v. Lamb* (*f*), where an action of *assumpsit* was brought on the warranty of a horse, and also for the expense of his keep. It appeared at the trial that the defendant sold and delivered the horse to the plaintiff on the 28th of June. Early in July the horse was found to be lame; and on the 10th, upon examination by a veterinary surgeon, the complaint was found to be spavin (*g*). On the 11th of July the plaintiff gave the defendant notice that the horse was unsound, and that he should return him and demand back the purchase-money; and on the 21st the plaintiff sent the horse to livery, and informed the defendant that he had done so. On the 27th the action was commenced; and on the 16th of September the plaintiff (having informed the defendant of his intention to do so) sold the horse by auction for twenty-three guineas. The action was brought to recover the difference between that sum and 40*l.*, the price given by the plaintiff, and likewise 9*l.* 17*s.* for the horse's keep at livery till the second sale.

For the defendant it was insisted that the horse was not unsound, and consequently that nothing was due on account either of the price or the keep.

Taunton, J., in leaving the case to the jury, said

Hannay, 3 Esp. 82; *Clare v. Maynard*, 6 A. & E. 519; *Cox v. Walker*, *ibid.* 523, n.; *Jones v. Just*, L. R., 3 Q. B. 197; 37 L. J., Q. B. 89; *Loder v. Kekulé*, 3 C. B., N. S. 128; 27 L. J., C. P. 27; *Mayne on Damages*, 7th Ed. 204; *Sedgwick on Damages*, 8th Ed. 762.

(*d*) *Clare v. Maynard*, 6 A. & E. 519; *Cox v. Walker*, *ibid.* 523, n.; *Mayne on Damages*, 7th Ed. 185.

(*e*) *McKenzie v. Hancock*, R. & M. 436; 27 R. R. 769.

(*f*) *Chesterman v. Lamb*, 2 A. & E. 129; 41 R. R. 397.

(*g*) *Spavin*, ante, p. 107.

that in his opinion there had been a sufficient tender of the horse back to the defendant; that if the horse was unsound, it was the defendant's duty to provide for the charges of standing at livery; and therefore the plaintiff, in that case, would be entitled to the 9*l.* 17*s.* claimed for keep. The jury found a verdict for the plaintiff for the whole sum demanded. A rule was obtained to show cause why there should not be a new trial, or why the verdict should not be reduced in respect of the keep; the rule, however, was discharged.

And Lord Denman, C. J., said, "I can conceive no case where a purchaser returns a horse, in which the seller may not be liable for some keep. The law upon the subject is that laid down in Mr. Selwyn's Law of Nisi Prius (*h*). As soon as the unsoundness is discovered, the buyer should immediately tender the horse to the seller; and, if he refuses to take him back, sell the horse as soon as possible for the best price that can be procured; for the purchaser is entitled to recover for the keep of the horse for such time only as would be required to re-sell the horse to the best advantage."

Seller liable for reasonable keep.

"Whether the time of keeping be reasonable or not, is a question for the jury. But here the defendant altogether denied his liability. It is true that counsel would have been under a disadvantage in resting the case on two different grounds; but that consideration cannot vary the course which must be pursued in trying a cause. If the defendant's counsel meant to rely upon the unreasonableness of the time, he should have shown grounds for insisting on that point, and taken the opinion of the jury upon it" (*i*).

What is reasonable.

In the following case, where an action of *assumpsit* was brought on the warranty of a horse, it appeared that the plaintiff had tendered back the horse to the defendant, and, on his refusal to receive it, had kept it nearly eight weeks at livery at Reading, till Reading Fair, when it was sold. The plaintiff sought to recover the difference between the price which he had given for the horse and the sum for which he was sold, and also the expense of his standing at livery.

Keeping the horse till a fair.

Coleridge, J., in summing up, said to the jury, "With respect to the keep of the horse, I am of opinion that if a person has bought a horse with a warranty, which has

(*h*) Selwyn's N. P., 13th Ed. vol. 1, p. 578, tit. Deceit, I. 2.

(*i*) *Chesterman v. Lamb*, 2 A. & E. 129; 41 R. R. 397.

been broken, and he tenders the horse to the seller, and the seller refuse to receive it back, the buyer is entitled to keep it a reasonable time till he can sell it, and for that time he may, against the seller, recover the expense of keeping it; but he must not keep it as long as he chooses. All that he is allowed to do is to keep it for a reasonable time till he can fairly sell it, and for that time he ought to be allowed for keeping it. If it was a good thing for the sale of the horse to keep it till Reading Fair, you will find your verdict for the amount claimed; but if you think the horse ought to have been sold within a week or a fortnight, or some other short time, you will deduct so much of the claim as goes beyond the time." The jury gave the plaintiff a verdict for the whole amount (k).

Expense consequent on the warranty.

In the case of *Cox v. Walker* (l), where an action was brought for a breach of the warranty of a horse sold as sound, the special damage alleged in the declaration was the plaintiff's expense incurred by reason of the warranty, and his loss of gains and profits in re-selling the horse; and the only plea was a denial of the unsoundness. It appeared that the plaintiff had bought the horse of the defendant for 100*l.*, and had been offered 140*l.* for him, but, the horse proving unsound, the plaintiff had been obliged to give up the bargain, and sell him for 49*l.* 7*s.* Lord Denman, C. J., directed the jury that the plaintiff was entitled to recover the difference between the price at which he was finally sold, and the actual value of the horse if he had been sound at the time of such sale; and he left to the consideration of the jury, as a measure of the value, the price offered for the horse whilst in the plaintiff's hands. The jury found for the plaintiff 90*l.* 13*s.* damages. A rule nisi was obtained for a new trial on the ground of misdirection, or for a reduction of damages. Cause was shown in Easter Term, 1836, before Lord Denman, C. J., and Littledale, Patterson, and Coleridge, JJ. The Court took time to consider, and the case stood over for several terms, but was at length settled.

Expense in selling.

And in another case, where the horse had been tendered to the defendant and refused, Tindal, C. J., in charging the jury said, "You will give as damages the

(k) *Ellis v. Chinnoek*, 7 C. & P. 169; 48 R. R. 778.

(l) *Cox v. Walker*, cited per

Lord Denman, C. J., in *Clare v. Maynard*, 6 A. & E. 523.

difference between the *price* paid and the *real value* of the horse, and the damages for the *expense* which the plaintiff was put to by the defendant selling him that which was of *no use* to him, for a certain time, at least to the time when he offered the horse to the defendant" (*m*).

The increase in value consequent on the care and expense bestowed on a horse after purchase, and evidenced by an advance of price on a resale, might probably be recovered if the cause of such increase were properly laid as special damage. Because, although the Court of Queen's Bench thought it unnecessary to give their opinion in *Clare v. Maynard* (*n*), as that point did not there properly arise, yet Lord Denman, C. J., appeared to hold that if it had arisen, he should have directed the jury as he did in the case of *Cox v. Walker*, and then the measure of damages would be the difference between the *price* ultimately obtained for him, and his actual *value* if he had been *sound* at the time of such last re-sale (*o*).

Where a horse had been bought in the country, and brought up to London, and after it was discovered to be unsound was tendered to the seller, and then sold by auction, Lord Denman, C. J., told the jury that the measure of damages was the difference between the *value* of the horse, if sound (of which the price was only *strong evidence*), and the *sum* it brought as unsound (*p*).

That the buyer could not recover the expenses of obtaining a certificate of unsoundness from the 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 that he could bring an action in safety (*p*).

But that he was entitled to be paid the expenses of bringing the horse up to London, and of its keep (*p*).

A person who has bought a horse warranted sound, and has had it returned to him after resale at a profit, cannot in an action on the warranty recover damages for the "loss of a good bargain" (*q*); and on this ground the Court of Queen's Bench gave their decision in *Clare v. Maynard* (*r*), because the declaration there merely

Expenses in advancing the horse's value.

Horse tendered and then sold by auction.

Expense of veterinary certificate and counsel's opinion.

Travelling expenses.

Loss of a good bargain.

(*m*) *Watson v. Denton*, 7 C. & P. 741.
P. 91; 48 R. R. 764.

(*n*) *Clare v. Maynard*, 6 A. & E. 523.

(*o*) *Cox v. Walker*, cited *ibid*.

(*p*) *Clare v. Maynard*, 7 C. &

(*q*) *Flureau v. Thornhill*, 2 W. Bl. 1078.

(*r*) *Clare v. Maynard*, 6 A. & E. 524.

alleged that the plaintiff *bought* the horse at so much, and *resold* him at so much, without alleging the cause of the advance, or averring that he had laid out any money on the horse in the meantime. And it was held, in that case, that although the contract of sale at a profit had been actually completed before the unsoundness was discovered, yet the plaintiff could not recover as special damage the advance in value, which, as stated in the declaration, was the mere loss of a good bargain (s).

Re-selling
with a
warranty.

If the buyer of a horse with a warranty, relying thereon, re-sells him with a warranty, and being sued thereon by his vendee, offers the defence to the vendor, who gives no direction as to the action, the plaintiff defending that action is entitled to recover the costs of it from his vendor as part of the damage occasioned by his breach of warranty (t). He may also recover not only a sum fairly and reasonably paid to the second vendee as compensation (u), but also a sum in respect of damages, which he has agreed to make good, although no amount has been fixed, nor any sum actually paid, the mere liability to pay such costs being sufficient to sustain the claim for special damage (x). But he cannot recover any such costs if, by a reasonable examination, he could have discovered the breach of warranty before sale (y).

Damages for
misrepresentation.

Where there is a misrepresentation of the character or condition of goods, the vendor is responsible for all injury which is the direct and natural result of the purchaser's acting on the faith of his representation. Therefore, where a cattle dealer fraudulently represented a cow to be free from infectious disease when he knew that it was not so, and the purchaser placed it with five others which caught the disease and died, the latter was held entitled to recover as damages, in an action for fraudulent misrepresentation, the value of all the cows (z). And the same rule would be applied where there was no fraud, but the beast was warranted free from disease, and both parties contemplated its being placed with other stock (a).

(s) *Clare v. Maynard*, 6 A. & E. 524.

(t) *Lewis v. Peake*, 7 Taunt. 153; 2 Marsh. 43; 17 R. R. 475; and see *Rolph v. Crouch*, L. R., 3 Ex. 41; 37 L. J., Ex. 8.

(u) *Dingle v. Hare*, 7 C. B., N. S. 145.

(x) *Randall v. Roper*, 27 L. J., Q. B. 266.

(y) *Wrightup v. Chamberlain*, 7 Scott, 598; 50 R. R. 855.

(z) *Mullet v. Mason*, L. R., 1 C. P. 559; 35 L. J., C. P. 299; *Mayne on Damages*, 7th Ed. 210; *Sherrard v. Longdon* 21 Iowa, 518.

(a) *Smith v. Green*, 1 C. P. D. 92; 45 L. J., C. P. 28. And see *Bradley v. Lea*, 14 Allen, 20.

It is illegal to bring a glandered horse into a public market or fair (*b*), but there is nothing illegal in a simple sale; therefore a person who sold a glandered horse without a warranty and without misrepresentation was held not responsible for disease communicated to other horses of the purchaser's in the stable to which he removed it (*c*). But a breach of statutory duty may not constitute the foundation for a private right of action. A statement that the purchaser of a horse must take it "with all faults" and that the vendor will give no warranty with it, and will refuse all future claim for compensation (where the vendor does nothing to conceal the defect), relieves the vendor from all liability in respect of any defect in the horse itself (*d*). If such a statement were followed by a declaration of the vendor (who knew the reverse) that he knew the animal to be free from objection, there might be ground for an action of deceit (*e*). Thus where a statute prohibited persons from sending animals infected with a contagious disease to market, and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not itself raise as between the vendor of the animals and the purchaser of them any right of the purchaser to claim damages in respect of an injury he had suffered in consequence of their purchase (*f*). But it seems that if the defendant had sent tainted animals into the public market-place, and the plaintiff's animals, in that public place, by contact or neighbourhood had been infected, and the plaintiff suffered loss, that he might have recovered damages for that loss (*g*).

(*b*) 57 & 58 Vict. c. 57, s. 22, (xxxv., xxxvi.). Glanders or Farcy Order, 1894, 9 (a).

(*c*) *Hill v. Bulls*, 2 H. & N. 299; 27 L. J., Ex. 45. And see per Willes, J., L. R., 1 C. P. 563.

(*d*) *Ward v. Hobbs*, 4 App. Cas.

13; 48 L. J., Q. B. 281; 40 L. T., 73; 27 W. R. 114.

(*e*) *Ibid.*, per Lord Cairns, C.

(*f*) *Ward v. Hobbs*, ante. note (*d*).

(*g*) *Ibid.*, per Lord Cairns, C.

CHAPTER X.

INNKEEPERS, VETERINARY SURGEONS, FARRIERS, HORSE-BREAKERS, TRAINERS, ETC.

Innkeeper.

- His business. WHEN a horse is taken to an inn, the *innkeeper* has a particular responsibility imposed upon him, in return for which he has certain peculiar privileges.
- Definition of an inn. An *innkeeper* is a person who makes it his business to entertain travellers and passengers, and to provide lodging and necessaries for them and their horses and attendants, and it is no way material whether he have any sign before his door (a).
- Derivation of hostler. The true definition of an *inn* is, a house where the traveller is furnished with every thing which he has occasion for whilst on his way " (b).
- Who is a guest. The word *hostler* is derived *ab hostile*; and the word *hospitator*, which is used in the old writs for an *innholder*, is derived *ab hospitio*; and *hospes est quasi hospitium petens* (c).
- What an innkeeper undertakes. A *guest* is properly a lodger or stranger at an inn; and the word "*quest*" is derived from the Saxon *gest*, which had the same meaning as the French *gist* or *gîte*, that is, "a stage of rest in a journey," "a lodging" (d). And Lord Holt says, "It is the lodging of the man at the inn that makes him guest" (e).
- An *innkeeper* or hotel-keeper undertakes to receive and entertain all travellers until his house is filled; and an innkeeper by opening a common inn undertakes also to receive and keep the horses of those who come to his inn (f).

(a) Palm. 374; 2 Rol. Rep. 345.
 (b) Per Bayley, J., *Thompson v. Lucy*, 3 B. & Ald. 286; 22 R. R. 385.
 (c) *Calye's case*, 8 Coke, 32.
 (d) *Westbrook v. Griffith*, Mo. 876, 877; *Saunders v. Plummer*, Orl. Bridg. 227.
 (e) *Smith v. Dearlove*, 6 C. B.

132, n. See also *Strass v. County Hotel Co.*, 12 Q. B. D. 27; 53 L. J., Q. B. 25; 49 L. T. 601; 32 W. R. 170; *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11; 60 L. J., Q. B. 209; 64 L. T. 851.
 (f) *Jones v. Osborne*, 2 Chit. 484.

It is said that an *innkeeper* may be compelled by the constable of the town to receive and entertain a traveller as his *guest* (g).

Innkeeper compellable to receive a traveller.

If an *innkeeper* who has room in his house refuse to receive a traveller, after a tender or an attempted tender of a reasonable sum for his accommodation, he may be indicted for it, and the *indictment* must state that the person refused was a traveller (h).

May be indicted for refusing.

And it is no defence for the *innkeeper* that the guest was travelling on a Sunday, and at an hour of the night after the *innkeeper's* family had gone to bed; or that the guest refused to tell his name and abode, as the *innkeeper* had no right to insist upon knowing these particulars (i).

What held to be no defence.

But although an *innkeeper* cannot refuse a person who is sick, he is not bound to receive a person who comes to the inn drunk, or behaves in an indecent or improper manner (k).

Sickness, drunkenness, &c.

An action lies to recover compensation for any injury in consequence of such refusal; but, as it appears, not for the mere refusal to receive the traveller or his horse (l). If his bedrooms are all occupied, he is not bound to receive a guest who desires to sleep the night at his inn (m).

Action for compensation.

An *innkeeper*, though licensed to let post-horses, is not liable to an action for refusing to supply a chaise and horses to enable his guest to pursue his journey, although they be disengaged and a reasonable sum be tendered for them (n).

Not liable for refusing to supply post-horses.

But although a traveller is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the *innkeeper* is willing and offers to furnish him with a proper room for that purpose (o); nor is he entitled to compel an *innkeeper* to furnish rooms in which to exhibit the wares of his guest, for an *innkeeper* is not bound by law to find show-rooms

Traveller not entitled to select particular apartments.

(g) 5 Edw. 4. 2 b. Dalt. cap. 7; 1 Show. 268.

(h) *Fell v. Knight*, 8 M. & W. 276; 58 R. R. 698; *Ree v. Irens*, 7 C. & P. 219; 48 R. R. 780; *Ree v. Luellin*, 12 Mod. 445.

(i) *Ree v. Irens*, 7 C. & P. 213; 48 R. R. 780.

(k) *Ree v. Luellin*, 12 Mod. 445; and see *Reg. v. Rymer*, 2 Q. B. D. 136; 46 L. J., M. C. 108; 35 L. T. 774; 25 W. R. 415.

(l) *Hawthorn v. Hammond*, 1 C. & K. 407; *Lane v. Cotton*, 1 Salk. 18; *Collins's case*, Godb. 346; Palm. 374; 2 Rol. Rep. 345; *Newton v. Trigg*, 1 Show. 270.

(m) *Browne v. Braudt*, [1902] 1 K. B. 696; 71 L. J., K. B. 367; 86 L. T. 625; 50 W. R. 654—D.

(n) *Dicas v. Hides*, 1 Stark. 247.

(o) *Fell v. Knight*, 8 M. & W. 269; 58 R. R. 698.

Liability of
innkeeper
limited by
26 & 27 Vict.
c. 41.

for his guests, but only convenient lodging-rooms and lodging (*p*).

An *innkeeper* was formerly *primâ facie* liable to any amount for loss not occasioned by the act of God or the King's enemies (*q*). But by the 26 & 27 Vict. c. 41, s. 1, he is no longer liable to make good to a guest any loss to goods or property brought to his inn, *not being a horse or other live animal*, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of 30*l.*, except where the loss shall have been occasioned "through the wilful act, default or neglect of the *innkeeper*, or any servant in his employ," or "where such goods or property shall have been deposited expressly for safe custody" with him: provided always, that in the case of such a deposit, the *innkeeper* may require, as a condition of liability, "that such goods or property shall be deposited in a box or other receptacle fastened and sealed by the person depositing the same." By section 3, the *innkeeper* must exhibit in a conspicuous part of the hall or entrance to his inn at least one copy of the first section of this Act, in order to be entitled to its benefit.

It has been held that "wilful" in section 1 of the 26 & 27 Vict. c. 41 must be read with "act" only, and not also with "fault or neglect" (*r*). A mere verbal error in a copy of section 1 of the Act, exhibited for the purpose of limiting an *innkeeper's* liability, will not vitiate the notice so as to make it ineffectual, provided the notice states correctly the provisions of the Act; but the omission of a material portion of the statute will render the notice ineffectual to protect the *innkeeper* (*s*). A notice was exhibited in a hotel, containing a copy of the first section of the Act, correct in every particular, only that in the exception the word "act" was accidentally omitted. The Court held that this was a material omission, and that the notice was insufficient to protect the *innkeeper* (*t*).

Salaried
manager not
liable as
innkeeper

The salaried manager of a hotel belonging to a company is not an *innkeeper*, so as to be by law responsible for the goods and property of the guests, although the usual licence has been granted to him personally (*u*).

(*p*) *Burgess v. Clements*, 4 M. & S. 306; 16 R. R. 473. 463; 46 L. J., Q. B. 713; 36 L. T. 896.

(*q*) Per Bayley, J., *Richmond v. Smith*, 8 B. & C. 9; 32 R. R. 326.

(*r*) *Ibid.*

(*s*) *Squire v. Wheeler*, 16 L. T., 93, per Byles, J.

(*u*) *Dixon v. Birch*, L. R. 8 Ex. 135; 42 L. J., Ex. 135; 28 L. T. 360.

(*t*) *Spice v. Bacon*, 2 Q. B. D.

An *innkeeper* is not absolved from responsibility for his guest's goods by reason of the luggage being placed in a particular room at the request of the guest (*x*); nor before the Innkeepers' Liability Act (*y*) was passed was he compellable to receive every description of goods with a guest, but only such as a person ordinarily travels with (*z*). But by the 2nd section of the 26 & 27 Vict. c. 41, it is enacted that, "if an *innkeeper* shall refuse to receive for safe custody, as before mentioned, any goods or property of his guest, or if any such guest shall, through any default of such *innkeeper*, be unable to deposit such goods or property as aforesaid, such *innkeeper* shall not be entitled to the benefit of this Act in respect of such goods or property." However, it is to be presumed that this section does not apply to such goods as an *innkeeper* was entitled to refuse before this Act came into operation, as, if made applicable to all goods, an *innkeeper* who refused to convert his inn into a warehouse for the goods of his guest would be disentitled to the benefit of the Act in respect of them.

Goods to which his liability extends.

It is no defence to an action by a guest for the loss of his goods for the *innkeeper* to allege that he was sick or of *non sane memory* at the time (*a*); or that there was no positive negligence on his part (*b*); but the negligence of the guest is a good defence, if it is gross negligence (*c*), or even if it occasioned the loss "in such a way as that it would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to take under the circumstances" (*d*).

How ousted.

If the guest's horse is stolen the *innkeeper* is answerable in an action upon the custom of the realm (*e*), even if the owner has gone away for several days, and it is lost or stolen in his absence, or if it has been brought by a servant (*f*). And inasmuch as 26 & 27 Vict. c. 41, s. 1,

Where a guest's horse is stolen.

(*x*) Per Bayley, J., *Richmond v. Smith*, 8 B. & C. 9; 32 R. R. 326.

(*y*) 26 & 27 Vict. c. 41.

(*z*) *Brounwood v. Granara*, 10 Ex. 417.

(*a*) *Cross v. Andrews*, Cro. Eliz. 622.

(*b*) *Morgan v. Rarey*, 30 L. J., Ex. 131.

(*c*) *Armistead v. White*, 20 L. J., Q. B. 524.

(*d*) Per Erle, C. J., *Cashill v. Wright*, 2 Jur., N. S. 1072—Ex. Ch. See also *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515;

10 L. J., C. P. 231; 25 L. T. 93; *Jones v. Jackson*, 29 L. T. 399; *Herbert v. Marchwell*, 45 L. T., 649; 46 J. P. 358; affirmed in C. A., W. N. 1882, p. 112; *Marchioness of Huntley v. Bedford Hotel Co.*, 56 J. P. 53.

(*e*) Fitzherbert's Nat. Brev. 913; *Gielley v. Clerk*, Cro. Jac. 188; *York v. Greenough*, 2 Lord Raym. 867; 1 Salk. 338.

(*f*) 1 Salk. 338; 1 Rol. Abr. 3; Moor, 877; Cro. Jac. 224; Yely. 162; Bac. Abr. tit. Inns and Innkeepers.

Where
another
person's
horse is
stolen.

Principle
upon which
liability
depends.

Horse out at
grass by the
guest's desire.

Horse out at
grass without
the guest's
desire.

specially exempts horses from the operation of that Act, the innkeeper's liability as respects amount is not restricted with regard to them.

But if a person takes *another's* horse, and rides him to an inn where he is lost or stolen, the owner has no action against the host, but has his remedy against the taker (*g*).

The liability of an *innkeeper* for loss continues only so long as he derives benefit from his visitor or his property, for if the *innkeeper* could not gain a profit, he is not liable to suffer loss without a special undertaking (*h*), for so long only is a visitor a guest. Upon this principle a person leaving a horse at an inn becomes a guest, while a person leaving dead goods at an inn does *not* become a guest, for the horse must be fed, by which the *innkeeper* has gain (*i*). And therefore the *innkeeper* is liable for the loss of the horse, although its owner is not staying at the inn. Thus, too, when a person came to an inn, and desired to leave some goods there till the next week, which was refused, and then stayed to drink something, during which time his goods were stolen, the *innkeeper* was held to be liable (*k*). But if a man who has been a guest, gives up his room, and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the *innkeeper* takes charge of them, the *innkeeper* is clothed only with the ordinary duties and responsibilities of a bailee (*l*).

An *innkeeper* is only bound by the custom of the realm to answer for those things that are *infra hospitium*, and not for anything out of his inn. For where a horse is lost or stolen when out at grass by the guest's desire, the host is not chargeable, unless it was the consequence of his *wilful* negligence (*m*): for instance, an action lies against an *innkeeper* who voluntarily leaves open the gates of his close, whereby the horse strays out and so is lost or stolen (*n*).

But he is answerable if he has put the horse out to grass without the owner requiring him to do so (*u*). And

(*g*) 1 *Rel. Abr.* 3.

(*h*) *Gelley v. Clerk*, *Cro. Jac.* 188.

(*i*) *York v. Grindstone*, 1 *Salk.* 388. See also *Day v. Bather*, 2 *H. & C.* 14; 32 *L. J., Ex.* 171.

(*k*) *Bennet v. Mellor*, 5 *T. R.* 273; 2 *R. R.* 593.

(*l*) *Smith v. Dearlove*, 6 *C. B.*

132.

(*m*) *Stuunders v. Plummer*, *Orl. Bridg.* 227.

(*n*) *Bac. Abr.* tit. *Inns and Innkeepers*: *Culpe's case*, 8 *Coke* 32 b; *Moor*, 1229; *Pop.* 127; *Mosley v. Fosset*, 1 *Rel. Abr.* 3; 4 *Leon.* 96; 2 *Brownl.* 255; *Richmond v. Smith*, *S. B. & C.* 11.

where an *innkeeper* took in a horse and gig on a fair-day, and the hostler, without the guest's permission, placed the gig outside the inn-yard, in the part of the street in which the carriages at the inn were usually placed on fair-days, and the gig was stolen thence, the Court of King's Bench held the *innkeeper* responsible. And Taunton, J., said, "It does not appear that the gig was put in this place at all at the request or instance of the plaintiff; the place is therefore a part of the inn; for the defendant by his conduct treats it as such. If he would wish to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it; not having done so, he is bound by his common law liability" (o).

It is said in *Calye's case* (p), that an *innkeeper's* liability is confined to "*bona et catalla*," and that he is not answerable if the *guest* himself is beaten, as that is not a damage to "*bona et catalla*." But it seems that this statement must be simply taken to mean that the *innkeeper* is not bound to insure his *guest*; for in a comparatively recent case it was held that it is the duty of an *innkeeper* to take reasonable care of the persons of his *guests*, so that they are not injured by reason of a want of such care on his part whilst they are in the inn as his *guests* (q). Where the *guest's horse* had been beaten, the *innkeeper* was held liable; and it appeared that it had been injured by having been taken out of the inn and immoderately ridden and whipped, though it did not appear by whom (r).

Where a *guest's horse* is injured, there is always a presumption of negligence against the *innkeeper*. It is questionable, indeed, if in any case this presumption can be rebutted without proof of actual negligence on the part of the *guest*. The case of *Dawson v. Chamney* (s) has been relied upon to show that this presumption may be rebutted by giving proof of such skilful management on the part of the *innkeeper* as to convince the jury that

Where a guest's person or horse is injured.

Presumption of negligence against the innkeeper.

(o) *Jones v. Tyler*, 1 A. & E. 522; 3 N. & M. 576; 40 R. R. 354.

(p) *Calye's case*, 8 Rep. 32 a; 8 Co. 32.

(q) *Sandys v. Florence*, 47 L. J., C. P. 598, per Lindley, J. See also *Walker v. Midland Rail. Co.*, 55 L. T. 489.

(r) *Stannion v. Davis*, 1 Salk. 404; 6 Mod. 323. See also *Bather v. Day*, 32 L. J., Ex. 171; 2 H. & C. 14.

(s) *Dawson v. Chamney*, 13 L. J., Q. B. 33; 5 Q. B. 165; 7 Jur. 1037. See also *Cashill v. Wright*, 2 Jur., N. S. 1072.

the damage could not have been occasioned by the negligence imputed. But this view of the law was held to be untenable by Pollock, C. B., in the case of *Morgan v. Rarey* (t), who, in delivering the judgment of the Court of Exchequer, said, "We think the cases show there is default in the innkeeper wherever there is a loss not arising from the plaintiff's negligence, the act of God, or the Queen's enemies" (u).

(t) *Morgan v. Rarey*, 6 H. & N. 265; 30 L. J., Ex. 131.

(u) According to the report of the case of *Dawson v. Chamney*, in 13 L. J., Q. B. 33, and in 5 Q. B. 164, the horse of the guest was left at the defendant's inn on a market day, and given in charge to the ostler, who placed it in a stall where there was another horse, which kicked it, and so inflicted an injury. On these facts it was held by the Court of Queen's Bench, that in such case there was a presumption of negligence on the part of the innkeeper or his servants; but that this presumption might be rebutted by giving proof of such skilful management on his or their part as to convince the jury that the damage could not have been occasioned by the negligence imputed. But a material difference will be found in the report of the facts of this case in 7 Jur. 1057, for it is there stated, that "there was no evidence of the manner in which the horse received the injury for which the action was brought." It

appears that the only report of this case which was seen by the Court, when giving judgment in the case of *Morgan v. Rarey*, was that of the Jurist, and that Pollock, C. B., founded the only possible reconciliation of *Dawson v. Chamney* with the law upon this point, which is the very point of discrepancy between the Jurist and the other reports. He said, "The only case which points the other way is that of *Dawson v. Chamney*, and according to the report of that case in 7 Jur. 1057, there was no evidence of the manner in which the horse received the injury for which the action was brought; and this may be the explanation of that case, for though the damage happening to the horse from what occurred in the stable might be evidence of default or neglect, still it was not shown how the damage arose, and it was not even shown that it arose from what occurred in the stable. It might have arisen from something which had occurred long prior to the horse being put into the

Negligence of Innkeepers.

Canadian Cases.—Plaintiff lent or hired his horse to S., who, while on a journey, put it up at defendant's inn, and it was strangled in the stable, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall: *Held*, that the defendant was liable for the negligence of his servant. *Walker v. Sharpe*, 31 U. C. Q. B. 340 (1871). See also *Henderson v. Barnes*, 32 U. C. Q. B. 176 (1871), in which *Cotton v. Wood*, 8 C. B. N. S. 568, is distinguished.

Plaintiff had left his horse with the defendant, who was a tavern-keeper, for hire, and while under his care it was shorn of its mane and tail: *Held*, that the bailee was responsible for such damage, and that, without proof to the contrary, the damage would be presumed to have been committed by his servants, or in consequence of their neglect. *Durocher v. Meunier*, 9 L. C. R. 8 (1858). But see *Templeton v. Waddington*, 14 Man. L. R. 495.

And it must be borne in mind that, though there be a private arrangement between the *innkeeper* and the keeper of the inn stables or hostler, and the result of that arrangement be that as between him and the *innkeeper*, the *innkeeper* has lost all control over the stables, yet as between the *innkeeper* and his guest no such private arrangement can be recognised, and the *innkeeper's* liability towards him for injury done to the horse remains unimpaired (x).

Not rebutted by stables being out of his control.

For the security and protection of travellers, inns are allowed certain privileges, such as that the horse and goods of the guest cannot be distrained, &c. (y).

A guest's goods not distrainable.

If an *innkeeper* takes his guests to rooms that he has provided for him, on account of not having sufficient room in his inn, these rooms are privileged from distress (z).

Even where he is accommodated out of the inn.

So also, if a guest's horse is put into a stable provided for a particular occasion, it cannot be distrained. Formerly, however, a different view was taken in a similar case. For where the tenant of a stable had sub-let it to an *innkeeper* during races, and the horses of a guest were put into it and afterwards distrained by the landlord, the distress was held good, and Lord Mansfield, C. J., thought that the owner of the horses had his remedy against the *innkeeper* under the implied warranty for safe custody (a).

Or uses a stable provided for the occasion.

An *innkeeper* has a general lien on all goods and chattels belonging to his guest (b).

Innkeeper's lien.

custody of the innkeeper. That would distinguish this case, and reconcile all the cases with the general current of authority." It matters not indeed, so far as the law is concerned, which report of the case of *Dawson v. Chamney* is authentic, for if that contained in the L. J. and Q. B. Reports is the correct one, it has been overruled by *Morgan v. Rarey*; and if that of the Jurist is to be taken, it does not establish the point that in case of loss to the guest, the presumption of negligence on the part of the innkeeper can be rebutted.

otherwise than by proof of actual negligence on the part of the guest.

(x) *Bather v. Day*, 32 L. J., Ex. 171; 8 L. T. 205.

(y) 1 Rol. Abr. 668; Co. Litt. 47.

(z) See per Pollock, C. B., *Hilliams v. Holmes*, 22 L. J., Ex. 284.

(a) *Crosier v. Tomkinson*, 2 Lal. Ken. 439; Barnes' Notes, 472.

(b) *Mulliner v. Florence*, 3 Q. B. D. 484; 47 L. J., Q. B. 700; 38 L. T. 167—C. A.

Canadian Case.—The plaintiffs, owning a line of stages, entered into a special agreement with the defendant, an innkeeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges, and ascertaining that the plaintiffs intended to

Innkeeper's lien.

He has no lien on goods sent to his guest for a particular purpose, and known by him to be the property of another person (c), but his lien extends to goods brought to the inn by a guest, though they belong to a third party, provided they be such as persons ordinarily travel with (d), as these he is compelled to receive. And in *Threfall v. Borwick* (e), it was held that his lien extends to all the goods which he has actually received with a guest whether the property of the guest or not, and is not limited to such things as he was bound to receive with the guest.

An innkeeper retaining the goods of his guest by virtue of such lien is not bound to use greater care as to their custody than he uses as to his own goods of a similar description (f).

Innkeeper
has a lien on
a horse for its
keep.

As an innkeeper by law is bound to receive the horse of a traveller in case his stable is not full, he has therefore a lien for its keep upon a horse left with him, and received by him in his character as innkeeper (g), whether it be kept in the stable or put out to grass. For the pasture of such persons, set up by law for entertainment, has the same privilege as the stables, and an action of trover cannot be maintained against him for detaining the horse of his guest, unless the money due for its keep has been paid or tendered (h).

Cannot detain
a guest for his
bill.

But may
detain his
horse.

An innkeeper cannot detain a guest, or take off his clothes, in order to secure payment of his bill (i).

But he may detain his horse, or may bring an action for lodging, &c., without any special contract (k).

(c) *Broadwood v. Granara*, 10 Ex. 417.

(d) *Snead v. Watkins*, 26 L. J., C. P. 57.

(e) L. R., 13 Q. B. 210; 44 L. J., Q. B. 87; 32 L. T. 95—Ex. Ch. See also *Gordon v. Silber*, 25 Q. B. D. 491; 59 L. J., Q. B. 507; 63 L. T. 283; 39 W. R. 111, where it was held to extend to the separate property of the wife of the party to whom credit was given.

(f) *Angus v. McLachlan*, 23

Ch. D. 330; 52 L. J., Ch. 587; 48 L. T. 863; 31 W. R. 641.

(g) *Smith v. Dearlove*, 6 C. B. 135; 12 Jur. 167.

(h) 2 Rol. Abr. 85; Cro. Car. 271; Carth. 150; 1 Salk. 388.

(i) Bac. Abr. tit. Inns and Innkeepers, 451; *Sunbolf v. Alford*, 3 M. & W. 248; 49 R. R. 593.

(k) *Saunders v. Plummer*, Orl. Bridg. 227; *Smith v. Dearlove*, 6 C. B. 135.

remove their horses to another inn, he refused to let them go. The plaintiffs then brought trover: Held, that the defendant had no right of lien, as the plaintiffs were not guests, but employed the defendant in the character of a livery-stable keeper, and under a special agreement which gave him no continuing right of possession: Held, also, that upon the facts the defendant was guilty of a conversion. *Dixon, et al. v. Dalby*, 11 U. C. Q. B. 79 (1853).

It has been said that the horse of a guest can be detained only for his own meals, and not for the meals and expenses of the guest (*l*). But this doctrine was doubtful (*m*). And in a comparatively recent case (*n*), the Court of Appeal held, that a chattel, although deposited with the *innkeeper* and placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, and entertainment of the guest.

An *innkeeper's* right of *lien* depends upon the fact of the goods coming into his possession in his character of *innkeeper*, as belonging to a guest (*o*). So in a case in which a trainer of racehorses went with them to an inn, stayed there for a length of time, and put the horses into training; nothing being said of any special contract between him and the *innkeeper*, it was held by the Exchequer Chamber that he came there on the ordinary terms of an inn, and that the *innkeeper* had a *lien* on the horses for their keep, although they were frequently taken off the premises for days together to attend races (*p*).

His right
of *lien*.

But if a man send his horses and carriage to livery at an inn, and they are so received, the fact of his becoming a guest at a subsequent period does not give the *innkeeper* any *lien* (*o*).

Horses and
carriage
sent to
livery at an
inn.

Where several horses are brought to an inn by the same person, each by the custom of London may be sold for his own keep only, and not for the keep of the others; so that if the *innkeeper* permits the guest to take away all but one, he cannot sell this to pay the expenses of keeping the whole, but must deliver it up on tender of the amount for its own keep (*q*).

Cannot sell
one horse for
the keep of
others.

Where a person wrongfully seizes a horse, and takes it to an inn to be kept, the owner cannot have it until he has satisfied the *innkeeper* for its ment; for the *innkeeper* is not bound to inquire who is the owner of the property brought to his inn (*r*). If the *innkeeper* in such case was to have no *lien*, Doderidge, J., said, "It were a pretty trick for one who wants keeping for his horse" (*s*).

Has a *lien*
on a horse
left by a
wrongdoer.

(*l*) Bac. Abridg. Inns and Inn-keepers.

(*m*) See Story on Bailments, 9th Ed. 446.

(*n*) *Mulliner v. Florence*, 3 Q. B. D. 484; 47 L. J., Q. B. 700; 38 L. T. 167—C. A.

(*o*) *Smith v. Dearlove*, 6 C. B. 135; 12 Jur. 377.

(*p*) *Allen v. Smith*, 9 Jur., N. S. 230, 1284; and see *Mulliner v. Florence*, *ubi supra*.

(*q*) *Moss v. Townsend*, 1 Balst. 207. But see the Innkeepers Act, 1878 (41 & 42 Vict. c. 38), s. 1, post.

(*r*) *Turrell v. Crawley*, 18 L. J., Q. B. 155.

(*s*) *Robinson v. Walter*, Pop. 127.

But not if he knew it at the time it was left.

But if he knew at the time the horse was left, that the person who brought it was a wrongdoer, and not the owner of it, he has made himself a party to the wrongful act, and has no lien upon the horse for its keep; and the question as to the *scienter* must be left to the jury (t).

A horse left by the police.

The horse must be placed at the inn by a guest to entitle the *innkeeper* to detain it for its keep; for where a person was stopped with a horse under suspicious circumstances, and it was left at an inn by the police, it was held that the *innkeeper* had no lien, and that an auctioneer, by the direction of the *innkeeper*, selling the horse for its keep, was liable to the owner of the horse in an action of *trover* (u).

Giving a guest credit.

If the *innkeeper* previously agree to give the guest credit for his entertainment, he cannot detain his horse or goods; or if where there has been no such agreement, he suffer his guest's horse to depart without payment, or by any other means give credit to the owner, he cannot afterwards detain it for the debt upon its coming again into his possession (x).

A third party when answerable.

If a third party promise the *innkeeper* to satisfy him for the ment of the horse, in consideration that he will deliver it to the guest, it is a good promise; for there is a good consideration, inasmuch as the *innkeeper* loses the detainer, which is a damage, and the guest regains the horse, which is the advantage (y).

Horse removed to defeat the lien.

But where the owner of a horse has fraudulently got possession of it to defeat the lien, the *innkeeper* may retake it without force, for the lien is not put an end to by his having thus parted with the possession of it (z). But it is held that the *innkeeper* must make fresh pursuit after it, and retake it, otherwise the custody is lost; for he cannot take it at any other time, as it is in the nature of a *distress*. But where there is a lien by agreement, it is in the nature of a *pledge*, and the *innkeeper* may retake the horse, not only on fresh pursuit, but also wherever he finds it (a).

Keep during detention.

It has been held that an *innkeeper* who detains a horse for his keep has a lien upon him for the necessary food supplied when thus in his possession, even if it be given against the express direction of the owner. Thus where the owner of a horse standing at an inn came and directed that

(t) *Johnson v. Hill*, 3 Stark. N. P. C. 172; 23 R. R. 764.

(u) *Bunn v. Pigot*, 9 C. & P. 208; 62 R. R. 745.

(x) *Jones v. Thurlow*, 8 Mod. 172; *Jones v. Pearce*, 1 Str. 557.

(y) *Hutton*, 101.

(z) *Wallace v. Woodgate*, Ry. & M. 193; 1 C. & P. 575.

(a) *Russe v. Bramstead*, 2 R. L. Rep. 138.

the innkeeper should not give him any more food, as he would not be responsible for it, and the question was, whether the owner was chargeable for the food given after this direction, Holt, C. J., was at first inclined to consider this a *discharge*, and that the horse, though he might be retained by the innkeeper, was but in the nature of a *distress*, and that being in the custody of the innkeeper in his inn, it was a *pondus covert*, and the horse consequently ought to be maintained at his peril. However, he afterwards changed his opinion, and directed that this was no *discharge*; for then any innkeeper might be deceived, and his security would be lessened (b). But his first opinion appears to be consistent with the law (c).

Where an innkeeper detains a horse for its meat he cannot use it, because he detains it as in the custody of the law, and the detention is in the nature of a distress, which cannot be used by the distrainor (d).

He cannot use a horse he detains.

An innkeeper could not formerly sell the horse he detained for his meat and so pay himself, because, as the Court said in *Jones v. Thurlow*, "he is not to be his own carver" (e). And even if the horse "eat out the price of its head," that is, consume as much as it is worth, he could not sell it, except he lived in London or Exeter, where by the custom of those places, if the horse is the property of the guest, he may take it as his own upon the reasonable appraisement of four of his neighbours (f).

He could not formerly sell a horse he detained.

But now, by the Innkeepers Act, 1878 (41 & 42 Vict. c. 38), s. 1, "the landlord, proprietor, keeper, or manager of any hotel, inn, or licensed public-house shall, in addition to his ordinary lien, have the right absolutely to sell and dispose by public auction of any goods, chattels, carriages, horses, wares, or merchandise which may have been deposited with him, or left in the house he keeps, or in the coach-house, stable, stable-yard, or other premises appurtenant or belonging thereunto, where the person depositing or leaving such goods, chattels, carriages, horses, wares,

But may now sell horse after six weeks.

(b) *Gelber v. Berkeley*, Skin. 648; and see *Scarfe v. Morgan*, 4 M. & W. 270; 51 R. R. 568.

(c) Co. Litt. 47 b; *British Empire Shipping Co. v. Sames*, 28 L. J., Q. B. 220—Ex. Ch.; 30 L. J., Q. B. 229—H. L. See also *Scarfe v. Morgan*, 4 M. & W. 279, 284; 51 R. R. 568.

(d) *Westbrook v. Griffith*, Moor. 876; *Robinson v. Walter*, 3 Bulstr.

270; Bac. Abr. tit. Inns and Innkeepers.

(e) *Jones v. Thurlow*, 8 Mod. 172; *S. C. sub nom. Jones v. Pearle*, Str. 556.

(f) *Baldway v. Ouster*, 1 Vent. 71; *Westbrook v. Griffith*, Moor. 876; *Moss v. Townsend*, 1 Bulstr. 207; *Robinson v. Walter*, 3 Bulstr. 270; Bac. Abr. tit. Inns and Innkeepers.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)

APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

or merchandise shall be or become indebted to the said innkeeper either for any board or lodging or for the keep and expenses of any horse or other animals left with or standing at livery in the stables or fields occupied by such innkeeper.

"Provided that no such sale shall be made until after the said goods, chattels, carriages, horses, wares, or merchandise shall have been for the space of six weeks in such charge or custody or in or upon such premises without such debt having been paid or satisfied, and that such innkeeper, after having, out of the proceeds of such sale, paid himself the amount of any such debt, together with the costs and expenses of such sale, shall on demand pay to the person depositing or leaving any such goods, chattels, carriages, horses, wares, or merchandise the surplus (if any) remaining after such sale.

"Provided further, that the debt for the payment of which a sale is made shall not be any other or greater debt than the debt for which the goods or other articles could have been retained by the innkeeper under his lien.

"Provided also, that at least one month before any such sale the landlord, proprietor, keeper, or manager shall cause to be inserted in one London newspaper and one country newspaper circulating in the district where such goods, chattels, carriages, horses, wares, or merchandise, or some of them, shall have been deposited or left, an advertisement containing notice of such intended sale, and giving shortly a description of the goods and chattels intended to be sold, together with the name of the owner or person who deposited or left the same, where known."

Waiver of
lien.

The lien of an innkeeper over a chattel belonging to a guest is waived, if in order to reimburse himself he sells it, unless under the foregoing enactment, and this rule holds good even although the retention of the chattel is attended with expense (g). But an innkeeper who accepts security from his guest for the payment of his bill does not waive his lien upon the goods of the guest unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien and, therefore, destructive of it.

(g) *Mulliner v. Florence*, 3 Q. B. D. 484; 47 L. J., Q. B. 700; 38 L. T. 167; 26 W. R. 385—C. A.

(h) *Angus v. McLachlan*, 23 Ch. D. 330; 52 L. J., Ch. 587; 48 L. T. 863; 31 W. R. 641.

Under statute 5 & 6 Will. 4, c. 59, s. 4, requiring the distrainer of any horse (which word "horse" may by section 21 be construed as "horses") to feed it while in the pound, and empowering him, after seven days, to sell any such horse for the expenses, a party distraining several horses may, by a proper exercise of discretion, sell one or more, for the expense of all. And it would seem that he may repeat such sale from time to time as need requires (i). This statute has been repealed. But its provisions have been substantially re-enacted by 12 & 13 Vict. c. 92, except as to the power of sale. And this was restored by 17 & 18 Vict. c. 60, s. 1.

Distrainer's power of sale by statute.

Veterinary Surgeon and Farrier.

VETERINARY SURGEON.

A veterinary surgeon (from *veterinarius*, concerned with *veterinum*, a beast of burden) is a person who treats the diseases or injuries of animals (k).

Definition.

Previously to the Veterinary Surgeons Act, 1881, there was no law which applied to *veterinary surgeons* in particular; and where there was no contract he had to go on a *quantum meruit*. And an usage to charge for attendance, where there was not much medicine required, was held too uncertain (l).

The Royal College of Veterinary Surgeons was founded in the year 1791, and received a charter of incorporation in the year 1845. Supplemental charters were granted thereto in 1876 and 1879. The charter of 1876 directs a register of veterinary surgeons to be kept. The business of members of the college, and the dispensing of medicines to animals by such persons, and persons holding certificates of the Highland, &c., Society, are expressly exempted from the operation of the Pharmacy Acts (31 & 32 Vict. c. 121, s. 6; 32 & 33 Vict. c. 117, s. 1; 38 & 39 Vict. c. 57, s. 31). By the original charter, veterinary surgery is constituted a profession, and the registered members of its body are alone to be recognised as the members of the veterinary profession. Its diploma is granted only to persons who have qualified

College of Veterinary Surgeons.

(i) *Layton v. Hurry*, 8 Q. B. 10th Ed., 790.
811; 70 R. R. 664.

(l) *Lane v. Cotton*, 1 Salk 18.

(k) Wharton's Law Lexicon,

themselves by a certain educational course tested by examination.

Veterinary
Surgeons Act,
1881.

In the earlier editions of this work it was suggested that it would be a security to the public against unqualified practitioners, if the Legislature were to impose a penalty on persons practising as veterinary surgeons, without possessing a diploma from the Royal College or some other duly constituted body. This suggestion is carried out by the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), which, as its preamble shows, was passed with a view to enable persons requiring the aid of a veterinary surgeon for the cure or prevention of diseases to horses or other animals, to distinguish between qualified and unqualified practitioners. In this Act the "Royal College of Veterinary Surgeons" means the college incorporated and regulated by the charter and two supplemental charters above referred to; the "Registrar" means the registrar for the time being of the Royal College; and "veterinary surgery" means "the art and science of veterinary surgery and medicine" (s. 2). Provisions are made as to the register of veterinary surgeons (s. 3); and for the correction of the register (s. 5); and also for the removal of names from, and restoration of names to, the register (ss. 6 and 7). By s. 8 provision is made as to proceedings for removal or restoration of names. Sects. 11 and 12 impose a penalty not exceeding 50*l.*, or imprisonment, with or without hard labour, for any term not exceeding twelve months, on any person obtaining registration by false representation, or on the registrar for wilful falsification of the register of veterinary surgeons. The Act, by ss. 13 and 14, further provides for the registration of colonial or foreign practitioners possessing some recognised diploma; by s. 16 imposes a penalty of 20*l.* on any person falsely representing himself to be a member of the Royal College; and by s. 17 imposes a like penalty on any person not possessing the prescribed qualifications who, after December 31st, 1883, "takes or uses . . . any name, title, addition, or description stating that he is . . . a practitioner of veterinary surgery or of any branch thereof," and further incapacitates any such person from recovering any fee for performing any veterinary operation.

Veterinary
Surgeons
Amendment
Act, 1900.

The Veterinary Surgeons Amendment Act, 1900 (63 & 64 Vict. c. 24), after reciting that persons who are

holders of the veterinary certificate of the Highland and Agricultural Society, granted prior to the Act of 1881, are permitted to practise the art and science of veterinary surgery and medicine, and are not answerable to the disciplinary power conferred on the Royal College of Veterinary Surgeons over persons on the register of veterinary surgeons, by s. 2 extends the disciplinary powers of the Royal College of Veterinary Surgeons to all such persons, and by s. 3 imposes the same penalties and disabilities upon any person who has been deprived by the Council of the College of his right of styling himself a member of the veterinary profession, and continues so to describe himself, as are prescribed by s. 17 of the principal Act.

Where a shoeing-smith not possessed of the qualifications specified by s. 17 had for the last twenty-five years described his place of business as a "veterinary forge," it was held that these words constituted a description that he was specially qualified to practise a branch of veterinary surgery within the meaning of the section, and that he was, therefore, liable under the section (*m*). But where a chemist published a book dealing with diseases of horses, recommending medicines which he kept and advising people in some cases to consult a veterinary surgeon, and described himself in the book as a pharmaceutical and veterinary chemist, it was held that he was not unlawfully using a description implying that he was a veterinary surgeon (*n*).

FARRIER.

A farrier is defined by Johnson as (1) "a shoer of horses," and (2) "one who professes the medicine of horses." According to the same authority "farriery" is "the practice of trimming the feet and curing the diseases of horses." But he adds that "the farriers of modern days have dissolved this partnership, applying farriery merely to shoeing horses, and the more stately term of veterinary art to physicking or healing the sick animal."

Definition of farrier.

Where a man takes upon himself a public employment

Farrier cannot refuse to shoe a horse.

(*m*) *Royal College of Veterinary Surgeons v. Robinson*, [1892] 1 Q. B. 557; 61 L. J., Q. B. 146.

(*n*) *Veterinary College v. Green*, 57 J. P. 505.

he is bound to serve the public as far as his employment goes, or an action lies against him for refusing. Thus if a *farrier* refuse to shoe a horse (o), an innkeeper to receive a guest, a carrier to carry, when he *may* do it, an action lies (p).

When brought at a reasonable time.

Answerable for his own want of skill.

Where a third person is affected.

When answerable for his servant.

Action against a farrier for pricking a horse.

Collins v. Rodway.

But the horse must be brought to be shod at a *reasonable time* for such purpose; because if brought at an irregular hour, the *farrier* may say, "I will not do it" (o).

A *farrier* is liable for laming a horse in shoeing it, and the action is founded on the implied contract, that every workman undertaking any work will perform it properly (q), because it is the duty of every artificer to exercise his art rightly and truly as he ought (r).

And an action may be maintained for a breach of duty arising out of a contract with a third person. Thus Coke, C. J., puts this case: "If the master sends his servant to pay money for him upon the penalty of a bond, and on his way a smith in shoeing doth prick his horse, and so by reason of this the money is not paid; this being the servant's horse, he shall have an action *upon the case* for pricking of his horse; and the master also shall have his action *upon the case* for the special wrong which he hath sustained by the non-payment of his money occasioned by this" (s).

And where a horse has been injured in shoeing from the *negligence* of a *farrier's* servant, the master is liable (t). But not if the wrong be *wilful*, as if the servant *maliciously* drives a nail into the horse's foot in order to lame him (u).

An action lies against a farrier for pricking a horse when shoeing him (r), and where one smith lends a horse to another, and the second pricks him in shoeing, the action lies against the first, or the second, in the option of the owner (w).

The rule of law as to the extent of a *farrier's* liability in shoeing a horse is fully and clearly laid down by Pollock, C. B., in the case of *Collins v. Rodway* (x); and

(o) 14 Hen. 6, 18.

(p) *Lane v. Cotton*, 1 Salk. 18.

(q) Chit. Pleading, 6th Ed. 262.

(r) *Rex v. Kilderby*, 1 Saund. 312, n. 2.

(s) *Everard v. Hopkins*, 2 Bulstr. 332; and see *Longmead v. Holliday*, 6 Exch. 764.

(t) 1 Bl. Com. 431; *Randleston v. Murray*, 8 A. & E. 109; 47

R. R. 513.

(u) *Jones v. Hart*, 2 Salk. 440.

(v) Nat. Brev. 94 d.; 17 Edw. 4, 43; 11 Edw. 4, 6; 56 Edw. 3, 19; 3 Hen. 6, 36; 14 Hen. 6, 88; Orig. 106 a; 48 Edw. 3, p. 11.

(w) 12 Edw. 4, 13.

(x) *Collins v. Rodway*, before Pollock, C. B., Guildhall, Dec. 15, 1845; 14 *Veterinarian*, 102.

as that case does not appear in any of the reports, it will here be given at considerable length. The following is compressed from a copy of the shorthand notes which were taken at the trial, and afterwards published in the *Veterinarian*. It was an action brought against the defendant, a *farrier*, for unskilfulness in the shoeing of two horses sent by the plaintiff to be shod at the defendant's forge, which he carried on for the purpose of shoeing horses with a shoe for which he had a patent.

The one, a grey mare pony, was sent on the 16th of July, in the evening after working hours, and was shod at the particular request of the plaintiff's father. On the 17th she was driven with two men in a gig to Barnet, and it was admitted that for three miles she had gone sound. On the 20th the shoes were taken off by the apprentice of Beck, another farrier. On the 21st the defendant received notice of her lameness, and on the 26th, after her feet had been cut about and poulticed, she was re-shod by Beck and afterwards worked. It appeared that subsequently she had been turned out for nine weeks.

The other, a black entire pony, was sent to be shod on the 18th July. On the 21st the shoes were taken off by Beck, and blood was said to have followed the withdrawal of two of the nails. It was admitted that this pony's feet were very thin and bad, and his action very high. What was done to this pony did not appear; but he had been under the care of a veterinary surgeon, and was afterwards sold for a small sum at Aldridge's repository some time in October.

At the trial no veterinary surgeons were called to give any information as to the nature of the injury or of the parts injured. And the allegation that the patent shoe was one likely to produce lameness by its application was withdrawn by the plaintiff's counsel.

The defendant's case rested on two grounds. First, that even supposing the ponies to have been lamed in shoeing, he was not liable, because he had brought to the performance of that duty *competent skill* and *reasonable care*, and that the plaintiff knowingly brought them to have the patent shoe applied. Secondly, that one pony was lame before it was shod, and the other had not been lamed by the shoeing, but the lameness had arisen from other causes.

In summing up, Pollock, C. D., said to the jury: "The

Rule as to
farriers.

only rule of law that I feel it necessary to lay down upon the subject in this case is, that if this operation has been performed unskillfully and improperly, no doubt the defendant is liable to the plaintiff for any mischief that may have resulted from such unskillfulness; but he is liable only to the extent to which mischief has been produced. The rule I take to be this, that a person employed for any purpose must bring to the subject-matter a *reasonable* skill and fitness, and he must exercise that reasonable skill and fitness with *due* and *proper* care. If he be deficient in the requisite skillfulness, and in consequence of that the operation is performed in a bad and bungling manner, or if, having the requisite skillfulness, he fails to bring it to act, he is liable for any mischief which results from that."

No insurance
against
injury.

"I need hardly tell you, that an operation of this sort cannot be considered in the light of an *insurance*. If you apply to a surgeon or a medical man to cure you of any disorder, he is liable if there is any want of skill or proper care; and I observed that one of you asked whether pricking a horse was a frequent accident. I think the answer to that immediate question was, that it was not, at all events, very unfrequent; still it may happen without any great degree of unskillfulness attaching to it. The operation most resembles that of shaving. If a man undertakes to shave another, he would not be responsible for every abrasion of the skin that the barber might make; it requires a degree of skillfulness and care, and it might be hardly possible to operate upon a certain person without something of that sort taking place; and although an accident may happen, such as in this case, it may be that the foot of the horse was in such a state that it would be difficult to perform the operation of shoeing."

Peculiar
difficulties
should be
mentioned.

"Wherever that is the case, you would naturally expect some information given that there were those defects and difficulties, so that the *farrier* might be made acquainted with the risk he was exposing himself to. You will therefore have to judge whether you think there was any want of skill in the operation of shoeing these horses. I own it appears to me that I think it is impossible to doubt as to the fact that there was an actual pricking."

Coming at an
unseasonable
hour.

"With respect to the man's skill, he may have done it on this occasion badly, they coming to him at night to insist upon the job being done at an irregular hour; that was partly suggested at one time. I must say it appears

to me as a question of law, that it is no excuse. If you go to any place, and call in a surgeon or a *farrier*, or any person to perform an operation, if the time is inconvenient, and if the light be not sufficient, and if the occasion be not suitable, he is bound to say 'I will not do it.' If he does it, he is answerable, unless indeed he distinctly and explicitly says, 'I do it at your urgent request, but *I will not be responsible* for the consequences.' Nothing of that sort appears to have come from him. On the contrary, though there may have been a remonstrance that the man came too late, yet it was done. It appears to me in point of law that if a person, called upon at an unreasonable time, undertakes to do it without declaring he will not be responsible, he does it with the same responsibility as if he did it at any proper time."

The jury found a verdict for the defendant, and the Court of Exchequer afterwards refused a rule for a new trial, which was applied for on the ground that the verdict was against the evidence.

Under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47, s. 54 (1), every person who, within the limit of the Metropolitan Police District, shall in any thoroughfare or public place, to the annoyance of the inhabitants or passengers, shoe, bleed, or farry any horse or animal, except in case of accident, or clean, dress, exercise, or break any horse or animal, is liable to a fine not exceeding 40s. And by s. 28 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), the like penalty is imposed on every person who does any of these things in any street, to the obstruction, annoyance, or danger of the residents—a prohibition which appears to be somewhat less extensive than that contained in the former Act.

A horse standing at a *farrier's* to be shod is exempt from distress on the ground of public utility (y).

As a party has a right to go to a farrier's shop by the tacit permission of the law (z), an action of *trover* does not lie against a *farrier* for refusing to deliver a horse which he has shod, unless the money due for the shoeing has been paid or tendered (a).

Because the artificer to whom goods are delivered for the purpose of being worked into form,—the *farrier* by

Farrying, &c.,
in the street.

Horse standing to be shod not distrainable.

Horse may be detained for the price of his shoeing.

Such lien is favoured by law.

(y) *Francis v. Wyatt*, 3 Burr. 1502, and the authorities there cited.

(z) *Lane v. Cotton*, 1 Salk. 18.
(a) *Bac. Abr. Trover* (E.) 816.

whose skill an animal is cured of a disease,—the horse-breaker by whose skill the animal is rendered manageable, and the man who covers a mare with a stallion, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases (b).

Extends only to each particular time.

But the horse can only be kept for work done at that particular time, for the lien does not extend to any previous account; and when this point was decided by the Court of Queen's Bench, Lord Ellenborough said, "Growing liens are always to be looked at with jealousy, as they are encroachments on the common law. If they are encouraged in practice, the farrier will be claiming a lien upon a horse sent to him to be shod. It is not for the convenience of the public that these liens should be extended further than they are already established by law" (c).

Liability to feed a horse detained.

In the case of *Searfe v. Morgan* (d) a difficulty arose out of the circumstance that a living chattel might become expensive to the detainer, and would raise the question as to who was liable to feed it intermediately. But this difficulty was answered by referring to the analogous case of a *distress* kept in a *pound covert*, where he who distrains is compellable to take reasonable care of the chattel distrained, whether living or inanimate; and to the case of a lien upon *corn*, which requires some labour and expense in the proper custody of it (e).

Horsebreaker, Trainer,

Horsebreaker liable for damage to the horse.

A horsebreaker is liable for any damage which through his negligence may happen to the horse he is breaking. Thus an action on the case was brought, and damages recovered against the defendant, to whose charge a mare had been committed, "to be taught to pace" (f).

(b) *Searfe v. Morgan*, 4 M. & W. 280; 51 R. R. 568; *Chase v. Westmore*, 5 M. & S. 189; 17 R. R. 301.

(c) *Rushforth v. Hadfield*, 7 East, 229; 8 R. R. 520.

(d) *Searfe v. Morgan*, 4 M. & W. 280; 51 R. R. 568.

(e) See ante, p. 229; 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, s. 1; also ante, p. 227; *British Empire Shipping Co. v. Somerset*, 28 L. J., Q. B. 220—Ex. Ch.

(f) Lib. Plac. 25.

Farrier's lien.

Canadian Case.—Per Robinson, C. J., in *Nicholls v. Duncan*, 11 U. C. Q. B. at p. 333: "The right of lien in such a case [that of a farrier] seems to be subject yet to doubt." But see s. 51 of Rev. Stats. Ontario (1897), Chap. 153.

The *horsebreaker*, by whose skill the horse is rendered manageable, has a lien upon him in respect of his charges; and such lien being consistent with the principles of natural equity, is favoured by the law, which in such case is construed liberally (g). Horse-breaker's lien.

It was for a long time doubtful whether in any case a trainer had a lien for the keep and exercise of a racehorse sent to him to be trained; unless perhaps it was delivered to be trained for the purpose of running a specified race (h). In *Beran v. Waters* (i) he was held to have a lien; and the question also arose in *Jacobs v. Latour* (k), but the case was decided on another point. The doubt seemed to be whether in the contract for training there was a stipulation for the re-delivery of the horse trained for the purpose of racing. And in a later case *Alderson, B.*, said, "It may be very doubtful whether a trainer would not be considered to be in the situation of a *livery-stable keeper*, if by the contract he is to allow the owner to run the horse" (l). *Parke, B.*, shortly afterwards in another case, said, "As to the case of the training groom it is not necessary to say anything, as it has not been formerly decided; for in *Jacobs v. Latour* (k) the point was left undetermined. It is true there is a *nisi prius* decision of *Best, C.J.*, in *Beran v. Waters* (m), that the trainer would have a lien, on the ground of his having expended labour and skill in bringing the animal into condition to run at races; but it does not appear to have been present to the mind of the Judge, nor was the usage of training to that effect explained to him, that when horses are delivered for that purpose the owner has always a right during the continuance of the process to take the animal away for the purpose of running races for plates elsewhere. The right of lien, therefore, must be subservient to this general right which overrules it; so that I doubt if that doctrine would apply where the animal delivered was a racehorse, as that case differs much from the ordinary case of training. I do not say that the case of *Beran v. Waters* (n) was wrongly decided; I only doubt if it

(g) *Scarfe v. Morgan*, 4 M. & W. 2, 51 R. R. 568.

(h) See *Jackson v. Cummins*, 5 M. & W. 359; 52 R. R. 737.

(i) *Beran v. Waters*, 3 C. & P. 520; 33 R. R. 692. See also *Sanderson v. Bell*, 2 C. & M. 304.

(k) *Jacobs v. Latour*, 2 M. & P. 205.

(l) See note (g).

(m) *Beran v. Waters*, 3 C. & P. 520; 33 R. R. 692.

(n) *Ibid.*

extends to the case of a racehorse, unless perhaps he was delivered to the groom to be trained for the purpose of running a specified race, when of course these observations would not apply" (o).

It has, however, been decided in a later case, that the labour and skill employed on a racehorse by a trainer are a good foundation for a lien (p). But if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession and consequently no lien (p).

Stallion-
master has
a lien.

The owner of a stallion is entitled to a specific lien on the mare, in respect of his charge for covering her. Thus in the following case S. sent a mare to M., a farmer, to be covered by a stallion belonging to him, and the mare was taken to M.'s stables and covered accordingly upon a Sunday. However, the charge for covering not being paid, M. detained the mare, and on a demand of her being afterwards made, M. refused to deliver her, claiming a lien not only for the charge on that occasion, but for a general balance due to him on another account. It was held that M. was entitled to a specific lien on the mare for the charge of covering her, and that the claim made by M. to retain the mare for the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum (q).

For work
done on a
Sunday.

It was also decided that such a contract was not void within 29 Car. 2, c. 7, s. 1, on the ground of its having been made and executed on a Sunday, but that even if it were void, the contract having been executed, the lien attached. And Parke, B., said, "We are of opinion that this is not a case within the statute 29 Car. 2, c. 7, which only had in its contemplation the case of persons exercising trades, &c. on that day, and not one like the present, where the defendant, in the ordinary calling of a farmer, happens to be in possession of a stallion occasionally covering mares; that does not appear to me to be exercising any trade, or to be the case of a person practising his ordinary calling" (r).

(o) *Jackson v. Cummins*, 5 M. & W. 350; 52 R. R. 737.

(p) *Forth v. Simpson*, 13 Q. B. 680; 18 L. J., Q. B. 266; 78 R. R. 493; see also *Lee v. Irwin*,

4 Ir. Jur. 372.

(q) *Scarfe v. Morgan*, 4 M. & W. 270; 51 R. R. 568.

(r) *Ibid.*

CHAPTER XI.

LIVERY-STABLE KEEPERS, ASSISTERS, AND THE HIRING AND BORROWING HORSES.

Livery-stable Keeper.

A LIVERY-STABLE is defined by Webster as "a stable where horses are kept for hire, and where stabling is provided."

