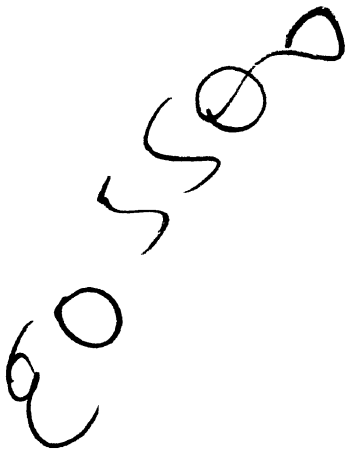


OLIPHANT'S

LAW OF HORSES.



THE

LAW OF HORSES,

INCLUDING THE LAW OF

Innkeepers, Veterinary Surgeons, &c.,

HUNTING, RACING, WAGERS & GAMING.

BY

GEORGE HENRY HEWITT OLIPHANT,

Of Trinity College, Cambridge, B.A., and Inner Temple, Esq., Barrister-at-Law.

Fourth Edition,

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

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

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

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1882

"Caveat emptor."—*Leg. Max.*

"Equi donati dentes non inspiciuntur."—*D. Hieron. in Proœm. 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, Olympiacæ miratus prœmia palmæ,
Pascit equos . . . . . .
Corpora prœcipuè matrum legat."—*Virg. Georg.*

PREFACE

TO THE FOURTH EDITION.

SINCE the publication of the last Edition of this Work the changes which have taken place in the law on the subjects embraced within its somewhat extensive scope have been very considerable. While strictly adhering to the plan of the original Work, the present Editor has taken great pains to eradicate all obsolete matter, and at the same time to combine with the text the additions and alterations rendered necessary by the above changes. The most important alterations are probably those necessitated by the passing of the Regulation of Railways Acts, 1868 and 1871, the Judicature Acts, and the Innkeepers Act, 1878; whilst at the same time the reported decisions during the last seventeen years have affected every branch of the subject.

The Index has been thoroughly revised and considerably enlarged, and care has been taken

to make the references to the new cases as numerous as possible, and to notice any conflict that may exist between the decisions in this country and those in the United States.

CLEMENT E. LLOYD.

4, King's Bench Walk, Temple,
June, 1882.

PREFACE

TO THE THIRD EDITION.

In preparing a new Edition of Mr. Oliphant's valuable Treatise on the Law of Horses, it has been the endeavour of the present Editor to amalgamate with the text of the preceding Edition such new matter as the growth of legal science during a period of eleven years has supplied, without disturbing the symmetry or impairing the method of the original Work.

It has been found necessary indeed to make considerable additions to the text, for there are few subjects upon which the law is long silent. But the alterations have been few, inasmuch as the opinions expressed by Mr. Oliphant have, in almost every instance, been confirmed by subsequent decisions; those, therefore, which have been made, have been rendered necessary, for the most part, by legislative enactment, as, for instance, by the Common Law Procedure Acts of 1854 and 1860, by the Railway and Canal Traffic Act of 1854, and by the Act for the Suppression of Gaming Houses of the same year.

The present Editor has had access to the notes and references made by the Author during the earlier part of the period which has elapsed since the publication of the Second Edition, and must make due acknowledgment for the assistance thence derived.

He ventures to express his hope that this Edition will not prove unworthy of the reputation which this Book has hitherto enjoyed, and that his aim to preserve its character as a complete Manual upon the various points of contact between the Horse and the Law, and upon the subjects kindred to them, has not been altogether unsuccessful.

G. R. RYDER.

10, KING'S BENCH WALK, TEMPLE,
May, 1865.

PREFACE

TO THE SECOND EDITION.

THE case of the Sale of a Horse is often chosen by our Judges as a favourite and popular mode of illustrating their views in numerous cases coming before them with respect to the Bargain and Sale of Chattels. It is here intended that the Law relating to Horses should be used for a similar purpose; because nearly the same incidents which affect the Bargain and Sale of Horses also affect the Bargain and Sale of other Chattels, including manufactured Goods, Carriages, Pictures and Works of Art.

An attempt has been made to arrange, in a logical and concise manner, the subjects hereafter discussed, and to reduce to a regular System the various principles which are found to be involved.

Great care has been taken to keep out all matter which might tend to encumber the Book, but the most ample references are given.

During the last few years there have been numerous decisions with respect to the Bargain and Sale of Chattels, and the other subjects here treated of. It will also be seen that great changes have recently been made in the Law of Pleading and Evidence; and that the Law of Wagers has been most materially affected by the "Act for the suppression of Betting Houses."

G. H. H. O.

1, NEW COURT, TEMPLE,
Dec. 20th, 1853.

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G. H. H. O.

1, NEW COURT, TEMPLE,
Dec. 20th, 1853.

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. H. O.

TEMPLE, *May 15th*, 1847.

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Arrangement of the subject.

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

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*).

(*a*) 8 & 9 Vict. c. 109. (*b*) 9 & 10 Vict. c. 48.
(*c*) 16 & 17 Vict. c. 119.

Giving a Warranty.

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. 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, buy 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 unbusiness-like 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.

When to give a 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.

The cause of Difficulty in Horse-dealing.

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 Rascality 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 Horsedealing transactions arises from parties 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 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.

Difficulties felt by the Veterinary profession.

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

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

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."

"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

(*a*) *The Veterinarian*, vol. xviii. p. 366.

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 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,

INCLUDING THE

BARGAIN AND SALE OF CHATTELS:

ALSO THE LAW OF

INNKEEPERS, VETERINARY SURGEONS, &c.;

AND OF

RACING, WAGERS AND GAMING.

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.

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BARGAIN, SALE AND EXCHANGE.

Bargain.

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

Sale and exchange.

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 prescribed for regulating the transaction (*b*).

Bargain and sale.

Therefore a bargain and sale of personal chattels is an agreement to sell, followed and completed by *actual* sale (*c*).

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 son (*d*).

Executed and executory contract.

A contract may be either *executed*, as if A. agrees to change Horses with B., and they do it immediately; or it may be *executory*, as if they agree to change next week (*e*).

Entire contract.

If a person buy a Horse and a Pony together for 100*l*., the contract is entire, as there is no means of determining the price of each (*f*).

Severable contract.

But if he should purchase them both together, agreeing to pay 30*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 (*f*).

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 (*g*).

Written contract.

But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as part of the contract (*g*).

(*a*) See 2 Steph. Com. 67.

(*b*) 2 Steph. Com. 66; *Anon.*, 3 Salk. 157; Chit. jun. Contr. 11th ed. 353.

(*c*) Com. Dig. Bargain and Sale (A.).

(*d*) *Irons* v. *Smallpiece*, 2 Barn. & Ald. 551.

(*e*) 2 Steph. Com. 57.

(*f*) See *Miner* v. *Bradley*, 22 Pick. Rep. 459 (Amer.); *Johnson* v. *Johnson*, 3 B. & P. 162; Story on Sales, 164, 190.

(*g*) *Kain* v. *Old*, 2 B. & C. 634.

Right of rescission.

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 trial.

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 not maintain such action (*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

(*h*) *Payne* v. *Cave*, 3 T. R. 148; Story on Sales, 99.

(*i*) *Eskridge* v. *Glover*, 5 Stew. & Port. (Amer.) 264.

(*k*) *Ellis* v. *Mortimer*, 4 B. & P. 257.

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

(*m*) Earnest, post, 15.

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 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 are at liberty to be off, provided that immediate possession of the Horse or the money be tendered by either side (*n*). Where neither party can be off.

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 mutuam manuum complexionem*" (*o*). 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. Striking a bargain.

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: "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." Statute of Frauds, s. 4.

A contract not to be performed within a year is very seldom made in buying or selling a Horse; and it will be seen that the only distinction between the 4th and 17th sections of the statute is this, that under the 4th section the *whole contract* must be in writing, including the consideration which induced the party to make the stipulation; whereas under the 17th section it is sufficient *if all the terms* by which the *defendant* is to be bound are stated in writing so as to bind *him* (*r*). Requisites under s. 4.

(*n*) *Cooper* v. *Andrews*, Hob. 41; Noy's Max. c. 42; 2 Bla. Com. 447.
(*o*) 2 Bla. Com. 448.
(*p*) 29 Car. 2, c. 3.
(*q*) *Leroux* v. *Brown*, post, p. 25.
(*r*) *Marshall* v. *Lynn*, 6 M. & W.

Buying a horse at 10*l.* or upwards.

The 17th section of the Statute of Frauds is 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.

Statute of Frauds, s. 17.

The words of the 17th section of the Statute of Frauds are as follows: "And be it enacted, that no contract for the sale of any goods, wares or merchandizes, *for the price* of 10*l.* or upwards, shall be allowed to be good, except the buyer shall *accept part* of the goods so sold, and *actually receive* the same, or give something in *earnest* to bind the bargain, or *in part payment*, or that some *note or memorandum in writing* of the said bargain be made and *signed by the party to be charged* by such contract, *or their agents* thereunto lawfully authorized."

Extended by 9 Geo. 4, c. 14.

This statute was further extended by 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, by the 7th section of which it is enacted, that "the provisions of the Statute of Frauds shall extend to all contracts for the sale of goods to the value of 10*l.* or upwards, notwithstanding 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."

Effect of extension.

The 17th section of the Statute of Frauds, and the 7th section of Lord Tenterden's Act, must be read together; the effect of which is to substitute for the words "for the price of 10*l.*," in the 17th section of the Statute of Frauds, the words "of the value of 10*l.*," and thus to make the rule uniform in all cases (*s*). Accordingly, 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 the statute, 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

118; *Wain* v. *Warlters*, 2 Sm. L. C. 8th ed. 261, 262; and see Benj. on Sales, 2nd ed. 91.

(*s*) *Scott* v. *Eastern Counties R. Co.*, 12 M. & W. 33.

might and would have been 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 (*t*).

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

Therefore to make the sale of a Horse at 10*l*. or upwards valid under the 17th section of the statute, 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.

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.

In what they consist.

To satisfy the Statute of Frauds, 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 (*t*). The acceptance must be with the intention of taking possession as owner. And the receipt implies delivery, either actual or constructive (*u*).

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 Mr. Justice Holroyd, "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" (*w*).

(*t*) *Harman* v. *Reeve*, 25 L. J., C. P. 257.

(*u*) See per Parke, B., *Saunders* v. *Topp*, 4 Ex. 394; *Holmes* v. *Hoskins*, 9 Ex. 753.

(*w*) *Baldey* v. *Parker*, 2 B. & C. 44; *S. C.* 3 D. & R. 220; *Cusack* v. *Robinson*, 30 L. J., Q. B. 261; and see Benjamin on Sales, 2nd ed. 140.

Acceptance before delivery.

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

When vendor may disaffirm sale.

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*).

Where an article is selected.

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 Mr. Baron Alderson 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

(*u*) See note (*u*), ante, p. 7.
(*x*) *Morton* v. *Tibbett*, 15 Q. B. 428; *Cusack* v. *Robinson*, 30 L. J., Q. B. 261.
(*y*) *Cusack* v. *Robinson*, 30 L. J., Q. B. 261.
(*z*) *Taylor* v. *Wakefield*, 6 E. & B. 765.
(*a*) *Saunders* v. *Topp*, 4 Ex. 390.

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

Question for the Jury.

It is a question for the Jury whether there has been an acceptance and receipt. Thus W., living at Hereford, ordered goods (at a price above 10*l.*) of A., living at Bristol, and directed that they should be sent by the "Hereford" sloop to Hereford. They were sent accordingly, and a letter of advice was also sent to W., with an invoice, stating the credit to be three months. On their arrival at Hereford they were placed in the warehouse of the owner of the sloop, where W. saw them; and he then said to the warehousemen that he would not take them, but he made no communication to A. till the end of five months, when he repudiated the goods. A. brought an action against W. for the price, and it was held that the Judge ought not to have told the Jury that there was no acceptance and actual receipt under the Statute of Frauds, but should have left them to find, upon these facts, whether or not there had been such acceptance and actual receipt (*c*).

Constructive possession by vendee.

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 con-

(*b*) Ibid. 395. 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. See also Benjamin on Sales, 2nd ed. 113.

(*d*) See ante, p. 8.

(*e*) *Marvin* v. *Wallace*, 2 Jur., N. S. 689.

structive possession by the vendee must be clearly such, as that by it the vendor would lose his lien on the goods (*f*).

Seller may become agent for buyer.

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 a 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. 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*).

What has been held sufficient as an acceptance and receipt.

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 Mr. Justice Bayley in *Howe* v. *Palmer* (*j*), it will be seen that it may be distinguished from that and all the following cases.

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 *Horse dealer*. He asked 180 guineas for two Horses, which the defendant at first refused to give, but afterwards sent word that

(*f*) *Holmes* v. *Hoskins*, 9 Ex. 753.

(*g*) *Castle* v. *Sworder*, 30 L. J., Ex. 310.

(*h*) *Beaumont* v. *Brengeri*, 5 C. B. 301.

(*i*) *Elmore* v. *Stone*, 1 Taunt. 458. See also *Kibble* v. *Gough*, 38 L. T., N. S. 204—C. A.

(*j*) *Howe* v. *Palmer*, 3 B. & Ald. 324.

"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 Chief Justice Mansfield 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 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 Mr. Justice Bayley said, "In

Elmore v. *Stone* (*k*) 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" (*l*).

However, the case of *Elmore* v. *Stone* (*k*) seems to have been properly decided, because the plaintiff, being a *Livery-stable keeper* as well as a *Horse dealer*, the buyer, by ordering him to keep the Horses at livery, directed expense to be incurred; and the plaintiff, by consenting to keep them at livery, relinquished his possession as owner, and held them only as *Livery-stable keeper*.

Various acts of ownership.

In the case of *Carter* v. *Touissant* (*m*), 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 30*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. Chief Justice Abbott and Justices Bayley and Holroyd distinguished this case from *Elmore* v. *Stone* (*k*), 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.

A ready-money transaction.

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

(*k*) *Elmore* v. *Stone*, 1 Taunt. 458.

(*l*) *Howe* v. *Palmer*, 3 B. & Ald. 324. And see *Rickard* v. *Moore*, 38 L. T., N. S. 841—C. A.

(*m*) *Carter* v. *Touissant*, 2 B. & Ald. 855; *S. C.*, 1 D. & R. 515.

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 of the Horse within the meaning of the Statute of Frauds (*o*).

Criterion for determining whether goods are accepted or not.

The conduct of the vendee after the receipt of the goods will often be the criterion for determining whether he has accepted them (*p*). Acts done for the mere purpose of examination of the goods do not constitute an acceptance (*q*). But a person must be taken to have accepted goods within the statute, if, on their being sent to him, he uses more of them than is necessary to test them (*r*).

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 (*s*). 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 (*t*).

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 (*u*).

Goods bought

If a man buys a quantity out of a larger bulk, he does

(*o*) *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680.

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

(*q*) *Nicholson* v. *Bower*, 28 L. J., Q. B. 97.

(*r*) *Harnor* v. *Groves*, 24 L. J., C. P. 53; *Coventry* v. *M'Enivry*, 13 Ir. Com. Law Reps. 160; and see *Heilbut* v. *Hickson*, L. R., 7 C. P. 438; 41 L. J., C. P. 228.

(*s*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597.

(*t*) *Rickard* v. *Moore*, 38 L. T., N. S. 841—C. A.

(*u*) *Chaplin* v. *Rogers*, 1 East, 192.

out of a larger bulk.

not buy it until it is separated from the rest, and there must be an acceptance after the separation (*v*). He must have an opportunity of refusing what the vendor may have selected. In some cases possibly an *à priori* assent may be enough (*x*), but the general principle deducible from the decisions is that the acceptance must be after the purchaser has exercised his option, or has done something to preclude him from so doing; and (*y*) until he is so precluded he cannot be said to have accepted them within the meaning of the statute (*z*). But where goods are delivered to the vendee, any objection on account of non-compliance with the order or otherwise must be made within a reasonable time, otherwise the vendee will be considered to have accepted them (*a*). It is for the reason that the vendee cannot be said to have accepted goods which he has not had an opportunity of rejecting, that the delivery to a carrier is a delivery to and an acceptance by the consignee only where the goods are specific and ascertained (*b*).

Vendee disposing of goods.

But where a vendor has recognized the right of his vendee to dispose of goods remaining in the actual possession of the vendor, he cannot defeat the right of a person claiming under the vendee, on the ground that no property passed to the latter by reason of the want of a specific appropriation of the goods (*c*).

Goods sold by sample.

Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of an usage or custom to the contrary, amount to a delivery and acceptance of a part of the thing sold; but it is otherwise, where the buyer draws samples from the bulk after he has purchased the goods (*d*).

More articles sent than ordered.

If a person orders one article, and two are put upon him, there is no delivery until both parties agree upon the particular one, so that there may be one which the buyer

(*v*) *Campbell* v. *Mersey Docks*, 14 C. B., N. S. 412.

(*x*) *Aldridge* v. *Johnson*, 26 L. J., Q. B. 296, per Campbell, C. J.; *Langton* v. *Higgins*, 28 L. J., Ex. 252; and see *Kibble* v. *Gough*, 38 L. T., N. S. 204, C. A., where defendant's foreman received goods and gave a receipt marked "not equal to sample," and it was held that there was sufficient evidence of an acceptance. See also *Smith* v. *Hudson*, 34 L. J., Q. B. 145.

(*y*) *Hunt* v. *Hecht*, 22 L. J. 295 (Ex.). Much of what was said in *Morton* v. *Tibbett*, 15 Q. B. 428, doubted in this case.

(*z*) *Norman* v. *Phillips*, 14 M. & W. 283.

(*a*) *Coleman* v. *Gibson*, 1 M. & Rob. 168.

(*b*) *Coombs* v. *Bristol and Exeter R. Co.*, 27 L. J., Ex. 401; and see Benjamin on Sales; 2nd ed. 135.

(*c*) *Woodley* v. *Coventry*, 32 L. J., Ex. 185.

(*d*) *Gardner* v. *Grout*, 2 C. B., N. S. 340.

can call his own. Thus, in an action to recover the price of ten hogsheads of claret, it appeared that the defendant having verbally ordered ten hogsheads of the plaintiff, the latter in October sent him fifteen, whereupon the defendant wrote to him, stating that he could only take ten on their proving satisfactory, and would hold the other five on account of the plaintiff. To this the plaintiff answered thus, "Whatever suits you best is most acceptable to us. The wine is superior: you will ascertain in the spring if you have room for it." The defendant placed the fifteen hogsheads in the bonded warehouse in his own name, and shortly after tasted and disapproved of the wine, but gave no notice to the plaintiff of his disapproval until April following, and in May refused to take any of the wine. It was held by the Court of Exchequer that there was no acceptance of the ten hogsheads, within the 17th section of the Statute of Frauds (*e*). But in all cases where the goods ordered are sent, together with others not ordered, the vendee would not have a right to refuse to accept any; though if there is any danger or trouble attending the severance of the two, or any risk that the vendee might be held to have accepted the whole, if he accepted his own, he is at liberty to refuse to accept at all (*f*).

Acceptance must be unequivocal.

In all cases the acts of the parties, in order to be tantamount to a delivery and actual receipt, must be unequivocal (*g*); and therefore, where goods are lodged with a warehouseman as agent for the vendor, the mere acceptance and retainer by the purchaser of the warrant or delivery order will not amount to an actual receipt of the goods so as to bind the bargain (*h*); but to have this effect the document must be lodged by the purchaser with the warehouseman, who must then, as it were, attorn to him, or, in other words, agree to hold the property henceforth as his agent (*i*).

THE EARNEST AND PART PAYMENT.

Two kinds of Earnest.

The civil law called the Earnest "*Arrha*," and this it interprets to be "emptionis-venditionis, contractæ argu-

(*e*) *Cunliffe* v. *Harrison*, 20 L. J., Ex. 325; *S. C.* 6 Ex. 903.

(*f*) Per Byles, J.; *Levy* v. *Green*, 1 El. & El. 969.

(*g*) *Nicholle* v. *Plume*, 1 C. & P. 272; *Eden* v. *Dudfield*, 1 Q. B. 307.

(*h*) *M'Ewan* v. *Smith*, 2 H. L. Cas. 309; *De Mattos* v. *Calcutta Steam Co.*, 33 L. J., Q. B. 214.

(*i*) *Bentall* v. *Burn*, 3 B. & C. 423; *Farina* v. *Home*, 16 M. & W. 119; *Cusack* v. *Robinson*, 30 L. J., Q. B. 261; *Hart* v. *Bush*, 27 L. J., Q. B. 271; *Currie* v. *Anderson*, 29 L. J., Q. B. 87; see also *Brown* v. *Hare*, 27 L. J., Ex. 372.

mentum" (*k*). 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 (*l*). A similar distinction is made in the Statute of Frauds (*m*). Thus the buyer must "give something in Earnest to bind the bargain," *or* "give something in part payment."

Symbolical.

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.

Pecuniary.

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 Earnest is a part payment.

Accordingly inasmuch as a pecuniary Earnest is to be considered as a part payment of the purchase-money, in a case where there was, upon a sale by auction, the common condition for the forfeiture of the deposit, and for a resale, and the condition that "*any deficiency* upon such resale, with all expenses, should be made good by the defaulter, and should be recoverable as liquidated damages;" and the purchaser did not pay the deposit, which amounted to 24*l.*, and upon a resale the property fetched 15*l.* less than upon the first sale, and the expenses of the second sale were 9*l.* 5*s.*; it was held that the seller could not recover the 15*l.*, the expenses, and the deposit besides; for although the deposit, if it had been paid, would have been forfeited, yet it would have been a part payment of the purchase-money. The seller was allowed, therefore, to recover only 24*l.* 5*s.*, to which sum the loss on the resale and the expenses amounted, exclusive of the deposit (*n*).

Earnest should be retained by the vendor.

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 of Frauds (*o*).

The old rule.

Where an Earnest was given on a contract of sale, the

(*k*) 2 Bla. Com. 447.
(*l*) Code Civile, 1590; Vinnius, Com. in Inst. l. 3, tit. 324.
(*m*) 29 Car. 2, c. 3, s. 17.
(*n*) *Ockenden* v. *Henly*, 27 L. J., Q. B. 361.
(*o*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597.

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 (*p*).

Effect of Earnest under the Statute of Frauds.

But under the Statute of Frauds 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 (*q*). 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 (*r*).

Effect of part payment.

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 (*s*).

It must be remembered that part payment of purchase-money is only a part performance in respect of contracts for the sale of goods, wares or merchandizes, within the 17th section of the Statute of Frauds (*t*).

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 (*u*).

No particular form required.

No particular form is necessary to constitute a good note or memorandum in writing; and a sold note (*x*) or a bill of parcels is sometimes sufficient, where it can be proved that it has been recognized by the other party (*y*).

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

(*q*) *Dyer* v. *Cowley*, 17 L. J., Q. B. 360.

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

(*s*) *Dyer* v. *Cowley*, 17 L. J., Q. B. 360.

(*t*) Sugd. Vend. & Purch. 14th ed. 152; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Wood* v. *Midgley*, 23 L. J., Ch. 553.

(*u*) Per Lord Abinger, C. B., *Allen* v. *Pink*, 4 M. & W. 144.

(*x*) *Parton* v. *Crofts*, 33 L. J., C. P. 189; *Sievewright* v. *Archibald*, 20 L. J., Q. B. 529.

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

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 (*z*). But it is not necessary that they should appear actually on the face of the memorandum; if, from the memorandum taken in connection with surrounding circumstances, it clearly appear who they are, this is sufficient (*a*).

Terms of the contract must be stated.

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* (*b*), the memorandum of agreement on the sale of a Race Horse called Baron Biel, 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.

May be collected from more than one document.

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 (*c*). The connection between the documents must appear on the face of them, for it cannot be supplied by parol evidence (*d*), 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 (*e*).

The Stamp Act.

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

Catalogue at a Sale.

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 (*g*). And it is not sufficient where they are merely in the room but not *actually attached* to the catalogue, or clearly referred to in

(*z*) *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; *Laythroap* v. *Bryant*, 2 Bing., N. S. 244; *Williams* v. *Jordan*, L. R., 6 Ch. D. 517; 46 L. J., Ch. 681.

(*a*) Chitty on Contracts, 10th ed. 359.

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

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

(*d*) *Boydell* v. *Drummond*, 11 East, 142; *Caddick* v. *Skidmore*, 27 L. J., Ch. 153; *Pierce* v. *Corf*, L. R., 9 Q. B. 217; 43 L. J., Q. B. 52.

(*e*) *Boydell* v. *Drummond*, 11 East, 142; *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78.

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

(*g*) *Hinde* v. *Whitehouse*, 7 East, 568.

it; and if during the sale they get separated, the signatures made after the separation are unavailable (*h*).

And 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 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 (*i*).

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 (*k*); but it has been held that a written order for goods "on moderate terms," is sufficient (*l*).

(*h*) *Kenworthy* v. *Scholfield*, 2 B. & C. 945.

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

(*k*) *Elmore* v. *Kingscote*, 5 B. & C. 583.

(*l*) *Ashcroft* v. *Morrin*, 4 M. & G. 450.

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 (*m*); 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 (*n*).

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

Contract by Letter.

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 (*p*). And if a letter be given in evidence with the direction torn off, the jury will do well to presume *primâ facie*, that it was addressed to the person who produces it (*q*).

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 (*r*).

Sufficient between the parties.

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 (*s*).

Must express all the terms of the agreement.

But they must express all the terms of the contract (*t*). Thus, where it was clear from Letters and Invoices that the defendant had bought goods from the plaintiff upon

(*m*) *Handley* v. *M'Laine*, 10 Bing. 488.

(*n*) 2 Bla. Com. 30.

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

(*p*) *Dunlop* v. *Higgins*, 12 Jur. 295; Chitty on Contracts, 10th ed. 11.

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

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

(*s*) *Archer* v. *Baynes*, 5 Ex. 629; *Richards* v. *Porter*, 6 C. B. 438; *Warner* v. *Willington*, 25 L. J., Ch. 662; *Smith* v. *Neale*, 26 L. J., C. P. 143; *Watts* v. *Ainsworth*, 1 H. & C. 83.

(*t*) *Bailey* v. *Sweeting*, 9 W. R. 273.

some contract or other; but whether he bought them on a contract to take particular goods seen by him at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with the sample, or whether the agreement was that they should be delivered within a particular time, did not appear. It was held, that there was no agreement coming within the Statute of Frauds; because what was in truth the dispute between the parties was not settled by the contract in writing (*u*).

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 (*x*).