A *livery-stable keeper*, who is not an innkeeper, has no privilege himself, and none can be claimed under him; he must therefore rest on his own agreement (a). But he is not liable to the inconveniences to which innkeepers are subject, such as taking out licences, &c.; and he is not bound to have soldiers quartered upon him (b).

If a horse in his keeping be lost or stolen, he is answerable for it (c). But he is not an insurer, and will not, therefore, be liable for the loss of an animal entrusted to him if he took reasonable care of it (d); but it seems that the onus lies on him to prove that he did take reasonable care (e).

A person should satisfy himself of the credit and solvency of the *livery-stable keeper* to whom he proposes to entrust his horse; because horses and carriages standing at livery are *distrainable* for rent (ee).

But the case of a horse sent to a livery-stable merely to be cleaned and fed, is very different from one, where he is sent to remain during the owner's pleasure, the

(a) Yelv. 66; *Chapman v. Allen*, Cro. Car. 271; *Yorke v. Greenhaugh*, 2 Ld. Raym. 687; 1 Salk. 388; *Gelley v. Clerk*, Cro. Jac. 188. In some of the States in America statutes are in force giving the livery-stable keeper a lien upon animals for their keep. See *Hanover on Horses*, 2nd Ed. 205; *Colquitt v. Kirkman*, 47 Ga. 555 (1873).

(b) *Parkhurst v. Foster*, 1 Salk. 387; *Barnard v. How*, 1 C. & P. 366.

(c) *Yorke v. Greenhaugh*, 2 Ld. Raym. 866; *Francis v. Wyatt*, 3 Burr. 148; 1 Bl. Rep. 485.

(d) *Searle v. Laverick*, L. R., 9 Q. B. 122.

(e) *Mackenzie v. Cor*, 9 C. & P. 632; 72 R. R. 762.

(ee) *Parsons v. Gingell*, 4 C. B. 545; 16 L. J., C. P. 227.

feeding and grooming being only incident to the principal object (f).

Distinction
taken in
Parsons v.
Gingell.

In the case of *Parsons v. Gingell* (g), the following distinction was taken by Wilde, C. J.: "If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade, and are to remain upon the premises until that purpose is answered, and no longer, the case falls within one class; but if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally different consideration."

Livery-stable
keeper has
no lien for
keep.

A livery-stable keeper cannot detain a horse for his keep as an innkeeper may, because he is not bound to take it, much less can he detain, or be bound to take a carriage without horses (h).

May have a
lien by agree-
ment.

But he may have a lien by special agreement, as where a mare was placed with a livery-stable keeper, who advanced money to her owner, and it was agreed that she should remain as a security for the repayment of the sum advanced, and for the expenses of her keep, the livery-stable keeper was held to have a lien on her for the amount due (i).

Horse
removed to
defeat such
lien.

And if he have such lien by agreement, and the owner of the horse fraudulently take it out of his possession to defeat the lien, the livery-stable keeper may retake it without force, for the lien is not put an end to by his having parted with the possession under such circumstances (k).

Livery-stable
keeper has no
lien for money
expended on
horse.

A livery-stable keeper has no lien on a horse for money expended by him on the horse at the request of the owner. Thus in a case in which a livery-stable keeper had employed a veterinary surgeon at the request of the owner to blister a horse standing at livery with him for splints, and had actually paid the bill, it was held that he had no right to detain the horse for the amount of this bill, inasmuch as the veterinary surgeon had no lien for his bill, nor the livery-stable keeper for his keep; and inasmuch as there is no rule of law, which gives a livery-stable keeper

(f) See per Wilde, C. J., *Parsons v. Gingell*, 4 C. B. 558.

(g) *Parsons v. Gingell*, 4 C. B. 558.

(h) *Barnard v. Inn*, 1 C. & P. 366; *Yorke v. Greenhaugh*, 2 Ld. Raym. 867; *Francis v. Wyatt*, 3

Burr. 1498; 1 Bl. Rep. 485; *Parsons v. Gingell*, 4 C. B. 545; 16 L. J., C. P. 227.

(i) *Donatty v. Crowder*, 11 Moore, 479.

(k) *Wallace v. Woodgate*, R. & M. 193; 1 C. & P. 575.

a lien for money expended upon a horse standing at livery at the request of the owner (*l*).

Where a *livery-stable keeper* brings an action for a horse's keep, money received by him as the price of the horse, but afterwards returned on the rescission of a contract of sale, cannot be set off against him by the defendant. Thus, the plaintiff, a *livery-stable keeper*, sold for the defendant a horse and received the price. The purchaser afterwards rescinded the contract on the ground of fraud, and was repaid the purchase-money. In an action by the plaintiff for the keep of the horse, it was held that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud (*m*).

What cannot
be set off in
an action for
keep.

A *livery-stable keeper* who undertakes for reward to receive a horse or carriage and lodge it in a stable or coach-house, is bound to take reasonable care (*n*). The obligation to take reasonable care of the thing entrusted to a bailee of this class, involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe. The fact that the building has been erected by the *livery-stable keeper* on his own ground makes no difference to his liability (*o*).

He must take
reasonable
care of the
horse.

In *Searle v. Laverick* (*p*), the plaintiff brought his horses and two carriages to the defendant, a *livery-stable keeper*; the carriages were placed under a shed on his premises, a charge being made by him in respect of each. The shed had just been erected, the upper part still being in the hands of workmen. The defendant had employed a builder to erect the shed for him as an independent contractor, not as his servant, and he was a competent and proper person to employ. The shed was blown down by a high wind, the defendant being ignorant of any defect in it, and the carriages were injured, upon which the plaintiff brought an action against him. At the trial, the above facts having been admitted, the judge rejected

(*l*) *Orchard v. Rackstraw*, 9 C. B. 698; 82 R. R. 509.

(*m*) *Murray v. Mann*, 2 Ex. 538; 76 R. R. 686.

(*n*) *Searle v. Laverick*, L. R., 9

Q. B. 122; 43 L. J., Q. B. 43; 30 L. T. 89.

(*o*) *Ibid*.

(*p*) *Ibid*.

evidence to prove that the fall of the shed was owing to its being unskillfully built through the negligence of the contractor and his men; and he nonsuited the plaintiff, ruling that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to take ordinary care in the keeping of the carriages, and that if he had exercised in the employment of the builder such care as an ordinarily careful man would use, he was not liable for damage caused by the carelessness of the builder, of which the defendant had no notice. And this nonsuit and ruling were held right.

An action for not taking due care of a horse founded on contract.

An action against a *livery-stable keeper* for not taking due and proper care of a horse of the plaintiff's, whereby damage resulted, is founded on contract, and not *in tort*, and thus differs from an action against a farrier, who shoes a horse negligently, and so commits a breach of a common law duty. Therefore, where less than 20*l.* is recovered against a *livery-stable keeper*, the plaintiff is deprived of costs by the County Courts Act, 1888, s. 116, unless the judge certifies that there was sufficient reason for bringing the action in the High Court (*q*).

Agister.

Definition of agistment.

The contract of agistment is "the taking in of other men's cattle into pasture land, at a certain rate per week, without letting them the land for their exclusive use as tenants, so called because the cattle are suffered *agiser*, *i.e.*, to be *levant et couchant* there. Also the profit of such feeding" (*r*).

Agister's possession.

An *agister* has such a possession that he may maintain *trespass* against a person who has taken away any horse or cattle left with him to be agisted (*s*). He may also maintain an action of *trover* for horses or other cattle during their agistment (*t*). If a horse so left be sold by him, it is no larceny (*u*); and if it be stolen, and the thief prosecuted, the property may be laid as his (*x*).

(*q*) *Legge v. Tucker*, 1 H. & N. 500; 26 L. J., Ex. 71, decided under 13 & 14 Vict. c. 61, s. 11.

P. C. 653.

(*t*) *Clarke v. Roe*, 4 Ir. C. L. Rep. 7.

(*r*) Wharton's Law Lexicon, 10th Ed. 44.

(*u*) *Rear v. Smith*, 1 Mood. C. C. 413.

(*s*) See 4 Inst. 293; 2 Rol. Abr. 551; *Woodward's case*, 2 East's

(*x*) *Woodward's case*, 2 East's P. C. 653.

Agistment.

Canadian Cases.—All the increase and offspring of a loan of mares belong to the lender, and must be returned at the determina-

A person who takes in horses to agist does not, like an innkeeper, insure their safety. He is obliged to use reasonable care, but is not answerable for the wantonness or mischief of others. For if a horse has been taken from his premises, or has been lost by accident, against which he could not guard, he is not responsible (y).

Does not insure a horse's safety.

A person who takes horses to agist is answerable, either if a *particular negligence* be proved, through which the horse was lost, or if, in ignorance of the special circumstances of the case, there be *gross general negligence*, to which the loss may reasonably be ascribed (z).

He is answerable for negligence.

For instance, if cattle be agisted, and the *agister* leaves the gates of his field open, he uses less than *ordinary* diligence; and if the cattle stray out and are stolen, he must make good the loss (a).

If he leaves his gates open.

Where an action was brought for the breach of a contract of agistment of a mare to be agisted in a field which was separated by a wire fence from another field in the occupation of a cricket club; and it was alleged that, owing to the negligence of the *agister's* servant in leaving open a gate between the two fields, the mare had escaped

(y) *Broadwater v. Blot*, Holt, 547; 17 R. R. 677. See *Corbett v. Packington*, 6 B. & C. 268; Lib. Plac. 14.

(a) *Broadwater v. Blot*, Holt, 547; 17 R. R. 677. Also per Byles, J., *Marfell v. South Wales Rail. Co.*, 8 C. B., N. S. 525.

(z) *Ibid.*

tion of the loan, and are not subject to seizure under execution against the bailee. *Dillaree v. Doyle*, 1 U. C. Q. B. 442 (1878).

Claim for agistment by vendor disallowed where vendee returned horses as not satisfying vendor's warranty. *Halliday v. White*, 23 U. C. Q. B. 593 (1864).

The standard of conduct required from an agister in respect of animals in his charge is the care of a "bon père de famille." But it is unreasonable to expect a man who charges a moderate price for agistment to watch the animals constantly. *Nadon v. Pesant*, Q. R. 26 S. C. 384 (1904). And see *Pearce v. Sheppard*, 24 Ont. R. 167.

In order to maintain an action for the value of the keep of a horse, based upon the obligation *quasi ex contract* to reimburse the expense incurred in the preservation of the property of another, there must be evidence adduced to show that the defendant was at the time the expense was incurred owner of the animal in question. *Richard v. Stevenson*, Q. R. 28 S. C. 188 (1905).

To a declaration by plaintiff for the price of one-half interest in a horse alleged to have been sold by plaintiff to defendant, plaintiff retaining the other half interest, defendant pleaded among other pleas a set-off for the care and keep of the horse, and certain other expenses, while the joint ownership lasted: *Held*, that such plea was good. *McDonald v. Power*, 12 N. S. R. 340 (1878).

from the field in which she was placed into the cricket field, whereupon certain members of the club endeavoured in a careful and proper manner to drive her back through the gate; but the mare refused to go through the gate, and having run against the wire fence fell over it, and was injured by one of the iron standards. It was held that the injury to the mare was the natural consequence of the gate having been left open, and that the *agister* was liable (b).

Fences out of order, &c.

So, too, if the *fences* were in an improper state when the horse was taken in to agist, or if the party taking it in, did not apply that care and diligence to its custody, even though it be taken in gratuitously (c), which the owner had a right to expect (c); as where, from not properly *fencing* a pond, the horse stuck in the mud and died, the *agister* is answerable for such negligence (d). But where a horse fell through some rotten boards into a cesspool and was injured, it was doubted by Willes, J., whether the defendant was liable (e).

Injury by another horse, &c.

In the case of *Gaunt v. Smith* (f), tried before Pollock, C. B., which was an action brought against an *agister* for negligence in the care of the plaintiff's pony, which was kicked and damaged during its agistment by a horse, whose shoes had not been taken off, there being no evidence that the defendant knew the horse to be vicious, the plaintiff was nonsuited. But it must not be supposed from this ruling that the doctrine of *scienter* has any application to an alleged breach of contract of agistment, except, perhaps, in so far as the knowledge of the *agister* of the ferocious character of the animal causing the injury may be evidence of negligence; for the contract of agistment is a contract to take reasonable care, and he is, therefore, not exempt from liability merely on the ground that he did not know that the animal causing the injury was ferocious. This statement would appear to be fully justified by the decision of the Queen's Bench Division

(b) *Halestrap v. Gregory*, [1895] 1 Q. B. 561; 64 L. J., Q. B. 415; 72 L. T. 292; 43 W. R. 567.

(c) *Rooth v. Wilson*, 1 B. & Ald. 59; 18 R. R. 431.

(d) *Povey v. Purnell*, before Jervis, C. J., C. P., N. P., Dec. 6, 1853. And see *Groucott v. Williams*, 32 L. J., Q. B. 237, in which it was held that injury done to a

horse when grazing in a field, by falling down a shaft, which was improperly fenced by the defendants, who were in occupation of the minerals under the field, was actionable.

(e) *Stacey v. Livesay*, C. P., N. P., Nov. 14, 1856.

(f) *Gaunt v. Smith*, N. P., Ex., Dec. 11, 1856.

in the case of *Smith v. Cook* (g), the facts of which were as follows :—An *agister* of cattle placed a horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the adjoining field, and there was no sufficient fence to keep it out. He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull and killed; and in an action by the owner of the horse against the *agister* for breach of contract to take reasonable care, the jury found for the plaintiff. It was held that the fact that the *agister* had no knowledge of the mischievous disposition of the particular bull was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an *agister* to take reasonable care of the horse.

The duty on the part of the *agister*, not to be negligent in dealing with the subject-matter of the agistment, is one which arises at common law out of the relation between the parties as bailor and bailee. In accordance, therefore, with the established rule, an action against an *agister* to recover damages for breach of that duty is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888 (h).

Action against, founded on tort.

It is only just, that if A. send his horse to B. to be kept for him at grass for a certain time, B. should be answerable to him, if the horse when returned appear in worse condition than horses usually are under such circumstances, unless B. show that the horse has been in a good pasture, and therefore that the falling off must have arisen from some fault in his constitution. But were B. to agree to take in A.'s horse as one of ten to graze on a certain field, in that case B. would not be answerable, if A.'s horse fell off in condition in consequence of the field being eaten bare.

The horse's condition.

On a demise of land or the vesture of land (as the *eatage* of a field) for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken. Therefore, where A. had agreed in writing to take the *eatage* of twenty-four acres of land from B. for seven months, at a rent of 40*l.*, and then stocked the land with beasts, several of which died a few days afterwards, from

Eatage let for a certain time.

(g) 1 Q. B. D. 79; 45 L. J., 1 Q. B. 56; 67 L. J., Q. B. 52; 77 Q. B. 122; 33 L. T. 722. L. T. 482; 46 W. R. 81—C. A.

(h) *Turner v. Stallibras*, [1898]

the effect of a poisonous substance, which had accidentally been spread over the field without B.'s knowledge among some manure; the Court of Exchequer held that A. was not entitled on that account to throw up the land, but continued liable for the whole rent; Parke, B., saying, in the course of the argument, "It comes simply to the question, whether there is an implied undertaking that the grass shall be fit for the eatage of cattle; if there is, *cadit questio*; if not, the plaintiff has performed his engagement, and the defendant has had all he bargained for, namely, a demise of the *catage* for six months, and must pay for all" (i).

Agister has
lien.

If a man take in horses, kine or other cattle to depasture, on a contract at so much a head per week, he cannot detain them for the value of the *agistment*, unless there is a *special agreement* to that effect (k). The law on this subject was laid down and explained in the case of *Jackson v. Cummins* (l), in which Parke, B., said, "I think that by the common law *no lien* exists in the case of *agistment*. The general rule as laid down by Best, C. J., in *Beran v. Waters* (m), and by this Court in *Scarfe v. Morgan* (n), is, that by the general law, in the absence of any special agreement, whenever a party has expended labour 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 *agister* 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, as was the case with the stallion in *Scarfe v. Morgan* (n); he simply takes in the animal to feed it. In addition to which we have the express authority of *Chapman v. Allen* (o), that an *agister* has no lien; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have proceeded on the more general principle that no lien can exist in the case of *agistment*; and it was so understood in this Court in *Judson v. Ethridge* (p). The

(i) *Sutton v. Temple*, 12 M. & W. 520; 67 R. R. 255.

520; M. & M. 236; 33 R. R. 692.

(k) *Chapman v. Allen*, Cro. Car. 271; *Richards v. Symons*, 8 Q. B. 93.

(n) *Scarfe v. Morgan*, 4 M. & W. 283; 51 R. R. 568.

(l) *Jackson v. Cummins*, 5 M. & W. 342; 52 R. R. 737.

(o) *Chapman v. Allen*, Cro. Car. 271.

(m) *Beran v. Waters*, 3 C. & P.

(p) *Judson v. Ethridge*, 1 Cr. & M. 743.

analogy also of the case of the livery-stable keeper who has no lien by law, furnishes an additional reason why none can exist here; for this is a case of an *agistment* of milch cows, and from the very nature of the subject-matter, the owner is to have possession of them during the time of milking; which establishes that it was not intended that the *agister* was to have the entire possession of the thing bailed; and there is nothing to show that the owner might not for that purpose have taken the animals out of the field wherein they were grazing if he had thought proper so to do. This claim of lien is therefore inconsistent with the necessary enjoyment of the property by the owner."

But where there is a special agreement there may of course be a lien (*q*). Thus the plaintiff having a cow at grass in defendant's field, and being indebted for the *agistment*, agreed with him that the cow should be security; that he would not remove her till the defendant was paid, and that, if he did, the defendant might take her where she might be, and keep her till he was paid. The plaintiff removed the cow without having paid the debt, and the defendant seized her on the high road. In an action of *trespass* for the taking, it was held that the agreement might be set up as a defence under a plea that the cow was not the plaintiff's (*q*).

May have a lien by agreement.

In *Re Woodward, Ex parte Hughes* (*r*), H. placed certain stock upon the lands of W. upon an agreement whereby the stock remained the property of H., who, at the end of a certain period, was to sell the stock; and, after deducting the original price and a percentage for profit, to hand over the balance to W. During the continuance of the agreement W. became bankrupt, and the trustee claimed the stock in question as being within the reputed ownership of the bankrupt. It was held that the custom of *agistment* was notorious, and that being the case, that no reputation of ownership could arise in the case of stock on the lands of a farmer.

Bankruptcy of agister.

Horses and cattle put into a close to be *agisted* are liable at common law to be taken in distress by the landlord, the general rule being that all things on the land are distrainable for rent in arrear (*s*).

Horses and cattle being *agisted* are distrainable.

Horses or cattle driven to a distant market, and put into

But not when

(*q*) *Richards v. Symons*, 8 Q. B.

490.

(*r*) 54 L. T. 683.

(*s*) *Jones v. Powell*, 5 B. & C. 650; 8 D. & R. 416; 29 R. R. 352; 3 Christ. Bl. Com. p. 8, n. 4.

taken in to
rest for a
night.

Decision of
the Irish
Court of
Queen's
Bench.

Distinction
where cattle
enter by
breaking
fences.

Limitation of
distress under
the Agricul-
tural Holdings
Act.

land to rest for one night, cannot be distrained for rent by the owner of the land, such protection being absolutely necessary for the public interests (*t*).

Thus it was held in the Irish Court of Queen's Bench, that certain cattle belonging to a drover on their way to a market for the purpose of being sold there, and put to graze for one night, immediately before the morning on which the market was to take place, were privileged from distress by the landlord, for rent due to him out of the place in which they fed (*u*).

The settled distinction seems to be, that where a stranger's cattle escape into another's land by breaking the fences, where there is no defect in them, or if the tenant of the land where the distress is taken is not bound to repair the fences, though there is a defect in them, the cattle may be distrained for rent whether they are *levant et couchant* or not. If, however, the cattle escape through the defect of fences which the tenant of the land is bound to repair, they cannot be distrained by the landlord for rent, though they have been *levant et couchant*, unless the owner of the cattle, after notice that they were on the land, neglects or refuses to drive them away (*x*).

But live stock agisted on a holding to which the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), applies, enjoy a limited privilege from distress by virtue of s. 45 of that Act, which enacts as follows:—

“Where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the dis-

(*t*) *Tate v. Glead*, C. B., H. T., 24 Geo. 3. And see *Poole v. Longueville*, 2 Wms. Saund. 290, n. (7).

(*u*) *Nugent v. Kirwan*, 1 Jebb &

Symes, 97 (Q. B. Ir.).

(*x*) *Poole v. Longueville*, 2 Wms. Saund. 290. And see 2 Lutw. 1580; Gilb. Dist. 34, 2nd Ed. See also Woolrych on Fences, 309, 310.

trainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been *bonâ fide* paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid."

Live stock agisted for a fair equivalent is within this section, as taken in to be fed at a "fair price," and may, therefore, be exempt from distress, even although such equivalent be not money. Therefore, where cows were agisted on the terms "milk for meat," *i.e.*, that the *agister* should take their milk in exchange for their pasturage, it was held that the agistment was within the Act (y). But otherwise, where cattle were distrained on a holding pursuant to an agreement by which the tenant, in consideration of 2*l.*, allowed the owner "the exclusive right to feed the grass on the land for four weeks," as there the tenant did not agree to "take in" or to "feed" the cattle, and the sum he was to receive was not the "price" of the feed of the cattle, but a payment in the nature of rent for use and occupation (z).

By s. 46 it is enacted that "where any dispute arises—

- (a) in respect of any distress having been levied contrary to the provisions of this Act; or
 - (b) as to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock; or
 - (c) as to any other matter or thing relating to a distress on a holding to which this Act applies:
- such dispute may be heard and determined by the County Court or by a Court of Summary Jurisdiction, and any such County Court or Court of Summary Jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the case where the price of the feeding is required to be ascertained, or may make any other order which justice requires: any such dispute as mentioned in this section

Remedy for
wrongful
distress.

(y) *London and Yorkshire Bank v. Belton*, 15 Q. B. D. 457; 54 L. J., Q. B. 568. (z) *Masters v. Green*, 20 Q. B. D. 807; 59 L. T. 476.

shall be deemed to be a matter in which a Court of Summary Jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such Court of Summary Jurisdiction under this section may, on giving such security to the other party as the Court may think just, appeal to a Court of General or Quarter Sessions.

Hiring Horses.

Letting for hire.

Warranty of fitness for journey.

Reasonable care not sufficient.

Hyman v. Nye.

Letting for hire is a bailment of a thing to be used by the *hirer*, for a compensation in money (*a*).

If a horse or carriage be let out for hire for the purpose of performing a particular journey, the party letting warrants that the horse or carriage, as it may be, is fit and proper and competent for such journey (*b*).

The fact that the defendant has taken all reasonable and proper care to provide a fit and proper carriage is not sufficient; it is his duty to supply a carriage as fit for the purpose for which it was hired as care and skill can render it, and this was so held in *Hyman v. Nye* (*c*), where the point was very fully discussed. In that case the plaintiff hired from the defendant, a jobmaster, for a specified journey a carriage, a pair of horses, and a driver. During the journey a bolt in the underpart of the carriage broke, the splinter bar became displaced, the horses started off, the carriage was upset, and the plaintiff injured. In an action against the defendant for negligence, the jury were directed that, if in their opinion the defendant took all reasonable care to provide a fit and proper carriage, their verdict ought to be for him. The jury found a verdict for the defendant, and in particular that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention. A rule having been obtained, calling upon the defendant to show cause why there should not be a new trial on the ground of misdirection, and that the verdict was against the weight of the evidence, Lindley, J., in the course of his judgment said, "A careful study of [the] authorities leads me to

(*a*) Jones on Bailments, 118.

(*b*) Per Pollock, C. B., *Chew v. Jones*, 19 L. T., O. S. 231; 89 R. R. 770. See also *Vegan v. Oulton*, 81 L. T. 435—C. A., affirming Wright,

J., 79 L. T. 384.

(*c*) 6 Q. B. D. 685; 44 L. T. 919; 55 J. P. 554. See also *Jones v. Page*, 15 L. T. 619.

the conclusion that the learned judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors, or railway companies who provide carriages for the public to travel in; but, in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident, and not preventible by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs* (d), and as the railway company did in *Readhead v. Midland Rail. Co.* (e), he will not be liable; but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as skill and care can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus to protect himself from risk, but also to charge his customers enough to cover his expenses.

"Such being, in my opinion, the law applicable to the case, it follows that the direction given to the jury did not go far enough, and that it was not sufficient, in order to exonerate the defendant from liability, for him to prove that he did not know of any defect in the bolt, had no reason to suppose it was weak, and could not see that it was by an ordinary inspection of the carriage. It further follows that, in my opinion, the evidence was not such as to warrant the finding that the carriage was in a fit and proper state when it left the defendant's yard." And Mathew, J., coming to the same conclusion, a new trial was ordered accordingly.

Where an article hired by the plaintiffs from the defen-

Damages for
breach of
warranty.

(d) 2 Camp. 80; 11 R. R. 666.

(e) L. R., 2 Q. B. 412; 36 L. J., Q. B. 181.

dant was unfit for the purpose for which it was supplied, and in consequence of such unfitness a man employed by the plaintiffs was injured in the course of his employment, and recovered damages and costs from the plaintiffs; it was held that the latter were entitled to recover, as damages for breach of warranty, the damages and costs so incurred (*f*).

Selecting a particular carriage.

A person who, on hiring a carriage, looks at it merely to test its capacity to hold a certain number of persons, does not by so doing, select it so as thereby to relieve the party letting it to hire from liability with respect to its safety (*g*). The question whether the owner would be relieved from liability if the *hirer* had selected the carriage after examining it with a view to ascertain its fitness, does not appear to have been decided, but it is clear that he would be so relieved if the *hirer* had selected it, notwithstanding the existence of patent defects.

Where a particular horse is selected.

But a horse should not be used for a purpose other than that for which it was hired.

Even if a particular horse has been selected out of the owner's stables, it makes no difference, as it must be supposed that all are fit for their work (*h*).

But if a horse is hired for one purpose, and is used for another, and the horse when thus used is injured, the *hirer* is liable for the damage thus occasioned. Accordingly where a horse was hired as a lady's riding horse, the *hirer* was held to be liable for damage occasioned when trying him in harness (*i*). So where a man hired a mare for a ride along the road, being told that she was not fit for jumping, but, nevertheless, lent her to a friend, who put her to a fence with the result that she was transfixed by a stake and killed (*k*).

What care is required.

In contracts reciprocally beneficial both parties, such as hiring, &c., such care is exacted, as every prudent man commonly takes of his own goods; and by consequence the *hirer* is answerable for ordinary neglect (*l*). If therefore a man so treat and manage his hired horse as any prudent man would act towards his own horse, he is not answerable for any damage the horse may receive (*m*).

Liability of hirer for negligence of servant.

If a hired horse is injured owing to the negligence of the *hirer's* servant, the *hirer* will be liable to make good the

(*f*) *Vogan v. Oulton*, 81 L. T. 435—C. A., affirming Wright, J., 79 L. T. 384.

(*g*) *Jones v. Page*, 15 L. T. 619.

(*h*) *Chew v. Jones*, 19 L. T. O. S. 231, 308; 89 R. R. 770.

(*i*) *Gapp v. Giandomati*, C. P.

N. P. November 14, 1857, *cer.* Cresswell, J.

(*k*) *Burnard v. Haggis*, 14 C. B., N. S. 45; 32 L. J., C. P. 189.

(*l*) *Jones on Bailments*, 25.

(*m*) *Cooper v. Burton*, 3 Camp., 5, n.; 13 R. R. 736.

damage to the owner. Thus where the coachman of the hirer of a horse and carriage instead of taking them, as was his duty, to the stable, drove for his own purposes in another direction, and while he was thus engaged the horse and carriage were injured, owing to his negligent driving; it was held that there had been a breach of the hirer's contract as bailee, for which he was liable (u).

(a) *Coupe Co. v. Muddick*, [1891] 2 Q. B. 413; 60 L. J., Q. B. 676.

Canadian Cases.—Defendant owned a threshing machine and a portable steam engine, and hired from the plaintiff a team of horses with a driver for use in moving the engine about and in drawing straw and grain during the threshing. While threshing for a certain farmer, sparks from the engine set fire to a stack of grain, and the separator being thereby placed in danger, the plaintiff's driver attached his horses to it for the purpose of hauling it to a place of safety; but the fire spread so rapidly, before the separator could be moved or the horses detached, that they were severely burned and had to be killed. The trial Judge found that the fire had been caused by negligence on the part of defendants' servants; also that the horses had been attached to the separator either in obedience to a call from the defendant's foreman or under his personal supervision; and that there was no negligence on the part of the plaintiff's driver: *Held*, that the evidence warranted the finding of negligence against the defendant's servants, and that the plaintiff's driver was not guilty of contributory negligence in exposing the horses to danger, as it was not obvious, and he had acted either on the orders of the defendant's foreman or in obedience to a natural impulse to try and save defendant's property. *Connell v. Town of Prescott*, 20 Ont. A. R. 49; 22 S. C. R. 147, followed; *Thorn v. James*, 14 Man. L. R. 373 (1903).

A hirer is liable for ordinary neglect. *Johnson v. The King*, 8 Ex. C. R. 360 (1903).

Suppliant entered into a contract with the Crown, through an officer of the Department of Public Works, to supply certain pack horses, with aparejos and saddles, for the construction of a telegraph line in the far north. It was not practicable, as the suppliant knew at the time of making the contract, to carry food for the horses along the line of construction, and it was necessary to turn the horses out to graze for food. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died or were killed to prevent them starving. There was a time during construction when the horses could have been taken back alive, and no prudent owner of horses would have continued them on the work beyond that time. The officer of the Crown in charge of the work, however, deemed that the interests of construction were sufficiently urgent to justify him in sacrificing the horses to the work: *Held*, that the hirer had acted imprudently in continuing the horses in employment after the grazing failed, and the Crown was liable to the owner for their loss. *Ibid*.

Hiring.

Negligence of servant in assuming risk.

Negligence of hirer.

Servant must
be acting
within scope
of employ-
ment.

*Sanderson v.
Collins.*

The ruling in the case just cited was considered by the Court of Appeal in *Sanderson v. Collins* (o), and a distinction drawn between the two cases, from which it seems clear that the liability of the hirer for the negligence of his servant must be taken to be subject to the qualification that the servant was acting within the scope of his employment at the time when the injury was incurred.

In *Sanderson v. Collins* (supra), the facts were as follows: The defendant sent his carriage to be repaired by the plaintiff, who was a coach-builder, and lent a carriage of his own to the defendant for use while the repairs were going on. The defendant's coachman, without his knowledge, took the plaintiff's carriage out for his own purposes, and while he was driving the carriage it was injured through his negligence. The plaintiff thereupon brought an action in the County Court to recover the cost of repairing the carriage, but was unsuccessful. The decision of the County Court judge was reversed by the Divisional Court, and judgment given for the plaintiff, on the authority of *Coupé Co. v. Maddick* (p). This judgment was, however, in its turn reversed by the Court of Appeal, where it was held, that as the coachman at the time when the injury was done was not acting in the course of his employment, the defendant was not liable. In delivering judgment in this case, Collins, M. R. (q) said: "The bailment was for mutual consideration, and was not gratuitous or voluntary, and the degree of the obligation on the bailee in such a case

(o) [1904] 1 K. B. 628; 73 L. J.,
K. B. 358; 90 L. T. 243; 52 W. R. 628.

(p) Supra.
(q) Now Lord Collins.

Negligence of
hirer.

Canadian Cases.—Where a person hiring from another a horse and waggon, with seats for two persons, places three therein, and the horse on the journey sickens and dies, he is liable because of the misuser. *Casey v. Archibald*, 3 N. S. R. 4 (1856).

A person who hires a horse to perform a journey is not liable for the value of the horse if he dies on the road without the fault of the hirer. *Dickie v. Campbell*, Hil. T., 1827. (See Stevens' New Brunswick Digest, 3rd Ed., p. 404).

Quære: Whether in such a case, and the hiring was not by the day, the owner of the horse could recover on a *quantum meruit* for the time the defendant used the horse? *Ibid*.

Per Robinson, C. J., in *McKay v. Cameron*, 6 U. C., Q. B., at p. 260: "When the horse ran away, it made it incumbent on the defendant to act with ordinary care and skill in the exigency." And see *Robertson v. Brown*, 1 U. C. Q. B. 345; *Klassen v. Wright*, 1 West. L. R. 158.

Horse
running
away.

is well settled, that the bailee must use reasonable care, which has been described as ordinary care, in the custody of the article bailed." And, after stating the facts of the case, continued : " So far as the act of his servant was to be taken as the act of the defendant, he would be bound by it ; and if the servant in the course of his employment and acting within the scope of his authority, did not use reasonable care in the custody of the carriage, the master would be responsible. On the other hand, it is clear law that such a bailee as the defendant was, is not responsible for the acts of persons who are not his servants in respect of particular acts. If a burglar broke into a coach-house and took away the carriage and caused damage to it and brought it back, no liability would attach to the bailee, because the act would not be his, and he would not be responsible for the acts of a person between whom and himself there was no connection. But while not responsible in such a case, yet if his servant whose duty it was to keep the carriage safely, had been negligent in leaving the coach-house open, and the carriage was taken away, the master would be liable, because of the negligence of a person for whom he is responsible. That, I think, illustrates the distinction between the two cases. Burglary is perhaps an extreme instance of something not done under any mandate of the master. If the servant in doing any act breaks the connection of service between himself and his master, the act done under those circumstances is not that of the master." Then, referring to *Coupé Co. v. Maddick* (r), the same learned judge proceeded : " Without deciding whether that case can or cannot be supported, it is sufficient to say that I think that it is distinguishable. The fact that makes it distinguishable from the one before us may be slight, but at the same time it may make all the difference. In that case, as I understand it, the act done by the coachman was admittedly within the scope of his authority. He had received an order to drive the horse in a particular direction ; he did drive the horse, but instead of doing so in the direction ordered, he drove in another direction. Still he was entrusted with the carriage and horses for the purpose of driving them, and they were injured owing to his negligent driving. Whether or not that is a sound distinction in point of law, it is a distinction in point of fact, and I think it is one that goes to the root of the matter, because the ground of the

Coupé Co. v. Maddick, distinguished.

decision appears to have been that the coachman was acting within the scope of his authority so as to render his master liable. I cannot agree with the Divisional Court as to that case being an authority in the present case, and for the reasons that I have given I think the appeal must be allowed, and the judgment of the learned County Court judge restored."

In this judgment Romer and Mathew, L. JJ., concurred, Romer, L. J., referring to *Coupé Co. v. Maddick* (r), saying: "In my opinion, that decision can only be supported upon the view that the servant was at the time of the accident acting in the course of his employment. If and so far as that case was decided on some broader grounds of the liability of the defendant as bailee, I can only say, speaking for myself, that it would appear to me to have been wrongly decided."

Infancy good
defence to an
action on
contract.

Where the plaintiff declared that, at the defendant's request, he delivered a mare to the defendant to be prudently ridden, and the defendant injured her, it was held that he might plead his infancy in bar, as the action was founded on a contract (s).

Seems where
action
founded
in tort.

But where it is clear, from the statement of claim, the whole of which must be looked at in order to see whether the action is substantially founded in tort or in contract, that the plaintiff claims damages for a tort; and that in addition to breaking the contract, the defendant by driving the horse at an excessive speed, and unduly flogging and otherwise illtreating and negligently and carelessly using him, has committed a separate and independent wrong apart from the contract, he will be liable for that wrong in the action, and the plea of infancy will afford no defence (t).

Where hirer
is answerable
at all events.

A hirer is answerable at all events, if he keep the thing hired, *after* the stipulated time, or use it differently from his agreement (u).

Unnecessary
deviation.

If a man hire a horse to go from A. to B., he ought to go by the usual road, and should not unnecessarily deviate from the usual and customary way. And if he make a material deviation, and any damage ensues, he would appear to be liable for it at all events (x).

(r) [1891] 2 Q. B. 413.

(s) *Jennings v. Rundall*, 8 T. R. 335; 4 R. R. 680.

(t) *Walley v. Holt*, 35 L. T. 631. See also *Burnard v. Haggis*,

14 C. B., N. S. 45; 32 L. J., C. P. 189.

(u) *Jones on Bailments*, 121.

(x) See *Davis v. Barrett*, 6 Bing. 716.

Where there has been no material deviation, and the horse has not been kept after any stipulated time, there must be *positive* proof of *negligence*, to fix the *hirer*. For instance, if an action is brought against him for using a *hired* horse so negligently that it broke its knees, it will not be sufficient for the plaintiff merely to show that the horse was a good horse, and not in the habit of falling (*y*).

Where negligence must be proved.

If the horse falls lame on the journey, the *hirer* may abandon him at any place where he turns out unfit, and give notice of that fact to the party letting him out, whose duty it is to send for him (*z*).

Where horse falls lame.

Where the strength of a horse which has been *hired* or *borrowed* is *exhausted*, and it has *refused its feed*, the *hirer* or *borrower* has no right to pursue his journey with it. This was so held in *Bray v. Mayne* (*a*), where a person had a horse on trial for some days on condition that he should pay 10*l.* for its hire if he did not like it. The horse at that time had a slight cold, but on the last day of trial, after the horse had been driven twenty miles, it was discovered that there was a swelling under its throat and it refused its feed. The defendant, however, drove it on to London, which was about twelve miles further, notwithstanding that it was much distressed during part of the journey; and when brought to the plaintiff's stables, it was in much worse condition than when delivered.

Where the horse is exhausted.

A veterinary surgeon in his evidence said that he considered it a want of proper care and attention to compel a horse to pursue his journey after it had been driven twenty miles, and had then *refused its feed*; and Dallas, C. J., directed the jury accordingly (*b*).

Where the horse refuses its feed.

His lordship also held that the defendant was not entitled to return the horse on payment of 10*l.*, because as the horse, on being returned, was in a worse state than when originally delivered, the condition on which it was delivered had not been fulfilled (*b*).

Where the horse is returned in worse condition.

If a *hired* horse is taken sick on the journey agreed upon, without the fault of the *hirer*, its cure is at the expense of the owner (*c*).

Expenses of curing sick horse.

(*y*) *Cooper v. Burton*, 3 Camp. 5. n.; 13 R. R. 736.

(*z*) Per Pollock, C. B., *Chew v. Jones*, 19 L. T. O. S. 231; 89 R. R. 770.

(*a*) *Bray v. Mayne*, 1 Gow, 1; 21 R. R. 786.

(*b*) *Ibid.*

(*c*) Pothier, *Louage*, p. 129; Story on Bailments, 9th Ed. s. 389.

Where the horse is improperly doctored.

But if the *hirer* prescribes medicines for it, he is answerable for any improper treatment, but not if he call in a *farrier*. Thus, where a horse has been hired of the plaintiff by the defendant, who, on the horse having been taken ill, prescribed improper medicines for it, and the horse died, Lord Ellenborough said, "Had the defendant called in a *farrier*, he would not have been answerable for the medicines the latter might have administered; but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a *prudent man towards his horse*, and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff" (d).

Who must pay for shoeing.

Pothier says, that where a horse is let to one on hire, to be kept by him for a certain period, the *hirer* is to pay for his shoeing during that time. But that it is otherwise, if a person lets his coach and horses to another for a journey, to be driven by his own servants (e). Pothier's language, even in the former case, ought probably to be taken with the qualification, that the horse was sufficiently well shod for the journey at its commencement, and that by accident or unexpected circumstances, the shoes became insufficient, or were lost or knocked off in the course of the journey (f).

Bailment determined by selling the goods.

A bailee of goods for hire, by selling them determines the bailment, and the bailor may maintain *trover* against the purchaser, though the purchase was *bonâ fide* (g). Thus, where a person hired a horse and sold it to a third party, it was held by Bosanquet, J., that the owner might recover its value from the purchaser, although he had acted *bonâ fide*, and had given the *hirer* the full value for it, as the *hirer* could give him no better title than he got himself (h).

Where the horse is stolen from the hirer.

If through the *hirer's* negligence, as by leaving the door of his stable open at night, the horse be stolen, he must answer for it; but not if he be robbed of it by highwaymen, unless by his imprudence he gave occasion

(d) *Dean v. Keate*, 3 Camp. 4; 672; 68 R. R. 798.
13 R. R. 735.

(e) See Pothier, *Louage*, pp. 107, 129.

(f) Story on Bailments, 9th Ed., s. 388.

(g) *Cooper v. Willomatt*, 1 C. B.

(h) *Shelly v. Ford*, 5 C. & P. 313. See also *Marnier v. Banks*, 17 L. T. 147; 16 W. R. 62; and see: Recovery of Stolen Horses, ante, Chap. III.

to the robbery, as by travelling at unusual hours, or by taking an unusual road. The *hirer* is liable in the same way for the negligence of his servant when acting under his directions either express or implied (i).

At common law, a person who hired a horse with the intention of converting it to his own use, and thereupon sold it (k), or even offered it for sale (l), was guilty of larceny. But where there was a *bonâ fide* hiring in the first instance, the subsequent conversion of the horse did not constitute a new felonious taking, and so make the hirer guilty of felony (m). But the difficulties involved in cases of this nature were obviated by 24 & 25 Vict. c. 96, s. 3, by which the fraudulent appropriation of property by bailees is declared to be larceny, and may therefore be the subject of an indictment for larceny.

If the owner parted with the possession of a horse for a special purpose, and the bailee, when that purpose was executed, neglected to return it, and afterwards disposed of it; if he had not a felonious intention when he originally took it, his subsequent withholding and disposing of it did not, at common law, constitute a new felonious taking, or make him guilty of felony (n).

Many of the cases decided upon this subject turned upon very nice distinctions, but it is unnecessary to refer further to them, having regard to the fact that it is no longer a defence to an indictment for larceny, that the prisoner originally received the goods in the character of a bailee.

Of course a person is liable to pay for horses used by himself and hired on his behalf by his servant. Thus, if a coachman go in his master's livery, and hire horses which his master uses, the master will be bound to pay for the hire of the horses, though he has agreed with the coachman that he will pay him a large salary to provide horses, unless the person letting the horses had some notice that the coachman hired them on his own account, and not for his master (o); for wherever one of two innocent persons must suffer by the acts of a third, he

Where the horse is stolen by the hirer.

Must have been originally taken with a felonious intention at common law.

Now bailee indicted for larceny 24 & 25 Vict. c. 96.

Horse hired by a servant

(i) Jones on Bailments, 88.

(k) *R. v. Pear*, 1 Leach, 521.

(l) *R. v. Janson*, 4 Cox, C. C. 82. overruling *R. v. Brooks*, 8 C. & P. 295.

(m) *R. v. Banks*, R. & R. 441.

(n) Ibid. But see post.

(o) *Rimell v. Sampayo*, 1 C. & P. 254. But see *Wright v. Glyn*, [1902] 1 K. B. 745, where it was

held that the relation of master and coachman does not clothe the latter with ostensible authority to pledge his master's credit for forage supplied to his horses; Collins, M. R., in a considered judgment saying that *Rimell v. Sampayo* must be taken to have been decided on special facts.

who has enabled such third person to occasion the loss, must sustain it (*p*).

Owner's
liability in
case of
accident.

In general the *owner* of a horse is liable for any accident which may befall it when fairly used by the *hirer* (*q*). Thus, where a carriage is let for hire, and it breaks down on the journey, the person who lets it is liable, and not the *hirer* (*r*) ; unless it breaks down through some act of the *hirer*, which is not within the contract (*s*). And we shall see in a variety of cases, what are the circumstances under which *owners* have been held liable for damage, inflicted through the negligent use of carriages or horses they have let for hire.

Horses driven
by the
owner's
servants.

If a man hire a carriage and any number of horses, and the *owner* send with him his postilion or coachman, the *hirer* is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage while he sits in it, and he is not answerable for any damage done by the negligence of the *owner's* servants (*t*).

Horses
driven by
the owner's
servants to a
certain place.

Where horses are hired to draw a private carriage to a certain place, and they are driven by the *owner's* servants, the *owner* is liable for any damage done through the servants' negligence. For where a person hired horses to take his own carriage to Epsom, and he was driven by the *owner's* postboys, Lord Ellenborough held that a person who *hires* horses under such circumstances has not the entire management and power over them, but that they continue under the control and power of the servants who are entrusted with the driving; and that the *owner* of them would be answerable for any accident occasioned by the postboys' misconduct on the road (*u*).

So where horses were hired to draw a private carriage to Windsor, the *owner* of the horses was held liable for damage done, because they were under the care and direction of his servant (*x*).

Horses
driven about
town by the
owner's
servant.

But where horses have been hired to be driven about by the *owner's* servant wherever the *hirer* pleases, and for

(*p*) Per Ashhurst, J., *Lickbarrow v. Mason*, 2 T. R. 70 ; 1 R. R. 425.

(*q*) See *Arbon v. Fussell*, 3 F. & F. 152 ; and *Holmes v. Onion*, 2 C. B., N. S. 790.

(*r*) *Sutton v. Temple*, 12 M. & W. 60 ; 67 R. R. 255.

(*s*) *Lygo v. Newbolt*, 23 L. J., Ex. 108.

(*t*) Jones on Bailments, 88 ;

Samuel v. Wright, 5 Esp. 263 ; *Smith v. Lawrence*, 2 M. & R. 1 ; 32 R. R. 698.

(*u*) *Dean v. Branthwaite*, 5 Esp. 35 ; and quoted by Littledale, J., in *Laugher v. Pointer*, 5 B. & C. 558 ; 29 R. R. 319.

(*x*) *Samuel v. Wright*, 5 Esp. 263. See also *Sir H. Hoghton's case*, cited 5 B. & C. 556.

which he gives him some gratuity, there seems at one time to have been a difference of opinion among the judges as to the party liable for injury done.

In *Laugher v. Pointer* (y), where the able judgments on both sides, as is observed by Story, J., in his book on Agency, "exhausted the whole learning of the subject," the judges of the Court of King's Bench were equally divided, Abbott, C. J., and Littledale, J., holding that the hirer of the horses was not liable for an injury done, and Bayley and Holroyd, JJ., being of the contrary opinion.

Laugher v. Pointer.

In the case of *Quarman v. Burnett* (z), the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses, who paid him regular weekly wages. The owners of the carriage paid him 2s. a drive, and provided him with livery, which he left at their house at the end of each drive. Parke, B., delivering the judgment of the Court, said, "It appears to us that there are no special circumstances which distinguish the present case, and that we must decide the difference between the judges in *Laugher v. Pointer* (a). There is no satisfactory evidence of any selection by which this man was made the defendant's servant; the question is therefore the same as in that case. If the driver be the servant of a *jobmaster*, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack postboy ceases to be the servant of an innkeeper, where a traveller has a particular preference to one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven not by one of the regular servants, but by a *stranger* to the *jobmaster*, appointed by themselves, it would have made all the difference.

Owner held liable in *Quarman v. Burnett.*

"The fact of the coachman wearing the defendant's livery with their consent, and so being the means of inducing third persons to believe that he was their servant, was mentioned in the course of argument as a ground of liability, but cannot affect our decision. If the defendants had told the plaintiff that he might sell goods to their

Wearing the hirer's livery.

(y) *Laugher v. Pointer*, 5 B. & C. 547; 29 R. R. 319. 14 Q. B. D. 890; 54 L. J., Q. B. 345; 33 W. R. 551.

(z) *Quarman v. Burnett*, 6 M. & W. 499; 55 R. R. 717. See also *Jones v. Corporation of Liverpool*, (a) *Laugher v. Pointer*, 5 B. & C. 547; 29 R. R. 319.

livery servant, and had induced him to contract with the coachman, on the footing of his really being such servant, they would have been liable on such contract; but this representation can only conclude the defendants with respect to those who have acted on their condition on the faith of its being true. In the present case it is matter of evidence only of the man being their servant, which the fact at once answers. We have fully considered the judgment on both sides in *Laugher v. Pointer* (b), and think that the weight of authority and legal principle is in favour of the view taken by Lord Tenterden (c) and Littledale, J."

A jobmaster's agreement.

A person jobbing a carriage by the year under a written agreement, by which the owner binds himself "to keep the same in perfect repair without any further charges whatever," is not liable for repairs made necessary by accident. And in a case where the owner had so bound himself, Lord Denman said, "Looking at the terms of the agreement, it seems to me that the only case in which the defendant could be subjected to the expense of repairs is the case of damage happening through the wilful default of the defendant. With regard to the evidence of the usage of the trade, the language of the agreement between the parties being clear and unequivocal, evidence as to the general usage of the trade cannot be of any avail" (d).

Where the hirer is liable for damage.

The hirer of a horse or carriage is liable for damage occasioned by the negligence of himself or his servant; and where two persons hire a carriage, they are both answerable for any damage occasioned by the negligent driving of one of them; but if it be hired by one only, the other, who is a mere passenger, is not liable (e).

Hirer liable through his own conduct.

It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. Thus, he may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of (f).

Hirer liable where he might have controlled his servant.

When a master and servant are together in a carriage,

(b) *Laugher v. Pointer*, 5 B. & C. 547; 29 R. R. 319.

(c) *Then Abbott*, C. J.

(d) *Reading v. Menham*, 1 M. & Rob. 234.

(e) *Davy v. Chamberlayne*, 4 Esp. 229.

(f) *Per Parke, B., Quarman v. Burnett*, 6 M. & W. 499; 55 R. R. 717.

and an injury ensues, the *master*, from his mere presence, is a *co-trespasser*, if the act of the servant amount to a *trespass (g)*. And on this principle where a carriage and horses are hired, and the postboys are servants of the owner; if the *hirer* be sitting outside, and have a view of their proceedings, and do not interfere to prevent their misconduct, and an injury ensues, he is a *co-trespasser* with them, because as he did not endeavour to stop their improper proceedings he has adopted their conduct as his own.

The Court of Common Pleas entered fully into the subject, and laid down the law upon it in the case of *M'Laughlin v. Pryor (h)*, in which a *trespass* had been committed by a carriage and horses hired by the defendant driving against the plaintiff's gig. It appeared that the defendant and seven others were driving in a carriage and four, with two postilions, to Epsom races. The defendant with another party *sat upon the box*. The carriage was not in the line of the vehicles which were going through the turnpike at Sutton, and as it approached the toll-bar the postilions endeavoured to get into that line, in order that they might pass through the gate. The plaintiff and a friend of his were driving in a small gig at that particular place where the postilions attempted to fall into the line. The man on the wheel horses said to the other postilion, "Brenk in, you are all right there," and upon doing this the trace of the leaders of the carriage caught the wheel of the plaintiff's gig; the gig was upset, and the plaintiff was injured and rendered lame for life. Immediately before the accident the defendant called out to his postilions to let the plaintiff's gig pass first, but the order then came too late. As soon as the accident had occurred the carriage was stopped and the owner's name demanded; whereupon the defendant, in order to prevent his party being detained, offered money to the parties, and eventually gave his ear.

On the part of the defendant it was objected, that, even assuming that the fault lay with the drivers of the carriage, the defendant was not responsible, neither the horses nor the carriage being his; or, at all events, that he was not liable in *trespass*. Tindal, C. J., left it to the jury to say whether the accident was the result of want of

M'Laughlin v. Pryor.

(g) *Chandler v. Broughton*, 1 & M. 354: 4 Scott, N. R. 655; Cr. & M. 229. 4 M. & G. 48: 61 R. R. 455.

(h) *M'Laughlin v. Pryor*, Car.

skill or caution on the part of the drivers of the carriage, or on the part of the owner of the gig—reserving it for the Court of Common Pleas to say whether, upon the facts proved, the defendant was liable in this form of action; the jury returned a verdict for the plaintiff.

Opinion of
the Court of
Common
Pleas.

The Court of Common Pleas discharged the defendant's rule *nisi* for a nonsuit, and Tindal, C. J., said, "Undoubtedly the cases in which the *hirer* of a glass-coach or a post-chaise has been held not to be responsible for the act of the driver, depend upon grounds wholly different from those on which the liability of the defendant on this occasion is to be sustained. It has always been held that the *hirer* of the carriage, having no power of selection, no foreknowledge of the character of the driver, is not responsible for any negligence or want of skill or experience on his part; for that it is the duty of the party who lets, to exercise care and caution in the selection of those to whom he entrusts the government and direction of his horses and his carriage. But here the question is, whether the evidence did not show that this *defendant* so conducted himself as to be liable as a *co-trespasser* with the postilions whose conduct has given rise to this inquiry.

The general
rule.

"The general rule is, that all who are present, and who from the circumstances may be presumed to be assenting to the wrongful act, are *trespassers*. In *trespass* all are principals. I think there was abundant evidence to justify the jury in coming to the conclusion they did. In the first place, the defendant was present, sitting on the box of the carriage; and when he saw that the carriage was out of the line, he must have known that the postboys intended to get into it again whenever they found an opportunity, so as to be enabled to pass through the toll-gate.

Where the
hirer would
not be liable.

"Had the defendant at the time expostulated, I hesitate not to say that he would *not* have been a *trespasser*, whatever might have ensued; for no servant can *against* his master's *will* make him a *trespasser* by any wrongful act of his. Had he expressed any, the slightest disapprobation of the course the postboys were evidently pursuing, he would have escaped all liability; or if the defendant and his friends had all been inside the carriage, so that they could not be supposed to be well aware of what was going on, the plaintiff must have sought his remedy elsewhere.

" But being, or some of them being, on the *outside*, and seeing the improper manner in which the postboys were endeavouring to get on, and though not actually encouraging them in their unlawful course, yet abstaining from all interposition to restrain them, this, though not very strong, certainly was *some* evidence whence the jury might properly infer that the defendant assented to that course. But the evidence does not stop there; for the defendant, some time after the accident, in a conversation with one of the witnesses, said that he intended to have stopped when the carriage had established itself in the line, and allowed the gig to regain its place. Now that remark shows pretty strongly that the defendant was exercising control over the motions of the postboys, and was an assenting party to their act. I therefore think the defendant, the *dominus pro tempore*, being present and seeing what was going on, and not interfering to prevent the mischief, must be taken to have been an assenting party; and that this case falls within the principle laid down in *Gregory v. Piper* (i) and *Chandler v. Broughton* (k), in which latter case it was held that where master and servant are together in a vehicle, and an accident occurs, from which an immediate injury ensues, the master is liable in *trespass* and not in *case*, although the servant was driving, and not only no evidence was given on the part of the plaintiff of any interference on the master's part, but the evidence on the part of the defendant distinctly negatives any interference; so that the mere presence of the master with the servant will constitute him a *trespasser*, if the act of the servant amount to a *trespass*. Upon the whole, therefore, in this case, I think the jury may have come justly to the conclusion that the *defendant* was a *co-trespasser* with the postboys." And in this decision Coltman, Erskine and Cresswell, JJ., concurred (l).

Hirer sitting
outside liable.

It is always a question for the jury whether the driver is acting as servant for the *hirer* or *owner*; and Lord Abinger, in leaving that point to the jury, observed, "that no satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of a driver, ceased to be responsible, and the temporary hirer to become

The jury
must decide
whether the
servant is
acting for the
hirer or
owner.

(i) *Gregory v. Piper*, 9 B. & C. 591; 4 M. & R. 500; 33 R. R. 268.

(k) *Chandler v. Broughton*, 1 C. & M. 29.

(l) *McLaughlin v. Piper*, Car. & M. 354; 4 Scott. N. R. 655; 4 M. & G. 48; 61 R. R. 455.

so; each case of this class must depend upon its own circumstances" (m).

Hirer
only.

In the foregoing cases, although a carriage was sometimes included, the hiring was invariably that of a horse or horses and a driver or postilions, but cases may arise in which the horse or horses, as well as the carriage, are the property of the hirer, and the hiring is only that of the driver. In such cases the liability of the jobmaster or livery-stable keeper and the hirer respectively depend upon the same principle as is involved in the former class of cases. In either case the question to be determined in the event of injury being caused to a third party owing to the negligence of the driver is, under whose control was the driver at the time he committed the wrongful act? In effect, was the driver, at the time of the accident, the servant of the jobmaster or of the hirer? In determining this question somewhat different elements may have to be taken into consideration, where the hiring is that of the driver only, to those to be considered where the hiring is that of both horse and driver.

Liability of
hirer.

*Jones v.
Scullard.*

The case of *Jones v. Scullard* (n) is an instance of the hiring of the driver only. In that case the defendant was the owner of a brougham, horse, and harness, which he kept at a livery stable. The keeper of the livery stable was in the habit of supplying the defendant with one of his own servants to drive the brougham. One day, whilst the brougham was being driven with one of the defendant's horses, the driver, owing to his negligence, as the jury found, lost control of the horse, which dashed through the window of the plaintiff's shop, and did damage. The man who was driving the brougham at the time of the accident had continuously driven the defendant for the preceding six weeks, and at the time of the accident was wearing a suit of livery which had been supplied to him by the defendant. The particular horse which caused the accident had only recently been purchased by the defendant, and previously to the accident had been driven by the driver in question at the utmost some three or four times. It was held by Lord Russell of Killowen, C. J., that upon these facts there was evidence on which a jury might find that the driver at the time of the accident was acting as the servant of the defendant,

(m) *Brady v. Giles*, 1 M. & Rob. 496; 42 R. R. 816.

(n) [1898] 2 Q. B. 565; 67 L. J., Q. B. 895; 79 L. T. 386.

so as to render the defendant responsible for his negligence.

In delivering his considered judgment in this case, Lord Russell, referring to the leading authorities on the subject, said, "No one of those cases is, in all essential characteristics, on all fours with the present. In no one of those cases is there the conjunction of all the facts which exist here, namely, the ownership by the defendant of the brougham, the horse, and the harness, the fact that the livery was supplied to the driver by the defendant, and the fact that the horse that was being driven was one to which the driver had not been previously accustomed." Proceeding with his examination of the authorities, after commenting on the judgments of Abbott, C. J., in *Laugher v. Pointer* (o) and the above-quoted remarks of Lord Abinger in *Brady v. Giles* (p), he said that *Quarman v. Burnett* (q) "might appear to be an authority in favour of the defendant; but I would point out that its facts differ from those in the present case in two material particulars. In the present case the horse which was being driven was the property of the defendant; and, secondly, not only was it his property, but it was one which he had only recently purchased, and with which consequently the driver supplied by the livery-stable keeper had but an imperfect acquaintance. Both these matters are, to my mind, material." After a further and exhaustive examination of the authorities, he then concluded, "The principle then to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver. And in such a case, especially if, as here, the driver has driven the hirer for a considerable period of time and been approved by him, and the horse is one the characteristics or peculiarities of which neither the livery-stable keeper nor his driver have had any practical opportunity of becoming acquainted with, there is, it seems to me, evidence upon which a jury would be justified in coming to the conclusion that the

Quarman v. Burnett, distinguished.

(o) 5 B. & C. 547; 29 R. R. 319. 816.

(p) 1 M. & Rob. 496; 42 R. R. (q) 6 M. & W. 499; 55 R. R. 717.

driver was upon the occasion in question acting as the servant, not of the livery-stable keeper, but of the person who hired him."

Liability of contractor.

It has been suggested that the principle involved in the judgment of the Court in *Quarman v. Burnett* (r) applies only to the special relations which exist between jobmasters and their customers (s), but that principle has been held to apply equally to the case of a contractor who lets out a horse and driver, or a horse, vehicle, and driver, for the performance of certain specified work which he agrees to undertake for the hirer (t).

Construction of contract.

In cases of this nature the contract is more often in writing than in the case of a jobmaster, and where this is so, the liability of the contractor, in the absence of any interference by the hirer, depends upon the construction of the agreement between the contractor and the hirer (u). In all cases where damage results from the negligence of the driver the question to be determined is, under whose control was the driver at the time of the accident? This may be either a question of fact, or of mixed law and fact, or one of law only, as where it depends entirely upon the construction of a written agreement (x). In such cases the driver is for general purposes the servant of the contractor, and the latter is therefore, *prima facie*, liable for the driver's negligence. But if it appear that for the particular occasion the contractor had parted with the control of the driver to the hirer, and the driver was being controlled by the hirer, the latter would be liable (y), and he may be liable under the contract, e.g., if it contains an express provision that the driver is to be under his control (z), or the nature of the work to be done was such as to necessitate his interference (a).

Hire of horse and driver.

The following cases would appear to illustrate the

(r) 6 M. & W. 499; 55 R. R. 717. See also ante, p. 261.

(s) See argument in *Jones v. Corporation of Liverpool*, 14 Q. B. D., at p. 892.

(t) *Ibid.*, 14 Q. B. D. 890; 54 L. J., Q. B. 345; 33 W. R. 551. See also *Waldock v. Winfield*, [1901] 2 K. B. 576; 70 L. J., K. B. 925; 85 L. T. 232—C. A.; *Dewar v. Tasker*, 23 T. L. R. 259—C. A., reversing Div. Ct., 22 T. L. R. 303.

(u) *Waldock v. Winfield*, supra.

(x) *Ibid.*

(y) *Jones v. Liverpool Corporation*, supra; *Waldock v. Winfield*, supra.

(z) *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205. See also *Jones v. Corporation of Liverpool*, supra; *Waldock v. Winfield*, [1901] 2 K. B., per Vaughan Williams, L. J., at p. 603.

(a) *Donovan v. Laing, Wharton and Down Construction Syndicate Limited*, [1893] 1 Q. B. 629.

foregoing statements:—In *Jones v. Corporation of Liverpool* (b), one D. contracted verbally with the defendants to supply by the day a driver and horse to drive and draw a watering cart belonging to the defendants. The driver was employed and paid by D., and was not under the defendants' direction or control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligence of the driver whilst in charge of the cart, it was held that the defendants were not liable; Grove, J., saying that he could see no valid distinction in principle between this case and *Quarman v. Burnett* (c), having regard to the judgment of the Court delivered by Parke, B. (c), in the latter case, and adding, that the distinction between cases in which one person binds his servant to another, "and cases of hiring like the present, may be this: where a driver is hired, the person from whom he is hired is bound to exercise due care in selecting a man of proper skill and conduct; but it is otherwise with the lender for no reward of a servant. The person who borrows him takes him *cum onere*, and is liable for his negligence whilst in the borrower's employment." And with this opinion Manisty, J., agreed.

Verbal contract. Control of driver.

In *Waldock v. Winfield* (d), a company called Measures Brothers, Limited, which carried on the business of ironfounders, entered into a written contract with the defendant for the hire from him of a van, horse, and driver, for the purpose of delivering goods to their customers. The contract provided that the defendant was to supply a capable man to drive and take charge of the van and horse, that the man in the defendant's employ, and all charges and claims whatsoever in reference to the van, horse, and man were to be paid for by the defendant, who was to be responsible for the same, and that the company were only to be responsible for the payment for the van, horse, and man at a certain rate per annum by monthly payments. The driver of a van supplied to the company by the defendant under their contract was guilty of negligence when delivering a girder at the premises of a customer of the company, by which the plaintiff, a servant of the customer, was injured. There was no evidence that anyone representing the company exercised any

Hire of van, horse, and driver.

Written contract.

No evidence of control of driver by hirer.

(b) *Supra*. Following *Quarman v. Burnett*, 6 M. & W. 499; 55 R. R. 717; and distinguishing *Rourke v. White Moss Colliery*

Co., 2 C. P. D. 205.

(c) *Ante*, p. 261.

(d) [1901] 2 K. B. 576—C. A.

control over the driver in respect of the delivery of goods for the company. It was held that, upon the true construction of the contract, the implication was that the control of the driver, when delivering goods for the company, remained in the defendant, and that the latter was therefore liable for his negligence.

Construction
of agreement.

A. L. Smith, M. R., in delivering judgment in this case, after expressing his opinion that the result of the action really depended upon the construction of the written agreement, and examining the terms of the agreement, proceeded: "In my opinion the meaning of this agreement clearly is that the driver of the van is not to be the servant of Measures Brothers, or under their control, but is to remain the servant of the defendant. I rest my judgment on the terms of this agreement, which differentiate this case from such cases as *Rourke v. White Moss Colliery Co.*(e), and *Donovan v. Laing, Wharton and Down Syndicate, Limited* (f), and other cases which have been cited. There is no evidence that any one representing Measures Brothers intervened in any way with regard to the unloading of the van." In this opinion Vaughan Williams and Stirling L. J.J. agreed, the former learned judge saying: "I agree in the construction which the Master of the Rolls has put upon that contract. I wish, however, to add a few words for myself in relation to it. In construing this contract, as in the case of other contracts, the surrounding facts must be taken into consideration . . . regard must be had to such matters as the nature of the work to be done under the contract. In this particular case the contract was one for the supply of a horse, van, and man by the defendant to Measures Brothers, and I see nothing in the surrounding facts to lead us to put on the words of the contract any other than their natural construction."

Hirer and
contractor
both held
liable.

Except for the fact that the hirer, though on a distinctly different principle, as well as the contractor, were held liable for the negligence of the driver, the case of *Milham v. St. Marylebone Borough Council and Latter* (g), was of a very similar nature to those just dealt with. In that case the plaintiff, while lawfully driving his cab, having come into collision with a key which had been improperly left standing in a water cock in a roadway of which a metropolitan borough council had the control

(e) 1 C. P. D. 205.

(f) [1893] 1 Q. B. 629.

(g) 1 L. G. R. 412.

and maintenance, brought an action for damages for negligence against the council, and against a person who had entered into a written contract to supply horses and drivers to work the water vans employed by them in watering the streets. The jury, in giving their verdict for the plaintiff, found that there had been negligence on the part of the driver of the water van, but who, at the time of the accident, was acting under the control of the council in his work. Upon this verdict Chmmeil, J., gave judgment against the council upon the authority of *Penny v. Wimbledon Urban Council* (h); and gave judgment against the contractor as master of the driver, because, upon the construction he placed on the contract, the contractor had not parted with the control of his servant (i).