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 (*y*). 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"

(*u*) *Archer* v. *Baines*, 5 Ex. 625; *Richards* v. *Porter*, 6 B. & C. 438; *Goodman* v. *Griffiths*, 26 L. J., Ex. 145; *M'Lean* v. *Nicholl*, 7 Jur., N. S. 999; *Honeyman* v. *Marryat*, 21 Beav. 14; *Pierce* v. *Corf*, L. R., 9 Q. B. 214; 43 L. J., Q. B. 52; 29 L. T., N. S. 919; *Mahalen* v. *Dublin, &c. Distillery Co.*, Ir. R., 11 C. L. 83; *Bertel* v. *Neveux*, 39 L. T., N. S. 257.

(*x*) *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., N. S. 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., N. S. 307; and see *Gibson* v. *Holland*, L. R., 1 C. P. 1.

(*y*) *Cooper* v. *Hood*, 28 L. J., Ch. 212.

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 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 (*z*). 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 defendant's 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 (*a*).

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 (*b*).

(*z*) *Jordan* v. *Norton*, 4 M. & W. 155; *Heyward* v. *Barnes*, 23 L. T. 68.
(*a*) *Lewis* v. *Pedrick*, 29 L. T., N. S. 178.
(*b*) *Metzler* v. *Gounod*, 32 L. T., N. S. 656.

It is also necessary that the Letter of acceptance be absolute and unqualified (*c*).

Where a contract is to be made out by an offer on one side and an acceptance on the other, if the answer is equivocal or anything is left to be done, the two do not constitute a binding contract (*d*).

Where the contract is complete.

The better opinion is that a contract is complete upon the posting by one party of a Letter addressed to the other, accepting the terms offered by the latter, notwithstanding such Letter never reaches its destination (*e*).

Terms cannot be varied by parol.

The terms of a written contract for the sale of goods, falling within the operation of the Statute of Frauds, 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; and Mr. Baron Alderson said,—"By the 4th section of the Statute of Frauds, it is provided that the contracts therein mentioned shall be in writing, otherwise no action shall be maintained upon them. The 17th section requires that some Note or Memorandum in writing of the bargain before made shall be signed by the party to be charged by such contract, or his agent lawfully authorized. There is undoubtedly a distinction between the two enactments, for by the 4th section the whole contract must be in writing, including the consideration which induced the party to make the stipulation by which he is to be bound; but by the 17th section it is sufficient if all the terms by which defendant is to be bound are stated in writing so as to bind him. Now here there is a stipulation which is to bind the defendant, and it is proposed to alter that by parol, which cannot be done. It is much better plainly to define what the law is than to attempt to create fanciful distinctions" (*f*). So,

(*c*) *Applcby* v. *Johnson*, L. R., 9 C. P. 158.

(*d*) Per Grove, J., *ibid.* 163; and see *Stanley* v. *Dowdeswell*, L. R., 10 C. P. 102; 23 W. R. 389.

(*e*) *Duncan* v. *Topham*, 8 C. B. 225; *Dunlop* v. *Higgins*, 1 H. L. C. 381; and see *Imperial Land Co. of Marseilles, In re, Harris's case*, L. R., 7 Ch. 587; 41 L. J., Ch. 621; 26 L. T., N. S. 781; 20 W. R. 290; and *Household Fire Insurance Co.* v. *Grant*, L. R., 4 Ex. D. 216; 48 L. J., Ex. 577; 41 L. T., N. S. 298; 27 W. R. 858—C. A., overruling *British and American Telegraph Co.* v. *Colson*, L. R., 6 Ex. 108: 40 L. J., Ex. 97; 23 L. T., N. S. 868, where it was held that the contract was not complete until the actual receipt of the letter.

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

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 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 nondelivery could not be maintained (*g*). But forbearance on the part of the plaintiff is not a variation of the contract (*h*).

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 (*i*); *e. g.*, where it contains no date (*k*), or where its terms can only be given precision when explained by the sense which mercantile usage has put upon them (*l*), or where the subject-matter of the contract can only be ascertained by the admission of a conversation with reference to it (*m*). 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 of Frauds, parol evidence is admissible to show that the goods were supplied on credit (*n*).

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 (*o*).

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 (*p*).

(*g*) *Stead* v. *Dawber*, 10 A. & E. 57; and see *Hickman* v. *Haynes*, L. R., 10 C. P. 598; 44 L. J., C. P. 358; 32 L. T., N. S. 873; 23 W. R. 871.

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

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

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

(*l*) *Lucas* v. *Bristow*, El. Bl. & El. 907; *Dale* v. *Humfrey*, El. Bl. & El. 1004.

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

(*n*) *Lockett* v. *Nicklin*, 2 Ex. 93.

(*o*) *Kain* v. *Old*, 2 B. & C. 634.

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

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 of Frauds (*q*). Memorandum made after action.

But though an agreement be not in writing, as required by this statute, it is not absolutely void, as the 4th section relates to the *mode* of procedure, and not to the contract itself. Therefore, although such contract is void, so far as no action can be brought on it in this country, there is nothing in the statute to prevent any *foreign* Court from giving force to the contract (*r*). A foreign contract.

THE SIGNATURE BY THE PARTY TO BE CHARGED.

The Statute of Frauds 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 (*s*). What is necessary.

The Christian name of the Signature may be set out at length or denoted by the initial, or left out altogether (*t*); but it seems that the surname must be written at length, and that the mere initials will not suffice (*u*). A mark by a person unable to write may suffice if sufficiently identified (*v*). 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 (*x*). 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 (*y*). And an invoice with "Bought of Norris & Co." printed on it, which was filled up in the Where a man prints his name.

(*q*) *Bill* v. *Bament*, 9 M. & W. 36.

(*r*) *Leroux* v. *Brown*, 16 Jur. 1021 (C. B.)

(*s*) Per Lord Abinger, C. B., *Johnson* v. *Dodgson*, 2 M. & W. 659.

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

(*u*) *Sweet* v. *Lee*, 3 M. & G. 452, 460.

(*v*) Chitty on Contracts, 10th ed. 362.

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

(*y*) *Saunderson* v. *Jackson*, 2 B. & P. 238.

body with the handwriting of Norris, was held to be, for the purpose of the statute, signed by Norris (*z*).

Names of parties how to be shown.

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 (*a*). But a note in writing, signed by one party, will be insufficient, unless it also specifies the name of the other party (*b*). A 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 (*c*). 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 (*d*). If, on the other hand, the note in writing is signed by the seller only, it will plainly be insufficient to charge the buyer (*e*).

Signature for another purpose.

It is no objection to the signature that it was not made to satisfy the Statute of Frauds, 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 to satisfy the Statute of Frauds (*f*).

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.

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

(*a*) *Allen* v. *Bennett*, 3 Taunt. 169; *Egerton* v. *Matthews*, 6 East, 307; *Laythroap* v. *Bryant*, 2 Bing. N. C. 744; *Reuss* v. *Picksley*, L. R., 1 Ex. 342, Ex. Ch.; *Buxton* v. *Rust*, L. R., 7 Ex. 279, Ex. Ch.

(*b*) *Williams* v. *Lake*, 29 L. J., Q. B. 1; *Williams* v. *Byrnes*, 9 Jur., N. S. 363; *Williams* v. *Jordan*, L. R., 6 Ch. 517; 46 L. J., Ch. 681; 26 W. R. 230.

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

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

(*e*) *Champion* v. *Plummer*, 1 B. & P., N. R. 252; *Cooper* v. *Smith*, 15 East, 103.

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

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 (*g*).

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

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 (*i*).

How constituted.

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

Need not be authorized in writing.

The authority of the Agent to sell for his Principal may be conferred by word of mouth (*l*); for it is now clearly settled that the Agent need not be authorized in writing (*m*).

Auctioneer.

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* (*n*), 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 (*o*).

Auctioneer's clerk.

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 a sign of assent from him makes a note accordingly in the book, is a Memorandum in writing by an agent within the statute (*p*).

Clear recognition of contract by parties sufficient.

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 (*q*). But a

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

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

(*i*) Paley's Principal and Agent, 2; *Prestwick* v. *Marshall*, 7 Bing. 565; *Prince* v. *Brunette*, 1 Bing. N. C. 438; 2 Steph. Com. 56.

(*k*) 2 Steph. Com. 56.

(*l*) *Acebal* v. *Levy*, 10 Bing. 378.

(*m*) Per Lord Eldon, *Coles* v. *Trecothick*, 9 Vesey, 249 a; *Emmerson* v. *Heelis*, 2 Taunt. 48.

(*n*) *Wright* v. *Dannah*, 2 Camp. 203.

(*o*) *Farebrother* v. *Simmons*, 5 B. & Ald. 335; *Sharman* v. *Brandt*, L. R., 6 Q. B. 720.

(*p*) *Bird* v. *Boulton*, 4 B. & Adol. 443. The book in which the entry is made must, however, be sufficiently connected with the conditions of sale. *Pierce* v. *Corf*, L. R., 9 Q. B. 310; and see *Repositories and Auctions*, post, 39.

(*q*) *Durrell* v. *Evans*, 31 L. J., Ex. 337.

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 (*r*).

DELIVERY AND PAYMENT.

Rights of property and possession.

The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another (*s*). For by the law of England, possession is not proof of property (*t*). It is, at the same time, presumptive proof of ownership, and may be acted on as such (*u*).

Executed and executory contracts.

When the contract is *executed*, the possession and the right are transferred together; where it is *executory*, the right only vests, and the reciprocal property is not in possession, but in action; for a contract *executed* (which when it relates to an exchange or sale of goods differs in nothing from an assignment) conveys a chose in possession, a contract *executory* conveys only a chose in action (*x*).

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 (*y*). 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 (*z*).

What immediately passes the property.

To constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be ascertained in the first instance, and that there should be a price ascertained or ascertainable (*a*). So that there may be a sale of a specific chattel, which shall immediately pass the property, even though the price may have to be afterwards ascertained (*b*).

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,

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

(*s*) *Tarling* v. *Baxter*, 6 B. & C. 364.

(*t*) See per Best, C. J., *Williams* v. *Barton*, 3 Bing. 145.

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

(*x*) 2 Steph. Com. 50.

(*y*) See per Parke, J., *Dixon* v. *Yates*, 5 B. & Adol. 340; *Buddle* v. *Green*, 27 L. J., Ex. 33.

(*z*) Chitty on Contracts, 10th ed. 548.

(*a*) Judgment of C. P., *Logan* v. *Le Mesurier*, 11 Jur. 1094.

(*b*) See *Logan* v. *Le Mesurier*, 11 Jur. 1091 (C. P.); Chit. Contr., 10th ed. 346.

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 (*c*).

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'" (*d*). 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 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 admitting 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" (*e*).

Unreasonable but not therefore to be rejected.

Where from the whole tenor of a contract it is clear that, however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon, and the other to submit to it, the Court will give full effect to the terms which have been agreed upon between the parties (*f*).

The risk after sale.

The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as

(*c*) *Blyth* v. *Bampton*, 3 Bing. 472.
(*d*) *Cave* v. *Coleman*, 3 M. & R. 3.
(*e*) *Guthing* v. *Lynn*, 2 B. & Adol. 234.
(*f*) *Stadhard* v. *Lee*, 32 L. J., Q. B. 75; *Andrews* v. *Belfield*, 2 C. B, N. S. 779.

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 (*g*). Thus, in Noy's Maxims it is said, "If the Horse die 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" (*h*). 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 (*i*).

Goods to be made to order.

Where goods are to be made to order, as on a contract for building a carriage or a ship, it is a question of intention, to be inferred from the circumstances, whether the property passes before the completion of the article or not (*k*).

Goods to be delivered on a future day.

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 (*l*).

Delivery and payment contemporaneous acts.

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 (*m*).

Time not the essence of a contract.

In a sale of chattels, Time was not generally, even at law, of the essence of the contract, unless made so by express agreement, by introducing conditional words into the bargain (*n*). And now, by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 7, stipulations in contracts as to Time or otherwise, which would not before the passing of that Act have been deemed to be or to have become of the essence of such contracts in a Court of equity,

(*g*) Per Bayley, J., *Tarling* v. *Baxter*, 6 B. & C. 364; see also *Furley* v. *Bates*, 33 L. J., Ex. 43; *Castle* v. *Playford*, L. R., 7 Ex. 98.

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

(*i*) *Martineau* v. *Kitching*, L. R., 7 Q. B. 436, cited in Chitty on Contracts, 10th ed. 348.

(*k*) *Read* v. *Fairbanks*, 22 L. J. 206 (C. P.).

(*l*) *Hibblewhite* v. *McMorine*, 5 M. & W. 462.

(*m*) *Pettitt* v. *Mitchell*, 5 Sco. N. R. 740; *Chase* v. *Westmore*, 5 M. & S. 189; *Cowper* v. *Andrews*, Hob. 41; Noy's Maxims, cap. 42; 2 Bla. Com. 447; Year Book, Easter Term, 5 Edw. 4, fol. 20.

(*n*) Per Cur., *Martindale* v. *Smith*, 1 Q. B. 395. See *Coddington* v. *Paleogo*, L. R., 2 Ex. 193.

shall receive in all Courts the same construction and effect as they would theretofore have received in equity.

Where nothing is said about the time of the delivery.

Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and every thing 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 (*o*).

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 (*p*). Thus it is said, in Noy's Maxims (*q*), "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 *Trespass*, or an action of *Debt* for the money, at his choice (*r*).

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 (*s*).

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 (*t*).

Conditional possession.

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

(*o*) *Bloxam* v. *Sanders*, 4 B. & C. 941.

(*p*) *Tarling* v. *Baxter*, 6 B. & C. 364.

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

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

(*s*) *Bloxam* v. *Sanders*, 4 B. & C. 948. It was held by Martin, B., in the case of *Stuckfield* v. *Hind*, Ex. N. P. Nov. 3, 1859, where two horses were sold, and were to be kept by a third party, until a cheque given in payment was cashed, that, as the cheque was dishonoured, the vendor had not given up possession.

(*t*) See *Hanson* v. *Meyer*, 6 East, 621.

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 (*u*).

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

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 (*v*).

How it may be defeated.

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

Seller's lien during possession.

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 (*x*).

His right of stoppage *in transitu*.

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 (*y*).

When goods are held to be *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 (*z*), and also so long as they remain in any place of deposit connected with their transmission (*a*).

When anything remains to be done by seller.

And so long as there remains any thing to be done by the seller, or at his risk or charge, the transit is incomplete. Thus, where corn was to be conveyed from the warehouse at the railway to the buyer's waggons, at the expense of the seller, it was held, even after it had reached the station, to be still *in transitu* (*b*).

(*u*) See Story on Sales, 236; *Reeves* v. *Capper*, 5 Bing. N. C. 136; and see Benj. on Sales, 667.

(*v*) *Bloxam* v. *Sanders*, 4 B. & C. 948.

(*w*) Ibid.; *Tooke* v. *Hollingsworth*, 5 T. R. 215; *Ex parte Chalmers*, L. R., 8 Ch. App. 289; and see Chitty on Contracts, 10th ed. 392.

(*x*) See per Cur., *Martindale* v. *Smith*, 1 Q. B. 395; *Tarling* v. *Baxter*, 6 B. & C. 362; *Ex parte Chalmers*, 8 Ch. App. 289.

(*y*) See Chit. Contr. 11th ed. 400; *Lickbarrow* v. *Mason*, 2 T. R. 63.

(*z*) *Whitehead* v. *Anderson*, 9 M. & W. 518.

(*a*) See 1 Smith's Leading Cases, 8th ed. 816.

(*b*) *Ex parte Cross, re Pigot*, Court of Bankruptcy, 17 L. T. 160; see *Coombs* v. *Bristol, &c. R. Co.*, 27 L. J., Ex. 401.

What the effect of stoppage *in transitu* is, whether entirely to rescind the contract, or only to replace the seller in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid, is a point not yet finally decided, but the latter view of the case seems to be the correct one (*c*). Effect of stoppage *in transitu*.

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 (*d*). Goods to be delivered before payment.

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" (*e*); 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 (*f*). When time of delivery is not fixed to a day.

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 (*g*). Goods to be paid for before delivery.

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 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 (*h*). Renunciation of contract.

(*c*) *Wentworth* v. *Outhwaite*, 10 M. & W. 452; 1 Sm. L. C. 8th ed. 811.

(*d*) *Staunton* v. *Wood*, 16 L. T., Q. B. 486.

(*e*) *Duncan* v. *Topham*, 8 C. B. 225.

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

(*g*) See *Pettitt* v. *Mitchell*, 5 Sco. N. R. 740; *Thorpe* v. *Thorpe*, 1 Lord Raym. 665; *S. C.* 1 Salk. 171; and see Add. Contr. 7th ed. 461.

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

Price directed to be sent by post.

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 (*i*), and the letter containing the money properly directed (*j*) and posted (*k*) is lost, the debt is extinguished, and the seller must bear the loss (*l*).

Post-office order.

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 (*m*).

Forged bank note.

If payment be made in *forged* Bank of England notes, it may be treated as a nullity, and an action be maintained by the creditor against the debtor for the money (*n*).

Dishonoured bill.

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 (*o*).

Halves of bank notes.

If payment is made by halves of Bank notes, no property in them passes to the payee, till the other halves are sent (*p*); and therefore it would seem that such an inchoate payment will be no payment within the Statute of Frauds.

Writing off debt by agent to agent.

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 (*q*).

Banker's cheque.

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

(*i*) *Warwicke* v. *Noakes*, Peake, N. P. 98.
(*j*) *Walter* v. *Haynes*, R. & M. 149.
(*k*) *Hawkins* v. *Rutt*, Peake, N. P. 248.
(*l*) *Kington* v. *Kington*, 11 M. & W. 233.
(*m*) *Gordon* v. *Strange*, 1 Ex. 477.
(*n*) See Chit. Contr. 10th ed. 681.
(*o*) Per Crompton, J., *Griffiths* v. *Perry*, 28 L. J., Q. B. 204.
(*p*) *Smith* v. *Mundy*, 29 L. J., Q. B. 172.
(*q*) *Underwood* v. *Nichols*, 25 L. J., C. P. 79.

with a balance of his principal in his hands to a larger amount (*r*).

The creditor must, however, present the cheque within a reasonable time (*s*).

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 (*t*).

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 (*u*).

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: "*Die autem Dominico nemo mercaturam facito; id quod si quis egerit, et ipsa merce, et* 30 *præterea solidis mulctator*" (*x*).

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 5*s.*; 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

(*r*) *Everett* v. *Collins*, 2 Camp. 515; see *Stuckfield* v. *Hind*, ante, p. 31.

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

(*t*) See per Lord Ellenborough, *Everett* v. *Collins*, 2 Camp. 516; and see Chit. Contr. 10th ed. 682.

(*u*) *Smith* v. *Ferrand*, 7 B. & C. 19; Chit. Contr. 10th ed. 683.

(*x*) 2 Inst. cap. 31, p. 220.

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 section 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" (*y*).

Sale by a Horsedealer.

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* (*z*) on a motion for a new trial, and Mr. Justice Bayley 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* (*a*) 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*" (*b*).

By an ordinary person.

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 Mr. Justice Bayley in the last case, as having been distinctly laid down by Lord Mansfield in *Drury* v. *De la Fontaine*.

Subsequent ratification of a contract.

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

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

(*z*) *Fennell and another* v. *Ridler*, 5 B. & C. 406.

(*a*) *Drury* v. *De la Fontaine*, 3 B. & C. 232; but see per Parke, J., *Smith* v. *Sparrow*, 4 Bing. 88.

(*b*) *Bloxsome* v. *Williams*, 1 Taunt. 135; *S. C.* 3 B. & C. 232.

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 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 (*c*).

Breach of warranty given on a Sunday.

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 *Horsedealer*. 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* (*d*), 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 *Horsedealer*. 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 Mr. Justice Bayley 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."

(*c*) *Williams* v. *Paul*, 6 Bing. 653. (*d*) See note (*b*), ante.

CHAPTER II.

HORSEDEALERS, REPOSITORIES AND AUCTIONS.

HORSEDEALER.

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HORSEDEALER.

Definition of a Horsedealer.

A *Horsedealer*, strictly, is a person who by his traffic "distributes" Horses (*a*). And by 29 Geo. 3, c. 49, s. 5, he is clearly defined to be a person who "seeks his living by buying and selling Horses" (*a*).

A seller on Commission.

It has not however been decided, whether a person who, for Commission, sells by auction or private contract the

(*a*) *Allen* v. *Sharp*, 2 Exch. 357.

Horses of others, is a Horsedealer within the Assessed Tax Acts.

The Proprietor of Aldridge's.

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, Mr. Baron Parke, with whom Mr. Baron Alderson 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*).

No duty payable by Horsedealer.

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.

A Horsedealer when a trader within the Bankruptcy Act.

Though all debtors are now liable to become bankrupts (*c*), yet the distinction between traders and non-traders retains its importance, inasmuch as the test of bankruptcy varies in the case of traders and non-traders (as defined before the Act of 1861), and many acts, which in the case of a trader would be acts of bankruptcy, would not justify an adjudication in the case of a non-trader. It must therefore be borne in mind that a person who seeks his living by buying and selling Horses (*d*), or who buys Horses for the express purpose of gaining by it (*e*) as part of his business (*f*), which is a question for the Jury (*g*), is a trader.

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 (*h*). For when he signs the printed particulars of sale, he signs them as the agent of the purchaser (*i*). 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 sales alone are applicable (*k*).

(*b*) *Allen* v. *Sharp*, 2 Ex. 352, 366.

(*c*) Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 69. And see 32 & 33 Vict. c. 71, s. 6.

(*d*) *Martin* v. *Nightingale*, 3 Bing. 421.

(*e*) *Bartholomew* v. *Sherwood*, 1 T. R. 573.

(*f*) *Bell* v. *Young*, 24 L. J., C. P. 66.

(*g*) *Wright* v. *Bird*, 1 Price, 20.

(*h*) Story on Sales, 61; *Williams* v. *Millington*, 1 H. Bla. 81; *Emmerson* v. *Heelis*, 2 Taunt. 38; Benjamin on Sales, 2nd ed. 202.

(*i*) See per Rolfe, B., *Eden* v. *Blake*, 13 M. & W. 619.

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

Liable to an action for negligence.

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 (*l*).

Or for conversion.

And where an Auctioneer, by an unauthorized sale, deprives another of his property permanently or for an indefinite time, he is liable to an action for conversion (*m*). The case of *Cochrane* v. *Rymill* (*n*) 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 recouped 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,

(*l*) *Parker* v. *Farebrother*, 2 Weekly Rep., C. B. 370; and see *Torrance* v. *Bolton*, L. R., 8 Ch. 118; 42 L. J., Ch. 177.

(*m*) *Hiort* v. *Bott*, L. R., 9 Ex. 86, 89; 43 L. J., Ex. 81; 30 L. T., N. S. 25; 22 W. R. 414.

(*n*) 40 L. T., N. S. 744; 27 W. R. 776.

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."

Selling Horses comprised in bill of sale.

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 (*o*). 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 (*p*).

Horse sent to a Repository.

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 *bonâ fide* purchaser, although made without his express consent (*q*).

Auctioneer's possession.

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* (*r*), but not in a case where the right of a third person intervenes, and is established (*s*). 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

(*o*) *National Mercantile Bank* v. *Rymill*, 44 L. T., N. S. 767—C. A. Reversing Ibid. 307—Lopes, J.

(*p*) Ibid. per Bramwell, L. J.

(*q*) See *Pickering* v. *Busk*, 15 East, 38, 45; Chit. Contr. 11th ed. 195.

(*r*) See *Williams* v. *Millington*, 1 H. Bla. 85; *Robinson* v. *Rutter*, 24 L. J., Q. B. 250. See also *Davis* v. *Artingstall*, 49 L. J., Ch. 609; 42 L. T., N. S. 507; 29 W. R. 137.

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

Liable to an action for negligence.

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 [illegible] which he has [illegible] and sell the [illegible] by a person who had gained possession of them by an illegal distress (*u*).

Interpleader by Auctioneer.

An Auctioneer may interplead where he has sold goods, and the proceeds of the sale are claimed by a third party (*x*); 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 (*y*). But where the claims are not co-extensive, an auctioneer has no right to interplead. Thus, in a case 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. 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 (*z*).

Goods privileged from distress.

Goods sent to an Auctioneer to be sold on premises occupied by him are privileged from distress for rent (*a*); although he may sell in a place let to him merely for

(*t*) See per Wilson, J., *Williams* v. *Millington*, 1 H. Bla. 86.

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

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

(*y*) Ibid., per Martin, B. In this case the Court of Exchequer refused to follow the decision in Chancery in *Mitchell* v. *Hayne* (2 Sim. & S. 63), where it was held that an Auctioneer, in such a case, could not file a bill of interpleader. As to interpleader generally, see 1 & 2 Will. 4, c. 58, ss. 1, 2, 7; 23 & 24 Vict. c. 126, ss. 12—18; 36 & 37 Vict. c. 66, Sch. Ord. 1, r. 2.

(*z*) *Wright* v. *Freeman*, 48 L. J., C. P. 276; 40 L. T., N. S. 134; ibid. 358, C. A.

(*a*) *Adams* v. *Grave*, 1 C. & M. 380; *Williams* v. *Holmes*, 22 L. J., Ex. 283.

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."

Selling Horses com-

auction, his [illegible] the plaintiffs were the holders of a Bill of to enter the premises Horses and harness; and the grantor 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 (*c*).

Auctioneer or clerk agent of both parties.

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 (*d*), because the agent, whose signature is to bind the defendant, must not be the other contracting party upon the record (*e*). 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 the Statute of Frauds; 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 (*f*).

Purchaser's name signed to a Catalogue.

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 (*g*); 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 (*h*).

(*b*) *Brown* v. *Arundell*, 10 C. B. 54; *S. C.* 16 L. T. 126.

(*c*) *Taplin* v. *Florence*, 10 C. B. 744; see *S. C.* 15 Jur. 402.

(*d*) *Wright* v. *Dannah*, 2 Camp. 203.

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

(*f*) 29 Car. 2, c. 3, and see ante, p. 27; *Bird* v. *Bolton*, 4 B. & Adol. 443; see Sugd. Vend. & Purch. 14th ed. 147.

(*g*) *Hinde* v. *Whitehouse*, 7 East, 568.

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

Printed Particulars of a Sale.

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* (*i*), *Powell* v. *Edmunds* (*k*), and many other cases collected in Mr. Phillip's book on Evidence, 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 (*l*).

An incorrect Catalogue.