In *Perkins v. Stead* (k), the defendant purchased and paid for a motor car in London, and the vendor agreed to provide a driver to drive the car to a certain place outside London, and deliver it there, as the defendant's driver did not know the locality, and had no experience of the class of car purchased. When the car was being driven by the driver supplied by the vendor from London to the place named for delivery, it collided with and damaged a motor bicycle owing to the negligence of the driver. At the time of the accident the defendant, his driver, and his son were in the car. The owner of the bicycle thereupon brought an action in the County Court in respect of the damage so sustained; and the County Court Judge held the driver of the car, though he was the general servant of the vendor, was at the time under the control of the defendant, who had the property in, and possession of the car, and that therefore the defendant was liable to the plaintiff for the negligence of the driver. And the Divisional Court, following *Jones v. Scullard* (l), held that this decision was right.

Hirer only
liable.

(h) [1899] 2 Q. B. 72; 68 L. J. Q. B. 704. In this case the council employed a contractor to make up a highway which was used by the public. In carrying out the work, he negligently left on the road a heap of soil unlighted and unprotected. A person walking along the road fell over the heap and was injured. In an action against the council and contractor for damages for injuries sustained, it was held

that as, from the nature of the work, danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not casual or collateral to his employment, and that the council were liable.

(i) Following *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890.

(k) 23 T. L. R. 433.

(l) [1898] 2 Q. B. 565.

Liability of
jobmaster
to hirer.

In the absence of any special contract between the parties a jobmaster who lets out a carriage, horse, and driver for the purpose of carrying the hirer's servant to such places as he may direct, is only bound to use ordinary care in the performance of the duties which he undertakes to perform. If damage results to the hirer owing to the negligence of the jobmaster or that of his servant, while acting within the scope of his employment, the jobmaster is liable. As his duty is only to take reasonable care, he does not warrant the honesty of the driver, and is, therefore, not responsible for the felonious act of the driver, committed outside the scope of his employment, unless it can be shown that such act was attributable to his own negligence.

Hire for use
of traveller.

Theft from
carriage by
stranger.

Scope of
employment.

In *Abraham v. Bullock* (m), the facts were as follows:—A manufacturing jeweller hired from a jobmaster a carriage with a horse and driver at an agreed weekly sum, for the express purpose of sending his traveller with a stock of jewels to his customers. One day, while making his rounds, the traveller went inside an hotel and left the carriage, with a stock of jewels inside it, in charge of the driver. The driver went into a coffee-house, leaving the carriage unattended in the street. A thief drove the carriage away and stole the jewels. The jeweller brought an action against the jobmaster to recover the value of the stolen jewels. It was held, reversing the judgment of Ridley, J., that it was the duty of the defendant to provide a driver who should take ordinary care of the carriage during the absence of the traveller, and that the theft of the jewels was the natural and ordinary result of a breach of such duty, so as to make the defendant liable for the loss suffered by the plaintiff. Referring to this case in the course of his judgment in *Cheshire v. Bailey* (n), Collins, M. R., said: "The negligence of the servant in that case was clearly committed within the scope of his employment, and was, therefore, negligence for which the master was responsible just as much as if he had elected to watch himself instead of doing it by his servant, and had then neglected it in the same manner. . . . I certainly did not intend to hold in that case that the defendant warranted that due care would be taken, though I did hold that he was responsible if his servant, acting in the scope of his employment, did not take it."

(m) 86 L. T. 796; 50 W. R. 626
— C. A.

(n) [1905] 1 K. B., at pp. 242,
243.

In *Cheshire v. Bailey* (o), the plaintiff, a wholesale silversmith, hired from the defendant, a jobmaster, a brougham, horse, and coachman for the purpose of driving his traveller about London with samples of the plaintiff's wares, to be shown to customers. It was known to the defendant that, in the course of business, occasions would arise when the traveller would have to leave the brougham with samples in it in charge of the coachman. On one of such occasions the coachman, in pursuance of an arrangement made with confederates, drove the brougham to a place where a great portion of the samples in it was stolen by them. In an action to recover the value of the goods so stolen, it was held, distinguishing *Abraham v. Bullock* (p), that the defendant was not liable in respect of the criminal act of his servant, the same not having been done within the scope of his employment.

Theft by driver.

The usual terms on which a cab proprietor lets a cab to a driver are, that the owner feeds the horse, and exercises no control over the driver after he leaves the yard, for which the driver pays a fixed sum a day. Under such circumstances the relation between the parties *inter se* is that of bailor and bailee, and the proprietor is liable to the driver if he do not take reasonable precautions to provide a horse reasonably fit for the purpose, and injury is thereby caused to the driver.

Liability of cab proprietor to driver.

This was the conclusion arrived at by Byles and Grove, JJ., Willes, J., dissenting, upon motion to enter judgment after verdict for the plaintiff in an action by the driver against the proprietor of a cab for injury sustained by reason of the former having been supplied with a vicious and unmanageable horse (q). This judgment was appealed from, but the judges in the Exchequer Chamber, being divided in opinion, delivered no judgment on the point of law, though they ordered a new trial in order that the question whether the plaintiff had taken on himself the risk with respect to the horse's fitness might be submitted to a jury (r). On the new trial coming on for hearing, the jury found that there had been personal negligence on the part of the defendant in the selection of the horse; and on this a third trial was

(o) [1905] 1 K. B. 237; 74 L. J., K. B. 176; 92 L. T. 142; 53 W. R. 322—C. A.

(p) *Supra*.

O.

(q) *Fowler v. Lock*, L. R., 7 C. P. 272; 41 L. J., C. P. 99; 26 L. T. 476.

(r) L. R. 9 C. P. 751, n.; 43 L. J., C. P. 391, n.; 30 L. T. 800.

refused (s). So that the judgment of Byles and Grove, JJ., still holds good, and the law is as above stated (t).

A hirer's
agreement.

A *hirer* may of course, by agreement, make himself answerable for accidents. Thus in the following case it appeared that a man who let out horses to *hire* told a person who applied to him for one, that he had no horse at home but a black one which *shied*, and that if he took it on *hire* he must be answerable for all accidents. The horse was engaged for six weeks at a certain price, and it appeared that whilst it was in the *hirer's* possession it came down upon the road in consequence of shying, and suffered a material injury in having its fetlock severely cut by a glass bottle. The *owner* of the horse brought an action against the *hirer* on his agreement, and the latter was held answerable for the damage done (n).

Hiring for a
year.
Right to
continue.

By an agreement the plaintiffs agreed to let and one E. to hire two carriage horses by the year from a certain date at 105*l.* per annum, payment to be made quarterly. It was also provided, "After the expiration of the first year the hiring can be terminated by either party giving one quarter's written notice from a quarter day." It was held that the hiring was for one year certain, with a right to keep the horses after the end of the year, and then to terminate the contract by a quarter's notice (r).

Borrowing Horses.

Lending for
use.

Lending for use is a bailment of a thing for a certain time when used by the *borrower* without paying for it (x).

Duties of
borrower and
lender.

The duties of the *borrower* and *lender* are thus well laid down by Coleridge, J., in *Blackmore v. Bristol and Exeter Railway Company* (y):—"The duties of the *lender* and *borrower* are in some degree correlative. The *lender* must be taken to lend for the purpose of a beneficial use by the *borrower*; the *borrower* therefore is not responsible

(s) L. R. 10 C. P. 90; 43 L. J., C. P. 394, n.; 31 L. T. 844; 23 W. R. 415.

(t) See also *Gibbon v. Standon*, 16 L. T. 497, per Byles, J., at N. P.; *Venables v. Smith*, 2 Q. B. D., at p. 283, per Cockburn, C. J.; *Gates v. Bill*, [1902] 2 K. B., at p. 41, per Vaughan Williams, L. J.

(n) *Jeffery v. Walton*, 1 Stark. N. P. C. 267.

(r) *Tilling, Ltd. v. James*, 94 L. T. 823; 22 T. L. R. 599 D.

(s) Jones on Bailments, 118.

(y) *Blackmore v. Bristol & Exeter Rail. Co.*, 8 E. & B. 1035; sub nom. *Blackmore v. Bristol & Exeter Rail. Co.*, 27 L. J., Q. B. 167. See also *McCarthy v. Young*, 6 H. & N. 329; 30 L. J., Ex. 227; 3 L. T. 785.

for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything which may be defined as legal *fraud*. So, on the other hand, as the *lender* lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the *borrower* is injured.

"Would it not be monstrous to hold, that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible?"

Lender of a horse.

"By the necessarily implied purpose of the loan a duty is contracted towards the *borrower* not to conceal from him those defects, known to the *lender*, which may make the loan perilous or unprofitable to him."

Must not conceal defects.

This case was approved by the Court of Appeal in *Coughlin v. Gillison* (z), where it was held that the duty of the gratuitous lender of a chattel, for the use of the borrower, is to communicate defects in the article lent with reference to the use to which it is to be put, of which he is aware, and if, wilfully or by gross negligence he does not discharge this duty, he is liable for the injury resulting to the borrower from such defects. This, it will be observed, is a slight emendation of the previous ruling, adverted as it does both to wilfulness and gross negligence in communicating the defects in the article lent.

In contracts from which a benefit accrues *only* to him who has the goods in his custody, as in that of lending for use, an *extraordinary* degree of care is demanded, and the *borrower* is therefore responsible for *slight* negligence (a).

What care is required.

(z) [1899] 1 Q. B. 145; 68 L. J., 113—C. A.
Q. B. 147; 79 L. T. 627; 47 W. R. (a) Jones on Bailments, 65.

Canadian Case.—A lad borrowed a horse from a person from whom his father had forbidden him to borrow horses. On the son reaching home with the horse, his father told him to tie it up, with the intention that his son should return it later. On his father attempting to untie the horse for the purpose of his son returning it, it broke away and was lost, and the father made no effort to find it: *Held*, that the father was not liable in *detinue* or *trover*, or in an action for negligence. *Kirkland v. Rendernecht*, 4 Terr. L. R. 195 (1899). And see *Wells v. Crew*, 5 U. C. Q. B. (O. S.) 209; *Campbell v. Boulton*, 2 U. C. Q. B. 202.

Borrowed horse.

As much as
the borrower
is capable of
bestowing.

Showing a
horse for
sale.

But if the *lender* was not deceived, but perfectly knew the quality as well as age of the *borrower*, he must be supposed to have demanded no higher care than that of which such a person was *capable*; as if a person lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection as he would expect from a riding-master or an officer of dragoons (v).

Where a person rides a horse *gratuitously* at the owner's request, for the purpose of *showing him for sale*, he is bound in so doing to use such skill as he *actually possesses*, or such as may be implied from his profession or situation, and he is equally liable with a *borrower* for injury done to the horse while ridden by him. In a case tried before Rolfe, B., it appeared that the plaintiff had entrusted a horse to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to one M. The defendant accordingly rode the horse to Peckham, and, for the purpose of showing it, took it to where M. was engaged with others playing at cricket; and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses.

The learned judge in summing up left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them, that under the circumstances the defendant being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it; and that if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff, which they did.

The Court of Exchequer refused a rule for a new trial applied for on the ground of misdirection. Lord Abinger, C. B., saying, "We must take the summing-up altogether; and all it amounts to is, that the defendant was bound to use such skill and management as he really possessed. Whether he did so or not, was, as it appears to me, the proper question for the jury."

And Parke, B., said, "The defendant was shown to be

(b) Jones on Bailments, 65. Dumoulin's Tract--De eo quod interest, 185.

a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use; if he did not, he was guilty of negligence."

And Rolfe, B., said, "The distinction I intended to make between this case and that of a borrower is, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another, not so skilled as he, does not, surely that makes a difference in the liability. I said I could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet" (c).

A gratuitous bailee.

Whether there is a distinction, and what that distinction is, if there be one, between negligence and gross negligence, is a matter of little importance; but one thing is settled, that the negligence of a gratuitous bailee, to be actionable, differs from the negligence which would be actionable in a bailee who is not gratuitous, and the distinction appears to be that a gratuitous bailee is not liable for simple negligence, for which a borrower would be liable, but only for such negligence as he is guilty of in spite of the better skill or knowledge, which he either actually had, or undertook to have (d).

Negligence of a bailee.

And the principle upon which he is liable is thus well laid down in *Coggs v. Bernard* (c): "If a man will enter upon a thing, and take the trust upon himself, and mis-carries in the performance of the trust, an action will lie against him for that; though no one could have compelled him to do the thing."

Rule as to negligence of gratuitous bailee.

In cases of mere gratuitous loan, the use is to be deemed strictly a personal favour and confined to the borrower, unless a more extensive use can be implied from other circumstances; such, for instance, as lending the horse on trial. In general it may be said, in the absence of all controlling circumstances, that the use

Use strictly personal.

(c) *Wilson v. Brett*, 11 M. & W. 113; 63 R. R. 528. See also per Willes, J., in *Grill v. General Iron Screw Colliery Co.*, L. R., 1 C. P. 612.

881; *Austin v. Manchester Rail. Co.*, 10 C. B. 454; 84 R. R. 645; *Giblin v. McMullen*, L. R., 2 P. C. 317.

(d) Per Pollock, C. B., *Beal v. South Devon Rail. Co.*, 5 H. & N.

(e) *Coggs v. Bernard*, 1 Smith's L. C., 11th Ed. 173 et seq.; *Giblin v. McMullen*, L. R., 2 P. C. 317.

intended by the parties is the natural and ordinary use for which the thing is adapted (f).

Cannot be used by a servant.

A borrowed horse cannot be used by a *servant*. Thus, where an action of *trespass* was brought for immoderately riding the plaintiff's horse, it appeared that the defendant had borrowed the animal, and that *he* and his servant had ridden it by turns. It was held that the licence was annexed to the person of the defendant, and could not be communicated to another (g).

Must be used according to the lending,

If a horse or cart, or such other thing as may be used and delivered again, be used according to the purpose for which they are lent and they perish, he who *owns* them must bear the loss, if they perish *not* through *default* of him who *borrowed* them, or he made a promise at the time of delivering to redeliver them safe again (h).

or else the borrower is answerable.

But if they be used in *any other manner* than according to the lending, in whatever manner they may perish, if it be *not* by *default* of the *owner*, the *borrower* is chargeable both in law and conscience (i). Thus, if the *borrower*, instead of coming to London, for which purpose the horse was lent, go towards Bath, or having borrowed him for a week, keep him for a month, he becomes responsible for any accident that may befall the horse in his journey to Bath, or after the expiration of the week (k).

Where no time is fixed for return.

In regard to time, if no particular time is *fixed a reasonable time must be intended*, keeping in view the objects of the bailment. If a horse is lent for a journey, it is presumed to be a loan for the ordinary time consumed in such a journey, making proper allowance for the ordinary delays and the ordinary objects of such a journey (l).

Redelivery on request.

But where the *borrower* of a horse promised to re-deliver it on request, and the horse died without his default *before* request, he was held not liable (m).

Borrower bound to feed the horse.

A party who *borrow*s a horse is bound to *feed* it during the time of the loan (n); and if it is returned out of condition, the *borrower* would probably be called upon to prove that he fed it *properly*, and that the falling

(f) Story on Bailments, 9th Ed., s. 231 et seq.; and *Lord Camoys v. Scurr*, 9 C. & P. 386; 62 R. R. 756.

(g) *Bringlow v. Morrice*, 1 Mod. R. 210; 3 Salk. 271.

(h) Noy's Maxims, 91.

(i) *Ibid.*

(k) Jones on Bailments, 68; *Cogg's v. Bernard*, 1d. Raym. 915;

2 Ld. Raym. 909; 3 Braet. c. 2. s. 1; 1 Smith's L. C. 11th Ed., 173.

(l) Story on Bailments, 9th Ed., s. 255.

(m) *Williams v. Lloyd*, Jones on Bailments, 179; nom. *Williams v. Hill*, Palm. 548.

(n) *Handford v. Palmer*, 2 B. & Bing. 359.

off in condition did not arise from any neglect on his part (o).

Where the horse is *exhausted* and *refuses his feed*, he must not be ridden or driven any further (p).

Where the horse is exhausted.

If a man through his own *imprudence* has his *borrowed* horse killed, by robbers for instance, or by a ruinous house or stable, in manifest danger of falling, coming on to his head, the *owner* is entitled to the price of the horse, but not if the house or stable were in good condition, and fell by the violence of a sudden hurricane (q).

Where the horse is killed.

Where a *borrowed* horse dies from disease, the *borrower* is not answerable. Thus, in *Williams v. Hide et Uxor.* (r), the plaintiff declared that in consideration that he had lent to the defendant's wife, *dum sola*, a horse to be returned upon request, she promised to return it upon request, but had not done so. The defendants pleaded that, before the request, the horse *per diversos morbos in corpore suo crescentes moritur*, and so they could not re-deliver it. Upon demurrer the defendants had judgment; for, where the agreement is possible when made, but afterwards becomes impossible by the act of God, the party is for ever discharged.

Where the horse dies from disease.

A person borrowing a horse or carriage is answerable for any damage occasioned by negligent management, whether done by himself or another person in driving (s).

Where borrower is answerable for damage.

Where the owner of a horse sent it to an auctioneer, with liberty to use it until sold, and whilst it was being driven by the bailee's servant along a highway, it was frightened by a steam tramcar, which was travelling at an improper speed, and in consequence fell, plunged, and injured itself, the accident being wholly due to the negligence of the tramway company; it was held that the auctioneer could not maintain an action to recover the diminution in the value of the horse, as he was under no liability to the owner for the injury it had sustained (t).

Horse injured by negligence of stranger.

But this case was treated as open to question by A. L. Smith, M. R., in *Meux v. Great Eastern Rail. Co.* (u),

Right of action by borrower.

(o) *Bray v. Mayne*, 1 Gow, 1; 21 R. R. 786.

R. R. 607.

(p) *Ibid.* And see *Hiring Horses*, ante, p. 257.

(s) *Wheatley v. Patrick*, 2 M. & W. 650; 46 R. R. 731. And see *Hiring Horses*, ante, p. 262.

(q) *Jones on Bailments*, 68.

(r) *Williams v. Hide et Uxor.*, Palm. 548; cited in *Powell v. Salisbury*, 2 Y. & J. 394; 31

(t) *Claridge v. South Staffordshire Tramway Co.* [1892] 1 Q. B. 422; 61 L. J. Q. B. 503.

(u) [1895] 2 Q. B. 387.

and was overruled in the case of *The Winkfield* (x), where it was held by the Court of Appeal that "the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed." From this it follows that the bailee of a horse which is injured while in his possession owing to the negligence of a third person, is entitled to recover from the wrongdoer the amount of the depreciation of the horse, notwithstanding that the injury is inflicted under circumstances which impose no liability upon the bailee towards the bailor.

Possession
good against
wrongdoer.

In delivering his considered judgment in the case of *The Winkfield* (x), a judgment in which Stirling and Mathew, L. JJ., concurred, Collins, M. R., said: "It seems to me that the position that possession is good against a wrongdoer, and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall show presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes, quite irrespective of the rights and obligations as between himself and the bailor. I think this position is well established in our law, though it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think, also, that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and further, I think it can be shown that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases, namely, that he was liable over to the bailor for the loss of the goods converted or destroyed." Then, after an exhaustive examination of the authorities,

Obligation of
bailee to
account to
bailor.

the learned Master of the Rolls proceeded to say: "As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor."

The rule is, that when there has been a misuser of the thing lent, as by its destruction or otherwise, there is an end of the bailment, and an action of *trover* is maintainable for the conversion (y).

Bailment
ended by
misuser.

(y) See per Pollock, C. B., *Bryant v. Wardell*, 2 Ex. 482.

CHAPTER XII.

CARRYING HORSES.

A common carrier.

A COMMON carrier is a person who undertakes for hire to transport from place to place, either by land or water, the goods of such persons as think fit to employ him (a). A person who carries persons *only* is not a common carrier (b).

Railway companies common carriers.

Railway companies are common carriers (c). But their duties and obligations differ in some respects from those which attach to common carriers by virtue of the statutes under which they are constituted, and of other Acts, more especially the Railway and Canal Traffic Act, 1854 (d).

Duty of common carriers.

A common carrier is bound to convey to and from the places within which he professes to ply (although one of those places may be without the realm (e)), the goods of any person who offers to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him be extraordinary, or unless the goods be of a sort which he cannot convey, or which he is not in the habit of conveying (f). He is not, in the absence of a special

(a) *Coggs v. Bernard*, 1 Smith's L. C., 11th Ed., 173; *Trent and Mersey Navigation v. Wood*, 3 Esp. 127; 4 Doug. 287.

(b) *Coggs v. Bernard*, supra, and cases there cited.

(c) *Coggs v. Bernard*, ubi supra; *Palmer v. Grand Junction Canal Co.*, 4 M. & W. 749; 51 R. R. 805; *Pickford v. Grand Junction Rail. Co.*, 10 M. & W. 399; *Parker*

v. Great Western Rail. Co., 7 Scott, N. R. 835.

(d) 17 & 18 Vict. c. 31; see post, p. 288.

(e) *Crouch v. London and North Western Rail. Co.*, 23 L. J., C. P. 73.

(f) See *Coggs v. Burnett*, ubi supra; *Pickford v. Grand Junction Rail. Co.*, 10 M. & W. 399; *Parker v. Great Western Rail. Co.*, 7 Scott, N. R. 835.

Carrying by Crown.

Canadian Case.—The owner of a horse shipped in a box-car, the doors of which can only be fastened from the outside, and who is inside the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started. Negligence in such case of a servant of the Intercolonial Railway, a public work of Canada, will render the Crown liable under s. 20 (c) of Chap. 140, R. S. C. 1906. *Lavoie v. The Queen*, 3 Ex. C. R. 96.

contract, bound to carry within any given period of time, but only within a time which is reasonable, regarding all the circumstances of the case; and he is not responsible for delay arising from causes beyond his control (g). He is bound to deliver the goods safely, and in the same condition as when they were received; or in default thereof to make compensation to the owner for any loss or damage which happens while the goods are in his custody, except such loss or damage as arises from the act of God, as storms, tempests, and the like; or from the Queen's enemies (h). Act of God means not merely an accidental circumstance, but something overwhelming (i), and which "could not have been prevented by any amount of foresight and pains and care reasonably to be expected from" the carrier (k).

The liability of railway companies as common carriers of animals is subject to a further exception in cases where the injury is the consequence of an inherent vice of the animal carried, which results in its destruction, without any negligence on their part. The leading case on this subject is *Blower v. Great Western Rail. Co.* (l), which was an action brought in the County Court, for the non-delivery of a bullock which was delivered to them at D. station to be carried by them to N. In the course of the journey the animal escaped from the truck in which it was placed, and was killed. In a case stated by the County Court judge, it was found that the escape was wholly attributable to the efforts and exertions of the animal itself, and not to any negligence on the part of the company, and that the truck was in every respect proper and reasonably sufficient for the conveyance of cattle; the Court held that, upon this state of facts, the judge ought to have directed a verdict for the defendants, and Willes, J., in the course of his judgment, said, "The bullock was received by the company under the terms of

Rule as to
inherent
vice.

(g) *Taylor v. Great Northern Rail. Co.*, L. R., 1 C. P. 385; 35 L. J., C. P. 210.

(h) *Crouch v. Great Western Rail. Co.*, 11 Ex. 742.

(i) *Oakley v. Portsmouth, &c., Steam Packet Co.*, 11 Exh. 623; 21 L. J., Ex. 101—per Martin. B.

(k) *Nugent v. Smith*, 1 C. P. D. 441, 444; 45 L. J., C. P. 697; 34 L. T. 827—per James, L. J. See also *Nichols v. Marsland*, L. R.,

10 Ex. 255; 2 Ex. D. 1; 46 L. J., Ex. 174—C. A.; and *Nitro-Phosphate, &c., Mannre Co. v. London & St. Katharine Docks Co.*, 3 Ch. D., 503; 39 L. T. 433.

(l) L. R., 7 C. P. 655; 41 L. J., C. P. 268; 27 L. T. 883. And see *Clark v. Rochester and Syracuse Railroad Co.*, 14 New York, 570; *Bissell v. New York Central Railroad Co.*, 25 New York, 442.

a notice which is assailed by the plaintiff. It is unnecessary to consider whether or not the notice was a reasonable one. The question for our decision is, whether the defendants, upon the facts and findings of the County Court judge, are liable as common carriers for the loss of this animal. Whether a railway company are common carriers of animals is a question upon which there has been much conflict of opinion, and, although there may be difficulties in determining that question, such as induced Lord Wensleydale, in *Carr v. Lancashire and Yorkshire Rail. Co. (m)*, to make the observations which have elicited remarks from some learned judges apparently to the contrary, it may turn out after all to be a mere controversy of words. The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves, or disposition producing unruliness or phrenzy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing whether we say that one who carries live animals is not liable in the one event, but is liable in the other, or that he is not a common carrier of them at all, because there are some accidents, other than those falling within the exception of the act of God and the animal's enemies, for which he is not responsible. By the expression 'vice,' I do not, of course, mean moral vice in the thing itself, or its owner, but only that sort of vice which, by its internal development, tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists, and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties."

Evidence in
proof of.

Kendall v. London and South Western Rail. Co. (n) was an action to recover damages for injuries sustained by the plaintiff's horse whilst it was being carried by the defendants on their railway. The cause was tried before Martin, B., at Guildhall, at the sittings after Hilary Term, 1872. It appeared that the horse was taken, saddled and bridled, to the defendants' station at Waterloo, and was there delivered to the defendants to be carried to Ewell. It was attempted to be shown that

(m) 7 Ex. 712, 713; 21 L. J., Ex. 261.

(n) L. R., 7 Ex. 373; 41 L. J., Ex. 184; 26 L. T. 735.

the defendants' servants were guilty of negligence in not fastening up the stirrups; but as the plaintiff was himself present when the horse was put into the box, and had, after first objecting, acquiesced in the stirrups being allowed to hang down; and, as evidence was also given that the course adopted was usual and proper, that contention was abandoned.

No accident happened to the train, nor anything likely to alarm the horse, which was proved to be a quiet animal and accustomed to travel by rail; but, at the end of the journey, the horse was found to have sustained considerable injuries; and it was in respect of these injuries that the action was brought.

A verdict was entered for the plaintiff for 31*l.* 10*s.*, leave being reserved to the defendants to move to enter the verdict for them, the Court to have power to draw inferences of fact. A rule having been obtained accordingly, the Court held, drawing inferences of fact (Martin and Bramwell, BB., Pigott, B., dissenting), that the defendants were not liable, since it was to be inferred that the injuries resulted from the proper vice of the horse, Bramwell, B., saying, "There is no doubt that the horse was the immediate cause of its own injuries. That is to say, no person got into the box and injured it. It slipped or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'its proper vice,' that is to say, from fright, or temper, or struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendants' negligence, or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line owing to some obstruction maliciously put upon it, then the defendants would, as insurers, be liable. . . . Now it might be a question on whom, in such a case as the present, the burthen of proof lay: on the carrier or his employer? But in the actual case each party has given evidence. The defendants' witnesses have sworn that the train proceeded on the journey without disturbance or interruption, and that there was nothing to excite the horse to do what he did to his own damage, no cause of mischief except his own inherent disposition. If this is so the defendants are not liable. On the other hand, the plaintiff's witnesses have shown that the horse was quiet, used

to travelling, and, therefore, they say there must have been something extraordinary to excite the animal. This is a question of fact properly for a jury, but referred to us. If I am to decide it, I find for the defendants. The evidence of the plaintiff makes it *improbable* it was the proper vice of the horse; the evidence of the defendants makes it impossible that it was otherwise."

Burthen
of proof.

The burthen of proof in such cases would appear to depend upon the question whether or not the defendants were common carriers of animals. If they were so, it would be for them to prove that they had not been guilty of any negligence (o).

Rule applies
to common
carriers by
sea.

In *Nugent v. Smith* (p), a common carrier by sea from London to Aberdeen received a mare to be carried to Aberdeen for hire. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the carrier's servants. It was held that the carrier was not liable for the death of the mare, on the ground that a carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can show that either the act of nature, or the defect of the thing itself, or both taken together, formed the sole, direct, and irresistible cause of the loss, he is discharged.

Proof in
action for
negligence.

In an action to recover damages for injuries sustained by the plaintiff's cattle whilst being carried by the defendants on their railway, it was held that the plaintiff, who was a drover, was not an expert competent to give evidence as to how the injuries were occasioned, and that the *onus* of proof being on the plaintiff, and no affirmative evidence having been given by him of negligence on the part of the defendants, they were entitled to judgment (q). But it is difficult to reconcile this case with *Prior v. London and South Western Rail. Co.* (r), except on the assumption that the company were carrying the animals under a special contract, which exempted them from their liability as common carriers.

(o) *Prior v. London and South Western Rail. Co.*, 2 T. L. R. 89.

(p) 1 C. P. D. 423; 45 L. J., C. P. 697; 34 L. T. 827—C. A.

(q) *Smith v. Midland Rail. Co.*, 57 L. T. 313; 52 J. P. 262.

(r) Ante, note (v).

In *Richardson v. North Eastern Rail. Co. (s)*, it was assumed, and in *Dickson v. Great Northern Rail. Co. (t)*, it was expressly decided, that railway companies are not bound to carry animals, but may limit their business of carriers in this respect, and may refuse to carry animals except under special contract. In the former case, the company had given public notice that they were not "common carriers of horses, cattle, sheep, pigs, and other animals," but would only undertake the carriage of animals under special contract. A greyhound, having on a leathern collar with a strap attached, was delivered to the defendants for carriage, and the fare paid. In the course of the journey there was a change of trains, and the greyhound was fastened by the strap and collar to an iron spout on the open platform of the station. While so fastened it slipped from the collar and ran upon the line, and was killed. It was held that the fastening of the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company.

When carriers may refuse to carry animals.

The *onus* of proving that damage, happening during transit or while the goods were in the carrier's hands, was occasioned by a cause for which he was not responsible, lies upon the carrier (*u*).

Onus of proof of non-liability.

All common carriers must carry goods for reasonable charges, and consequently not take more from one than from another for the same service. Therefore one customer or class of customers cannot be charged more than another customer or class of customers, or the public generally (*x*).

Must carry for reasonable charges.

Railway companies, being common carriers, are *prima facie* liable at common law for defects in their carriages or trucks, by which damage accrues to the goods entrusted to them to carry (*y*).

Defects in carriages.

But a special contract entered into with a common carrier, by the party who delivers goods to be conveyed, by which contract the carrier is exempted from all

A special contract to carry.

(s) L. R., 7 C. P. 75; 41 L. J., C. P. 60; 26 L. T. 131; and see *Lake Shore Railroad Co. v. Perkins*, 25 Mich. 329.

(t) 18 Q. B. D. 176; 36 L. J., Q. B. 111; 55 L. T. 868—C. A.

(u) *Hudson v. Bazendale*, 2 H. & N. 575.

(x) *Johnson v. Midland Rail. Co.*, 4 Ex. 367; 80 R. R. 611; and *Coggs v. Bernard*, 1 Smith's L. C., 11th Ed. 173, and cases there cited.

(y) See *Combe v. London and South Western Rail. Co.*, 31 L. T. 613.

liability for any loss occasioned by his negligence, is binding upon both parties (z) *at common law*.

Binding at
common law.

At one period indeed there was a disposition in our Courts to hold that common carriers could not by their notices shake off their common law responsibility; but Mr. Justice Story says (a):—"The right of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's case* (b), and it was admitted in *Morse v. Slue* (c). It is now fully recognized and settled beyond any reasonable doubt in England." For this assertion he cites a number of authorities, and the Court of Common Pleas held that he had arrived at a correct conclusion (d).

Hardship
thus
occasioned.

It being thus established, that the common law liability of railway companies as common carriers might always be defeated by the express contracts to carry, which were embodied in their notices and tickets (e), the monopoly enjoyed by them led to their unduly restricting their liability by special contracts with customers, who could not afford the time or expense of litigating the right to refuse to carry except upon such contracts, and thus in many cases they were enabled to protect themselves against the legal consequences of the grossest negligence on their part (f).

Remedy
17 & 18 Vict.
c. 31.

With the view of remedying the hardships thus occasioned, the Railway and Canal Traffic Act was passed in 1854 (g).

Company to
be liable not-
withstanding
notices.

By the 7th section of that Act it is enacted that every such company "shall be liable for the loss of or for any injury done to any horses, cattle or other animals, or to any articles or goods," "in the receiving, forwarding, or delivering thereof," "occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition or declaration made and given, being thereby declared to be null and void; provided always, that

(z) *Carr v. Lancashire and Yorkshire Rail. Co.*, 7 Ex. 707.

(a) Story on Bailments, 9th Ed., s. 549.

(b) *Southcote's case*, 4 Rep. 83.

(c) *Morse v. Slue*, 1 Vent. 238.

(d) See judgment of Court of C. P., *Austin v. Manchester, Sheffield and Lincolnshire Rail. Co.*, 21 L. J., C. P. 183.

(e) *Carr v. Lancashire and*

Yorkshire Rail. Co., 7 Ex. 707; *Austin v. Manchester, Sheffield and Lincolnshire Rail. Co.*, 21 L. J., C. P. 183; *Chippendale v. Lancashire and Yorkshire Rail. Co.*, 21 L. J., Q. B. 22.

(f) *Carr v. Lancashire and Yorkshire Rail. Co.*, 7 Ex. 707, and cases there cited.

(g) 17 & 18 Vict. c. 31.

nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to receiving, forwarding and delivering of any of the said animals or goods that shall be adjudged by the Court or Judge, before whom the question relating thereto shall be tried, to be just and reasonable; provided always, that no greater damages shall be recovered for the loss or for any injury done to any such animals," beyond 50*l.* for any horse, 15*l.* per head for any neat cattle, and 2*l.* per head for sheep or pigs: "unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge."

Conditions must be reasonable.

Limitation of liability.

It is also provided by this section that such percentage or increased rate of charge shall be publicly notified (*h*); that the *onus* of proof of value and injury shall lie with the person claiming compensation, and that "the *special contract* shall be signed by him or the person delivering the animal or goods for carriage."

Special contract must be signed.

The Act only extends to the traffic on a company's own lines, and section 7 does not apply to a contract exempting a company from liability for loss on a railway not belonging to or worked by the company (*i*). But where the company contract to carry over their own as well as other lines, they must prove that the loss did not occur on their line, in order to avail themselves of a condition of non-liability (*k*).

Application of section 7.

The principal points of difficulty in the construction of this ill-drawn and ambiguous section are those restrictions on the common law, which it appears to have been its especial object to create. They are these: First, whether general notices given by such companies are valid for the purpose of limiting their common law liability as carriers? Secondly, what, if any, distinction

Construction of section 7.

(A) According to the provisions of the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68.

(i) *Zunz v. South Eastern Rail. Co.*, L. R., 4 Q. B. 539; 38 L. J.,

Q. B. 209; 20 L. T. 873.

(k) *Kent v. Midland Rail. Co.*, L. R., 10 Q. B. 1; 44 L. J., Q. B. 18; 31 L. T. 430.

is to be drawn between the words "special contract" and "condition"? And, thirdly, whether this common law liability may be limited by such conditions as the Court or Judge shall determine to be just and reasonable? And, moreover, if this common law liability may be limited by such conditions as the Court or Judge shall determine to be just and reasonable, it is important to consider what conditions have come within that definition.

Notwithstanding a great divergence of opinion among the learned Judges, the construction to be put upon this section, with especial regard to these points of difficulty, has been defined with considerable exactitude by decisions, which it will be necessary to give in some detail.

*Peek v. North
Staffordshire
Railway
Company*

In the case of *Peek v. North Staffordshire Railway Company* (1), the whole law on this subject was reviewed by the House of Lords, and in a great measure settled. It is therefore unnecessary, with regard to those points which it determined, to advert to the judicial decisions which preceded it, and which exhibit considerable variances of opinion.

The defendants in this case had issued a notice, that they would receive, forward and deliver goods solely subject to certain conditions, one being, "That they would not be responsible for the loss or injury to any marbles, &c., unless declared or insured according to their value." The plaintiff's forwarding agent had knowledge of this notice or condition, and on the 1st of August, 1857, by letter, directed the defendants to forward the goods in question (three cases of marbles), "not insured." The marbles sustained injury on the journey from wet impregnated with the rust of the nails of the cases penetrating through, and discolouring the stone, and this action was brought for the damage thus occasioned against the company as common carriers.

By their fourth plea the company pleaded under 17 & 18 Vict. c. 31, s. 7, that the marbles were delivered to be carried by them subject to a certain special contract, whereby it was agreed that they should not be responsible for the loss of or injury to marbles unless declared and insured according to their value, and that the same were not nor was any part thereof so declared or insured; and by their fifth plea, that the marbles were delivered and

(1) *Peek v. North Staffordshire Rail. Co.*, 10 H. L. Cas. 473; 32 L. J., Q. B. 241; 8 L. T., 768; 11 W. R. 1023.

received on the above condition; that such condition made by the defendants, and assented to by the plaintiff, was a just and reasonable condition.

It having been decided by the Exchequer Chamber (reversing the judgment of the Queen's Bench) that the defendants were entitled to the verdict on these pleas, the House of Lords reversed that decision, and affirmed the judgment of the Court of Queen's Bench, holding that no general notice given by a railway company is valid in law for the purpose of limiting the common law liability of the company as carriers; but that such common law liability may be limited by such conditions as the Court or judge shall determine to be just and reasonable.

General
notice
invalid.

The majority of the Lords present were of opinion that the condition above cited was neither just nor reasonable, as the effect of such a condition would be to exempt the company from responsibility for injury however caused, whether by their own negligence, or even by fraud or dishonesty on the part of their servants; and that the letter of the 1st of August, 1857, did not constitute a special contract in writing, the words "not insured" being insufficient, either expressly or by reference, to embody the condition itself into the letter.

Condition
limiting
liability.

It was held also by the Lord Chancellor (Lord Westbury) and by Lord Wensleydale, Lords Cranworth and Chelmsford dissenting, that the conditions must be embodied in a special contract in writing, to be signed by the owner or person delivering the goods (*m*). This question therefore remains as decided by *M'Manus v. Lancashire and Yorkshire Railway Company* (*n*), that in order to give this section (*o*) its intended extent of remedy, it must be construed, in accordance with the approved principle of interpretation, with reference to the state of the law when the statute was passed. Before that time, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract. Therefore, the construction to be put upon the words "special contract," in the Act must date back to a state of the law when a condition signed by the owner or his

"Condition"
and "special
contract"
synonymous
terms.

(*m*) See also *Lewis v. Great Yorkshire Rail. Co.*, 4 H. & N. 349 —Ex. Ch.

(*n*) *M'Manus v. Lancashire and* (*o*) 17 & 18 Vict. c. 31, s. 7.

agent for delivering the goods was held to be a "special contract," except where expressly varied by the words of the statute.

Special contract binding on company without signature.

But a railway company cannot repudiate a special contract on the ground that it has not been signed by the consignor; the proviso in section 7 only applies to cases where the company seek to relieve themselves from liability by reason of there being a special contract (*p*).

Effect of signature by agent.

Where an agent who is employed to deliver cattle to be sent by a railway company signs the consignment note, he must be taken to have known the contents, and thereby binds his principal (*q*). If a man who can read sends a man who cannot read to sign a document or to enter into a contract in which a document must to his knowledge be signed, he cannot dispute his liability on the contract so signed, on the ground that his agent could not read the contents; for in such a case the principal must be taken to be in the same position as though he had signed it himself without reading it (*r*).

As to reasonableness Court to decide.

It was also decided, in the case of *M'Manus v. Lancashire and Yorkshire Railway Company* (*s*), that the 17 & 18 Vict. c. 31, s. 7, gave power to the Court or Judge trying the cause to decide upon the justice and reasonableness of conditions in a special contract for the carriage of animals or goods on a railway; and the Court expressed their concurrence with the opinion pronounced by Jervis, C. J., in *Simons v. Great Western Railway Company* (*t*), that "the company may make special contracts with their customers, provided they are just and reasonable, and signed; and that whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security, that the Court shall see that the condition or special contract is just and reasonable."

General effect of these decisions.

Thus, then, the effect of the 7th section of the Railway and Canal Traffic Act (*u*) has been determined by the foregoing decisions to be this:—First, to make general notices given by companies under this statute, for the purpose of limiting their common law liability as carriers,

(*p*) *Barendale v. Great Eastern Rail. Co.*, L. R., 4 Q. B. 244; 58 L. J., Q. B. 137.

(*q*) *Kirby v. Great Western Rail. Co.*, 18 L. T. 658, per Martin, B.

(*r*) *Foreman v. Great Western Rail. Co.*, 38 L. T. 351.

(*s*) See note (*n*), ante.

(*t*) *Simons v. Great Western Rail. Co.*, 26 L. J., C. P. 25.

(*u*) 17 & 18 Vict. c. 31, s. 7.

invalid; and, secondly, to make the words "special contract" and "condition" in the 7th section synonymous terms, to the extent of permitting the common law liability of such companies to be limited by such conditions, or such special contract, signed by the owner or his agent for delivering the goods, as the Court or Judge shall determine to be just and reasonable.

It is therefore important to consider what conditions have been held to be just and reasonable, and what have been held not to be so. For no rule of universal application can be laid down with respect to what is a mixed question of law and fact, inasmuch as a reasonable condition may be applied to a state of facts which makes it unreasonable (x).

In the case of *Pardington v. South Western Railway Company* (y), a person sending cattle by railway signed a contract containing the following amongst other conditions:—"A pass for a drover to ride with his stock, the company is to be held free from all risks in respect of any damages arising in the loading or unloading, from suffocation or from being trampled upon, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever." A drover received a pass to go with the cattle. The cattle were not put into proper cattle-trucks, but into vans closing with lids ordinarily used for the conveyance of salt, and this was done with the consent, or, at all events, without any objection on the part of the drover. The lid of one of the vans having become closed in the course of the journey, several of the cattle were suffocated. The drover travelled in the same carriage with the guard, and did not get out during the journey to look at the cattle. The jury having found that the cattle were suffocated during the transit, Alderson, B., directed a verdict to be entered for the defendants, giving leave to the plaintiffs to move to enter a verdict for 135*l.* if the Court thought that the conditions were unreasonable. The Court refused a rule, and considered that the drover had the means of knowing whether the cattle could travel safely in the carriage provided for them, and that the condition was a reasonable one.

In the case of *M'Manus v. Lancashire and Yorkshire*

What conditions are just and reasonable, and what not.

To be free from all risks in respect of damage—cattle suffocated.

To be free from all risks

(x) Per Martin, B., in *Gregory v. West Midland Rail. Co.*, 33 L. J., Ex. 155.

(y) *Pardington v. South Western*

Rail. Co., 1 H. & N. 392. And see *Wise v. Great Western Rail. Co.*, 1 H. & N. 63; 25 L. J., Ex. 258.

of conveyance—horse injured by unsound truck.

Railway Company (z), a horse was placed by defendants' servants in a truck which was insufficient and unsound, and the horse put its foot through a hole in the floor, and was injured; and the question of liability on the contract turned upon the reasonableness or unreasonableness of the following condition:—"This ticket is issued, subject to the owner's undertaking "all risks of conveyance, loading and unloading whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." This condition was held to be neither just nor reasonable, and Williams, J., in delivering the judgment of the Court, said: "In order to bring the defendants within the protection of the special contract, it is necessary to construe it as excluding responsibility for loss occasioned not only by all risks, of whatever kind, directly incident to the transit, but also for that caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the company are to carry on their business is a matter, generally speaking, which they, and they alone, have, or ought to have, the means of fully ascertaining. And it would, we think, not only be unreasonable, but mischievous, if they were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability from the consequence of their own negligence however gross, or misconduct however flagrant; and that is what the condition under consideration professes to do. That condition is therefore void; and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured."

Owner's risk at lower rate.

But where A. knew that there was a certain rate for carrying horses on a railway by passenger train, and in horse-boxes, and that there was a lower rate for carrying them by goods train, and in waggons; it was held that it was a reasonable condition of the contract for conveyance

(z) *M. Mann v. Lancashire and Yorkshire Rail. Co.*, 4 H. & N. 349—Ex. Ch.

that the horses should be carried entirely at the owner's risk, and that such condition would protect the railway company if the horses were injured on the journey, but would not protect them from the consequences of delay where the contract was to deliver in a reasonable time (a).

Conditions protecting the company against claims for loss unless made within seven days from the time at which the goods should have been delivered, and against liability for the loss of goods nutruly or incorrectly declared or described by the sender, are reasonable, and binding (b).

In the case of *Allday v. Great Western Railway Company* (c), the plaintiff delivered some beasts to the station-master at Oxford, with directions to send them to Birmingham, for the market there, and signed a ticket, containing certain conditions, and amongst others that the defendants were "not to be answerable for any consequences arising from overcarriage, detention or delay in, or in relation to the conveying or delivery of the said animals, however caused." The company have two stations at Birmingham, one at Bordesley, for the cattle from Oxford and places south of Birmingham, and the other at Hockley, north of Birmingham, which would not be the proper station for the plaintiff's cattle to be sent to. The plaintiff made inquiries for them the next morning at the Bordesley Station, but inasmuch as they had been carried to the Hockley Station, he did not get them till the middle of the day. The proper time for him to have received them would have been early in the morning, and at the Bordesley Station. By reason of the delay which took place he lost the market; and in addition it was proved that the cattle had become injured by having been kept in the trucks without food or water. The defendants refused to make any compensation, and contended that they were protected by the conditions of the ticket above specified, and that they were therefore not liable in respect of overcarriage. It was held, however, by the Court of Queen's Bench that the cattle were "injured" within the meaning of the statute, and also

Condition as to time within which loss should be declared to create claim.

As to loss of market coupled with "injury" to cattle.

(a) *Robinson v. Great Western Rail. Co.*, 35 L. J., C. P. 123; H. & R. 97. See also *D'Arc v. London and North Western Rail. Co.*, L. R., 9 C. P. 325; 30 L. T. 763; *Harris v. Midland Rail. Co.*, 25 W. R. 63—D.; *Lewis v. Great Western*

Rail. Co., 3 Q. B. D. 195; 47 L. J., Q. B. 131; 37 L. T. 774. Per Brett, L. J., 3 Q. B. D. 209.

(b) *Lewis v. Great Western Rail. Co.*, 5 H. & N. 867.

(c) *Allday v. Great Western Rail. Co.*, 34 L. J., Q. B. 5.

that the condition in the ticket was unreasonable. And Cockburn, C. J., said, "It is admitted that there had been loss of condition to the cattle, and it is clear that that amounts to 'injury' within the meaning of the 7th section. I am also of opinion that the condition expressed in the ticket is unreasonable. The defendants claim complete immunity from liability in respect of all delay, overcarriage, &c. They talk of reduced rates, but there is no proof that they charged the plaintiff anything less than the ordinary rates of charge. It might perhaps be reasonable, if they had given the plaintiff the choice of two classes of rates, and had made a special contract limiting their liability in consideration of the lesser rate being charged. But no such thing has been done here." And Crompton, J., said, "I am of the same opinion. It is clear that the cattle sustained injury by reason of the conduct of the defendants. It is also clear that the condition is an unreasonable one; it was compulsory upon the plaintiff, no option being given to him, and the defendants cannot in such a manner protect themselves from liability." In these judgments Mellor and Shee, JJ., concurred. It is important to observe in this case, that the "injury" to the cattle is the only damage adverted to by the learned Judges, so it may be inferred, in accordance with former decisions (*d*), that the loss of market alone would not have entitled the defendants to compensation.

Condition as to value coupled with unreasonable rate.

In *Harrison v. London, Brighton and South Coast Railway Company* (*e*), the following condition was called in question:—"The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner, or his agent, at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value declared. The company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*,

(*d*) *Beal v. South Devon Rail. Co.*, 5 H. & N. 875; *White v. Great Western Rail. Co.*, 26 L. J., C. P. 158.

(*e*) *Harrison v. London, Brighton and South Coast Rail. Co.*, 29 L. J., Q. B. 209.

the price of conveyance will, in addition to the regular fare, be after the rate of two and a half per cent. upon the declared value of above 40*l.*, whatever may be the amount of such value, and for whatever distance the animal is to be carried." In this case the plaintiff delivered to the defendants a dog to be carried, and signed a ticket with this condition annexed. The value of the dog was 21*l.*, but the plaintiff made no declaration of its value, and paid only the regular fare 3*s.* The dog escaped from the train during the journey, and was lost, without any negligence on the part of the defendants. The plaintiff having sued the defendants for the loss, it was held by the majority of the Court of Exchequer: first, that the meaning of this ticket, the whole of which must be read together, was, that if the value of a dog was above 5*l.*, and its value was not declared, and the extra price paid accordingly, the defendants would not be liable at all, even for loss or injury caused by their own negligence, and that the condition was therefore within 17 & 18 Vict. c. 31, s. 7; secondly, that this condition was not just and reasonable, inasmuch as the extra charge of two and a half per cent. (without proof to the contrary, which it lay on the defendants to give) appeared excessive and unreasonable; and, thirdly, that the condition being void, the plaintiff, although there was no negligence on the part of the defendants, was entitled to recover the full value of the dog against them as common carriers.

The judgment in this case was reversed in the Exchequer Chamber (*f*), and, as reversed, was the subject of some discussion in *Ashendon v. London, Brighton and South Coast Railway Company* (*g*), where it was held that a condition that a railway company will not be liable "in any case" for loss or damage to a horse or dog above certain specified values delivered to them for carriage, unless the value is declared, is not reasonable, as it is in its terms unconditional, and would, if valid, protect the company even in case of the negligence or wilful misconduct of their servants; and the Court further gave its opinion that the judgment of the Exchequer Chamber was in effect overruled by *Peck v. North Staffordshire Railway Company* (*h*).

Where a condition contained in a ticket signed by a person delivering a dog for carriage to a railway company stated that "the company are not and will not be common

(*f*) 31 L. J., Q. B. 113.

(*g*) 5 Ex. D. 190; 42 L. T. 586.

(*h*) Ante, p. 290.

carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for the amount of damages for the loss thereof, or for injury thereto beyond the sum of 2*l.* unless a higher value be declared at the time of delivery to the company and a percentage of 5 per cent. paid upon the excess of value beyond the 2*l.* so declared; it was held that although the railway company were not bound to be common carriers of dogs, yet, being bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions, and that the above-mentioned condition was not just and reasonable within s. 7 of that Act; and, therefore, did not protect the company from liability to an amount exceeding 2*l.* in respect of damage done to the dog through the negligence of their servants (i).

Where value
untruly
declared.

But where the condition as to an increased rate for increased value is not objectionable on the ground of excess or otherwise, a wilfully false statement as to the value of a horse to be conveyed made by the plaintiff in order that it might be conveyed at the lower rate will disentitle him from recovering in damages, if it is injured, upon any other value than that which was falsely declared to be its real value (k).

Condition as
to general
non-liability.

In the case of *Gregory v. West Midland Railway Company* (l), a cow and a heifer had been placed by the defendants' servants without halters in a sheep or calf truck without rails, and during the journey the cow fell or jumped out of the truck and was injured. An action was brought for the damage thus occasioned, and the company relied upon the special contract made by them with the plaintiff, among the conditions of which were these:—That "the company are to be free from all risk and responsibility with respect to any loss or damage arising in the loading or unloading, or injury in the transit from any cause whatever, it being agreed that the animals are to be carried at the owner's risk, and that the owner of the cattle is to see to the efficiency of the waggon, before his stock is placed therein; complaints to be made in writing to the company's officer before the

(i) *Dickson v. Great Northern Rail. Co.*, 18 Q. B. D. 176; 36 L. J., Q. B. 111; 55 L. T. 868—C. A.

North Western Rail. Co., 34 L. J., Ex. 39.

(l) *Gregory v. West Midland Rail. Co.*, 33 L. J., Ex. 155.

(k) *McCance v. London and*

waggon leaves the station." In accordance with the decision of the Exchequer Chamber in *M'Manus v. Lancashire and Yorkshire Railway Company* (m), these conditions were held to be neither just nor reasonable.

In *Rooth v. North Eastern Railway Company* (n), a contract for the conveyance of cattle by railway, signed by the party sending them, contained the two following, amongst other, conditions:—"The owner undertakes all risks of loading, unloading and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatsoever."—"The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them:—"It was held that the first of these conditions was unreasonable, and that its unreasonable character was not removed by the mere fact that the company, under the second condition, granted, and the owner accepted, a free passage for a person who travelled with the cattle sent.

If carriers receive a chattel to carry to a particular place, they must be said to have the carrying of it to the end of the journey, whether they themselves carry it all the way or not. Therefore any parties to whom they may hand it over are their agents, and they are clearly liable, unless the facts show that their responsibility has determined (o). But a company (which is within the Railway and Canal Traffic Act) may divest itself of this responsibility for goods beyond its own limits, as the following conditions have been held to be just and reasonable, viz., that "in respect of goods destined for places beyond the limits of the company's railway, the company's responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for another conveyance." And "that any money, which may be received by the company as payment for the conveyance of goods beyond their own limits, will be so received for the

Condition as to non-liability beyond their own limits.

(m) *M'Manus v. Lancashire and Yorkshire Rail. Co.*, 4 H. & N. 327—Ex. Ch. See also *Peck v. North Staffordshire Rail. Co.*, 10 H. L. Cas. 473; 32 L. J., Q. B. 241, ante, p. 290.

(n) L. R., 2 Ex. 173; 36 L. J.,

Ex. 83.

(o) *Muschamp v. Lancaster and Preston Junction Rail. Co.*, 8 M. & W. 421; 58 R. R. 758; *Watson v. Ambergate, Nottingham and Boston Rail. Co.*, 15 Jur. 448; 89 R. R. 762.

If part of special contract is reasonable, such part may be relied on.

Alternative rates.

convenience of the consignors, and for the purpose of being paid to the other carrier" (p).

If a railway company puts two conditions into their carrying clause, one of which is unreasonable, they may rely upon the other, which is reasonable. So, too, if part of a condition, which is severable from the rest of it, is reasonable (q).

It has been said that the principle deducible from the authorities is, that a contract, *prima facie* unreasonable, becomes reasonable if an alternative rate is offered to the customer, i.e., if the company have two rates, at one of which, the higher, it undertakes the ordinary risk of a carrier, while at the other, the reduced rate, it carries upon condition of being relieved from that risk (r). It is the common practice of railway companies to offer alternative rates, and the question of the validity of these rates has frequently been the subject of judicial decision. From these decisions it would appear that conditions are just and reasonable if the company offer a *bonâ fide* option, and if the higher rate is reasonable as well as the lower (s). If a railway company offer to undertake the ordinary carrier's liability at a price they are not entitled to charge, or to carry at a lower price free from liability, the alternative offer is not reasonable (t). But a condition that the company will not be liable for injuries caused by fear or restiveness of animals, and a limit of liability as regards amount, the amounts being those specified in s. 7, and a provision that the company do not admit liability in the case of animals able to walk from the truck, have been held not to invalidate an alternative offer (u).

Where alternative rates are charged for the conveyance of cattle or goods, the lower rate being at owner's risk, *a priori* the higher rate, if within the parliamentary limit, is not necessarily unreasonable or prohibitory (x). It is a

(p) *Aldridge v. Great Western Rail. Co.*, 33 L. J., C. P. 161.

(q) *McCance v. London and North Western Rail. Co.*, 7 H. & N. 477.

(r) *Gallagher v. Great Western Rail. Co.*, Ir. R., 8 C. L. 326.

(s) *Hodges on Railways*, 7th Ed. 571. See also *Simons v. Great Western Rail. Co.*, 18 C. B. 805; 26 L. J., C. P. 25; *Harris v. Midland Rail. Co.*, 25 W. R. 63; *Lewis v. Great Western Rail. Co.*, 3 Q. B. D. 195; 47 L. J., Q. B. 131;

37 L. T. 774—C. A.; *Manchester, &c. Rail. Co. v. Brown*, 8 App. Cas. 703; 53 L. J., Q. B. 124; 50 L. T. 281; 32 W. R. 207.

(t) *Peck v. North Staffordshire Rail. Co.*, 10 H. L. Cas. 473; 32 L. J., Q. B. 241; 8 L. T. 768; 11 W. R. 1023.

(u) *Great Western Rail. Co. v. McCarthy*, 12 App. Cas. 218; 56 L. J., P. C. 33; 56 L. T. 582; 35 W. R. 429.

(x) *Foreman v. Great Western Rail. Co.*, 38 L. T. 851.

question for the jury whether the higher rate is unreasonable in the sense that it is so high as to be prohibitory; and the mere fact that the lower rate is so low that cattle dealers invariably avail themselves of it is not, standing alone, evidence that the higher rate is unreasonable or prohibitory (y).

The higher rate need not be published in the manner that tolls are directed to be published by the Railway Clauses Act, 1845, s. 93; the posting up the effect of it, *e.g.*, that it is 10 per cent. the owner's risk rate, is sufficient (z).

When a railway company agrees to carry, at a reduced rate, upon condition of being relieved from the ordinary liability for negligence, and to be responsible only for the consequences of the wilful misconduct of their servants,—a condition which has been held to be reasonable if a higher rate is offered, which is not exorbitant,—it will be for the plaintiff, in an action for injury to the goods carried, to prove more than culpable negligence. There must be evidence of actual wilful misconduct causing the injury (a). “‘Wilful misconduct,’” said Bramwell, J. (b), “means misconduct to which the will is a party, something opposed to accident or negligence, the *misconduct*, not the *conduct*, must be wilful. It has been said, and, I think, correctly, that perhaps one condition of wilful misconduct must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other ‘wilful misconduct.’ I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it.”

What is wilful misconduct.

The withholding of cattle under a groundless claim to detain them is not “detention” within the meaning of conditions that the company are not to be liable in respect of loss, or detention, or injury, except upon proof that such loss, detention, or injury, arose from the wilful misconduct of the company or its servants (c).

The onus of proving that a condition is reasonable, lies upon the company (d). Onus of proof.

(y) *Foreman v. Great Western Rail. Co.*, 38 L. T. 851.

(z) *Great Western Rail. Co. v. McCarthy*, *ubi supra*.

(a) *Great Western Rail. Co. v. Glenister*, 29 L. T. 422; 22 W. R. 72. See also *Webb v. Great Western Rail. Co.*, 26 W. R. 111; *Lewis v. Great Western Rail. Co.*, 3 Q. B. D. 195; 47 L. J., Q. B. 131;

37 L. T. 744; 26 W. R. 55—C. A.; *Hoare v. Great Western Rail. Co.*, 37 L. T. 186; 25 W. R. 63.

(b) *Lewis v. Great Western Rail. Co.*, 3 Q. B. D., at p. 206.

(c) *Gordon v. Great Western Rail. Co.*, 8 Q. B. D. 44; 51 L. J., Q. B. 58; 45 L. T. 509; 30 W. R. 230.

(d) *Harrison v. London, Brighton*

General effect of the decisions as to conditions.

It will have been seen by a consideration of the cases that the reasonableness or unreasonableness of a condition depends upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and all the circumstances of each particular case.

Delivery by carrier.

Very slight evidence of non-delivery is sufficient to call upon the defendant to prove delivery (e). If the carrier deliver the goods at the place directed in accordance with the ordinary usage, he has fulfilled his obligation, although he has delivered them to a person the sender did not intend (f). Where cattle sent by railway were kept at the arrival station with the sanction of the plaintiff's servant, until they could be removed according to the police regulations, it was held that the liability of the railway company as carriers had ceased when the alleged loss and damages occurred (g).

Notice of consignee's refusal to consign.

There is no general rule of law requiring carriers to give notice to the consignor of the refusal of the consignee to receive goods, but carriers are merely bound to do what is reasonable, under the particular circumstances of each case (h). However, Bramwell, B., said in the case of *Hudson v. Baxendale* (h), that "the judgment of the majority of the Court" (from which, however, he dissented) "in *Crouch v. Great Western Railway Company* (i) seemed to show that it was the duty of the carrier to communicate with the consignor."

Effect of consignee's refusal.

If the consignee makes default in receiving the goods the carrier is entitled to recover from him the expenses reasonably incurred in taking care of the goods. A person sent a horse by railway, consigned to himself at a station on the line, and paid the fare. When the horse arrived at the station there was no one on his behalf to receive it, and the railway company therefore placed it with a livery stable-keeper; and it was held that the company could recover from the owner of the horse the reasonable charges which it had paid to the stable-keeper (k).

and *South Coast Rail. Co.*, 29 L. J., Q. B. 209; *Lewis v. Great Western Rail. Co.*, 3 Q. B. D., at p. 205. Per Bramwell, L. J.

(e) *Griffiths v. Lee*, 1 C. & P. 110; *Hawkes v. Smith*, Car. & M. 72.

(f) *M'Kean v. M'Iver*, L. R., 6 Ex. 36; 40 L. J., Ex. 30; 24 L. T. 559.

(g) *Shepherd v. Bristol and Exeter Rail. Co.*, L. R., 3 Ex. 189; 37 L. J., Ex. 113.

(h) *Hudson v. Baxendale*, 27 L. J., Ex. 93.

(i) *Crouch v. Great Western Rail. Co.*, 26 L. J., Ex. 418.

(k) *Great Northern Rail. Co. v. Swaffield*, L. R., 9 Ex. 132; 43 L. J., Ex. 89; 30 L. T. 562.

After goods have been refused at the consignee's address, the carrier becomes an involuntary bailee, and is only bound to act with due and reasonable care and diligence (l).

It is no answer to an action against carriers by the owner of goods lost (who was the consignee), that the consignor, after the loss of the goods, claimed compensation, and that the carriers, without notice, and believing him to be the owner, paid compensation to him (m).

In a case (n) in which the plaintiff sent a horse of great value to the yard of the defendants' railway station at Worcester, for the purpose of its being carried by their railway; and by the direction of a servant of the company, the plaintiff's groom was leading the horse to the platform, when it was startled by another horse, and backed upon some sharp iron girders lying on the spot, receiving such an injury that it was necessary to kill it. No declaration of value had been made, nor had any ticket been taken or fare demanded; the usual practice at that station being to put the horse into the box, in which it was to be conveyed in the first instance. The jury found that the defendants were guilty of negligence in putting the girders where they were, and that there was no negligence on the part of the groom, and found a verdict for the plaintiff for 1,000*l*. A rule was subsequently obtained, pursuant to leave reserved, calling upon the plaintiff to show cause why the damages should not be reduced to 50*l*., on the ground that the plaintiff's right to recover was limited to that sum by 17 & 18 Vict. c. 31, s. 7. The Court differed in opinion, but it was held by the majority that the rule should be made absolute to reduce the damages to 50*l*.

It was held by Cockburn, C. J., who dissented from this judgment, that as the negligence complained of was not the negligence of the defendants in their character of carriers, they were not entitled to the protection of this section; secondly, if they would have otherwise been entitled to the protection, there was no evidence of their having notified the increased rate of charge as required by the section; and thirdly, therefore, on both grounds, the plaintiff was entitled to recover the full value of the horse.

Compensation paid erroneously to consignor no answer to action by consignee.

Liability of company when accident happens to a horse in their yard.

Opinion of Cockburn, C. J.

(l) *Heugh v. London and North Western Rail. Co.*, L. R., 5 Ex. 51; 39 L. J., Ex. 48; 21 L. T. 676.

(m) *Coombs v. Bristol and Exe-*

ter Rail. Co., 27 L. J., Ex. 269.

(n) *Hodgman v. West Midland Rail. Co.*, 33 L. J., Q. B. 233.

Of Mellor, J.

Mellor, J., was of opinion that the provision in the section applied not only to the risks of carriage and conveyance, but also to those which attend the receiving and delivery; that the injury was done in receiving the horse; and therefore, that as there was no declaration of value, the plaintiff could not recover more than the 50l.

Of Blackburn, J.

It was held by Blackburn, J., that the statute is not confined to neglects and defaults after the relation of carrier and customer has been completely established, and that the real value above 50l. cannot be recovered unless the declaration is made before the injury happens, though it happen before the receipt by the railway company is complete.

Declaration of value under 17 & 18 Vict. c. 31, s. 7.

The mere casual knowledge of a railway company of the excess in value of a horse sent to be carried, derived from a letter of the sender to their traffic manager, does not entitle them to refuse to carry it, except at the increased per centage of charge (o).

Non-compliance with a rule as to receipt.

A railway company is not responsible for the non-delivery of live stock, where the owner has, in defiance of the known course of business of the company, permitted them to be delivered at one of the company's stations without an acknowledgment from the proper officer of their receipt for the purpose of their being carried, although they are proved to have been delivered to an officer in the company's employ (p).

Through carriage on railways, what company liable.

Where one railway company undertakes to carry goods from a station on their railway to a place on another distinct railway, with which it communicates, this is evidence of a contract with them for the whole distance, and the other company will be regarded simply as their agents (q). But the first company might by a special contract restrain their liability to the limits of their own rail, where they expressly act as agents for the other company (r). And the question as to which company is liable will depend on the terms of the special contract in each individual case. Thus, in *Coxon v. Great Western Railway Company* (s), the plaintiff delivered cattle at a station of the Shrewsbury and Hereford Railway Company, to be conveyed to

(o) *Robinson v. South Western Rail. Co.*, 19 C. B., N. S. 51; 34 L. J., C. P. 234.

C. 7. 4 H. & C. 582—Ex. Ch.; 58 R. 758.

(p) *Slim v. Great Northern Rail. Co.*, 14 C. B. 647.

(r) *Rowles v. Great Western Rail. Co.*, 22 L. J., Ex. 76; 7 Exch. 699.

(q) *Muschamp v. Lancaster, &c., Rail. Co.*, 8 M. & W. 421; 3 H. &

(s) 29 L. J., Ex. 165; 5 H. & N. 274.

B., and signed a contract note with that company, one of the terms of which was, that the company would not be subject to liability for any damage arising on other railways. The cattle were placed on a truck of the defendants lying at the station, and were conveyed in it along the Shrewsbury and Hereford Railway to S., and then on the defendants' line to B. Between S. and B. the cattle were injured by the floor of the truck giving way; and it was held that, as the contract of carriage was with the Shrewsbury and Hereford Company for the entire journey, the defendants were not liable.