But when the contract is not in writing, a mistake in the Catalogue may be explained by the Auctioneer. Thus, in the printed Catalogue of articles intended to be sold by auction, a dressing-case was described to have silver fittings, but previously to the sale of it the Auctioneer stated publicly from his box, and in the hearing of the defendant, that the Catalogue was incorrect in stating the fittings of the dressing-case to be of silver, and that it would be sold as having plated fittings; but no alteration was made in the Catalogue. The defendant afterwards bid for the dressing-case, and became the purchaser. In an action brought by the Auctioneer to recover the price of the dressing-case, which was less than 10*l*., it was held that parol evidence of the statement of the Auctioneer at the time of the sale was admissible, the contract not being in writing. And Mr. Baron Alderson said, "The sole question is, what were the terms upon which this article was sold. Are those terms in writing? If they are, they cannot be varied by parol testimony; but if they exist only in parol, they of course may be varied by parol; and as it appears that the article was not sold under an agreement in writing, it was for the Jury to say whether the contract existed in the printed particulars alone, or partly in them and partly in parol, namely, that the Auctioneer stated that there was an inaccuracy in the particulars, which declaration was heard by the defendant, who after hearing it bid for the article. This the Jury have found" (*m*).

A limited warranty.

By the conditions of sale at Repositories and public auctions a specified short time is usually allowed, within

(*i*) *Gunnis* v. *Echart*, 1 H. B. 289.

(*k*) *Powell* v. *Edmunds*, 12 East, 6.

(*l*) *Shelton* v. *Livius*, 2 C. & J. 416.

(*m*) *Eden* v. *Blake*, 13 M. & W. 614.

which the purchaser must give notice of any breach of warranty; and if he neglect 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 sale 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 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 Mr. Justice Littledale 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" (*n*).

Where it applies only to soundness.

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

(*n*) *Bywater* v. *Richardson*, 1 A. & E. 508; *S. C.* 3 N. & M. 748; *Mesnard* v. *Aldridge*, 3 Esp. 271; and see post, p. 117.

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 the same difficulty (*o*).

Trial of a Horse warranted quiet in harness.

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 (*p*).

Notice of the conditions of sale.

Where the Auctioneer declares that the conditions of a sale by auction are as usual, there is a sufficient notice of them to purchasers (*q*), 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 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

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

(*p*) *Hardingham* v. *Allen*, 5 C. B. 797.

(*q*) 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.)

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" (*r*).

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 (*s*).

Where a bidder may retract.

A Bidder at an auction under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding before the hammer is down; because 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 (*t*).

Sale "without reserve."

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* (*u*), 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 5*l.* 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 the action was brought, and that they were not called upon to say whether

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

(*s*) *Curtis* v. *Thomas*, 33 L. T., N. S. 664, V.-C. H.

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

(*u*) 29 L. J., Q. B. 14.

there was any or what remedy on the conditions of sale against the vendor, who violated the condition 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.

Effect of advertisement.

But 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 (*x*).

Warranty of ownership.

A statement that a Horse is the property of the vendor,

(*x*) *Harris* v. *Nickerson*, L. R., 8 Q. B. 286; 42 L. J., Q. B. 171; 28 L. T., N. S. 410; 21 W. R. 635.

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 (*y*); and the following case goes much further, for where the defendant, erroneously supposing that a picture had been in the possession of Sir F. Agar, purchased it from the agent of the plaintiff, who, though aware of the defendant's mistake, did not undeceive him; Lord Ellenborough held, that the plaintiff could not recover the sum for which the picture was sold, the price being probably enhanced by the error (*z*).

Auctioneer not disclosing his principal.

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 (*a*), and the same rule, according to the general law of principal and agent, applies to purchasers (*b*).

Liability for non-delivery.

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 (*c*).

Puffing.

Where a Horse is bid up by a Puffer, and one condition of the auction is, that the highest bidder is to be the purchaser, the vendor cannot recover the price (*d*). The law on this point was fully considered by the Court of Common Pleas in the following case:—An action was brought by the plaintiff to recover the value of a Horse sold by him to the defendant, at a public auction at Aldridge's Repository. It appeared that it was one of the conditions

(*y*) *Bexwell* v. *Christie*, Cowp. 397; and see *Bradshaw's case*, there cited.

(*z*) *Hill* v. *Gray*, 1 Stark. N. P. C. 434.

(*a*) *Hanson* v. *Roberdeau*, 1 Peake, 163.

(*b*) As to principal and agent, see the rule in *Thompson* v. *Davenport*, 9 B. & C. 86; and post, 54, *Williamson* v. *Barton*.

(*c*) *Woolfe* v. *Horne*, L. R., 2 Q. B. D. 355; 46 L. J., Q. B. 534; 36 L. T., N. S. 705; 25 W. R. 728.

(*d*) *Pilmore* v. *Hood*, 5 N. C. 97; *Green* v. *Baverstock*, 32 L. J., C. P. 181.

of sale, "that each Horse should be sold to the highest bidder;" that the plaintiff's groom attended at the sale on the part of his master for the purpose of raising the price; that the last *bonâ fide* bidder had bid 12*l.*; after which, until the horse was knocked down to the defendant for 29*l.*, he and the groom were the only bidders; and that when the defendant discovered against whom he had been bidding he refused to take the Horse. Upon these facts Chief Justice Best said: "I am clearly of opinion that the action cannot be maintained. I have long been surprised that the objection has never been taken. A man goes to a sale, and is told that if he is the highest bidder he shall have the article. He bids a certain sum, and a person (employed by the seller) whom he does not know attends and puffs against him, and in consequence of that he is compelled to pay a much larger price than he would otherwise have paid. Is not this a gross fraud? I am prepared to nonsuit the plaintiff."

Person employed to bid.

It was then proved for the plaintiff, by the evidence of the Auctioneer, that the defendant was in the habit of attending sales of Horses, and that he knew the plaintiff's groom was present; and it was stated that there was a case deciding that a seller has a right to have one person to bid for him at the sale, if he does not do it in order to impose. Chief Justice Best then said: "I agree that he has such a right, but then he must declare it by the conditions of sale. I am of opinion that a person acts in opposition to the conditions of sale where the highest bidder is to be the buyer, if he employs a person to bid for the purpose of enhancing the price. In this case the other person at the sale did not go near the ultimate sum. It is impossible under these circumstances to say that 29*l.* was the highest price contemplated by the conditions; for the defendant, under them, was entitled to have the Horse at the next highest bidding to that of the only fair bidder" (*e*). The Court of Common Pleas confirmed Chief Justice Best's ruling at *nisi prius;* and Mr. Justice Park said: "I entirely concur in the opinion expressed by Lord Mansfield;" as to which Lord Kenyon, in *Howell* v. *Castle* (*f*), said: "The whole of the reasoning of Lord Mansfield in *Bexwell* v. *Christie* (*g*) is founded on the

(*e*) *Crowder* v. *Austin*, 2 C. & P. 208.

(*f*) *Howard* v. *Castle*, 6 T. R. 634.

(*g*) *Bexwell* v. *Christie*, Cowp. 396.

noblest principles of morality and justice,—principles that are calculated to preserve honesty between man and man. The circumstance of puffers bidding at auctions has been always complained of. If the first case of this kind had been tried before me, perhaps, I should have hesitated a little before I determined it; but Lord Mansfield's comprehensive mind saw it in its true colours, and made a precedent which I am happy to follow" (*h*). And this decision has been further confirmed by a case in the Court of Exchequer, where it was held, that in a sale by auction without reserve, if a puffer be employed without notice of his being there to protect the interest of the seller, the sale is void (*i*).

Effect of previous private warranty.

The law is so jealous of the rights of *bonâ fide* bidders, that it has been held as doubtful (in the Court of Common Pleas) 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 (*j*).

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 (*k*).

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 (*l*).

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 bought, to a third party; so as to maintain an action for *Goods bargained and sold* (*m*).

Where party

Where a party refuses to take goods he has purchased,

refuses to take goods.

they should be resold, and he will be liable to the loss, if any, upon the resale (*n*).

Goods resold without communicating with purchaser.

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 (*o*).

Auctioneer proper party to receive the price.

An Auctioneer, employed to sell goods for ready money, is the agent of the vendor to receive the price (*p*); 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 (*q*).

Has no authority to receive a bill of exchange.

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 (*r*).

He is stakeholder for both parties.

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 (*s*); 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 (*t*).

Effect of this attribute.

If he parts with the deposit without authority from the 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

(*n*) See *Maclean* v. *Dunn*, 4 Bing. 729; Story on Sales, 348.

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

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

(*q*) *Sykes* v. *Giles*, 5 M. & W. 650; *Mynn* v. *Joliffe*, 1 M. & Rob. 326. And see *Alexander* v. *Gibson*, 2 Camp. 555.

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

(*s*) See *Edwards* v. *Hodding*, 5 Taunt. 815; *Gray* v. *Gutteridge*, 3 C. & P. 40; Story on Contracts, 64. And see *Sweeting* v. *Turner*, L. R, 7 Q. B. 310; 41 L. J., Q. B. 58; 25 L. T., N. S. 796; 20 W. R. 185.

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

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 (*u*); for in strict law the Auctioneer, being a stakeholder, is not entitled to notice of the contract being rescinded (*x*).

As to interest.

An Auctioneer, being a mere stakeholder, is not liable for interest on the deposit to the vendor (*y*).

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 (*z*). 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 (*a*).

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 (*b*).

Price obtained 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 he could not recover, as the principle of *Murray* v. *Mann* (*c*) applied with the greatest force to this case. And it was said that it would be a

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

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

(*y*) *Harington* v. *Hogart*, 1 B. & Ad. 577.

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

(*a*) *Robinson* v. *Rutter*, 24 L. J., Q. B. 250.

(*b*) *Hardingham* v. *Allen*, 5 C. B. 796.

(*c*) *Murray* v. *Mann*, 2 Exch. 538.

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 (*d*).

Agent not declaring himself to be so.

It is still an undecided question, the Court of Exchequer being equally divided on the point, whether an agent, who does nothing by word or act at an auction to indicate that he is contracting for himself, and who allows the Auctioneer to put down his name as the purchaser, is to be fixed as such, there being thus much of evidence after the sale was over, that he was buying merely as an agent, that the goods were fetched away afterwards by the principal's carts, and made use of by him (*e*).

Auctioneer's commission.

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 (*f*). 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 (*g*).

(*d*) *Stevens* v. *Lee*, Q. B., Nov. 7, 1853.

(*e*) *Williamson* v. *Barton*, 31 L. J., Ex. 170.

(*f*) *Clark* v. *Smythies*, 2 F. & F. 83; and see *Miller* v. *Beale*, 27 W. R. 403, M. R.

(*g*) *Green* v. *Bartlett*, 8 L. T., N. S. 503.

CHAPTER III.

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

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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*). It does not extend to gifts; nor to sales of pawns taken to any pawnbroker in London, or within two miles thereof; nor to sales of goods belonging to the Sovereign; nor to sales made between sunset and sunrise (*e*).

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 (*f*), for the sale of particular goods, is also in the country the only Market overt, but in the city of London by the custom of London every Shop (*except pawnbrokers*) in which goods are exposed publicly for sale is Market overt, but for such things only as the owner professes to trade in (*a*).

What held to be Market overt without the City of London.

Without the city of London, Market overt is an open, public and legally-constituted Market (*g*). Therefore a mere Repository for Horses, such as Rea's Repository in Southwark, is not Market overt (*h*).

What held to be Market overt within the City of London.

But within the city of London a sale in an open shop of goods usually dealt in there, such sale being of the goods in bulk and not by sample, and there not only commenced but also completed (*i*), is a sale in Market

(*a*) 2 Bla. Com. 449.
(*b*) See per Abbott, C. J., *Dyer* v. *Pearson*, 3 B. & C. 42.
(*c*) *Cundy* v. *Lindsay*, L. R., 3 App. Cas. 459; 47 L. J., Q. B. 481; 38 L. T., N. S. 573.
(*d*) Chitty on Contr. 10th ed. 356.
(*e*) Benj. on Sales, 2nd ed. 8.
(*f*) *Ganly* v. *Ledwidge*, 10 Ir. R., C. L. 33, Q. B.
(*g*) See Com. Dig. *Market*; per Jervis, C. J., *Lee* v. *Bayes*, 18 C. B. 601.
(*h*) *Lee* v. *Bayes*, 18 C. B. 601.
(*i*) *Crane* v. *London Dock Co.*, 33 L. J., Q. B. 224. It will be observed that the sale must be of goods usually dealt in at the shop. Thus a scrivener's shop is not a market overt for plate. So Smith-

overt, though the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within (*i*).

By the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), s. 13, every person, other than a licensed hawker, 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. Horse "an article" within 10 & 11 Vict. c. 14.

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 sect. 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 (*j*). The section includes Horses under the word *article*, when sold by a licensed Auctioneer by auction in the yard belonging to a dwelling-house not his own, and within the prescribed limits (*k*). But where a special act enlarged the exception to a sale in *any* shop attached to *any* dwelling-house, and an Auctioneer sold goods in his auction room, which was attached to a dwelling-house, but not his own dwelling-house, it was held that this came within the exception (*l*). A skittle-ground covered with a roof and enclosed, but having a door opening upon the street, let for two days, for the sale of goods mentioned in a special act, is not the lessee's shop, and therefore does not come within the exception (*m*). But *secus*, where a shed is built out in front of the seller's shop on land belonging to himself (*n*).

Where an Auctioneer sold sheep, cattle and Horses at a building called the "Agricultural Hall," of which he *Fearon* v. *Mitchell.*

field was held not to be a market overt for clothes, nor Cheapside for horses, nor Aldridge's for carriages; see Benj. on Sales, 2nd ed. 7.

(*i*) *Lyons* v. *De Pass*, 11 A. & E. 326.

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

(*k*) *Llandaff and Canton Districts Market Co.* v. *Lyndon*, 6 Jur., N. S. 1344; 30 L. J., M. C. 105; 8 W. R. 693.

(*l*) *Wiltshire* v. *Willett*, 11 C. B., N. S. 240; 31 L. J., M. C. 8; 10 W. R. 445; 5 L. T., N. S. 355.

(*m*) *Hooper* v. *Kenshole*, L. R., 2 Q. B. D. 127; 46 L. J., M. C. 160; 36 L. T., N. S. 111.

(*n*) *Ashworth* v. *Heyworth*, L. R., 4 Q. B. 316; 38 L. J., M. C. 91; 20 L. T., N. S. 439.

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 (*o*). 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' within that term as used in sect. 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

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

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" (*p*).

Where a Horse at a Fair is exempt from distress.

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 (*q*).

Sale of diseased animals in.

The Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), s. 32, Ord. 442, renders the exposure for sale of diseased animals unlawful, but it does not render the sending of diseased animals to a public Market an actionable wrong, in the absence of any warranty of soundness or of any evidence of fraud or misrepresentation (*r*).

HORSE STEALING.

Stat. 24 & 25 Vict. c. 96.

By 24 & 25 Vict. c. 96, s. 10, it is enacted, that "whosoever shall steal any Horse, Mare, Gelding, Colt or Filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep or lamb, shall be guilty of felony:" and by sect. 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 (*s*).

Description in an indictment.

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 (*t*); and the construction thus given to the former

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

(*q*) See *Francis* v. *Wyatt*, 3 Burr. 1502, and the authorities there cited.

(*r*) *Ward* v. *Hobbs*, L. R., 4 App. Cas. 13; 48 L. J., C. P. 281; 40 L. T., N. S. 73; 27 W. R. 114. Decided under 32 & 33 Vict. c. 70, s. 57, repealed.

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

(*t*) *Rex* v. *Aldridge*, 4 Cox, C. C. 143.

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

Property given up.

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 (*y*).

Delivery of a Horse to a stranger.

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

(*u*) 1 Hale, 508.
(*x*) *Rex* v. *Pitman*, 2 C. & P. 423.
(*y*) Per Coleridge, J., *Reg.* v. *Sheppard*, 9 C. & P. 123.

prisoner promised to pay him, and not on account of any of the false pretences charged, the prisoner was entitled to an acquittal (z).

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 it 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 (a).

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 (b).

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 (c).

Appropriation of a hired Horse.

If a Horse be hired for the day by a person intending at the time of hiring to appropriate it, and it is accordingly taken away and sold, a felony is committed, because the owner did not intend to relinquish his property in the Horse, but only the temporary possession (d). But where a Horse is hired for a particular purpose the selling him after that purpose is accomplished will not constitute a *new* felonious taking (e).

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

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

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

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

(c) *Gilbert's case*, 1 Mood. C. C. 186.

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

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

place; it was held nevertheless that he was guilty of larceny (*f*).

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 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 (*g*). 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 (*h*).

Possession six months after loss.

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 (*i*).

Killing or maiming Horses.

By 24 & 25 Vict. c. 97, s. 40 (*k*), the malicious killing, maiming or wounding of any *cattle* is felony. And the word "cattle," which alone is mentioned in the act, has been held under former acts to include Horses (*l*), as well as oxen, &c., pigs (*m*) and asses (*n*).

Other animals.

By section 41 of the same statute, the malicious killing, maiming or wounding of other animals is made punishable by imprisonment or fine.

Pouring acid into a Mare's ear.

Where a person had poured nitrous acid into a Mare's ear, and some had run into her eyes and blinded her, and the injuries produced to the ear were ulcers not wounds, though such ulcers would have turned to wounds, a conviction for maiming was held right (*o*).

"Maiming and wounding."

The distinction between maiming (*p*) and wounding (*q*)

(*f*) *Reg.* v. *Janson*, 4 Cox, C. C. 82, overruling *Reg.* v. *Brooks*, 8 C. & P. 295.
(*g*) *Rex* v. *Phillips*, 2 East, P. C. c. 16, s. 98.
(*h*) *Rex* v. *Crump*, 1 C. & P. 658.
(*i*) Per Maule, J., *Reg.* v. *Cooper*, 16 Jur. 750.
(*k*) Repealing but re-enacting 7 & 8 Geo. 4, c. 30, s. 16.
(*l*) *Rex* v. *Patey*, 2 W. Bla. 721.
(*m*) *Rex* v. *Chapple*, R. & R. 77.
(*n*) *Rex* v. *Whitney*, 1 Mood. C. C. 3.
(*o*) *Owen's case*, 1 Mood. C. C. 205.
(*p*) *R.* v. *Jeans*, 1 C. & K. 539.
(*q*) *R.* v. *Haywood*, Russ. & Ryan, 16.

appears to be that the former implies permanent injury, while the latter does not necessarily do so.

Use of instrument need not be proved.

It is not necessary under this statute to prove that any instrument has been used; where the roots of a Horse's tongue were lacerated, and the tongue was protruding from his mouth, and there was only evidence to show that the injury had been done by the prisoner's hand, it was held that an offence against the act had been committed (*r*).

Malice.

To support an indictment under these sections, it is unnecessary to give evidence of Malice against any particular person (*s*), yet an evil intent in the prisoner must appear. Thus, in a case in which the prisoner, a groom, administered sulphuric acid to his Horses, Parke, J., left it to the Jury to say, whether he had done it with the intent feloniously to kill them, or under the impression that it would improve their appearance (there being some evidence of a practice of that kind among grooms), and that in the latter case they ought to acquit him (*t*).

Where, however, the act is cruel and wanton the law will imply malice. Thus, where a man caused the death of a Mare from internal injuries not intending by his act to kill, maim, or wound her, and acting recklessly and not caring whether she was injured or not, though without any ill-will or spite, either towards the owner of the animal, or the animal herself, and without any motive except the gratification of his own depraved tastes, he was found guilty of maliciously killing the Mare contrary to the Statute (*u*).

Drugging of Animals Act.

By 39 Vict. c. 13 (The Drugging of Animals Act, 1876), the practice of administering poisonous drugs to Horses and other animals by disqualified persons and without the knowledge and consent of the owner of such animals is made punishable by fine or imprisonment. The act does not extend to the owner of the animal, nor anyone acting under his authority, nor does it exempt a person from punishment under any other act, so that he be not punished more than once for the same offence.

RECOVERY OF STOLEN HORSES.

Sale in Market overt.

Although as a general rule the purchaser of stolen goods in Market overt acquires a title to them, this is not the case

(*r*) *R.* v. *Bullock*, 37 L. J., M. C. 47; L. R., 1 C. C. R. 115.

(*s*) *R.* v. *Tivey*, 1 C. & K. 704. See also *Reg.* v. *Pembliton*, L. R., 2 C. C. R. 119; 43 L. J., M. C. 91; 30 L. T., N. S. 405; 22 W. R. 553; 12 Cox, C. C. 607.

(*t*) *R.* v. *Mogg*, 4 C. & P. 364.

(*u*) *R.* v. *Welch*, 45 L. J., M. C. 17.

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 (*x*), and Elizabeth (*y*).

Statutory regulations.

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 (*z*).

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 (*a*).

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. (*b*).

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 (*c*).

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 (*c*). But, in a case (*d*) in which no evidence

(*x*) 2 & 3 Ph. & M. c. 7.
(*y*) 31 Eliz. c. 12.
(*z*) 2 Ph. & M. c. 7, and 31 Eliz. c. 12.
(*a*) 31 Eliz. c. 12, s. 4; Kel. 48.
(*b*) *Joseph* v. *Adkins*, 2 Stark. N. P. C. 76.
(*c*) 2 Bla. Com. 449.
(*d*) *North* v. *Jackson*, 2 F. & F. 198.

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

Proof of compliance with statute.

The onus of showing that the formalities required by the statute have been observed lies on the buyer. In *Moran* v. *Pitt* (*e*) 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.

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

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 (*f*). 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* (*g*).

To be taken with modifications.

Though the decisions themselves in the cases of *Gimson* v. *Woodfall* 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 (*h*).

(*e*) 42 L. J., Q. B. 47; 28 L. T., N. S. 554; 21 W. R. 554.

(*f*) *Gimson* v. *Woodfall*, 2 C. & P. 41.

(*g*) *Peer* v. *Humphrey*, 2 A. & E. 495.

(*h*) 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. 557; 41 L. J., Q. B. 306.

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 (*h*), and therefore it is not applicable where the action is against a third party, who is innocent of the felony.

Where the action is against a third party.

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 (*h*). 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 not 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 a 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 (*i*).

Evidence of conversion.

Order for restitution.

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 (*k*), to an order of restitution from the Court before whom the trial took place, and this notwithstanding any intervening sale in Market overt (*l*).

Or action of *trover*.

Or the goods may be recovered in *Trover* from the purchaser of them in Market overt, upon 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 (*k*), is to revest the property in stolen goods in the original owner upon conviction of the felon (*m*).

(*h*) *White* v. *Spettigue*, 13 M. & W. 606; *Stone* v. *Marsh*, 6 B. & C. 551; *Marsh* v. *Keating*, 1 Bing. N. C. 198; per Crowder, J., *Lee* v. *Bayes*, 18 C. B. 602; and see *Osborn* v. *Gillett*, L. R., 8 Ex. 88; 44 L. J., Ex. 53.

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

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

(*l*) 2 Steph. Com. 64.

(*m*) *Scattergood* v. *Sylvester*, 19 L. J., Q. B. 447.

This enactment applies to cases of false pretences as well as felony, and the fact that the prisoner parted with the goods to a *bonâ fide* pawnee will not disentitle the original owner to the restitution of the goods (*n*). 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 (*o*).

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 *bonâ 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 (*p*).

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.

Order of Police Magistrate.

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 (*q*).

Where no special damages can be awarded.

And if the order is immediately complied with, no special damages can be awarded for the detention. Thus, in the following case, A. hired a Horse and gig of B., and the same day pledged it with C., an innocent party, for value. After some inquiries made, B. demanded the restitution of them from C., who offered to restore them on being satisfied of B.'s right to recover. A Magistrate's order was then obtained by B., under 2 & 3 Vict. c. 71, s. 40, compelling C. to deliver the goods to B., which order was immediately complied with by C. A. was, subsequently to this order, tried and convicted on the evidence of B. and C. of stealing the Horse and gig, and after such conviction B. entered a plaint in the Sheriff's Court against C. for special damage arising from the de-

(*n*) *Reg.* v. *Stancliffe*, 11 Cox, C. C. 318.

(*o*) *Reg.* v. *Goldsmith*, 12 Cox, C. C. 594; *Reg.* v. *Smith*, 12 Cox, C. C. 597.

(*p*) *Reg.* v. *Horan*, 6 Ir. R., C. L. 293, C. C. R.

(*q*) See 2 & 3 Vict. c. 71, ss. 27, 40.

tention of the goods prior to such restitution. It was held by Mr. Russell Gurney that there was no evidence of a conversion by C. so as to enable B. to recover in this action (*r*).

***Replevin* for unlawful taking.**

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 of the borough of Liverpool, appointed under 5 & 6 Will. 4, c. 76, s. 76; 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 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 (*s*).

Wrongful sale by Agent of Horse entrusted to him.

It was held by Wightman, J., in the case of *R.* v. *Haigh* (*t*), that a person, who was employed to take a Horse to a particular place, and sold it on the way, was rightly indicted under the 2nd section 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.

(*r*) *Dossett* v. *Rymill and Gower*, 19 L. T. 339. (Sheriff's Court.)

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

(*t*) Liverpool Winter Assize, Dec. 1, 1857.

CHAPTER IV.

WHAT DISEASES OR BAD HABITS CONSTITUTE UNSOUNDNESS OR VICE.

UNSOUNDNESS AND VICE.

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UNSOUNDNESS AND VICE.

Present state of the law.

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 had 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 Mr. Baron Parke 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

(*a*) *Kiddell* v. *Burnard*, 9 M. & W. 670; *Coates* v. *Stephens*, 2 M. & Rob. 157. 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.

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."

Definition of Soundness.

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. Chief Justice Best, in the case of *Best* v. *Osborne* (*c*) held that "sound" meant perfect. In *Kiddell* v. *Burnard* (*d*), Mr. Baron Parke 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 Mr. Baron Alderson said, "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 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.*

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 (*e*)), or from 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* (*f*). This very much resembles the definition of *Unsoundness* given in an excellent work, on the Construction of the Horse and the Treatment of his Diseases, by the late Mr. Youatt, published by the Society for the Diffusion of Useful Knowledge, and which will be used as an authority in the description of those diseases and bad habits to which the Horse is subject. But in that work *Unsoundness* is referred to disease only; namely, to that alteration of structure which is connected with or will produce disease, and lessen the usefulness of the animal; and any alteration

(*b*) *Scholefield* v. *Robb*, 2 M. & Rob. 210.
(*c*) *Best* v. *Osborne*, R. & M. 290.
(*d*) *Kiddell* v. *Burnard*, 9 M. & W. 670.
(*e*) *Holyday* v. *Morgan*, 28 L. J., Q. B. 9; see post.
(*f*) Per Parke, B., *Kiddell* v. *Burnard*, 9 M. & W. 670; *Coates* v. *Stephens*, 2 M. & Rob. 137; *Smart* v. *Allison*, Appendix.

of structure from accident is not comprehended within the definition there given. This, however, is an important omission, because when the Court of Exchequer laid down the rule as to unsoundness, Mr. Baron Alderson on this point said, "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" (*g*).