In *Gill v. Manchester, Sheffield and Lincolnshire Railway Company* (t), the Great Northern Railway Company and the Manchester Railway Company had agreed that a complete and full system of interchange of traffic should be established from all parts of one company and beyond its limits, to all parts of the other company and beyond its limits, with through tickets, through rates and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock. The agreement provided for the division of the traffic. The plaintiff, wishing to send a cow from D. to S., went to the station of the Great Northern Railway Company at D. and booked her for S. by the Manchester line. He signed a contract, by which it was agreed that the cow was to be conveyed upon certain conditions, one of which was as follows:—"The Great Northern Railway Company gives notice that they convey horses, cattle, sheep, pigs and other live stock in waggons, subject to the following condition: That they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal, in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal." The cow was put into a truck belonging to the Manchester Railway Company, and was conveyed to S., where their servant, who was in charge of the yard or loading place, let her out of the truck, although he was cautioned by the plaintiff not to do so at that time. The cow rushed out of the truck, and, after running about the yard, got upon the line and was killed. It was held that the Great Northern Railway Company was the agent of the Manchester Railway Company to make the contract for the carriage of the cow, and that, as the Manchester

Conditions as to restiveness.
Gill v. Manchester, &c.,
Rail. Co.

(t) L. R., 8 Q. B. 186; 42 L. J., Q. B. 89; 28 L. T. 587.

Defect in
horse box
belonging
to another
company.

*Combe v.
London and
South Western
Rail. Co.*

Through
carriage,
partly by
railway and
partly by sea.
Regulation of
Railways Act,
1868.

Railway was not protected by the condition above set out, an action was maintainable against them.

In *Combe v. London and South Western Railway Company* (u), the plaintiff sent off some horses from W., a station on one company's line, in horse boxes belonging to that company in charge of a groom, who was to take them to F., a station on the defendants' line. At G. was the junction with the defendants' railway, where it was necessary to book again, and whence there are two routes to F. The groom, on going to take tickets, was told, in answer to his inquiries, that the train direct to F. did not go for some hours, but that by paying a little higher fare, he could go on by a train which was about to start immediately, and went round a longer way. He said he would go on at once, and he and the horses proceeded in the same trucks in which they had come from W. At Farnham two porters came to unload the truck, and the groom told them of the danger of an accident arising from a wide space between the flap and the body of the horse-box, and how at W. it had been stopped up for the horses to be put in. They accordingly tried to stop it up with straw, while the groom kept the horses quiet inside. When done they said "All right," and he then led out a mare, her foal following. The latter put its foot through the opening and broke its leg. It was held that the company were bound to provide a truck reasonably fit for the conveyance of the plaintiff's horses, and there was evidence that this was unfit, and that the defendants had adopted it from the other company at G., and, by sending it on to F., became liable for an accident caused by its defects.

The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), Part II., s. 14, provides that where a company, by through booking, contracts to carry any *animals*, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such *animals*, &c. by sea, from the act of God, the king's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers and navigations, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the

(u) 31 L. T. 613.

company gives for such *animals*, &c., be valid as part of the contract between the consignor of such *animals*, &c., and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purpose of this section, the word "company" includes the owners, lessees or managers of any canal or other inland navigation.

Sect. 16 of the same Act contains provisions for securing equality of treatment in respect of tolls where a railway company is authorized to work steam vessels in connection with their lines.

By sect. 17, "where any charge shall have been made by a company in respect of the conveyance of goods over their railway, on application in writing within one week after payment of the said charge made to the secretary of the company by the person by whom or on whose account the same has been paid, the company shall within fourteen days render an account to the person so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages, and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and for other expenses; but without particularizing the several items of which the last-mentioned portion of the charge may consist."

By sect. 18, "where two railways are worked by one company, then, in the calculation of tolls and charges for any distances in respect of traffic (whether passengers, *animals*, goods, carriages, or vehicles) conveyed on both railways, the distances traversed shall be reckoned continuously on such railways, as if they were one railway."

The Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), s. 12, enacts that "where a railway company under a contract for carrying persons, *animals*, or goods by sea procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of loss of life or personal injury, or in respect of loss or damage to *animals* or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company; provided that such loss of life or personal injury, or loss or damage to *animals* or goods, happens to the person, *animals*, or

Company to furnish particulars of charges.

Carriage in vessel not belonging to company.

Regulation of Railways Act, 1871.

goods (as the case may be) during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company."

This section extended the provisions of the 31 & 32 Vict. c. 119, s. 16, *ante*, p. 307, to the carriage of goods which a railway company contracted to carry in ships not belonging to them; and as the second paragraph of that enactment incorporated the whole of the Railway and Canal Traffic Act, 1854, it was held that a condition made by a railway company limiting their liability in respect of animals procured to be carried by them by sea in vessels not belonging to them, was not binding on the consignor unless reasonable (*x*). But this provision was repealed by sect. 59 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), and sect. 28 of the same Act specifically applied to sea traffic the prohibition of undue preference only, so that sect. 7 of the Act of 1854 no longer applies to sea traffic (*y*).

Steamboat
and railway
companies,
&c., to disin-
fect carriages,
boats, &c.

Sect. 22 (xxi.) of the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), empowers the Board of Agriculture from time to time to make such orders as they think fit, subject and according to the provisions of the Act, for prescribing and regulating the cleansing and disinfecting of vessels, vehicles, and pens, and other places used for the carrying of animals for hire or purposes connected therewith. Accordingly, by the Animals (Transit and General) Order, 1895, provisions are made for the cleansing and disinfecting in the mode therein ordered—of every vessel used for carrying animals by sea, or on a canal, river, or inland navigation, after the landing of animals therefrom, and before the taking on board of any other animal, or other cargo—of every horse-box, truck and van on every occasion after an animal is taken out of the same, and before any other animal is placed therein—of every movable gangway or other apparatus used for transit of animals on or from a truck or vessel as soon as practicable—and of every loading pen, either on each day on which it is used and after the using thereof, or at some time not later than twelve o'clock at noon of the next following day, unless the following day is Sunday, and then on the following Monday, and before the using thereof. For any contravention of these provisions the owner and master of the vessel in which; and the railway

(*x*) *Doolan v. Midland Rail. Co.*,
2 App. Cas. 792; 34 L. T. 317.

(*y*) *Hodges on Railways*, 7th Ed.
p. 627.

company carrying animals on or owning or working the railway on which; and the owner of the apparatus, in respect of which the same is done, shall each be deemed to be guilty of an offence against the Act (z).

A carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts, or incur extra expense in order to surmount obstructions caused by the act of God, such as a fall of snow (a). Nor is he responsible for delay arising from causes beyond his control; e.g., a railway company was prevented from unavoidable obstruction on its line from carrying goods within the usual time. The obstruction was occasioned by an accident resulting solely from the negligence of another company, having parliamentary running powers over their line; and it was held that the railway company was not liable to the owner of the goods for damage caused to them by the delay (b). What is, or is not, reasonable time, must be judged with reference to the means at the carrier's disposal for forwarding the goods (c); but if his course of business is inconsistent with reasonable expedition, it is no answer to an action against him for damages arising from delay, that he carried at the ordinary rate at which he conducted business (d). Provided that he carry by a reasonable and usual route he is not bound to carry by the shortest route, even though empowered by statute to charge a mileage rate for carriage (e).

"Reasonable time."

A ferryman is bound not only to provide a safe mode of conveyance, but also proper means for the embarkation and landing of the animals carried by him. The defendants, lessees of a ferry over the river Mersey, ran steam-boats across for the conveyance of passengers and goods for hire. They also carried animals, but it was not their practice to take charge of the animals when on board. The plaintiff, having paid his usual fare, led his mare on board at one side of the river, and remained with her until the steam-boat reached the other side. For landing the passengers and animals the defendants had provided

A ferryman.

(z) See *Imay v. Blake*, 66 L. T. 530; 56 J. P. 486. See also *Animals (Transit and General) Amendment Order*, 1904.

(a) *Bridgdon v. Great Northern Rail. Co.*, 28 L. J., Ex. 51.

(b) *Taylor v. Great Northern Rail. Co.*, L. R., 1 C. P. 385; 35 L. J., C. P. 210.

(c) *Hales v. London and North Western Rail. Co.*, 32 L. J., Q. B. 292.

(d) *Blakemore v. Lancashire and Yorkshire Rail. Co.*, 1 F. & F. 76; *Hales v. London and North Western Rail. Co.*, 32 L. J., Q. B. 292.

(e) *Myers v. London and South Western Rail. Co.*, L. R., 5 C. P. 1.

a movable slip leading from the boat to a landing-barge. The slip had a hand-rail, which had been twice recently, to the defendants' knowledge, broken by the pressure of a horse on landing; and in the handrail was an iron spike, which appeared whenever the rail gave way. The defendants had also been cautioned that the slip was unsafe. They notwithstanding continued to use the slip, leaving the broken rail slightly tied up, so that it appeared sound. Over this slip the plaintiff proceeded to lead his mare towards the shore; but she pushed against the rail, which immediately gave way, and the iron spike concealed in it injured her severely. It was held that the defendants were bound not only to find a good boat, but also a good slip, and therefrom so to bridge over the space between the boat and the land as to provide means for getting from one to the other. And that although the mare was under the control and management of the plaintiff, they were liable for the injury to her in consequence of their culpable negligence in allowing an improper slip to be used (*f*).

Damages.

The damages to be paid will be measured by the value of the animal, if it be killed, or by the loss on the sale, if it be injured, but in respect of companies under the Railway and Canal Traffic Act (*g*), within the limit of Damages imposed by that statute, *viz.*, for a horse 50*l.*, neat cattle per head 15*l.*, and for sheep and pigs per head 2*l.*, unless at the time of delivery they shall be declared to be of higher value than that above mentioned; in which case, however, they cannot be estimated upon a higher value than that which has been declared by their owner or his agent in the written declaration required by

(*f*) *Willoughby v. Horridge*, 22 L. J., C. P. 90. (g) 17 & 18 Vict. c. 31.

Express company.

Canadian Cases.—Where animals were delivered to an express company to be carried to a place for exhibition, this being made known to the company at the time of delivery, and they were not delivered to the address given until ten hours after their arrival at such place and too late for exhibition, the company was held liable to the owner in damages, including anticipated profits. *Kennedy v. American Express Company*, 22 Ont. A. R. 278 (1895).

Ferryman.

The owner of a horse who keeps the animal under his personal charge while being carried on a ferry-boat with guard-rails only fifteen inches high cannot recover from the ferryman the value of the horse if it is lost overboard and drowned by reason of its restless disposition and the inability of the owner to control it. *Roussel v. Aumais*, Q. R. 18 S. C. 474 (1900). But see *Lavoie v. The Queen*, 3 Ex. C. R. 96.

the company, though the declared value is less than the real value (*h*).

If horses or cattle are injured on their way to an agricultural show, the chance of obtaining a prize is too remote a ground for damages (*i*). But such expenses as are reasonably and necessarily incurred by the owner in consequence of unreasonable delay in the delivery of goods, may be recovered against the carrier (*k*).

In order to recover damages for non-sale, owing to delay in carrying, there must have been an actual contract to buy for a price (*l*).

A railway company having failed to provide horse-boxes, pursuant to contract, for the conveyance of horses for sale by auction in Dublin on the day but one following, the owner was compelled to send them by road, a distance of twenty-four miles, in order that they might arrive in due time for the sale, and for previous inspection by purchasers. The horses, which were valuable hunters, were in soft condition at the time. They were deteriorated in appearance by the fatigue of the road journey; one of them was lamed; and such as were sold realised prices below what would have otherwise been obtained, the others being left on the owner's hands. It appeared that if they had been in hard-fed condition, they would have borne the journey without injury. The company's station-master was, at the time of the contract, aware of the intended sale and of the day on which it was to take place. It was held that the company were not liable in damages for the whole of the loss which the owner sustained in consequence of the injuries occasioned by the road journey; but that the measure of damages was the deterioration which the horses, if in ordinary condition and fit to make the journey, would have suffered thereby, and the time and labour expended on the road (*m*).

Injury must not be too remote.

Failing to provide horse-boxes for horses to be sold at auction.

(*h*) *McCune v. London and North Western Rail. Co.*, 31 L. J., Ex. 65; 34 L. J., Ex. 39—Ex. Ch.

(*i*) *Watson v. Ambergate, Nottingham and Boston Rail. Co.*, 15 Jur. 448; 89 R. R. 762.

(*k*) *Black v. Barendale*, 1 Ex.

410.

(*l*) *Hart v. Barendale*, 16 L. T. 390, Martin, B.

(*m*) *Waller v. Midland Great Western Rail. Co.*, L. R., 4 Ir. 376; reversing L. R., 1 Ir. 520.

Canadian Law.—Under the Criminal Code of Canada, R. S. C., 1906, c. 146, s. 544, a railway company, or the owner or master of a vessel, having cattle in transit, or the owner or person having the custody of such cattle, who knowingly or wilfully fails to afford proper rest and nourishment to such cattle while in transit is liable to a penalty not exceeding \$100.

Penalty for improper treatment while being carried.

PART II.

NEGLIGENCE IN THE USE OF HORSES, ETC.

CHAPTER I.

THE CRIMINAL AND CIVIL LIABILITIES OF PARTIES FOR INJURIES INFLICTED OR INCURRED IN DRIVING, ALSO THE RULE OF THE ROAD AND NEGLIGENT DRIVING BY A SERVANT.

Negligent Driving.

Definition of negligence.

Negligent driving.

NEGLIGENCE is defined to be the omitting to do something which a reasonable man would do, or the doing something which a reasonable man would not do; in either case causing mischief to a third party; not *intentionally*, for then there would be no negligence (a).

An abstract rule as to what will constitute *negligent driving* can hardly be laid down. It must depend upon all the circumstances of each case. Thus, it was held by Bayley, J. (b), that a carter sitting inside a cart, instead of attending at the horse's head, was guilty of *negligence*; and the fact that while he was there sitting, the cart went over a child, who was gathering up flowers on

(a) Per Alderson, B., *Blyth v. Birmingham Waterworks Co.*, 2 Jur. N. S. 333. (b) *Knight's case*, 1 Lewin, C. C. 168.

Careless driving.

Canadian Cases.—The trial Judge submitted these questions to the jury: 1. Was the injury to the boy [plaintiff's son] the result of the negligence of the defendant or his servant in driving the horses or team? 2. Could the boy, by the exercise of ordinary care, have avoided the injury? The jury having found a verdict for defendant, under the directions of the trial Judge, as the result of their findings on the questions so put to them: *Held*, that the verdict should be set aside and a new trial ordered on the ground that the question should have been put to the jury in this wise: Whether, assuming negligence on the part of the boy, the injury

the road, and killed it, made him guilty of manslaughter. And the same point was ruled by Hullock, B. (c). But under other circumstances a driver would be more negligent in being off than on his vehicle.

If a man rides recklessly a wild horse into a crowd, and kills a person, it will be *murder*, in the same way as it has been so held when bricks were thrown from the top of a house into a thoroughfare, and killed a person (d).

Where killing a person is held to be murder.

If a person driving a carriage happens to kill another, and he saw or had timely notice of the mischief likely to ensue, and yet *wilfully* drove on, it will be *murder*; for the presumption of malice arises from the doing a dangerous act intentionally, and "there is the heart regardless of social duty" (e).

If the driver *might* have seen the danger, but did not look before him, it will be *manslaughter* for want of due circumspection (e). And generally it may be laid down, that where one by his *negligence* has contributed to the death of another, he is guilty of *manslaughter* (f).

Where killing a person is held to be manslaughter.

Where a man was indicted for the manslaughter of a woman by driving a cab over her in a public street, and his defence was, that he had used due and proper care in driving the cab upon the occasion in question; it was held that the burthen of proving negligence did not lie on the Crown, but that, upon the fact of the killing being proved, it was cast upon the prisoner to show that he had used due and proper care in driving the cab (g).

Burthen of proof.

If a man drive a carriage or cart at an *unusually rapid pace* (h), whereby a person is killed, though he calls

Furious driving.

(c) Spring Assizes, 1829, quoted 1 Lewin, C. C. 168.

(f) *Reg. v. Swindall*, 2 C. & K. 230.

(d) Liverpool Spring Assizes, 1847, per Alderson, B., *Reg. v. Cook*, 1 Ld. Raym. 143.

(g) *Reg. v. Cavendish*, 9 Ir. R., C. L. 178—C. C. R.

(e) 1 Hale, 476; Fost. 263; 1 East's Pleas of the Crown, 263; and see *Reg. v. Cook*, 1 Ld. Raym. 143.

(h) See the General Highway Act, 5 & 6 Will. 4, c. 50, s. 78; and for the Metropolis, 2 & 3 Viet. c. 47, s. 54.

could not have been avoided by the exercise of ordinary care on the part of the driver. *West v. Boutilier*, 18 N. S. R. 297 (1884). And see *Cork v. Canada Ice Company*, 3 Ont. W. R. 106.

In an action for damages caused by alleged careless driving: *Held*, that where the highway is used in the customary way, or in such way as circumstances may make necessary, evidence of actual negligence must be given. *Ramie v. Walker*, 18 N. S. R. 175 (1885).

Careless driving.

Carriages
racing.

Driver
unable to
pull up.

repeatedly to such person to get out of the way; if from the rapidity of driving, or from any other cause, the person cannot get out of the way in time enough, but is killed, the driver is in law guilty of *manslaughter* (i).

If each of two persons be driving a cart or carriage, at a dangerous and furious rate, along a highway, and they be racing and inciting each other so to drive, and one of them runs over a man and kills him, both are guilty of *manslaughter* (k); and it is no ground of defence, that the death was caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time (k).

So, also, if the driver of a carriage be racing with another carriage, and from being unable to pull up his horses in time, the first-mentioned carriage is upset, and a person thrown off it and killed, this is *manslaughter* in the driver of that carriage. Thus, where two omnibuses, running in opposition to each other, were galloping along a road, and a person killed by the upsetting of one of them, for which the driver was tried:—Patteson, J., in summing up, said to the jury, "The question here is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost command of his horses? And that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable, for a man is not to say, I will race along a road, and when I have got past another carriage, I will pull up. If the prisoner did really race, and only when he got past the other omnibus endeavour to pull up, he must be found guilty; but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, Were the two omnibuses racing? and Was the prisoner driving as fast as he could in order to get past the other omnibus, and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion, you ought to convict him; but if his horses ran away of their own accord, without any act of his, he is entitled to an acquittal" (l).

(i) Per Garrow, B., *Reg. v.* 230.

Walker, 1 C. & P. 320; 28 R. R. 781.

(k) *Reg. v. Swindall*, 2 C. & K. 500.

(l) *Reg. v. Timmins*, 7 C. & P.

If a man undertakes to drive another in a vehicle, he is bound to exercise proper care in regard to the safety of the man under his charge, and if by culpable negligent driving he causes the death of the other, he will be guilty of manslaughter. But he cannot be found guilty of manslaughter if the deceased himself interfered in the management of the horse and thereby assisted in bringing about the accident (*m*).

Causing death of passenger.

Contributory negligence is not an answer to a criminal charge, as to a civil action (*n*). And even if the doctrine of contributory negligence does apply to criminal cases, yet there is no contributory negligence on the part of anyone in merely getting into a vehicle and allowing himself to be driven, although the driver be perceptibly drunk (*o*).

Defence of contributory negligence.

When a person has been killed in such a manner that *no want of care* could be imputed to the driver, it will be *accidental death*, and he will be excused (*p*).

Where killing a person is held to be accidental death.

Therefore, if the driver of a conveyance use all reasonable care and diligence, and an accident happen through some chance which he could not foresee or avoid, he is not to be held liable for the results of such accident (*q*).

And the driver is not liable.

Thus, in an old case, where A. was driving a waggon with four horses in the highway at Whitechapel, and he being in the waggon, and the horses upon a trot, they threw down a woman, who was going the same way with a burden upon her head, and killed her, Holt, C. J., Tracy, J., Bury, B., and the Recorder Lovel, held this to be only a *misadventure* (*r*).

Trotting a waggon along a road.

But Lord Holt held in that case, if it had been in a street where people usually pass, it would have been *manslaughter*; but it was clearly agreed that it could not be *murder* (*r*).

Trotting a waggon along a street.

It must be taken for granted from this note of the case, that the accident happened in a highway *where people did not usually pass* (*s*); for otherwise, the circumstance of the driver's being in his cart, and going so much faster than is usual for carriages of that construction,

Remarks in East's Pleas of the Crown.

(*m*) *Reg. v. Jones*, 22 L. T. 217; 11 Cox, C. C. 544—Lush, J.

(*n*) *Reg. v. Kew*, 12 Cox, C. C. 355—Byles, J. See *R. v. Birchall*, 4 F. & F. 1087, contra — per Willes, J.

(*o*) *Reg. v. Jones*, 22 L. T. 217; 11 Cox, C. C. 544—Lush, J.

(*p*) 1 Hale, 476; Fost. 263; 1 East's Pleas of the Crown, 263.

(*q*) *Reg. v. Murray*, 5 Cox, C. C. 509 (Ir.).

(*r*) O. B. Sess. before Mich. T. 1704, M. S. Tracy, 32.

(*s*) Unlike Whitechapel of the present day

savoured much of negligence and impropriety ; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly in order to avoid any person who could not get out of the way in time. And indeed such conduct in a driver of so heavy a carriage might, under most circumstances, be thought to betoken a want of due care, if any, though but few, persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required ; but whoever seeks to excuse himself, for having unfortunately occasioned by any act of his own the death of another, ought at least to show that he took that care to avoid it which persons in similar situations are most accustomed to do (t).

Where streets are unusually crowded.

The fact that streets are unusually crowded from any public procession or other cause, instead of excusing a driver when proceeding at his ordinary pace and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally answerable for any accidents ensuing from driving at a rate, and with those precautions which he might have ordinarily observed (u).

Where driver is indictable under 24 & 25 Vict. c. 100, s. 35.

If any one be maimed or otherwise injured by the "wanton and furious driving or racing," or by the "wilful misconduct" of the driver of any public stage carriage, the person so offending is guilty of a misdemeanor, and indictable under the statute 24 & 25 Vict. c. 100, s. 35 (x).

Furious driving in the Metropolitan Police District.

Under 2 & 3 Vict. c. 47, s. 54, every person who, within the Metropolitan Police District, "shall ride or drive furiously, or so as to endanger the life or limb of any person, or to the common danger of the passengers in any thoroughfare," is liable to a penalty of not more than 40s.

Power of police constables.

Police constables are empowered to take a person into custody without warrant, who may commit any such offence "within view of any such constable" (y) ; and this power is not confined to cases where the offender's name and residence are unknown (z).

Conviction no bar to action of trespass.

A conviction for furious driving under this statute, not alleging the offence to have been committed within view of the police constable, was held not to be a bar to

(t) 1 East's Pleas of the Crown, 632.

(u) *Reg. v. Murray*, 5 Cox, C. C. 509 (Ir.).

(x) Re-enacting 1 Geo. 4, c. 4.

(y) 2 & 3 Vict. c. 47, s. 54.

(z) *Justice v. Gosling*, 16 J. P. 105 ; 21 L. J., C. P. 94 ; 2 & 3 Vict. c. 47, s. 63.

an action of *trespass* against a police constable for the arrest and detention of the party, although such conviction was unappealed against and acquiesced in (a).

A party who sustains an injury from the careless or negligent driving of another may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury (b).

The driver of a public vehicle is bound to be a skilful driver, and any damage arising from his unskilful driving is a ground of action. A less degree of skill is to be looked for from the driver of a private vehicle, but he is bound to drive with reasonable care and skill. Thus, in the case of *Collier v. Chaplin* (c), which was an action to recover damages for an injury to the plaintiff, and to her clothes, from being upset by the defendant, when driven by him, it appeared that the plaintiff at the defendant's request took a drive with him in his cart, and that the defendant upset the cart, by reason of which a can of gas-tar, which was in the cart, was spilt over her clothes, and her ankle was injured. Byles J. told the jury that the defendant was not bound to bring the same skill and care as a driver of a public vehicle, to the driving of his cart, in which he allowed the plaintiff to accompany him, but he was bound to drive with reasonable care and skill, and that the question for them was whether the accident arose from the defendant's culpable negligence or not.

An action lies for neglect in taking care of vicious horses, cattle, dogs, &c. As if a man ride an unruly horse in Lincoln's Inn Fields (or other public place of resort) to tame him, and he break loose and strike a person (d).

But where damage is done in consequence of a person striking a horse on which another rides, the *striker* is the *trespasser* and the rider is not (e).

A man and his wife brought an action of *trespass* for

Where party injured by negligent driving may maintain an action.

Duty of drivers of public and private vehicles.

Negligence in the care of vicious horses, &c.

Where another person strikes a horse.

Damages recovered in *trespass*.

(a) *Justice v. Gosling*, 16 J. P. 105; 21 L. J., C. P. 94.

(b) See per Coltman, J., *Thoroughgood v. Bryan*, 8 C. B. 130.

(c) *Collier v. Chaplin*, N. P., C. P. cor. Byles, J., Westminster, Feb. 1, 1865. See also *Moffat v. Bateman*, L. R., 3 P. C. 115; 22 L. T. 140; 6 Moore, P. C. C., N. S. 369; *Simson v. London General Omnibus Co.*, L. R., 8 C. P. 390;

42 L. J., C. P. 112; 28 L. T. 560; 21 W. R. 595; *Manzoni v. Douglas*, 6 Q. B. D. 145, 151; *Martin v. North Metropolitan Tramways Co.*, 3 T. L. R. 600.

(d) See Com. Dig. Action upon the Case for Negligence, A. 5; and *Ferocious and Vicious Animals*, post, Part II., Chap. II. See also *Michael v. Alestree*, 2 Lev. 173.

(e) *Gibson v. Pepper*, 2 Saik. 637.

a battery, and declared that the defendant struck the horse whereon the wife rode, so that the horse ran away with her, whereby she was thrown down, and another horse ran over her, whereby she lost the use of two of her fingers. The jury found for the plaintiffs and gave them 48*l.* damages (*f*).

Driving
furiously
round a
corner.

Mail cart
rapidly
entering Post
Office yard.

If a man drive furiously round a corner and injure a person on the further side, he is liable to an action for his negligence (*g*).

One of the mail carts, entering the General Post Office yard at the rate of five or six miles an hour, knocked down and seriously injured the plaintiff, a widow. On an action being brought the defence was, that the accident was occasioned by the plaintiff's own awkwardness, in not attending to the driver's warning. Lord Campbell told the jury, that the real question was whether that was a proper pace to drive into the yard. And they gave a verdict for the plaintiff, with 50*l.* damages (*h*).

Negligence in
harnessing.

Independently of negligent driving, an action will also lie in respect of damage sustained in a collision resulting from the improper harnessing of the defendant's horse. Where the defendant was driving along a highway a sixteen hand horse in a van which was much too small for it, in consequence of which the horse's houghs rubbed against the cross-bar of the shafts; and the horse, having been startled by a slight collision with a cab, violently collided with an omnibus which was standing at the kerb on its proper side, producing damage; and it was clear that no accident would have happened to the omnibus if the defendant's horse had not been too large for the van; it was held that the harnessing of the horse to such a van was the negligence which materially and proximately led to the accident (*i*).

Frightening
a horse by a
fire-basket.

If damage is caused by a horse taking fright at something which is improperly placed in the public street, the person so placing it is liable; as where the defendant placed a fire-basket in the street with the result that the horse that the plaintiff was in charge of took fright, and notwithstanding his catching hold of the bridle, threw him down and caused him severe injuries (*k*).

(*f*) *Dodwell v. Burford*, 1 Mod. 21.

(*g*) See *Mayor of Colchester v. Brooke*, 7 Q. B. 359.

(*h*) *Smith v. M'Namara*, cor. Lord Campbell, C. J., Queen's

Pench, N. P., May 12, 1853.

(*i*) *Burkim v. Bilezikdgi*, 53 J. P. 760—Fry, L. J.

(*k*) *Lambert v. Harrison*, cor. Talfourd, J., at Guildhall, Feb. 25, 1853.

In *Harris v. Mobbs* (l) a house-van attached to a steam-plough was left for the night on the grassy side of a highway by the defendant. The van and plough were four or five feet from the metalled part of the way. During the evening the plaintiff's testator drove his mare in a cart along the metalled road. The mare was a kicker, but he was unaware of her vice. Passing the van she shied at it, kicked, and galloped, kicking for 140 yards, then got her leg over the shaft, fell, and kicked her driver as he rolled out of the cart. He afterwards died from the kick so received. In an action under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 1), by his executors for wrongful and negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably, and negligently, and caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did, and by the inherent vice of the mare combined, and that there was no contributory negligence. It was held on these findings that the verdict and judgment must be for the plaintiffs; for the unauthorized, unreasonable, and dangerous user of the highway by the defendant was the proximate cause of the injury.

By van left on roadside.

Harris v. Mobbs.

So, too, where an engine-driver blew off steam at a spot where a railway crossed a highway on a level, so as to frighten horses waiting to cross the line, such crossing being a place where there was considerable traffic, it was held to be actionable negligence on the part of the company (m).

By engine-driver blowing off steam at a crossing.

But where, in an action against a railway company, it appeared that the plaintiffs were leaving a station belonging to the defendants in a carriage, when the horse was frightened by the sight and sound of an engine at the station blowing off steam, and the carriage was upset and

Blowing off steam at a station.

(l) 3 Ex. D. 268; 39 L. T. 164; 27 W. R. 154. See also *Wilkins v. Iurton*, 14 C. B., N. S. 54; 11 W. R. Day, 12 Q. B. D. 110; 49 L. T. 754.
399.

Canadian Case.—The motorman of an electric car is not necessarily guilty of negligence because he does not stop the car at the first notice that a horse is being frightened either at the car or something else. In each case the question is as to whether the motorman has proceeded with care. *Robinson v. Toronto Rail. Co.*, 2 Ont. L. R. 18 (1901). And see *Liddiard v. Toronto Rail. Co.*, 3 Ont. W. R. 852.

Street car.

the plaintiffs injured ; and it did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient ; but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident. It was held by the Court of Appeal that the defendants were not liable, as there was no evidence of any obligation on their part to screen the railway from the road (n).

Rules as to
civil liability.

Where damage has been caused by collision, there may be negligence on one side only (o) ; or negligence on both sides (p). Both parties may be to blame (q) ; or it may be altogether an accident (r). The following rules, which appear fully borne out by the cases hereafter quoted, will fix the liabilities of the parties concerned, under whatever circumstances the damage may be inflicted.

1st. If a party who is taking *reasonable* and *proper* care receives damage in consequence of a horse or carriage he encounters being negligently managed, the person who has the control over such horse or carriage is answerable.

2nd. Where damage is not the *necessary* consequence of a particular wrongful act, the person sustaining damage, though a wrongdoer, may recover against the person causing it, if it be shown that with *ordinary* care on the part of the latter, the injury might have been avoided.

3rd. But where one party by his *improper* conduct makes it *impossible* for the other party, who is also acting improperly, to avoid doing him damage, the person inflicting the injury is not liable, because the negligence of both parties *concurs* in producing it.

4th. Where damage is the consequence of *pure* accident, neither party is answerable.

Negligence on
one side only.

In the following case the jury found for the plaintiff, being of opinion that there was *negligence* on the side of the defendant *only*. It appeared that between seven and eight o'clock on the evening of the 30th of November, the plaintiff, who was a female servant, was intending to cross High Street, Aldgate, and was stepping off the

(n) *Sinkin v. London and North Western Rail. Co.*, 21 Q. B. D. 453 ; 59 L. J., Q. B. 797 ; 53 J. P. 85. See also *Ramsden v. Lancashire and Yorkshire Rail. Co.*, 53 J. P. 183.

(o) Negligence on one side only,

infra.

(p) Negligence on both sides, post, p. 322.

(q) Both parties to blame, post, p. 332.

(r) Altogether an accident, post, p. 334.

curbstone for that purpose, when a cabriolet, which came up at a pace of nine or ten miles an hour, struck against her and knocked her down, by which she was injured. In summing up, Coleridge, J., said, "If the plaintiff has contributed to the accident by her own neglect, she cannot recover in this action. I will put this case. If a person in Oxford Street sees an omnibus coming, however furiously, and he will be headstrong enough to try to cross the street, and is run over, he cannot recover in an action against the proprietors of the omnibus, as no one has a right of action if he meets with an accident which by ordinary care he might have avoided. The cabriolet, it is said, was coming at the rate of nine or ten miles an hour, which was a most improper pace at such an hour and in such a place. Even a much less pace would be too fast at that time of the evening in such a place as High Street, Aldgate. If the plaintiff took reasonable and proper care, and it was on account of the extraordinary speed of the cabriolet that she could not save herself, and thus met with the accident, she is entitled to your verdict; but if she, by her own negligence and want of care, contributed to the accident, she cannot recover in this action, even though you should think the driver of the cabriolet was driving too fast, and was therefore guilty of negligence as well as the plaintiff. If, however, the plaintiff took reasonable and proper care, and it was the negligence of the driver which caused the accident, you ought to find a verdict for the plaintiff" (s).

So, also, where it appeared that the plaintiff was a passenger on the top of an omnibus, which was struck by the defendant's omnibus, and the consequence was that the omnibus on which the plaintiff sat, continuing its course, ran against some obstacle, and the plaintiff was thrown off with considerable violence, it was held by the Court of Exchequer that the defendant was liable (t).

If a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by, in striking the horse. Thus, where damage had been done under such circumstances, Tindal, C. J., said, "If a man chooses to leave a cart standing in the street, he must take the risk of any

Passenger
thrown from
an omnibus.

Horse and
cart left
standing in
the street.

(s) *Woolf v. Beard*, 8 C. & P. 373.

(t) *Rigby v. Howitt*, 5 Ex. 242; 32 R. R. 652.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)

APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

Damage from
tackle
breaking.

Or from a
defect in the
carriage.

Negligence on
both sides.

mischief that may be done" (u). And in like manner a master is liable if his cart be so left by his servant (x).

The owner of a cart or carriage is bound to have good tackle, and he is liable for an accident in consequence of its breaking; as where the chain-stay of a cart broke, and the horse being frightened ran away and did damage (y); and where, in consequence of the reins breaking, a foot passenger was run over and injured (z).

So, also, in the following case, in which it appeared that the defendant was driving his cart down a hill, and the horse, which was usually quiet, suddenly commenced kicking, and proceeded at a furious pace. Eventually the shafts broke, and the horse and cart came into collision with the plaintiff's gig, and injured it. It was held that as the breaking of the shafts showed a defect in the cart, which raised a presumption of negligence in the owner, he was liable for the damage sustained by the plaintiff (a).

The subject of *negligence on both sides* was fully considered by the Court of Exchequer in *Bridge v. The Grand Junction Railway Company* (b), and Parke, B., there said, "The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester* (c), that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he is entitled to recover. But if by ordinary care he might have avoided them, he is the author of his own wrong." And in a later case (d) the law as deducible from preceding decisions was thus laid down by Wightman, J., delivering the judgment of the Exchequer Chamber:—"It appears to us that the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the

(u) *Illidge v. Goodwin*, 5 C. & P. 193; 38 R. R. 798.

(x) *Lyuch v. Nurdin*, 1 Q. B. 33; 55 R. R. 191. The correctness of this decision has, however, been doubted. See *Mann v. Ward*, 8 T. L. R. 699—per Lord Esher, M. R. See also *Lygo v. Newbolt*, 9 Ex. 302; 96 R. R. 727.

(y) *Welsh v. Lawrence*, 2 Chit. 262.

(z) *Cotteril v. Turley*, 8 C. & P. 693.

(a) *Templeman v. Haydon*, 19

L. T., O. S. 218.

(b) *Bridge v. The Grand Junction Rail. Co.*, 3 M. & W. 24; 49 R. R. 590.

(c) *Butterfield v. Forrester*, 11 East. 60; 10 R. R. 433.

(d) *Tuff v. Warn*, 27 L. J., C. P. 322. See also *Adley v. London and North Western Rail. Co.*, 1 App. Cas. 754; 46 L. J., Ex. 573; *Dublin, &c., Rail. Co. v. Slattery*, 3 App. Cas. 1155; 39 L. T. 365.

misfortune by his own negligence, or want of ordinary and common care and caution, that but for such negligence or want of ordinary and common care and caution on his part, the misfortune would not have happened. In the first place, the plaintiff would be entitled to recover; in the latter not, as but for his own misconduct the misfortune would not have happened. Mere negligence or want of ordinary and common care and caution would not, however, have disentitled him to recover, unless it was such that but for the negligence and want of ordinary care and caution the misfortune would not have happened; or if the defendant might, by the exercise of caution on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

In an action for personal injuries against the defendants, an omnibus company, the jury found that there had been negligence on the part of the defendants' driver, and also contributory negligence on the part of the plaintiff. Two other questions were put to them: viz., whether, notwithstanding the negligence of the plaintiff, the defendants' driver could have avoided the accident by the exercise of reasonable care, and whether the defendants' driver and the plaintiff could each of them, up to the moment of the collision, have prevented the accident by the exercise of ordinary care; but upon these questions they were unable to agree. It was held that the Judge on these findings was right in entering judgment for the defendants (e).

Where the negligence of the party injured did *not* in any degree *contribute* to the *immediate cause* of the accident, such negligence ought not to be set up as an answer to an action brought against the person who committed an injury (f).

A person who is guilty of negligence, and thereby produces injury to another, cannot set up as a defence that *part* of the mischief would not have arisen if the person had not himself been guilty of some negligence (g).

The extent to which the rule relating to contributory negligence applies to the case of a child who is so young as to be incapable of exercising ordinary care and caution, is somewhat doubtful. In *Lynch v. Nurdin* (h), the Court of Queen's Bench, after taking time to consider their

Disagreement of jury as to reasonable care by defendant.

Where negligence of the injured party did not contribute to the accident.

Where such negligence occasioned part of the mischief.

Contributory negligence of children.

(e) *Reynolds v. Tilling, Ltd.*, 20 of Works, 2 F. & F. 604.
T. L. R. 57—C. A.

(g) *Greenland v. Chaplin*, 5 Ex. 243; 82 R. R. 655.

(f) See *Greenland v. Chaplin*, 5 Ex. 248; 82 R. R. 655. See also (h) 4 P. & D. 672; 1 Q. B. 29; *Brownlow v. Metropolitan Board* 55 R. R. 191.

judgment, held that the rule in question had no application in such cases. There, the defendant's servant had negligently left a horse and cart unattended in a public street, and the plaintiff, a child under seven years of age, during his absence, had climbed on the wheel, whereupon another child incautiously led the horse on, with the result that the plaintiff was thrown down and hurt; and it was held that the defendant was liable in an action for negligence, although the plaintiff was a trespasser and contributed to the mischief by his act; and that it was properly left to the jury to say whether the conduct of the defendant's servant was negligent, and, if so, whether his negligence caused the injury. But the authority of this case has been doubted (*i*), and a distinction has been drawn between cases in which the conduct of the child amounts to what in an adult would be mere negligence, and those in which it amounts to intentional trespass (*k*). If a child of very tender years is guilty of what in an adult would be mere negligence and nothing more, as, for instance, where it is exercising a right of passage on a public way but in a careless manner, and in so doing is injured by an act of which the negligence of another is the proximate cause, it seems clear that the conduct of the child can afford no defence to an action to recover damages on its behalf (*l*). But where such a child is guilty, not of mere carelessness in the doing of a lawful act, but of a wholly unlawful act such as a wilful and intentional trespass (*m*), it is doubtful whether such conduct will not afford a defence to an action for negligence. If *Lynch v. Nurdin* (*n*) is good law, it is clear that it would not do so, but if, on the other hand, the ruling in more recent cases is to be accepted, it would seem to be equally clear that it would (*o*).

(*i*) *Lygo v. Newbold*, 96 R. R. 727; 9 Exch., at p. 305—per Alderson, B.; *Mann v. Ward*, 8 T. L. R. 699—per Lord Esher, M. R. But see the observations of Cockburn, C. J., in *Clark v. Chambers*, 3 Q. B. D. 338, 339.

(*k*) Clerk & Lindsell on Torts, 3rd Ed., p. 477.

(*l*) *Gardner v. Grace*, 1 F. & F. 359—Channel, B., at N. P.; *Lay v. Midland Rail. Co.*, 34 L. T. 30.

(*m*) See Clerk & Lindsell on Torts, 3rd Ed., p. 478.

(*n*) See note (*h*), supra.

(*o*) See *Hughe v. Macfie*, 33 L. J., Ex. 177, where it was held that a child of seven who had wrongfully climbed upon the defendant's cellar-flap, which the latter had negligently reared against the wall of his house, and had been injured in jumping off, could not maintain an action. See also *Mangan v. Atterton*, L. R., 1 Ex. 239; 35 L. J., Ex. 161, where the same conclusion was arrived at in the case of a child of four who had injured its hand in meddling with a machine exposed by the

As a general rule of law, every one in the conduct of that which may be harmful to others if misconducted, is bound to use due care and skill, and the wrongdoer is not without the pale of the law for this purpose (p).

A wrongdoer not without the pale of the law.

Therefore, where the defendant negligently drove his horses and waggon against and killed an ass, which had been left in the highway fettered in the fore feet, and was thus unable to get out of the way of the defendant's waggon, which was going at a smartish pace along the road, Erskine J. told the jury, that though the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it might be illegal, still if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff, which they accordingly did.

Driving against an ass left fettered on the road.

The Court of Exchequer refused a rule for a new trial which was applied for on the ground of misdirection; and Parke, B., said, "The correct rule is laid down in *Bridge v. The Grand Junction Railway Company* (q), namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence. Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road" (r).

In an action for damage occasioned by the defendant's negligence, a material question is, whether or not the plaintiff might have escaped the damage by ordinary care on his own part (s).

Question of ordinary care on the part of the plaintiff.

defendant, unfenced, in a public place. But see as to this case the observations of Cockburn, C. J., in *Clark v. Chambers*, 3 Q. B. D. 338, 339. See also Pollock on Torts, 7th Ed., pp. 465, 580 n.
(p) See per Lord Denman, C. J., *Mayor of Colchester v. Brooke*, 7

Q. B. 377; 68 R. R. 458.

(q) *Bridge v. The Grand Junction Rail. Co.*, 3 M. & W. 244; 49 R. R. 590.

(r) *Davies v. Mann*, 10 M. & W. 546; 62 R. R. 698.

(s) *Clayards v. Dethick*, 12 Q. B. 439; 76 L. R. 305.

On the part
of the defend-
ant.

There is negligence, and a want of ordinary care, if a person riding a vicious horse applies the spur when in close proximity to a bystander, and the horse kicks out and injures him; but there would not be negligence nor a want of ordinary care, if the person riding the horse is not aware that it is a vicious one, and it suddenly kicks out without provocation, and kills a bystander (*t*).

Circum-
stances of
the case
must be left
to the jury.

The defendant, however, is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger; the amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury (*u*).

Horse injured
in being led
out of the
stable.

Therefore, where Commissioners of Sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only a narrow passage, on which they heaped rubbish, and a cabman, in the exercise of his calling, attempted to lead his horse out over the rubbish, and the horse fell and was killed, for which loss he brought an action:—It was held by the Court of Queen's Bench that the plaintiff was not disentitled to recover because he had, at some hazard created by the defendants, brought his horse out of the stable. Also, that the case was properly left to the jury on the question whether or not the plaintiff had persisted, contrary to express warning at the time (as to which there was contradictory evidence), in running upon a great and obvious danger (*u*).

Where no
negligence on
the part of
the defendant.

The mere fact of an accident happening to a very young child will not raise a presumption of negligence any more than in the case of an adult. In a case in which a child three years old strayed upon a railway, and had its leg cut off by a passing train, it was therefore held that in the absence of any evidence to show any negligence on the part of the company, they were not responsible for the injury (*x*).

A heap left
on the high-
way.

If a person using ordinary care is injured by falling over a heap on a highway, the person who left it there is liable (*y*).

Opportunity
of seeing the
obstruction.

But a person who is injured by an obstruction, against which he may fall on a highway, cannot maintain an action, if it appear that he was riding with great violence

(*t*) *North v. Smith*, 10 C. B., N. S. 572.

(*u*) *Clayards v. Dethick*, 12 Q. B. 439.

(*x*) *Singleton v. Eastern Counties Rail. Co.*, 7 C. B., N. S. 287.

(*y*) *Tucker v. Arbridge Highway Board*, 53 J. P. 87.

and want of ordinary care, without which he might have seen and avoided the obstruction. Thus Lord Ellenborough, C. J., said, "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right" (z).

The opportunity, however, of seeing stones during the day is no defence to an action for damage caused by running over them at night (a).

Running over stones at night.

When a railway company constructs its line across a highway on a level under the sanction of an Act of Parliament, it is the duty of the company to keep the crossing in a proper state for the passage of carriages across the rails; if, therefore, a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company is liable (b).

Level crossing in improper state.

If a person leaves the highway and sustains injury, he cannot recover any damages. Thus, where a person stepped aside at night from a highway, and fell into the foundation of a house, and broke his leg, and brought an action against the defendant, Cresswell J. held that there was a wilful departure from the highway, and, in summing up, directed the jury that the first question for them to consider was, whether the excavation made by the defendant prevented the public from passing in safety along the highway. A second question, involved in the first, was, whether the defendant was bound to have fenced off the excavation; and, thirdly, had the defendant tumbled into the hole while passing along the highway. The evidence was that he had departed from the road. The jury found a verdict for the defendant (c).

Leaving the highway

But when the newly-made and unfenced excavation for a house adjoins an immemorial public way, which is found by the jury to render the way unsafe to those who use it with ordinary care, it is a public nuisance, though the danger consists in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much

Excavation a public nuisance.

(z) See *Butterfield v. Forrester*, 11 East, 61; 10 R. R. 433.

(a) Per Rolfe, B., *Griere v. Milton*, Carlisle Spr. Ass. 1850.

(b) *Oliver v. North Eastern Rail. Co.*, L. R., 9 Q. B. 409; 43 L. J., Q. B. 198. See also *Sadler v.*

South Staffordshire, &c., Steam Tramways Co., L. J., Q. B. 179; 40 L. T. 344; 37 W. R. 204—C.

(c) *Firth v. Ackroyd*, cor. Cresswell, J., York Spr. Ass., March 10, 1853.

impeded, as in the case of an ordinary nuisance to a highway (*d*). And a private injury arising from a public nuisance is the subject-matter of an action for damages (*e*).

Steam roller.

Where a steam roller, though lawfully on the highway constitutes a nuisance, the owners are liable for damage caused thereby although they have not been guilty of any negligence, and it is a question for the jury in each case whether the steam roller was or was not a nuisance on the occasion complained of (*f*).

Trespasser may maintain an action.

It by no means follows that, because the person injured is a trespasser on the land at the time the injury was sustained, he cannot maintain an action. A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained (*g*).

True test of legal liability.

The proper and true test of legal liability in these cases is, whether the excavation be substantially adjoining the way. When an excavation is made adjoining a public way, so that a person walking on the public way might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse and carriage, who might by the sudden starting of the horse be thrown into the excavation, it is reasonable that the person making such an excavation should be liable for the consequences. But it would not be reasonable that he should be liable for the consequences, 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 (*h*).

Owners of private ways may be liable for negligence.

But it is not only when injury results to persons using a public way from the negligence of adjoining proprietors, that an action lies. It lies also against the owner of a private way for injury to person lawfully, and by his permission, using it, if caused by the negligence of his servants, and if not arising from the risks attendant on the ordinary nature of the business carried on, as

(*d*) *Barnes v. Ward*, 9 C. B. 392; 82 R. R. 375; *Hadley v. Taylor*, L. R., 1 C. P. 53.

(*e*) *Hardcastle v. South Yorkshire Rail. Co.*, 28 L. J., Ex. 139. See also *Houssell v. Smyth*, 7 C. B., N. S. 731; *Benjamin v. Storr*, L. R., 9 C. P. 400; 43 L. J., C. P. 162; 30 L. T. 362; 22 W. R. 631.

(*f*) *Jeffrey v. St. Pancras Vestry*, 63 L. J., Q. B. 618.

(*g*) *Sadler v. Henlock*, 24 L. J., Q. B. 138; *Blake v. Thirst*, 2 H. & C. 20; *Butler v. Hunter*, 7 H. & N. 826.

(*h*) *Hardcastle v. South Yorkshire Rail. Co.*, 28 L. J., Ex. 139. See also *Houssell v. Smyth*, 7 C. B., N. S. 731; *Benjamin v. Storr*, L. R., 9 C. P. 400; 43 L. J., C. P. 162; 30 L. T. 362; 22 W. R. 631.

where the injury was caused by negligently lowering goods from a warehouse, under which the private way passed (i).

Where the defendant's horse by the negligence of his servant ran away with a cart and turned into the yard of the defendant's house, which opened on to the highway, and the plaintiff's wife, who happened to be paying a visit at the house ran out into the yard to see what was the matter, when she was met and knocked down by the horse and cart, it was held that as the defendant's servant was not bound to anticipate that the woman would be in the yard, there was no duty on the part of the defendant towards her, and that the action was therefore not maintainable (k).

Where one person having a right over a private road causes an obstruction which results in an injury to another person having a similar right, the person causing the obstruction is liable. In *Clark v. Chambers* (l), the defendant, who was in the occupation of certain premises abutting on a private road consisting of a carriage and footway over which he had a right of way, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises and overlooking the sports. In the middle of this barrier was a gap, which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that the defendant had no legal right to erect this barrier. A person, without the defendant's authority, removed part of the barrier armed with spikes, commonly called *chevaux-de-frise*, from the carriage-way where the defendant had placed it, and put it in an upright position across the footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier, and getting on the footpath was proceeding along it when his eye came in contact with one of the spikes of the *chevaux-de-frise* and was injured. It was not suggested that the plaintiff was

Injury to person unexpectedly on defendant's premises.

Obstruction by licensee of private road. Intervening act of third party.

(i) *Gallagher v. Humphrey*, 6 L. T. 684; 10 W. R. 664. See also *Murley v. Grove*, 46 J. P. 360.
(k) *Tolhausen v. Davies*, 58 L. J., Q. B. 98—C. A. See also *Batchelor v. Fortescue*, 11 Q. B. D. 474—C. A.
(l) *Clark v. Chambers*, 3 Q. B. D. 327; 47 L. J., Q. B. 427; 38 L. T. 454.

guilty of any negligence contributing to the accident, and the jury found that the use of the *chevaux-de-frise* in the road was dangerous to the safety of the persons using it. It was held, that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriage-way (*m*).

Liability of contractor.

Although where a contractor does what he contracts to do, the act of the employed is the act of the employer; yet where the act to be done is lawful, the contractor is liable for anything done negligently, or beyond his contract (*n*). But a contractor lawfully employed to construct a sewer under a road, is not liable for injury caused to an individual, through a hole having formed in the roadway from the natural subsidence of the ground, the work having been properly completed by the defendant (*o*).

Where there are several ways of doing a thing.

So, if a man employs another to do a thing, and there are several ways of doing it, one criminal and another innocent, and he does it in a criminal manner, the employer is not liable (*p*).

Liability of an employer.

If a contractor, however, is employed to do an unlawful act, the employer is liable, because in such case the act of the employed is the act of the employer. Therefore, where the defendants had employed a contractor to open, without legal authority, the streets of Sheffield, and the plaintiff was injured by the rubbish, it was held that this being the act from which the injury arose, the defendants were liable (*q*). And where a duty is imposed on the defendant by common law (*r*), or by a statute (*s*), he cannot excuse himself by throwing the blame on his contractor.

(*m*) *Clark v. Chambers*, 3 Q. B. D. 327; 47 L. J., Q. B. 427; 38 L. T. 454.

(*n*) *Ellis v. Sheffield Gas Co.*, 23 L. J., Q. B. 42; *Gray v. Pullen*, 32 L. J., Q. B. 169.

(*o*) *Hyams v. Webster*, L. R., 2 Q. B. 264; L. R., 4 Q. B. 138—Ex. Ch.

(*p*) *Peachey v. Roland*, 13 C. B. 182; 93 R. R. 483. See, too, *Cleeland v. Spier*, 16 C. B., N. S. 399.

(*q*) *Ellis v. Sheffield Gas Co.*, 23

L. J., Q. B. 42. And see *Whiteley v. Pepper*, 2 Q. B. D. 276; 46 L. J., Q. B. 436; 36 L. T. 588; 25 W. R. 607.

(*r*) *Tarry v. Ashton*, 1 Q. B. D. 314; 45 L. J., Q. B. 260; 34 L. T. 97; 24 W. R. 581. See also *Bower v. Peate*, 1 Q. B. D. 321; 45 L. J., Q. B. 446; 35 L. T. 321.

(*s*) *Hole v. Sittingbourne Rail. Co.*, 6 H. & N. 488; 30 L. J., Ex. 81.

The question in such cases is, whether the injury was the act of the party as the employer's servant, or in the character of contractor; because in the first place the employer would be liable to an action, and in the second he would not (t). And the test applicable to the determination of this fact is whether the employer has any control over the persons employed as to the manner in which their work should be performed (u).

What is the question in such cases.

Thus the defendant with the consent of the owner of the soil and the surveyor of the district, employed P., who was an ordinary labourer, but nevertheless a person particularly skilled in the construction of drains, to cleanse a drain, which ran from the defendant's garden under the public road, and paid P. five shillings for the job. The defendant had never before employed P., and did not in any way interfere with or direct him in doing the job. But it was held that the relationship of master and servant had been established between the defendant and P., so as to render the defendant liable for an injury occasioned to the plaintiff, whilst riding on the public road, by reason of the negligent manner in which P. had left the soil of the road over the drain, because P. was not a person exercising the independent business of making and repairing drains, but only a labourer chosen by the defendant in preference to any other person (x).

Drain repaired by an ordinary but skilful labourer.

But in a case in which the defendants were employed by A. to pave a district, and contracted with B. to pave one of the streets, and B.'s workmen, in the course of paving the street, left some stones at night in such a position as to constitute a public nuisance, and the plaintiff was injured by falling over these stones; it was held that, as no personal interference of the defendants with, or sanction of, the work of laying down the stones was proved, the defendants were not liable (y).

Stones left by a sub-contractor.

When a surveyor of highways has been ordered by a vestry to do certain works on a highway, and during the performance of those works an accident occurs in

Statutory duty. Surveyor of highways.

(t) *Knight v. For.* 5 Ex. 725; *Overton v. Freeman*, 21 L. J., C. P. 52.

(u) *Sadler v. Henlock*, 24 L. J., Q. B. 138; *Blake v. Thirst*, 2 H. & C. 20; *Butler v. Hunter*, 7 H. N. 826.

(x) *Ibid.*

(y) *Overton v. Freeman*, 21 L. J.,

C. P. 52; *Gray v. Pullen*, 32 L. J., Q. B. 169; this latter case was reversed in the Exchequer Chamber, 34 L. J., Q. B. 265; but the reasoning on which the decision was founded has been disapproved: see *Wilson v. Merry*, L. R., 1 H. L. 326, 341.

consequence of the road being left in a dangerous condition, the surveyor is guilty of neglect of a statutory duty, under 5 & 6 Will. 4, c. 50, s. 56, and will be liable in an action for damage, notwithstanding that he has contracted with a third party for supplying the necessary labour, and has not personally interfered with the work (z).

Works
executed
under local
Acts.

If in the execution of works authorized by Act of Parliament damage be sustained, and the Act provides a special mode in which compensation for such damage may be recovered, no action will lie for it. But this only relates to works carefully and skilfully executed, and if there be a want of proper skill on the part of those executing the works an action for the negligence, to recover damages for the injury thus sustained, will lie (a).

Both parties
to blame.

Where the negligence of both parties concurs in producing the damage, so that both are to blame, neither party can recover. Thus, where the plaintiff, in crossing a road, was knocked down and seriously injured by the defendant's cart, Tindal, C.J., told the jury that they must be satisfied that the injury was attributable to the negligence of the driver and to that *alone*, before they could find a verdict for the plaintiff; for if they thought that it was occasioned in *any degree* by the improper conduct of the plaintiff in crossing the road in an incautious and imprudent manner, they must find their verdict for the defendant (b). And where an action was brought for an injury to the plaintiff's chaise by the defendant's carriage, Alderson, J., left it to the jury to say whether the injury was occasioned by negligence on the part of the defendant's servant, without *any* negligence on the part of the plaintiff himself; for that if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict (c). So, also, if a person sees another carriage coming furiously on the wrong side of the road, and does not get out of the way when he has the opportunity, he cannot recover for any injury he may sustain (d).

(z) *Taunton v. Greenhalgh*, 24 W. R. 311—C. A.; reversing L. R., 9 Q. B. 487; 43 L. J., Q. B. 168; 31 L. T. 184; 23 W. R. 4; see also *Pendlebury v. Greenhalgh*, 1 Q. B. D. 36; 45 L. J., Q. B. 3; 33 L. T. 372; 24 W. R. 98—C. A. In *Hardenstle v. Bielby*, [1892] 1 Q. B. 709; 61 L. J., M. C. 101, a conviction for causing an obstruction under

similar circumstances was quashed.

(a) *Clothier v. Webster*, 31 L. J., C. P. 316; *Ohrby v. Ryde Commissioners*, 33 L. J., Q. B. 296.

(b) *Hawkins v. Cooper*, 8 C. & P. 473.

(c) *Pluckwell v. Wilson, Bart.*, 5 C. & P. 375.

(d) See *Reed v. Tate*, post, p. 342.

In an action brought by an infant plaintiff against a railway company for an injury from an accident, which was caused by the joint negligence of the defendants and the grandmother of the child, who had charge of it, the child being unable to take care of itself, it was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the child could not maintain an action against the company, as a complete identification was constituted between the plaintiff and the party whose negligence contributed to the damage (e).

Identification of child with person in charge of it.

In the case of *Thorogood v. Bryan* (f), where a person was run over and killed by an omnibus which was racing, and the negligence of the driver of the omnibus, in which the deceased was a passenger, was relied on as a defence to the action brought by the widow of the deceased, it was held that the deceased having trusted the party by selecting the particular conveyance, he had so far identified himself with the carriage in which he was travelling, that want of care on the part of its driver was a defence for the driver of the other carriage, which directly caused the injury; and that this was in accordance with the opinion expressed by the Court of Exchequer in *Bridge v. The Grand Junction Railway Company* (g). The soundness of this doctrine was, however, doubted from the first in this country (h), and subsequently in Scotland (i) and America (k), and the former case has now been finally overruled (l). The direction to the jury in an action by a passenger on an omnibus against the owner of another vehicle for compensation for damages sustained by collision should therefore be, "was there negligence on the part of the driver of the other vehicle which caused the accident? if so it is no answer to say that there was also negligence on the part of the omnibus driver," the plaintiff in such case not being disentitled to recover by reason of the negligence of the driver of the omnibus on which he was a passenger (m).

Doctrine of identification of passenger with driver exploded.

(e) *Waite v. North Eastern Rail. Co.*, E. B. & E. 719.

(f) *Thorogood v. Bryan*, 8 C. B. 130.

(g) *Bridge v. The Grand Junction Rail. Co.*, 3 M. & W. 244; 49 R. R. 590.

(h) 1 Sm. L. C., 3rd Ed. by Willis & Keating, p. 132a. See also 1 Sm. L. C., 11th Ed., at p. 288. In this doubt Parke, B., seems to have concurred. See *The Bernina*, 12

P. D. at p. 71—per Lord Esher, M. R. See also *The Milan*, Lush. 388.

(i) *Adams v. Glasgow and South Western Rail. Co.*, 2 Court Sess. Cas., 4th ser. 215.

(k) See *Little v. Hockett*, 9 Davis Supr. Ct. U. S. 360.

(l) *Mills v. Armstrong (The Bernina)*, 13 App. Cas. 1; 57 L. J., P. D. & A. 65; 58 L. T. 423; 36 W. R. 870; 52 J. P. 212.

(m) *Matthews v. London Street*

Altogether an accident.

Where the injury arises *altogether* from *accident* the defendant is not liable (n). Thus, where an action of *trespass* was brought for injury done to a horse by a pony and chaise running against it, the plaintiff called witnesses who said they saw the pony and chaise standing half an hour in the street without any person to take care of them, and also they afterwards saw the pony run away with the chaise and run against the plaintiff's horse, but they did not know the cause of the pony's starting. It was sworn on the part of the defendant, that his wife was holding the pony by the bridle, when a Punch and Judy show coming by frightened the pony, which ran away, and almost pulled down the defendant's wife while she tried to hold it in, and she was obliged at length to let go the rein. Lord Denman, C. J., in summing up, said to the jury, "If the facts are true as suggested for the defence, I very much think you would be disposed to consider this as an *inevitable accident*, one which the defendant could not prevent." However, the jury disbelieved the defendant's evidence, and found a verdict for the plaintiff (o).

Running over a person at night.

In the following case, a servant was sent with a van and a horse on some errand by the defendant, with directions to bring back with him another horse, which had been left on the road. When the servant obtained possession of the second horse, which seemed to have been in the habit of following the van without being tied, he gave a boy permission to ride him. As the servant drove on, he came upon the plaintiff, who was returning home late at night with a hand-barrow, and, seeing him, he turned his horse's head out of his direct line to avoid him. The boy and horse behind, however, went on without noticing the plaintiff, and the consequence was they both fell over him and severely injured him. On the trial Pollock, C. B., nonsuited the plaintiff, being of opinion that the defendant was not liable for this, and ruled that the declaration was not supported, as the horse which did the injury was not conducted or driven by the servant of the defendant. And the Court of Exchequer afterwards held that this ruling was correct, and that the facts clearly showed that the

Tramways Co., 58 L. J., Q. B. 12 : 60 L. T. 47 ; 52 J. P. 774. See also *Pike v. London General Omnibus Co.*, 8 T. L. R. 164.

(n) Per Alderson, J., *Pluckwell v. Wilson*, 5 C. & P. 375.

(o) *Goodman v. Taylor*, 5 C. & P. 410.

injury sustained by the plaintiff was the result of the purest accident (*p*).

This was held to be the case, where the defendant's horse, being frightened by the sudden noise of a butcher's cart, which was driven furiously along the street, became ungovernable, and plunged the shaft of a gig into the breast of the plaintiff's horse (*q*). So, too, where a horse ridden by the defendant was frightened by a clap of thunder, and ran over the plaintiff, who was incautiously standing with others in the carriage-road (*r*).

In *Hammack v. White* (*s*), the defendant having bought a horse at Tattersall's, the next day took him out to try him in Finsbury Circus, a much-frequented thoroughfare. From some unexplained cause the horse became restive, and notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement, and killed a man. It was held that these facts disclosed no evidence of negligence, which the Judge was warranted in submitting to the jury; Erle, C. J., saying, "I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury, unless he gives some affirmative evidence that there has been negligence on the part of the defendant. The sort of negligence imputed here is either that the defendant was unskilful in the management of the horse, or imprudent in taking a vicious animal, or one with whose propensities or temper he was not sufficiently acquainted, into a populous neighbourhood. The evidence is, that the defendant was seen riding a horse at a slow pace, that the horse seemed restless and the defendant was holding the reins tightly, omitting nothing he could do to avoid the accident; but that the horse swerved from the roadway on to the pavement, where the deceased was walking, and knocked him down, and injured him fatally. I can see nothing in this evidence to show that the defendant was unskilful as a rider or in the management of a horse. There is nothing which satisfies my mind affirmatively that the defendant was not quite capable of riding so as to justify him in being with his horse at the place in question. It appears that the defendant had only bought the horse the day before, and was for the first time trying his new purchase, using his

Where it is the result of the sudden fright of a horse.

Trying horse in frequented thoroughfare.

Hammack v. White.

(*p*) *Bird v. Sharpe*, Ex. Nov. 5, 1853.

(*q*) *Wakeman v. Robinson*, 1 Bing. 213; 25 R. R. 618.

(*r*) *Gibbons v. Pipper*, 1 Ld Raym. 38.

(*s*) *Hammack v. White*, 11 C. B., N. S. 588.

horse in the way he intended to use it. It is said that the defendant was not justified in riding in that place a horse whose temper he was unacquainted with. But I am of opinion that a man is not to be charged with want of caution because he buys a horse without having had previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will make a horse restive. The mere fact of restiveness is not even *prima facie* evidence of negligence" (t).

Horse inexplicably bolting.
Manzoni v. Douglas.

Where a horse drawing a brougham under the care of the defendant's coachman in a public street suddenly, and without any explainable cause, bolted, and, notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and injured the plaintiff, it was held that there was no evidence of negligence to go to the jury; and that the fact that the horse had cast a shoe shortly after he bolted, and that the driver did not under the circumstances in which he was placed call out or give any warning, did not alter the case (u).

Rule as to horse running away.

In all cases, therefore, where a horse *runs away* and inflicts an injury, if the rider or driver has not acted in such a manner as would lead a jury to suppose that his conduct must have contributed to the accident, he is not answerable (x).

Qualification of rule.

But the rule that a person is not answerable for injury resulting from circumstances over which he has no control admits of this qualification, namely, that if a person is aware beforehand that the circumstances in which of his own free will he is about to place himself, will put him in a position over which he has no control, and in which he will probably cause injury to others, he will then be answerable for an injury so caused; thus, if in the case quoted above of *Hammack v. White*, the defendant had been proved to have known beforehand that the horse was vicious and unmanageable (y), he would have been held responsible.

Where a passenger in an omnibus was injured by a blow from one of the horses, which had kicked through the

(t) *Hammack v. White*, 11 C. B., N. S. 588.

(u) *Manzoni v. Douglas*, 6 Q. B. D. 145; 40 L. J., C. P. 289; upholding *Hammack v. White*, ubi supra.

(x) See ante, p. 314; *Ree v. Timmins*, 7 C. & P. 500; and see

Holmes v. Mather L. R., 10 Ex. 261; 44 L. J., Ex. 176; 33 L. T. 361.

(y) See judgment of Willes, J., *Hammack v. White*, 11 C. B., N. S. 597. See also *Villiers v. Arey*, 3 T. L. R. 812.

front panel of the vehicle, and there was no evidence on the part of the passenger that the horse was a kicker; but it was proved that the panel bore marks of other kicks, and that no precaution had been taken by the use of a kicking-strap or otherwise against the possible consequences of a horse striking out, and no explanation was offered on the part of the owner of the omnibus; it was held that there was evidence of negligence proper to be submitted to a jury (z).