The term "Natural usefulness."

The term "*Natural usefulness*" must be borne in mind. One Horse may possess great speed, but is soon knocked up; another will work all day, but cannot be got beyond a snail's pace; one with a heavy forehead is liable to stumble, and is continually putting to hazard the neck of his rider; another with an irritable constitution and a washy make, loses his appetite, and begins to scour if a little extra work is exacted from him. The term *Unsoundness* cannot be applied to any of these; it would be opening far too widely a door to disputation and endless wrangling. 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 (*h*).

Important decision as to Unsoundness.

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 Mr. Justice Erskine at the trial, a verdict was found for the plaintiff. In refusing a rule for a new trial, Mr. Baron Parke 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* (*j*):—

"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 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 an *Unsoundness*; but even if such

(*g*) *Kiddell* v. *Burnard*, 9 M. & W. 671.

(*h*) Lib. U. K. "The Horse," 361.

(*i*) *Coates* v. *Stephens*, 2 M. & Rob. 137; and see "Rule as to Unsoundness," ante, p. 71.

(*j*) *Bolden* v. *Brogden*, 2 M. & Rob. 113.

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."

"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 (*k*), 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 Mr. Baron Alderson said, "I am of the same opinion. 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 recognized by Lord Ellenborough and other Judges in a series of cases" (*m*).

Temporary diseases.

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

(*k*) 43 Eliz. c. 6, s. 2.
(*l*) *Coates* v. *Stephens*, 1 M. & Rob. 137.
(*m*) *Kiddell* v. *Burnard*, 9 M. & W. 670.

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 Mr. Baron Parke in *Coates* v. *Stephens* (*p*), and by the Court of Exchequer in *Kiddell* v. *Burnard* (*q*), although Mr. Justice Coleridge in *Bolden* v. *Brogden* (*r*) was of a different opinion.

Acute diseases.

It will be unnecessary to take into consideration acute diseases, such as fevers, inflammation, &c., because all Horses are without dispute *unsound*, during the time they are affected by them.

Rule as to Vice.

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*).

How Unsoundness or Vice should be left to a Jury.

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*).

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

(*n*) *Elton* v. *Brogden*, 4 Camp. 281.

(*o*) *Elton* v. *Jordan*, 1 Stark. N. P. C. 127.

(*p*) *Coates* v. *Stephens*, 2 M. & Rob. 137.

(*q*) *Kiddell* v. *Burnard*, 9 M. & W. 670.

(*r*) *Bolden* v. *Brogden*, 2 M. & Rob. 113.

(*s*) *Scholefield* v. *Robb*, 2 M. & Rob. 210; and see Crib-biting, post.

(*t*) *Lewis* v. *Peake*, 7 Taunt. 153; *S. C.* 2 Marsh. 43; per Patteson, J., *Baylis* v. *Lawrence*, 11 Ad. & E. 926.

(*u*) See Saddle-galls, post; and *Ainsley* v. *Brown*, there cited.

the Courts, an attempt will be made to fix in each instance, 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 and Gibbing.

Backing and *Gibbing* 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 and backs, as soon as he thinks he has had enough work, or has been improperly checked or corrected, or when he begins to feel the pressure of the collar painful. It is impossible permanently to cure a Horse of this bad habit when it has become fixed (*v*); and as it is both dangerous and diminishes a Horse's natural usefulness, it is 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 (*w*).

Biting.

Biting when dangerous is a *Vice*.

Blindness.

The *Crystalline Lens* is generally the seat of disease in the eye of a Horse; 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 of a thick jelly-like consistence, *convex* on each side, but there is more convexity on the inner than on the outer side. It is inclosed in a delicate transparent bag or *capsule*, and is placed between the *aqueous* and the *vitreous* humours, and 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 into the pupil. The *Lens* is very apt to be affected from long or violent inflammation of the *conjunctiva*, and either its *capsule* becomes *cloudy*, and imperfectly transmits the light, or the substance of the *Lens* becomes *opaque* (*x*).

Cataract.

The confirmed *Cataract*, or the *Opaque Lens* of long standing, will exhibit a pearly appearance, which cannot

(*v*) Lib. U. K. "The Horse," 334.

(*w*) *Finley* v. *Quirk*, 9 Minn. 194.

(*x*) Lib. U. K. "The Horse," 94.

be mistaken, and will frequently be attended with a change of form, a portion of the *Lens* being forced forward into the pupil. Although the disease may not have proceeded so far as this, yet if there be the slightest cloudiness of the *Lens* either generally, or in the form of a minute spot in the centre, and with or without lines radiating from that spot, the Horse is to be condemned; for in ninety-nine cases out of a hundred the disease will proceed, and *Cataract*, or complete *Opacity of the Lens* and absolute *Blindness* will be the result (*x*). *Cataract* is an *Unsoundness* (*y*).

Remittent Inflammation.

That *Inflammation* of the eye of the Horse, which usually terminates in *Blindness* of one or both eyes, has the peculiar character of *remitting* or *disappearing* 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 recognize the traces of former disease. After a time, however, the inflammation returns, and the result is unavoidable (*z*).

Opacity of the Lens held to Unsoundness.

Blindness is undoubtedly an *Unsoundness;* but to constitute a breach of warranty in cases of *Cloudiness of the Eye or Opacity of the Lens*, 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 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 an eminent 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;* to produce which state, it must have required a great many successive attacks of inflammation. 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*).

(*x*) Lib. U. K. "The Horse," 94.

(*y*) *Higgs* v. *Thrale*, before Chief Baron Pollock, Guildhall, Feb. 18, 1850.

(*z*) Lib. U. K. "The Horse," 363.

(*a*) *Briggs* v. *Baker*, before Chief Justice Tindal, Nov. 29, 1845.

Attached to the extremities of most of the tendons, and between the tendons and other parts, are little bags containing a mucous substance to lubricate the tendons so as to prevent friction. From violent exertion these little bags are liable to enlargement, of which Wind-galls (*b*) and Thoroughpins (*c*) are instances. There is one of these bags inside the bending of the hock; this sometimes becomes considerably increased in size, and the enlargement is called a *Bog-spavin*. When the vein, which passes over this bag, is distended with accumulated blood, it is called a *Blood-spavin*, and is therefore the consequence of *Bog-spavin*, with which it is very often confounded (*d*); they generally produce lameness, and constitute *Unsoundness*. Blood and Bog-spavin.

Bone-spavin is an affection of the bones of the hock joint. When an undue weight and concussion are thrown on the inner splint bone, they cause an inflammation of the cartilaginous substance, which unites it to the shank bone; the consequence of which is, that the cartilage is absorbed and bone deposited, so that the union between the splint-bone and shank becomes bong instead of cartilaginous, and the degree of elastic action between them is destroyed. A Splint in the form of a tumour appears in the inside of the hind-leg, in front of the union of the head of the splint-bone with the shank, and is called a *Bone-spavin*. It almost invariably produces lameness, and the enlargement rapidly spreads with quick and hard work (*e*), so as to interfere with the flexion of the hock. Bone-spavin.

Bone-spavin, whether it produce lameness apparent at the time of sale or not, is an *Unsoundness;* and the following veterinary evidence was given in a case which was tried. Held to be an unsoundness.

Mr. Nice, a Veterinary Surgeon, stated for the plaintiff, that eleven days after sale he had seen the Horse, which then had a confirmed *Bone-spavin*, and that in his opinion it was not a curable disease. Mr. Sewell, of the Veterinary College, had examined him about a month after sale, and said that at that time he had a confirmed *Bone-spavin*, which could not have occurred subsequent to the *time of sale*.

For the defendant, Mr. Child, a Veterinary Surgeon, was called, who said that there was a bony deposit in the interior of the hock, but that it did not interfere with its

(*b*) Wind-galls, post. 119.
(*c*) Thoroughpins, post.
(*d*) Lib. U. K. "The Horse," 270, 365.
(*e*) Lib. U. K. "The Horse,"

flexion. It was what is called a *Bone-spavin*, though the term was very indefinite; that the deposit generally, but not invariably, *increases* (*f*); and in the incipient stages it requires skill, and is often difficult to determine; that there might be a deposit to a considerable extent without producing lameness; that he had known Horses rejected for *Bone-spavin* as unsound, which had not become lame, and had one himself which was rejected three years ago, and had not become so. Another witness, a Farrier, said, "I do not think *Bone-spavin* is an *Unsoundness* myself, without lameness; but *Bone-spavin* is in our profession a known *Unsoundness*, whether it produce lameness or not." The plaintiff obtained a verdict (*g*).

Broken-backed. 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 ligament. When this exists to any considerable extent, the Horse is not pleasant to ride; he turns with difficulty in his stall; he is unwilling to lie down; or when down, to rise again; and he has a curious straddling action. Such Horses are said to be *Broken-backed*, or *Chinked in the chine* (*h*). Where this impairs the natural usefulness of the Horse, it is such an alteration of structure as constitutes *Unsoundness*.

Broken-down. For *Broken-down*, see "Sprain and Thickening of the Back Sinews" (*i*).

Broken-knees. *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 (*k*).

Broken-wind. *Broken-wind* is the rupture or running together of some of the air-cells. It is easily distinguished from Thick-wind (*l*); in Thick-wind the breathing is rapid and laborious, but the inspiration and expiration are equally so, and occupy precisely the same time. In *Broken-wind* the inspiration is performed by one effort, the expiration by two, occupying double the time, which is plainly to be distinguished by observing the flanks. The reason is that when the lungs are expanded, the air will run in easily

(*f*) Reported *decreases*.
(*g*) *Watson* v. *Denton*, 7 C. & P. 86.
(*h*) Lib. U. K. "The Horse," 165.
(*i*) Sprain and Thickening of the Back Sinews, post.
(*k*) Lib. U. K. "The Horse," 361.
(*l*) Thick-wind, post.

enough, and one effort of the respiratory muscles is sufficient for the purpose; but when these cells have run into each other, the cavity is so irregular, and contains so many corners and blind pouches, that it is exceedingly difficult to force it out again, and two efforts can scarcely effect it. This disease is also accompanied by a dry and husky cough of a peculiar sound, and is the consequence of Thick-wind (*m*), and of those alterations of structure consequent on inflammation (*n*). It is most decidedly an *Unsoundness* (*o*).

Bronchitis.

The division of the windpipe just before it enters the lungs, and the numerous vessels into which it immediately afterwards branches out, are called the *Bronchial tubes*, and the inflammation of the membrane that lines them is called *Bronchitis*. It is *Catarrh* (*p*), extending to the entrance of the lungs, and is characterized by quicker and harder breathing than Catarrh usually presents; and by a peculiar wheezing, which is relieved by the coughing up of *mucus* (*q*). It is decidedly an *Unsoundness*.

Canker.

Canker is a separation of the horn from the sensible part of the foot, and the sprouting of fungous matter instead of it, occupying a portion of or even the whole of the sole and frog. It is the occasional consequence of bruise, puncture, corn (*r*), quittor (*s*), and thrush (*t*). It is extremely difficult to cure (*u*), and is an *Unsoundness*.

Capped hocks.

Capped hocks may be produced by lying on an unevenly-paved stable, with a scanty supply of litter, or by kicking (*x*), in neither of which cases would they constitute *Unsoundness*, though in the latter they would be an indication of *Vice;* but in the majority of instances they are either the consequence of sprain in the hock, or are accompanied by enlargement of it, when they would be an *Unsoundness* (*y*).

Cataract.

A Horse with a *Cataract* is *Unsound*. See Blindness (*z*).

Chest-founder.

The muscles of the breast are occasionally the seat of a singular and somewhat mysterious disease. The old

(*m*) Thick-wind, post.
(*n*) Lib. U. K. "The Horse," 194.
(*o*) *Willan* v. *Carter*, before Mr. Baron Martin, Lancaster Spr. Ass. 1853.
(*p*) See Cough, post.
(*q*) Lib. U. K. "The Horse," 189.
(*r*) Corns, post.
(*s*) Quittor, post.
(*t*) Thrush, post.
(*u*) Lib. U. K. "The Horse," 308.
(*x*) Kicking, post.
(*y*) Lib. U. K. "The Horse," 361. See, however, App. to Lib. U. K. "The Horse," Ed. 1862, 522, where an opinion is given that it is not an unsoundness, on the ground that it is never occasioned by strains, and is therefore no more than a blemish.
(*z*) Blindness, ante.

Farriers called it *Anticor* and *Chestfounder*. The Horse has considerable stiffness in moving, evidently not referable to the feet. There is a tenderness about the muscles of the breast, and occasional swelling, and after a while the muscles of the chest waste considerably (*a*). It is evidently an *Unsoundness*, and was formerly supposed to proceed from rheumatism; but now, according to later opinions (*b*), *Chestfounder* is pronounced to be the result of navicular disease, which, preventing the forelegs from being exercised to the same extent as before, produces an absorption of the muscles of the chest. *Anticor* is distinguished from *Chestfounder*, and declared to be an abscess of the breast of the brisket.

But where an action was brought on the warranty of a Horse, and the plaintiff obtained a verdict on the ground that the Horse was *Chestfoundered*, the Court of Common Pleas refused to grant a new trial on the grounds that there was *no* known disease to constitute such an *Unsoundness*, or that the defendant was taken by surprise, the plaintiff having before trial refused to inform him of the cause or nature of the Unsoundness (*c*).

Chinked in the Chine.

For *Chinked in the Chine*, see Broken-backed (*d*).

Clicking.

As to *Clicking*, see Overreach (*e*).

Cloudiness.

Cloudiness of the Eye is an *Unsoundness*, as it is almost quite sure to proceed to complete Opacity of the Lens, Cataract and Blindness (*f*).

Contraction.

In *Contraction* the foot loses its healthy circular form; it increases in length, and narrows in the quarters, particularly at the heel; the frog is diminished in width; the sole becomes more concave; the heels higher, and lameness, or at least a shortened and feeling 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

(*a*) Lib. U. K. "The Horse," 171.

(*b*) Lib. U. K. "The Horse," Ed. 1862, App. 491.

(*c*) *Atterbury* v. *Fairmanner*, 8 Moore, 32.

(*d*) Broken-backed, ante.

(*e*) Overreach, post.

(*f*) Blindness, ante.

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, or by Thrushes (*g*), which, however, are much oftener the consequence than the cause of it. The *Contraction*, however, which is connected with permanent lameness, though increased by the circumstances just mentioned, usually derives its origin from a cause which acts violently and suddenly, namely, an inflammation of the little plates covering the Coffin bone, and not sufficiently intense to be characterized as Acute founder (*h*). The contracted heel can rarely or never permanently expand, as neither the lengthened and narrowed Coffin bone can resume its natural shape, nor can the portion of the frog which has been absorbed be restored (*i*).

When held to be unsoundness.

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 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 Chief Baron Pollock:—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 (*j*).

Corns.

In the angle between the bars and the quarters, the horn of the sole has sometimes a red appearance, 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 an occasional or permanent lameness. This disease of the foot is termed *Corns*, bearing this resem-

(*g*) Thrush, post.
(*h*) Founder, post.
(*i*) Lib. U. K. "The Horse," 292.
(*j*) *Greenway* v. *Marshall*, Ex. Sittings, Dec. 9, 1845.

blance to the corn of the human being, that it is produced by pressure 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 is neglected, so much inflammation is produced in that part of the sensible sole that suppuration follows, which is succeeded by quittor (*k*), and the matter either undermines the horny sole or is discharged at the coronet. The cause is, pressure 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 blood becomes inclosed in it. The portion of the foot in which they are 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 will cause serious lameness. They render it necessary to wear a thick and heavy shoe or a bar shoe to protect the weakened and diseased part (*l*).

Corns are hardly ever found on the hind feet; in any situation they are very seldom radically cured, and manifestly constitute *Unsoundness*.

Cough.

A *Cough* from catarrh or common cold is a complaint of frequent occurrence, generally subdued without much difficulty, but often becoming of serious consequence when neglected. It is accompanied by a little increase of pulse, a slight discharge from the nose and eyes, a rough coat, and a diminished appetite. If the inflammation increases the complaint degenerates into bronchitis (*m*), catarrhal fever, thick-wind (*n*), and broken-wind (*o*).

Held to be unsoundness when temporary.

Although it was laid down differently by Mr. Justice Coleridge in *Bolden* v. *Brogden* (*p*), it may now be considered as settled 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 (*q*) but may be proved in *reduction of damages* (*r*).

(*k*) Quittor, post.
(*l*) Lib. U. K. "The H.

law on the subject of temporary diseases was laid down by Lord Ellenborough nearly seventy 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 (*s*). Any infirmity which renders a Horse less fit for present use and convenience is *Unsoundness*" (*t*).

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 *diseased 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. Mr. Baron Parke, 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

(*s*) *Elton* v. *Brogden*, 4 Camp. 281.

(*t*) *Elton* v. *Jordan*, 1 Stark. N. P. C. 127.

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" (*u*). The Jury found a verdict for the plaintiff (*v*).

Crib-biting.

Crib-biting, being an unnatural sucking in of the air, must be to a certain degree injurious to digestion, must dispose to colic, and so interfere with the strength and usefulness and health of the Horse. Some *Crib-biters* are good goers, but they probably would have possessed more endurance had they not acquired this habit; and it is a fact well established, that as soon as a horse begins to become a *Crib-biter*, he, in more than nine cases out of ten, begins to lose condition. He is not to the experienced eye the Horse he was before. The wear of the front teeth, and even the frequent breaking of them, makes a Horse old before his time, and sometimes renders it difficult or almost impossible for him to graze (*w*).

When not an Unsoundness.

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 Mr. Justice Burrough 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 (*x*).

(*u*) Mr. Justice Coleridge in *Bolden* v. *Brogden*, 2 M. & Rob. 113.

(*v*) *Coates* v. *Stephens*, 2 M. & Rob. 157.

(*w*) Lib. U. K. "The Horse," 362. See also App. to U. K. Ed. 1862, p. 523.

(*x*) *Broennenburgh* v. *Haycock*, Holt's Rep. 630; and see *Washburn* v. *Cuddihy*, 8 Gray, 430; *Walker* v. *Holsington*, 43 Vt. 608 (American Cases).

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* (*y*). 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.

Mr. Baron Parke 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 (*z*), 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 (*a*). 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 (*b*).

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 may ensue, or the sheaths of the tendons in the neighbourhood

(*y*) Windsucker, post.
(*z*) Kicking, post.
(*a*) *Scholefield* v. *Robb*, 2 M. & Rob. 210.
(*b*) *Paul* v. *Hardwick*, Sittings at Westminster, H. T. 1831, MS.; Chitty on Contracts, 11th ed. 429. And see the American cases of *Washburn* v. *Cuddihy*, 8 Gray, 438; *Dean* v. *Morley*, 33 Iowa, 120; *Walker* v. *Holsington*, 43 Vt. 608.

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 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 it, and Horses that are *Cowhocked*, or whose hocks and legs resemble those of the Cow, the hocks being turned inward and the legs forming a considerable angle outwards; for in hocks so formed the annular ligament must be continually on the stretch to confine the tendon (*c*)..

A Horse with a Curb is manifestly *Unsound*. But as Curbs do not necessarily produce lameness, 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.

Curby Hocks not an Unsoundness.

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, Mr. Baron Alderson saying, "*Dickenson* v. *Follett* (*d*) is expressly in point for the defendant, and the law as laid down by me on

(*c*) Lib. U. K. "The Horse," 267. See also App. to U. K. Ed. 1862, p. 509.

(*d*) *Dickenson* v. *Follett*, 1 M. & Rob. 299; and see Cutting, post.

that occasion has not been questioned in any subsequent case" (*e*).

Cutting, like Speedy cut, arises from badness of structure, and being neither a disease nor a bad habit, cannot be pronounced a *breach* of a warranty of *Soundness* and *freedom from Vice;* and 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 appear 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 and endangered themselves and their riders. *Cutting* renders a Horse liable to serious injury of the legs, and indicates that he is either weak or has an awkwardness of gait inconsistent with safety (*f*). Cutting.

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 Mr. Justice Alderson 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*" (*g*). Held not to be an Unsoundness.

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, particularly when the animal is weakened by them, and sometimes appear when there is no other disease than the debility, which, in the spring and fall of the year, accompanies the changing of the coat (*h*). Dropsy of the Skin.

When the *pericardium* or the heart itself becomes inflamed, the secretion of the *pericardium* is much increased, Dropsy of the Heart.

(*e*) *Brown* v. *Elkington*, 8 M. & W. 132.

(*f*) Lib. U. K. "The Horse," 363, and App. Ed. 1862, p. 523.

(*g*) *Dickenson* v. *Follett*, 1 M. & Rob. 299.

(*h*) Lib. U. K. "The Horse," 171.

and so much fluid accumulates as to obstruct the beating of the heart. This is called *Dropsy of the heart* (*h*), and each of these diseases is an *Unsoundness* (*i*).

Enlarged Glands.

Simple Catarrh will occasionally, and severe affection of the chest will generally, be accompanied by a swelling of the *Glands* under the jaw, and this does not subside for a considerable time after the cold or fever has apparently been cured. If the *Enlargement* is considerable, and especially if tender, and the gland at the root of the ear partakes of it, and the membrane of the nose is redder than it should be, the commencement or lurking of some insidious disease is to be feared (*k*); and a Horse under such circumstances is *Unsound.*

Enlarged Hock.

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 will always lame him (*l*). A decided case of *Enlarged hock* is an *Unsoundness*, unless it is a mere blemish, the result of external injuries.

Ewe neck.

For *Ewe Neck* see Star-gazer (*m*).

False Quarter.

Where the coronary ligaments by which the horn of the coronet is secreted, is either divided by a cut or bruise, or eaten through by caustic, there will be a division of the horn as it grows down, either in the form of a permanent Sandcrack (*n*), 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 (*o*); and must be considered *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.

Farcy.

Farcy, which is a disease of the absorbents of the skin, is an *Unsoundness.* It is immediately connected with Glanders (*p*); they will run into each other, or their symptoms will mingle together; and before either arrives at its fatal termination, its associate will almost invariably appear. An animal inoculated with the matter of *Farcy*

(*h*) Lib. U. K. "The Horse," 171.
(*i*) See *Eaves* v. *Dixon*, 2 Taunt. 343.
(*k*) Lib. U. K. "The Horse," 363.
(*l*) Lib. U. K. "The Horse," 363. See also Lib. U. K., Ed. 1862, App. 523; and see Capped Hocks, ante, p. 79.
(*m*) Star-gazer, post.
(*n*) Sandcrack, post.
(*o*) Lib. U. K. "The Horse," 301.
(*p*) Glanders, post.

will often be afflicted with Glanders, while the matter of Glanders will frequently produce *Farcy*. They are different types or stages of the same disease. There is, however, a very material difference in their symptoms and progress; and this most important of all, that while Glanders are generally incurable, *Farcy*, in its early stage and mild form, may be successfully treated (*q*).

Water Farcy, confounded by name with the common Farcy, is a dropsical (*r*) affection of the skin, either of the chest or of the limbs generally (*q*), and is also an *Unsoundness*. Water Farcy.

Inflammation of the Foot, or *Acute Founder*, is generally caused by suffering a Horse to stand in the cold or wet after being hard ridden or driven, and is called "Fever in the feet." This fever is not easily subdued; and, if it be subdued, it sometimes leaves after it some fearful consequences. The loss of the hoof is not an unfrequent one (*s*). A Horse, therefore, which either has "Fever in the feet," or has been at all injured by it, is *Unsound*. Founder.

For *Gibbing*, see Backing and Gibbing (*t*). Gibbing.

The most formidable of all the diseases to which the Horse is subject is *Glanders*. It is described by writers fifteen hundred years ago; and it was then, and is now, not only a loathsome, but an incurable, disease. The most early and unquestionable symptom of Glanders, is an increased discharge from one or both nostrils; different from the discharge of Catarrh, because it is usually lighter and clearer in its colour, and more glutinous or sticky. It is not discharged occasionally and in large quantities like the *mucus* of Catarrh, but it is constantly running from the nostril (*u*). It need hardly be said that a Glandered Horse has on him the worst sort of *Unsoundness*. Glanders.

It is a disease not only infectious to beasts (*v*), but also to man. Thus, in the spring of 1853 a whole family in Sligo died of Glanders. The father first caught it from a Horse bought at a fair in Mayo, and then his wife and four children took it and all died in great agony. There- Infectious to mankind.

(*q*) Lib. U. K. "The Horse," 128, 131.

(*r*) Dropsy, ante, p. 87.

(*s*) Lib. U. K. "The Horse," 290.

(*t*) Backing and Gibbing, ante, p. 75.

(*u*) Lib. U. K. "The Horse," 121; and see Farcy, ante. In an American case (*Woodbury* v. *Robbins*, 10 Cush. (Mass.) 520), it was held that the moment symptoms of glanders appear in a Horse he is unsound; and that whether or not the symptoms are in fact the seeds of the disease is to be proved by the future history of the horse.

(*v*) See *Baird* v. *Graham*, 14 Court of Sess. 515 (Sco.).

fore, knowingly to bring a Glandered Horse into a public place is held to be an indictable offence (*w*).

Contagious Diseases (Animals) Act.

By the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), sect. 32, sub-ss. xxxii., xxxiii., the Privy Council may from time to time make such general or special orders as they may think fit, subject and according to the provisions of the act, for applying all or any of the provisions of the act to Horses, Asses, and Mules, and to glanders and farcy, and other diseases thereof; and 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 those purposes comprise any disease of animals in addition to the diseases mentioned in the act. Accordingly, by Order 442, Horses, &c. are to be deemed "animals," and glanders and farcy "diseases;" 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. And provisions are also made against 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 from an opacity of the vitreous humour. 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 (*x*).

Grease.

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. The skin of the heel of the Horse somewhat differs 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 heels become 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, ulceration and fungus (*y*). When this disease renders a Horse unfit for immediate work, it must be considered an *Unsoundness*.

Grogginess.

The peculiar knuckling over of the fetlock-joint and

(*w*) *Reg.* v. *Henson*, 1 Dears. & Pearce, C. C. 24.

(*x*) *Settle* v. *Garner*, cor. Martin, B., Westminster, Feb. 10, 1857.

(*y*) Lib. U. K. "The Horse," 276.

tottering of the whole of the fore leg, known by the name of *Grogginess*, and which is so often seen in old and overworked Horses, is seldom an affection of either the fetlock or pastern joints simply, although these have their full share in the mischief that has been produced. It is sometimes difficult to fix on any particular joint; at other times, it seems to be traced to a joint deep in the foot, where the flexor tendon runs over the navicular bone. It seems usually to be a want of power in the ligaments of the joints, generally produced by frequent and severe sprains, or by ill-judged and cruel exertion, and, in the majority of cases, admits of no remedy, especially as dissection often discovers ulceration within the joints and of the membrane which lines the cartilage, and even of the cartilage itself, which it was impossible to reach or to remove (*z*). When it exists in such a degree as to diminish the natural usefulness of the Horse, it must be considered an *Unsoundness*.

Grunting.

Grunting is an *Unsoundness;* see Roaring (*a*).

Gutta serena.

Gutta serena, commonly called *Glass-eye*, is a species of Blindness. The pupil is unusually dilated; it is immoveable, bright and glassy. It is a palsy of the optic nerve, or its expansion, the retina, and is usually produced by determination of blood to the head. It may be caused by improper treatment of the Staggers, where the pressure on the base of the brain has been so great, that the nerve has been injured and its function destroyed (*b*). It is an *Unsoundness*.

Hereditary disease.

There is scarcely a malady to which the Horse is subject which is not *Hereditary*. Contracted feet, Curb, Spavin, Roaring, Thick-wind, Blindness, notoriously descend from the father and dam to the Foal, which from them inherits its constitution and endurance (*c*). It would no doubt be a matter of great difficulty to maintain an action on a breach of warranty of soundness on the sale of a Horse, on the ground of *Hereditary disease* alone, but it is presumed to be just possible that if some general decay of the system or such like, developing itself after sale, could be proved to be *Hereditary*, the purchaser might have his action; and the following case appears somewhat in point:—The plaintiff bought a hundred sheep warranted sound; about two months after sale fifty of them died of

(*z*) Lib. U. K. "The Horse," 252. See also Lib. U. K. App. Ed. 1862, p. 507.

(*a*) Roaring, post.

(*b*) Lib. U. K. "The Horse," 116. And see Patent Defects, post.

(*c*) Lib. U. K. "The Horse," 35, 221.

the *Goggles*, which was stated by farmers and others conversant with sheep to arise from "breeding in and in from relations;" and that sheep so disordered will thrive and seem to be in sound health until they be about two or three years old; that there were no means of discovering by the appearance or otherwise when sheep are affected; that it is generally fatal, and no cure or prevention known for it, and that it was reputed among farmers an *Unsoundness*. Chief Justice Abbott left it to the Jury to say, "whether, at the time of the sale, the sheep had existing in their blood or constitution the disease of which they afterwards died, or whether it had arisen from any subsequent cause." And on this direction a verdict was found for the plaintiff (*d*).

Kicking. *Kicking*, either in the stable or in harness, is a bad and dangerous habit, and 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, and produces swelled hocks or some more serious injury. It shows *Vice* in the temper of the animal (*e*), and it is very seldom that a confirmed *Kicker* can be cured (*f*).

Kidney-dropping. A *Kidney-dropper* will appear quite well at starting, but after travelling a short distance he will come to a dead stand-still, and, if not supported, will drop down on the spot. A Kidney-dropper is worthless and *Unsound* (*g*).

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 (*h*).

Temporary lameness an Unsoundness. The law as laid down in *Coates* v. *Stephens* (*i*) and *Kiddle* v. *Burnard* (*k*), 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

(*d*) *Joliff* v. *Bendell*, R. & M. 136.
(*e*) Lib. U. K. "The Horse," 336.
(*f*) *Scholefield* v. *Robb*, 2 M. & Rob. 210.
(*g*) See *Eastman's case*, Lambeth Police Court, Nov. 11, 1853.
(*h*) Lib. U. K. "The Horse," 364.
(*i*) *Coates* v. *Stephens*, 2 M. & Rob. 137, overruling *Bolden* v. *Brogden*, 2 M. & Rob. 113.
(*k*) *Kiddell* v. *Burnard*, 8 M. & W. 670.

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" (*l*). 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 fore legs 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 ultimately prove fatal. Any infirmity which renders a Horse less fit for present use and convenience is *Unsoundness*" (*m*). 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 (*n*).

Laminitis.

Laminitis is an inflammation of the *Laminæ* of the feet, namely, of the connecting medium between the coffin bone and the interior of the hoof, there being numerous fleshy plates which support the foot. The coronary ring is contracted, the soles become convex, the Horse puts his heels to the ground first and goes short, and lameness ensues. *Laminitis* is such an alteration in structure as is without doubt *Unsoundness* (*o*).

(*l*) *Elton* v. *Brogden*, 4 Camp. 281.
(*m*) *Elton* v. *Jordan*, 1 Stark. N. P. C. 127.
(*n*) *Garment* v. *Bars*, 2 Esp. 673.
(*o*) See *Hall* v. *Rogerson*, Appendix; *Smart* v. *Allison*, Appendix.

Lampas. Some of the lower bars of the palate occasionally swell, and rise to a level with and even beyond the edge of the teeth; they are very sore, and the Horse feeds badly on account of the pain he suffers from the pressure of the food on the bars (*p*). This is called *Lampas*, and being easily cured, and not dangerous, it is only *Unsoundness* while it interferes with the Horse's usefulness.

Liver disease. A diseased Liver is of course an *Unsoundness* (*q*). •

Lungs hepatized. All diseases of the Lungs constitute *Unsoundness*. The various symptoms were discussed in the case of *Hyde* v. *Davis* (*q*).

Mallenders and Sallenders. 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. They seldom produce lameness, but if no means are taken to get rid of them, a discharge proceeds from them which it is afterwards difficult to stop (*r*). They must be considered *Unsoundness*.

Mange. The *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 carcase; it is one of the most contagious diseases to which the Horse is exposed (*s*). A *Mangy* Horse is decidedly *Unsound*.

Navicular Joint disease. The *Navicular Joint disease* is *Unsoundness*, as it produces lameness, which is rarely cured. It proceeds from sudden concussion, or from rapid and overstrained motion. Horses which have irregular and undue exercise are most liable to it, and particularly those whose feet are contracted (*t*). An action was brought for the breach of an alleged warranty; the Unsoundness in question was what is termed "Navicular disease," which was stated to be an inflammation in a joint on the inside of the hoof, and to be of such a nature that it might be alleviated by proper treatment, so far as to render a Horse fit for gentle work, and to make him appear sound for a short time and on soft ground; but could seldom, if ever, be permanently cured, so as to qualify him for hard work (*u*). The "Navicular disease" is an *Unsoundness*, and is incurable (*x*).

Nerved Horse. A Horse on whom the operation of *Nerving* has been

(*p*) Lib. U. K. "The Horse," 134.

(*q*) See *Hyde* v. *Davis* and *Buckingham* v. *Rogers*, Appendix.

(*r*) Lib. U. K. "The Horse," 273.

(*s*) Lib. U. K. "The Horse," 379; and see Scab, post.

(*t*) *Bywater* v. *Richardson*, 1 A. & E. 508.

(*u*) *Bywater* v. *Richardson*, 1 A. & E. 508.

(*x*) *Matthews* v. *Parker*, Appendix.

performed may be improved, may cease to be lame, may go well for many years; but there is no certainty of his continuing to do so, and he is *Unsound* (*y*).

This was decided in the following case, soon after Neurotomy had been first introduced by Veterinary Surgeons. An action was brought on the warranty of a Horse which had been *Nerved*. Several eminent Farriers were called, who stated that the operation of *Nerving* consisted in the division 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 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 *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 *Nerved*, whether by accident or design, was *Unsound*, and could not be safely trusted for any severe work, and that it was an organic defect (*z*). Held to be Unsound.

It appeared that the Horse in question had not exhibited any lameness. But Chief Justice Best 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 (*a*).

The most frequent disease of the Nose is an increased and thickened discharge from it. It may properly be called a *Nasal gleet*. There is a continued and often a profuse discharge of the fluid secreted to lubricate the membrane lining the Nose, when every symptom of Catarrh and fever has passed away, and an almost incredible quantity of thickened *mucus*, of different colours; *green*, if the Horse is at grass; or, if he be stabled, *white*, *straw-coloured*, *brown*, or even *bloody*, and sometimes evidently mingled with *matter* or *pus*; and either constantly running, or snorted out in masses many times in the day, often Nose, Chronic discharge.

(*y*) Lib. U. K. "The Horse," 364.

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

(*a*) Ibid.

continuing several months, and sometimes eventually destroying the Horse (*b*). Such a disease is without doubt an *Unsoundness*.

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 (*c*). It is a bad habit, and when decidedly injurious to his health, and so tending to impair his usefulness, it is a *Vice*.

Opacity of the Lens.

Opacity of the crystalline Lens of the eye is an *Unsoundness*. See Blindness (*d*).

Ossification of the Cartilages.

The *Slide 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 inflammation, and the result of that inflammation is, that the cartilages are absorbed, and bone is substituted in their stead. This *Ossification of the Cartilages* frequently accompanies Ringbone (*e*); but it may exist without any affection of the pastern joint. It is oftenest found in Horses of heavy draught. 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 well understood, but of the effect the instances are very numerous, a few heavy draught horses arriving at old age without this change of structure (*f*). Like Ringbone (*g*), it is an *Unsoundness* (*h*).

Overreach.

This very disagreeable noise known by the name of "*Clicking, Overreach*," &c. arises from the toe of the hind foot knocking against the shoe of the fore foot (*i*). 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 (*k*) and Quittor (*l*). This defect, like Cutting (*m*), arises from the bad formation of the Horse (*m*) and is therefore *neither* an

(*b*) Lib. U. K. "The Horse," 121.
(*c*) Lib. U. K. "The Horse," 341. See App. to Lib. U. K. Ed. 1862, p. 521.
(*d*) Blindness, ante, p. 75.
(*e*) Ringbone, post.
(*f*) Lib. U. K. "The Horse," 310.
(*g*) Ringbone, post.
(*h*) See *Simpson* v. *Potts*, Appendix.
(*i*) Lib. U. K. "The Horse," 341.
(*k*) False-quarter, ante, p. 88.
(*l*) Quittor, post.
(*m*) *Brown* v. *Elkington*, 8 M. & W. 132; *Dickenson* v. *Follett*, 1 M. & Rob. 299.

Unsoundness nor a *Vice;* but if suspected, a special warranty should be taken against it.

The *Parotid Gland* is placed in the hollow which extends from the root of the ear to the angle of the lower jaw. In bad Strangles, and sometimes in violent cold, it will swell to a great size and ulcerate; or an obstruction will arise in some part of the duct, and the accumulating fluid will burst the vessel, and a fistulous ulcer will be formed, very difficult to heal. Such a disease is an *Unsoundness* (*n*). Parotid Gland ulcerated.

The point of juncture between the head and the bone nearest the skull is called the *Atlas*, and is the seat of a very serious and troublesome ulcer 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, or perhaps by unnecessary tight reining; the consequence is inflammation, and a swelling appears, hot, tender and painful. The swelling increases, and matter is formed, which spreads around and eats into the neighbouring parts (*o*). This disease is an *Unsoundness*. Poll-evil.

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, it gets bruised and injured (*p*). This is called *Pumiced-feet;* it is incurable, and is decidedly an *Unsoundness*. Pumiced Feet.

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 ceases when these are remedied (*q*). It would be a symptom of *Unsoundness* while the sore throat lasted. Quidding.

Quittor is an *Unsoundness*. It has been described as being the result of neglected or bad tread or Overreach (*r*); 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 Quittor.

(*n*) Lib. U. K. "The Horse," 8.
(*o*) Ibid. 153.
(*p*) Ibid. 291.
(*q*) Ibid. 342.
(*r*) Overreach, ante, p. 9

the actual healing of the part. The matter which is thrown out in wounds of the foot is usually pent up there, and increases in quantity, and thus urges its way in every direction; it forces the fleshy little plates of the coffin bone from the horny ones of the crust, or the horny sole from the fleshy sole, or even eats deeply into the internal parts of the foot. These *Pipes* or *Sinuses* run in every direction, and constitute the essence of *Quittor* (*s*).

Rat-tails. On the back part of the leg are sometimes excrescences called by Farriers *Rat-tails*, from the appearance they give the hair. They generally yield to mild treatment (*t*), and as they are unlikely, from their situation, to impede the natural usefulness of the Horse, it is only in a bad case that they can be considered *Unsoundness*.

Rearing. *Rearing*, which is unprovoked by the bruising and laceration of the mouth, is an inveterate and dangerous bad habit (*u*), and a *Vice*.

Rheumatism. In the case of *Couch* v. *Culbreth* (*x*) it was held, by the Supreme Court of South Carolina, that in questions of unsoundness, where the disease is chronic, like rheumatism, it is not necessary to show that the symptoms existed at the time of sale, for subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed.

Ring-bone. *Ring-bone* commences in one of the pasterns, and usually about the pastern joint; but it rapidly spreads, and involves 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*. Its motion is lost, and the disease proceeds to the cartilages of the foot and to the union between the lower Pastern and the Coffin and Navicular bones; the motion of these parts is impeded or lost, and the whole of this part of the foot becomes one mass of spongy bone. When the bony tumour is small and on one side only, there is little or no lameness, yet from the action of the foot, and the stress upon the part, the disease has a great tendency to spread, after there has been the slightest enlargement either of the pasterns or round the coronet (*y*). The law respecting

(*s*) Lib. U. K. "The Horse," 302.
(*t*) Ibid. 275.
(*u*) Ibid. 337.
(*x*) 11 Rich. Law, S. C. 9.
(*y*) Lib. U. K. "The Horse," 254, 365.

Bone-spavin (z) appears on principle to be exactly applicable to *Ring-bone*, the slightest appearance of which must be considered an *Unsoundness*, whether it produce lameness or not.

Roaring is so called from a peculiar sound uttered by a Horse with this disease, when briskly trotted or galloped, particularly up hill. In moderate exercise it is scarcely or not at all perceived; but in brisk exercise it may be heard at the distance of several yards. The most general cause of *Roaring* is a tough and viscid substance which is thrown out in the shape of fluid, and adheres to the side of the *larynx* and upper part of the windpipe, materially obstructing the passage, and sometimes running across it in bands. Some *Roarers*, on dissection, are found to have the shape of the *larynx* and windpipe materially deformed, crooked, and compressed, and others have presented no appearance of disease. *Roaring* is no unusual consequence of Strangles (a), and it may proceed from tight reining (b). 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 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. There can be no doubt, however, that every *Roarer* is inconvenienced by it when in rapid action, and it would be difficult to say, in any case, that it is merely a bad habit acquired, without some previous inflammation or alteration of structure. In practice *Roaring* is always very properly considered an *Unsoundness.* Roaring.

The following cases show the opinions expressed in courts of law with regard to *Roaring*. An action was brought on the warranty of a Horse, which soon after sale had turned out a *Roarer*. Mr. Field, a Veterinary Surgeon of experience, stated that *Roaring is occasioned by the circumstance of the neck of the windpipe being too narrow for accelerated respiration*, and that the disorder is frequently produced by sore throat or other topical inflammation, and that the disorder is of such a nature as to incommode a Horse very much when pressed to his speed. And Lord Ellenborough said, "If a Horse be affected by any malady which renders him less serviceable for a per- Decisions on the subject.

(z) Bone-spavin, ante, p. 77.
(a) Strangles, post.
(b) Lib. U. K. "The Horse," 160.

manency, I have no doubt that it is an *Unsoundness*. I do not go by the noise, but by the disorder" (*c*).

And in a previous 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. 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 (*d*).

Rolling. *Rolling* is a pleasant and safe amusement for a Horse at grass, but cannot be indulged in the stable without the chance of his being dangerously entangled with the collar, and being cast. Yet, although the Horse is cast, and bruised, and half-strangled, he will roll again on the following night, and continue so to do as long as he lives (*e*). Now this is a bad habit, and a Horse may have his health and usefulness impaired by being often cast, or half-strangled and lamed; it must render a Horse less valuable, and when inveterate may perhaps be considered a *Vice*.

Running away. 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 here; and being a bad and dangerous habit, it is a *Vice* (*f*).

Saddle-galls. When the *Saddle* has been suffered to press long upon the withers, a tumour will sometimes be formed, hot and exceedingly tender. In neglected *Fistulous withers* the ulcer may be larger and deeper, and more destructive than in Poll-evil (*g*). It may burrow beneath the shoulder-

(*c*) *Onslow* v. *Eames*, 2 Stark. N. P. C. 81.
(*d*) *Bassett* v. *Collis*, 2 Camp. 522.
(*e*) Lib. U. K. "The Horse," 342.
(*f*) Ibid. 337.
(*g*) Poll-evil, ante, p. 97.

blade, and the matter may 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. These little tumours resulting from the pressure of the saddle are called *Warbles;* and when they ulcerate, they frequently become *Sitfasts* (*h*). If the smallest Warble 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* (*i*).

Pimple on a Horse's skin.

On this point Mr. Baron Parke expressed an opinion in *Kiddell* v. *Burnard* (*k*), 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."

Question for the Jury.

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; Mr. Justice Wightman 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 (*l*).

Sallenders.

Sallenders constitute *Unsoundness.* See Mallenders (*m*).

Sandcrack.

Sandcrack, as its name imports, is a *Crack* or division of the hoof downwards, and into which *Sand* and dirt are very apt to insinuate themselves; or it is so called, as some say, because it most frequently occurs in *Sandy* districts, the heat of the sand applied to the feet giving them a disposi-

(*h*) Lib. U. K. "The Horse," 169.

(*i*) The same principle is applicable to *Bruised Shoulder.*

(*k*) *Kiddell* v. *Burnard*, 9 M. & W. 670.

(*l*) *Ainsley* v. *Brown*, before Mr. Justice Wightman, Newcastle Spring Assizes, 1845.

(*m*) See Mallenders, ante, p. 94.

tion to crack. It occurs both in the fore and hind feet, and indicates a brittleness of the crust, which is sometimes natural, but oftener the consequence of mismanagement or disease, particularly of *False Quarter* (*n*); and where the horn has grown down whole, but leaves a narrow strip of horn of a different and lighter colour, this indicates that there has been a *Sandcrack*, and that a disposition to it may possibly remain (*o*). *Sandcrack* is an *Unsoundness*; but as in the case of a Curb (*p*), if a Horse, without any indication of having previously had the disease, throw out a *Sandcrack* immediately after sale, it is *no breach* of a warranty of *Soundness*.

Scab. The *Scab* is a disease which constitutes a breach of warranty of Soundness, and there is a form of declaration in the *Liber Placitandi* (*q*), in a case where, in consequence of the existence of such disease, an action was brought on a warranty given at Leeds in 1649.

Statute of Hen. 8. By the statute 32 Hen. 8, c. 13, s. 9, intituled "The Bill for the Breed of Horses," no person shall have or put to pasture any Horse, Gelding or Mare infected with Scab or Mange, in any Common or Common Fields, on pain of forfeiting 10*s*., which offence shall be inquirable in the leet, as other common annoyances be, and the forfeiture shall be to the lord of the leet. This statute was, however, repealed by the 19 & 20 Vict. c. 64.

Shivering. *Shivering* is a disease known among the London Dray Horses. The Horse constantly shivers, and frequently cannot lie down; he is unable to back, and consequently can only be used in the team and not in the shafts. This would no doubt be a *breach* of a warranty of *Soundness*.

Shoulder, Bruised. See ante, 101, n. (*i*).

Shying. *Shying* is often the result of cowardice, playfulness or want of work. *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 (*r*). When confirmed, it is a bad and dangerous habit, and therefore a *Vice*.

Shying the result of short-sightedness. *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

(*n*) False-quarter, ante, p. 88.
(*o*) Lib. U. K. "The Horse," 301.
(*p*) Curb, ante, p. 85.
(*q*) Lib. Plac. 30.
(*r*) Lib. U. K. "The Horse," 344.

the case, there is thereby induced a habit of shying, such shying is an *Unsoundness*, although there is no disease, and although it is the natural result of a congenital malformation of the eye (*s*).

Side-bones is the same disease as Ossification of the cartilages (*t*). A lameness is caused, which is removed by absolute rest for a length of time, but quick work on a hard road soon brings it back again. It is an *Unsoundness*, whether it produces lameness or not (*u*). Side-bones.

Many Horses are very clever at *Slipping the collar* at night; they gorge themselves with food, and run the risk of being kicked and lamed by other Horses (*v*). As this may be prevented either by carefully and accurately fixing his collar, or by keeping him in a loose box, it cannot in practice be considered a *Vice*. Slipping the collar.

Spavin is an *Unsoundness*. See Blood and Bog-spavin (*w*), and Bone-spavin (*x*). Spavin.

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 the *Speedy-cut*, 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 (*y*). *Speedy-cut*, like Cutting (*z*), is the consequence of defective shape; and therefore, where a Horse is sound at the time of sale, lameness from a *Speedy-cut* immediately afterwards is *no breach* of a *Warranty* of *Soundness*. Speedy-cut.

A *Splint*, like a *Bone-spavin* (*a*), 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 is thus produced by each; by *Bone-spavin* nearly always, by a *Splint* sometimes. It entirely depends on the situation of the bony tumour on the inside Splint.

(*s*) *Holiday* v. *Morgan*, 28 L. J., Q. B. 9. See ante, p. 71.
(*t*) Ossification of the Cartilages, ante, p. 96.
(*u*) *Simpson* v. *Potts*, Appendix.
(*v*) Lib. U. K. "The Horse," 344.
(*w*) Blood and Bog-spavin, ante, p. 77.
(*x*) Bone-spavin, ante, p. 77.
(*y*) Lib. U. K. "The Horse," 245.
(*z*) Cutting, ante, p. 87.
(*a*) Bone-spavin, ante, p. 77.

of the shank-bone, whether a *Splint* is to be considered an *Unsoundness* (*b*). If it is not in the neighbourhood of any joint, so as to interfere with its action, and if it does not press upon any ligament or tendon, it can be no cause of *Unsoundness*. And although it is often very unsightly, it does not lessen the capabilities and value of the animal (*c*).

Decision on the subject.

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.

Lord Chief Justice Tindal 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*" (*d*).

Sprain and Thickening of the Back Sinews.

The Back Sinews are inclosed 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 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.

(*b*) See App. to Lib. U. K. Ed. 1862, 524, where Professor Spooner gives it as his opinion that situation has less to do with the lameness occasioned by splint than the character of the splint. He considers that the test of its being an *unsoundness* or not is, whether there is tenderness or not on its being pressed.

(*c*) Lib. U. K. "The Horse," 365.

(*d*) *Margetson* v. *Wright*, 1 M. & Sc. 622. See also *Smith* v. *O'Brien*, 11 L. T., N. S. 346; and post, pp. 136, 137.

A slight injury of this nature is called a *Sprain of the back sinews or tendons*, and when it is more serious the Horse is said to have *Broken down* (*e*).

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.

Star-gazer. 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.

Ewe-necked. 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 (*f*). These being defects in the formation of a Horse are *neither Unsoundness nor Vice*.

Strangles. *Strangles* are peculiar to young Horses, almost all of which have it once. It is quite different from Glanders (*g*), though they have sometimes been confounded. In its early stage it resembles a common cold and is accompanied with sore throat. It is not dangerous, and is *Unsoundness only* during the time the Horse is ill with it (*h*).

String-halt. *String-halt* is a singular and very unpleasant action of the hind leg, arising from an irregular communication of nervous energy to some muscle of the thigh, observable when the Horse first comes out of the stable, and gradually ceasing on exercise. It is probably so called from its resemblance to the sort of "halt" produced by a "string" tied to the leg of a pig, and held in the hand of the person driving it. It has often been found in those Horses that have a more than common degree of strength and endurance, and is almost entirely confined to well-bred Horses (*i*).

Held to be an Unsoundness. There has always, until lately, been a difference of opinion whether *String-halt* constitutes *Unsoundness;* however, in *Thompson* 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 Mr. Justice Cresswell

(*e*) Lib. U. K. "The Horse," 246.
(*f*) Ibid. 155.
(*g*) Glanders, ante, p. 89.
(*h*) Lib. U. K. "The Horse," 123; Story on Contracts, 309.
(*i*) Lib. U. K. "The Horse," 365.

at the Liverpool Summer Assizes, 1846, and was an action of *Assumpsit* on the warranty of a Horse, the breach of which was *Wilremhaunch* 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.

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 his 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 than any 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.

Thickening of the Back Sinews.

For *Thickening of the Back Sinews* see Sprain and Thickening of the Back Sinews (*k*).

Thick-wind.

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 rapid as evidently to express distress, and occasionally almost to threaten suffocation. Some degree of it frequently exists in round-chested and fat Horses, and heavy draught-horses are almost invariably *Thick-winded*, and so are almost all Horses unused to exercise or violently exercised on a full stomach. The principal cause, however, of *Thick-wind* is previous inflammation, and particularly inflammation of the bronchial passages. *Thick-wind* is often the forerunner of Broken-wind (*l*), and when it proceeds from inflammation it is an *Unsoundness* (*m*).

Thinness of Sole.

Thinness of Sole which does not afford sufficient protection to the inner or sensible sole makes a Horse liable to lameness.

Held not an Unsoundness.

In a case tried at Liverpool before Mr. Justice Cresswell, 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. 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 Mr. Justice Cresswell 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

(*k*) Sprain and Thickening of the Back Sinews, ante, p. 104.
(*l*) Broken-wind, ante, p. 78.
(*m*) Lib. U. K. "The Horse," 193; *Atkinson* v. *Horridge*, Appendix.
(*n*) *Brown* v. *Elkington*, 8 M. & W. 132.

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, between the flexor of the foot and the extensor of the hock, on both sides of which it projects in the form of a round swelling. It is called a *Thoroughpin*, and is an indication of considerable work, but, unless it be of great size, it is rarely attended with lameness (*q*). It constitutes *Unsoundness* when it causes lameness, or perhaps when it is so large as to render it likely that lameness will soon ensue; however, in such a case it would be very conspicuous, and a special warranty against it had better be taken.

Thrush. A *Thrush* is the inflammation of the lower surface of the inner or sensible frog, and the secretion or throwing out of *pus*, almost invariably accompanied by a slight degree of tenderness of the frog itself, or of the heel a little above it, and if neglected, leading to diminution of the substance of the frog, and separation of the horn from the parts beneath, and the production of fungus and Canker (*r*), and ultimately a diseased state of the foot, destructive of the present and dangerous to the future usefulness of the Horse (*s*). A *Thrush* is an *Unsoundness.*

Tripping. *Tripping* arises from a heavy forehead, and from the fore legs being too much under the Horse, so that, like Cutting (*t*), it is a consequence of malformation; it also may indicate tenderness of the foot, Grogginess (*u*), or

(*o*) Curby-hocks, ante, p. 86.
(*p*) *Bailey* v. *Forrest*, 2 C. & K. 131.
(*q*) Lib. U. K. "The Horse," 265.
(*r*) Canker, ante, p. 79.
(*s*) Lib. U. K. "The Horse," 366.
(*t*) Cutting, ante, p. 87.
(*u*) Grogginess, ante, p. 90.

old lameness (*w*). As it arises from such causes it cannot be called a bad habit, and is therefore *not a Vice*, but in some cases it indicates an alteration of structure.