The proof of negligence must be affirmative. Therefore where there is a perfectly even balance of evidence there is no negligence. Thus, in the case of *Cotton v. Wood* (a), the plaintiff's wife, on a dark night, and in a snowstorm, proceeded slowly, accompanied by another female, to cross a crowded thoroughfare, whilst the defendant's omnibus was coming up on the right side of the road, and at a moderate pace. There was abundant time for the women to have got safely across, and they had got so far across as to have passed in front of the omnibus, when they were alarmed by the approach of another vehicle from the opposite direction, and turned back; the result of which was that the plaintiff's wife was knocked down and run over by the omnibus, and was so injured that she died. The only circumstance that was at all suggestive of negligence on the part of the defendant was that, though he saw the women cross in front of his omnibus, he had at the moment when they turned back looked round to speak to the conductor, and therefore was not aware of their danger, until warned by a cry of a bystander, when it was too late to avert the mischief.

Proof of negligence must be affirmative.

It was held that there was in this case no proof of negligence on the part of the defendant, for it was not shown that there existed some duty owing from the

(z) *Simson v. London General Omnibus Co.*, L. R., 8 C. P. 390; 42 L. J., C. P. 112; 28 L. T. 560; 21 W. R. 595. (a) *Cotton v. Wood*, 8 C. B., N. S. 568.

Canadian Case.—It is some evidence of negligence in a street railway company carrying passengers for reward in a closed vehicle that they used horses which they had reason to suppose were skittish and frightened of a train, where the route passes over a much used railway by a bridge, although the horses had been driven for eighteen months almost daily, and many times a day, over the route and had never run away before. . . . The company's knowledge of the unsuitability of the horses may be inferred from the knowledge of the driver. *Rainnie v. St. John City Rail. Co.*, 31 N. B. R. 582 (1892).

Evidence of negligence.

defendant to the plaintiff, of which there had been a breach. And Erle, C. J., said, "Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case. . . . One of the plaintiff's witnesses stated that the driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. The man was driving on his proper side, and at a proper pace. As far as the evidence goes, there appears to me just as much reason for saying that the plaintiff's wife came negligently into collision with the defendant's horses and omnibus as for saying that the collision was the result of negligence on the part of the defendant's servant. . . . A *scintilla* of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury (b). There must be evidence upon which they might reasonably and properly conclude that there was negligence. . . . The very vague use of the term negligence has led to many cases being left to the jury, in which I have been utterly unable to find the existence of any legal duty, or any evidence of a breach of it."

Where evidence is equally consistent with negligence and no negligence.

When a horse standing in a highway kicked a child.

And in the same case (c) Williams, J., said, "There is another rule of the law of evidence, which is of the first importance, and which is fully established in all the Courts, viz., that where the evidence is equally consistent with either view,—with the existence or non-existence of negligence,—it is not competent to the Judge to leave the matter to the jury."

So, in a case in which the defendant's horse, being on a highway, kicked the plaintiff, a child who was playing there. There being no evidence to show how the horse got to the spot, or that the defendant knew that he was there, or that the defendant knew that he was accustomed to kick, or that the horse was accustomed to kick, or what induced him to kick the child, it was held that there was no evidence from which a jury would be justified in

(b) Quoting from Williams, J., in *Toomey v. London, Brighton, and South Coast Rail. Co.*, 3 C. B., N. S. 146. See also *Cornman v. Eastern Counties Rail. Co.*, 4 H. & N. 781;

Smith v. Midland Rail. Co., 57 L. T. 813; 52 J. P. 262.

(c) *Cotton v. Wood*, 8 C. B., N. S. 568, ante, p. 337.

inferring that the defendant had been guilty of actionable negligence (*d*).

In *Abbott v. Freeman* (*e*), the defendant was the proprietor of a yard and premises used for the sale of horses. The plaintiff attended a sale, and was walking up the yard behind a row of spectators, who were watching a horse then on sale. In order to show the horse's pace, a servant of the defendant led it with a halter down a lane formed by the spectators on one side, and a blank wall on the other. There was no barrier between the horse and the spectators, and when the horse was about ten yards from the plaintiff, another servant of the defendant struck it with a whip in order to make it trot. On being struck the horse swerved into and through the crowd, and kicked and injured the plaintiff. It was a usual thing for a man to be stationed with a whip at the particular point when horses were brought out for sale. There was no evidence as to the kind of blow that was given, nor the character of the horse, nor how it was being led, nor that it was customary to put a barrier for the protection of the public in yards where horses were being sold. The plaintiff sued the defendant to recover damages for injuries caused by the negligence of the defendant's servant; and it was held that there was no evidence upon which the jury could reasonably find negligence on the part of the defendant.

Horse kicking at sale.

Generally speaking, the fact that an omnibus is driven so closely to the kerb as to result in injury to a passenger sitting on the top of the omnibus by his coming in contact with a projection from a lamp-post, or other similar erection, would appear to point to the negligence of the driver; but he is not necessarily guilty of negligence, the question whether he is so or not depending on the circumstances of each particular case. In two recent cases where the accident occurred under circumstances of this nature the driver was acquitted from blame.

Injury to passenger on omnibus.

The first of those cases was *Simon v. London General Omnibus Co.* (*f*). In that case the plaintiff was a passenger on the top of one of the defendant's omnibuses. The driver of the omnibus, in turning out of one street into another, drove close to the kerb to avoid a tramcar which was passing in the same direction, and while

Contact with projection.

(*d*) *Cox v. Burbidge*, 13 C. B., 34 L. T. 544—Ex. D. N. S. 430.

(*e*) 35 L. T. 783—C. A. Reversing

(*f*) 23 T. L. R. 463.

passing an electric light standard, which was on the pavement, the jolt of the omnibus grating round the kerb caused the plaintiff's arm to come in contact with a fire alarm finger post, fixed to and standing out from, the electric standard. The plaintiff's arm was at the time projecting from the omnibus, but the finger post did not project over, but came flush with the kerb. There was no evidence that the driver either saw or knew of the alarm. It was held that as it was not shown that there was an obstruction of such a nature, that with reasonable care the driver ought to have seen it, and ought to have realized the fact that it might or would hit a passenger, there was no evidence of negligence.

The second case was *Hase v. London General Omnibus Co.* (23 T. L. R. 616). There the plaintiff was also a passenger on the top of an omnibus. In consequence of the road along which the omnibus usually travelled being closed, the driver of the omnibus had to pass through side streets, and in turning the corner of one of them drove so close to the kerb that the top of the omnibus, owing to the camber of the road, projected over the pavement. A street lamp stood at the corner with a small iron arm projecting from it, but not sufficiently far to extend over the roadway. While the omnibus was being driven round the corner the iron arm struck the plaintiff on the chest and injured him. There was no traffic which prevented the omnibus from being driven further away from the kerb. The County Court Judge who tried the case found that the driver did not see the projection, and that he was not guilty of negligence in not having seen it, and in driving so close to the kerb, and gave judgment for the defendants. On appeal to the Divisional Court, it was held that there was evidence to support the finding, which was one of fact, and therefore that the Court could not interfere; Lord Alverstone, C. J., however, expressing the hope that it would not be thought that the Court was deciding that there could not be evidence of negligence if a person sitting on the top of an omnibus was injured by coming in contact with anything projecting, a remark which would seem to indicate that the Court was of opinion that the case was very near the line.

Accident
itself some-
times affirma-
tive proof of
negligence.

But there are cases in which the mere occurrence of an accident is *prima facie* proof of negligence, the presumption depending upon the nature of the accident. Thus in a case in which the plaintiff, while walking in a

street in front of the house of a flour-dealer, was injured by a barrel of flour falling upon him from an upper window, it was held that the mere fact of the accident, without any proof of the circumstances under which it occurred, was evidence of negligence to go to the jury in an action against the flour-dealer, the declaration alleging that the plaintiff was injured by the negligence of the defendant's servants. And Pollock, C. B., said, "There are certain cases of which it may be said *res ipsa loquitur*, and this seems to be one of them. The Courts have held that from certain occurrences negligence may be presumed, railway accidents, &c." (g).

It may be taken as a rule that the same evidence is required to establish a case of negligence as would suffice to convict a man of manslaughter (h).

Evidence identical with that required for manslaughter.

Rule of the Road.

The customary rules of driving are, first, that in meeting each party should bear or keep to the left; secondly, that in passing, the foremost person bearing to the left, the other shall pass on the off-side; thirdly, that in crossing, the driver coming transverse, shall bear to the left-hand, so as to be behind the other carriage (i). And these rules are judicially recognised without proof (k). It is customary for foot passengers to take the right-hand side.

Customary rules of driving.

(g) *Byrne v. Boadle*, 33 L. J., Ex. 13. See also *Scott v. London Dock Co.*, 13 W. R. 410, and *Kearney v. London, Brighton, and South Coast Rail. Co.*, L. R., 5 Q. B. 411; affirmed in Ex. Ch., L. R., 6 Q. B. 759.

(h) See judgments of Williams, J., and Wilde, J., *Hammack v. White*, 11 C. B., N. S. 588.

(i) 2 Steph. N. P. 984.

(k) 1 Taylor on Evidence, 10th Ed. 6.

Canadian Cases.—In an action on the case for negligence in driving the defendant's horse whereby his waggon came into collision with and damaged that of the plaintiff, it is not sufficient to prove merely that the defendant was driving on the wrong side of the road, especially if it be shown that the defendant just before the collision had crossed from the left side of the road for the purpose of speaking to a man sitting on a doorstep on the other side, and that the plaintiff's horse at the time of the accident was running away and beyond control. *Stout v. Adams*, 35 N. B. R. 118 (1900). And see *Keenan v. Yeats*, 28 N. B. R. 148.

Defendant's horses and carriage, driven by his servant, while proceeding in a westerly direction along a certain road, met, opposite the gate of defendant's stable yard, situate on the northern side of the road, a horse and truck coming in the opposite

Careless driving.
Rule of road.

In the case of highways not regulated by special Acts, the law of the road is a statutory enactment under 5 & 6 Will. 4, c. 50, s. 78; and by sect. 85, sub-sect. (1) of the Local Government Act, 1888, "bicycles, tricycles, velocipedes, and other similar machines," are declared to be carriages within the meaning of the Highway Acts.

Right side of the road.

If there be no peculiar circumstances to the contrary, it is the duty of each party to keep the regular side of the road. However, a person riding or driving is not bound to keep his side; but if he does not, he must use more care, and keep a better look-out, to avoid collision, than would be necessary if he were on the proper part of the road (l). But the mere fact of a man driving on the wrong side of the road is no evidence of negligent driving in an action brought against him for running over a person, who was crossing a road on foot (m).

Driving on the wrong side in the dark.

If a person driving on the wrong side of the road in the dark accidentally injures another carriage or person, he is answerable for it (n).

Seeing a person coming on his wrong side.

If a person driving a gig on his proper side sees a gig coming down on the wrong side of the road, he must not let himself be run down, but if he have time and room, must get out of the way; for if he does not, he cannot bring an action and recover damages (o).

Does not justify a wanton injury.

And where an action was brought for negligently driving against the plaintiff's horse, and it appeared that the defendant's chaise came out of another road, and in crossing over to its right side broke the leg of the plaintiff's horse, which was then on the wrong side of the road, Lord Ellenborough held that the circumstance of

(l) *Alexander v. Laidley*, Cor. Alderson, B., Carlisle Spr. Assizes, 1847; and *Pluckwell v. Wilson*, 5 C. & P. 375.

(m) *Lloyd v. Ogleby*, 5 C. B., N. S. 667.

(n) See *Handyside v. Wilson*, 3 C. & P. 530; 33 R. R. 695; *Alexander v. Laidley*, ante, p. 341;

Elvin v. Chapman, Cor. Lord Campbell, C. J., Norwich Spr. Assizes, 1853. See also *Leame v. Bray*, 3 East, 593; 7 R. R. vii.

(o) Per Patteson, J., *Reed v. Tate*, Newcastle Spr. Ass. 1846; and see *Case of the Commerce*, 3 Rob. Adm. Cas. 287.

direction, and instead of passing on the southern side attempted to pass on the side nearest the stable yard, the intention of the driver being to proceed to a house a few yards west of the stables, when the horses turned in suddenly towards the yard, knocking down and injuring the plaintiff who was coming along the side walk near the gate: *Held*, that the defendant was liable. *Lownds v. Robinson*, 11 N. S. R. 364 (1877). And see *Conlon v. Connolly*, 10 N. S. R. 95.

the person being on the wrong side of the road was not sufficient to discharge the defendant; for though a person might be on his wrong side of the road, if the road was of sufficient breadth, so that there was full and ample room for the party to pass, he was of opinion that he was bound to take that course which would carry him clear of the person who was on his wrong side; and that if an injury happened by running against such a person he would be answerable. A person being on his wrong side of the road could not justify another in wantonly doing an injury which might be avoided. The question, therefore, to be left to the jury was, whether there was such room, that, though the plaintiff's servant was on his wrong side of the road, there was sufficient room for the defendant's carriage to pass between the plaintiff's horse and the other side of the road (p).

And in another similar case it was held by the Court of King's Bench, that whatever might be the law of the road, it was not to be considered as inflexible and imperatively governing cases where negligence was the question. In the crowded streets of the metropolis, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. Of this the jury are the best judges; and, independently of the law of the road, it is their province to determine from whose negligence the accident has arisen (q).

On the same principle, apparently, it has been laid down in the United States that a traveller on foot or on horseback must give way to, and, if necessary, cross the road for a vehicle with a heavy load (r), and that a lightly-loaded vehicle must, in like manner, give way to a heavily-loaded one (s).

Though the rule of the road is not to be adhered to, if by departing from it an injury can be avoided, and there is clear space enough to get out of the way, yet in cases where parties meet *on a sudden*, and an injury results, the party on the wrong side is answerable, unless it clearly appear that the party on the right side had ample means and opportunity to prevent it (t).

Rule of the road not inflexible.

Light load meeting heavy.

Parties meeting on a sudden.

(p) *Clay v. Wood*, 5 Esp. 42; 8 R. R. 827.

St. 196.

(q) *Wayde v. Lady Carr*, 2 D. & R. 256; 25 R. R. 554; *Lloyd v. Ogleby*, 5 C. B., N. S. 667.

(s) *Grier v. Sampson*, 27 Penn. St. 183.

(r) *Beach v. Parmeter*, 23 Penn.

(t) *Chaplin v. Hawes*, 3 C. & P. 554; 33 R. R. 705.

Rule of the
road applies
to saddle
horses.

The rule of the road as to keeping the proper side *applies to saddle horses* as well as to carriages; and if a carriage and a horse are to pass, the carriage must keep its proper side and so must the horse. But if the driver of a carriage is on his proper side, and sees a horse coming furiously on its wrong side of the road, it is the duty of the driver of the carriage to give way and avoid an accident, although in so doing he goes a little on what would otherwise be the wrong side of the road (u).

Modification
of rule.
Tramcars.

The introduction of tramways has been said to have considerably modified the rule of the road as above stated. There is no reported case on this point in any of the English Reports, but in Scotland Lord President Inglis, in delivering judgment in *Jardine v. Stonefield Laundry Co.* (x), said, "There is one rule of the road which has been very much altered by the appearance of these new vehicles, viz., that one carriage overtaking another is bound to pass it upon the right-hand side. The new rule requires that when a carriage is coming up behind a tramway car, and the car stops, the driver of the other vehicle shall pass upon the left-hand side. That is the opposite of the old rule. The new rule has been introduced from considerations of convenience and safety; and the reason is very obvious, because tramway cars pass upon two lines of tramways, one in one direction, and another in the other. If vehicles were to pass a car on the right-hand side, there would be very great danger of their coming into collision with another car coming the opposite way. That is the reason of the rule."

Ordinary
vehicles
meeting
street or
tramcars.

In America it has been held that the rule of the road had no application to the meeting of ordinary vehicles with street cars; the ground for such decision being, that the latter cannot turn off their path, and the former should turn to that side which appears, under the circumstances, to be the safest, without regard to the usual rule; and the fact that either was on the left of the road at the time of a collision is no evidence of negligence (y). And for the same reason, when a collision occurs between an ordinary vehicle and a street car, travelling side by side, the presumption is that the driver of the vehicle was negligent, the car being unable to turn out (z). This rule appears

(u) *Turley v. Thomas*, 8 C. & P. 103; 66 R. R. 839.

(x) 14 Rettie, 839.

(y) *Hegan v. Eighth Avenue*

Rail. Co., 15 N. Y. 380.

(z) *Suydam v. Grand St. Rail. Co.*, 41 Barb. 365; *Siegel v. Eisen*, 41 Cal. 109.

to be dictated by common sense, and to be applicable to similar cases of collision between an ordinary vehicle and a tramcar in England.

The law as to *foot passengers* is laid down in the following case, where an action of *trespass* was brought for running over a foot passenger with a carriage which was on its wrong side of the road, and Patteson, J., said to the jury, "A *foot passenger* has a right to cross a highway; and it was held in one case (1) that a *foot passenger* has a right to walk along the carriage way. But without going that length, it is quite clear that a *foot passenger* has a right to cross, and that persons driving carriages along the road are liable if they do not take care so as to avoid driving against the foot passengers who are crossing the road; and if a person driving along the road cannot pull up because his reins break, that will be no ground of defence, as he is bound to have proper tackle.

Foot passengers.

"With respect to what has been said about the carriage being on the wrong side of the road, I think you should lay it out of your consideration, as the rule as to the proper side of the road does not apply with respect to *foot passengers*; and as regards the foot passengers, the carriages may go on whichever side of the road they please" (b).

Rule of the road does not apply.

It is the duty of a person who is driving over a crossing for foot passengers at the entrance of a street, to drive slowly, cautiously, and carefully; but it is also the duty of a foot passenger to use due care and caution in going upon such crossing, so as not to get among the carriages, and so receive injury (c).

Going over a crossing.

A person dismounting from a tramcar is just as much bound to look after his own safety as if he were crossing from one side of the street to the other. It is just as much a carriage way as the whole street, and while vehicles are bound to go at a steady pace, and not to be driven furiously, foot passengers crossing carriage ways are bound to look after their own safety, and not to run obvious and unnecessary risk (d).

Alighting from a tramcar.

If there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it

Nuisance on a public highway.

(a) *Boss v. Litton*, 5 C. & P. 407.

(b) *Catteril v. Turley*, 8 C. & P. 693. See also *Lloyd v. Ogleby*, 5 C. B., N. S. 667.

(c) See per Pollock, C. B., *Williams v. Richards*, 3 C. & K.

82. See also *Cotton v. Wood*, 8 C. B., N. S. 568, cited ante, pp. 337, 338.

(d) *Jardine v. Stonefield Laundry Co.*, 14 Rettie, 839, *Ramsay v. Thompson*, 9 Rettie, 140.

does him a special injury, and he can only interfere with it so far as is necessary to exercise his right of passing along the highway; and he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience (e).

Horse and carriage before tradesman's door.

A tradesman may remove a horse and cart or carriage from before his door, if it impedes his business. Thus if a hackney coach stands before a shopkeeper's door, and hinders customers, he may lawfully take hold of the horses and lead them away, and is not bound to take his remedy for damages (f).

Negligent Driving by a Servant.

When the master was liable according to former decisions.

It was formerly held that the master was liable only where his servant caused injury by doing a *lawful act negligently*, but *not* where he *wilfully* did an *illegal one*; and, therefore, in cases of negligent driving, where the servant had the authority of his master to do the particular act, namely, to drive along the highway, which is perfectly lawful in itself, it was held by Patteson, J., that the master was chargeable, because the act so authorized by him had been done negligently; but that if the servant drove wilfully against another, the master was not chargeable for the injury done (g).

Liability now held to be more extensive.

But this definition is not an exhaustive one, for the liability of the master extends beyond the lawful acts of his servant. And the test of his liability is, not whether the acts of his servant are illegal and wilful, or the contrary, but whether they are within the scope of the servant's employment and in the execution of the service for which he is engaged (h).

Limpus v. The General Omnibus Company.

In the case of *Limpus v. The General Omnibus Company* (h), decided in the Exchequer Chamber, which fixed

(e) See Judgment of Court of Queen's Bench, *Dimes v. Petley*, 15 Q. B. 288; 81 R. R. 573; *Bridge v. Grand Junction Rail. Co.*, 3 M. & W. 244; 49 R. R. 590; *Davies v. Mann*, 10 M. & W. 546; 62 R. R. 698; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; 68 R. R. 458.

(f) *Slater v. Swann*, 2 Str. 872. But see the remarks of Jessel, M. R., in *Original Hartlepool Colliery Co. v. Gibb*, 5 Ch. D. at

pp. 721, 772, from which it would appear that the tradesman could only act in the manner above indicated upon the assumption that the obstruction was unreasonable.

(g) *Lyons v. Martin*, 8 A. & E. 515; 3 Nev. & P. 509; 47 R. R. 637; and see *M'Manus v. Cricket*, 1 East, 106; 5 R. R. 518.

(h) *Limpus v. The General Omnibus Co.*, 1 H. & C. 526.

and defined the law on this subject, the driver of the defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. The driver said that he pulled across the plaintiff's omnibus to prevent it passing him. The defendants had given printed instructions to their driver not to obstruct any omnibus.

Martin, B., before whom the case was tried, directed the jury that, "When the relation of master and servant existed, the master was responsible for the reckless and improper conduct of his servant in the course of the service; that if the jury believed that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and doing that which he believed to be for the interest of the defendants, then they were responsible; that if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible; that the instructions given to the defendants' driver by them were immaterial if he did not pursue them; but that, if the act of the defendants' servant was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible." This direction was held to be right by all the Judges with the exception of Wightman, J.

Williams, J., in the course of the argument said, "If a driver in a moment of passion vindictively strikes a horse with a whip, that would not be an act done in the course of his employment; but in this case the servant was pursuing the purpose for which he was employed, viz., to drive the defendants' omnibus. Suppose a master told his servant not to drive when he was drunk, but he nevertheless did so, would not the master be responsible?" And in his judgment he said: "If a master employs a servant to drive and manage a carriage, the master is responsible for any misconduct of the servant in driving and managing it, which must be considered as having resulted from the performance of the duty entrusted to him, and especially if he was acting for his master's benefit and not for any purpose of his own."

Willes, J., said, with reference to the question whether

Acts done within employment and for master's interest.

If servant vindictively strikes a horse with his whip.

Instructions of master, if

disregarded,
immaterial.

the injury was done by the driver in the course of his employment, "It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion, those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment? The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus," which desire was prompted by the fact "that he was employed not only to drive the omnibus, which alone would not support this summing-up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road."

Master liable,
if acts are
done for his
benefit.

Byles, J., after expressing his agreement with the direction of Martin, B., said, "The direction amounts to this, that if a person acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant. It is said that what was done was contrary to the master's instructions; but that might be said in ninety-nine out of a hundred cases in which actions are brought for reckless driving. It is also said that the act was illegal. So, in almost every action for negligent driving, an illegal act is imputed to the servant. If we were to hold this direction wrong, in almost every case a driver would come forward and exaggerate his own misconduct, so that the master would be absolved. Looking at what is a reasonable direction, as well as at what has been already decided, I think this summing-up perfectly correct."

Unless done
out of the
course of the
servant's
employment.

And Blackburn, J. said, with reference to the act being done by the defendant when "in the course of his service and employment," it is "not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it

for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses. But, in this case, I think the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in the course of the employment. The learned Judge goes on to say, that the instructions given to the defendants' servants were immaterial if he did not pursue them (upon which all are agreed); and at the end of his direction he points out that, if the jury were of opinion 'that the true character of the act of the defendants' servant was, that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible.' That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his master's interest nor in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible. That removes all objection, and meets the suggestion that the jury may have been misled by the previous part of the summing-up."

Generally speaking, the relationship of master and servant will not be inferred. Thus where the plaintiff's horse was injured by another horse which became restive owing to the noise of the band of the Salvation Army in the public street, and he thereupon brought an action against the head of the Salvation Army for damages; it was held, that in the absence of evidence to show what the relationship was between the particular members of the Army and the defendant, it could not be inferred that such members were his servants, or were acting under his authority (i).

Under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the registered proprietor of a hackney carriage is responsible for the acts of his driver whilst he is plying for hire as if the relationship of master and servant existed between them, even though it does not, in fact, exist (k).

Relationship of master and servant not inferred.

Liability of cab proprietor.

(i) *London General Omnibus Co. v. Booth*, 63 L. J., Q. B. 244.

(k) *King v. London Improved Cab Co.*, 23 Q. B. D. 281; 58 L. J., Q. B. 456; 61 L. T. 34; 37 W. R. 737; 53 J. P. 788—C. A., approv-

ing *Venables v. Smith*, 2 Q. B. D. 279; 46 L. J., Q. B. 470; 36 L. T. 509; 25 W. R. 584; and overruling *King v. Spurr*, 8 Q. B. D. 104, where it was held that there is only a *prima facie* presumption of

The registered proprietor of a cab in London is therefore liable for the loss of a passenger's luggage through the negligence of the driver (*h*), or for personal injury to the passenger or a stranger (*m*), or damage to the horse or carriage of another (*n*), caused by the negligence of the driver, where there is no wrongful user of the cab by the driver. The fact that the driver through whose negligence the injury was caused is really the servant of a person to whom the cab has been let by the proprietor is immaterial, for the latter cannot, by letting his cab, escape from his liability under the statute. But the right of action against the proprietor which the statute gives to the injured party in such a case does not interfere with any right of action which the latter may have at common law against the driver's master in the ordinary sense of that word (*o*).

Where the defendant and her son were partners in a cab business in London, and a cab belonging to them,

such relationship which may be rebutted by the circumstances of the case. See also *Keen v. Henry*, [1894] 1 Q. B. 292; 63 L. J., Q. B. 211; 69 L. T. 671; 42 W. R. 214; 58 J. P. 262—C. A., where the effect of the ruling in *King v. London Improved Cab Co.* upon the decision in *King v. Spurr* was

pointed out by the Court.

(*l*) *Powles v. Hider*, 25 L. J., Q. B. 331.

(*m*) *Venables v. Smith*, ubi supra; *King v. London Improved Cab Co.* ubi supra.

(*n*) *Keen v. Henry*, ubi supra.

(*o*) *Keen v. Henry*, [1894] 1 Q. B. 292, 294—per Lord Esher, M. R.

"Hack horse."

Cab regulations.

Canadian Cases.—A "hack horse" is one that is usually driven in a hack, without reference to the matter of breeding. *Robinson v. Provincial Exhibition Commission*, 32 N. S. R. 216 (1899).

A municipal by-law that is not just and equal in its operation, or which is unreasonable or permits favouritism, is void. In this case the impugned by-law discriminated in favour of hackmen who happened to own stables, enabling them to stand their vehicles in favourable positions, which privilege was denied to others. *Reg. v. Russell*, 1 B. C. R. (Pt. 1) 256. See *Jonas v. Gilbert*, 5 S. C. R. 356; *Re Nash and McCracken*, 33 U. C. Q. B. 181; *Reg. v. Johnston*, 38 U. C. Q. B. 549.

A municipal by-law prohibited cabs from standing on any street while waiting for hire or engagement: *Held*, that where an hotel company engaged a number of vehicles from a livery man to stand constantly at the hotel doors ready for immediate use by guests of the hotel, the company paying one cent per hour from beginning of attendance until dismissed or hired by a guest, and becoming responsible for the payment by the guests of the fees charged for such service, the by-law was not infringed by the livery man by keeping such vehicles waiting on the street in pursuance of such agreement. *Rex v. Maher*, 10 Ont. L. R. 102 (1905). And see *Canadian Pacific Rail. Co. v. City of Toronto*, 1 Ont. W. R. 255.

which was let in the ordinary way to a cabman, through his negligence came into collision with a vehicle in which the plaintiff was riding, and so caused personal injuries to the plaintiff; it was held that an action by the plaintiff against the defendant in respect of the injuries so occasioned was maintainable, although the cab licence was taken out in the name of the son only; on the ground that the liability imposed in such cases on cab proprietors, by virtue of the Hackney Carriage Acts, is not confined to licensed proprietors, or that the defendant must be considered as being a licensed proprietor in respect of the Act (*p*).

If an injury is caused by the negligence of the driver whilst wrongfully using the cab, or doing anything contrary to the terms of the bailment as between himself and the proprietor, the latter will not be liable, as his liability only exists with respect to acts done by the driver within the scope of his employment. Where a driver, who had no specified time for starting or returning to the proprietor's stables, made a short deviation, for his own convenience, at the close of his day's work, and while returning to the stables, and after such deviation, he was again returning when he ran over and injured the plaintiff; it was held, that the driver was not on an independent journey, and must be considered to be in the proprietor's employ at the time of the accident (*q*). In that case it was contended on behalf of the proprietor that the driver was not acting within the scope of his employment, and Cockburn, C. J., said (*r*), "To determine whether the driver was so acting or not, it is necessary to consider what the terms were upon which the cab was entrusted to the driver. If the employment of the cab by the driver at the time when the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statute for the protection of the public. But it appears that the cab was entrusted to the driver to use entirely at his discretion, provided that he used it properly and returned it to the proprietor's stables when the day's work was over, paying

Scope of
driver's
employment.

(*p*) *Gates v. Bill*, [1902] 2 K. B. 38; 71 L. J., K. B. 702; 87 L. T. 288; 50 W. R. 546—C. A.

(*q*) *Venables v. Smith*, 2 Q. B. 11 279.

(*r*) 2 Q. B. D. 283.

the sum agreed upon between them for the hire of it. I cannot see that the driver did anything wrongful, or contrary to the terms of the bailment as between himself and the proprietor."

Mann v. Ward a doubtful authority.

Where in an action for personal injury against a cab proprietor it appeared that the plaintiff was knocked down and injured by a cab belonging to the defendant, the licensed driver being inside drunk, and the vehicle being driven by an unlicensed man also drunk, but not the servant of the defendant, a nonsuit was ordered to be entered (s). But this case is of doubtful authority. In delivering their judgments in *Engelhart v. Farrant* (t), both Lord Esher, M. R. and Lopes, L. J. entertained doubts as to whether it was fully reported; the former learned Judge saying that it was a question of fact that the Court had to decide, and he suspected that there were some additional facts to those reported; but after all, it was only the decision of the Court of Appeal on a question of fact, and if the Court of Appeal was wrong in that case it was not a binding authority on the Court in the case in question. Whilst Lopes, L. J. said that it was a very peculiar case which must be regarded as a decision on its very peculiar facts, "and if correctly reported, the decision is one at which I could not myself have arrived. It is impossible to reconcile the various decisions with regard to negligence; and the reason is that fact and law are so mixed up in them that they are frequently decisions rather on the facts than on the law, and the variety of facts involved is infinite."

Liability of owner of traction engine.

In *Smith v. Bailey* (u) it was sought to extend the construction placed on the Hackney Carriages Act in the cases just cited to sections 3 and 7 of the Locomotives Act, 1865 (28 & 29 Vict. c. 83), the former of which requires the name and address of the owner to be affixed to a traction engine, the contention being that the legislation was analogous. But the Court declined to do so, Lord Esher, M. R. (x), saying, "I do not think that the construction which has been placed on the Hackney Carriages Acts is any authority for the construction of this Act. Each Act must be construed according to its

(s) *Mann v. Ward*, 8 T. L. R. 699.

(t) [1897] 1 Q. B. 240; 66 L. J., Q. B. 122; 75 L. T. 617; 45 W. R. 179—C. A.

(u) [1891] 2 Q. B. 403; 60 L. J., Q. B. 779; 65 L. T. 331; 40 W. R. 28—C. A.

(x) [1891] 2 Q. B. at p. 406.

own language. I see nothing in this Act to show that the Legislature intended that, if a traction engine is let out and negligently used by the person to whom it is let, the owner of it shall be responsible to a person thereby injured." And it was accordingly held that the owner of a traction engine, to which his name and address were duly affixed, was not liable in respect of injuries occasioned to the plaintiff through the negligent management of the engine whilst it was being used upon a highway by a person to whom it had been let.

Where a master and servant are together in a vehicle, and an accident occurs from which an immediate injury ensues, the master is liable although the servant is driving, and there is no evidence of any interference on the master's part; and even where the evidence on the part of the defendant strictly negatives an interference, the mere presence of the master with the servant will constitute him a trespasser if the act of the servant amount to a trespass (y).

Master and servant driving together.

So where a carriage and horses are hired, and the post-boys are servants of the owner, and an accident ensues in consequence of their negligence, the hirer, if he sit outside and have a view of their proceedings, and do not endeavour to stop their misconduct, is a co-trespasser with them (z).

A master was held liable in an action for damages resulting from the negligence with which his cart had been driven, although it appeared that his servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was riding with him, and who was not in the master's service (a).

Servant entrusting the reins to a stranger.

In that case the declaration stated that the cart was so negligently driven by the defendant's servant that it struck the plaintiff's carriage and so injured it; and it was submitted on behalf of the defendant that he was not liable, on the ground that, as a person not in his service was driving at the time of the accident, the allegation that the cart was driven by the defendant's servant was

(y) *Chandler v. Broughton*, 1 Cr. & M. 29.

(z) *McLaughlin v. Pryor*, 4 Scott, N. R. 655; 4 M. & G. 48; 61 R. R. 455.

(a) *Booth v. Mister*, 7 C. & P. 66. In delivering judgment in *Harris v. Fiat Motors, Ltd.* (22 T. L. R. 556—D.), Ridley, J.,

said that the Court could not treat *Booth v. Mister* as any authority in the face of the decision in *Gwilliam v. Twiss*, infra. The judgment in question was, however, overruled by the Court of Appeal, though upon a different point. See 23 T. L. R. 505.

not sustained by the evidence. And Lord Abinger, C. B., said, "I will reserve the point, but I think that the evidence is sufficient to support the allegation. As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself." No motion was, however, made on the point reserved.

Intervening
act of third
party.

There is no rule of law to prevent a master being liable for the negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case (*b*). In other words, the mere fact that a third party takes upon himself to drive a cart entrusted to the owner's servant, is not sufficient to exonerate the owner if the negligence of his servant has conduced to the act of the third party. If a stranger interferes it does not follow that the master is liable; but equally it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is an effective cause of the accident (*c*).

Effective
cause of
damage.

Where the defendant employed a man to drive a cart, with instructions not to leave it, and a lad, who had nothing to do with the driving, to go in the cart and deliver parcels to his customers; and the driver left the cart in which the lad was, and went into a house, and in his absence the lad drove on, and came into collision with the plaintiff's carriage, it was held that the negligence of the driver in so leaving the cart was the effective cause of the damage, and that the defendant was liable (*d*).

Extent of
servant's
authority.
Sudden
emergency.

It is doubtful whether the servant of the proprietor of a public vehicle has an implied authority, in cases of sudden emergency, to appoint another person to act as servant on his master's behalf (*e*), but it is clear that a servant employed to drive such a vehicle has no authority to delegate the performance of his duty to another person, unless there is a necessity for so doing. This was so held by the

(*b*) *Engelhart v. Farrant*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617; 45 W. R. 179—C. A.

(*c*) See *Engelhart v. Farrant*, [1897] 1 Q. B. at p. 243, per Lord Esher, M.R.

(*d*) *Engelhart v. Farrant*, *supra*.

(*e*) In *Gwilliam v. Twist*, [1895] 2 Q. B. 84, Lord Esher said that he

was very much inclined to agree with the view that the doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of a bill of exchange for the honour of the drawer.

Court of Appeal in the recent case of *Gwilliam v. Twist* (f). There, the defendant's omnibus was being driven by his servant through a public street when a policeman, thinking that the driver was drunk, ordered him to discontinue driving, the omnibus being then only a quarter of a mile from the defendant's yard. The driver and the conductor of the omnibus thereupon authorised a person who happened to be standing by to drive the omnibus home. That person through his negligence while so driving injured the plaintiff. It was held, reversing the judgment of a Divisional Court, that as the defendants might have been communicated with, there was no necessity for their servants to employ the other person, and the employment of such person in the absence of necessity, being clearly beyond the scope of their duty, the defendants were not liable for the negligence of the person so employed.

In an action for damages sustained owing to the negligent driving of the defendant's servant, proof that the defendant's vehicle was being driven by a stranger would not raise any case against the defendant. The plaintiff must in such case go on to show that the stranger was driving with the consent and approval of the defendant, or on such an emergency that his consent must be implied (g). Where, at the end of a journey, the conductor of an omnibus belonging to the defendants, in the absence of the driver, and apparently for the purpose of turning it in the right direction for the next journey, drove it through some by-streets at a considerable pace, and while so doing negligently ran into and injured the plaintiff; and at the trial the latter gave no evidence that the conductor was authorised by the defendants to drive the omnibus in the absence of the driver; at the close of the plaintiff's case judgment was entered for the defendants; and it was held on appeal, by A. L. Smith and Romer, J. J., that the plaintiff had not discharged himself from the burden cast upon him of showing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment, and that the defendants were entitled to judgment. And by Vaughan Williams, L. J., that in general, if, in the absence of the driver of an omnibus, an accident occurs while the

Omnibus
driven by
conductor.

Onus of
proving
authority.

(f) [1895] 2 Q. B. 84; 64 L. J., Q. B. 474; 72 L. T. 579; 43 W. R. 566.

General Omnibus Co., [1900] 2 Q. B. at p. 532, per A. L. Smith, L. J.

(g) See *Beard v. London*

Servant
striking the
horse of
another.

conductor is driving, it would be for the proprietor to show that the act was unauthorised, and that the facts of the particular case negated the giving of authority, and that the defendants were entitled to retain the judgment (h).

If a servant driving his master's carriage in order to effect some purpose of his own, *wantonly* strikes the horse of another person, and produce an accident, the master *will not* be liable. But if in order to *perform his master's orders* he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master *will be* liable, being an act done in pursuance of the servant's employment. And where a coachman, in consequence of his master's carriage having become *entangled* with another, struck the other horses, which were standing still without a driver, upon which they ran away and upset the carriage, the jury thought that the entangling arose originally from the fault of the coachman, and that as he was acting *within the scope* of his employment in endeavouring to extricate himself, the master was liable (i).

Servant
striking
passenger.

The fact that a passenger in an omnibus is struck by the driver's whip is *prima facie* evidence of negligence by the driver in the course of his employment; and even if it appears that the blow was struck at the servant of another omnibus, with whom there had been a dispute, and who had jumped on the omnibus step to get his number, it is a question for the jury whether the blow was struck by the driver in private spite, or in supposed furtherance of his employer's interests (k).

Guard of
omnibus
using undue
violence to a
passenger.

It was held by the Exchequer Chamber in the case of *Seymour v. Greenwood* (l) that the master was liable, where the guard of an omnibus belonging to him, in removing therefrom a passenger, whom he deemed to be drunk, dragged him out with undue violence, and threw him upon the ground, whereby he was seriously injured; for the master, by giving the guard authority to remove offensive passengers, necessarily gives him authority to determine whether any passenger had misconducted himself. And inasmuch as the master puts the guard in his

(h) *Beard v. London General Omnibus Co.* [1900] 2 Q. B. 530; 69 L. J., Q. B. 895; 83 L. T. 362; 48 W. R. 658—C. A.

(i) Per curiam in *Croft v. Alison*, 4 B. & Ald. 592; 23 R. R. 407.

(k) *Ward v. London General Omnibus Co.*, 42 L. J., C. P. 265; 28 L. T. 850—Ex. Ch., affirming the decision of C. P. 27 L. T. 761; 21 W. R. 538.

(l) *Seymour v. Greenwood*, 7 H. & N. 355.

place because it is not convenient for him personally to conduct the omnibus, if the guard forms a wrong judgment, the master is responsible (*m*).

But where a van was standing at the door of the plaintiff, from which the plaintiff's goods were being unladen, and the plaintiff's gig was standing behind the van; and the defendant's coachman drove her carriage up, and there not being room for the carriage to pass, the coachman got off his box and laid hold of the van horse's head; and this caused the van to move, and thereby a packing-case fell out of the van and broke the shafts of the gig; it was held, with the assent of the Barons sitting in the Exchequer Chamber, that the defendant was not liable, as the coachman was not acting in the employ of his mistress, that is, within the scope of his employment, at the time this matter occurred (*n*).

If a servant does what his master employs him to do in a negligent, improper, or roundabout way, and damage is done, the master is liable (*o*).

If a servant driving his master's cart, on his master's business, make a *detour* from the direct road for some purpose of his own, the master will be answerable in damages for any injury occasioned by his careless driving while so out of his road (*p*). And this was so held by Erskine, J., where a servant, having set his master down in Stamford Street, was directed by him to put up in Castle Street, Leicester Square; but in so doing, he went to deliver a parcel of his own in Old Street Road, and in returning along it he drove against an old woman and injured her (*q*).

So, in *Whatman v. Pearson* (*r*), the defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but

Servant removing an obstruction.

Servant acting improperly.

Making a *detour* for his own purposes.

(*m*) Per Williams, J., *Seymour v. Greenwood*, 7 H. & N. 355.

(*n*) *Lamb v. Lady Elizabeth Palk*, 9 C. & P. 629.

(*o*) See per Cresswell, J., *Mitchell v. Cresswell*, 22 L. J., C. P. 104.

(*p*) *Joel v. Morrison*, 6 C. & P. 501; 40 R. R. 814.

(*q*) *Sleath v. Wilson*, 9 C. & P. 608. In this case Erskine, J., took the view that the master was liable because he had put it in the servant's power to mismanage his

carriage by entrusting him with it. But in *Storey v. Ashton*, post, p. 359, the Court declined to adopt this view on the ground that the true rule is, that the master is only responsible so long as the servant is acting within the scope of his employment, which in point of fact he would appear to have been doing.

(*r*) L. R., 3 C. P. 422; and see *Burns v. Poulson*, L. R., 8 C. P. 563; 42 L. J., C. P. 302.

were not permitted to go home to dine, or leave their horses and carts. One of the men went home, about a quarter of a mile out of the direct line of his work, to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff; and it was held that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was.

Servant acting contrary to his trust.

But where a servant is acting, and knows that he is acting, contrary to his trust, and to his master's employment, the master is not liable for any damage which may be done by him (s).

Taking his master's horse without leave.

Thus if a servant without his master's leave or knowledge take his cart or carriage when it is not wanted, and drive it about for his own purposes, the master is not answerable for any injury he may do, because he has not in such case entrusted him with the cart or carriage (t). So where it was the duty of the defendant's carman, after having delivered his master's goods for the day, to return to the house, get the key of the stable, and put up his horse and cart in a mews in an adjoining street; on his return one evening he got the key, and instead of going to the mews, and without the defendant's leave, he drove a fellow-servant in an opposite direction, and on his way back injured the plaintiff by his negligent driving; it was held that the defendant was not liable (u).

And this is further illustrated by *Storey v. Ashton*. In that case the defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles; on their return, when about a quarter of a mile from the defendant's offices, the carman, instead of performing his duty and driving to the defendant's offices, depositing the bottles, and taking the horse and cart to stables in the neighbourhood, was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk's; and while they were thus driving the plaintiff was run over, owing to the negligence of the carman; it was held that the defendant was not liable, for that the carman was not doing the act, in doing which he had been guilty of

(s) See per Cresswell, J., *Mitchell v. Crassweller*, 22 L. J., C. P. 104.

(t) *Joel v. Morrison*, 6 C. & P. 501; 40 R. R. 814; *Sleath v.*

Wilson, 9 C. & P. 608.

(u) *Mitchell v. Crassweller*, 22 L. J., C. P. 100.

negligence, in the course of his employment as a servant (x). And Cockburn, C. J., in delivering judgment in this case, said, "I think that the judgments of Maule and Cresswell, JJ., in *Mitchell v. Crassweller* (y), express the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in *Sleath v. Wilson* (z), that is, because the master has entrusted the servant with the control of the horse and cart that the master is responsible. The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as a servant. I am very far from saying, if the servant, when going on his master's business, took a somewhat longer road, that, owing to his deviation, he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey."

The case of *Rayner v. Mitchell* (a) is another instance of a servant acting beyond the scope of his authority. There a carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out his master's horse and cart, and on his way home negligently ran against a cab and damaged it. The course of the employment of the carman was, that, with the horse and cart, he took out beer to his master's customers, who was a brewer, and in returning to the brewery, he called for empty casks wherever they would be likely to be collected, for which he received from his master a gratuity of 1d. each. At the time of the accident the carman had with him two casks, which he had picked up on his return journey at a public-house which his master supplied, and for which he afterwards received the customary 1d.; and it was held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and, therefore, the master was not liable.

Where a master sent his servant on an errand, and he took and rode a horse belonging to another person without his master's permission, and on his way back inflicted an

Re-entering
on duty.

Taking the
horse of
another

(x) *Storey v. Ashton*, L. R., 4 Q. B. 476; 38 L. J., Q. B. 223; 17 W. R. 727.

(y) See note (u), ante.

(z) See note (t), ante.

(u) 2 C. P. D. 357; 25 W. R. 633.

injury to the plaintiff, Park, J., said, "I cannot bring myself to go the length of supposing that if a man sends his servant on an errand without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act. If it were so, every master might be ruined by acts done by his servant, without his knowledge or authority (b).

No express
authority
of master
necessary.

But where (c) the general manager of the defendant, a horsedealer, had a horse and gig of his own, which he used for the defendant's business as well as his own, and was allowed to keep them on the defendant's premises at the defendant's expense; and, on one occasion, the manager, on putting the horse into the gig, told the defendant that he was going to S. to collect a debt for him and afterwards to see his own doctor; and before he got to S. he drove against and killed the plaintiff's horse; it was held that there was abundant evidence to make the defendant responsible, although he had not *expressly* requested the manager to use the horse and gig on that occasion; and that it is not necessary in cases of this sort that there should be any *express* request, as the jury may imply a request or assent from the general nature of the servant's duty and employment (d). And it was also held in the same case (c) that the proper question to leave to the jury is, whether at the time of the act complained of, the servant was driving on his master's business and with his authority.

Master's
name on
the cart.

According to the language used in the report of the case of *Stables v. Eley* (e), it has been held that if, in an action for negligent driving, it appears that the defendant has held himself out to the world as the owner of a cart by suffering his name to remain painted on it, and over the door of the house of business to which it belongs, an action is maintainable against him in respect of the negligence of the driver, although it is proved that he had for some days ceased to be the owner of the cart, or to be concerned in the business. But this case was recently commented on and disapproved of in the Court of Appeal (f), Lord Esher, M. R., remarking that it must

(b) *Goodman v. Kennel*, 3 C. & P. 167.

(c) *Patten v. Bea*, 26 L. J., C. P. 235.

(d) See also *Tuberville v. Stampe*,

1 Lord Raym. 264, per Holt, C. J.

(e) *Stables v. Eley*, 1 C. & P. 614.

(f) *Smith v. Bailey*, [1891] 2 Q. B. 403; 60 L. J., Q. B. 779.

either be misreported or wrong, and that the utmost effect that can be given to the decision is that under such circumstances there would be *prima facie* evidence of liability, which might be met, however, by showing the truth of the matter (g), and in this opinion Bowen and Kay, L. J.J., concurred.

Where a carriage strikes against another, and a person who sees the transaction demands the address of the owner, the address given by a person in the carriage is admissible in evidence; but a statement that any damages done will be paid for is not so (h).

Giving an address.

If a servant, in the course of his master's employ, drives over any person and does a wilful injury (described by Martin, B., as an act of his own, and in order to effect a purpose of his own (i)), the servant, and not the master, is liable; if the servant, by his negligent driving, in the course of his employment, causes an injury, the master is liable; if the master himself is driving, or though not actually driving is sanctioning the conduct of his servant, he is liable whether the damage be the effect of negligence or of a wilful act done or sanctioned by him (k).

Liability of master and servant respectively.

It is a well-established rule of law that a servant cannot ordinarily sue his master for an injury sustained through the negligence of a fellow-servant (l). And a stranger, invited by a servant, or one who volunteers to assist a servant in his work, while engaged in giving such assistance, bears the same relation to the master as a servant, and is subject to the same disabilities in this respect (m).

Negligence of fellow-servant.

But in all cases the master is bound to use due care in the selection of competent servants, and is liable for negligence in employing incompetent persons to his

Master bound to use due care in selection of servants.

(g) [1891] 2 Q. B. at p. 406.

(h) *Beamon v. Ellice*, 4 C. & P. 586.

(i) *Limpus v. London General Omnibus Co.*, ante, p. 346.

(k) See per Parke, B., *Gordon v. Holt*, 4 Ex. 366; 18 L. J., Ex. 433.

(l) *Tarrant v. Webb*, 25 L. J., C. P. 261; *Waller v. South Eastern Rail. Co.*, 32 L. J., Ex. 295; *Tall v. Johnson*, 13 W. R. 41; *Wiggett v. Fox*, 25 L. J., Ex. 188. The law relating to the liability of employers to make compensation for injuries suffered

by workmen in their service is extended and regulated by the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42); but that Act does not extend to domestic or menial servants. They are, however, included in the Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), which imposes a very extensive liability upon employers as to compensating their servants when injured by accident arising out of and in the course of their employment.

(m) *Potter v. Faulkner*, 31 L. J., Q. B. 30.

servants and to those acting as such. Nevertheless he is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant was incompetent, but whether the master exercised due care in employing him (*n*).

Action by
representa-
tives of a
person
killed.

Formerly, if a person were killed, no action could be maintained by his representatives. Now, however, deodands are abolished (*o*), and under Lord Campbell's Act (*p*) a party causing death is liable to an action in all cases where the party injured might himself have maintained one, if death had not ensued. And such action is to be brought, within twelve calendar months of the death of the injured party, by his executor or administrator, and to be "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused," and among whom the damages are to be divided as the jury shall direct (*q*). A child *en ventre sa mère* is entitled to sue under this Act on the death of its father by negligence (*r*).

By persons
beneficially
interested.

This Act is amended by and is to be read with the 27 & 28 Vict. c. 95, called "An Act for compensating the families of persons killed by accident," by the first section of which, where no action has been brought within six months of the death by the executor or administrator of the person killed, then the action may be brought by the persons beneficially interested in the result of the action. The action may be sustained by a relative of the deceased, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased (*s*). By the second section, the money paid into Court may be paid in one sum, without regard to its division into shares (*t*).

Construction
to be put
upon the
condition in
9 & 10 Vict.
c. 93.

The condition contained in Lord Campbell's Act (*p*), that the action is maintainable in all cases when the party injured might himself have maintained one, if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under

(*n*) *Tarrant v. Webb*, 25 L. J., C. P. 261; *Waller v. South Eastern Rail. Co.*, 32 L. J., Ex. 205; *Hall v. Johnson*, 13 W. R. 411; *Wiggett v. Fox*, 25 L. J., Ex. 188.

(*o*) 9 & 10 Vict. c. 62.

(*p*) *Ibid.*, c. 93.

(*q*) *Ibid.*, ss. 1, 2, 3.

(*r*) *The George and Richard*, L. R., 3 Adm. 466; 24 L. T. 717.

(*s*) *Holleran v. Begnell*, L. R., 4 Ir. 740—C. P. D.

(*t*) 27 & 28 Vict. c. 95.

which the bodily injury arose, and the nature of the wrongful act, neglect or default complained of (*u*). Thus, if the deceased has by his own negligence materially contributed to the accident by which he lost his life, as he, if still living, could not have maintained an action in respect of any bodily injury thus sustained, notwithstanding there might have been negligence on the part of the defendants, an action cannot be maintained under Lord Campbell's Act. But supposing the circumstances of the negligence to be such that, if death had not ensued, the deceased might have brought his action in respect of any injury arising to him from it, his representative, or a person beneficially interested in the result of the action, might maintain an action in respect of an injury arising from a pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased, if he had lived (*x*). But in order to maintain the action the persons on whose behalf it is brought must prove that during the lifetime of the deceased a pecuniary advantage accrued to them owing to their relationship with him. They are not entitled to compensation under the statute, if the only pecuniary benefit to them from his life was derived from a contract which they had entered into with him (*y*).

In an action for negligent driving, a *plan*, which is to be put into the hands of the witnesses, should merely show the street, the pavement, the turnings, corners, &c., and not the supposed position of the carriages; for if it does, the Judge will not allow it to be used (*z*).

Plan of the locality.

An award of compensation by a magistrate against the driver of a hackney or metropolitan stage-carriage upon an information for furious driving under 6 & 7 Vict. c. 86, s. 28 (the London Hackney Carriages Act, 1843), is a bar to a subsequent action against such driver's employers by the party injured in respect of his injuries. And if the party accepts such compensation he is barred from further proceedings, even where he did not lay the

Conviction for furious driving a bar to subsequent action.

(*u*) See *Haigh v. Royal Mail Steam Packet Co.*, 52 L. J., Q. B. 640; 49 L. T. 802; 48 J. P. 230—C. A.

(*x*) Per Cockburn, C. J., *Pym v. Great Northern Rail. Co.*, 2 B. & S. 767; and per Erle, C. J., *S. C.*, 4 B. & S. 406. See also *Franklin v. South Eastern Rail. Co.*, 3 H. & N. 211; *Dalton v. South Eastern*

Rail. Co., 27 L. J., C. P. 227; and *Rowley v. London and North Western Rail. Co.*, L. R. 8 Ex. 221; 42 L. J., Ex. 153; 29 L. T. 180—Ex. Ch.

(*y*) *Sykes v. North Eastern Rail. Co.*, 44 L. J., C. P. 191; 32 L. T. 199; 23 W. R. 173.

(*z*) *Beamon v. Ellice*, 4 C. & P. 586.

Separate
actions in
respect of
same wrong-
ful act.

information, or, in the first instance, request the magistrate to award compensation (a).

Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for damage to the goods is no bar to an action subsequently commenced for the injury to the person. Thus where the plaintiff brought an action in the county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court against the defendant, claiming damages for personal injury due to the same negligence; it was held, by Brett, M. R., and Bowen, L. J., Lord Coleridge, C. J., dissenting, that the latter action was maintainable, and was not barred by the previous proceedings in the county court (b).

Damages.

Generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury. And it is quite clear that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct (c).

Damage too
remote.

A servant, in breach of the Metropolitan Police Act (2 & 3 Vict. c. 47), s. 54, washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the master knew of the grating being obstructed. A horse, while being led past the spot, slipped upon the ice and broke its leg. It was held that this was a consequence too remote to be attributed to the wrongful act of the servant (d). And Bovill, C. J., said, "No doubt, one who commits a wrongful act is responsible for the ordinary

(a) *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271; 46 L. J., Q. B. 429; 36 L. T. 590; 25 W. R. 647.

(b) *Brensdon v. Humphrey*, 14 Q. B. D. 141; 53 L. J., Q. B. 476;

51 L. T. 529; 32 W. R. 944—C. A.

(c) *Rigby v. Hewitt*, 5 Ex. 243; 82 R. R. 652.

(d) *Sharp v. Powell*, L. R., 7 C. P. 253; 41 L. J., C. P. 95; 26 L. T. 436.

consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. 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 wrongdoer liable to an action (e).

A.'s carriage was driven against the wheel of B.'s chaise, and the collision threw a person who was in the chaise upon the dashing-board. The dashing-board fell on the back of the horse, and caused him to kick, and thereby the chaise was injured. It was held that B. was entitled to recover in *trespass* against A. damages commensurate with the whole of the injury sustained (f).

Injury done to a carriage.

Where a horse has been injured by negligent driving, the jury must give as damages the expenses of curing the horse and of his keep during that time, in addition to the difference between the value of the horse before he was injured, and his value after he had been cured. Thus in an action for negligent driving, whereby the plaintiff's horse was injured, it appeared that the horse was sent to a farrier's for six weeks for the purpose of being cured. At the end of that time it was ascertained that the horse was permanently damaged to the extent of 20*l*. And it was held by Lord Abinger, C. B., that the proper measure of damages was the *keep* of the horse at the farrier's, the amount of the *farrier's bill*, and the *difference* between the *value* of the horse at the *time* of the accident and at the *end* of six weeks; but that the plaintiff ought not to be allowed also for the *hire* of another horse during the six weeks.

Measure of damages where a horse has been injured.

In an action by the personal representatives of a deceased person to recover damages for his death under 9 & 10 Vict. c. 93, the jury in assessing the damages, are confined to injuries of which a pecuniary estimate can be

Damages where a person has been killed.

(e) See note (d), ante.

(f) *Hughes v. Quinn*, 8 C. &

(f) *Gilbertson v. Richardson*, 5 P. 703.
C. B. 502.

made, and cannot take into their consideration the mental suffering or the loss of society occasioned to the survivors by his death (*h*).

How limited.

Such an action cannot be maintained without some evidence of actual pecuniary damage (*i*), or the loss of the reasonable probability of pecuniary benefit from the continuance of the life of the deceased (*k*).

The expectation of life of the deceased is an element to be considered by the jury in assessing damages (*l*). But the jury are to give a fair compensation, and not to treat the damages on the footing of the value of an annuity (*m*).

Where the widow of the deceased is the plaintiff, and her husband has made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration; as she is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting premiums from the estimated future earnings of the deceased (*n*).

Cannot be given for funeral expenses.

No damages can be given for funeral expenses or mourning. For the subject-matter of the statute is compensation for injury by reason of a relative not being alive, and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss (*o*).

L. ges not given to a class but to individuals.

The remedy given by Lord Campbell's Act (*p*) is not given to a class but to individuals; and, therefore, on the death of a person, whose income arose from land and personally independent of any exertion of his own, although no portion of it was lost to his family, *as a*

(*h*) *Blake v. Midland Rail. Co.*, 21 L. J., Q. B. 233; *Pym v. Great Northern Rail. Co.*, 4 B. & S. 396.

(*i*) *Duckworth v. Johnson*, 4 H. & N. 653.

(*k*) *Pym v. Great Northern Rail. Co.*, 4 B. & S. 396.

(*l*) *Rowley v. London and North Western Rail. Co.*, L. R., 8 Ex. 221; 42 L. J. Ex. 153—Ex. Ch.

(*m*) *Armstrong v. South Eastern*

Rail. Co., 11 Jur. 758; 81 R. R. 918; Surrey Summer Assizes, 1847, cor. Parke, B., cited L. R., 8 Ex. 230.

(*n*) *Grand Trunk Rail. Co. of Canada v. Jennings*, 13 App. Cas. 800, 58 L. J., P. C. 1; 59 L. T. 679; 37 W. R. 430, approving *Hicks v. Newport, &c., Rail. Co.*, 4 B. & S. 403, n.

(*o*) *Dolton v. South Eastern Rail. Co.*, 27 L. J., C. P. 227.

(*p*) 9 & 10 Vict. c. 33.

whole, by his death, the action is maintainable, if, in consequence of that death, the mode of its distribution is changed to the detriment of some of the members of the family, though to the advantage of others (*q*).

(*q*) *Pym v. Great Northern Rail. Co.*, 4 B. & S. 396.

CHAPTER II.

FEROCIOUS AND VICIOUS ANIMALS.

Wild and
tame animals.

It is laid down that "there is a difference between things *feræ naturæ*, as lions, bears, &c., which a man must always keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses" (a).

As to animals
feræ naturæ
only, *scienter*
unnecessary.

Thus in the case of *Besozzi v. Harris* (b), the defendant was owner of a bear, which he left fastened by a chain six feet long, on a part of his premises accessible to persons frequenting his house. The plaintiff walking past his house was seized by the bear, and injured. An action being brought for damages for this injury, it appeared at the trial that there was no notice or caution, written or verbal, to those visiting the premises, but the bear was proved to have been always tame and docile in its habits up to the time of this attack being made on the plaintiff. The evidence was contradictory as to the plaintiff's knowledge of the bear being there. Crowder, J., thus laid down the law to the jury, "The statement in the declaration, that the defendant knew the bear to be of a fierce nature, must be taken to be proved, as every one must know that such animals as lions and bears are of a savage nature. For though such nature may sleep for a time, this case shows that it may wake up at any time. A person who keeps such an animal is bound so to keep it that it shall do no damage. If it be insufficiently kept, or so kept that a person passing is not sufficiently protected, the owner is liable. If the plaintiff, with knowledge that

(a) *Rex v. Huggins*, 2 Ld. Raym. 1583.

(b) *Besozzi v. Harris*, 1 F. & F. 92.

Horse mansuete by nature.

Canadian Case.—A horse being an animal of a mansuete nature, in the absence of proof of knowledge of his viciousness the owner is not liable for injury done by the horse to a person in the street while the animal is at large. *Chase v. McDonald*, 25 U. C. C. P. 129 (1875).

the bear was there, put herself into a position to receive the injury, she could not recover. But, assuming such knowledge, it is for you to say, whether she had such notice of the proximity of the bear as would amount to negligence disenti- tling her to recover." The jury found for the plaintiff.

An elephant kept for the purpose of exhibition cannot be said to belong to a class of animals which, according to the experience of mankind, is not dangerous to man, and therefore the owner of such an animal keeps it at his own risk, and his liability for damage is not affected by his ignorance of its dangerous character (c). The broad principle which governs cases of this nature is, according to Bowen, L. J. (d), that laid down in *Fletcher v. Rylands* (e), that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control.

(c) *Filburn v. People's Palace, &c.*, Co., 25 Q. B. D. 258; 59 L. J., Q. B. 471; 38 W. R. 706—C. A. See the remarks of Wright, J., in *Harper v. Marcks*, [1894] 2 Q. B.

at p. 323.

(d) 25 Q. B. D. at p. 261.

(e) L. R., 1 Ex. 265; L. R., 3 H. L. 330.

Canadian Cases.—A person, who was present at a fire from motives of curiosity, was knocked down and injured by a horse running away. The horse belonged to the fire department and had been left without any one in charge of it: *Held*, that the defendant corporation was liable. *Guimond v. Corporation of Montreal*, 4 R. L. 285 (1872).

Injury by horse.

A constable in charge of a patrol waggon is not a servant of a board of commissioners of police constituted under s. 481 of the Municipal Act, R. S. O., 1897, c. 223, as amended by 62 Vict. c. 26, c. 28, so as to make them liable for his negligence in the performance of his duties, whereby a person walking in the street was knocked down and injured. *Winterbottom v. London Police Commissioners*, 1 Ont. L. R. 549; 2 Ont. L. R. 105.

A municipal by-law prohibited the driver of an express waggon from leaving it unattended on the stand: *Held*, that the nature or disposition of the horse had nothing to do with the interpretation of the regulation, the object of which was to compel the driver to remain in close proximity to horse and vehicle. *Reg. v. Duggan*, 21 C. L. T. (Occ. N.) 35.

Running at large.

In an action for damages for the death of two horses caused by the stings of bees, it was shown that the bees were in ordinary flight at the time of the accident. that they were the defendant's bees, and that the defendant had reasonable grounds for believing that his bees were by reason of the situation of the hives, or their numbers, dangerous to persons or horses upon the highway or elsewhere than on the defendant's premises: *Held*, that the defendant was liable. The doctrine of *scienter* had no application. It

Scienter.

What ought to be the liability of the person keeping them.

The Athenian and Roman laws.

The French Code.

Argument in *Mason v. Keeling*.

Decision in Scotland.

It would appear, however, only fair and right that whoever keeps an animal of any description should keep it at his risk, and that for any injury occasioned by it he ought to be *civilly* responsible, whether he knew of its mischievous propensities or not. And it ought only to be necessary to prove a *scienter*, where it is sought to make him *criminally* responsible.

Neither the Athenian nor Roman law required it to be proved, that the owner had *notice* of the mischievous propensities of the animal. They probably thought that for civil purposes, when A. sustains damage by the horns, hoofs or teeth of an animal in which B. has a beneficial property, and over which he has the exclusive control, it is for B., and not for A., an innocent stranger, to ascertain that which should determine the degree of care which ought to be exercised (*f*).

So also in the French Code, neither knowledge in the owner of the mischievous qualities of the animal, nor even the existence of these qualities, is regarded (*g*).

In arguing the case of *Mason v. Keeling* (*h*), it was said, "If a man have an unruly horse, which breaks through his close or stable and does mischief, an action will lie for it; and it is hard that one should thus have a remedy for the least trespass done in his land, and none for a *trespass* done to his person, by wounding or maiming. Suppose one keeps several mastiffs, shall he be exempt from an action for mischief done by every one of them, till he knows that he has done a prior mischief? Is no care to be taken to prevent a first mischief?"

And in accordance with this common-sense view of the case, it was decided in Scotland, that a *scienter* was not necessary; and Lord Cockburn said, "I have always thought that if a dog worries sheep, his master is liable. I do not attach any weight to the law of England. I am told that knowledge on the part of the owner is requisite to make him liable. This is absurd; he cannot know it

(*f*) See *Card v. Case*, 5 C. B. 627, n. v. *Case*, 5 C. B. 627, n.
 627, n. (*h*) *Mason v. Keeling*, 12 Mod.
 (*g*) Code Civil, No. 1385; *Card* 333; 1 Ld. Raym. 606.

was the defendant's right to have on his premises a reasonable number of bees, or bees so placed as not unfairly to interfere with the rights of his neighbour; but if the number was unreasonable or if they were so placed as to interfere with such rights, then what would otherwise have been lawful became an unlawful act. *Lucas v. Pettit*, 12 Ont. L. R. 448 (1906).

until it is done. This would allow each dog to have one worry with impunity" (i).

But this case was carried to the House of Lords, where Lord Cockburn's judgment was reversed on the ground of there being no allegation of a *scienter* nor of negligence on the part of the defendant, it being held that blame can only attach to the owner of a dog, when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take precautions to protect the public against the ill consequences of those anomalous habits. However, in this case Lord Campbell said, "If in Scotland it is sufficient to allege negligence on the part of the owner, without averring or proving his knowledge of the animal's habits, it is not that the foundation of the action is different, but that the Scotch law does not so readily permit the owner of the animal to rely on the general consequences from its being supposed to be an animal *mansuetæ naturæ*, a supposition which experience shows to be very often far from the truth, and which I am inclined to think that we in England have sometimes too readily acted on" (k).

Reversed in the House of Lords.