Vicious to clean.

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 (*x*), yet, when it exists in such a degree as to be dangerous, it is a *Vice*.

Vicious to shoe.

The same may be said of being *Vicious to shoe* as where 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* (*y*).

Wall-eyed.

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 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 (*z*).

Warbles.

As to *Warbles* see Saddle-galls (*a*).

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 parts of the skin, and on the prepuce (*b*). 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 are *not Unsoundness* (*c*).

Water-farcy.

For *Water-farcy* see *Farcy* (*d*).

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

(*w*) Lib. U. K. "The Horse," 344.
(*x*) Ibid. 338.
(*y*) See Lib. U. K. "The Horse," App. Ed. 1862, 521.
(*z*) Ibid. 93.
(*a*) Saddle-galls, ante, p. 100.
(*b*) Lib. U. K. "The Horse," 381.
(*c*) *Kiddell* v. *Burnard*, 9 M. & W. 670.
(*d*) Farcy, ante, p. 88.

can never stand much work. They will be subject to Corns (*e*), to Bruises, to Convexity of the sole, to Punctures in nailing, to breaking away of the Crust, to Inflammation of the foot, and to Sprain and injury of the pastern, the fetlock, and the flexor tendon (*f*). 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; a Horse which is thus incessantly on the fret will seldom carry flesh, or be safe to ride or drive (*g*). This being a bad habit is a *Vice*, when it either injures a Horse's health, or makes him dangerous.

Wheezing. The *Wheezer* utters a sound not unlike that of an asthmatic person when a little hurried. This is a kind of Thick-wind (*h*), caused by the lodgment of some mucous fluid in the small passages of the lungs, and it frequently accompanies Bronchitis. *Wheezing* can be heard at all times, even when the Horse is at rest in the stable, and thus differs from Roaring (*i*), which is confined to the increased breathing during considerable exertion (*k*). It is an *Unsoundness* (*l*).

Whistling. The *Whistler* utters a shriller sound than the Wheezer, but only when in exercise, and that of some duration, as a sudden motion will not always produce it. It seems to be referable to some contraction in the windpipe or larynx. The sound is a great nuisance to the rider, and the *Whistler* very speedily becomes distressed (*m*). This is an *Unsoundness* (*n*).

Wilrem-haunch. *Wilremhaunch* is the Lancashire name for String-halt (*o*).

Wind-galls. There are few Horses perfectly free from *Wind-galls*, but they do not interfere with the action of the fetlock or cause lameness, except when they are numerous or large. Like Thoroughpin (*p*), they do not constitute *Unsoundness* unless they cause lameness, or perhaps when they are so

(*e*) Corns, ante, p. 81.
(*f*) Lib. U. K. "The Horse," 310.
(*g*) Ibid. 345.
(*h*) Thick-wind, ante, p. 107.
(*i*) Roaring, ante, p. 99.
(*k*) Lib. U. K. "The Horse," 196.
(*l*) *Onslow* v. *Eames*, 2 Stark. N. P. C. 81.
(*m*) Lib. U. K. "The Horse," 196.
(*n*) *Onslow* v. *Eames*, 2 Stark. N. P. C. 81.
(*o*) String-halt, ante, p. 105.
(*p*) Thoroughpin, ante, p. 108.

large and numerous as to make it likely they will soon cause it (*q*).

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 (*r*). 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 (*s*); it arises from the same causes, and the same results follow. 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 (*t*). It is a *Vice*. Wind-sucking.

In some few instances the second teeth do not rise immediately under the temporary or middle teeth, but somewhat by their side. The tooth is pushed out of its place to the fore part of the first grinder, and remains for a considerable time under the name of a *Wolf's tooth*, causing swelling and soreness of the gums, and frequently wounding the cheeks. This is easily remedied by drawing the tooth (*u*), and though an *Unsoundness* while it lasts, no dispute would be likely to arise in practice respecting it. Wolf's tooth.

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 (*x*). It is, while it lasts, an *Unsoundness*. Yellows.

(*q*) Lib. U. K. "The Horse," 366.
(*r*) *Stuart* v. *Wilkins*, Doug. 18.
(*s*) Crib-biting, ante, p. 84.
(*t*) Lib. U. K. "The Horse," 340.
(*u*) Lib. U. K. "The Horse," 140. See, however, Lib. U. K. App. Ed. 1862, 487.
(*x*) Ibid. 213.

CHAPTER V.

WARRANTY; SALE AND WARRANTY BY AN AGENT; AND PATENT DEFECTS.

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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*).

Warranty of title.

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.

Not implied by law of England.

But by the law of England there is no implied Warranty of title in the contract of sale of a personal chattel; and, in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct; and the question in each case, where there is no Warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a Warranty (*e*).

How it may be inferred.

But a wide construction has been put upon "the circumstances which may be held to be equivalent to an express Warranty." Indeed Lord Campbell has said, that if by the law of England the maxim *caveat emptor* applies on a sale of personal property, the exceptions have well-nigh eaten up the rule (*f*). And this dictum was quoted with approval by Erle, C. J., in *Eicholz* v. *Bannister* (*g*). Thus, it seems that executory contracts must be brought

(*a*) *Jones* v. *Bright*, 3 M. & P. 175.
(*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.
(*e*) Per Parke, B., *Morley* v. *Attenborough*, 18 L. J., Ex. 148; *Eicholz* v. *Bannister*, 11 Jur., N. S. 15.
(*f*) *Sims* v. *Marryat*, 17 Q. B. 281.
(*g*) 11 Jur., N. S. 15.

within the exception (*h*). And a Warranty may be inferred from usage of trade, or from the nature of the trade being such as to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons; as where articles are bought in a shop professedly carried on for the sale of goods (*i*).

Rule of law.

Nevertheless it must still be taken as a rule of law, that, with regard to the sale of ascertained chattels, there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied (*k*). The case of *Morley* v. *Attenborough* (*l*), recognized and affirmed by subsequent decisions (*m*), establishes the rule with respect to *title;* and with respect to *quality* it is no less firmly established (*n*). And in a more recent case (*o*) Mr. Baron Martin said, "That in his view of the law, where there is no Warranty, the rule *caveat emptor* applies to sales, and except there be deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for Unsoundness lies by the vendee against the vendor upon the sale of a Horse or other animal."

Where the consideration fails.

If it be shown that it was the understanding of both parties, that the bargain should be put an end to if the purchaser should not have a good title, it would seem that the purchaser may recover back his money as on a consideration which has failed (*l*).

Mode of trying a disputed title.

A dispute respecting the title of different parties to a Horse may be decided by an interpleader issue. Thus, a

(*h*) *Morley* v. *Attenborough*, 18 L. J., Ex. 148; *Eicholz* v. *Bannister*, 11 Jur., N. S. 15. And Mr. Benjamin, in his work on Sales (2nd ed. pp. 522, 523), goes still further and says: "The exceptions have become the rule, and the old rule has dwindled into the exception, by reason, as Lord Campbell said, of its having been well-nigh eaten away;" and then proceeds to lay down the following rule as in accordance with these cases, viz.: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and, therefore, he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." And see Campbell on Sales, 328.

(*i*) *Sims* v. *Marryat*, 17 Q. B. 281.

(*k*) *Hall* v. *Conder*, 2 C. B., N. S. 40; *Bagueley* v. *Hawley*, L. R., 2 C. P. 625; 36 L. J., C. P. 328. See Broom's Maxims, 4th Ed. 768.

(*l*) *Morley* v. *Attenborough*, 18 L. J., Ex. 148; *Eicholz* v. *Bannister*, 11 Jur., N. S. 15.

(*m*) *Hall* v. *Conder*, 2 C. B., N. S. 40. See Broom's Maxims, 4th Ed. 768.

(*n*) *Chanter* v. *Hopkins*, 4 M. & W. 399.

(*o*) *Hill* v. *Balls*, 2 H. & N. 304. See also *Osborne* v. *Hart*, 23 L. T., N. S. 851; 19 W. R. 331—Ex.

question was tried whether certain Race horses named Ægis, Ninnyhammer, and War Eagle, 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 the Jury found a verdict for the plaintiff (*p*).

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 (*q*).

Reason for requiring a Warranty.

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 damnified 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 (*r*). And the late Mr. Youatt said, "A man should have a more perfect knowledge of Horses than falls to the lot of most of men, and a perfect knowledge of the vendor too, who ventures to buy a Horse without a Warranty" (*s*). 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.

(*p*) *Ford* v. *Sykes*, before Lord Campbell, C. J., Cambridge Spring Assizes, 1853.

(*q*) *Wright* v. *Freeman*, 48 L. J., C. P. 276; 40 L. T., N. S. 134.

(*r*) 1 Rol. Abr. 90; *Jones* v. *Bright*, 5 Bing. 544.

(*s*) Lib. U. K. "The Horse," 368.

Buyer should protect himself by one.

If a buyer, however, means to protects himself from hidden defects, he must take a Warranty, and he is not protected otherwise, unless he can make out fraud (*t*).

What constitutes a Warranty.

It is much better both for the buyer and seller when 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 (*u*); 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 (*v*). The general Rule laid down by Mr. Justice Bayley is, that whatever the vendor represents at the time of sale is a Warranty (*x*). 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 (*y*).

If an article sold is described, the description amounts to a Warranty or a condition precedent that it shall be an article of the kind described (*z*).

Words, however, of expectation and estimate only do not amount to a Warranty (*a*).

Article named in a Sold Note.

So it was held that a Sold Note amounted to a Warranty that the article delivered should be as named in the note, the contract being a sale of a certain known article of commerce (*b*).

Buyer entitled to article commercially known by the name.

And when goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk, and without Warranty (*c*).

(*t*) *Ormrod* v. *Huth*, 14 M. & W. 661.

(*u*) Per Best, C. J., *Salmon* v. *Ward*, 2 C. & P. 211.

(*v*) Per Best, C. J., *Jones* v. *Bright*, 3 M. & P. 173. See also *Randall* v. *Newson*, L. R., 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T., N. S. 164; 25 W. R. 313—C. A.

(*x*) *Wood* v. *Smith*, 4 C. & P. 45.

(*y*) *Cave* v. *Colman*, 3 M. & R. 2.

(*z*) *Bowes* v. *Shand*, L. R., 2 App. Cas. 455; 46 L. J., Q. B. 561.

(*a*) *M'Connel* v. *Murphy*, L. R., 5 P. C. 203; 28 L. T., N. S. 713.

(*b*) *Henderson* v. *Blake*, Q. B. 1852; 3 M. Dig. 326.

(*c*) *Josling* v. *Kingsford*, 32 L. J., C. P. 94. See also *Allen* v. *Lake*, 18 Q. B. 560; *Wieler* v. *Schilizzi*, 17 C. B. 619; *Carter* v. *Crick*, 28 L. J., Ex. 238.

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" (*d*). A sound price not tantamount to a 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 General 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 (*e*). A Qualified 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. 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, Mr. Justice Littledale 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" (*f*). A Limited Warranty.

In the case of *Chapman* v. *Gwyther* (*g*) 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.
£90. 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.

The purchaser, however, may return the Horse at any

(*d*) *Parkinson* v. *Lee*, 2 East, 323.
(*e*) *Wood* v. *Smith*, 4 C. & P. 45. See also *Pinder* v. *Button*, 7 L. T., N. S. 269.
(*f*) *Bywater* v. *Richardson*, 1 A. & E. 508; *S. C.* 3 N. & M. 748; and see *Best* v. *Osborne*, 2 C. & P. 74; *Hinchcliffe* v. *Barwick*, L. R., 5 Ex. D. 177; 49 L. J., Ex. 495; 42 L. T., N. S. 492.
(*g*) L. R., 1 Q. B. 463; 35 L. J., Q. B. 142; 14 L. T., N. S. 477.

time within that specified in the Warranty, even though he has notice of the breach of Warranty before he removes the Horse, and the Horse, through an accident, becomes depreciated in value (*h*).

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 (*i*); or expressly state what he warrants: as where a Mare was warranted to be "a good hunter, and to have one eye" (*k*). 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.

A Written Warranty.

The buyer should always take care to distinguish between a Warranty and a Representation (*l*); 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 Special Agreement.

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 (*m*).

Form of Warranty.

The following form of Receipt and Warranty will be found, for general purposes, short and comprehensive:—

"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.
£50. R. F."

Effect of a Written Warranty.

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

(*h*) *Head* v. *Tattersall*, L. R., 7 Ex. 7; 41 L. J., Ex. 4; 25 L. T., N. S. 631; see also *Hinchcliffe* v. *Barwick*, L. R., 5 Ex. D. 177; 49 L. J., Ex. 495; 42 L. T., N. S. 492; *Elphick* v. *Barnes*, L. R., 5 C. P. D. 387; 49 L. J., C. P. 698; 29 W. R. 139.

(*i*) *Jones* v. *Cowley*, 4 B. & C. 445; *S. C.* 6 D. & R. 533; and *Hemming* v. *Parry*, 6 C. & P. 580.

(*k*) *Higgs* v. *Thrale*, before Chief Baron Pollock, Feb. 18, 1850.

(*l*) See post, p. 138.

(*m*) *Payne* v. *Whale*, 7 East, 274.

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 (*n*).

Warranty may be gathered from Letters.

A Warranty may be gathered from Letters which have passed between the parties. But where it is sought to import 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 (*o*).

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 (*p*).

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 (*q*). 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 (*q*).

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 (*r*).

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 (*s*). 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

(*n*) Per Abbott, C. J., *Kain* v. *Old*, 2 B. & C. 627.

(*o*) *Stucley* v. *Bailey*, 31 L. J., Ex. 483.

(*p*) Per Gibbs, J., *Pickering* v. *Dawson*, 4 Taunt. 785.

(*q*) *Dickson* v. *Zizinia*, 10 C. B. 602; see also *Anthony* v. *Halstead*, 37 L. T., N. S. 433.

(*r*) See Story on Sales, 191; *Symonds* v. *Carr*, 1 Camp. 361.

(*s*) *Eden* v. *Parkinson*, Doug. 732 a.

sound two years hence (*t*). 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*" (*u*).

Warranting a future Event.

There is no doubt, however, that a *Future Event* may be warranted if there be an *express* undertaking to that effect (*x*); 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 (*y*). 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 (*z*).

Buying for a particular Purpose.

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* (*a*) for which they are required, but only that they must be merchantable, that is to say, fit for some purpose (*b*).

Must be reasonably fit for the 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 (*c*). 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

(*t*) 3 Bla. Com. 165.
(*u*) Year Book, 9 Edw. 4, p. 6.
(*x*) *Eden* v. *Parkinson*, Doug. 732a.
(*y*) *Pasley* v. *Freeman*, 3 T. R. 59.
(*z*) *Liddard* v. *Kain*, 9 Moore, 356; *S. C.* 2 Bing. 183.
(*a*) Per Parke, B., *Sutton* v. *Temple*, 12 M. & W. 55.
(*b*) Per Best, C. J., *Jones* v. *Bright*, 5 Bing. 544.
(*c*) Per Abbott, C. J., *Gray* v. *Cox*, 4 B. & C. 115.

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 (*c*).

A Carriage Horse.

And in *Chanter* v. *Hopkins* (*d*), Mr. Baron Parke 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 his sending that Horse" (*e*).

Latent undiscoverable defects.

Nor is there any exception as to latent undiscoverable defects. In *Randall* v. *Newson* (*f*), the plaintiff ordered and bought of the defendant, a coach-builder, 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 (*g*) 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.* (*h*) 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.* (*i*), 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

(*c*) Per Best, C. J., *Jones* v. *Bright*, 5 Bing. 544; *S. C.* 3 M. & P. 162; see also *Jones* v. *Just*, L. R., 3 Q. B. 197; 37 L. J., Q. B. 89; 18 L. T., N. S. 208.

(*d*) 4 M. & W. 406.

(*e*) *Chanter* v. *Hopkins*, 4 M. & W. 406. See also *Chalmers* v. *Harding*, 17 L. T., N. S. 571.

(*f*) L. R., 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T., N. S. 164.

(*g*) Blackburn and Lush, JJ.

(*h*) L. R., 4 Q. B. 379.

(*i*) 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.

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; the word *good* must mean "good" in all particulars (*k*). 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 (*l*). 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 (*m*).

Unfitness must be clearly proved.

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 (*n*). 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" (*o*).

General rule.

The general rule, then, is this:—Where the purchase is of a defined and well-known article, the vendor performs his part of the contract by sending that article, and it is the vendee's concern, whether it answers the purpose for which he wanted to use it or not. And if a man purchase goods of a tradesman, without in any way

(*k*) *Coltherd* v. *Puncheon*, 2 D. & R. 10.
(*l*) *Smith* v. *Parsons*, 8 C. & P. 199.
(*m*) *Anthony* v. *Halstead*, 37 L. T., N. S. 433.
(*n*) *Geddes* v. *Pennington*, 5 Dow, 164.
(*o*) *Buckingham* v. *Reeve*, N. P. Ex. Dec. 1, 1857.

relying upon the skill and judgment of the vendor, the vendor is not responsible for their turning out contrary to his expectation. But if the tradesman is informed at the time that the order is given of the purpose for which the article is wanted, and the buyer relies upon the seller's judgment, the seller impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required (*p*); and it seems that the liability of the vendor in this latter case is the same, whether he be also the manufacturer of the article or not, and whether the vendee has or has not had an opportunity of inspecting the goods purchased; provided the defect be one which cannot be discovered on inspection, but only on trial (*p*).

Warrantor's liability.

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 (*q*); and the seller will be liable for any latent defect, according to the old law concerning Warranties (*r*), that is, as Lord Mansfield laid down, for all *faults*, known or unknown to the seller (*s*), inconsistent with the Warranty given.

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 (*t*). 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" (*u*).

SALE AND WARRANTY BY AN AGENT.

An Agent cannot delegate his Authority.

An Agent is always incompetent, without special authority for that purpose, to appoint another person to act in

(*p*) Chit. on Contr., 11th ed. 417; *Bigge* v. *Parkinson*, 31 L. J., Ex. 301, 303; *Mallan* v. *Radloff*, 5 N. R. 54.

(*q*) Archbold's N. P. 40; *Fielder* v. *Starkin*, 1 H. Bla. 17.

(*r*) *Parkinson* v. *Lee*, 2 East, 321.

(*s*) *Stuart* v. *Wilkins*, Doug. 19.

(*t*) *Steward* v. *Coesvelt*, 1 C. & P. 23.

(*u*) *Geddes* v. *Pennington*, 5 Dow, 163.

his stead, the Maxim of the law being, *Delegatus non potest delegare* (*x*).

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 (*y*).

Agency determines 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 (*z*).

Difference between a remunerated and an unremunerated 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 (*a*).

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 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 (*b*).

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 (*c*). 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 (*d*).

Where he cannot be sued on the Contract. 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

(*x*) 2 Steph. Com. 59.
(*y*) *Thompson* v. *Davenport*, 9 B. & C. 78.
(*z*) 2 Steph. Com. 57.
(*a*) See Smith's Merc. Law, 112; *Balfe* v. *West*, 22 L. J., C. P. 176.
(*b*) Story's Commentaries, 226; *Harper* v. *Williams*, 4 Q. B. 232.
(*c*) *Higgins* v. *Senior*, 8 M. & W. 845.
(*d*) *Kelner* v. *Baxter*, L. R., 2 C. P. 174; 36 L. J., C. P. 94.

Principal liable, the Agent cannot be sued upon the contract (*e*).

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 (*e*). 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 (*f*); but the Agent must be acting within the scope of his authority and in the course of his employment (*g*). Principal answerable for his 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 (*h*). Misrepresentation collateral to contract.

A master sent his Servant with a Horse to a Fair, at 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 proper execution of his duty, and for which the master was liable, upon proof merely of the Servant's knowledge of the disease (*i*). Damage caused by his Negligence.

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 with it, he may afterwards recover the amount from the real Prin- Undisclosed Principal.

(*e*) *Lewis* v. *Nicholson*, 21 L. J., Q. B. 316.

(*f*) See per Parke, B., *Murray* v. *Mann*, 2 Ex. 539; *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J., P. C. 31.

(*g*) *Coleman* v. *Riches*, 16 C. B. 104; *Udell* v. *Atherton*, 7 H. & N. 172.

(*h*) *Barwick* v. *English Joint Stock Bank*, L. R., 2 Ex. 259, 265; *Swift* v. *Winterbotham*, L. R., 8 Q. B. 244, 254; *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 394, 411, 412; 43 L. J., P. C. 31; Chit. Contr. 10th ed. 627; and see *Swire* v. *Francis*, L. R., 3 App. Cas. 106; 47 L. J., P. C. 18; *Weir* v. *Barnett*, L. R., 3 Ex. D. 32.

(*i*) *Baird* v. *Graham*, 14 Court of Sess. (Sco.) 615.

cipal; 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 (*k*). 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 (*l*). 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* (*m*) and *Paterson* v. *Gandasequi* (*n*) 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" (*o*). 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 (*o*). 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 (*p*). 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 (*q*). 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 (*r*).

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 com-

(*k*) *Thompson* v. *Davenport*, 9 B. & C. 86, per Lord Tenterden, C. J.

(*l*) *Armstrong* v. *Stokes*, L. R., 7 Q. B. 598; 41 L. J., Q. B. 253; 26 L. T., N. S. 872; and see Evans on Agency, 442.

(*m*) *Addison* v. *Gandasequi*, 4 Taunt. 574.

(*n*) *Paterson* v. *Gandasequi*, 15 East, 69.

(*o*) *Thompson* v. *Davenport*, 9 B. & C. 86.

(*p*) *Smethurst* v. *Mitchell*, 28 L. J., Q. B. 241.

(*q*) *Calder* v. *Dobell*, L. R., 6 C. P. (Ex. Ch.) 486; 40 L. J., C. P. 224.

(*r*) *Curtis* v. *Williamson*, L. R., 10 Q. B. 57, 59; 44 L. J., Q. B. 27; 31 L. T., N. S. 678.

petent for the party with whom he contracts to show that, although described as Agent, he is in fact the Principal (*s*). 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 by Bowen, J., on further consideration, 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 (*t*).

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 (*u*). 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" (*x*). Thus, in *Assumpsit* on a charter-party executed, not by the plaintiff, but by a third person, who in the contract described himself as "owner" of the ship, it was held, that evidence was not admissible to show that such person contracted merely as the plaintiff's Agent (*y*).

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 (*z*).

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

(*s*) *Carr* v. *Jackson*, 7 Ex. 382. See also *Paice* v. *Walker*, L. R., 5 Ex. 173; 39 L. J., Ex. 109; 22 L. T., N. S. 547.

(*t*) *Irvine & Co.* v. *Watson & Sons*, L. R., 5 Q. B. D. 102; 49 L. J., Q. B. 239; 41 L. T., N. S. 51—Bowen, J. Affirmed W. N. 1880, 117.

(*u*) *Humble* v. *Hunter*, 12 Q. B. 315.

(*x*) *Lucas* v. *De la Cour*, 1 M. & S. 249.

(*y*) *Humble* v. *Hunter*, 12 Q. B. 310.

(*z*) *Sykes* v. *Giles*, 5 M. & W. 650.

to him (*a*). Therefore the Servant of a private owner 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 (*b*).

It is still an undecided question whether a special Agent entrusted with the sale of a Horse in a fair or other public mart, where stranger meets stranger, and the usual course of business is for the person in possession of the Horse, and appearing to be the owner, to have all the powers of an owner in respect of the sale, is or is not authorized to bind his master by a Warranty (*c*).

Warranty by a Servant as general Agent.

But wherever 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* (*d*). 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. And where a Warranty has been so given, Lord Ellenborough said, "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

(*a*) Chit. Contr. 11th Ed. 198.
(*b*) *Miller* v. *Lawton*, 15 C. B., N. S. 834.
(*c*) *Brady* v. *Todd*, 9 C. B., N. S. 604. See also *Miller* v. *Lawton*, 15 C. B., N. S. 834.
(*d*) Per M. of R., *Collen* v. *Gardner*, 21 Beav. 543.

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 powers to transact the business with which he is entrusted in the common and usual manner" (*e*).

The case of *Howard* v. *Sheward* (*f*) 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 in March, 1866, 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 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

(*e*) *Alexander* v. *Gibson*, 2 Camp. 555. It appears to be taken for granted in Chit. Contr. 7th ed. 201, that the master in this case was a Horsedealer, but it is not so expressed in the Report. If the master were not a Horsedealer, *Alexander* v. *Gibson* must be taken to be overruled by *Brady* v. *Todd* (*c*), ante, and, therefore, such a reading of the case does not affect the statement of the law in the text.

(*f*) L. R., 2 C. P. 148; 36 L. J., C. P. 42.

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."

Evidence of usage not to warrant.

It was also decided in *Howard* v. *Sheward* (*f*) 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.

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 (*g*). 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" (*h*).

Warranty by a Servant forbid to give one.

If the Servant of a *Horsedealer*, with express directions not to warrant do warrant, the master is bound; because

(*f*) L. R., 2 C. P. 148.

(*g*) Per Erskine, J., *Allen* v. *Denstone*, 8 C. & P. 760; *Peto* v. *Hague*, 5 Esp. 133; 1 Tayl. Evid. 4th ed. 526.

(*h*) *Helyer* v. *Hawke*, 5 Esp. 72.

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 (*i*). 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 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 (*k*). And 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 (*l*).

Warranty by a Stranger forbid to give one.

But 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 (*m*).

Master unwilling to stand by his Servant's Warranty.

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 (*m*). 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 (*n*).

(*i*) Per Bayley, J., *Pickering* v. *Busk*, 15 East, 45; *Brady* v. *Todd*, 9 C. B., N. S. 604.

(*k*) Per Ashurst, J., *Fenn* v. *Harrison*, 3 T. R. 760; see also *Howard* v. *Sheward*, L. R., 2 C. P. 148.

(*l*) *Best* v. *Osborne*, 2 C. & P. 74.

(*m*) Per Ashurst, J., *Fenn* v. *Harrison*, 3 T. R. 761; and *Scotland* (*Bank*) v. *Watson*, 1 Dow, 45.

(*n*) *Cornfoot* v. *Fowke*, 6 M. & W. 381.

Rule as to a Servant binding his Master.

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 have been expressly or impliedly, *i. e.*, by implication of law, granted by the master.

Warranty by a Person entrusted to deliver.

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 (*o*). 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 (*p*).

Agent employed 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 (*q*).

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, as 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

(*o*) *Woodin* v. *Burford*, 2 Cr. & M. 391; *S. C.* 4 Tyrw. 264.

(*p*) *Strode* v. *Dyson*, 1 Smith, 400.

(*q*) *Jordan* v. *Norton*, 14 M. & W. 155.

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 (*r*).

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 perfect be *minus* an Eye or a Tail (*s*), or a House warranted to be in perfect repair, be without Roof or Windows (*t*), 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" (*u*).

In what they consist.

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.

How far the Loss of an Eye is Patent.

Although the loss of an Eye is a breach of a Warranty of Soundness (*x*), 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 *conusance*, and such Warranty or affirmation is not material nor to be regarded" (*y*). But this seems to assume that the Eye has entirely *disappeared*, or has been so *obviously* damaged, that it *must* lie in the *conusance* of the buyer; and nothing is said with regard to a loss of sight, where there is little *apparent* injury to the Eyes; for a Horse may appear to the majority of people

(*r*) *Price* v. *Morgan*, 2 M. & W. 55.

(*s*) 2 Bla. Com. 165; and per Hank, J., Year Book, 13 Hen. 4, p. 1.

(*t*) *Dyer* v. *Hargrave*, 10 Vesey, 507.

(*u*) *Bailey* v. *Merrell*, 3 Bulst. 95.

(*x*) *Butterfield* v. *Burroughs*, 1 Salk. 211.

(*y*) Year Book, 13 Hen. 4, p. 1; *Bayley* v. *Merrell*, Cro. Eliz. 389.

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*" (*z*), which is a Palsy of the *optic nerve* or *retina*, and being difficult of detection can certainly never be considered a *Patent defect*.

"Bright Eye."

This point seems to have been taken in an old case, where it is said, "*Lou jeo vend chivall que ad null* Oculus *la null action gist; autermont lou il ad un counterfeit faux 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*" (*a*). 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. Because, putting a false Eye into a Horse is very far in advance of the sharpest practices of the present day, or of any former period.

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" (*b*).

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 (*c*).

Where Defects are discussed.

Where the buyer observes some Defects, ards discussed by both parties before sale, and a se, pay for it, given; if an action is afterwards brought for to receive it the Warranty, it is a question for the Jury to the Horse is sound in the terms of the Warr orse may be those manifest and visible Defects which were at, as in the the parties. And then if he is sound with these on, that in they must consider whether the effect which mi gony to the duced by any of those Defects was contemplat defendant hase it on

(*z*) Gutta serena, ante, p. 91.

(*a*) *Southerne* v. *Howe*, 2 Rol. Rep. 5.

(*b*) *Holyday* v. *Morga* Q. B. 9. 14 M. & W.

(*c*) *Margetson* v. *Wrig* P. 610.

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 (*d*) and a Splint (*e*) on the off-fore leg, were discussed by the parties at the time of the bargain, and after that discussion, the Warranty in question was given. The Horse soon became lame and afterwards broke done. On the case being tried, the Jury returned a verdict for the plaintiff.

Chief Justice Tindal, 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 and he must to the Jury to say whether the Horse was fit which lies in purposes. His direction would have been affirmation is misapprehension, if he had left it to them in this seems to the Warranty to say whether the Horse was, or has been of the bargain, sound wind and limb, saving *conusance* of est and visible defects which were known to a loss of si; the Jury might then have considered whether Eyes; fact which might be produced by the Splint was plated or not" (*f*).

hen the case was again tried the Jury found for the

(*d*) Crib-biting, ante, p. 84.
(*e*) Splint, ante, p. 103.
(*f*) *Margetson* v. *Wright*, 5 M. & P. 610.

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 (*g*).

In a more recent case, in which the defendant sold a Horse to the plaintiff with a generally 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 rule is asked for on the ground that when you point out a Splint to the 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* (*g*). 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 (*h*).

Conclusion to be drawn from the cases.

The conclusion then to be drawn from the recent 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,

(*g*) *Margetson* v. *Wright*, 1 M. & Scc. 627.

(*h*) *Smith* v. *O'Brien*, 11 L. T., N. S. 346.

an Unsoundness. And as Mr. Baron Bramwell'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 (*i*), 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 warranted sound had turned out "*Shoulder-tied*," it was contended that an action would not lie, because the defect was visible. But Sir Henry Montague, C. J., said, "This was the ground, that the plaintiff wished to have ridden the Horse, but the defendant said, 'I will warrant him sound.'" And Noy, J., said, "That is the distinction, where the Defect is visible" (*k*).

Purchase without Inspection.

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 (*l*). 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" (*m*). 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 (*n*).

(*i*) *Smith* v. *O'Brien*, 11 L. T., N. S. 346.

(*k*) *Dorrington* v. *Edwards*, 2 Rol. 188.

(*l*) *Gardiner* v. *Gray*, 4 Camp. 145.

(*m*) Year Book, 13 Hen. 4, p. 1.

(*n*) See *Gardiner* v. *Gray*, 4 Camp. 145. See also *Jones* v. *Just*, L. R., 3 Q. B. 197; 37 L. J., Q. B. 89; 18 L. T., N. S. 208.

CHAPTER VI.

WARRANTY DISTINGUISHED FROM REPRESENTATION.

WARRANTY DISTINGUISHED FROM REPRESENTATION.
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WARRANTY DISTINGUISHED FROM REPRESENTATION.

Representation 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 Representation.

The distinction between a *Warranty* and *Representation* is pointed out in a note to the case of *Goram* v. *Sweeting* (*c*),

(*a*) Smith's Leading Cases, 7th ed. 174; *Power* v. *Barham*, 4 A. & E. 473; *Shephard* v. *Kain*, 5 B. & Ald. 240; *Freeman* v. *Baker*, 2 N. & M. 446.

(*b*) *Chandelor* v. *Lopus*, Cro. Jac. 4; Rol. Abr. 101.

(*c*) *Goram* v. *Sweeting*, 2 Wms. Saund. 200 c; and see per Martin, B., *Benham* v. *United Guarantee Co.*, 7 Ex. 753.

and was also laid down by Chief Justice Best, 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." Chief Justice Best said, "The question is, whether I and the 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 (*e*).

Where a Representation amounts to a Warranty.

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,

(*e*) *Salmon* v. *Ward*, 2 C. & P. 211; and see *Cave* v. *Coleman*, 3 M. & Ry. 3.

and ended when he was knocked down to the highest bidder (*f*).

And in the case of *Chalmers* v. *Harding* (*g*) the plaintiff, a farmer, having by letter inquired of the defendant, an Agent for the sale of agricultural machines, the lowest price for which he could furnish a corn machine, the defendant replied by letter as follows:—"I happen to have a very good second-hand Wood's Reaper, which I can offer you at 16*l.* 16*s.* It belonged to a gentleman who has retired from farming; he paid me 35*l.* for it a little time ago; it has only cut fifty acres, and it is not one penny the worse,—in fact, you would hardly know it from a new one. I enclose drawings. I have shown more than thirty of these machines in this part, all of which are doing well, so that I can confidently recommend it. I do not recommend it for cutting meadow grass, but it will cut wheat, barley, oats, clover, French grass, &c., or any grain crop efficiently." In an action to recover damages for breach of Warranty, the machine having failed to perform the desired work, it was held that the letter did not amount to a Warranty on a contract that the particular machine would do the specified work, but was a mere representation and a description of Wood's Patent Reapers generally.

Question to be put to the Jury.

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* (*h*), 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.

(*f*) *Hopkins* v. *Tanqueray*, 23 L. J., C. P. 162.
(*g*) 17 L. T., N. S. 571.
(*h*) *Foster* v. *Smith*, 18 C. B. 156.

Rule as to Warranty and Representation.

The Judges in the Exchequer Chamber have 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 most recent decisions, that they thought it unnecessary to bring them forward in review. The judgment was pronounced by Chief Justice Tindal, 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*" (*i*).

Mere expression of opinion.

In *Jendwine* v. *Slade* (*k*), where two pictures were sold, described in a Catalogue as one by Claude Loraine (*l*), and the other by Teniers (*m*), 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.

Selling according to Pedigree.

And 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 (*n*).

Partly a Warranty and partly a Representation.

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, Chief Justice Dallas held that the *Warranty* was confined to the *Soundness*, and the statement that he was got by *Cheshire Cheese* was a mere *Representation* (*o*).

(*i*) *Ormrod* v. *Huth*, 14 M. & W. 664.

(*k*) *Jendwine* v. *Slade*, 1 Esp. 572.

(*l*) Claude Loraine died in 1682.

(*m*) Teniers died in 1694.

(*n*) *Dunlop* v. *Wright*, 1 Peake, 197.

(*o*) *Dickenson* v. *Gapp*, H. T. 1821, cited in *Budd* v. *Fairmanner*, 1 M. & Sc. 78.

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, Chief Justice Tindal 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 Mr. Justice Alderson 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" (*p*). 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 (*q*).

So, also, in the case of *Anthony* v. *Halstead* (*r*), 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;* Chief Justice Tindal, in summing up, said, "The question is, whether you think that a *Warranty* was in fact given, and that it was

(*p*) *Budd* v. *Fairmanner*, 5 C. & P. 78.

(*q*) *Richardson* v. *Brown*, 8 Moore, 338; *S. C.* 1 Bing. 344.

(*r*) 37 L. T., N. S. 433.

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 (*s*). 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 (*t*) is not a very old painter" (*u*).

Percival v. *Oldacre*.

So, too, in the case of *Percival* v. *Oldacre* (*x*) 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 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 Mr. Justice Byles, 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.

Judgment in *Behn* v. *Burness*.

In the case of *Behn* v. *Burness* (*y*) Mr. Justice Williams, in delivering the judgment of the Exchequer Chamber, gave the following lucid exposition of the legal characteristics

(*s*) *De Schwanberg* v. *Buchanan*, 5 C. & P. 343.

(*t*) Canaletti died in 1768, and Claude Loraine and Teniers (the younger), mentioned in *Jendwine* v. *Slade*, died, the former in 1682, the latter in 1694.

(*u*) *Power* v. *Barham*, 4 A. & E. 473.

(*x*) *Percival* v. *Oldacre*, N. P. C. P. Jan. 18, 1865.

(*y*) *Behn* v. *Burness*, 32 L. J., Q. B. 204, recognized and approved by Erle, C. J., *Mallan* v. *Radloff*, 5 N. R. 54.

of Representation as distinguished from Warranty. He said, "Properly speaking, a representation is a state- "ment or assertion made by one party to the other, be- "fore or at the time of the contract, of some matter or "circumstance relating to it. Although it is some thing "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 fraudu- "lently, either by reason of its being made with a know- "ledge of its untruth, or by reason of its being made dis- "honestly, or with a reckless ignorance whether it was "true or untrue (*z*). If this be so, it is difficult to un- "derstand the distinction which is to be found in some "of the treatises, and is in some degree sanctioned by "judicial authority (*a*), that a representation, if it differs "from the truth to an unreasonable extent, may affect "the validity of the contract. Where, indeed, a repre- "sentation is so gross as to amount to sufficient evidence "of fraud, it is obvious that the contract on that ground "is voidable. Although representations 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.

"But with respect to statements in a contract descrip- "tive of the subject-matter of it, or of some material "incident thereof, the true doctrine established by prin- "ciple as well as by authority appears to be, generally "speaking, that if such descriptive statement was in- "tended to be a substantive part of the contract (*b*), it "is to be regarded as a Warranty, that is to say, a "condition on the failure or nonperformance of which "the other may, if he be so minded, repudiate the con- "tract *in toto*, and so be relieved from performing his

(*z*) *Elliott* v. *Von Glehen*, 18 L. J., Q. B. 221; *Wheelton* v. *Hardisty*, 27 L. J., Q. B. 241.

(*a*) *Barker* v. *Windle*, 6 El. & Bl. 675, 680.

(*b*) *Foster* v. *Smith*, 18 C. B. 156.

" part of it (*c*), provided it has not been partially exe-
" cuted 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 cha-
" racter 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 (*d*), 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 per-
" formance 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 con-
" tract has not been performed. Still, if he receives the
" thing sold, and has the enjoyment of it, he cannot
" afterwards treat the descriptive statement as a con-
" dition, but only as an agreement, for the breach of
" which he may bring an action to recover damages."

Counterfeit trade marks.

An action lies by a manufacturer of goods against a person who affixes to his own goods the known and accustomed mark of the former, and sells them upon a fraudulent representation that they are of the manufacture which such mark would denote them to be (*e*); and such action is maintainable without any allegation or proof of special damage (*f*). And now by the Merchandize Marks Act, 1862 (*g*), a sale of an article bearing a trademark or description, imports a warranty of such trademark or description, unless the contrary is expressed in writing.

(*c*) *Wheelton* v. *Hardisty*, 27 L. J., Q. B. 241.
(*d*) *Bannerman* v. *White*, 10 C. B., N. S. 844.
(*e*) *Rodgers* v. *Nowill*, 5 C. B. 109.
(*f*) *Blofield* v. *Payne*, 4 B. & Ad. 410.
(*g*) 25 & 26 Vict. c. 88, ss. 19, 20.

CHAPTER VII.

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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 aiding 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 subquently 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 Mr. Justice Cresswell, 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*).

(*a*) See per Law, Recorder of London, *Reg.* v. *Bailey*, 4 Cox, C. C. 397.

(*b*) *Pasley* v. *Freeman*, 3 T. R. 58; *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.

(*g*) *Reg.* v. *Read*, 6 Cox, C. C. 135.

Conspiring to obtain money by false pretences.

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 Horsedealer, 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 induce a creditor to forego his claim.

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 39*l.*; 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 27*l.*, to induce S. to accept 27*l.*, instead of the agreed-on price of 39*l.*, and thereby to defraud S. of 12*l.* (*i*).

Where only one person cheats, an action lies.

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 (*j*). 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 (*k*).

Chandelor v. *Lopus*.

Chandelor v. *Lopus* (*l*) is a well-known case on the subject of *Fraudulent Representation*. It was an action *on 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 every one 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."

(*h*) *Reg.* v. *Kenrick*, 5 Q. B. 63.
(*i*) *R.* v. *Carlisle*, 23 L. J., M.C. 109.
(*j*) *Rex* v. *Wheatly*, 2 Burr. 1128.
(*k*) *Pasley* v. *Freeman*, 3 T. R. 58.
(*l*) *Chandelor* v. *Lopus*, Cro. Jac. 4.

But the opinion of Anderson is now held to have been the 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 (*m*):—"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 (*n*). 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 been disputed, *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" (*o*).

Remarks on that case.

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

Form of action.

(*m*) 1 Smith's Leading Cases, 7th ed. 174.

(*n*) See *Power* v. *Barham*, 4 A. & E. 473; *Shepherd* v. *Kain*, 5 B. & Ald. 240; *Freeman* v. *Baker*, 2 N. & M. 446.

(*o*) *Dunlop* v. *Waugh*, Peake, 223; *Jendwine* v. *Slade*, 2 Esp. 572; *Dobell* v. *Stevens*, 3 B. & C. 625; *Fletcher* v. *Bowsher*, 2 Stark. N. P. C. 561.

misrepresentation or deceit (*p*). Because such action lies where a man does any Deceit to the damage of another (*q*).

Foundation of the 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 (*r*).

In what Fraud consists. 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 (*s*).

There must be moral Fraud. To support the action there must always be proof of *Moral Fraud* (*t*): 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 (*u*).

Effect of 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 had been employed, the contract would never have been made (*v*).

How the question of Fraud is to be decided. The facts to constitute Fraud must be found by the 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 (*w*).

Falsehood 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 (*x*), 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 (*y*).

(*p*) *Rex* v. *Wheatly*, 2 Burr. 1128.

(*q*) Com. Dig. tit. Action upon the Case for a Deceit, A. 1.

(*r*) Per Croke, J., *Bailey* v. *Merrell*, 3 Bulst. 95. See *Barry* v. *Croskey*, 2 J. & H. 21.

(*s*) Chit. Contr. 10th ed. 630.

(*t*) Per Parke, B., *Taylor* v. *Ashton*, 11 M. & W. 413; per Lord Wensleydale, *Smith* v. *Kay*, 7 H. L. Cas. 775.

(*u*) *Springwell* v. *Allen*, Aleyn, 91, cited in *Williamson* v. *Allison*, 2 East, 448.

(*v*) Per Lord Wensleydale, *Smith* v. *Kay*, 7 H. L. Cas. 775; per Byles, J., *Holson* v. *Brown*, 9 C. B., N. S. 445.

(*w*) See per Platt, B., *Murray* v. *Mann*, 2 Ex. 539; *Milne* v. *Marwood*, 15 C. B. 778; Broom's Maxims, 4th ed, 758, 759; *Polwill* v. *Walter*, 3 B. & Ad. 114.

(*x*) *Barley* v. *Walford*, 9 Q. B. 197.

(*y*) *Longmead* v. *Holliday*, 6 Ex. 766; and see *Levy* v. *Langridge*, 4 M. & W. 337.

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 (*z*).

Presumption that person defrauded was influenced by the Misrepresentation.

It it 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" (*a*). 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* (*b*), 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 made to appear that in entering into such contract he exercised a due degree of caution, because *Vigilantibus non dormientibus succurrunt jura* (*c*).

Not Fraud to suppress what there is no Duty to communicate.

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 (*d*).

(*z*) Per Buller, J., *Pasley* v. *Freeman*, 3 T. R. 56; and *Mummery* v. *Paul*, 1 C. B. 322.

(*a*) *Watson* v. *Earl of Charlmont*, 12 Q. B. 862.

(*b*) *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. 100; and in *R.* v. *Saddlers' Co.*, per Blackburn, J., 32 L. J., Q. B. 343.

(*c*) See Chit. Contr. 10th ed. 630; *Shrewsbury* v. *Blount*, 2 Scott, N. R. 588.

(*d*) *Horsfall* v. *Thomas*, 1 H. & C. 90; *Smith* v. *Hughes*, L. R., 6

Requisites to an action for False Representation.

To support an action for a false representation or deceit three circumstances must combine. The representation must be proved, *first*, to be false in fact; *secondly*, to be false, or not to be true, to the knowledge and belief of the person making it; and *thirdly*, that it was the false representation which gave rise to the contracting of the other party (*e*).

Or on Breach of Warranty.

But to support an action *ex contractu*, for a breach of Warranty, it is not necessary that all these three circumstances should concur, in order to ground an action for damages at law or a claim for relief in a Court of Equity; 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 (*f*).

Caveat Emptor.

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 (*g*).

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 (*h*).

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,"

(*e*) *Attwood* v. *Small*, 6 C. & F. 444, 445; *Behn* v. *Kemble*, 7 C. B., N. S. 260.

(*f*) *Attwood* v. *Small*, 6 C. & F. 444, 445; Broom's Maxims, 4th ed. 756.

(*g*) *Attwood* v. *Small*, 6 C. & F. 232.

(*h*) 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.

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 appeared 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 (*i*).

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 (*k*).

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 *mere* folly and weakness, or want of judgment, will not defeat a contract, even in Equity (*l*).

Representation known to be untrue.

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 (*m*); 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 (*n*).

Made before a Sale by Auction.

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

(*i*) *Harvey* v. *Young*, Yelv. 20; cited per Grose, J., *Pasley* v. *Freeman*, 3 T. R. 55.

(*k*) *Feret* 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.

(*l*) *Milnes* v. *Cowley*, 8 Price, 620; *Prebble* v. *Boyhurst*, 1 Swanst. 329; *Willan* v. *Carter*, before Martin, B., Lancaster Spr. Ass. 1852.

(*m*) Per Lord Ellenborough, C. J., *Vernon* v. *Keys*, 12 East, 637.

(*n*) *Ferrier* v. *Peacock*, 2 F. & F. 717.

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 (*o*).

Made by a bidder at an 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's 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 (*p*).

Representation not known to be true.

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* (*q*); because there may undoubtedly be a *fraudulent* Representation, if made dishonestly, of 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* (*r*).

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 (*s*).

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 (*t*).

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 (*u*).

(*o*) *Bardell* v. *Spinks*, 2 C. & K. 646. But see *Hopkins* v. *Tanqueray*, 23 L. J., C. P. 162, ante, p. 140.

(*p*) *Fuller* v. *Abrahams*, 3 B. & Bing. 116.

(*q*) Per Lord Mansfield, C. J., *Schneider* v. *Heath*, 3 Camp. 508.

(*r*) Per Parke, B., *Taylor* v. *Ashton*, 11 M. & W. 413; and per Lord Cairns in *Reese River Silver Mining Co.* v. *Smith*, L. R., 4 H. L. 64, 69; 39 L. J., Ch. 849.

(*s*) *Shrewsbury* v. *Blount*, 2 Scott, N. R. 588.

(*t*) *Hill* v. *Gray*, 1 Stark. N. P. C. 434.

(*u*) Per Lord Ellenborough, C. J., *Vernon* v. *Keys*, 12 East, 367.

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 180*l.* 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 (*v*). Representation through 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: Mr. Baron Alderson 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 from the charge of having made a Fraudulent Representation on the occasion of the sale." The Jury found a verdict for the plaintiff (*w*). Representation by a third party.

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 (*x*). 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 Representation as to Credit.

(*v*) *Pilmore* v. *Hood*, 5 Bing. N. C. 97; see also *Swift* v. *Winterbottom*, L. R., 8 Q. B. 244, 253; 42 L. J., Q. B. 111; *Swift* v. *Jewsbury*, L. R., 9 Q. B. 301; 43 L. J., Q. B. 56; *Richardson* v. *Sylvester*, L. R., 9 Q. B. 34; 43 L. J., Q. B. 1.

(*w*) *Mash* v. *Densham*, 1 M. & Rob. 442.

(*x*) *Shrewsbury* v. *Blount*, 2 M. & G. 475; *S. C.* 2 Scott, N. R. 588; *Haycraft* v. *Creasy*, 2 East, 92; *Ormrod* v. *Huth*, 14 M. & W. 664.

[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 (*y*). And one partner signing in the name of and by the express authority of his firm will make himself only liable (*z*).

Sale of goods "with all faults" excludes latent defects.

It is now well settled (*a*) 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.

Unless there be an express Warranty.

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 "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 (*b*). 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 (*c*).

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 (*d*).

Or Fraud is

However, Lord Ellenborough overruled this decision,

(*y*) *Swift* v. *Jewsbury*, L. R., 9 Q. B. 301, Ex. Ch., reversing *S. C. sub nom. Swift* v. *Winterbottom*, L. R., 8 Q. B. 244.

(*z*) *Mason* v. *Williams*, 28 L. T., N. S. 232, February, 1873.

(*a*) Chit. Contr. 10th ed. 418.

(*b*) *Shepherd* v. *Kain*, 5 B. & Ald. 240.

(*c*) *Taylor* v. *Bullen*, 5 Ex. 779.

(*d*) *Mellish* v. *Motteux*, Peak. Cas. 115.

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 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'" (*e*).

used to conceal them.

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 (*f*). But where, on the sale of a House in South Audley Street, the seller being conscious of a *Defect* in the main wall, plastered it up and papered it over; it was held that as the seller had *expressly concealed* it, the purchaser might recover (*g*).

It would appear from this case, 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.

(*e*) *Baglehole* v. *Walters*, 3 Camp. 156.

(*f*) *Pickering* v. *Dowson*, 4 Taunt. 784.

(*g*) Case cited by Gibbs, J., in *Pickering* v. *Dowson*, 4 Taunt. 785.

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 (*x*). 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 defendants, for there was never any sale to A., or any contract between *him* and the plaintiffs (*y*).

Contract with intent to cheat the seller.

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 (*z*).

Preconceived design of not paying for goods.

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 (*a*). Thus where some Sheep had been bought under such circumstances, Chief Justice Abbott 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 (*b*).

Question for the Jury.

Whether the buyer has obtained possession of the goods with such a preconceived design, is a question for the Jury (*b*).

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 (*c*).

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 (*d*).

(*x*) *Kingsford* v. *Merry*, 26 L. J., Ex. 83.

(*y*) *Higgons* v. *Barton*, 26 L. J., Ex. 342.

(*z*) *Gibson* v. *Carruthers*, 8 M. & W. 346.

(*a*) See *Irving* v. *Motley*, 7 Bing. 551; *Load* v. *Green*, 15 M. & W. 221; *Ferguson* v. *Carrington*, 9 B. & C. 59; see Chit. Contr. 11th ed. 382.

(*b*) *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 521.

(*c*) *Ferguson* v. *Carrington*, 9 B. & C. 59; *S. C.* 3 C. & P. 457.

(*d*) *Holmes* v. *Sixsmith*, 7 Ex. 802; *Reg.* v. *Gompertz*, 9 Q. B. 824.

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 (*e*). Payment by a Cheque which is dishonoured.

The contract of an infant, however fair and conducive to his interests it may be, is not binding on him, unless it be for necessaries. By the Common Law, however, the contracts of an infant, other than for necessaries, 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 necessaries), 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" (*f*). 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; and that the other party believing this representation, and on the faith thereof, contracted with him (*g*). Nor did these facts form the subject of a good replication, on equitable grounds, to a plea of infancy (*h*), although in such a case a Court of Equity might grant relief against the infant on the ground of fraud (*i*). Fraud of an Infant.

A husband is not liable for any fraud of the wife, which is directly connected with and dependent upon a contract (*k*). In a case in which an action had been brought against a husband and wife for a false and fraudulent representation by the wife to the plaintiffs, that she was sole and unmarried at the time of her signing a promissory note as surety to them for a third person, whereby they were induced to advance a sum of money to that person, it was held that an action would not lie. And Pollock, C. B., said, "A *feme covert* is unquestionably Of a married Woman.

(*e*) *Hawse* v. *Crowe*, R. & M. 414; *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 521.
(*f*) Chit. Contr. 10th ed. 138.
(*g*) *Johnson* v. *Pye*, 1 Sid. 258.
(*h*) *Bartlett* v. *Wills*, 31 L. J., Q. B. 57.
(*i*) *Nelson* v. *Stocker*, 28 L. J., C. 760.
(*k*) *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 422; *Wright* v. *Leonard*, 30 L. J., C. P. 365.

incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is undoubtedly responsible for all torts committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife" (*l*).

Where a contracting party is old and weakminded.

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, weakminded 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 (*m*).

Drunkenness of a contracting party.

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 (*n*).

Goods kept by a party when sober.

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 (*o*).

(*l*) See note (*k*), *ante*.

(*m*) *Longmate* v. *Ledger*, 6 Jur., N. S. 481. See also Roberts' Principles of Equity, 3rd ed. 79.

(*n*) *Gore* v. *Gibson*, 13 M. & W. 626.

(*o*) See Chit. Contr. 10th ed. 137; *Gore* v. *Gibson*, 13 M. & W. 626.