By the law of England, as laid down in a large number of cases, a *scienter* is held necessary (l); and therefore, as there is practically no efficient means of keeping snapping dogs, &c., off the highways, every dog has the opportunity of indulging *once* in the luxury, not, since the 28 & 29 Vict. c. 60 (as to which see post, p. 374), of worrying sheep, as suggested by Lord Cockburn, but of biting men, women and children. But it was the opinion of the Court in *Smith v. Cook* (m) that the rule requiring proof of *scienter* in the case of injuries by animals *mansuetæ naturæ* is an artificial rule which ought not to be extended.

In England a *scienter* is held necessary.

Thus, where the plaintiff was severely bitten by a fierce mongrel mastiff, which the owner allowed to range the streets of London unmuzzled, it was held that to recover damages the plaintiff must prove that the defendant *knew* the dog to be of a mischievous nature (n).

Where a dog bites a person.

In an action to recover damages for injuries caused by

Necessity of ownership.

(i) *Orr v. Fleeming*, 2 Macq. H. L. Cas. 14 : 1 W. R. 339.

N. S. 430, 436.

(k) *Ibid.*, 25 L. T., O. S. 73.

(m) 1 Q. B. D. 79 ; 45 L. J., Q. B. 122 ; 33 L. T. 722 ; 24 W. R. 206.

(l) But see dictum of Maule, J., in *Card v. Case*, 5 C. B. 634. See, however, per Erle, C. J., and Willes, J., *Cox v. Burbidge*, 13 C. B.,

(n) *Mason v. Keeling*, 12 Mod. 332.

a savage dog, it is not necessary that the dog should belong to the defendant; if he harbours it or allows it to resort to his premises, he sufficiently keeps it to render himself liable (o). But where the defendant has done all that is reasonable to get rid of a stray dog which has come on to his premises, he will not be liable for any injury it may do (p).

Report that
dog had been
bitten by
a mad dog.

In an action *on the case* for keeping a mischievous dog, by which the plaintiff's child was bitten, report of the dog having been bitten by a mad dog was held to be evidence to go to the jury, that the plaintiff *knew* the dog was mischievous and ought to be confined, and particularly as by tying up the dog he had shown some knowledge or suspicion of the fact (q).

Where dog
had bitten a
child.

It was held also in the case of *Gething v. Morgan* (r) that where a dog had bitten a girl four years before he worried the plaintiff's sheep, an action would lie.

Not necessary
to show that
dog had bitten
another man.

It is not necessary to show that the dog has bitten another man before it bit the plaintiff; it is sufficient to show that the defendant knew it had evinced a savage disposition by attempting to bite (s), or had otherwise indicated a ferocious disposition towards mankind (t); and the ferocity may be of an intermittent character, as, for instance, when a bitch has pups (tt). But a mere habit of bounding upon and seizing persons, not so as to hurt or injure them, though causing some annoyance and trivial accidental damage to clothes, will not sustain an action (u). Nor is it sufficient to show that the dog has to the defendant's knowledge attacked and bitten another animal. Its ferocity must have been exhibited towards mankind (x).

Evidence of
scienter.

Where the defendant was a milkman, and his wife occasionally attended to his business, carried on in the premises where he kept the dog, it was held that a complaint that the dog had bitten a person, made to the wife

(o) *McKone v. Wood*, 5 C. & P. 1; 38 R. R. 787.

(p) *Smith v. Great Eastern Rail. Co.*, L. R., 2 C. P. 4; 36 L. J., C. P. 22; 15 L. T. 246; 15 W. R. 131.

(q) *Jones v. Perry*, 2 Esp. 482.

(r) *Gething v. Morgan*, Times Newspaper, May 2, 1857, *ex. gr.* Lord Campbell, C. J., and Wightman, Erle, and Crompton, JJ. See *Hartley v. Herriman*, 1 B. & A. 620.

(s) *Worth v. Gilling*, L. R., 2

C. P. 1. See also *Judge v. Cox*, 1 Stark. 285; 18 R. R. 769. *Beck v. Dyson*, 4 Camp. 198; 16 R. R. 774; and *Thomas v. Morgan*, 4 D. P. C. 223, appear to be to the contrary effect.

(t) *Barnes v. Lucille*, 96 L. T. 680; 23 T. L. R. 389—D.

(tt) *Ibid.*

(u) *Linc v. Taylor*, 3 F. & F. 731.

(x) *Osborne v. Choqueel*, [1896] 2 Q. B. 109; 65 L. J., Q. B. 534; 74 L. T. 786; 44 W. R. 575—D.

on the premises, to be communicated to the husband, was evidence of *scienter* (y). But the converse does not hold good, and a notice to the husband will not, taken alone, be sufficient proof of *scienter* to render the wife liable after her husband's death (z).

If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master (a). But notice to an ordinary servant is not sufficient of itself to charge the master (b), though, if under the circumstances it would be the duty of such servant on becoming aware of the animal's ferocity to inform the master, which in each case is a question for the jury (c), then the fact of the notice to the servant would be some evidence of actual knowledge on the part of the master (d).

With respect to questions of *scienter*, there is no difference between a corporation and an individual; and whatever is notice to a person competent to receive it is notice to the corporation. Thus, where a passenger by a steam-boat went to the premises of the company to which it belonged, to inquire for his luggage, and while there was bitten by a dog of the company, which had to the knowledge of persons in their employ (but who had no control over their business or authority with respect to the dog), previously bitten another person; it was held that, assuming the company to be aware of the dangerous nature of the dog, they were liable in damages, but that there was no evidence of a *scienter* to enable the passenger to maintain an action (e). It is doubtful whether a promise by the owner of the dog, on being informed of the injury it has done, to make compensation, is evidence of *scienter*. In *Beck v. Dyson* (f) it was held that it was not so. But in *Thomas v. Morgan* (g) it was held that it was evidence, though of the slightest degree.

An action may be maintained against a person for

Damage done by dog to game ground of action.

(y) *Gladman v. Johnson*, 36 L. J., C. P. 153.

(z) *Miller v. Kimbray*, 16 L. T. 360.

(a) *Baldwin v. Casella*, L. R., 7 Ex. 325; 41 L. J., Ex. 167; 26 L. T. 707; 21 W. R. 16.

(b) *Ibid.* See also *Calget v. Norris*, 2 T. L. R. 471—C. A.

(c) *Applebee v. Percy*, L. R., 9 C. P. at p. 658—per Lord Cole-

ridge, C. J. See also *Cleerton v. Uffernel*, 3 T. L. R. 509.

(d) *Applebee v. Percy*, L. R., 9 C. P. 617; 43 L. J., C. P. 365; 30 L. T. 785; 22 W. R. 704.

(e) *Stiles v. Cardiff Steam Navigation Co.*, 33 L. J., Q. B. 310; 10 L. T. 844; 12 W. R. 1080.

(f) 4 Camp. 198; 16 R. R. 774.

(g) 4 D. P. C. 233.

Evidence of
mischievous
propensity
unnecessary
under the
Dogs Act,
1906.

damages done to the plaintiff's game by his dog, which was in the habit of hunting game on its own account, and in a peculiarly destructive manner, a fact known to the defendant, who also knew that the plaintiff preserved game (*h*).

In the case of injury by a dog to sheep or cattle, evidence of a mischievous propensity of the dog or of the owner's knowledge thereof was rendered unnecessary by the 28 & 29 Vict. c. 60, and the proof of the ownership of the dog was simplified. This Act was, however, repealed by the Dogs Act, 1906 (6 Edw. 7, c. 32), which is entitled "An Act to consolidate and amend the enactments relating to injury to live stock by dogs, and otherwise to amend the law relating to dogs," and enacts as follows:—

Sect. 1 (1): "The owner of a dog shall be liable in damages for injury done to any cattle by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog or the owner's knowledge of such mischievous propensity, or to show that the injury was attributable to neglect on the part of the owner."

This is practically a re-enactment of sect. 1 of the Act of 1865, under which it was held that a horse which was frightened by a dog, and bolted, whereby it sustained damage, had sustained an injury within the meaning of the section, and that the owner of the dog was liable (*i*). So where the plaintiff's sheep was killed by the defendant's dog, it was held that the latter was liable, notwithstanding that the sheep was trespassing on his land (*j*).

Proof of
ownership

Sub-sect. (2) enacts that "where any such injury has been done by a dog, the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury shall be deemed to be the owner of the dog, and shall be liable for the injury unless he proves that he was not the owner of the dog at the time (*k*); provided that where there are more

(*h*) *Read v. Edwards*, 11 L. T. 311.

(*i*) *Elliott v. Longden*, 17 T. L. R. 648.

(*j*) *Grange v. Silcock*, 77 L. T. 340; 46 W. R. 221; 61 J. P. 709—D.

(*k*) Under sect. 2 of the Act of

1865, for which this enactment is substituted it was held that an innkeeper was liable for injuries to a horse caused by a dog living in his hotel, notwithstanding that the dog was at the time of the injuries complained of under the control of a person staying at the hotel, to

occupiers than one in any house or premises, let in separate apartments or lodgings or otherwise, the occupier of that particular part of the house or premises in which the dog is kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog."

If the damages claimed under this section do not exceed 5*l.*, they may be recovered under the Summary Jurisdiction Acts as a civil debt (sub-sect. (3)). And where a dog is proved to have injured cattle or injured sheep, it may be dealt with under sect. 2 of the Dogs Act, 1871, as a dangerous dog (sub-sect. (4)).

In this Act the expression "cattle" includes horses, mules, asses, sheep, goats, and swine (sect. 7).

By sect. 2 of the Dogs Act, 1871 (34 & 35 Vict. c. 56), any Court of Summary Jurisdiction may take cognizance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the Court having cognizance of such complaint that such a dog is dangerous, the Court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order. It is not necessary to show knowledge by the owner that a dog is dangerous in order to support a complaint under this section (l). Nor is it necessary to prove that the dog is dangerous to mankind (m). The Court may order a dangerous dog to be destroyed, without giving the owner the option of keeping it under proper control (n). Whether a dog is under control or not is a question of fact, not of law (o). By sect. 3, power is given to the local authority to make, and when made vary or revoke an order placing restrictions upon dogs being at large, if danger from mad dogs is

The Dogs Act, 1871.

whose care it had been committed by the real owner (*Gardner v. Hart*, 44 W. R. 527—D). But it is doubtful whether this ruling would hold good under the present enactment which appears simply to impose the burden of proving that he is not the owner of the dog on the occupier of the house where the dog is kept or permitted to live.

(l) *Parker v. Walsh*, 1 T. L. R.

583.

(m) *Williams v. Richards*, [1907] 2 K. B. 88; 76 L. J. K. B. 589; 96 L. T. 644; 71 J. P. 222; 23 T. L. R. 423—D.

(n) *Pickering v. Marsh*, 43 L. J., M. C. 143; 22 W. R. 798. See also *R. v. Dymock*, 49 W. R. 618.

(o) *Wren v. Pocock*, 34 L. T. 697; *Ex p. Hay*, 3 T. L. R. 24.

apprehended (*p*). In the absence of any special provision for the mode of publication of such an order it is enough to show that such an order has been posted up in five or six places within a borough (*q*).

The Diseases
of Animals
Act, 1894.

By sect. 22 of the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), (xxx.) and (xxxi.), the Board of Agriculture may make such orders as they think fit, subject and according to the provisions of the Act, for prescribing and regulating the muzzling of dogs, and the keeping of dogs under control; and for prescribing and regulating the seizure, detention, and disposal (including slaughter), of stray dogs and dogs not muzzled, and of dogs not kept under control, and the recovery from the owners of the dogs of the expense incurred in respect of their detention.

Straying
horse kicking
a child.

Where a horse which had strayed upon a highway without apparent reason kicked a child, it was held, independently of any question of negligence on the part of the owner, that in the absence of any proof of knowledge of a vicious disposition, the latter was not liable (*r*); the apparent reason for this decision being, that it is not in accordance with the ordinary nature of horses to kick human beings.

Trespassing
horse injuring
another horse.

But where, through the defect of a gate which the defendant was bound to repair, the defendant's horse strayed into a field belonging to the plaintiff, and kicked his horse; it was held that the plaintiff was entitled to recover without any proof of *scienter* (*s*). So where the defendant's horse injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendant's (*t*); the reason for the decision in each case being, that the damage was the natural and direct consequence of a trespass for which the defendants

(*p*) As to proof of ownership under this section, see *Wren v. Pocock*, 34 L. T. 697.

(*q*) *R. v. Huntingdon JJ.*, 4 Q. B. D. 522.

(*r*) *Cor v. Burbidge*, 17 C. B., N. S. 245; 32 L. J., C. P. 89; 11 W. R. 435. See also *Michael v.*

Alstree, 1 Vent. 295.

(*s*) *Lee v. Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212; 12 L. T. 388; 13 W. R. 751.

(*t*) *Ellis v. Laftus Iron Co.*, L. R., 10 C. P. 10; 44 L. J., C. P. 24; 31 L. T. 483; 23 W. R. 246.

Impounded
horse.

Canadian Case.—The owner of an animal impounded cannot revendicate it without the payment of the fine and costs of maintenance. *Brousseau v. Brousseau*, 1 M. L. R., S. C. 307. And see the notes to sect. 294 of the Dominion Railway Act on p. 398.

were liable. In both cases there was evidence of negligence, but in the latter case it was held that the defendants were liable, apart from any question of negligence on their part (*u*).

The result of the authorities dealing with the liability of the owners of animals for damage done by them under such circumstances is stated to be, "That in the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act if done by himself would have been a trespass" (*x*).

(*u*) The ruling in these cases is inconsistent with that in *Scotchell v. Eltham* (Freem. 534 C. P.) as reported. According to the report, the declaration stated that the defendant kept his horse so negligently that it broke into the plaintiff's close, and bit some of his horses so that "they were spoiled, and died," and a verdict was found

for the plaintiff, but judgment was arrested because no *arrier* was alleged. It is, however, suggested either that the report is erroneous, and it was really an action on the case, or that the decision must be considered as bad law.

(*x*) *Ellis v. Loftus Iron Co.*, L. R., 10 C. P. at p. 13, per Brett, J.

Canadian Cases.—Defendant left his horse, attached to a vehicle, upon a public highway, without tying it up or putting any person in charge. The horse ran away and struck and injured the plaintiff, who was driving a loaded sleigh: *Held*, that the defendant was liable; and that it made no difference that the plaintiff had got down from his sleigh, and when struck was endeavouring to keep the runaway horse from running into his sleigh, as the evidence showed that he would have been struck had he remained upon the sleigh. *Laflamme v. Staines*, Q. R. 18 S. C. 105 (1899).

Defendant's horse strayed from his field to the highway, the fence being defective, and being frightened by a boy, ran upon the side walk and knocked down and injured the plaintiff. A municipal by-law made it unlawful for any person to allow horses to run at large: *Held*, that the horse was unlawfully on the highway, and that the defendant was liable, the injury being the natural result of, and properly attributable to, his negligence. *Patterson v. Fanning*, 2 Ont. L. R. 462 (1901).

Action for damages brought by the father of a boy seven years of age who had been run over and injured, and the plea was that the boy had contributed to the accident by his negligence and imprudence: *Held*, that the boy could only be held to the exercise of such prudence as was equal to his capacity. *Beauchamp v. Cloran*, 11 L. C. J. 287 (1866).

The defendant's horse being on the highway, a boy twelve years of age approached to catch him by taking hold of a rope then around his neck, when the boy was kicked and injured. There was evidence to show that the horse had previously been interfered with by several boys, of whom the injured boy was one, Running at large.

Cattle
straying off
highway.

This rule does not, however, apply to damage done by cattle straying off a highway on which they are being lawfully driven, whether such highway is a country road (y) or a town street (z); the owner in such case being liable only on proof of negligence.

Liability for
trespass
by dog.

Whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as is the case with an ox, is an undecided point. The better opinion would appear to be that he is not (a). Where the plaintiff was digging a well in a garden adjoining that of the defendant, and the defendant's dog jumped over the wall separating the two gardens, and fell down the well and injured the plaintiff; it was held that, as the dog was not shown to be mischievous to the knowledge of the owner, the plaintiff had no cause of action either for trespass or breach of duty (b).

Negligence
without proof
of scienter.

In *Card v. Case* (c), Maule, J., is reported to have said that it might be that an allegation of negligence, coupled with consequent damage to the plaintiff, would show a cause of action; and this view appears to have been adopted by the Court in *Jones v. Owen* (d), where it was held that the finding by an arbitrator that the defendant had been guilty of negligence in running his two greyhounds, coupled together, to be a dog on a highway, with the result that they rushed at and severely injured the plaintiff, was good in law although there was no evidence of scienter; Willes, J., saying that it was not a case in which the Court had to deal with the acts of

(y) *Goodwin v. Cherckley*, 4 H. & N. 631; 28 L. J., Ex. 298; 7 W. R. 631.

Edwards, 17 C. B., N. S. 245; 34 L. J., C. P. 31; Pollock on Torts, 8th ed. 497.

(z) *Tillett v. Ward*, 10 Q. B. D. 17; 52 L. J., Q. B. 61; 47 L. T. 546; 31 W. R. 197.

(b) *Sanders v. Teape*, 51 L. T. 263; 48 J. P. 757.

(a) *Brown v. Giles*, 1 C. & P. 118; 28 R. R. 769; *Read v.*

(c) 5 C. B. at p. 634.
(d) 24 L. T. 587.

and that the boy fully understood the risk he ran. On the other hand, it was not shown that the defendant knew that the horse was accustomed to stray or had any vicious propensity, nor that the horse was of a vicious nature as a matter of fact. In an action by the boy and his father: *Held*, that they could not recover. *Patterson v. Fanning*, 2 Ont. L. R. 462, distinguished. *Flett v. Coulter*, 2 Ont. W. R. 142. See *Doughty v. Dobbs*, 3 Ont. W. R. 19.

Injury to
horse.

In an action of trespass for an injury to the plaintiff's horse by the defendant's cow, the declaration was held bad, on demurrer, for not alleging negligence or knowledge of vice. *Elliott v. Doak*, 36 N. B. R. 328.

dogs by themselves, as the cause of the accident was partly the act of the master and partly that of the dogs.

Where a servant breaking an *ungovernable* pair of horses in Lincoln's Inn Fields, ran over and hurt a man, it was held that no *scienter* was necessary, as a place so frequented by the public was an improper place for horsebreaking (*e*).

Breaking horses in a public place.

But where a bull made mad, from having been "cut or hoxed," escaped through the defendant's negligence, and tossed, gored and wounded the plaintiff, and a verdict was found for him, the judgment was arrested, because there was no *scienter* alleged in the declaration (*f*).

Where a mad bull wounds a person.

And where a bull passing along a highway, seeing the plaintiff with a red hankerchief, ran at and gored him, the decision turned upon the question, whether or not the owner of the bull knew that he had a tendency to run at any person wearing red (*g*).

Where a bull singled out a person wearing red.

So, too, in a case in which a ram, which is an animal known to be mischievous at certain seasons, butted and injured the plaintiff's wife in the street. the Court of Exchequer held that the owner of the animal was not liable to an action in the absence of evidence that he was aware of its propensity to attack passers-by (*h*).

Where a ram injured a person.

If through negligence a vicious beast goes abroad, after warning or notice of his condition, and kills a person, it is the opinion of Hale, that it is *manslaughter* in the owner (*i*). And if he purposely let him loose, and wander abroad, with a design to do mischief, even though it were merely to frighten people and make sport, and the beast kills a man, it is *murder* in the owner (*i*).

Where a vicious beast kills a person.

The owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode he has adopted to secure it proves insufficient (*k*).

Owner bound to secure a vicious animal at all events.

A person who keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed,

He is liable to an action for damage.

(*e*) *Michael v. Alestree*, 2 Lev. 172; 1 Vent. 295.

(*f*) *Bayntine v. Sharp*, 1 Lutw. 90.

(*g*) *Hudson v. Roberts*, 6 Ex. 697; 86 R. R. 438.

(*h*) *Jackson v. Smithson*, 15 M. & W. 563; 71 R. R. 763.

(*i*) See judgment — *Rex v.*

Huggins, 2 Id. Raym. 1583. cited *May v. Burdett*, 9 Q. B. 107; 72 R. R. 189. But not so if the owner can show that he turned the beast out in self-preservation — per Bramwell, B., *Reg. v. Child*.

C. C. C. Feb. 4, 1858.

(*k*) *Blackman v. Simmons*, 3 C. & P. 138; 33 R. R. 659.

The gist of the action.

Not necessary to prove negligence.

When the action will lie.

Injury occasioned by a vicious bull.

Shooting a dog for worrying sheep.

is *prima facie* liable in an action at the suit of any person attacked and injured by such animal (*l*).

The gist of the action being the keeping of the animal after knowledge of its mischievous propensities (*l*).

And it is not necessary to prove negligence or default in the securing or taking care of it (*l*).

No action lies for an injury done by a fierce dog to a person trespassing on the owner's premises (*m*); or incautiously entering them by night, knowing the dog to be let loose for the protection of the premises (*n*). But though a person has a right to keep a fierce dog to protect his property, he must not place it in the open approaches to his house, so as to injure persons lawfully coming there (*o*). If the person injured has no means of knowing the danger, and is not otherwise in fault, he may recover, although the owner has attempted to give notice; and it is, therefore, no answer to such an action, that a printed notice was put up, if it appears that the plaintiff could not read (*p*); and it is immaterial that he has, on a previous day, been warned against going near the dog, if the jury thinks that the injury was not occasioned by his own carelessness and want of caution (*q*).

In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow, the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head to drive him away from the cow (*r*).

To justify a person in shooting a dog for worrying his sheep, it is not necessary to prove that he was shot in the act; it having been held that it is sufficient if it appear that he has been accustomed to worry sheep, and that just before he was shot he had been worrying sheep, and could not have been otherwise restrained from further doing so (*s*). In that case the act of shooting would appear to have been done in the protection of the defendant's property; but where the owner of the sheep which had been worried by a dog shot the dog in the field at some

(*l*) *May v. Burdett*, 9 Q. B. 101; 72 R. R. 189; *Besozzi v. Harris*, 1 F. & F. 92, ante, p. 368. See also *Fletcher v. Rylands*, L. R., 1 Ex. 265, 281.

(*m*) *Sarch v. Blackburn*, M. & M. 505; 4 C. & P. 297.

(*n*) *Brock v. Copeland*, 1 Esp. 203; 5 R. R. 730; *Deane v. Clayton*, 1 B. Moo. 225, 245.

(*o*) *Sarch v. Blackburn*, M. & M. 505—per Tindal, C. J.; 34 R. R. 805.

(*p*) *Ibid.*, M. & M. 505; 4 C. & P. 297; 34 R. R. 805.

(*q*) *Curtis v. Mills*, 5 C. & P. 489; 38 R. R. 843.

(*r*) See note (*k*), ante.

(*s*) *Kellett v. Stannard*, 4 Ir. Jur. 50 (Ex. lr.).

distance from that in which his sheep had been worried, it was held that there was no justification, as the net was not done in the protection of his property (t).

It has, moreover, been held that a person cannot justify shooting a dog worrying his fowls, unless it appear that the dog was in the very act at the time, and could not otherwise be prevented (u). But it would seem that if the transaction had taken place in the person's poultry-yard, it would be enough to show that the dog was pursuing the fowl. Because when a dog is killed pursuing conies in a warren, it is sufficient to state that the dog was pursuing conies there, and it is not necessary to prove that the dog could not otherwise be prevented killing them (x).

Shooting a dog for worrying fowls.

The servant of the owner of an ancient deer park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and notwithstanding that the dog may not have been chasing deer at the moment when it was shot, if the chasing of the deer and the shooting of the dog were all one and the same transaction (y).

Shooting a dog for chasing deer.

To justify shooting the dog of another person, it is not sufficient to show that it was of a ferocious disposition, and was at large; but it must be actually attacking the party at the time. Therefore, where the defendant was passing the plaintiff's house, and the plaintiff's dog ran out and bit his gaiter, and on the defendant turning round and raising his gun, the dog ran away, it was held that the defendant was not justified in shooting it (z). It is a question for the jury whether a person who has struck or killed a dog has done so for his own preservation, or whether it was a wilful and malicious trespass on his part (a).

Shooting a dog in self-protection.

Where an information under 24 & 25 Vict. c. 97, s. 41, was laid against a gamekeeper for unlawfully and maliciously killing a dog; and the dog was at the time near an aviary in which pheasants, the property of his master, were confined for breeding purposes; it was held that the test of the gamekeeper's liability under the section was whether he acted under the *bonâ fide* belief that what

Shooting a dog in protection of property.

(t) *Wells v. Head*, 4 C. & P. 568; 34 R. R. 819.

(u) *Janson v. Brown*, 1 Camp. 41; 1 R. R. 626.

(x) *Wadhurst v. Damme*, Cro. Jac. 45.

(y) *Protheroe v. Matthews*, 5 C. & P. 581.

(z) *Morris v. Nugent*, 7 C. & P. 572; 48 R. R. 821.

(a) *Hanway v. Boulter*, 4 C. & P. 350; 1 M. & Rob. 15.

he was doing was necessary for the protection of his master's property, and that it was the only way in which it could be protected (b).

Shooting at a dog that is trespassing, without intention to kill it, but with the intention of injuring it if necessary to frighten it away, is not of necessity cruelly ill-treating it within the meaning of 12 & 13 Vict. c. 92, s. 2. Each case is a question of degree, and is for the justices (c).

(b) *Miles v. Hutchings*, [1903] 2 K. B. 714; 71 L. J., K. B. 775; 89 L. T. 420. (c) *Armstrong v. Mitchell*, 88 L. T. 870; 67 J. P. 329.

CHAPTER III.

THE LIABILITIES OF PARTIES HUNTING OR TRESPASSING UPON THE LANDS OF ANOTHER.

Hunting and Trespassing.

WHERE the fox, gray, or otter, and other noxious animals, are pursued as *vermin*, and the governing object of the pursuers is their extirpation as such, and not merely the amusement of "*a run*," the law, as laid down in the older authorities, is to a certain extent correct at the present day.

Fresh pursuit
over another's
land.

It is laid down that one may justify hunting foxes over the ground of another because they are noisome *vermin* (a); and also gray or otter and other noxious animals, as they are injurious to the commonwealth (b). And in *Gundry v. Feltham* (c), Lord Mansfield, C. J., said, "By all the cases as far back as the reign of Henry the Eighth, it is settled that a man may follow a fox into the grounds of another."

Pursuing
vermin.

But a person so hunting must not unnecessarily trample down another man's hedges, nor maliciously ride over his grounds; for if he does more than is absolutely necessary he cannot justify it (c). Therefore, pursuing an animal as vermin does not justify fifty or sixty people following the dogs (d).

No un-
necessary
damage.

A man cannot justify entering a close or digging up the soil to hunt or take a fox, badger, &c., though it be for the public good (e). So that it appears a person cannot enter another's grounds to find *vermin*, nor can he dig it out when it has run to earth.

Digging for a
fox, &c.

Persons hunting for their own amusement, and going

Hunting for
amusement.

(a) *Nicholas v. Badger*, 3 T. R. 259, n.; *Gedge v. Minue*, 2 Bulst. 62.

(b) Com. Dig. Pleader, 3 M. 37.
(c) *Gundry v. Feltham*, 1 T. R.

337; 1 R. R. 215.

(d) *Earl of Essex v. Capel*, Hertford Summer Assizes, 1809.

(e) Com. Dig. Pleader, 3 M. 37, and the authorities there cited.

*Earl of Essex
v. Capel.*

over the lands of another, are *trespassers*; and fox-hunters, like all other hunters, may be warned off (*f*).

This point was decided by Lord Ellenborough in the case of *The Earl of Essex v. Capel* (*g*), which settled the law on the subject and has never been questioned. An action of *trespass* was brought for breaking, entering and hunting over the plaintiff's lands, and the defence was that the fox was pursued as *vermin*. But Lord Ellenborough said, "The defendant states in his plea that the *trespass* was not committed for the purpose of diversion and amusement of the chase merely, but as the only way and means of killing and destroying the fox. Now if you were to put it upon this question, Which was the principal motive? Can any man of common sense hesitate in saying that the principal motive and inducement was not the killing of *vermin*, but the enjoyment of the sport and diversion of the chase? And we cannot make a new law to suit the pleasures and amusements of those gentlemen who choose to hunt for their diversion. These pleasures are to be taken only where there is the consent of those who are likely to be injured by them, but they must be necessarily subservient to the consent of others. There may be such a public nuisance by a noxious animal as may justify the running him to his earth, but then you cannot justify the digging for him afterwards; that has been ascertained and settled by the law. But even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have therefore a right to follow the dogs and *trespass* on other people's lands. I cannot see what it is that is contended for by the defendant. The only case which will at all bear him out is that of *Gundry v. Feltham* (*h*); if it be necessary I should be glad that that case should be fully considered. I have looked into the case in the Year Book (*i*); that seems to be nothing more than the case of a person who had chased a stag from the forest into his own land, where he killed it; and on an action of *trespass* being brought against the forester who came and took the stag, he justified, that he had made

(*f*) *Earl of Essex v. Capel*, Hertford Summer Assizes, 1809; *Bwyer v. Cook*, 4 C. B. 236; 16 L. J., C. P. 180.

(*g*) *Earl of Essex v. Capel*, Hertford Summer Assizes, 1809, cited in Chitty on Game Laws, 31. See also *Paul v. Summerhayes*, 4

Q. B. D. 9; 48 L. J., M. C. 33; 39 L. T. 574; 27 W. R. 215, in which this case was discussed and approved.

(*h*) *Gundry v. Feltham*, 1 T. R. 337; 1 R. R. 215.

(*i*) 12 Hen. 8, p. 9.

fresh suit after the stag; and it was held that he might state that he was justified, and the plaintiff took nothing by his writ. This is the case upon which that of *Gundry v. Feltham* (j) is built, but it is founded only on an *obiter dictum* of Justice Brook, and it does not appear to me much relied on. But even in that case it is emphatically said by the Judge, that a man may not hunt for his *pleasure* or his *profit*, but only for the good of the common weal, and to destroy such noxious animals as are injurious to the common weal. 'Therefore, according to this case the good of the public must be the governing motive' (k). The jury, under his lordship's direction, found a verdict for the plaintiff.

And in an action against a huntsman for hunting over the lands of another, Lord Ellenborough, C. J., held that damages might be recovered, not only for the mischief immediately occasioned by the defendant himself, but also by the concourse of people who accompanied him (l).

Huntsman
liable for
damage done
by the field.

And in another case it was laid down by Lord Tenterden, C. J., that if a gentleman sends out his hounds and his servants, and invites other gentlemen to hunt with him, although he does not himself go on the lands of another, but those other gentlemen do, he is answerable for the *trespass* they may commit in so doing, unless he distinctly desires them not to go on those lands (m).

Master of
hounds, when
responsible
for the field.

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. (n).

Killing a
hare on
another's
land.

And where a stag hunted by the hounds of B. was run into the barn of A., it was held that B. and his servants had no right to enter the barn to take the stag, and that if they did so they would be *trespassers* (m).

Taking a stag
on another's
land.

But where a deer strayed from a park on to the plaintiff's land, and ate his grass, and he hounded it with greyhounds, which pursued it into the owner's park, and killed it there, the Court of Common Pleas held that he was justified in doing so (o).

Hunting a
stray deer.

(j) *Gundry v. Feltham*, 1 T. R. 337; 1 R. R. 215.

(k) *Earl of Essex v. Capel*, Hertford Summer Assizes, 1809, cited in Chitty on Game Laws, 31.

(l) *Hume v. Oldacre*, 1 Stark. N. P. C. 351; 18 R. R. 779.

(m) *Baker v. Berkley*, 3 C. & P. 32.

(n) *Sutton v. Moody*, 1 Ld. Raym. 250.

(o) *Barrington v. Turner*, 3 Lev. 28.

Dead game
property of
owner.

He has a
right to have
his game
undisturbed.

Cattlegate
owners have
not the right
of shooting.

Reservation
of rights of
lords of the
manor under
Enclosure
Acts.

Who may kill
hares without
a game certi-
ficate.

Game taken on land, as soon as killed there, becomes the property of the owner of the land (*p*), though up to the time of its being killed, he has no property in it, yet he has a right to have it kept undisturbed (*q*); therefore he has a right of action against the master of a dog, which is in the habit of disturbing and destroying it, after having received due notice of the fact, and taken no steps to restrain it (*r*).

The customary right of pasture in a manor, or cattlegates, gives the owners no right to possession of the soil; but the ownership of it remains in the lord of the manor, subject to the right of several pasture upon it by the cattlegate owners, and therefore the lord may maintain *trespass* against a cattlegate owner for sporting over it without his permission (*s*).

The reservation of the rights of the lords of the manor under Enclosure Acts reserves the right of shooting therefore in the case of *Graham v. Ewart* (*t*), in which the plaintiff was entitled under a private Enclosure Act "to all mines and minerals within and under the soil, and to other rights, royalties, liberties and privileges in and over the same," it was held by the Exchequer Chamber, reversing the decision of the Court below, and overruling *Greathead v. Morley* (*u*), that the right of hunting, fishing, shooting and fowling over the allotment in question was thereby intended to be included, and that this right must be exclusive, for that was the character of the right existing before the Act passed, and the object of the proviso was expressly to reserve the former right unimpaired by the consequence of the enclosure. It was also held in this case, that the subsequent concurrent enjoyment of sporting for more than twenty years by the owners of the allotments, claiming to do so of right, did not deprive the original lord of his exclusive right.

Persons in the occupation of enclosed ground, and in certain cases owners, may kill (*x*) hares without a game certificate.

(*p*) *Blades v. Hicks*, 9 Jur., N. S. 1040; 10 C. B., N. S. 713; 30 L. J., C. P. 347; 11 H. L. C. 621; 34 L. J., C. P. 286; *Rigg v. Earl of Lonsdale*, 1 H. & N. 923.
(*q*) Per Keating, J., *Read v. Edwards*, 11 L. T. 311.
(*r*) Per Keating, J., *Read v. Edwards*, 11 L. T. 311.

(*s*) *Rigg v. Earl of Lonsdale*, 1 H. & N. 923.
(*t*) *Graham v. Ewart*, 26 L. Ex. 97.
(*u*) *Greathead v. Morley*, 3 M. G. 139; 60 R. R. 479.
(*x*) Not to authorize the lay of poison, 11 & 12 Vict. c. 29, s. 1.

certificate (y). The owner may also give authority to kill hares, to be limited to one person at the same time in any one parish. This authority is to be sent to the clerk of the peace for registration, who is also to receive notice of revocation (z).

And now by the Ground Game Act, 1880 (43 & 44 Vict. c. 47), every occupier of land has a right, inseparable from his occupation, to kill hares and rabbits concurrently with any other person entitled to kill the same on land in his occupation (section 1); where the occupier is otherwise entitled to kill ground game on land in his occupation, he cannot divest himself wholly of such right (section 2); and all agreements in contravention of the right of the occupier to destroy ground game are declared void (section 3). The occupier and the persons duly authorized by him do not require a game licence for the purpose of killing ground game under the Act. But they are not exempt from the Gun Licence Act, 1870 (section 4).

Ground Game Act, 1880.

And it is "lawful for any person to pursue and kill, or join in the pursuit and killing of, any hare by coursing with greyhounds, or by hunting with beagles or other hounds, without having obtained an annual game certificate" (a).

Any person may hunt hares.

Where acts terminate in themselves, and once done cannot be done again, there can be no continued trespass, as hunting and killing a hare or five hares. But hunting may be continued as well as spoiling, consuming or cutting grass (b).

Continued trespass.

When two persons are engaged in a common purpose, what one does is the act of both. Therefore, in a case in which A. and B. were driving in a trap along the turnpike road for a lawful purpose, and A. got out of the trap, went into a field, and shot a hare, which he gave to B., who had remained in the trap, it was held that there was sufficient evidence that B. was present aiding and abetting A. in a trespass in pursuit of game (under 11 & 12 Vict. c. 43, s. 5), and that he was not the less an aider and abettor, because he might have been convicted as a principal (c).

Two persons engaged in a common purpose.

(y) 11 & 12 Vict. c. 29, s. 1.

639.

(z) Ibid. s. 2.

(a) 11 & 12 Vict. c. 29, s. 4.

(b) *Monkton v. Pushley*, 2 Salk.

(c) *Stacey v. Whitehurst*, 13 W. R. 384; *Mayhew v. Wardley*, 14 C. B., N. S. 550.

Trespass in search of game.

Under 1 & 2 Will. 4, c. 32(d), *trespassers in pursuit of game* may be required to quit the land, and to tell their names and abodes, and in case of refusal may be arrested and brought before a justice within twelve hours. And any *trespasser*, on conviction before a justice, is to forfeit a sum not exceeding 5*l.*, together with the costs of conviction (d).

Hunting with hounds or grey-hounds.

But hunters in fresh pursuit of deer, hare or fox (with hounds or greyhounds) started on other lands, are exempted from the provisions of 1 & 2 Will. 4, c. 32, against *trespassers* (e).

Jurisdiction of justices ousted.

By 1 & 2 Will. 4, c. 32, s. 30, it is provided that "any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." But the jurisdiction of the justices is not ousted by the claim of a prescriptive right in gross to kill game on the land, there being no colour for such a claim; nor by the assertion that the land is not in the occupation of the lord of the manor, but is vested in other persons, nor the claim of title to oust the jurisdiction of the justices must be a claim of title in the party charged, and not in a third person (f). In a case in which a prescriptive right in gross to kill game is set up, which is an impossible right, unknown to the law, the *bonâ fides* is immaterial; but where a *bonâ fide* and probable right of property is set up, the justices are bound to hold their hands (g). The mere belief, however, on the part of the alleged trespasser that he has such a right, is not a *bonâ fide* claim of right (h).

A landlord may give verbal permission to another to take game on his land, and such permission is a justification for a fresh pursuit of game on an adjoining field within the meaning of section 30 (i).

Trespass from the highway.

It is a *trespass in pursuit of game* within the meaning of this statute to fire at it from the highway (k). But

(d) 1 & 2 Will. 4, c. 32, s. 31.

(e) Ibid. s. 35.

(f) *Cornwell v. Sanders*, 3 B. & S. 206.

(g) *Reg. v. Kayley*, 10 L. T. 339. See also *Watkins v. Major*, L. R., 10 C. P. 662; 44 L. J., M. C. 164; 33 L. T. 352; 24 W. R. 164; *Loosey v. Stullard*, 30 L. T. 792.

(h) Per Wightman, J., *Cornwell v. Sanders*, 3 B. & S. 213. See also *Leatt v. Vine*, 30 L. J., M. C.

507; *R. v. Cridland*, 7 E. & L. 853; *Morden v. Porter*, 7 C. B. N. S. 641; *Legg v. Pardoe*, 9 C. B. N. S. 289; *Adams v. Masters*, 2

L. T. 502; *Reg. v. Critchlow*, 2 W. R. 681; *Birnie v. Marshall*, 3 L. T. 373.

(i) *Jones v. Williams*, 46 L. J., M. C. 270; 36 L. T. 559; 25 W. R. 50.

(k) *Mayhew v. Wardley*, 1 C. B., N. S. 550.

merely sending a dog into an adjoining cover in search or pursuit of game, is not a *trespass by entering and being in or upon such cover*, the Act requiring a personal trespass (l).

A person who from his own land shoots a pheasant in the land of another, and goes on such land to pick the bird up, commits a *trespass in pursuit of game* within the Act, the shooting and the picking up the game being one transaction (m). But it is not a *trespass in pursuit of game* to pick up dead game, which rose from the person's own land, and fell dead within the land of another (n).

From his own land to pick up game.

Under 25 & 26 Vict. c. 114, s. 2, a person may be convicted of having obtained game by unlawfully going on land in search or pursuit of game, without evidence of his having been on any particular land (o).

Under 25 & 26 Vict. c. 114.

The owner of a close must first request a *trespasser* to depart before he can lay hands on him to turn him out, because every *impositio manuum* is an assault and battery, which cannot be justified on the ground of a person breaking into the close, without a request (p).

Laying hands on a trespasser.

But in case of actual force, as in burglary or breaking open a door or gate, it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence (q).

Opposing force to force.

Therefore to *trespass* for an assault and battery, it was held that the defendant might plead that the plaintiff, with force and arms and with a strong hand, endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance, &c.; and it was held that if any damage happened to the plaintiff it was in consequence of the defence of the possession of the close (q). And it is also a good defence to an action for an assault that it was committed in an attempt to take from the plaintiff dead rabbits of the defendant's master, which he refused to give up (r).

Defence to an action.

(l) *R. v. Pratt*, 24 L. J., M. C. 113.

N. S. 485; *Hall v. Knorr*, 33 L. J., M. C. 1; *R. v. Parker*, 33 L. J., M. C. 135.

(m) *Oxbond v. Meadows*, 12 C. B., N. S. 10.

(p) *Green v. Goddard*, 2 Salk. 640.

(n) *Kenyon v. Hart*, 13 W. R. 406.

(q) *Wearer v. Bush*, 8 T. R. 78.

(o) *Evans v. Butteril*, 33 L. J., M. C. 50. And see as to this statute, *Brown v. Turner*, 13 C. B.,

(r) *Blades v. Higgs*, 10 C. B., N. S. 713; 30 L. J., C. P. 347; 11 H. L. C. 621; 34 L. J., C. P. 286.

Distress
damage
feasant.

Distress *damage feasant* may be taken for injury done to chattels upon the land as well as to the land itself; but an action of trespass is not maintainable so long as the distress is detained. This was so held in *Boden v. Roscoe(s)*, where the plaintiff brought an action to recover damages for injury done to his filly by the defendant's pony, which the plaintiff had restrained *damage feasant*, and still retained possession of.

Horse with a
rider cannot
be distrained.

A horse cannot be distrained *damage feasant* if there be a rider upon him; for if such a distress were permitted, it would perpetually lead to a breach of the peace (*t*). And indeed if a man or woman be riding a horse, it cannot be distrained at all (*u*). But it has been held that a horse may be distrained *damage feasant* notwithstanding that he is being led by a person at the time (*x*).

Action of
trespass lies
for riding
over land.

A man has an action of *trespass* against another for riding over his ground, though it do him no damage; for it is an evasion of his property, and the other has no right to come there (*y*).

But not where
a dog jumps
into a field.

But where a dog jumps into a field without the consent of its master, it is not a *trespass* for which an action will lie (*z*).

Maintenance
of fences.

The obligation to make and maintain fences, both at common law and by the Railway Clauses Consolidation Act (*a*), is only as against the owners or occupiers of the adjoining close. If the company neglect to fence, neither they nor their servants can recover for injury caused by animals straying on their land (*b*), nor can the tenants of the land (*c*). And where the plaintiff's sheep, trespassing on A.'s close, strayed upon the defendant's railway which adjoined, through a defect of fences which the defendants were bound as against A. to make and maintain, and was

(s) [1894] 1 Q. B. 608; 63 L. J., Q. B. 767; 70 L. T. 450; 42 W. R. 445.

(t) *Storey v. Robinson*, 6 T. R. 138; 3 R. R. 137. See also *Field v. Adams*, 12 A. & E. 649; 54 R. R. 657.

(u) Co. Litt. 47 a, cited *Parsons v. Gingell*, 4 C. B. 550. And see *Webb v. Bell*, 1 Sid. 440.

(x) *Wagstaffe v. Clack*, Cambridge Summer Assizes, 1826, M. S.

(y) See per Holt, C. J., *Ashby v. White*, 1 Smith's L. C., 11th Ed. 240.

(z) See per Parke, J., *Brown v. Giles*, 1 C. & P. 119; 28 R. R. 769; *Head v. Edwards*, 11 L. T. 311; 34 L. J., C. P. 31.

(a) 8 & 9 Vict. c. 20, s. 68. And see *Burton v. North Eastern Rail. Co.*, L. R., 3 Q. B. 549; 37 L. J., Q. B. 258; 18 L. T. 795; 16 W. R. 1194.

(b) *Child v. Hearn*, L. R., 9 Ex. 176; 43 L. J., Ex. 100; 22 W. R. 864.

(c) *Wiseman v. Booker*, 3 C. P. D. 184; 38 L. T. 392; 26 W. R. 634.

killed; it was held by the Court of Common Pleas that the plaintiff could not recover (*d*).

But a person using the lands of an adjoining owner by his permission is in the same position as he is (*e*).

A person whose field adjoins a highway may leave his field open and permit cattle to pass over it. He cannot distrain them if he has suffered them to come there; but he commits no breach of duty by leaving the field open (*f*).

Gate of a field left open.

The following important case decided that where a railway company is by statute bound absolutely to keep the gates of its level crossings closed, it is liable for damage occasioned to a trespasser in consequence of one of these gates having been left open. It appeared that the Y. Railway passed over a highway on a level, and that there were gates across each end of the road so crossed by the line of railway. Some horses belonging to the plaintiff leaped over the fence of a field, in which they had been placed, into a second field, and from that over a broken gate into a third field, all three being the plaintiff's fields; they then strayed through an open gate of the third field into the highway crossed by the railway on a level. One of the gates across the end of the road where it was crossed by the line of railway having been left open, the horses strayed through it on to the railway, where they were soon afterwards killed by one of the company's trains. An action was brought by the plaintiff against the railway company, who contended that the horses were, under the circumstances, trespassers on the highway. But it was held by the Court of Queen's Bench, that the plaintiff was entitled to recover the value of his horses from the company, because the obligation imposed on them by

Gate of a railway crossing left open where there is a statutory obligation.

(*d*) *Rivketts v. East and West India Docks and Birmingham Junction Rail. Co.*, 21 L. J., C. P. 201.

49; 21 W. R. 56.

(*e*) *Dawson v. Midland Rail. Co.*, L. R., 8 Ex. 8; 42 L. J., Ex.

(*f*) See per Patteson, J., *Flaccett v. York and North Midland Rail. Co.*, 16 Q. B. 617; 20 L. J., Q. B. 222; 83 R. R. 630.

Canadian Cases.—In an action for killing a horse: *Held*, that the words of s. 27, c. 109, R. S. C. (1886), "injury sustained by reason of the railway," were not confined to neglect in running the trains, nor to improper construction of the railway, but extended to damage arising from the improper construction of cattle-guards, and from neglect to fence the railway as directed. *Levesque v. New Brunswick Rail. Co.*, 29 N. B. R. 588 (1889). And see the Dominion Railway Act, *infra*, where the cases are fully noted.

Horse trespassing. Fences.

Statutory
obligation to
maintain
gates.

5 & 6 Vict. c. 55, s. 9, to keep the gates closed, was not only against cattle travelling on the road, but also against all cattle straying there (g).

A very similar conclusion was arrived at in *Charman v. South Eastern Railway Company* (h), which was an action for not properly fencing the defendant's line at a level crossing in accordance with their statutory obligation under section 47 of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), whereby two horses belonging to the plaintiff strayed on to the line and were killed. At the trial, it appeared that there were gates at the level crossing of the full width of the road properly so called, but that a swing gate had been placed by the defendants upon a piece of land beyond the limit of the road, on the same line with the gates, for the convenience of foot-passengers using the crossing, and that plaintiff's horses after straying from his land arrived at the gates at the level crossing, and finding them closed, turned aside to the swing gate, and forcing their way through it, owing to the defective condition of the posts, got on to the line and were killed by a passing train. It was held that there was evidence of a breach of the defendants' obligation to fence in the railway from the road, and that they were therefore liable.

The provisions of the 5 & 6 Vict. c. 55, s. 9, and presumably of the 8 & 9 Vict. c. 20, s. 47, as to making and maintaining gates where a railway crosses a road on a level, do not apply to a railway belonging to a private owner, and not constructed under parliamentary powers, nor used for the conveyance of passengers (i).

Gate of
station left
open where
there is no
statutory
obligation.

In the preceding cases it will be observed that there was an express statutory obligation to keep the gate closed across the road under all circumstances; consequently, the company were guilty of committing a wrong, in omitting to do so. But under section 68 of the last-mentioned Act, the obligation of a railway company is merely to fence against the owners and occupiers of *adjoining* lands, and therefore where some horses strayed into a high road, and thence into the yard of a railway station, the gate of which was open, from which they got on the line through a gap

(g) *Fawcett v. York and North Midland Rail. Co.*, 16 Q. B. 610; 15 Jur., Q. B. 173; 20 L. J., Q. B. 222; 83 R. R. 630.

(h) 21 Q. B. D. 524; 57 L. J.,

Q. B. 597; 37 W. R. 8—C. A.

(i) *Matson v. Baird*, 3 App. Cas. 1082; 39 L. T. 304; 26 W. R. 835.

in the fence, and were killed by a train, it was held that the company were not responsible for the injury, inasmuch as their obligation under section 68 is co-extensive only with the common law prescriptive obligation to repair fences, which would only render them responsible, if the horses were using the highway according to the dedication of the owner of the soil (*k*). So, where a colt had strayed on to a highway, and whilst *being driven home* escaped into a railway-yard and thence on to the line, and was killed, the company were held liable, as the colt was then lawfully using the highway (*l*). But if the adjoining land belongs to the company, and cattle stray thence on to the line, and are killed, the company are not liable; nor if cattle are by the permission of the company grazing on the slopes or embankments of the railway, or in a yard belonging to the company, and stray thence on the line, and are injured (*m*).

There is no obligation upon a railway company carrying cattle to provide fences or guards at the station where the cattle may be landed, between the line and the station-yard, so as to prevent them straying on the line (*n*). Fence within station-yard.

(<i>k</i>) <i>Manchester, Sheffield and Lincolnshire Rail. Co. v. Wallis</i>, 14 C. B. 213. (<i>l</i>) <i>Midland Rail. Co. v. Daykin</i>, 17 C. B. 126.	(<i>m</i>) <i>Marfell v. South Wales Rail. Co.</i>, 29 L. J., C. P. 315. (<i>n</i>) <i>Roberts v. Great Western Rail. Co.</i>, 4 Jur., N. S. 1240.

CANADIAN NOTES.

PROVISIONS OF DOMINION RAILWAY ACT AFFECTING HORSES.

(A.) *Duty of Company respecting Fences, Gates and Cattle-Guards, &c.*

By sect. 254 of the Dominion Railway Act, R. S. C. 1906, c. 37, it is enacted:—

“The Company shall erect and maintain upon the railway—

“(a) fences of a minimum height of four feet six inches on each side of the railway;

“(b) swing gates in such fences at farm crossings of the minimum height aforesaid, with proper hinges and fastenings: Provided that sliding or hurdle gates, constructed before the first day of February, one thousand nine hundred and four, may be maintained; and,

“(c) cattle-guards, on each side of the highway, at every highway crossing at rail level with the railway.

“2. The railway fences at every such highway crossing shall be turned into the respective cattle-guards on each side of the highway.

“3. Such fences, gates, and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

“4. Whenever the railway passes through any locality in which the

lands on either side of the railway are not inclosed and either settled or improved, the Company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs."

The word "cattle" in this section would include "horses." See per Wilson, J., in *McAlpine v. Grand Trunk Rail. Co.*, 38 U. C. Q. B., at p. 450. See the following cases interpretative of the provisions of the above section:—

Constitution-
ality of
Federal
Legislation.

In an action for killing the plaintiff's horse: *Held*, that the Parliament of Canada, having the exclusive right to legislate on the subject of railways, had, as incident thereto, power to limit the time within which actions could be brought for damages sustained by reason of the railway; and, therefore, that sect. 27 of c. 109, R. S. C. (1886), which limited the right of action to six months after the alleged damage was sustained, was not *ultra vires*. *Levesque v. New Brunswick Rail. Co.*, 29 N. B. R. 588 (1889). See *Grand Trunk Rail. Co. v. Atty.-Gen. of Canada*, (1907) A. C. 65.

Fences.

A railway company is required to erect and maintain fences suitable and sufficient to prevent cattle from getting on the railroad from adjoining land which is cultivated and settled on, though not inclosed. *Dreyer v. Canadian Northern Rail. Co.*, 15 Man. L. R. 386 (1905). See also *Phair v. Canadian Northern Rail. Co.*, 6 Ont. W. R. 137 (1905).

The obligation to erect railway fences imposed upon railway companies by the legislature is in the public interest, and a person other than an adjoining owner, whose cattle or horses are lawfully on adjoining property and stray therefrom upon an unfenced track, may maintain an action against the railway company. *Quebec Central Rail. Co. v. Pellerin*, Q. R. 12 K. B. 152 (1902). But see *McLellan v. Grand Trunk Rail. Co.*, 8 U. C. C. P. 411 (1859); *Rathwell v. Canadian Pacific Rail. Co.*, 25 C. L. J. 468 (1889); *Douglass v. Grand Trunk Rail. Co.*, 5 Ont. A. R. 585 (1880); *McIntosh v. Grand Trunk Rail. Co.*, 30 U. C. Q. B. 601 (1871); *McAlpine v. Grand Trunk Rail. Co.*, 38 U. C. Q. B. 446 (1876); *Brown v. Grand Trunk Rail. Co.*, 24 U. C. Q. B. 350 (1865); *Canadian Pacific Rail. Co. v. Cross*, Q. R. 3 Q. B. 170 (1894). The company is not obliged to fence on each side of a culvert across a water course; and where cattle went through the culvert into a field, and thence to the highway, from which they strayed on to the railway track where they were killed, the company was held not liable. *Grand Trunk Rail. Co. v. James*, 31 S. C. R. 420, reversing 1 Ont. L. R. 127.

As to proper fences ("suitable and sufficient") and their maintenance, see *Plath v. Grand Forks and Kettle River Valley Rail. Co.*, 10 B. C. R. 299; *McKellar v. Canadian Pacific Rail. Co.*, 14 Man. L. R. 614; *Studer v. Buffalo and Lake Huron Rail. Co.*, 25 U. C. Q. B. 160; *Landry v. La Compagnie de Chemin de fer du Nord*, 9 L. N. 5; *Pontiac and Pacific Junction Rail. Co. v. Irish*, Q. R. 3 Q. B. 267; *Huet v. Quebec, &c., Rail. Co.*, Q. R. 21 S. C. 427; *Hillyard v. Grand Trunk Rail. Co.*, 8 Ont. R. 583.

Waiver of statutory right to fence. *Great Western Rail. Co. v. Vilaire*, 11 U. C. C. P. 509; *Clayton v. Great Western Rail. Co.*, 23 U. C. C. P. 137; *Kilmer v. Great Western Rail. Co.*, 35 U. C. Q. B. 595.

Gates.

Where gates are provided, the company's liability to maintain them is the same as in the case of fences. See *McMichael v. Grand Trunk Rail. Co.*, 12 Ont. R. 547; *Dunsford v. Michigan Central Rail. Co.*, 20 Ont. A. R. 577. But see the Quebec

case of *Jasmin v. Canadian Pacific Rail. Co.*, 6 L. N. 163; also *Fleming v. Canadian Pacific Rail. Co.*, 31 N. B. R. 318.

The provision requiring cattle-guards cannot be construed to render the company liable for injury to cattle unlawfully on the highway. *Ferris v. Grand Trunk Rail. Co.*, 16 U. C. Q. B. 474; nor on the railway lands whither they have strayed owing to defective cattle guards. *Thompson v. Grand Trunk Rail. Co.*, 22 Ont. A. R. 453; *Whitman v. Windsor and Annapolis Rail. Co.*, 18 N. S. R. 271; *Phillips v. Canadian Pacific Rail. Co.*, 1 Man. L. R. 110.

Cattle-guards.

Sub-sect. 2 applies to all public road crossings. *Grand Trunk Rail. Co. v. Hainer*, 36 S. C. R. 180. See also *Grand Trunk Rail. Co. v. McKay*, 34 S. C. R. 81.

Sect. 274 of the Dominion Railway Act (R. S. C. 1906, c. 37) enacts that:—

"When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

"2. This section shall not apply to trains approaching such crossing within the limits of cities or towns where municipal by-laws are in force prohibiting such sounding of the whistle and ringing of the bell."

A siding of the defendants' railway, which was not used by the defendants more than two or three times a week, crossed a narrow arched-in lane or alleyway, constituting a highway, very close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engines or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiff's servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The plaintiff's servant did not stop the horse at the mouth of the alleyway, or look or listen for trains: *Held*, that assuming, but not deciding, that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that not having done so, they were guilty of negligence, and *prima facie* liable in damages. *Smith v. Niagara and St. Catherine's Rail. Co.*, 9 Ont. L. R. 158 (1904).

Sidings.

Wetmore and Tuck, JJ., held in *Van Wart v. New Brunswick Rail. Co.*, 27 N. B. R. 59, that it was contributory negligence for a man who knew that his horses were afraid of trains to take them to a railway siding without making enquiry as to the time of the arrival of trains. On appeal, the Supreme Court of Canada held, *inter alia*, that "bell and whistle" were not required at sidings: 17 S. C. R. 35. *Shields v. Grand Trunk Rail. Co.*, 7 U. C. C. P. 111 (1858). In this case it was held that 14 & 15 Vict. c. 51, s. 21 (Prov. Can.), which was the parent of the section here annotated, required the bell and whistle to be used as a warning to cattle using a crossing. See also *Tyson v. Grand Trunk Rail. Co.*, 20 U. C. Q. B. 256; and cf. *Weir v. Canadian Pacific Rail. Co.*, 16

Dangerous
crossings.

Ont. A. R. 100; *Johnston v. Northern Rail. Co.*, 34 U. C. Q. B. 432.

Dangerous crossings demand special precautions. *Hallinger v. Canadian Pacific Rail. Co.*, 20 Ont. A. R. 244; *Harris v. The King*, 9 Ex. C. R. 206.

(B.) *Injury to Horses on Railway Tracks.*

By sect. 294 of the Dominion Railway Act (R. S. C. 1906), it is enacted as follows:—

"No horses, sheep, swine, or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

"2. All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the pound-keeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

"3. If the horses, sheep, swine or other cattle of any person which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

"4. When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

"5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover."

Similar provisions are to be found in the Government Railways Act, and the Railway Acts of the various provinces of the Dominion noted in the Appendix of Canadian Statutes.

See the following cases touching the liability of railway companies under this section:—

Scope of
obligation.

The obligation to erect railway fences imposed upon railway companies by the legislature is in the public interest, and a person other than an adjoining owner whose cattle or horses are lawfully on adjoining property and stray therefrom upon an unfenced track and are killed, may maintain an action against the railway company. *Quebec Central Rail. Co. v. Pellerin*, Q. R. 12 K. B. 152 (1902).

There is some difficulty in harmonising this decision with Ontario cases such as *Brown v. Grand Trunk Rail. Co.*, 24 U. C. Q. B. 350, and *Douglass v. Grand Trunk Rail. Co.*, 5 Ont. A. R. at p. 591.

The plaintiff's cattle running at large, under one of the by-laws of the municipality permitting the same, got upon Crown lands and thence strayed upon the railway and were killed: *Held* (Meredith, J., dissenting) that by virtue of the by-law the cattle were properly upon the Crown lands, and hence the railway company were liable. Such a by-law affects all unenclosed lands, and under it cattle may properly depasture and rumble over all open lands, wastes, or commons, even if owned by the Crown, if no objection is taken thereto and no barrier or fences be erected against them.

Judgment of Britton, J., 2 Ont. L. R. 479, varied. *Fensom v. Canadian Pacific Rail. Co.*, 7 Ont. L. R. 254; 8 Ont. L. R. 688 (1904).

Where cattle went through a culvert into a field and thence to the highway and straying on the railway track were killed, the company was held not liable to the owner. *James v. Grand Trunk Rail. Co.*, 31 Can. S. R. 420 (1901).

But see *Davidson v. Grand Trunk Rail. Co.*, 5 Ont. L. R. 574, where the above case was distinguished. See also *Huot v. Quebec Railway, Light and Power Company*, Q. R. 21 S. C. 427 (1901).

The fact that a horse strayed from his owner's pasture, by reason of defective fencing, into an adjoining field, and thence upon a railway track where he was killed, was held to be no defence in an action by the owner against the railway company which had not sufficiently fenced its track as required by sect. 15, C. S. C., c. 66. *McAlpine v. Grand Trunk Rail. Co.*, 38 U. C. Q. B. 446 (1876).

A railway company is not liable in damages for the death of an animal which, having got on the track through a defective fence, is frightened by a train and then runs upon a barbed wire in another part of the fence, and is so cut by the barbs that it dies. The damage to the animal cannot be said to be "caused by any of the companies' trains or engines," unless the animal is actually struck by the train or engine. Dicta of the judges in *James v. Grand Trunk Rail. Co.*, 1 Ont. L. R. 127, 31 S. C. R. 420, and decision in *Winspear v. Accident Insurance Co.*, 6 Q. B. D. 42, followed. *McKellar v. Canadian Pacific Rail. Co.*, 14 Man. L. R. 614 (1904). And see *Henderson v. Grand Trunk Rail. Co.*, 20 U. C. Q. B. 602; *Wilson v. Northern Rail. Co.*, 28 U. C. Q. B. 274.

Defendants maintained along their line of railway, through a farming country, a barbed wire boundary fence, without any pole, board, or other capping connecting the posts; the plaintiff's horse picketed in the field adjoining became frightened from some cause unexplained and ran into the fence and received injuries on account of which it had to be killed: *Held*, that the fence was not inherently dangerous, and therefore the company were not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse. *Plath v. Grand Forks and Kettle River Valley Rail. Co.*, 10 B. C. R. 299 (1904).

Held, that the damage not having been done at the point of intersection, plaintiff was not absolutely precluded from recovering, but was subjected to the *onus* of showing that defendant might, with the exercise of ordinary care and diligence, have avoided the mischief, and having failed to do so, the verdict in his favour could

Lack of fences.

Unfenced culvert.

Defective and dangerous fences.

Point of intersection.

not stand. *Whitman v. Windsor and Annapolis Rail. Co.*, 18 N. S. R. 271 (1885).

Impounding.

Regulations respecting the impounding of horses and other animals running at large are to be found in the legislative enactments of the several provinces of the Dominion, or are made by municipal bodies under the authority of Provincial legislation. See R. S. Ont., 1897, c. 272, and c. 223, s. 346, sub-s. 2; Quebec Municipal Code, Arts. 428 to 448 and 560; R. S. Nova Scotia, 1900, c. 92 and 93; Cons. Stats. New Brunswick, 1903, c. 187; P. E. Island Statutes, 51 Vict. c. 4, as amended by 3 Edw. 7, c. 2; Manitoba Municipal Act (R. S. Man., 1902, c. 116), s. 644; Municipal Clauses Act (R. S. British Columbia, 1897, c. 144), s. 50 (24); Consolidated Ordinances North West Territories, 1898, c. 80.

See the following cases on impounding cattle:—

Brown v. Williams, 6 U. C. Q. B. (O. S.) 656; *Wardell v. Chisholm*, 9 U. C. C. P. 125; *Dennison v. Cunningham*, 35 U. C. Q. B. 383; *Davis v. Williams*, 13 U. C. C. P. 365; *Sargeant v. Allen*, 29 U. C. Q. B. 384; *Barber v. Armstrong*, 5 Ont. P. R. 153; *Lucas v. Delorme*, 6 R. L. 210; *Lahaie v. McMartin*, 7 R. L. 185; *Smith v. Brownlee*, 10 L. N. 405; *Black v. Stewart*, 19 N. S. R. 77. And see cases under the next following paragraph:—

Cattle at large.

Grand Trunk Rail. Co. v. James, 31 S. C. R. 420, reversing 1 Ont. L. R. 127; *Hurd v. Grand Trunk Rail. Co.*, 15 Ont. A. R. 58; *Thompson v. Grand Trunk Rail. Co.*, 22 Ont. A. R. 453; *Daniels v. Grand Trunk Rail. Co.*, 11 Ont. A. R. 471; *Nixon v. Grand Trunk Rail. Co.*, 23 Ont. R. 124; *Lebu v. Grand Trunk Rail. Co.*, 12 Ont. L. R. 590; *Bacon v. Grand Trunk Rail. Co.*, 12 Ont. L. R. 196; *Ibbotson v. Henry*, 8 Ont. R. 625; *Feusom v. Canadian Pacific Rail. Co.*, 8 Ont. L. R. 688.

In charge of competent person.

Thompson v. Grand Trunk Rail. Co., 18 U. C. Q. B. 92, 22 Ont. A. R. 453; *Grand Trunk Rail. Co. v. James*, 31 S. C. R. 420; *Styles v. Michigan Central Rail. Co.*, 18 Can. L. T. 5; *Duffield v. Grand Trunk Rail. Co.*, 31 Can. L. J. 667; *Tyson v. Grand Trunk Rail. Co.*, 20 U. C. Q. B. 256.

Evidence of negligence.

The fact that animals are killed on the track is not of itself evidence of negligence; there must be affirmative evidence thereof, and if the fact of negligence is left doubtful, the defendant is entitled to a verdict. *Falconer v. European and North American Rail. Co.*, 1 Pug. 179 (1872). But a plaintiff is not bound to prove negligence beyond reasonable doubt. *Rainald v. St. John City Rail. Co.*, 31 N. B. R. 582 (1892).

By sect. 295 of the Dominion Railway Act (R. S. C. 1906) it is enacted:—

"No person whose horses, cattle, or other animals are killed or injured by any train shall have any right of action against any company in respect of such horses, cattle, or other animals being so killed or injured, if the same were so killed or injured by reason of any person

Leaving gates open.

"(a) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed when not in use; or,

"(b) wilfully leaving open any gate on either side of the railway provided for the use of any farm crossing, without some person being at or near such gate to prevent animals from passing through the gate on to the railway; or,

- "(c) other than an officer or employee of the company while acting in the discharge of his duty, taking down any part of a railway fence; or,
- "(d) turning any such horse, cattle, or other animal upon or within the inclosure of any railway, except for the purpose of and while crossing the railway in charge of some competent person using all reasonable care and precaution to avoid accidents; or,
- "(e) except as authorized by this Act, without the consent of the company, leading or driving any such horse, cattle, or other animal, or suffering the same to enter upon any railway, and within the fences and guards thereof."

Similar provisions are found in the Government Railways Act and the railway Acts of the various Provinces of the Dominion noted in the Appendix of Canadian Statutes.

Cases relating to this section:—

Ferris v. Grand Trunk Rail. Co., 16 U. C. Q. B. 474; *Simpson v. Charge of competent person.*
Great Western Rail. Co., 17 U. C. Q. B. 37; *Thompson v. Grand Trunk Rail. Co.*, 18 U. C. Q. B. 92; *Markham v. Great Western Rail. Co.*, 25 U. C. Q. B. 572; *Ibbotson v. Henry*, 8 Ont. R. 625. See also notes to s. 294, *supra*.

Wheatbourne Cattle Co. v. Manitoba and North Western Rail. Co., 6 Man. R. 553; *Ferris v. Canadian Pacific Rail. Co.*, 9 Man. R. 501; *Grout v. Canadian Pacific Rail. Co.*, Q. R. 3 S. C. 81; *Langevin v. Canadian Pacific Rail. Co.*, Q. R. 5 S. C. 127; *Grand Trunk Rail. Co. v. Campbell*, Q. R. 3 Q. B. 570; *Daigle v. Temiscouata Rail. Co.*, 37 N. B. R. 219. Unlawfully on track.

N. S. R.
 and other
 e enact-
 made by
 on. See
 Quebec
 a Scotia,
 c. 187;
 7, c. 2;
 : Muni-
 30 (24);
 80.

Chisholm,
 B. 383;
 Allen, 29
Lucase v.
Smith v.
 7. And
 versing 1
 A. R. 58;
Daniels v.
and Trunk
Co., 12
 t. L. R.
 in Pacific

22 Ont.
 R. 420;
uffield v.
al Trunk

of itself
 thereof,
 ndant is
 American
 to prove
 ohn City

006) it is

skilled or
 inst any
 being so
 reason of

ailing to
 sed when

the rail-
 without
 prevent
 a to the

APPENDIX OF STATUTES.

2 & 3 PHILIP AND MARY, CAP. 7.

An Act against the Buying of Stolen Horses.

11 Hen. 7,
c. 13.

Further provisions relating hereto.

31 Eliz. c. 12.

In what manner horses shall be sold in fairs or markets.

The former misuse in sale of stolen horses.

A place shall be appointed for a horse fair and also a toll taker.

When, where, and of whom toll for horses shall be taken.

"Forasmuch as stolen horses, mares and geldings by thieves and their confederates, be for the most parts sold, exchanged given or put away in houses, stables, back-sides and other secret and privy places of markets and fairs, and the toll also privily paid for the same, whereby the true owners thereof being not able to try the falsehood and covin betwixt the buyer and seller of such horse, mare or gelding, is by the common law of this realm without remedy :"

2. Be it therefore enacted by the authority of this present parliament, That the owner, governor, ruler, fermor, steward, bailiff or chief keeper of every fair and market overt within this realm, and other the queen's dominions, shall before the feast of Easter next, and so yearly, appoint and limit out a certain and special open place within the town, place, field, or circuit where horses, mares, geldings and colts have been and shall be used to be sold in any fair or market overt; in which said certain and open place as is aforesaid there shall be by the said ruler or keeper of the said fair or market, put in and appointed one sufficient person or more to take toll and keep the same place from ten of the clock before noon until sunset of every day of the foresaid fair and market, upon pain to lose and forfeit for every default forty shillings: And that every toll-gatherer, his deputy or deputies, shall, during the time of every the said fairs and markets, take their due and lawful tolls for every such horse, mare, gelding or colt at the said open place to be appointed as is aforesaid, and betwixt the hours of ten of the clock in the morning and sunset of the same day, if it be tendered, and not at any other time or place; and shall have presently before him or them, at the taking of the same toll, the parties to the bargain, exchange, gift, contract or putting away of every such horse, mare, gelding or colt; and also the same horse, mare, gelding and colt so sold, exchanged or put away; and shall then write or cause to be written in a book to be kept for that purpose, the names

surnames and dwelling-places of all the said parties, and the colour, with one special mark at the least, of every such horse, mare, gelding and colt, on pain to forfeit at and for every default contrary to the tenor thereof, forty shillings.

3. And the said toll-gatherer or keeper of the said book shall within one day next after every such fair or market bring and deliver his said book to the owner, governor, ruler, steward, bailiff, or chief keeper of the said fair or market, who shall then cause a note to be made of the true number of all horses, mares, geldings and colts sold at the said market or fair, and shall there subscribe his name, or set his mark thereunto; upon pain to him that shall make default therein, to lose and forfeit for every default forty shillings, and also answer the party grieved by reason of the same his negligence in every behalf.

A note of all horses sold in a fair or market.

4. And be it further enacted by the authority aforesaid, That the sale, gift, exchange or putting away after the last day of February now next coming, in any fair or market overt, of any horse, mare, gelding or colt that is or shall be thievishly stolen or feloniously taken away from any person or persons, shall not alter, take away nor exchange the property of any person or persons to or from any such horse, mare, gelding or colt, unless the same horse, mare, gelding or colt shall be, in the time of the said fair or market wherein the same shall be so sold, given, exchanged or put away, openly ridden, led, walked, driven or kept standing by the space of one hour together at the least, betwixt ten of the clock in the morning and the sun-setting, in the open place of the fair or market wherein horses are commonly used to be sold, and not within any house, yard, back-side or other privy or secret place, and unless all the parties to the bargain, contract, gift or exchange, present in the said fair or market, shall also come together and bring the horse, mare, gelding or colt so sold, exchanged, given or put away to the open place appointed for the toll taker, or for the book-keeper, where no toll is due, and there enter or cause to be entered their names and dwelling-places, in manner as is aforesaid, with the colour or colours, and one special mark at the least of every the same horses, mares, geldings or colts, in the toll-taker's book, or in the keeper's book for that purpose where no toll is due as is aforesaid, and also pay him their toll, if they ought to pay any; and if not, then the buyer to give one penny for the entry of their names, and executing the other circumstances afore rehearsed, to him that shall write the same in the said book.

The using of a stolen horse in a fair, &c. before the owner's property shall be taken away.

5. And if any horse, mare, gelding or colt that is or shall be thievishly stolen or taken away, shall after the said last day of February next coming be sold, given, exchanged or

Recovery of horse by owner.

Application
of penalties.

The justices
of peace shall
hear and
determine the
offences
aforesaid.

The allowance
of the keeper
of the book
where no toll
is due.

put away, in any fair or market, and not used in all points according to the tenor and intent of this estatute, that then the owner of every such horse, mare, gelding or colt, shall and may by force of this estatute, seize or take again the said horse, mare, gelding, or colt, or have an action of *detinue* or *replevin* for the same; any sale, gift, exchange or putting away of any such horse, mare, gelding or colt, other than according to this estatute, in any wise notwithstanding.

6. The one-half of all which forfeitures to be to the king and queen's majesties, her heirs and successors, and the other to him or them that will sue for the same before the justices of peace, or in any of the king's and queen's majesties ordinary courts of record, by bill, plaint, action of *debt* or information in which suits no protection, *essoin* or wager of law shall be allowed.

7. And be it enacted by the authority aforesaid, That the justices of peace of every place and county, as well with liberties as without, shall have authority in their sessions within the limits of their authority and commission, to inquire and hear and determine all offences against this estatute, as they may do any other matter triable before them.

8. Provided alway, that in every such fair or market where any toll is nor shall be due ne leviabie by reason of the freedom, liberty or privilege of the said fair or market, the keeper or keepers of the book, touching the execution of this present Act, shall take nor exact but one penny upon and for every contract for his labour in writing the entry concerning the premises, in manner and form as is before declared.

31 ELIZ. CAP. 12.

An Act to avoid Horse Stealing.

"Whereas through most counties of this realm horse stealing is grown so common, as neither in pastures or closes, nor hardly in stables, the same are to be in safety from stealing which ensueth by the ready buying of the same by horse coursers and others, in some open fairs or markets far distant from the owner, and with such speed as the owner cannot pursue possibly help the same; and sundry good ordinances have heretofore been made touching the manner of selling and tolling of horses, mares, geldings, and colts in fairs and markets which have not wrought so good effect for the repressing and avoiding of horse stealing as was expected:"

11 Hen. 7,
c. 13.

2. Now for a further remedy in that behalf, be it enacted by the authority of this present parliament, That no person

after twenty days next after the end of this session of parliament shall in any fair or market sell, give, exchange or put away any horse, mare, gelding, colt, or filly, unless the toll taker there, or (where no toll is paid) the book-keeper, bailiff, or the chief officer of the same fair or market, shall and will take upon him perfect knowledge of the person that so shall sell or offer to sell, give or exchange any horse, mare, gelding, colt, or filly, and of his true christian name, surname and place or dwelling or resiancy, and shall enter all the same his knowledge into a book there kept for sale of horses; or else that he so selling or offering to sell, give, exchange or put away any horse, mare, gelding, colt, or filly, shall bring unto the toll taker or other officer aforesaid, of the same fair or market, one sufficient and credible person that can, shall, or will testify and declare unto and before such toll taker, book-keeper or other officer, that he knoweth the party that so selleth, giveth, exchangeth or putteth away such horse, mare, gelding, colt, or filly and his true name, surname, mystery and dwelling-place, and there enter or cause to be entered in the book of the said toll taker or officer, as well the true christian name, surname, mystery and place of dwelling or resiancy of him that so selleth, giveth, exchangeth or putteth away such horse, mare, gelding, colt or filly, as of him that so shall testify or avouch his knowledge of the same person; and shall also cause to be entered the very true price or value that he shall have for the same horse, mare, gelding, colt or filly, so sold: And that no person shall take upon him to avouch, testify or declare that he knoweth the party that so shall offer to sell, give, exchange or put away any such horse, mare, gelding, colt or filly, unless he do indeed truly know the same party, and shall truly declare to the toll taker or other officer aforesaid, as well the christian name, surname, mystery and place of dwelling and resiancy of himself, as of him of and for whom he maketh such testimony and avouchment: And that no toll taker or other person keeping any book of entry of sales of horses in fairs or markets, shall take or receive any toll, or make entry of any sale, gift, exchange or putting away of any horse, mare, gelding, colt or filly, unless he knoweth the party that so selleth, giveth, exchangeth or putteth away any such horse, mare, gelding, colt or filly, and his true christian name, surname, mystery and place of his dwelling or resiancy, or the party that shall and will testify and avouch his knowledge of the same person so selling, giving, exchanging or putting away such horse, mare, gelding, colt or filly, and his true christian name, surname, mystery, and place of dwelling or resiancy, and shall make a perfect entry into the said book of such his knowledge of the person, and of the name, surname, mystery and place of the

Sellers of horses in fairs or markets must be known to the toll taker, or some other who will avouch the sale, which shall be entered in the toll book, &c. 2 & 3 Phil. & M. c. 7.

A sufficient and credible person shall avouch the horse seller.

The price of the horse shall be entered in the tollers book.

A note in writing shall be given to the buyer.

The penalty of the person offending in any of the cases aforesaid.

Every sale otherwise made shall be void.

The justices of peace may hear and determine the offences aforesaid.

dwelling or resiancy of the same person, and also the true price or value that shall be *bonâ fide* taken or had for any such horse, mare, gelding, colt or filly so sold, given, exchanged or put away, so far as he can understand the same, and then give to the party so buying or taking by gift, exchange or otherwise, such horse, mare, gelding, colt or filly requiring and paying twopence for the same, a true and perfect note in writing of all the full contents of the same, subscribed with his hand; on pain that every person that so shall sell, give, exchange, or put away any horse, mare, gelding, colt or filly without being known to the toll taker or other officer aforesaid, or without bringing such a voucher or witness causing the same to be entered as aforesaid, and every person making any untrue testimony or avouchment in the behalf aforesaid, and every toll taker, book-keeper or other officer of fair or market aforesaid, offending in the premises contrary to the true meaning aforesaid, shall forfeit for every such default the sum of *five pounds*; but also that every sale, gift, exchange, or other putting away of any horse, mare, gelding, colt, filly, in fair or market, not used in all points according to the true meaning aforesaid, shall be void; the one-half of all which forfeitures to be to the queen's majesty, her heirs and successors, and the other half to him or them that will sue for the same before the justices of peace, or in any of her majesty's ordinary courts of record, by bill, plaint, action of debt or information, in which no essoin or protection shall be allowed.

3. And be it further enacted, That the justices of peace in every place or county, as well within liberties as without, shall have authority in their sessions, within the limits of their authority and commission, to inquire, hear and determine all offences against this statute, as they may do any other matters triable before them.

4. And be it further enacted, That if any horse, mare, gelding, colt, or filly, after twenty days next ensuing the end of this session of parliament, shall be stolen, and after shall be sold in open fair or market, and the same shall be used in all points and circumstances as aforesaid, that yet nevertheless the sale of any such horse, mare, gelding, colt or filly, within *six* months next after the felony done, shall not take away the property of the owner from whom the same was stolen, so long as claim be made within *six* months by the party from whom the same was stolen, or by his executors, or administrators, or by any other by any of their appointment, at or in the town or parish where the same horse, mare, gelding, colt or filly shall be found before the mayor or other head officer of the same town or parish, if the same horse, mare, gelding, colt or filly, shall happen to be found in any town corporate or market town,

else before any justice of peace of that county near to the place where such horse, mare, gelding, colt, or filly shall be found, if it be out of a town corporate or market town; and so as proof be made within forty days then next ensuing by two sufficient witnesses to be produced and deposed before such head officer or justice (who by virtue of this Act shall have authority to administer an oath in that behalf), that the property of the same horse, mare, gelding, colt or filly so claimed was in the party by or from whom such claim is made, and was stolen from him within six months next before such claim of any such horse, gelding, mare, colt or filly; but that the party from whom the said horse, mare, gelding, colt or filly was stolen, his executors or administrators shall and may at all times after, notwithstanding any such sale or sales in any fair or open market thereof made, have property and power to have, take again and enjoy the said horse, mare, gelding, colt, or filly upon payment or readiness, or offer to pay, to the party that shall have the possession and interest of the same horse, mare, gelding, colt, or filly, if he will receive and accept it, so much money as the same party shall depose and swear before such head officer or justice of peace (who by virtue of this Act shall have authority to minister and give an oath in that behalf) that he paid for the same *bond fide*, without fraud or collusion; any law, statute or other thing to the contrary thereof in anywise notwithstanding.

The owner may redeem a horse stolen from him within six months after paying the price.

APPENDIX OF CANADIAN STATUTES RELATING TO HORSES.

(A) DOMINION.

1. Animal Contagious Diseases Act, R. S. C. 1906, c. 75.

Sub-sect. (e) of sect. 2, declares that in the Act "'Infectious or contagious disease' includes, in addition to other diseases generally so designated — glanders, farcy, *maladie du coït*, pleuro-pneumonia contagiosa, foot and mouth disease, rinderpest, anthrax, Texas fever, hog cholera, swine plague, mange, scab, rabies, tuberculosis, actinomycosis and variola ovina.

The object of the statute is to suppress disease among animals, and relates to horses throughout.

2. The Criminal Code, R. S. C. 1906, c. 146.

The following sections have a special bearing upon offences in respect of horses.

Sect. 2, sub-sect. (5), "Cattle" includes horse or mule.

" 345. Theft of living creatures.

" 347. Definition of theft.

" 350. Killing animals.

" 358

" 359 } Punishment of theft of cattle and domestic
" 369 } animals.

" 370

" 392. Fraudulent taking of stray cattle. (See *Reg. v. Slavin*, 35 N. B. R. 388.)

" 400. Receiving stolen property.

" 417. Penalty for defrauding creditors by disposing of property.

" 510. Killing, maiming, poisoning or wounding cattle or the young thereof.

" 536. Attempts to injure cattle.

" 538. Threats to injure cattle.

" 542. Cruelty to cattle.

" 544. Conveyance of cattle without proper rest and nourishment.

3. The Government Railways Act, R. S. C., c. 36.

This statute contains the following sections relating to horses:—

Sects. 22 to 25, inclusive, provide for the erection of fences, gates, and cattle-guards. Until such works are provided the Crown is made liable for damages for cattle injured. When

such works are provided, the Crown is only liable for the wrongful or negligent acts of its servants. Farm crossings require to be fenced on both sides.

- Sect. 26. Forbids cattle to be at large on highway near railway.
- „ 27. Stray cattle may be impounded.
- „ 28. No damages for killing stray cattle on highway without negligence.
- „ 29. No damage for killing or injuring cattle on railway without negligence.
- 4. The Railway Act, R. S. C., c. 37.
The following sections relate to injury to horses:—
 - Sect. 252. Live stock at farm crossings.
 - „ 254. Fences, gates, and cattle-guards.
 - „ 255. Farm crossing gates to be kept closed.
 - „ 274. Use of bell and whistle at crossings.
 - „ 277. Signals at rail level crossings.
 - „ 278. Stopping trains at rail level crossings.
 - „ 294. Forbids cattle to be at large on highway near railway.
 - „ 295. No damages for cattle injured in certain cases.
 - „ 407. Penalty and damages for allowing horses to go upon railway.

(B) PROVINCIAL.

(a) ONTARIO.

1. The Ontario Railway Act, 1906, 6 Edw. 7, c. 30.
This Act applies to railways and street railways within the legislative authority of the Legislature of Ontario.
The following sections relate to horses.
 - Sect. 86. Live stock at farm crossings.
 - „ 87. Fences, gates and cattle-guards.
 - „ 95. Fencing approaches to highway crossings.
 - „ 123. Signals at rail level crossings.
 - „ 238. Animals at large near railway.
2. The Unorganised Territory Act, R. S. O., 1897, c. 109.
Sect. 94 provides that damages may be recovered in respect of injuries committed by horses, cattle, sheep or swine straying upon lands in the unorganized districts of the Province of Ontario if there is any by-law forbidding them running at large; and where there is no such by-law prohibiting or regulating the running at large of such animals, no damages shall be recovered unless the animal has broken through or jumped over a fence then being in reasonably good order and of the height of four and one-half feet; but this enactment does not apply to the case of breachy or unruly animals.
3. The Municipal Act, R. S. O., 1897, c. 223.
Sect. 546, sub-sect. 2, empowers the municipal council of any city, town or village, to pass by-laws for restraining and regulating the running at large or trespassing of any animals.
Sect. 595 prescribes a reward for the apprehension of horse thieves.

4. An Act respecting Pounds (R. S. O., 1897, c. 272).

The provisions of this Act remain in force until other provisions are made by by-law as authorised by The Municipal Act, R. S. O., 1897, c. 223, sect. 546, sub-sect. 2.

5. An Act to prevent the spread of Contagious Diseases among Horses and other Animals, R. S. O., 1897, c. 273. (Amended by 3 Edw. 7, c. 7, sec. 47.)

The disease sought to be suppressed by this statute is "glanders" or "farcy." (See sect. 1 (a).)

6. An Act to make provision for preventing the spread of certain Malignant Diseases among Horses, R. S. O., 1897, c. 274.

The object of this statute is to suppress "equine syphilis" or other malignant venereal disease among horses.

7. An Act to prevent the Fraudulent Entry of Horses at Exhibitions, R.S.O., c. 254.

This Act penalizes entries for competition for prizes of horses under false or assumed names or pedigrees.

8. The Agricultural Societies Act (6 Edw. VII., c. 16).

This Act prohibits horse racing, other than trials of speed, at Agricultural Exhibitions.

By sect. 22 it is enacted that "It shall not be lawful to carry on any horse racing other than trials of speed under the control and regulation of the officers of the society during the days appointed for holding any exhibition by any society, at the place of holding the exhibition, or within five miles thereof.

2. Any person who is guilty of a violation of this section shall be liable, upon summary conviction before a justice of the peace, to a fine not exceeding \$50, or imprisonment in the common gaol of the county for a period not exceeding thirty days.

3. In case any person is convicted under this section, the society thus proven to have permitted horse racing shall be debarred from receiving any portion of the legislative grant in the next ensuing year.

9. The Municipal Act, R. S. O., 1897, c. 223.

Sect. 578 authorizes municipal by-laws to be passed for the holding of public fairs to be held for the sale, barter, and exchange of horses.

10. The Assessment Act, R. S. O., 1897, c. 224.

Sect. 7 exempts all horses owned by a farmer, while carrying on the general business of farming or grazing, from liability to taxation.

(b) QUEBEC.

1. Title IV. (Public Departments), R. S. Q., 1888.

Sect. 1745 exempts two horses of a settler in the province from seizure and execution for debt for a period of fifteen years from the date of the issuing of his patent for the lands occupied by him.

2. Title XI. (Companies, &c.), R. S. Q., 1888.

Sect. 5171 provides for the erection and maintenance of fences, gates, cattle-guards and farm crossings by railway companies under the control of the Legislature of the Province

of Quebec. Until the same are properly erected and maintained the company is liable for all damages done by their trains to cattle and horses on the railway; but when the company satisfies these requirements the company is only responsible for damages arising from negligent or wilful conduct by their servants.

3. The Municipal Code of the Province of Quebec.

Arts. 428 to 448, inclusive, regulate the matter of impounding stray animals.

Art. 560 empowers town and village councils to establish pounds and appoint keepers thereof.

(c) NOVA SCOTIA.

1. The Nova Scotia Railway Act, R. S. N. S., 1900, c. 99.

Sect. 262 forbids horses being allowed at large within half a mile of the intersection of a highway with any railway. If so found at large they may be impounded. Owner has no right of action if stray cattle are killed at point of intersection.

Sect. 263 forbids horses being allowed to enter within the fences or guards of the railway other than at farm crossings.

2. Stray Cattle and Animals, R. S. N. S., 1900, c. 92.

This Act provides for the detention and sale of animals straying on private property between the 1st day of November and the 1st day of May in any year. If they are found on private property, and their owner is unknown, the person finding them may detain them; and if, when so detained, they are not claimed within twenty-four hours such person must forthwith transmit a description of the animals to the municipal clerk, who must file the same in his office and post up copies thereof in three or more public places in the polling district in which such animals were found. If no person claims such animals within ten days after notice so given the animals may be sold under the order of a justice of the peace, and in the manner prescribed by the Act. If the animals are claimed before sale the owner must pay the expenses of the finder and the municipal clerk.

By sects. 12, 13 and 14 of the Act authority is given to municipal councils to make by-laws preventing horses going at large; and also for preventing the spreading of disease by infected horses and cattle.

3. Fences and Impounding of Cattle, R. S. N. S., 1900, c. 93.

Sect. 14 provides for damages in the case of animals breaking into any inclosure and destroying the product thereof.

Sect. 15 provides for the recovery of damages in the case of animals trespassing upon improved land whether inclosed or not, where such animals are prohibited from running at large by municipal by-law or regulation.

Sects. 16, 17, 18 and 19 provide for cases of fence-breaking by animals.

Sects. 20 to 24, inclusive, regulate the impounding of animals doing mischief, and animals at large.

Sect. 26 provides a penalty in the case of anyone rescuing animals while being driven to a pound, or while impounded.

(d) NEW BRUNSWICK.

1. Fences, Trespasses, and Pounds, Consol. Stats. N. B., 1903, c. 187.

Sect. 1, sub-sect. (2), declares that the word "cattle" as used in the Act includes horses.

Sect. 4 provides for the protection of barbed wire fences by a top rail of wood.

Sect. 5 declares that no barbed wire fence without the protection prescribed in the preceding section shall be considered a lawful fence.

Sects. 15 to 38, inclusive, provide for the impounding of cattle, the replevy of cattle impounded, and the recovery of damages arising from cattle breaking into closes.

2. Horse Pedigrees, Consol. Stats. N. B., 1903, c. 48.

This Act makes provision for the registration of pedigrees of stallions used for breeding purposes in the Province of New Brunswick.

4. 7 Edw. VII., c. 17.

This statute provides for the importation of horses into the Province of New Brunswick for breeding purposes.

(e) PRINCE EDWARD ISLAND.

1. An Act respecting Domestic Animals (51 Vict. c. 4).

Part I. relates to the regulation by school districts of the running at large of animals therein.

Part II. relates to the running at large of animals in a district or place wherein no regulations are in force.

Part III. relates to the running at large of unruly or dangerous animals, and unringed swine in a district or place.

Part IV. relates to trespasses by animals on an inclosure.

Part V. relates to stray animals, their disposition and sale.

This statute is amended in part by 3 Edw. 7, c. 2.

2. An Act for the encouragement of Agriculture, 1 Edw. 7, c. 17. Amended by 3 Edw. 7, c. 4, and by 5 Edw. 7, c. 4.

Provides, among other things, for the improvement of breeds of horses in the Province of Prince Edward Island.

(f) MANITOBA.

1. The Manitoba Railway Act, R. S. Man., 1902, c. 145.

The Act relates to railways under the control of the Legislature of Manitoba.

Sects. 32 to 38, inclusive, relate to fences, gates and cattle-guards. Until the company provides them, it shall be liable for injury to animals on the railway, but not afterwards except for damages from wilful and negligent acts of servants of the railway.

2. The King's Bench Act, R. S. Man., 1902, c. 40.

Sects. 831 to 833, inclusive, provide for the sale at public auction of horses, &c., when taken by the sheriff under a writ of attachment.

3. The County Courts Act, R. S. Man., 1902, c. 38.

Sects. 262 to 264, inclusive, relate to the sale of animals and perishable goods in cases of attachment under County Court process.

4. The Executions Act, R. S. Man., 1902, c. 58.

Sect. 29 exempts three horses or mules of judgment debtor in cases where they are used by him in earning his living. The word "horses" includes "colts" and "fillies."

5. The Animals' Diseases Act, R. S. Man. 1902, c. 6.

The object of the Act is to suppress infectious and contagious diseases among horses and other animals in the Province.

Sect. 2 (h) declares: "The expression 'infectious or contagious disease' when applied to diseases of animals, includes in addition to other diseases generally so designated, cattle-plague, pleuro-pneumonia, foot and mouth disease, anthrax, tuberculosis, splenic, Texas or Spanish fever, sheep-pox, sheep-scab, swine-plague or hog-cholera, hydrophobia, glanders, farcy, equine syphilis, and mange, and any disease which the Lieutenant-Governor in Council from time to time declares to be an infectious or contagious disease for the purposes of this Act."

6. The Horse Breeders' Lien Act, R. S. Man., 1902, c. 73.

This statute provides for the registration of stallions throughout the Province, and for the registration and enforcement of liens for the services of stallions.

7. The Municipal Act, R. S. Man., 1902, c. 116.

Sect. 642 authorises municipal councils to pass by-laws for compensating the owners of glandered horses which have been destroyed. Sect. 643 provides for impounding stray animals.

Sect. 644 authorizes by-laws to be made in respect of yards and inclosures for pounds, and matters incidental to the impounding of stray animals.

8. The Municipal Act, R. S. Man., 1902, c. 16.

Sect. 647 provides for the passage of by-laws by municipal councils for regulating the style and form of shoe to be worn by horses driven on the public streets; and for preventing leading, riding or driving horses on side-walks of streets; and for preventing horses or mules being driven in harness without bells during the winter season, and for regulating hack stands in public streets.

9. The Mines Act, R. S. Man., 1902, c. 113.

Sect. 49 (d) directs in all mine roads in which persons travel and on which the produce of the mine in transit by horses exceeds ten tons in any one hour over any part thereof, shall be provided with places of refuge of certain dimensions at intervals of not more than one hundred yards.

10. Agricultural Societies, R. S. Man., c. 1.

Sect. 24 designates as one of the objects of such societies the procuring of "pedigree" animals of new and valuable kinds.

11. Stable Keepers Act, R.S. Man., 1902, c. 159, gives lien for food, &c., supplied to animals.

(g) BRITISH COLUMBIA.

1. The Animals Act, R. S. B. C., 1897, c. 7.

This Act provides restrictions upon horses unlawfully running

at large, defines the liability of their owners, and provides for the impounding and sale of stallions running at large among a band of mares lawfully pastured on private lands or public lands of the Province.

2. The Wild Horse Act, R. S. B. C., 1897, c. 192.

This Act provides for the destruction of any unbranded stallions over the age of twenty months, which may be found running at large upon the public lands of the Province.

3. The Cattle Farming Act, R. S. B. C., 1897, c. 38.

This Act makes provision for the registration of cattle farming agreements.

4. The Cattle Lien Act, R. S. B. C., 1897, c. 39.

This Act creates a lien in favour of liverymen, boarding and sale stable keepers, and agisters, for food, care, attendance or accommodation supplied to horses belonging to others.

5. The Cattle Act, R. S. B. C., 1897, c. 40.

This Act provides for the protection and marking of horses. It requires records of brands and marks to be kept, and provides a penalty for fraudulent branding or marking. Sect. 14 enacts that no action for the price, or damage for breach of any contract for the sale of any cattle shall be recoverable unless such sale shall have been made by bill of sale or memorandum in writing, wherein is inserted at the period of making thereof, the particular brands or marks upon each of the cattle included in such sale.

6. The British Columbia Railway Act, R. S. B. C., 1897, c. 163.

Sect. 30 makes provision for the erection and maintenance of fences, gates and cattle-guards by the company. In the absence thereof, the company is responsible for all damages sustained by the owners of horses on the railway whether they came rightfully or wrongfully upon the land or highway from whence they got upon the railway. When such works are provided, the company is only liable for the negligent or wilful acts of their servants. Horses are not to be ridden, led or driven on the railway without the consent of the company, under a penalty not exceeding \$40 for every such offence.

(h) SASKATCHEWAN.

The Railway Act, Statutes of 1906, c. 30.

Sect. 138 provides that the company shall have crossings for farm purposes, and requires that live stock using the same shall be in charge of some competent person who shall use all reasonable care and precaution to avoid accidents.

Sects. 141 to 147, inclusive, provide for the erection and maintenance of fences, gates and cattle-guards by the company.

Sects. 169 and 170 provide for signals at level crossings.

Sects. 181 to 183, inclusive, prohibit animals being ridden, led or driven on the railway without the consent of the company. If a horse running at large is killed at the point of intersection of the railway with the highway, no right of action accrues to the owner. If a horse is killed upon the property of the company, having strayed there without the negligence or wilful act or omission of the owner, the company is liable.

The fact that the horse was not in charge of some competent person will not deprive the owner of his right to recover under sect. 183.

(i) ALBERTA.

The Railway Act, Statutes of 1907, c. 8.

Sect. 138 is similar in its provisions to sect. 138 of the Saskatchewan Railway Act, *supra*.

Sects. 144 to 150, inclusive, make provisions for fences, gates and cattle-guards, similar to those in sects. 141 to 147 of the Saskatchewan Railway Act, *supra*.

Sects. 178 and 179 provide for signals at level crossings.

Sects. 190 and 191 contain similar provisions to those in sects. 181 to 183, inclusive, in the Saskatchewan Railway Act, *supra*.

NOTE.—The following ordinances of the North-West Territories relating to horses are still in force in the provinces of Saskatchewan and Alberta: Consol. Ordinances of North-West Territories, Chap. 80, Respecting Estray Animals; Chap. 81, Respecting the Herding of Animals; and Chap. 82, Protection of Animals from Dogs. See The Saskatchewan Act, 4 & 5 Edw. 7, c. 42, s. 16, and The Alberta Act, 4 & 5 Edw. 7, c. 3, s. 16 (Dom.).

HORSES.

mpetent
er under

8 of the

fences,
to 147 of

ngs.
those in
way Act,

ritories
tchewan
ritories,
ting the
als from
16, and

INDEX.

ACCEPTANCE AND RECEIPT,

- in what they consist, 7
- must be of the goods "so sold," *id.*
- general rule, 8
- acceptance before delivery, 8, 10
- when vendor may disaffirm sale, 9
- where an article is selected, *id.*
- question for the jury, 10
- constructive possession by vendee, *id.*
 - must divest vendor of his lien, *id.*
 - seller may become agent for buyer, *id.*
 - question for jury in such case, *id.*
- what amounts to an acceptance and receipt, 11
- buyer directing expense to be incurred, *id.*
- what has been held insufficient, 12
- various acts of ownership, 18
- a ready-money transaction, *id.*
- criterion for determining whether goods are accepted or not, 14
 - conduct of buyer, *id.*
 - where buyer offers to resell, *id.*
 - where goods are agreed to be resold, *id.*

ACCIDENT,

- unsoundness caused by, 70
- to hired horse or carriage, 200
- to horse in railway yard, 303
- when injury arises altogether from, 334
- horse running away, 334, 335
- running over a person in the dark, 334
- from the sudden fright of a horse, 335
- when trying horse in frequented thoroughfare, *id.*
- accident itself sometimes *prima facie* proof of negligence, 340

ACCIDENTAL DEATH. See NEGLIGENCE DRIVING.

ACCOUNT STATED,

- proof of, 192

ADDRESS,

- giving one after an accident, 361

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)

APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5969 - Fax

ADVERTISING,

effect of, by auctioneer, 48

AFFIRMATION,

when it amounts to a warranty, 148

AGENT,

signature by, under Sale of Goods Act, 24

who may be an agent, *id.*

how constituted, 25

need not be authorized in writing, *id.*

auctioneer, agent of both parties, 25, 41

except when he sues as a contracting party, *id.*

auctioneer's clerk, agent at an auction, *id.*

writing off debt due from agent by agent, 31

agent not declaring himself to be so, 49

money coming to agent by fraud of principal, 52

cannot delegate his authority, 182

nor exceed it, *id.*

agency determines by principal's death, *id.*

difference between remunerated and unremunerated agent,
id.

acting without proper authority, *id.*

his personal responsibility, 133

where he cannot be sued on the contract, *id.*

but is liable in damages, *id.*

principal answerable for his fraud, *id.*

misrepresentation by, collateral to contract, *id.*

damage caused by his negligence, 133, 134

surreptitious dealing of, with other principal, 134

avoidance of contract, *id.*

undisclosed principal, 134, 135

person described as an agent may be proved to be principal,
136

principal cannot be proved to be agent, *id.*

their respective rights of action on a contract, *id.*

warranty by servant as special agent, *id.*

when authority to sell may imply authority to warrant,
137

warranty by special agent at a fair, *id.*

warranty by a servant as general agent, *id.*

servant of horse-dealer has implied authority to warrant,
id.

illustration of rule, *id.*

alleged usage not to warrant, 139

warranty by servant on incidental matter, *id.*

warranty by a servant after sale, 140

warranty by a servant forbid to give one, *id.*

warranty by a stranger forbid to give one, *id.*

master unwilling to stand by his servant's warranty, *id.*

rule as to servant binding his master, *id.*

warranty by a person entrusted to deliver, 142

agent employed to take a warranty, *id.*

action against a pretended agent, *id.*

effect of signature of consignment note by, 292

AGISTER,

- his possession, 242
- does not insure a horse's safety, 243
- he is answerable for negligence, *id.*
 - if he leaves his gates open, *id.*
 - fences out of order, &c., 244
 - injury by another horse, *id.*
 - doctrine of scienter does not apply, *id.*
- action against, founded on tort, 245
- the horse's condition, *id.*
- entage let for a certain time, *id.*
- agister has no lien, 246
- may have a lien by agreement, 247
- bankruptcy of agister, *id.*
- horses and cattle being agisted are distrainable, *id.*
 - but not when taken in to rest for a night, *id.*
 - decision of the Irish Court of Queen's Bench, 248
 - distinction where cattle enter by breaking fences, *id.*
- limitation of distress under Agricultural Holdings Act, *id.*
- taking in live stock to be fed at a fair price, *id.*
- terms "milk for meat," 249
- "exclusive right to feed" for limited period, *id.*
- remedy for wrongful distress, *id.*

AGISTMENT,

- definition of contract of, 242

AGREEMENT. See NOTE OR MEMORANDUM.

- unstamped, admissible to prove fraud, 170

AGREEMENT STAMP,

- written warranty does not require, 196

AGREEMENT TO SELL, 1, 2

- definition of, 2
- when it becomes a sale, *id.*

AGRICULTURAL HOLDINGS ACT. See AGISTER.

ALDRIDGE'S,

- proprietor of, a horsedealer, 35

ALTERNATIVE RATES, 300. See CARRYING HORSES.

AUCTIONS AND REPOSITORIES,

- an auctioneer, 36
- extent of authority, *id.*
- not to warrant, *id.*
- to sell for true owner, 37
- true owner not bound to indemnify against mistaken claim of third party, *id.*
- liable to an action for negligence, *id.*
- or for conversion, *id.*
- selling horses comprised in bill of sale, 39
- horse sent to a repository, *id.*
- auctioneer's possession, *id.*
- an auctioneer can set up *jus tertii*, 40
- interpleader by auctioneer, *id.*

AUCTIONS AND REPOSITORIES—*continued*.

- goods privileged from distress, *id.*
- auctioneer's right to remain on the premises, *id.*
- auctioneer or clerk agent of both parties, 41
- purchaser's name signed to a catalogue, 17, 41
- printed particulars of sale, 41
- an incorrect catalogue, 42
- a limited warranty, *id.*
- where it applies only to soundness, 43
- trial of a horse warranted quiet in harness, *id.*
- notice of the conditions of sale, *id.*
- notice of particulars, 44
- goods put up in lots, *id.*
- where a bidder may retract, 45
- warranty by auctioneer of authority to sell, *id.*
- sale "without reserve," *id.*
- implied authority to sell without reserve, 46
- Warlow v. Harrison*, distinguished, 47
- sales subject to reserve, *id.*
- liability of auctioneer for failing to sign memorandum, 48
- effect of advertisement, *id.*
- warranty of ownership, *id.*
- rescission of contract on ground of misrepresentation of ownership, *id.*
- auctioneer not disclosing his principal, 49
- liability for non-delivery, *id.*
- puffing, *id.*
- sale not notified to be subject to right to bid on behalf of seller, 49, 50
- right to bid expressly reserved, 50
- effect of previous private warranty, *id.*
- agreement not to bid against each other, *id.*
- mock auctions, *id.*
- purchaser may transfer his bargain, *id.*
- where party refuses to take goods, 51
- goods resold without communicating with purchaser, *id.*
- auctioneer proper party to receive the price, *id.*
- has no authority to receive a bill of exchange, *id.*
- he is stakeholder for both parties, *id.*
- effect of this attribute, *id.*
- as to interest, 52
- auctioneer's lien, *id.*
- when the price vests in the vendor, *id.*
- price obtained by principal's fraud, *id.*
- auctioneer's commission, 53
- entitled to commission though no sale by auction, 52
- misrepresentation made by seller before sale by auction, 149, 163
- by bidder at an auction, 163

BACK SINEWS. See SPLINT and THICKENING OF THE BACK SINEWS.

BACKING AND GIBBING. 72

BAILEE,

- vendor may become, 9
- setting up title of bailor, evidence of conversion, 64
- innkeeper may become, 220
- fraudulent appropriation by, larceny, 60, 259
- a gratuitous bailee, 277
- negligence of *v.* bailee, *id.*
- of a gratuitous bailee, *id.*

BAILMENT. See **AGISTER. BORROWING HORSES, CARRYING HORSES, FARRIER, HIRING HORSES, INNKEEPER, LIVERY-STABLE KEEPER.**

BARGAIN,

- implied in contract of sale, 1
- striking a bargain, 4
- striking off a bargain, 15
- bound by an earnest, *id.*
- a foolish bargain, 207
- loss of a good bargain, 213

BARGAIN AND SALE,

- included in "sale," 2
- proof of, 193

BEAR,

- liability of owner of, for injury caused by, 368

BEHN v. BURNESSE, judgment of Williams, J., in, as to distinction between warranty and representation, 153—155

BICYCLE,

- a carriage within Highway Acts, 342

BILL OF EXCHANGE. See **PROMISSORY NOTE.**

- dishonoured, effect of, 31
- payment for goods, *id.*
- agent receiving one, 51
- breach of warranty no defence to action on, 200
- unless there be a total failure of consideration, *id.*

BITING, 72

BLACKSMITH. See **FARRIER.**

BLINDNESS,

- an unsoundness, 74

BLOOD AND BOG-SPAVIN, 75**BONE SPAVIN.**

- an unsoundness, 75, 76

BORROWING HORSES,

- remedy against borrower for detaining, 183
- lending for use, 274
- duties of borrower and lender, *id.*

BORROWING HORSES—continued.

- lender of a horse, 275
- must not conceal defects, *id.*
- what care is required, *id.*
- as much as the borrower is capable of bestowing, 276
- showing a horse for sale, *id.*
- a gratuitous bailee, 277
- negligence of a bailee, *id.*
- rule as to negligence of gratuitous bailee, *id.*
- use strictly personal, *id.*
- cannot be used by a servant, 278
- must be used according to the lending, *id.*
- or else the borrower is answerable, *id.*
- where no time is fixed for return, *id.*
- re-delivery on request, *id.*
- borrower bound to feed the horse, *id.*
- where the horse is exhausted, 279
- where the horse is killed, *id.*
- where the horse dies from disease, *id.*
- where borrower is answerable for damage, *id.*
- horse injured by negligence of stranger, *id.*
- right of action by borrower, 279, 280
- possession against wrongdoer, 280
- obligation of bailee to account to bailor, *id.*
- bailment ended by misuser, 281

BREACH OF WARRANTY,

- requisites to action on, 161
- buyer neither bound to tender the horse nor give notice, 172
- seller not bound to take back the horse, *id.*
- unless the contract was executory, *id.*
- Street v. Blay*, *id.*
- judgment of the Court of King's Bench, 173
- Lord Eldon's opinion discussed, *id.*
- evidence in mitigation of damages, 175
- unfitness for a particular purpose, *id.*
- an intermediate profit, *id.*
- acts of ownership inconsistent with trial, *id.*
- confirmed by a later case, 176
- remedy for breach of warranty, 177
- goods are returnable where there is fraud, *id.*
- agreement that a horse is to be returned if unsound, *id.*
- notice of untruth of warranty before removal, 178
- Head v. Tattersall*, *id.*
- condition for return if unsuitable, *id.*
- horse unfit for a particular purpose, 179
- verbal offer after sale to take back the horse, *id.*
- return should be within a reasonable time, *id.*
- or the contract becomes complete, *id.*
- where buyer should tender the horse, *id.*
- sale after tender, 180
- notice instead of tender, *id.*
- length of time before notice, *id.*
- seller should have the horse examined, 181

BREACH OF WARRANTY—*continued*.

- sale by order of Court, 181
- pleading in an action on, 186
- statement of claim, how framed for, 188
- when any one substantive part is untrue, *id.*
- when condition is annexed to the warranty, *id.*
- payment in action on, *id.*
- proof of breach of warranty, 192, 197
- plea of, in reduction of damages, 200
- defence to action on, 201
- And see WARRANTY.

BREAKING HORSES.

- in a public place, 379

BRIGHT EYE, 143, 144

BROKEN BACKED. See STIFF BACK.

BROKEN DOWN. See SPRAIN.

BROKEN KNEES, 77

BROKEN WIND, 77

BRONCHITIS, 78

BULL,

- where a mad bull wounds a person, 379
- where a bull singled out a person wearing red, *id.*
- injury occasioned by a vicious bull, 380

BUYING, SELLING AND EXCHANGING,

- bargain, 1
- sale and exchange, *id.*
- sale and agreement to sell, *id.*
- bargain and sale, 2
- entire contract, *id.*
- severable contract, *id.*
- verbal contract, *id.*
- written contract, *id.*
- right of rescission, 3
- right of trial, *id.*
- buying a horse under 10*l.*, 4
- where neither party can be off, *id.*
- striking a bargain, *id.*
- contract not to be performed within a year, 5
- Statute of Frauds, s. 4, *id.*
- buying a horse at 10*l.* or upwards, *id.*
- Sale of Goods Act, 1893, s. 4, *id.*
- contract within the section, 6
- requisites of a sale under s. 4, *id.*

CAB,

- liability of proprietor to public, 349
- for loss of luggage, 350
- or personal injury, *id.*
- or damage to horse or carriage of another, *id.*

CAB—*continued*.

- liability of proprietor to public—*continued*.
- relationship between proprietor and driver, 350
- where licence taken out in partner's name, 350, 351
- scope of driver's employment, 351
- Mann v. Ward*, a doubtful authority, 352
- liability of proprietor to driver, 273. See **HIRING HORSES**.

CANKER, 78

CAPPED ELBOW, 80

CAPPED HOCKS, 79

CARRYING HORSES,

- a common carrier, 282
- railway companies common carriers, *id.*
- duty of common carriers, *id.*
 - bound to carry within reasonable time, 283
 - and to deliver safely, *id.*
 - exceptions, *id.*
 - meaning of "act of God," *id.*
- rule as to inherent vice, *id.*
 - Blower v. Great Western Railway Company*, *id.*
 - evidence in proof of, 284, 285
 - where each party gives evidence, 285
 - upon what burthen of proof depends, 286
 - rule applies to common carriers by sea, *id.*
- proof in action for negligence, *id.*
- when carrier may refuse to carry animals, 287
- onus of proof of non-liability, 254
- must carry for reasonable charges, *id.*
- defects in carriages, *id.*
- a special contract to carry, *id.*
- binding at common law, 288
- hardship thus occasioned, *id.*
- remedy under 17 & 18 Vict. . . .
- provisions of section 7, *id.*
 - company to be liable . . . giving notices, *id.*
 - conditions must be read . . .
 - limitation of liability, *id.*
 - special contract must be signed, *id.*
- application of section 7, *id.*
- construction of section 7, *id.*
- Peck v. North Staffordshire Railway Company*, 290
- general notices invalid, 291
- condition limiting liability, *id.*
- "condition" and "special contract" synonymous terms, *id.*
- special contract binding on company without signature, 292
- effect of signature by agent, *id.*
- as to reasonableness Court to decide, *id.*
- general effect of these decisions, *id.*
- what conditions just and reasonable, and what not, 298
- "to be free from all risks"—cattle suffocated, *id.*

CARRYING HORSES—*continued.*

"to be free from all risks of conveyance"—unsound truck,
293, 294

owner's risk at lower rate, 294

condition as to time within which loss should be declared,
295

as to loss of market coupled with "injury" to cattle, 295, 296
condition as to value coupled with unreasonable rate, 296,
297

where value untrue declared, 298

condition as to general non-liability, 298, 299

as to non-liability beyond their own limits, 299

if part of special contract is reasonable, such part may
be relied on, 300

alternative rates, 300, 301

what is wilful misconduct, 301

plaintiff must prove more than culpable negligence, *id.*
onus of proof that condition is reasonable, *id.*

general effect of the decisions as to conditions, 302

delivery by carrier, *id.*

notice of consignee's refusal to consignor, *id.*

effect of consignee's refusal, *id.*

compensation paid in error to consignor no answer to action
by consignee, 303

liability of company when accident happens to horse
within yard, *id.*

opinion of Cockburn, C.J., *id.*

of Mellor, J., 304

of Blackburn, J., *id.*

declaration of value under 17 & 18 Vict. c. 31, s. 7, *id.*

non-compliance with a rule as to receipt, *id.*

through carriage on railways, *id.*

what company liable, *id.*

contract by one company for entire journey, 305

contract by one company as agent for another, *id.*

one company adopting defective vehicle from another,
306

through carriage, partly by railway and partly by sea, *id.*

Regulation of Railways Act, 1868, *id.*

company to furnish particulars of charges, 307

carriage in vessel not belonging to company, *id.*

Regulation of Railways Act, 1871, *id.*

steamboat and railway companies to disinfect carriages,
boats, &c., 308

Diseases of Animals Act, 1894, *id.*

Animals (Transit and General) Order, 1895, *id.*

"reasonable time," 309

a ferryman, *id.*

damages, 310

injury must not be too remote, 311

failing to provide horse-boxes, *id.*

CATALOGUE,

at a sale, 17

purchaser's name signed, 17, 41

CATALOGUE—continued.

- conditions separated, 17, 41
- terms of, must not be varied by parol, 41
- incorrect, may be explained, 42
- description in, amounting to a warranty, 152

CATARACT,

- definition of, 73
- varieties of, *id.*
- opacity of cornea and, 74

CATTLEGATE OWNERS, rights of, 386**CAVEAT EMPTOR. See WARRANTY.**

- rule in buying and exchanging, 116, 143, 146, 147, 161, 165
- when it does not apply, 147
- possession of the means of knowledge, 163

CHEATING,

- where several persons combine to cheat, 156
- conspiracy to cheat indictable, *id.*
- must be evidence of concert, *id.*
- what evidence held insufficient, *id.*
- where only one person cheats an action lies, 157

CHILD,

- contributory negligence of, 323
- injury to, whilst trespassing, 324
- identification of, with person in charge of, 333
- effect of such identification, *id.*

CHRONIC OPACITY OF THE LENS,

- an unsoundness, 98

CLOUDINESS OF THE CORNEA,

- an unsoundness, 80

COACHMAN. See HIRING HORSES, and NEGLIGENCE IN DRIVING BY SERVANT.**COMMISSION,**

- auctioneer's, 53. See AUCTIONS, LIEN, SALE.

CONDITION,

- implied, as to right to sell, 117
- implied, as to quality or fitness, 120
- when to be treated as a warranty, 122, 123
- annexed to a warranty, 125, 188
- where performance of, impossible, 126

CONDITIONS OF SALE,

- catalogue must refer to them, 41
- separation from catalogue, *id.*
- printed particulars, *id.*
- warranty limited as to time may be one of them, 42, 125
- notice of conditions, 43, 44

CONSPIRACY TO CHEAT. See CHEATING, FRAUDULENT REPRESENTATION.

CONTRACT,

executed, 1
 executory, *id.*
 of sale, *id.*
 entire, and price indivisible, 2
 entire, and warranty, several, 128
 severable, 2
 verbal, *id.*
 written, *id.*
 right of rescission of, 3
 right of trial, *id.*
 not to be performed within a year, 5
 Statute of Frauds, s. 4, *id.*
 Sale of Goods Act, s. 4, *id.*
 time not the essence of, 28
 reduced to writing, 127
 to carry. See CARRYING HORSES.
 a foolish bargain, 162, 207
 affected by a delusion, 164
 an impossible contract, 207
 action against livery-stable keeper for not taking due care,
 founded on, 242
 injury by hirer of horse when founded on, 256

CONTRACTION,

when held to be an unsoundness, 81, 82

CONTRACTOR,

liability of, for negligence, 330, 331. See also HIRING HORSES.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENT DRIVING.

no defence to a criminal charge, 315

CONVERSION,

auctioneer liable to action for, 37
 setting up title of bailor, evidence of, 61
 damages for wrongful, 204

CONVEXITY,

of eye not a patent defect, 144

CORNS. 82

COUGHER, 83

held to be an unsoundness, though temporary 83, 84

CRACKED HEELS. 93

CRIB-BITING. 84, 144

when not an unsoundness, 85
 held to be a vice, *id.*

CROSSING,

railway, 369
 street, 345

CRYSTALLINE LENS. See BLINDNESS.

CURB, 86, 198

CURBY HOCKS.

not an unsoundness, 87

CUTTING.

held not to be an unsoundness, 88

DAMAGES.

general damages, 202

special damages, *id.*

legal and natural consequences of breach of contract, 203

judge to direct jury as to rules of, 204

damages arising from special circumstances, *id.*

for wrongful conversion, *id.*

in tort, 205

in actions for a sum certain, *id.*

interest, 206

effect of 3 & 4 Will. 4, c. 42, s. 28, *id.*

Sale of Goods Act, 1893, s. 54, *id.*

in actions which sound in damages, *id.*

a foolish bargain, 207

an impossible contract, *id.*

in goods bargained and sold, *id.*

in an action for not accepting, *id.*

in an action for not delivering, 208

nominal, *id.*

in goods sold and delivered, *id.*

in money had and received, 209

on breach of warranty, *id.*

general rule, *id.*

where the horse has been returned, *id.*

where the horse has not been returned, *id.*

where the horse has been tendered, 210

expense of keep, *id.*

seller liable for reasonable keep, 211

what is reasonable, *id.*

keeping the horse till a fair, *id.*

expense consequent on the warranty, 212

expense in selling, *id.*

expense in advancing the horse's value, 213

horse tendered and then sold by auction, *id.*

expense of veterinary certificate and counsel's opinion, *id.*

travelling expenses, *id.*

loss of a good bargain, *id.*

re-selling with a warranty, 214

damages for misrepresentation, *id.*

for loss of or injury to horse, by carrier, 310

injury must not be too remote, 311

for failing to provide horse-boxes, *id.*

from negligent driving, 364

where injury too remote, *id.*

injury done to a carriage, 365

DAMAGES—continued.

- measure of, when horse has been injured, 365
- where the party is killed, *id.*
- Lord Campbell's Act, 362, 365
 - how limited under, 366
 - cannot be given for funeral expenses, *id.*
 - not given to a class, but to individuals, *id.*
 - so individuals may recover, when class do not suffer, *id.*

DEALING-TALK. 162**DEFECTS,**

- latent, 121. See LATENT DEFECTS.
 - buyer protected against, by warranty, 121
 - sale of goods with "all faults" excludes, 165
 - unless there be an express warranty, *id.*
 - or fraud is used to conceal them, 166, 167
- patent, 142. See PATENT DEFECTS.
- suspected, 146
- visible, 162
- lender of horse must not conceal, 275

DEFENCE. See PLEADING AND EVIDENCE FOR THE DEFENDANT.**DELIVERY AND PAYMENT,**

- delivery implied in receipt, 7
- actual or constructive, *id.*
- rights of property and possession, 25
- property may pass without delivery, 26
- condition as to price ascertainable, *id.*
- effect where not ascertainable, *id.*
- risk after sale, 27
- goods to be delivered on a future day, *id.*
- delivery and payment contemporaneous acts, *id.*
- are not the essence of a contract, 28
- where nothing is said about the time of delivery, *id.*
- relative position of the parties, *id.*
- seller's lien for the price, *id.*
- lien in case of an exchange, *id.*
- conditional possession, 29
- buyer's right of possession where goods sold on credit, *id.*
- how it may be defeated, *id.*
- seller's lien during possession, *id.*
- his right of stoppage *in transitu*, *id.*
- when goods are held to be *in transitu*, *id.*
- effect of stoppage *in transitu*, 30
- goods to be delivered before payment, *id.*
- when time of delivery is not fixed to a day, *id.*
- goods to be paid for before delivery, *id.*
- renunciation of contract, *id.*
- price directed to be sent by post, 31
- post-office order, *id.*
- dishonoured bill, *id.*
- writing off debt due from agent by agent, *id.*

DELIVERY AND PAYMENT—continued.

banker's cheque, 31
 bill of exchange, 32
 debt paid to a third party, *id.*

DELUSION,

affecting the contract, 164

DEODANDS,

abolished, 362

DESCRIPTION,

sale by, 118. See **WARRANTY.**

DETINUE,

by whom maintainable, 183
 defence in action of, 198

DISEASES,

congenital, or otherwise, 68
 alterations in structure, *id.*
 temporary, 71

DISEASES OF ANIMALS ACT, 1894,

application of provisions of, to horses, 92
 glanders and farcy "diseases" under, *id.*
 unlawful to expose diseased horse for sale under, *id.*
 disinfecting vessels, vehicles, &c., under, 308
 provisions of, as to making orders as to the muzzling, &c.,
 of dogs, 376

DISTRESS,

auctioneer selling goods taken by illegal distress, 40
 goods sent to auctioneer to be sold privileged from, *id.*
 horse bringing goods to market exempt, 57
 guest's horse at an inn exempt, 223
 horse at a farrier's exempt, 235
 horse at livery not exempt, 239
 nor horses during agistment, 247
 except when taken in to rest for a night, 247, 248
 distinction as to, where cattle enter by breaking fences, 248
 limitation of, under Agricultural Holdings Act, *id.*
damage feasant, may be taken for injury to chattels upon
 the land, 390
 horse with rider cannot be distrained *damage feasant*, *id.*
 but horse being led may, *id.*

DOG,

where a dog bites a person, 371
 necessity of ownership, *id.*
 report that dog had been bitten by mad dog, 372
 where it had bitten a child, *id.*
 not necessary to show that dog has bitten another man, *id.*
 but it must have exhibited ferocity towards mankind, *id.*
 evidence of scienter, *id.*
 complaint to wife may be evidence against husband,
 372, 373

DOG—*continued.*

- complaint to husband will not render wife liable after his death, 373
- when knowledge of servant is knowledge of master, *id.*
- no difference between corporation and individual, *id.*
- quere* whether promise to make compensation is evidence against owner, *id.*
- damage done by dog to game, ground of action, *id.*
- where a dog worries sheep, 371, 374
- evidence of mischievous propensity, unnecessary under Dogs Act, 1906...374
- in case of injury to cattle, *id.*
- proof of ownership, *id.*
- "cattle" includes horses, 375
- The Dogs Act, 1871, *id.*
- dangerous dogs, order for confinement or destruction of, *id.*
- fine for non-compliance with order, *id.*
- general restrictions on dogs being at large, *id.*
- The Diseases of Animals Act, 1894...376
- power of Board of Agriculture to make orders as to muzzling, &c., *id.*
- liability for trespass by dog, 378, 390
- negligence without proof of scienter, 378
- trespasser cannot maintain action for injury by, 380
- effect of negligence on part of person bitten by, *id.*
- shooting a dog for worrying sheep, *id.*
- for worrying fowls, 381
- for chasing deer, *id.*
- in self-protection, *id.*
- in protection of property, *id.*

DRIVING. See NEGLIGENT DRIVING.

DROPSY,

- of the skin, 88
- of the heart, *id.*

DRUNKENNESS,

- of contracting party, 171

EARNEST AND PART PAYMENT,

- a requisite under s. 4 of Sale of Goods Act, 7
- two kinds of earnest, 14
- symbolical, 15
- pecuniary, *id.*
- should be retained by vendor, *id.*
- the old rule, *id.*
- effect of earnest under s. 4 of Sale of Goods Act, *id.*
- effect of part payment, *id.*
- oral contract to treat previous payment as part payment, 16
- cheque sent by post returned, *id.*

ENLARGED GLANDS, 89

ENLARGED HOCK, 89

ENTIRE CONTRACT.

what is, 2

EVIDENCE. See **PLEADING AND EVIDENCE.**

EWE NECK, 89, 109

EXCHANGE. See **BUYING, SELLING AND EXCHANGING.**
what is, 1

EXECUTED CONTRACT.

what is, 1. See **SALE.**

EXECUTORY CONTRACT.

what is, 1. See **AGREEMENT TO SELL.**

EXPENSE. See **DAMAGES, KEEP.**

of keep, 210

consequent on warranty, 212

in selling, damages for, *id.*

in advancing horse's value, 213

of veterinary certificate and counsel's opinion, *id.*

travelling expenses, when included in damages, *id.*

EXPRESSUM FACIT CESSARE TACITUM

applies to warrantics, 128

EYE,

how far loss of, patent, 143

convexity of, 144

FAIRS AND MARKETS OVERT.

sales at fairs and markets overt, 54

the general rule of law, *id.*

when market overt is held, *id.*

where market overt is held, *id.*

market overt in London, 55

market overt without the city of London, *id.*

Markets and Fairs Clauses Act, *id.*

setting up private market, *id.*

horse "an article" within Act, *id.*

building separated from auctioneer's dwelling-house by
yard, 56

horsedealer's premises "a shop," *id.*

where a horse at a fair is exempt from distress, 57

sale of diseased animals in market overt, *id.*

purchaser of stolen horses in market overt, 61

restitution of stolen goods, notwithstanding sale in, 64

FALSE QUARTER, 69

FALSE REPRESENTATION. See **FRAUD, FRAUDULENT
CONTRACTS, REPRESENTATION, and FRAUDULENT REPRE-
SENTATION.**

FARCY,

identical with glanders, 91

a "disease" under Diseases of Animals Act, 92

FARRIER.

- definition of, 231
- cannot refuse to shoe a horse, *id.*
- when brought at a reasonable time, 232
- answerable for his own want of skill, *id.*
- where a third person is affected, *id.*
- when answerable for his servant, *id.*
- action against a farrier for pricking a horse, *id.*
- Collins v. Rodway*, *id.*
 - rule as to farriers, 233, 234
 - no insurance against injury, 234
 - peculiar difficulties should be mentioned, *id.*
 - coming at an unseasonable hour, 234, 235
- farrying, &c., in the street, 235
- horses standing to be shod not distrainable, *id.*
- horse may be detained for the price of his shoeing, *id.*
 - such lien is favoured by law, *id.*
 - extends only to each particular time, 236
 - liability to feed a horse detained, *id.*

FAULTS, SALE OF GOODS WITH ALL,

- excludes latent defects, 165
- unless there be an express warranty, *id.*
- or fraud is used to conceal them, 166
 - for instance, the practice of plugging, 167
- no difference whether sale takes place in market or privately, *id.*

FENCES.

- liability of agister, when out of order, 244
- maintenance of, 390
- obligations of railway companies in respect of, 391, 392
- fence within station-yard, 392

FERÆ NATURÆ, 368

FEROCIOUS AND VICIOUS ANIMALS,

- wild and tame animals, 368
- as to animals *feræ naturæ* only, scienter unnecessary, *id.*
- a bear fastened by a chain, *id.*
- an elephant kept for the purpose of exhibition, 369
- principle laid down in *Fletcher v. Rylands*, *id.*
- what ought to be the liability of the person keeping them, 370
- the Athenian and Roman laws, *id.*
- the French code, *id.*
- argument in *Mason v. Keeling*, *id.*
- decision in Scotland, *id.*
- reversed in the House of Lords, 371
- in England a scienter is held necessary, *id.*
- where a dog bites a person, *id.*
- necessity of ownership, 371, 372
- stray dog on defendant's premises, 372
- report that dog had been bitten by a mad dog, *id.*
- where dog had bitten a child, *id.*
- not necessary to show that dog has bitten another man, *id.*

FEROCIOUS AND VICIOUS ANIMALS—*continued.*

but it must have evinced ferocity towards mankind, 372
evidence of scienter, *id.*

complaint to wife may be evidence against husband,
372, 373

complaint to husband will not render wife liable after
his death, 373

when knowledge of servant is knowledge of master, *id.*
no difference between a corporation and an individual, *id.*

quærr whether promise to make compensation is
evidence against owner, *id.*

damage done by dog to game, ground of action, 373, 374
where a dog worries sheep, 371, 374

evidence of mischievous propensity unnecessary under
Dogs Act, 1906...374

in case of injury to cattle, *id.*

proof of ownership, *id.*

"cattle" includes horses and mares, 375

The Dogs Act, 1871, *id.*

order for confinement or destruction of dangerous dogs,
id.

fine for non-compliance with order, *id.*

general restrictions on dogs being at large, *id.*

The Diseases of Animals Act, 1894...376

power of Board of Agriculture to make orders as to
muzzling, &c. dogs, *id.*

straying horse kicking a child, *id.*

trespassing horse injuring another horse, *id.*

result of authorities, 377

cattle straying off highway, 378

liability for trespass of dog, *id.*

negligence without proof of scienter, *id.*

breaking horses in a public place, 379

where a mad bull wounds a person, *id.*

where a bull singled out a person wearing red, *id.*

where a ram injured a person, *id.*

where a vicious beast kills a person, *id.*

owner bound to secure a vicious animal at all events, *id.*

he is liable to an action for damage, *id.*

the gist of the action, 380

not necessary to prove negligence, *id.*

when the action will lie, *id.*

injury occasioned by a vicious bull, *id.*

shooting a dog for worrying sheep, *id.*

for worrying fowls, 381

for chasing deer, *id.*

in self-protection, *id.*

in protection of property, *id.*

FISTULA OF THE WITHERS, 104

FOOT-PASSENGER,

custom to take right-hand side, 341

his right to cross a road, 345

rule of the road does not apply, *id.*

going over a crossing, *id.*

alighting from a tram-car, *id.*

FORM OF WARRANTY, 127

FOUNDER, 89

FRAUD,

- avoids sale, 132, 168
 - unless party defrauded wishes otherwise, 168
 - and unless injustice results, *id.*
 - or he continues to deal with the article, *id.*
 - in what it consists, 159
 - moral fraud, *id.*
 - must concur with damage, *id.*
 - legal fraud, 160
 - principle of relief for, *id.*
- not fraud to suppress what there is no duty to communicate, 161
- collateral, does not avoid deed, 162
- when implied by a foolish bargain, *id.*
- practised upon the buyer, 138
- practised upon the seller, 169
- of infant, 170
- of a married woman, *id.*
- on a weak-minded person, 171
- on a person when drunk, *id.*
- goods returnable, where there is fraud, 177

FRAUDULENT CONTRACTS,

- where the law does not interfere, 156
- where several persons combine to cheat, *id.*
- conspiracy to cheat indictable, *id.*
- there must be evidence of concert, *id.*
- what evidence has been held insufficient, *id.*
- conspiring to obtain money by false pretences, 157
- conspiring to induce a creditor to forego his claim, *id.*
- where only one person cheats an action lies, *id.*
- Chaudclor v. Lopez*, *id.*
- remarks on that case, 158
- form of action, 159
- foundation of action, *id.*
- in what fraud consists, *id.*
- there must be moral fraud, *id.*
- effect of fraud, *id.*
- how the question of fraud is to be decided, *id.*
- falsehood must be followed by damage, 163
- a naked lie no cause of action, *id.*
- presumption that person defrauded was influenced by the misrepresentation, *id.*
- due caution must always be observed, *id.*
- not fraud to suppress what there is no duty to communicate, 161
- requisites to an action on false representation, *id.*
- or on breach of warranty, *id.*
- carcat emptor*, *id.*
- a visible defect and a nude assertion, 162
- dealing talk, *id.*
- collateral fraud does not avoid a contract, *id.*

FRAUDULENT CONTRACTS--continued.

- a foolish bargain, 162
- representation known to be untrue, 163
- made before a sale by auction, *id.*
- made by a bidder at an auction, *id.*
- representation not known to be true, *id.*
- a well-grounded belief, 164
- delusion affecting the contract, *id.*
- representation to prevent inquiries, *id.*
- representation through a third party, *id.*
- representation by a third party, *id.*
- a *bona fide* representation, 165
- representation as to credit, *id.*
- sale of goods "with all faults" excludes "latent defects," *id.*
- unless there be an express warranty, *id.*
- or fraud is used to conceal them, 166
- plugging, &c., 167
- exposure in public market not evidence of fraud, *id.*
- contract made voidable by fraud, 168
- where fraud is practised upon the buyer, *id.*
 - he may recover price, *id.*
 - except where it works injustice, *id.*
 - where he continues to deal with the article, *id.*
- where fraud is practised upon the seller, 169
- resale by the buyer to an innocent vendee, *id.*
- contract with intent to cheat the seller, *id.*
- preconceived design of not paying for goods, *id.*
- question for the jury, *id.*
- resale at a reduced price, 170
- unstamped agreement admissible to prove fraud, *id.*
- payment by a cheque which is dishonoured, *id.*
- fraud of an infant, *id.*
- of a married woman, *id.*
- where a contracting party is weak-minded, 171
- drunkenness of a contracting party, *id.*
- goods kept by the party when sober, *id.*

FRAUDULENT REPRESENTATION. See FRAUDULENT CONTRACTS.

- action for, 187
- statement of, in claim, 189
- proof in an action for, 193
- defence to an action for, 201

FURIOUS DRIVING,

- causing death by, manslaughter, 343, 344
- causing injury by, when indictable, 316
- in Metropolitan Police District, *id.*
- power of police constable, *id.*
- conviction no bar to action of trespass against constable, *id.*
- conviction for, when a bar to subsequent action, 363

GAME,

- dead, property of owner of land, 386
- owner has a right to have it undisturbed, *id.*

GAME—continued.

cattlegate owners have not right of shooting, 386
when reservation of manorial rights includes shooting, *id.*
Ground Game Act, 387
two persons engaged in common pursuit, *id.*
trespass in search of, 387, 388
shooting from the highway, 388
game falling on another's land, *id.*
conviction for unlawfully obtaining, *id.*

GATE,

left open by agister, 343
of a field left open, 391
of a railway crossing left open where there is a statutory obligation, *id.*
statutory obligation to maintain, 392
of a railway station left open where no statutory obligation, *id.*

GENERATIVE ORGANS,
discharge from, 90**GIBBING,**

backing and, 72, 90

GIFT,

requisites of transfer of property by, 2

GLANDERS, 90—92

infectious to mankind, 91. See also DISEASES OF ANIMALS Act.

GLASS EYE, 93, 144**GLAUCOMA, 92****GOODS BARGAINED AND SOLD,**

for payment of the price, 182
proof for the plaintiff, 190
defence, 199
damages, 207

GOODS SOLD AND DELIVERED,

for payment of the price, 184
proof for the plaintiff, 191
defence, 200
damages, 208

GRASS. See INNKEEPER and AGISTER.**GREASE, 93****GROGGINESS, 93****GRUNTING, 93, 103****GUEST. See INNKEEPER.****GUTTA SERENA, 93, 144**

HARE. See HUNTING and TRESPASSING.

HARNESS.

quiet in, 127, 180, 181

HIGHWAY,

driving against an ass left fettered on, 325
 person injured by falling over heap on, 326
 opportunity of seeing, *id.*
 running over stones by night on, 327
 level crossing in improper state, *id.*
 leaving it, and sustaining injury, *id.*
 excavation adjoining, when a public nuisance, *id.*
 where steam-roller on, constitutes a nuisance, 328
 true test of legal liability, *id.*
 neglect of statutory duty by surveyor of, 331, 332
 abatement of nuisance on, by private individual, 345
 trespass in pursuit of game from, 388

HIRING HORSES,

letting for hire, 250
 warranty of fitness for a journey, *id.*
 reasonable care not sufficient, *id.*
 person letting, insurer against all defects which care and
 skill can guard against, 251
 damages for breach of warranty of fitness, *id.*
 selecting a particular carriage, 252
 where a particular horse is selected, *id.*
 horse should not be used for purpose other than that for
 which it was hired, *id.*
 what care is required on part of hirer, *id.*
 liability of hirer for negligence of servant, 252, 253
 servant must be acting within scope of employment.
 254
 Sanderson v. Collins, id.
 judgment of Collins, M.R., 254, 255
 Coupe Co. v. Maddick, distinguished, 255
 judgment of Romer, L.J., 256
 infancy good defence to an action on contract, *id.*
secus, where action is founded on tort, *id.*
 where hirer is answerable at all events, *id.*
 unnecessary deviation, *id.*
 where negligence must be proved, 257
 where the horse falls lame, *id.*
 where the horse is exhausted, *id.*
 where the horse refuses its feed, *id.*
 where the horse is returned in worse condition, *id.*
 expenses of curing sick horse, *id.*
 where the horse is improperly doctored, 258
 who must pay for shoeing, *id.*
 bailment determined by selling the goods, *id.*
 where the horse is stolen from the hirer, *id.*
 where the horse is stolen by the hirer, 259
 must have been originally taken with a felonious intention
 at common law, *id.*

HIRING HORSES—continued.

- now bailee indictable for larceny by 24 & 25 Vict. c. 96, s. 3...259
- horse hired by a servant, *id.*
- owner's liability in case of accident, 260
- horses driven by the owner's servants, *id.*
- horses driven by the owner's servants to a certain place, *id.*
- horses driven about town by the owner's servants, *id.*
- Laugher v. Painter*, 261
- owner held liable in *Quarman v. Burnett*, *id.*
- wearing the hirer's livery, *id.*
- a job-master's agreement, 262
- where the hirer is liable for damage, *id.*
- hirer liable through his own conduct, *id.*
- hirer liable where he might have controlled his servant, *id.*
- McLaughlin v. Pryor*, 263
- opinion of the Court of Common Pleas, 264, 265
- the general rule, 264
- where the hirer would not be liable, *id.*
- hirer sitting outside liable, 265
- jury must decide whether servant is acting for the hirer or owner, *id.*
- hirer of driver only, 266
- liability of hirer, *id.*
- Jones v. Scullard*, *id.*
- Quarman v. Burnett*, distinguished, 267
- liability of contractor, 268
- construction of contract, *id.*
- hire of horse and driver, *id.*
- verbal contract, control of driver, 269
- hire of van, horse, and driver, *id.*
- no evidence of control of driver by hirer, *id.*
- construction of agreement, 270
- hirer and contractor both held liable, *id.*
- hirer only liable, 271
- liability of job-master to hirer, 272
- hire for use of traveller, *id.*
- theft from carriage by stranger, *id.*
- scope of driver's employment, *id.*
- theft by driver, 273
- liability of cab proprietor to driver, *id.*
- relation between the parties, *id.*
- a hirer's agreement, 274
- hiring for a year, *id.*
- right to continue, *id.*

HOCK,
enlarged, 79

HORSE,
an "article" within Markets and Fairs Clauses Act, 52
bringing goods to market exempt from distress, 57
exposure for sale, when diseased, 92
sale of, by order of Court, 181
accident to, in yard of railway company, 303

HORSE—*continued.*

- negligence in harnessing, 318
- frightening by a fire-basket, *id.*
 - by van left on roadside, 319
 - by an engine-driver blowing off steam at a crossing, *id.*
 - by blowing off steam at a station, *id.*
- accident the result of sudden fright of, 335, 336
- kicking child on highway, 338, 376
- kicking at a sale, 339
- injury to, by dog, 374, 375
- trespassing horse injuring another horse, 376
- breaking horses in a public place, 379
- where a vicious horse kills a person, *id.*

HORSEBREAKER,

- liable for damage, 236
- has a lien, 237

HORSEDEALER,

- definition of a horsedealer, 35
- the proprietor of Aldridge's, *id.*
- no duty payable by, *id.*
- exemption from licence for servants, *id.*
- entry of description of premises by, 35, 34
- sale of horse by, on Sunday illegal, 33
- giving a warranty on a Sunday, 34
- premises of, when a "shop" within Markets Clauses Act, 56, 57
- servant of, has implied authority to warrant, 138
- alleged usage not to warrant, 139
- warranty by servant of, on incidental matter, *id.*
- his servant forbid to warrant, 140
- general rule as to liability of, for warranty by servant, 141

HORSE-STEALING,

- statute of 24 & 25 Vict. c. 96...57
- description in an indictment, 58
- when the offence is complete, *id.*
- property given up, 59
- delivery of a horse to a stranger, *id.*
- delivery on trial, 60
- goods taken without consent, *id.*
- appropriation of a hired horse, *id.*
- larceny: without proof of sale, *id.*
- taking with intent to use, *id.*
- possession six months after loss, 60
- where a horse is stolen from the hirer, 258
- where a horse is stolen by the hirer, *id.*
- fraudulent appropriation by bailee of a horse, *id.*

HOSTLER. See **INNKEEPER.****HOTEL-KEEPER.** See **INNKEEPER.****HUNTING AND TRESPASSING,**

- fresh pursuit over another's land, 383
- pursuing vermin, *id.*
- no unnecessary damage, *id.*

HUNTING AND TRESPASSING—continued.

- digging for a fox, &c., 383
- hunting for amusement, *id.*
- Earl of Essex v. Chapel*, 384
- hunter liable for damage done by the field, 385
- master of hounds, when responsible for the field, *id.*
- killing a hare on another's land, *id.*
- taking a stag on another's land, *id.*
- hunting a stray deer, *id.*
- dead game property of owner, 386
 - he has a right to have his game undisturbed, *id.*
- cattlegate owners have not right of shooting, *id.*
- reservation of rights of lords of manors, *id.*
- who may kill hares without a game certificate, *id.*
- Ground Game Act, 1880...387
- any person may hunt hares, *id.*
- continued trespass, *id.*
- two persons engaged in a common purpose, *id.*
- trespass in search of game, *id.*
- hunting with hounds or greyhounds, 388
- jurisdiction of justices ousted, *id.*
- trespass from the highway, *id.*
- from own land to pick up game, 389
- under 25 & 26 Vict. c. 114, *id.*
- laying hands on a trespasser, *id.*
- opposing force to force, *id.*
- defence to an action, *id.*
- distress *damage feasant*, 390
 - horse with a rider cannot be distrained, *id.*
 - but horse being led may, *id.*
- action of *trespass* lies for riding over land, *id.*
- but not where a dog jumps into a field, *id.*
- maintenance of fences, *id.*
- gate of a field left open, 391
- leaving gate open where there is statutory obligation, *id.*
- statutory obligation to maintain gates, 392
- leaving gate open where no statutory obligation, 392, 393
- fence within station yard, 393

IDENTIFICATION,

- of child with person in charge, 333
- of passenger with driver, doctrine of exploded, *id.*

INFANT,

- may be an agent, 24
- fraud of, 170
- liable for *torts*, 186
- but not where substantial ground of action is contract, 137
- when liable for injury to hired horse, 256

INHERENT VICE. See CARRYING HORSES.**INITIALS. See SIGNATURE.****INNKEEPER,**

- his business, 216
- definition of an inn, *id.*

INNKEEPER—continued.

derivation of hostler, 216

who is a guest, *id.*

what an innkeeper undertakes, *id.*

innkeeper compellable to receive a traveller, 217

may be indicted for refusing, *id.*

what has been held to be no defence, *id.*

sleekness, drunkenness, &c., *id.*

action for compensation, *id.*

not liable for refusing to supply post-horses, *id.*

traveller not entitled to select particular apartments, *id.*

liability of innkeeper limited by 26 & 27 Viet. c. 41...218

horses exempted from operation of this Act, *id.*

"wilful," in section 1, must be read with "net" only, *id.*

verbal error will not vitiate notice, *id.*

omission of word "act," material, *id.*

salaries manager not liable as innkeeper, *id.*

goods to which his liability extends, 219

liability, how ousted, *id.*

negligence on part of guest, *id.*

where a guest's horse is stolen, *id.*

where another person's horse is stolen, 220

principle upon which liability depends, *id.*

circumstances under which he becomes merely a bailee, *id.*

horse out at grass by the guest's desire, *id.*

horse out at grass without the guest's desire, 220, 221

where a guest's horse is injured, 221

presumption of negligence against the innkeeper, 221, 222

not rebutted by stables being out of his control, 223

a guest's horse not distrainable, *id.*

even where he is accommodated out of the inn, *id.*

or uses a stable provided for the occasion, *id.*

innkeeper's lien, 223, 224

innkeeper has a lien on a horse for its keep, 224

whether in the stable or at grass, *id.*

he cannot detain a guest for his bill, *id.*

but may detain his horse, *id.*

what his right of lien depends on, 225

horses and carriages sent to livery at an inn, *id.*

cannot sell one horse for the keep of others, *id.*

has a lien on a horse left by a wrong-doer, *id.*

but not if he knew it at the time it was left, 226

a horse left by the police, *id.*

giving a guest credit, *id.*

a third party when answerable, *id.*

horse removed to defeat the lien, *id.*

keep during detention, *id.*

he cannot use a horse he detains, 227

he could not formerly sell a horse he detained, *id.*

but may sell a horse after six weeks, 227, 228

advertisement of sale, 228

waiver of lien, *id.*

distrainor may sell a horse for his keep, 229

- INNOCENT VENDEE,**
resale to, by buyer under fraudulent sale, 160
- INSPECTION,**
purchase without, 147
- INTEREST,**
when recoverable, 200
- INTERPLEADER,**
by auctioneer, when allowed, 40
claims must be co-extensive, *id.*
mode of trying disputed title, 118
- JAUNDICE, 115**
- JOBMASTER,**
letting for hire, 250
his agreement, 262
where the hirer is liable to for damage, *id.*
liability of, to hirer. See **HIRING HORSES.**
- KEEP,**
recovering the cost of, 210
seller liable for reasonable keep, 211
what is reasonable, *id.*
keeping a horse till a fair, *id.*
innkeeper's lien on a horse for, 224, 228. And see **INN-KEEPER.**
livery stable keeper has no lien for, 240
unless by agreement, *id.*
money received but returned cannot be set off in action by
livery-stable keeper for, 241. And see **LIES.**
- KERATITIS, 81**
- KICKING, 93**
- KIDNEY DROPPING,**
an unsoundness, 94
- LAMENESS,**
whether temporary or permanent, an unsoundness, 94
temporary, 94, 95
- LAMINITIS, 95**
- LAMPAS, 95**
- LARCENY.** See **HORSE-STEALING.**
- LATENT DEFECTS,**
reason for requiring a warranty, 121
buyer protected against, by warranty, *id.*
no exception as to, in case of purchase for particular
purpose, 130
sale "with all faults" excludes, 165, 167
unless fraud is used to conceal them, 166, 167

LENDING HORSES. See BORROWING HORSES.

LETTER,

contract by, 19, 20, 21, 22
warranty may be gathered from, 127

LETTING HORSES. See HIRING HORSES.

LIEN.

loss of, by vendor, 9
seller's lien, 28
in case of exchange, *id.*
how suspended, 29
keeper of repository has, for expense of trial, 43
auctioneer has, for commission, &c., 52
innkeeper's lien, 224—228. And see INNKEEPER.
farrier's lien, 235, 236
horsebreaker's lien, 237
trainer's lien, *id.*
stallion-master's lie, 238
livery-stable keeper has no lien for keep, 240
except by agreement, *id.*
horse removed to defeat his lien, *id.*
livery-stable keeper has no lien for money expended on
horse, *id.*
agister has no lien, 246
except by agreement, 247

LIVER DISEASE, 95

LIVERY-STABLE KEEPER.

constructive delivery by, 11
remedy against, for detaining a horse, 183
definition of, 239
has no privilege, *id.*
liable where the horse is lost, *id.*
but is not an insurer, *id.*
horse at livery distrainable, *id.*
but not where he is merely to be cleaned and fed, *id.*
distinction taken in *Parsons v. Gingell*, 240
livery-stable keeper has no lien for keep, *id.*
may have a lien by agreement, *id.*
horse removed to defeat such lien, *id.*
has no lien for money expended on horse, *id.*
what cannot be set off in an action for keep, 241
he must take reasonable care of the horse, *id.*
and see that stable is in a proper state, *id.*
but there is no implied warranty on his part that it is
safe, *id.*
action against, for not taking due care of a horse founded
on contract, 242

LORD CAMPBELL'S ACT (9 & 10 Vict. c. 93).

action by representatives of persons killed, 362
by persons beneficially interested, *id.*
where the action is maintainable, 362, 363

LORD CAMPBELL'S ACT—*continued*.

- damages under, confined to injuries of which pecuniary estimate can be made, 365, 366
- amount of life policy not to be deducted from, 366
- cannot be given for funeral expenses, *id.*
- does not give remedy to a class but to individuals, *id.*
- And see DAMAGES.

LUNG DISEASES, 95

LYMPHANGITIS, 95. See WEED.

LYMPHANGITIS EPIZOOTICA, 95

MALLENDERS, 95

MANGE, 96

MANSLAUGHTER. See NEGLIGENCE DRIVING.

- where killing a person held to be, 313
- defence of contributory negligence in case of, 315
- evidence identical with that required to establish actionable negligence, 341

MANSUETÆ NATURE, 368

MARKETS. See FAIRS AND MARKETS OVERT.

MARKETS AND FAIRS CLAUSES ACTS,

- horse "an article" within, 55
- premises of horsedealer, when a "shop" within, 56

MARRIED WOMAN,

- may be an agent, 24
- fraudulent contract by, 170

MASTER AND SERVANT. See SERVANT.

MASTER OF HOUNDS,

- liable for damage, 384, 385
- when responsible for the field, 385

MEGRIMS, 113

MEMORANDUM. See NOTE OR MEMORANDUM IN WRITING.

METROPOLITAN POLICE DISTRICT,

- penalty for farrying, &c., in the street within, 235
- penalty for furious driving within, 316

MISREPRESENTATION,

- damages for, 214
- And see FRAUDULENT CONTRACTS.

MISTAKE,

- money paid under, 185

MOCK AUCTIONS,

an offence at common law, 50

MONEY,

paid under a mistake, 185

MONEY HAD AND RECEIVED,

for repayment of the price, 185

for repayment of part of the price, *id.*

for price of horse wrongfully sold, 186

subject to certain conditions, *id.*

where conditions of sale have not been complied with, 195

proof for the plaintiff, 192

defence, 201

damages, 209

MURDER. See NEGLIGENCE DRIVING.

NASAL GLEET, 96

NAVICULAR DISEASE, 96, 97

NEGLECTANCE. See HIRING CARRIAGES, BORROWING HORSES.

NEGLECT DRIVING,

definition of negligence, 312

no rule as to what constitutes negligent driving, *id.*

where killing a person is murder, 313

where killing a person is manslaughter, *id.*

burthen of proof, *id.*

furiously driving, *id.*

carriages racing, 314

driver unable to pull up, *id.*

causing death of passenger, 315

contributory negligence no defence to criminal charge, *id.*

where killing a person is accidental, *id.*

trotting a waggon along a road, *id.*

trotting a waggon along a street, *id.*

remarks in East's Pleas of the Crown, 315, 316

where streets are unusually crowded, 316

where driver is indictable under 24 & 25 Vict. c. 100, s. 35,

id.

furiously driving in the Metropolitan Police District, *id.*

power of police constable, *id.*

conviction no bar to action of *trespass* against constable,

id.

where party injured may maintain an action, 317

duty of drivers of public and private vehicles, *id.*

negligence in the care of vicious horses, &c., *id.*

where another person strikes a horse, *id.*

damages recovered in *trespass*, *id.*

driving furiously round a corner, 318

mail cart rapidly entering Post Office yard, *id.*

negligence in harnessing, *id.*

NEGLIGENT DRIVING—*continued.*

- frightening a horse by a fire-basket, 318
 - by van left on roadside, 319
 - by blowing off steam at a crossing, *id.*
 - by blowing off steam at a station, *id.*
- rules as to civil liability, 320
- negligence on one side only*, 320, 321
- passenger thrown from an omnibus, 321
- horse and cart left standing in the street, *id.*
- damage from tackle breaking, 322
 - or from defect in the carriage, *id.*
- negligence on both sides*, 322, 323
- disagreement of jury as to reasonable care by defendant, 323
- where negligence of injured party did not contribute to the accident, *id.*
- where such negligence occasioned part of the mischief, *id.*
- contributory negligence of children, 323, 324
- a wrongdoer not without the pale of the law, 325
- driving against an ass fettered on the road, *id.*
- question of ordinary care on the part of plaintiff, *id.*
 - on the part of the defendant, 326
- circumstances of the case must be left to the jury, *id.*
- horse injured in being led out of the stable, *id.*
- where no negligence on the part of defendant, *id.*
- a heap left on a highway, *id.*
- opportunity of seeing the obstruction, *id.*
- running over stones at night, 327
- level crossing in improper state, *id.*
- leaving the highway, *id.*
- excavation a public nuisance, *id.*
- steam-roller on highway, 328
- trespasser may maintain an action, *id.*
- true test of legal liability, *id.*
- owners of private ways may be liable for negligence, *id.*
- injury to person unexpectedly on defendant's premises, 329
- obstruction by licensee of private road, *id.*
 - intervening act of third party, *id.*
- liability of a contractor, 330
 - where there are several ways of doing a thing, *id.*
- liability of an employer, *id.*
- what is the question in such cases, 331
- drain repaired by an ordinary, but skilful labourer, *id.*
- stones left by a sub-contractor, *id.*
- surveyor of highways guilty of neglect of statutory duty, *id.*
- works executed under local Acts, 332
 - both parties to blame*, *id.*
- identification of child with person in charge, 333
- doctrine of identification of passenger with driver exploded, *id.*
- altogether an accident*, 334
- running over a person at night, *id.*
- where it is the result of the sudden fright of a horse, 335
- trying horse in frequented thoroughfare, *id.*
- restiveness not necessarily proof of negligence, *id.*

NEGLIGENT DRIVING—*continued.*

- horse inexplicably bolting, 336
- rule as to horse running away, *id.*
- qualification of rule, *id.*
- where defendant knows that horse is unmanageable, *id.*
- or a kicker, *id.*
- proof of negligence must be affirmative, 337, 338
- where evidence is equally consistent with negligence and no negligence, 338
- when a horse straying on a highway kicked a child, *id.*
- horse kicking at a sale, 339
- injury to passenger on omnibus, *id.*
- contact with projection, *id.*
- evidence of negligence, 340
- accident itself sometimes affirmative proof of negligence, *id.*
- evidence identical with that required for manslaughter, 341

NEGLIGENT DRIVING BY A SERVANT,

- when the master was liable according to former decisions, 346
- liability now held to be more extensive, *id.*
- Limpus v. General Omnibus Company*, *id.*
- acts done within employment and for master's interest, 347
- if servant vindictively strikes horse with his whip, *id.*
- instructions of master, if disregarded, immaterial, 347
- master liable, if acts are done for his benefit, 348
- unless done out of the servant's employment, 348, 349
- relationship of master and servant not inferred, 349
- liability of cab proprietor for negligence of driver, 349, 350
- relationship between proprietor and driver, *id.*
- where licence taken out in partner's name, 351
- scope of driver's employment, *id.*
- Mann v. Ward*, a doubtful authority, 352
- liability of owner of traction engine, *id.*
- master and servant driving together, 353
- servant entrusting the reins to a stranger, 353, 354
- intervening act of third party, 354
- effective cause of damage, *id.*
- extent of servant's authority, 354, 355
- sudden emergency, *id.*
- omnibus driven by conductor, 355
- onus of proving authority, *id.*
- servant striking the horse of another, 356
- servant striking passenger, *id.*
- guard of omnibus using undue violence to passenger, *id.*
- servant removing an obstruction, 357
- servant acting improperly, *id.*
- making a *detour* for his own purposes, 357, 358
- servant acting contrary to his trust, 358
- taking his master's horse without leave, 358, 359
- re-entering on duty, 359
- taking the horse of another, *id.*
- no express authority of master necessary, 360
- question for the jury, *id.*

NEGLIGENT DRIVING BY A SERVANT—*continued.*

- master's name on cart, 360
- giving an address, 361
- liability of master and servant respectively, *id.*
- negligence of fellow-servant, *id.*
- master bound to use due care in selection of servants, *id.*
- action by representatives of a person killed, 362
 - within what time it may be brought, *id.*
 - by whom it may be brought, *id.*
 - by persons beneficially interested, *id.*
 - construction to be put upon the condition in 9 & 10 Viet. c. 93, *id.*
- plaintiff must prove pecuniary loss, 363
- plan of the locality, in action for negligent driving, *id.*
- conviction for furious driving a bar to subsequent action *id.*
- separate actions in respect of same wrongful act, 364
- damages, *id.*
- damage too remote, *id.*
- injury done to a carriage, 365
- measure of damages where a horse has been injured, *id.*
- damages where a person has been killed, *id.*
 - how limited, 366
- evidence of actual pecuniary damage essential, 360
 - expectation of life of deceased to be considered in assessing, *id.*
 - amount of policy on life of deceased not to be deducted, *id.*
 - cannot be given for funeral expenses, *id.*
 - not given to a class, but to indiv

NERVED HORSE.

held to be unsound, 97. See UNNERVED HORSE.

NEURECTOMY,

only palliative, 97

NOSE,

- chronic discharge, 96
- nasal gleet, *id.*

NOT LYING DOWN. 98

NOTE OR MEMORANDUM IN WRITING,

- under Sale of Goods Act, 1893, s. 4...6, 7
- written agreement, 16
- no particular form required, *id.*
- names of the contracting parties, *id.*
- terms of the contract must be stated, 17
 - may be collected from more than one document, *id.*
- the Stamp Act, *id.*
- catalogue at a sale, *id.*
- price when agreed upon, 18
- where no price is agreed upon, *id.*

NOTE OR MEMORANDUM IN WRITING—*continued.*

- where no mode or time is stated, 19
- contract by letter, *id.*
- must express all the terms of the agreement, *id.*
- mutual assent, 20
- introduction of new term, 21
- terms cannot be varied by parol, *id.*
 - but may be explained, 22
- evidence that goods are supplied on credit, *id.*
- matters antecedent to the writing, *id.*
- condition precedent, *id.*
- memorandum made after action, *id.*
- memorandum drawn up by agent of both parties, 25
 - though unsigned, sufficient, *id.*
- by agent of seller, at request of buyer, not sufficient, *id.*
- by auctioneer, 41, 47, 48
- by auctioneer's clerk, 41

NOTICE,

- of conditions of sale, 43
- of the breach of warranty, 172
- of the nature of the unsoundness, 197
- buyer not bound to give it in either case, 172, 180, 197
- instead of tender, 180
- length of time before it is given, 172, 180
- by railway companies with regard to carrying, 288—291.
 - And see CARRYING HORSES.
- of consignee's refusal of goods to consignor, 302

OMNIBUS,

- racing, 314
- passenger thrown from, 321
- doctrine of identification of passenger with driver exploded, 333
- injury to passenger on, 339
 - contact with projection, 339, 340
- case of *Limpus v. General Omnibus Company*, 346
- driven by conductor, 355
 - onus of proving authority, *id.*
- guard of, using undue violence to drunken passenger, 356
- And see NEGLIGENCE DRIVING.

OPACITY OF THE CORNEA, 74

OPACITY OF THE LENS,

- held to be an unsoundness, 74, 98

OSSIFICATION OF THE CARTILAGES, 98, 99

OVERREACH, 99

OWNERSHIP,

- warranty of, by auctioneer, 48

- PAROL EVIDENCE,**
written contract cannot be varied by, 17, 21
but may be explained, 22
- PAROTID GLAND,**
swelling of, 99
fistula of duct, *id.*
- PARTICULARS OF SALE.**
notice of, 44
- PART PAYMENT.** See **EARNEST AND PART PAYMENT.**
- PARTY TO BE CHARGED.** See **SIGNATURE.**
- PATENT DEFECTS.**
not covered by a warranty, 142
in what they consist, 143
loss of an eye or tail, *id.*
how far the loss of an eye is patent, *id.*
"bright eye," *id.*
convexity of the eye, 144
where the buyer knows the defect, *id.*
where defects are discussed, 144, 145
conclusion to be drawn from the cases, 146
suspected defects, *id.*
where seller objects to examination, *id.*
purchase without inspection, 147
caveat emptor does not apply, *id.*
inspection prevented by fraud, *id.*
purchase after inspection, 161
- PAYMENT.** See **DELIVERY AND PAYMENT.**
proof of payment of price, 194
- PEDIGREE,**
selling according to, 151
- PIMPLE ON THE SKIN.** 92
- PLEADING AND EVIDENCE FOR THE PLAINTIFF,**
executory and executed contracts, 182
action for price of horse, *id.*
action for not accepting, *id.*
resale of the goods, 183
action for detention of goods, *id.*
action for not delivering, 183, 184
specific performance under Sale of Goods Act, 184
goods sold and delivered for payment of price, *id.*
action maintainable on rescission of contract by one of the
parties, *id.*
horse sold and delivered, 185
money had and received for repayment of price, *id.*
under a mistake, *id.*
money had and received for repayment of part of price,
185, 186
- O.

PLEADING, &c. FOR THE PLAINTIFF—*continued.*

- money had and received for price of horse wrongfully sold, 186
- money received subject to certain conditions, *id.*
- action on a breach of warranty, *id.*
- liability of an agent, *id.*, 187
- action for fraudulent representation, 187
- statement of facts in action for breach of contract, *id.*
- statement of facts in action for deceit, *id.*
- statement of the consideration, 187, 188
- if the horse turn out lucky, 188
- statement of the warranty, *id.*
- condition annexed to the warranty, 188, 189
- the purchase and the payment, 189
- statement of the false warranty or fraudulent representation, *id.*
- statement of the breach, 190
- statement of the damage, *id.*
- proof in goods bargained and sold, *id.*
- proof in an action for not accepting, *id.*
- meaning of readiness and willingness, 191
- proof in an action for not delivering, *id.*
- proof in goods sold and delivered, *id.*
- proof in money had and received, 192
- proof of an account stated, *id.*
- proof in an action for breach of warranty, *id.*
- where it is doubtful whether false warranty is proveable, *id.*
- proof in an action for fraudulent representation, 193
- proof of the bargain and sale, *id.*
- proof of the consideration, *id.*
- proof of payment of the price, 194
- appropriation of money tendered, *id.*
- proof of the promise or warranty, 195
- a warranty not contained in the receipt, *id.*
- warranty in a receipt not always conclusive, *id.*
- written warranty requires no agreement stamp, 196
- where authority to warrant need not be proved, *id.*
- where authority to warrant must be proved, *id.*
- proof of power to rescind, *id.*
- proof of fraudulent representation, 197
- proof of the breach of warranty, *id.*
- notice of the nature of the unsoundness, *id.*
- evidence as to unsoundness, *id.*
- matter of fact alone, *id.*
- either fact or veterinary opinion, *id.*
- both fact and veterinary opinion, 198
- veterinary opinion alone, *id.*
- evidence as to vice, *id.*
- evidence as to unfitness, &c., *id.*
- proof of rescission, *id.*
- proof of tender, *id.*

PLEADING AND EVIDENCE FOR THE DEFENDANT,

- defence for detention of goods, 198
- defence for goods bargained and sold, 199

PLEADING, &c. FOR THE DEFENDANT—continued.

- defence in action for not delivering, 199
- where evidence of usage of trade is not admissible, *id.*
- defence for goods sold and delivered, 200
- defence to action on a bill for the price, *id.*
- evidence in reduction of damages, *id.*
- defence for residue of the price, *id.*
- defence for money had and received, 201
- defence to an action on a breach of warranty, *id.*
- a surreptitious warranty, *id.*
- evidence in reduction of damages, *id.*
- defence to an action for fraudulent representation, *id.*
- disputing the warranty, 202
- disputing the unsoundness, &c., *id.*
- subsequent recovery, *id.*

PLUGGING, 167**POLL-EVIL, 100****POSSESSION,**

- constructive, by vendee, 10
- only presumptive proof of ownership, 26

POST. See LETTER, PRICE.**POST-HORSES,**

- innkeeper not liable for refusing to supply, 217

POST-OFFICE ORDER,

- misdescribing plaintiff, no evidence of payment, 31

POSTING,

- damage done when, 260

PRICE,

- under 10*l.*, 4
- day agreed upon for payment, *id.*
- 10*l.* or upwards, 5
- when agreed upon, material part of bargain, 18
- "on moderate terms," held sufficient statement, *id.*
- reasonable price inferred, when none stated, *id.*
- condition as to, ascertainable, 26
- effect where not ascertainable, *id.*
- when sent by post and lost, 31
- who entitled to receive it at an auction, 51
- when price vests in vendor at an auction, 52
- where auctioneer is innocent agent of principal's fraud, *id.*
- a sound price not tantamount to a warranty, 124
- action for price of horse, 182
- goods sold and delivered for payment of, 184
- money had and received for payment of, 185
 - for repayment of part of the price, *id.*
 - for price of horse wrongfully sold, 186
- proof of payment of price, 194
- defence to action for residue of, 200

PRINCIPAL AND AGENT. See AGENT.

PROMISSORY NOTE. See BILL OF EXCHANGE.
breach of warranty no defence in action on, 200
unless there be a total failure of consideration, *id.*

PUFFING,
at an auction, effect of, 40, 50

PUMICED FEET, 100

QUALITY,
warranty of, 120, 121. And see WARRANTY.

QUIDDING, 100

QUIET,
in harness, 180, 181

QUITTOR, 100

RAILWAY. See CARRYING HORSES, HUNTING AND TREES-
PASSING.

REARING, 101

RECEIPT. See ACCEPTANCE AND RECEIPT, STAMP, DELIVERY,
PLEADING.

RECOVERY OF STOLEN HORSES. See STOLEN HORSES.

REPLEVIN,
maintainable for any unlawful taking of goods, 65

REPOSITORIES. See AUCTIONS AND REPOSITORIES.

REPRESENTATION. See WARRANTY DISTINGUISHED FROM
REPRESENTATION, and FRAUDULENT CONTRACTS.

does not affect a written warranty, 127, 128
untrue, if immaterial, does not avoid sale, 132

intended as a warranty, 148

distinguished from warranty, *id.*

where it amounts to a warranty, 149

the correct rule, 150

influence of, need not be proved, 160
false, requisites of action for, 161

known to be untrue, 163

made before sale by auction, *id.*

made by a bidder at auction, *id.*

not known to be true, *id.*

founded upon a well-grounded belief, 164

to prevent inquiries, *id.*

through a third party, *id.*

by a third party, *id.*

bonà fide, 165

as to the character of another, *id.*

RESCISSION,

- right of, 2
- of contract on ground of misrepresentation of ownership, 48. See AUCTIONS AND REPOSITORIES.
- in case of surreptitious dealing between buyer's agent and seller, 184
- action maintainable on, 184, 185
- money had and received lies, 185
- proof of rescission, 192, 196, 198

RE-SELLING,

- damage on, with false warranty, 214

RESERVE,

- sale without, 45, 46
- implied authority to sell without 46, 47
- sale subject to, 47. See also AUCTIONS AND REPOSITORIES.

RETURN. See BREACH OF WARRANTY.

- condition as to, 52, 177, 178, 179
- if unsound, 177
- if unsuitable, 178, 179
- if disapproval capricious, 179
- if unfit for particular purpose, *id.*

RINGBONE, 101**RISK,**

- after sale, 27
- condition as to, in contract for carriage of horse, 293, 294
- owner's risk, 294. And see CARRYING HORSES.

ROAD. See RULE OF THE ROAD.**ROARING,**

- decisions on the subject, 101, 102
- symptomatic of disease, 103

RULE OF THE ROAD,

- customary rules of driving, 341
- law of the road under Highway Act, 342
 - bicycles, &c. carriages within the meaning of the Highway Acts, *id.*
- right side of the road, *id.*
- driving on the wrong side in the dark, *id.*
- seeing a person coming on his wrong side, *id.*
 - does not justify a wanton injury, 342, 343
- rule of the road not inflexible, 343
- light load meeting heavy, *id.*
- parties meeting on a sudden, *id.*
- rule of the road applies to saddle-horses, 344
- modification of rule, *id.*
 - tramears, *id.*
- ordinary vehicles meeting tramears, *id.*
- foot passengers, 345
 - rule of the road does not apply, *id.*

RULE OF THE ROAD—continued.

- going over a crossing, 865
- alighting from a tramcar, *id.*
- nuisance on public highway, *id.*
- horse and carriage before tradesman's door, 846

RUNNING AWAY.

- when a vice, 104
- without explainable cause, 336
- rules as to, *id.*
- qualification of rule, *id.*

SADDLE GALLS, 104**SADDLE HORSES.**

- rule of the road applies, 344

SALE.

- what is, 1
- of goods under 10*l.*, 4
- hand sale, *id.*
- of specific chattel, 26
- "without reserve," 45—47
- subject to reserve, 47
- auctioneer entitled to commission on sale, not by auction, 58
- avoided by fraud, 132
- by an agent, *id.*
- with all faults, 165
- by order of Court, 181

SALE OF GOODS ACT, 1893.

- sale and agreement to sell, 1, 2
- "sale" includes bargain and sale as well as sale and delivery, 2
- contract of sale for 10*l.* and upwards, 5
- Sale of Goods Act, 1893, s. 4...5, 6
- contract within the section, 6
- requisites of sale under s. 4...7
- acceptance and receipt, *id.*
- earnest, 14
 - two kinds of, *id.*
 - symbolical, 15
 - pecuniary, *id.*
 - should be retained by vendor, *id.*
 - old rule, *id.*
 - effect of, under s. 4, *id.*
- part payment, 15
 - effect of, *id.*
 - oral contract to treat previous payment as, 16
 - cheque sent by post returned, *id.*
 - note or memorandum in writing, *id.*
 - no particular form required, *id.*
 - names of contracting parties, *id.*
 - terms of contract must be stated, 17
 - may be collected from more than one document, *id.*

SALE OF GOODS ACT, 1893—*continued*.

requisites of sale under s. 4—*continued*.

the Stamp Act, 17

catalogue at a sale, *id.*

price when agreed upon, 18

where no price is agreed upon, *id.*

contract by letter, 19

must express all the terms of agreement, *id.*

mutual assent, 20, 21

terms cannot be varied by parol, 21

but may be explained, 22

matters antecedent to the writing, *id.*

condition precedent, *id.*

memorandum made after action, *id.*

signature by party to be charged, 23

what is necessary, *id.*

as to initials, *id.*

where a man prints his name, *id.*

names of parties, how to be shown, *id.*

signature for another purpose, 24

signature by an agent, *id.*

clear recognition of contract by parties sufficient,
25

provisions of, as to sales by auction, 44, 45, 50

goods put up in lots, 44

where bidder may retract, 45

puffing, 49, 50

sale not notified to be subject to right to bid on behalf
of seller, 50

right to bid expressly reserved, *id.*

provisions of, as to market overt not to affect law relating
to sale of horses, 61, n.

implied undertaking as to title, &c., 116—118

sale by description, 118

implied conditions as to quality or fitness, 120, 121

when condition to be treated as warranty, 122

goods which have perished, 124

goods perishing before sale, but after agreement to sell, *id.*

remedy for breach of warranty, 177

action for price, 181

action for not accepting, *id.*

action for not delivering, 183

specific performance of contract to deliver specific or
ascertained goods, 184

interest and special damages, 206

damages for non-acceptance, 207, 208

damages for non-delivery, 208

damages for breach of warranty, 209

SALLENDERS, 95

SANDCRACK, 105

SCAB, 105

SCIENTER. See FEROCIOUS AND VICIOUS ANIMALS.

SCIRRHUS CORD, 105

SEEDY-TOE, 105

SELLER,

- effect of his becoming bailee, 9
- when he may disaffirm sale, *id.*
- may become agent of buyer, 10
- his lien for the price, 28, 29
- his right of stoppage *in transitu*, 29
- not entitled to notice of unsoundness, 173
- not bound to take back unsound horse, *id.*
 - unless the contract was executory, *id.*
 - or there is fraud, 177
- where he refuses to take back the horse, 180

SERVANT. See WARRANTY AND SALE BY AN AGENT, HIRING HORSES.

- damage caused by negligence of, 133, 134
- warranty by, as special agent, 136
 - in case of private sale, 137
 - in case of sale at a fair, *id.*
- warranty by, as general agent, 138, 139
 - upon an incidental matter, 139, 140
- warranty by, after sale, 140
- warranty by, when forbidden to give one, *id.*
- master unwilling to stand by warranty of, 141
- rule as to servant binding his master, *id.*
- when farrier is answerable for his servant, 232
- liability of hirer for negligence of, 252, 253
 - servant must be acting within scope of employment, 254—256
- horse hired by a servant, 259
- horses driven by owner's servants, 260
- horses driven about town by the owner's servant, 260, 261
- hirer liable where he might have controlled his servant, 262
- jury must decide whether servant is acting for hirer or owner, 265
- borrowed horse cannot be used by a servant, 278
- test whether person employed is a contractor or a servant, 331
- negligent driving by a servant, 346—367. And see NEGLIGENCE DRIVING BY A SERVANT.
- striking another's horse, 347, 356
- striking a passenger, 356
- negligence of fellow-servant, 361
- master bound to use care in selection of servants, 361, 362

SHIVERING, 106

SHOULDER BRUISED, 104, n.

SHOULDER-TIED, 147

SHYING,

- a vice, 106
- an unsoundness, *id.*

SIDEBONE, 106

SIGNATURE,

- by the party to be charged, 23
- what is necessary, *id.*
- may be in the beginning or middle of instrument, *id.*
- it is then open to jury whether party meant to bind himself, *id.*
- what is sufficient, as to initials, *id.*
- by a printed name, *id.*
- by filling up a printed invoice, *id.*
- of other party unnecessary, *id.*
- in order book, on fly-leaf, sufficient, 24
- of instructions to telegraph clerk, *id.*
- by seller insufficient, *id.*
- sufficient when made for another purpose, *id.*
- by an agent, *id.*
- what equivalent to, under Sale of Goods Act, *id.*
- authority may be conferred by word of mouth, 25
- auctioneer, agent and witness of both parties, *id.*
- auctioneer's clerk, *id.*

SLIPPING THE COLLAR, 106

SMITH. See FARRIER.

SOUNDNESS,

- definition of, 67
- important decision as to, 69, 70

SPAVIN, 107

SPECIFIC GOODS, DELIVERY OF,
how enforceable, 184

SPECIFIC OPHTHALMIA, 74

SPEEDY-CUT, 107

SPLINT, 107, 108

- decision on the subject, 108
- not a patent defect, 145, 146

SPRAIN AND THICKENING OF THE BACK SINEWS,
108STALLION-MASTER,

- has a lien, 238
- for work done on a Sunday, *id.*

STAMP,

- agreement stamp not necessary to warranty, 196

STAR-GAZER, 109

STATUTE OF FRAUDS,

- requisites under s. 4...5
- repeal of s. 17...*id.*
- reproduction of, in s. 4 of Sale of Goods Act, 5, 6

STIFF BACK, 77

STOLEN HORSES.

- recovery of them, 61
- sale in market overt, *id.*
- statutory regulations, 57
 - not affected by Sale of Goods Act, *id.*, n.
- recovery when sold under these regulations, 62
- owner must prove the horse was stolen, *id.*
- sale out of market overt, *id.*
- recovery when not sold under these regulations, *id.*
- proof of compliance with statute, 63
- owner must first endeavour to bring the thief to justice, *id.*
- rule to be taken with modifications, *id.*
- where the action is against a third party, 64
- evidence of conversion, *id.*
- order for restitution, *id.*
- or action of *trover id.*
- applies to false pretences, 65
- and receiving stolen goods, *id.*
- may be made where second *bonâ fide* purchase, *id.*
- order of police magistrate, *id.*
- replevin* for unlawful taking, *id.*
- wrongful sale by agent of horse entrusted to him, 66
- And see HIRING HORSES, HORSE-STEALING, and FAIRS
AND MARKETS OVERT.

STOPPAGE IN TRANSITU,

- seller's right of, 29
- when goods are held to be *in transitu*, *id.*
- effect of, 30

STRANGLES, 109

STRING-HALT, 109

- held to be an unsoundness, 110

SUNDAY,

- market overt in London on all days but, 54
- work done by a stallion-master on, 238

SUNDAY DEALING,

- law of King Athelstan, 32
- statute of Charles 2, *id.*
 - institution of proceedings under, *id.*
 - farmers not within this statute, *id.*
- sale by a horsedealer, 33
- by an ordinary person, *id.*
- a subsequent ratification, *id.*
- breach of warranty given on Sunday, 34

SURVEYOR. See HIGHWAY.

TAIL,

- loss of, 143

TEETH,

- decay of, 111

TEMPORARY DISEASE,
unsoundness, 71

TENDER,
by buyer of horse, 172, 179, 180
sale after, 180
notice instead of, *id.*
length of time before notice of, *id.*
appropriation of money tendered, 194
proof of it, 198
necessary to recover keep, 210, 211, 212

THICKENING OF THE BACK SINEWS, 111

THICK WIND, 111

THINNESS OF SOLE,
held not to be an unsoundness, 111

THOROUGH-PIN, 112

THROMBOSIS, 112, 113

THRUSH OF FOOT, 113

TITLE,
warranty of, 116—118
dispute respecting, how tried, 118

TRACTION ENGINE,
owner of, not liable for negligence of hirer, 352, 353

TRAINER,
remedy against, for detaining a horse, 183
has a lien, 237

TRAMCARS,
modification of rule of the road by, 344
ordinary vehicles meeting, *id.*
alighting from, 345

TRESPASS. See NEGLIGENT DRIVING, HUNTING AND TRESPASSING.
by horse, liability of owner for, 376, 377
by persons hunting for amusement, 383, 384
 hunter liable for damage done by field, 385
 master of hounds, when responsible for field, *id.*
continued trespass, 387
two persons engaged in common pursuit, *id.*
in search of game, *id.*
jurisdiction of justices, when ousted, 388
from the highway, *id.*
from his own land to pick up game, 389
laying hands on a trespasser, *id.*
defence to an action for, 389, 390
lies for riding over land, *id.*
but not where a dog jumps into a field, *id.*

TRIAL OF A HORSE,

- right of, 8
- by rule of a repository, 48
- objected to, to conceal a defect, 146

UMPIRE. See **STAKEHOLDER, STEWARDS**

UNSOUNDNESS,

- what constitutes it, 67
- present state of the law, *id.*
- rule as to, 68
- important decision as to, 69, 70
- rule applies to temporary diseases, 70, 71
- how it should be left to a jury, 71
- proof of, 197
- notice of nature of, *id.*
- evidence as to, *id.*
 - matter of fact alone, *id.*
 - either fact or veterinary opinion, *id.*
 - both fact and veterinary opinion, 198
 - veterinary opinion alone, *id.*

USAGE,

- evidence of usage not to warrant, 139

VALUE,

- declaration of. See **CARRYING HORSES.**

VENDOR. See **SELLER.**

VERTIGO, 113

VETERINARY SURGEON. See also **FARRIER.**

- definition of, 229
- legal position of, previously to 1881, *id.*
- Royal College of Veterinary Surgeons, *id.*
 - charter of incorporation, *id.*
 - supplemental charters, *id.*
 - diploma of, *id.*
- Veterinary Surgeons Act, 1881...230
 - object of, *id.*
 - meaning of "registrar" in, *id.*
 - of "veterinary surgery," *id.*
- register of veterinary surgeons, *id.*
 - removal from, and restoration to, *id.*
 - penalty for obtaining registration by false representation, *id.*
 - or on registrar for wilful falsification of register, *id.*
 - registration of colonial, &c. practitioners, *id.*
 - penalty for false representation of membership of Royal College, *id.*
 - penalty on unqualified person using a description implying that he is a veterinary surgeon, *id.*
- Veterinary Surgeons Amendment Act, 1900, *id.*
 - extension of disciplinary powers of Royal College, 231

VETERINARY SURGEON—*continued*.

- decisions under Act of 1881...281
 - a "veterinary forge," *id.*, n.
 - a "pharmaceutical and veterinary chemist," *id.*
- remedy against for detaining a horse, 183
- evidence of, 197, 198

VICE.

- what constitutes it, 67
- present state of the law, *id.*
- rule regarding it, 71
- how it should be left to a jury, *id.*
- proof of, 198
- rule as to inherent vice, 283, 284. And see CARRYING HORSES.
 - evidence in proof of, 284, 285
 - burthen of proof, 286
 - applies to common carriers by sea, *id.*

VICIOUS,

- to clean, 113
- to shoe, *id.*

VICIOUS ANIMALS. See FEROCIOUS AND VICIOUS ANIMALS.

VISIBLE DEFECT, 162

WALL-EYED, 113

WARRANTY,

- of soundness limited as to time by conditions of sale, 42
- of ownership by auctioneer, 48
 - rescission of contract on ground of misrepresentation of ownership, 48, 49
- effect of private warranty of soundness before sale, 50
- warranty required in buying a horse, 116
- implied undertaking as to title, *id.*
 - warranty of title formerly not implied by law of England, *id.*
 - rule of law, 116, 117
 - under s. 12 of Sale of Goods Act, 117
 - when the consideration fails, 118
- mode of trying a disputed title, *id.*
 - interpleader order not granted unless claims co-extensive, *id.*
- sale by description, *id.*
- implied as distinguished from express warranty, 119
 - intention of parties, *id.*
- implied conditions as to quality and fitness, 120
 - rule of law, *id.*
 - under s. 14 of Sale of Goods Act, *id.*
 - exceptions to rule, 120, 121
- reason for requiring a warranty, 121
- buyer should protect himself by one, *id.*
- definition of warranty, *id.*

WARRANTY—*continued.*

- no particular words necessary, 121
- representation of vendor at time of sale, 122
- words of expectation do not amount to, *id.*
- when condition to be treated as warranty, 122, 123
- acceptance under entire contract, 123
- sale of specific goods, *id.*
- goods which have perished, 124
- goods perishing before sale, but after agreement to sell, *id.*
- a sound price not tantamount to a warranty, *id.*
- a general warranty, *id.*
- a qualified warranty, *id.*
- a limited warranty, 42, 124
 - complaint of breach must be made within time limited, 125
 - effect of notice of breach before removal, *id.*
 - accidental injury, *id.*
 - where performance of condition impossible, 126
 - continued existence of subject-matter of agreement implied, *id.*
- a special warranty, *id.*
- a written warranty, 127
- a special agreement, *id.*
- form of warranty, *id.*
- effect of a written warranty, *id.*
 - warranty may be gathered from letters, *id.*
 - the parties are bound by it alone, 128
 - unless fraud is shown, *id.*
 - representation does not avail, *id.*
- it cannot be extended by implication, *id.*
- a warranty is several though the contract be entire, *id.*
- a warranty applies only to time of sale, *id.*
- warranting a future event, 129
- buying for a particular purpose, *id.*
 - must be reasonably fit for the purpose, *id.*
 - a horse to carry a lady, *id.*
 - a carriage horse, 130
 - no exception as to latent undiscoverable defects, *id.*
 - quiet in harness, *id.*
 - unfitness must be clearly proved, 131
 - must have existed at time of sale, *id.*
- presumption that horse answers warranty, *id.*
- warrantor's liability, *id.*
- sale avoided by fraud, 132
 - but not by immaterial representation, *id.*
- proof of warranty not contained in the receipt, 195
 - when to be gathered from letters, *id.*
 - when formally made in writing, *id.*
- warranty in a receipt not always conclusive, *id.*
- warranty need not have agreement stamp, 196
- defence of breach of warranty, 201
- proof of surreptitious warranty, *id.*
- And see BREACH OF WARRANTY.

WARRANTY AND SALE BY AGENT,

- an agent cannot delegate his authority, 132
- nor exceed it, *id.*
- agency determines by principal's death, *id.*
- difference between a remunerated and an unremunerated agent, *id.*
- agent acting without proper authority, *id.*
- his personal responsibility, 133
- where he cannot be sued on the contract, *id.*
- but is liable in damages, *id.*
- principal answerable for his fraud, *id.*
- misrepresentation collateral to the contract, *id.*
- damage caused by his negligence, *id.*
- servant putting up glandered horse in stable of another, 134
- surreptitious dealing between buyer's agent and seller, *id.*
- avoidance of contract, *id.*
- undisclosed principal, *id.*
- where vendor does not know that there is a principal, 134, 135
- alteration of account between principal and agent, 135
- where vendor knows name of principal, *id.*
- vendor's election, *id.*
- where vendor does not know name of principal, *id.*
- person described as agent may be proved to be principal, 136
- principal cannot be proved to be an agent, *id.*
- their respective rights of action on a contract, *id.*
- warranty by a servant as special agent, *id.*
- when entrusted to sell horse privately, 137
- when entrusted to sell horse at a fair, *id.*
- warranty by a servant as general agent, 138
- servant of horsedealer has implied authority to warrant, *id.*
- illustration of rule, 138, 139
- alleged custom not to warrant, 139
- warranty by servant on incidental matter, *id.*
- warranty by a servant after sale, 140
- warranty by a servant forbid to give one, *id.*
- warranty by a stranger forbid to give one, 141
- master unwilling to stand by his servant's warranty, *id.*
- rule as to a servant binding his master, *id.*
- warranty by a person entrusted to deliver, 142
- agent employed to take a warranty, *id.*
- action against a pretended agent, *id.*
- proof in warranty by a servant, 196

WARRANTY DISTINGUISHED FROM REPRESENTATION,

- representation intended as a warranty, 148
- recommendation of the seller, *id.*
- affirmation as to value, *id.*
- distinction between a warranty and a representation, *id.*
- where representation amounts to a warranty, 149
- it must form part of the contract, *id.*

WARRANTY DISTINGUISHED FROM REPRESENTATION—*continued.*

- and be made pending contract, 149
- intention of parties, *id.*
- question to be put to jury, 150
- rule as to warranty and representation, *id.*
- mere expression of opinion, *id.*
- selling according to a pedigree, 151
- partly a warranty and partly a representation, *id.*
- jury must decide between a warranty and a representation, 152
- Perceval v. Oldacre*, 152, 153
 - evidence of warranty, *id.*
- judgment in *Behn v. Burness*, 153, 154
 - representation, 153
 - construction of, when in writing, 154
 - warranty, *id.*

WARTS, 114

WEAK-FOOT, 114

WEAVING, 114

WEED, 114

WHEEZING, 115

WHISTLING, 115

WILFUL MISCONDUCT. See CARRYING HORSES.

WILREMHAUNCH, 115

WIND-GALLS, 115

WIND-SUCKING, 115

YELLOWWS, 115

THE END.

Coroners.—JERVIS (Sir J.) on the Office and Duties of Coroners. 6th Edit. By R. E. MLENSIMER. 10s. 6d. 1898.

Costs.—JOHNSON. Bills of Costs in the High Court of Justice and Court of Appeal, in the House of Lords and the Privy Council, Tables of Fees, Conveyancing Costs, &c., &c. By HOMER MAXWELL JOHNSON. 2nd Edit. 35s. 1901.

DAY'S Handybook to Solicitors' Costs, showing at a glance the various charges. 2nd Edit. 5s. net. 1906.

County Courts.—The Annual County Courts Practice. By His Honour Judge SMYLY & W. J. BROOKS. 2 vols. 25s.

Covenants.—BROWN'S (R.C.) Covenants running with Land. 10s. 6d. 1907.

Criminal Law.—ARCHBOLD'S (J. F.) Pleading and Evidence in Criminal Cases, with the Statutes and Precedents of Indictments. 23rd Ed. By W. F. CRAIG and G. STEPHENSON. 35s. 1905.

ROSCON'S (H.) Digest of the Law of Evidence in Criminal Cases. 13th Ed. By HERMAN COHEN. 31s. 6d. 1908.

RUSSELL (Sir W. O.) on Crimes and Misdemeanours. 6th Ed. 3 vols. 51.15s. 6d. 1896.

WILSHERR'S (A. M.) Elements of the Criminal Law. 7s. 6d. 1906.

Deeds.—NORTON on Deeds. Being a 2nd Ed. of ELPHINSTONE ON DEEDS. By R. NORTON, K.C. 30s. 1906.

KELKE'S Epitome of Rules for Interpretation of Deeds. 6s. 1901.

Digest.—Digest of English Case Law to the end of 1897. 16 vols. 20l.

Continued annually.

A Digest of Cases, Overruled, &c., in the English Courts. 3 vols. Price £5 5s. 1907.

Divorce.—BROWNE & POWLEN' Law and Practice in Divorce and Marimonial Causes; with the Statutes, Rules, Fees and Forms. 7th Ed. 25s. 1905.

Easements.—GALE on Easements. 8th Edition. By R. ROOPE REEVE. 25s. 1908.

BLYTH'S Epitome of the Law of Easements. 6s. 1905.

Ecclesiastical Law.—PHILLIMORE'S Ecclesiastical Law of the Church of England. 2nd Ed. 31. 3s. 1895.

Elections.—JELF'S Corrupt and Illegal Practices at Elections. 3rd Edit. 7s. 6d. 1905.

Equity.—WHITE & TUDOR'S Selection of Leading Cases in Equity, with Notes. 7th Edition. 2 vols. 31. 15s. 1897.

KELKE'S Epitome of Leading Cases in Equity, founded on White & Tudor. 6s. 1901.

Evidence.—TAYLOR'S (PITT) Treatise on the Law of Evidence, as administered in England and Ireland. 10th Edit. By W. E. HUME-WILLIAMS, K.C. In 2 vols. 31. 3s. 1906.

BEST'S Principles of Evidence. 10th Ed. By J. M. LELY. 25s. 1906.

COCKLE'S Leading Cases on the Law of Evidence. By E. COCKLE. 7s. 6d. 1907.

Executors.—WILLIAMS' (Sir E. V.) Treatise on the Law of Executors and Administrators. 10th Edition. 41. 1905.

INGPEN'S Law relating to Executors and Administrators. By A. R. INGPEN. 25s. 1908.

Factories.—Law relating to Factories and Workshops under the Factory and Workshop Act, 1901. With Rules, Orders, &c., and other Statutes affecting the subject. By W. BOWSTEAD. 10s. 1901.

Forms.—HOUSE'S Practical Man. 17th Edit. 10s. 6d. 1900.

CHITTY'S Forms of Proceedings in the King's Bench Division. 13th Edit. 35s. 1902.

Fraud.—KERR'S Treatise on the Law of Fraud and Mistake. 3rd Edit. By S. E. WILLIAMS. 25s. 1902.

Guide for Articled Clerks.—A new Guide for Articled Clerks, containing the most recent Regulations and Examination Papers. By H. W. STIFF, Solicitor. 6s. 1895.

Guide to the Bar.—A New Guide to the Bar, containing the most recent Regulations and Examination Papers. By LL.B., Barrister-at-Law. 5s. 1906.

Horses.—OLIPHANT'S Law of, including the Law of Innkeepers, Veterinary Surgeons, &c. 6th Ed. By CLEMENT ELPH. LLOYD. 21s. 1908.

Husband and Wife.—MACQUEEN on Husband and Wife. The rights and liabilities of Husband and Wife. 4th Ed. By WYATT PAINE. 25s. 1905.

Income Tax.—Income Tax Acts, with Introduction, Notes, and Cross-references. By H. ST. G. PEACOCK. 15s. 1901.

Injunctions.—KERR on the Law and Practice of Injunctions. 4th Edit. By E. P. HEWITT, S. E. WILLIAMS and J. M. PATTERSON. 35s. 1903.

Interpleader.—CABABÉ (M.) on Interpleader in the High Court of Justice and County Courts; with Forms. 3rd Edit. 6s. 1900.

Justices.—WIGRAM'S Justices' Note Book. 8th Edit. 7s. 6d. 1908.

PALEY'S Law and Practice relating to Summary Convictions. 8th Ed. 25s. 1904.

Landlord and Tenant.—WOODFALL'S Law of Landlord and Tenant. 18th Edit. By W. HANBURY AGGS. 38s. 1908.

Law Dictionary.—STROUD'S Judicial Dictionary, or Interpreter of Words and Phrases by the British Judges and Parliament. By F. STROUD. 2nd Ed. 3 vols. 41. 4s. 1903.

Legal Quotations.—Dictionary of Legal Quotations, or Selected Dicta of the English Chancellors and Judges. By J. W. NORTON-KYSSER. 10s. 6d. 1904.

Local Government.—WRIGHT and HOBHOUSE'S Outlines of Local Government and Local Taxation. 3rd Edit. 7s. 6d. 1906.

Master and Servant.—SMITH'S Law of Master and Servant in every description of Trade and Occupation. 6th Edit. 30s. 1906.

Maxims.—BROOM'S Selection of Legal Maxims, Classified and Illustrated. 7th Edit. 28s. 1900.

Mercantile Law.—SMITH'S Compendium of Mercantile Law. By E. LOUIS DE HART and R. I. SIMEY. 11th Ed. 2 vols. 21. 2s. 1906.

Merchant Shipping.—A Treatise on the Law of Merchant Shipping. 4th Edit. By DAVID MACLACHLAN, M.A. 2l. 2s. 1892.
ARMEN'S Digest of Cases relating to Shipping, Admiralty, and Insurance Law, from the reign of Elizabeth to the end of 1897. 30s. 1899.

Mines, Minerals.—A Treatise on the Law of Mines, Quarries, and Minerals. By R. F. MACSWINNEY. 3rd Edit. 2l. 2s. 1907.

Mortgage.—COOTE'S Treatise on the Law of Mortgages. 6th Edit. By S. E. WILLIAMS. 3l. 3s. 1904.

Municipal Corporations.—RAWLINSON'S Municipal Corporations Acts. 9th Edit. By J. F. P. RAWLINSON, K.C., and J. A. JOHNSTON. 2l. 2s. 1903.

Nisi Prius.—ROSCOE'S (H.) Digest of the Law of Nisi Prius Evidence. 18th Edition. By M. POWELL. 2 vols. 2l. 2s. 1908.

Partnership.—LINDLEY on the Law of Partnership. 7th Edit. By His Honour Judge LINDLEY and T. J. C. TOMLIN. 38s. 1905.

Patents.—TERRELL (T.) Law and Practice relating to Letters Patent for Inventions. 4th Edit. 30s. 1906.

Personal Property.—GOODEVE'S Modern Law of Personal Property. 4th Ed. By J. H. WILLIAMS and W. M. CROWDY. 18s. 1904.

KELKE'S Epitome of Personal Property Law. 2nd Edit. 6s. 1905.

WILLIAMS' Principles of the Law of Personal Property, intended for Students. 16th Edit. 21s. 1906.

Pleading.—BULLEN and LEAKE'S Precedents of Pleading. 6th Edit. By T. WILLES CHITTY and C. DODD. 38s. 1905.

Prescription.—Prescription and Custom. By T. H. CARSON, K.C. 6s. 1907.

Private International Law.—A Digest of the Law of England with reference to the Conflict of Laws. By A. V. DICEY. 30s. 1896.

WESTLAKE, J., K.C., on Private International Law. 4th Ed. 16s. 1905.

Privy Council.—Practice of the Privy Council on Appeals from British and Colonial Courts. With Forms and Precedents. By F. SAFFORD & G. WHEELER. 2l. 10s. 1901.

Probate.—POWLES and OAKLEY on the Law and Practice relating to Probate and Administration. 4th Edit. By L. D. POWLES, W. M. F. WATERTON, and E. L. MANSBRIDGE. 30s. 1906.

Quarter Sessions.—Pritchard's Quarter Sessions Practice. 2nd Edit. By J. B. MATTHEWS and V. G. MILWARD. 12. 11s. 6d. 1904.

Railway and Canal Cases.—12 vols. 19l. 1874 to 1905.

Real Property.—WILLIAMS' Principles of the Law of Real Property. Intended as a First Book for the Use of Students in Conveyancing. 20th Edit. 21s. 1906.

GOODEVE'S Modern Law of Real Property, with an Introduction for the use of Students. 5th Edit. By Sir H. W. ELLPHINSTONE and J. W. CLARK. 21s. 1906.

KELKE'S Real Property Law. An Epitome of Real Property Law, for the Use of Students. By W. H. HASTINGS KELKE. 4th Edit. 6s. 1907.

CARRON'S Real Property Statutes, comprising, among others, Prescription, Limitations, Wills, Trustees, Conveyancing, Settled Lands, Partition, &c. 10th Edit. By T. H. CARRON, K.C., and H. B. BOMPAS. 35s. 1902.

Receivers.—KERR on Receivers appointed by the High Court of Justice or out of Court. 5th Edit. By W. D. RAWLINS, K.C. 10s. 1905.

Restraint of Trade. MATTHEWS & ADLER. Law relating to Covenants in Restraint of Trade. 2nd Edit. 7s. 6d. 1907.

Roman Law. KELKE'S Epitome of Roman Law. 6s. 1901.

JURINIAN'S Digest, Book 20, translated by T. C. JACKSON. 7s. 6d. net. 1908.

Sale.—BENJAMIN'S (J. P.) Treatise on the Law of Sale of Personal Property, with reference to the American Decisions and the French Code and Civil Law. 5th Edit. By W. F. A. KER and A. R. BUTTERWORTH. 2l. 2s. 1906.

Sheriff Law.—Sheriff and Execution Law. By P. E. MATHER. 30s. 1903.

Solicitors' Liens.—ATKINSON'S Law and Practice relating to Solicitors' Liens and Charging Orders, with Forms, Costs, etc. 7s. 6d. net. 1905.

Statutes.—CHURCH'S Statutes of Practical Utility. New Edit. By J. M. LEBY. Magna Charta to 1901. In 14 vols. 15l. 15s. Continued by Annual Supplements.

The Interpretation of Statutes. By Sir P. B. MAXWELL. 4th Ed. By J. A. THEOBALD. 25s. 1905.

Title.—Hints as to Advising on Title. 4th Edit. By W. H. GOWER. 9s. 1905.

Torts.—The Law of Torts, by J. F. CLEKK and W. H. B. LINDSELL. 4th Ed. By WYATT PAINE. 30s. 1906.

Compendium of the Law of Torts. By H. FRASER. 7th Edit. 8s. 1908.

Trade Marks.—A Treatise on the Law of Trade Marks, Trade Name and Merchandise Marks. By D. M. KERLY. 3rd Edit. 35s. In the press.

Trade Unions.—Trade Union Law and Cases. 2nd Edit. By H. COHEN. 6s. net. 1907.

Vendor and Purchaser.—Law relating to Vendors and Purchasers of Real Estate and Chattels Real. By T. C. WILLIAMS. 2 vols. 2l. 5s. 1906.

Waters.—Law relating to Waters, Sea, Tidal and Inland. By H. J. W. COULSON and U. A. FORBES. 2nd Edit. 35s. 1902.

Wills.—JARMAN'S Treatise on Wills. 5th Edition. 2 vols. 3l. 10s. 1893.

HAYES and JARMAN'S Concise Forms of Wills; with Practical Notes. 12th Edit. 21s. 1905.

STRAHAN'S Law of Wills. By J. H. STRAHAN. 7s. 6d. 1908.