CHAPTER VIII.

BREACH OF WARRANTY.

BREACH OF WARRANTY.

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BREACH OF WARRANTY.

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*).

Buyer neither bound to tender the Horse nor give Notice.

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

Seller not bound to take back the Horse.

(*a*) *Fielder* v. *Starkie*, 1 H. Bla. 17; and see *Poulton* v. *Lattimore*, 9 B. & C. 265.

the price on the ground of breach of Warranty, except in case of fraud or express agreement authorizing 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 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 43*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?

Judgment of the Court of King's Bench.

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

(*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. *Couston* v. *Chapman*, L. R., 2 H. L. (S. C.), 250, per Lord Chelmsford.

(*c*) *Street* v. *Blay*, 2 B. & Ad. 456; and see *Dawson* v. *Collis*, 10 C. B. 523; and *Ollivant* v. *Bailey*, 5 Q. B. 288.

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; 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."

Lord Eldon's opinion discussed.

"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.

(*d*) *Curtis* v. *Hannay*, 3 Esp. 83.

(*e*) Starkie on Evidence, part iv. p. 645.

In *Weston* v. *Downes* (*f*), *Towers* v. *Barrett* (*g*), *Payne* v. *Whale* (*h*), *Power* v. *Wells* (*i*), and *Emanuel* v. *Dane* (*j*), 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."

Evidence in mitigation of damages.

"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 (*k*); 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."

Unfitness for a particular purpose.

"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" (*l*).

"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."

An interme diate profit.

"But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there

(*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.
(*j*) *Emanuel* v. *Dane*, 3 Camp. 299.
(*k*) *Cormack* v. *Gillis*, cited 7 East, 480; *King* v. *Boston*, 7 East, 481, n.; and see *Dawson* v. *Collis*, 10 C. B. 532.
(*l*) *Okell* v. *Smith*, 1 Stark. N. P. C. 107.

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."

Acts of ownership inconsistent with trial.

"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 intermediate benefit in consequence of the bargain, which he would still retain. But he is entitled to reduce the Damages, as he has a right of action against the plaintiff for the breach of Warranty" (*m*).

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 Mr. Baron Bayley 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* (*m*), 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* (*n*), 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."

(*m*) *Street* v. *Blay*, 2 B. & Ad. 456.

(*n*) *Power* v. *Welles*, Cowp. 818.

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* (*o*) 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, which is the most recent, your remedy was an action for damages" (*p*).

Goods are returnable where there is fraud.

In an unconditional Warranty, the only ground on which goods are returnable is that of *Fraud.* And Mr. Baron Parke, referring to the case of *Street* v. *Blay* (*o*), 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" (*q*).

But not for non-correspondence with sample.

Upon the sale of specific goods, with a Warranty that they are equal to sample, the vendee cannot refuse to receive them on the ground that they do not correspond with the sample, unless there be an express condition to that effect; but he must trust to a cross-action, or rely on the non-correspondence with sample as a ground for reduction of damages (*r*).

Agreement that a Horse is to be returned if unsound.

But if on 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 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 (*s*).

(*o*) *Street* v. *Blay*, 2 B. & Ad. 456.

(*p*) *Gompertz* v. *Denton*, 1 Cr. & M. 207.

(*q*) *Hilliard* v. *Orbell*, Ex. Sittings, Jan. 11, 1834.

(*r*) *Dawson* v. *Collis*, 10 C. B. 523; *Hayworth* v. *Hutchinson*, L. R., 2 Q. B. 447; 36 L. J., Q. B. 370, per Cockburn, C. J.

(*s*) *Adam* v. *Richards*, 2 H. Bla. 573.

The right to return a horse sold with a Warranty which proves incorrect, 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 (*t*). 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.

Head v. *Tattersall.*

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 3*s.* 6*d.* *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 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 3*s.* 6*d.* *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.

Or unsuitable.

(*t*) *Head* v. *Tattersall*, L. R., 7 Ex. 7; 41 L. J., Ex. 4; 25 L. T., N. S. 631.

(*u*) L. R., 7 Ex. 7; 41 L. J., Ex. 4; 25 L. T., N. S. 631.

(*x*) *Towers* v. *Barrett*, 1 T. R. 133.

(*y*) *Street* v. *Blay*, 2 B. & Ad. 456.

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 should be returned, if unsuitable, they would 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*).

Or unfit for a particular purpose.

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*).

Verbal offer after sale to take back the Horse.

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*).

Where goods should be returned immediately.

A buyer who rejects goods sent to him as not being equal to sample, is bound to return them immediately, if it can be done without injury to the goods. He has no right to retain them in security of his claim of damages for non-performance of the contract (*e*).

Or the contract becomes complete.

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 (*f*).

Where buyer

Where a Breach of Warranty has taken place it is

(*z*) *Towers* v. *Barrett*, 1 T. R. 138.
(*a*) *Dallman* v. *King*, 5 Scott, 382.
(*b*) *Andrews* v. *Belfield*, 2 C. B., N. S. 779.
(*c*) *Chanter* v. *Hopkins*, 4 M. & W. 400; but see *Dawson* v. *Collis*, 10 C. B. 523.
(*d*) *Payne* v. *Whale*, 7 East, 274.
(*e*) *Padgett* v. *Macnair*, 15 Court of Sess. 76 (Sco.); *S. C.* 2 S. M. & P. 41; *S. C.* 4 M. Dig. 187.
(*f*) *Moss* v. *Sweet*, 16 L. T. 341; *S. C.* 20 L. J. 167 (Q. B.); *S. C.* 16 Q. B. 493. In the case of *Steinthal* v. *Myers*, Nov. 23, 1855 (Cor. Brandt, County Court, Manchester), a month was held to be a reasonable time to keep a Horse on sale or return.

prudent for the Buyer, in an ordinary case, to tender the Horse back to the Seller immediately on discovering such Breach (*g*); and so entitle himself to be repaid the expenses he has been put to in keeping him (*h*); and if the Seller receive him back there will be a mutual rescission of the original contract (*i*). **should tender the Horse.**

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 (*j*). 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*). **Sale after 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*). **Notice instead of tender.**

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 Mr. Justice Parke, who directed a nonsuit. However, in the ensuing term a rule was obtained to set that nonsuit aside, and for new trial, the **Length of time before Notice.**

(*g*) Selwyn's N. P. 8th ed., vol. i. p. 657, tit. Deceit, I. 2, cited in *Chesterman* v. *Lamb*, 2 A. & E. 129.
(*h*) *Chesterman* v. *Lamb*, 2 A. & E. 129; *Cross* v. *Bartlett*, 3 M. & P. 542.
(*i*) *Weston* v. *Downes*, Doug. 24.
(*j*) *Caswell* v. *Coare*, 1 Taunt. 566.
(*k*) *Dingle* v. *Hare*, 7 C. B., N. S. 145.
(*l*) *Fielder* v. *Starkie*, 1 H. Bla. 17.
(*m*) *Poulton* v. *Lattimore*, 9 B. & C. 265.

cases 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 Justices Littledale, Patteson and Coleridge, said, "We think that *Fielder* v. *Starkie* is *not overruled*. The rule must be absolute" (*p*).

Seller should have the Horse examined.

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.

Breach of Warranty no defence to action on Bill of Exchange.

It seems that if a Bill of Exchange or Promissory Note has been given for goods, which were warranted to be of a particular quality or description, the buyer has no defence, even *pro tanto*, to an action brought upon the Bill or Note by the Seller, merely upon the ground that the goods are of an inferior quality or description (*q*).

Unless there be a total failure of consideration.

But he may defend on the Bill or Note *in toto*, if an action be brought by the seller, where there has been a *total failure* of consideration, provided the buyer has repudiated the contract; the difference being between an action for the *price* of goods, and an action upon the *security* given for them (*r*).

Sale by order of Court.

In an action for the Breach of Warranty of a Horse, an order may be made under Ord. LII. r. 2 (Judicature Act, Sched.), for the sale of the Horse, as "goods which for some just and sufficient reason it may be desirable to have sold at once" (*s*).

(*n*) *Fielder* v. *Starkie*, 1 H. Bla. 17.

(*o*) *Caswell* v. *Coare*, 1 Taunt. 566.

(*p*) *Pateshall* v. *Tranter*, 3 A. & E. 103; *S. C.* 4 Nev. & M. 649.

(*q*) See Chit. Contr. 11th ed. 678, and the cases there cited; *Moggridge* v. *Jones*, 3 Camp. 38; *Knox* v. *Whalley*, 1 Esp. 159.

(*r*) See Chit. Contr. 11th ed. 678, and the cases there cited.

(*s*) *Bartholomew* v. *Freeman*, L. R., 3 C. P. D. 316; 38 L. T., N. S. 814; 26 W. R. 743.

CHAPTER IX.

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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*).

(*a*) Per Lord Campbell, *Lowe* v. *London and North Western Rail. Co.*, 21 L. J., Q. B. 363.

Where the property has completely passed (*b*), and the Vendor does not wish to deliver the Horse till he has received the Price agreed upon; or if the purchaser refuse to receive him, the Vendor may bring an action for payment of the price of the Horse (*c*). Action for price of Horse.

Where the Purchaser refuses to accept the Horse he has bought, the Vendor may maintain against him an action for not accepting, even though the Horse may afterwards have been re-sold (*d*); and the Statement of Claim will set 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 (*e*). Action for not accepting.

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 (*f*).

It appears that the general averment of the performance and happening of all things necessary to the plaintiff's right of action imports a sufficient statement of his being ready and willing to do all things necessary to be done on his part for the future (*g*). But the general averment of readiness and willingness is not sufficient in a case of *condition precedent* (*h*).

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" (*i*). 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 Action for detention of goods.

(*b*) *Atkinson* v. *Bell*, 8 B. & C. 277; *Scott* v. *England*, 2 D. & L. 524.

(*c*) *Dunmore* v. *Taylor*, Peake, N. P. C. 56; *Hankey* v. *Smith*, Ibid. 57, n.

(*d*) *Maclean* v. *Dunn*, 1 M. & P. 761; *S. C.* 4 Bing. 722; *Hore* v. *Milner*, Peake, N. P. C. 58, n.

(*e*) *Bordenave* v. *Gregory*, 5 East, 111.

(*f*) *Bach* v. *Owen*, 5 T. R. 409; *Rawson* v. *Johnson*, 1 East, 203; *Wilks* v. *Atkinson*, 1 Marsh. 412.

(*g*) *Bentley* v. *Dawes*, 9 Ex. 666.

(*h*) *Roberts* v. *Brett*, 6 C. B., N. S. 611, 633.

(*i*) *Maclean* v. *Dunn*, 4 Bing. 722.

either by delivery or finding, and refuses to deliver them (*l*).

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 (*l*). 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 (*m*). 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.

Delivery of specific goods.

The delivery of specific goods, contracted to be delivered, may, in accordance with a special finding of the Jury, be enforced under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). Section 2 of the Act providing, that, in actions in the Superior Courts, or any Court of Record, for breach of contract to deliver specific goods for a money price, on application of the plaintiff, and by leave of the Judge, the Jury shall, if they find for the plaintiff, find what are the goods which remain undelivered, the sum which the plaintiff was liable to pay on delivery, the damages sustained if the goods should be delivered under execution, and the damages if not so delivered; and, thereupon, if judgment be given for the plaintiff, the Court or any Judge thereof, at their or his discretion, and on application of the plaintiff, may order execution to issue for the delivery of the goods on payment of the sum found payable by the plaintiff, without giving the defendant the option of detaining the goods on payment of the damages assessed. Where it is intended to proceed under this section, a formal tender of the price agreed, and a demand of the specific chattel, should be made before action, as probably execution for the specific chattel would not be allowed to issue, unless the writ had been specially indorsed with notice of the specific claim, and unless that claim is repeated in the Statement of Claim (*n*).

Action for not delivering.

But where the Vendor refuses to deliver the Horse he has sold, and the Purchaser is satisfied with his remedy

(*l*) Selwyn's N. P. 12th ed. 660, 662.

(*m*) 3 Steph. Comm. 4th ed. 514.

(*n*) See Day's Common Law Procedure Acts, 4th ed. 393.

in damages, he may maintain against him an action *for not delivering* (*n*); and where a particular time for delivery has 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 (*o*). 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 (*p*), there must be a special *Request* to deliver, which will come under a general averment of performance of conditions precedent (*q*). But if a place is mentioned, and no time (*r*), or the defendant has incapacitated himself from completing the agreement, as by reselling, &c., a *Request* to deliver is unnecessary (*s*).

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 (*t*); 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* (*u*).

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 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 (*x*).

Horse sold and delivered.

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 (*y*).

(*n*) *Bach* v. *Owen*, 5 T. R. 410.
(*o*) 15 & 16 Vict. c. 76, s. 57; *Bordenave* v. *Gregory*, 5 East, 111.
(*p*) 3 Wentw. 3; and 2 Chit. Pleading, 6th ed. 166.
(*q*) *Bach* v. *Owen*, 5 T. R. 410.
(*r*) See *Jones* v. *Gibbons*, 22 L. J., Ex. 348.
(*s*) *Bowdell* v. *Parsons*, 10 East, 359.
(*t*) *Sheldon* v. *Cox*, 3 B. & C. 420; *Harrison* v. *Luke*, 14 M. & W. 139.
(*u*) *Bayley* v. *Gouldsmith*, Peake, 56; and see *Bianchi* v. *Nash*, 1 M. & W. 545; and see *Dyer* v. *Cowley*, 17 L. J., Q. B. 361; *Moss* v. *Sweet*, 16 L. T., Q. B. 441.
(*x*) *Bartholomew* v. *Markwick*, 33 L. J., C. P. 145.
(*y*) *Shelaon* v. *Cox*, 3 B. & C. 420; *S. C.*, 5 D. & R. 277; *Earl of Falmouth* v. *Penrose*, 6 B. & C. 387; and see 2 Chit. Pleading, 6th ed. 167.

Money had and received for Repayment of the Price.

Where an article, which has been paid for, does not answer the description of the thing which when bought it purported to be (*z*); or where a Horse is bought warranted sound, &c., and paid for, and on its turning out unsound is returned to the sellers, 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* (*a*). Also, where a Horse has been bought warranted sound, to be returned if *Unsound* (*b*); or if the contract is, that the Horse is to be returned if *Unsuitable* (*c*); or *Unfit* for a particular purpose (*d*); 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.

Under a mistake.

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 (*e*). 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 (*f*), even though the plaintiff cannot be put *in statu quo* (*g*).

Money had and received for Repayment of part of the Price.

Where a Horse is bought and the Price paid, but the Buyer, by the terms of the agreement, has the option of 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* (*h*).

(*z*) *Gompertz* v. *Bartlett*, 22 L. J., Q. B. 99.

(*a*) *Weston* v. *Downes*, Doug. 24; *Power* v. *Wells*, Cowp. 818; and *Simpson* v. *Potts*, before Rolfe, B., Carlisle Spr. Ass. 1847, Appendix.

(*b*) *Adam* v. *Richards*, 2 H. Bla. 573.

(*c*) *Towers* v. *Barrett*, 1 T. R. 133.

(*d*) *Chanter* v. *Hopkins*, 4 M. & W. 406.

(*e*) *Platt* v. *Bromage*, 24 L. J., Ex. 63; *Barker* v. *Pott*, 4 H. & N. 759; *Rogers* v. *Ingham*, L. R., 3 Ch. D. 351.

(*f*) *Bize* v. *Dickason*, 1 T. R. 285.

(*g*) *Standish* v. *Ross*, 3 Ex. 527.

(*h*) *Hurst* v. *Orbell*, 8 A. & E. 107.

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 *primâ 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* (*i*), 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 (*k*).

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 (*l*); 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*.

Action for a False Warranty.

The old method of suing on a Breach of Warranty was an action *on the Case* (*m*). And now the plaintiff instead of suing on the breach of contract may claim damages for a false Warranty: and where this is done the Statement of Claim should set out concisely the facts leading up to the Warranty; the statement of the *Wrongful Act*, namely, the Sale by means of the False Warranty (*n*); and the statement of the *Damage*. It ought to appear in the Statement of Claim that the Warranty was made at the time of Sale, *Warrantizando vendidit* (*o*). But a *Scienter* need not be alleged, and if stated it need not be proved.

Liability of an Infant.

Although Infants are liable for *torts* and injuries of a private nature (*p*), yet where the substantial ground of

(*i*) *Oughton* v. *Seppings*, 1 B. & Ad. 241.
(*k*) *Hardingham* v. *Allen*, 5 C. B. 793.
(*l*) Roscoe, N. P. 13th ed. 463.
(*m*) *Margetson* v. *Wright*, 6 M. & P. 610.
(*n*) *Mummery* v. *Paul*, 1 C. B. 325.
(*o*) Com. Dig. Action on the Case for Deceit, F. 2; *Margetson* v. *Wright*, 6 M. & P. 610; *Lysney* v. *Selby*, Ld. Raym. 1120.
(*p*) *Green* v. *Greenbank*, 2 Marsh. 485; *Howlett* 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 (*p*).

Action for Fraudulent Representation.

We have seen in the Seventh Chapter under what circumstances an action lies, where a Horse has been sold without a Warranty, and also what *constitutes* Fraudulent Representation (*q*). 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 (*r*), and with regard to which a *Scienter* must be laid; and also the statement of the *Damage*.

Statement of Facts in an action for Breach of Contract.

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 Deceit.

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 (*s*). Thus, where a Declaration in *Case* stated that the plaintiff *bargained with the defendants*, and then alleged a deceitful Warranty of Sheep, the joint property of two defendants, upon a joint sale made to him by both, and there was proof of a Contract of Sale and Warranty by one only as of his own separate property, it was held, before the passing of 15 & 16 Vict. c. 76, that the plaintiff could not recover, as the action, though laid in *tort*, was founded on the joint contract alleged (*t*).

Statement of

The Consideration may either be *Executed* or *Executory*.

(*p*) See note (*p*), ante.

(*q*) See ante, pp. 150—152.

(*r*) *Mummery* v. *Paul*, 1 C. B. 325.

(*s*) *Gutsole* v. *Mathers*, 1 M. & W. 495; *Barley* v. *Walford*, 9 Q. B. 197. 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.

(*t*) *Weall* v. *King*, 12 East, 452; and see *Green* v. *Greenbank*, 2 Marsh. 485.

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 (*u*). the Consideration.

An *Executory Consideration* is something *to be done*, and in the statement of it a greater degree of certainty is required (*x*). But in either case the whole of the Consideration, if it be an entire one, should be stated, no part of it ought to be omitted (*y*). 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 (*z*).

If the Horse turn 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 (*a*).

Words used in the statement.

If the plaintiff, in stating the Consideration, uses the words "Had bought" instead of "Would buy," it is bad, because an executed Consideration will support no other promise than such as would be implied by law (*b*). But this would be amended by the Judge at the Trial (*c*). There is, however, no variance if the word "Horse" is used and it is proved to be a "Mare" (*d*), or "Geld-

(*u*) See 1 Chit. Pleading, 6th ed. 295; and *King* v. *Sears*, 2 C., M. & R. 53.

(*x*) See 1 Chit. Pleading, 6th ed. 296; and *Ring* v. *Roxbrough*, 2 Tyrw. 468; *S. C.* 2 C. & J. 418.

(*y*) *Clarke* v. *Gray*, 6 East, 564; see also *Robertson* v. *Howard*, L. R., 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.

(*z*) *Symonds* v. *Carr*, 1 Camp. 361.

(*a*) *Guthing* v. *Lynn*, 2 B. & Ad. 232; and see *Saxby* v. *Wilkin*, 1 D. & L. 281.

(*b*) *Roscorla* v. *Thomas*, 3 Q. B. 234.

(*c*) 15 & 16 Vict. c. 76, s. 222; and see also Order XXVII. (Judicature Act), which still further extends the power of amendment.

(*d*) *Ware* v. *Juder*, 2 C. & P. 351; or "Colt" or "Filly," in an Indictment, *Reg.* v. *Aldridge*, 4 Cox, 143.

ing" (*e*); nor where the price is stated as money, and part of the price was paid by giving goods of a specified value (*f*).

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 (*g*).

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 to declare on the Warranty alone without the condition annexed to it. However, Mr. Baron Parke 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" (*h*).

Qualification of the Promise or Warranty.

But where there is a *Qualification* of the Promise it should be stated in the Statement of Claim; for where the plaintiff, before the passing of 15 & 16 Vict. c. 76, declared on a Warranty that the Horse was "sound," and the Warranty proved was that the Horse was "sound everywhere except a kick on the leg," the omission was held to be fatal (*i*). The plaintiff would now, however, be permitted to amend.

The Purchase and the Payment.

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

(*e*) "*Equus*," in the Latin pleadings, was satisfied by proof of a "Gelding," *Gravely* v. *Ford*, Lord Raym. 209.

(*f*) *Hands* v. *Burton*, 9 East, 349; *Brown* v. *Fry*, 1 Selw. N. P. 12th ed. 652.

(*g*) *Miles* v. *Sheward*, 8 East, 7; *Clarke* v. *Gray*, 6 East, 568.

(*h*) *Smart* v. *Hyde*, 8 M. & W. 728.

(*i*) *Jones* v. *Cowley*, 4 B. & C. 445; *S. C.* 6 D. & R. 533.

to show that he possesses a right of action, and there must be a general averment of performance of conditions precedent (*k*). 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 such an averment, but Payment is not essential to support the action.

Statement of the False Warranty or Fraudulent Representation.

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 Mr. Baron Alderson said, "I think the Declaration is substantially proved, and therefore I shall direct the record to be amended under the recent statute (*l*). 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 the wind, makes no difference to the merits." After this amendment a verdict was found for the plaintiff (*m*).

Statement of the Breach.

A *Breach* must always be stated in the Statement of Claim, so that the cause of complaint may appear (*n*). 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 (*o*). It is a Rule in Pleading that

(*k*) See Bul. N. P. 146; and *Ring* v. *Roxbrough*, 2 Tyr. 468; *S. C.* 2 & J. 418; and 1 Chit. Pleading, 6th ed. 296; 15 & 16 Vict. c. 76, s. 57.

(*l*) 3 & 4 Will. 4, c. 42, s. 23.

(*m*) *Marsh* v. *Densham*, 1 M. & Rob. 442; and see 15 & 16 Vict. c. 75, s. 222; and Ord. XXVII. rr. 1—6.

(*n*) *Brickhead* v. *Archbishop of York*, Hob. 198, 233.

(*o*) Com. Dig. Pleader, C.; *Wright* v. *Johnson*, 1 Sid. 440, 447; *Aleberry* v. *Walby*, 1 Stra. 231.

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 (*p*).

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 (*q*).

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 (*r*), 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 17th section of the Statute of Frauds has been complied with (*s*). And it will be necessary to show that a specific price was agreed upon (*t*) as part of the contract.

Proof in an action for not accepting.

Where 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* (*u*). And if the defendant contest it in his pleading, the plaintiff must show either a *Tender* (*x*), as the case may be, or that during a reasonable time he was *Ready and Willing* to deliver it (*y*).

Meaning of readiness and willingness.

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 (*z*).

Where the plaintiff has otherwise than at the buyer's request delayed delivery beyond the proper time, he can-

(*p*) Com. Dig. Pleader, C. 45; and see 1 Chit. Pleading, 6th ed. 172.

(*q*) See *Boorman* v. *Nash*, 9 B. & C. 152; and Chit. Contr. 11th ed. 817; Bullen and Leake's Pleading, 4th ed. 19; and Damages, *post*.

(*r*) Requires no Stamp. *Marson* v. *Short*, 2 Bing. N. C. 118; *S. C.* 2 Scott, 243.

(*s*) *Elliott* v. *Pybus*, 10 Bing. 512; *Rohde* v. *Thwaites*, 6 B. & C. 388.

(*t*) *Simmons* v. *Swift*, 5 B. & C. 857.

(*u*) *Beal* v. *White*, 12 A. & E. 670.

(*x*) Proof of Tender, post.

(*y*) *Granger* v. *Dacre*, 12 M. & W. 431; *Tempest* v. *Kilner*, 2 C. B. 308.

(*z*) *Cort* v. *Ambergate Railway Company*, 20 L. J., Q. B. 465; *Baker* v. *Firminger*, 28 L. J., Ex. 130.

not enforce acceptance, unless the defendant has entered into a new binding contract (*a*).

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 (*b*). But it will not be necessary to prove a Tender of the money (*c*). And it is sufficient evidence that the plaintiff was *Ready and Willing*, if within a reasonable time the Horse is demanded by him (*d*), or his servant (*e*). 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 *primâ facie* evidence (*e*); 2nd, the *Delivery* either to the defendant or his agent, or something which has been done equivalent to a Delivery (*f*); 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 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 Goods sold and delivered.

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 (*g*). He must, therefore, prove the *Consideration* and the *Performance* of it on his part, namely, the *Payment of a particular Price* (*h*); Proof in Money had and received.

(*a*) *Plevins* v. *Downing*, L. R., 1 C. P. D. 220; 45 L. J., C. P. 695; 35 L. T., N. S. 263.

(*b*) *Rawson* v. *Johnson*, 1 East, 203; *Waterhouse* v. *Skinner*, 2 B. & P. 447.

(*c*) *Wilkes* v. *Atkinson*, 1 Marsh. 412; *Levy* v. *Lord Herbert*, 7 Taunt. 318; *Tempest* v. *Kilner*, 2 C. B. 308.

(*d*) *Squire* v. *Hunt*, 3 Price, 68.

(*e*) *Bennett* v. *Henderson*, 2 Stark. N. P. C. 550; and see *Smith* v. *Rolt*, 9 C. & P. 696, and Roscoe, N. P. 14th ed. 497.

(*f*) *Lee* v. *Shore*, 1 B. & C. 94; *Smith* v. *Chance*, 2 B. & A. 755. See also *Bartholomew* v. *Markwick*, 33 L. J., C. P. 145, and *Webb* v. *Fairmaner*, 3 M. & W. 473.

(*g*) Roscoe, N. P. 14th ed. 542.

(*h*) *Harvey* v. *Archbold*, 3 B. & C. 626; *Bernasconi* v. *Anderson*, M. & M. 183; *Leeson* v. *Smith*, 4 N. & M. 304.

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 (*i*).

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 *Vice*, or whatever is alleged as the subject-matter of the Breach (*k*). And of course he must in all cases prove *Damage* whether General or Special.

Proof in an action for a False Warranty.

Where an action is brought for a False Warranty, the plaintiff should be prepared to prove the *Wrongful act* alleged to have been committed by the defendant (*l*), namely, the *Sale* by means of the *False Warranty*. He must also prove *Damage* whether general or special.

Where it is doubtful whether false Warranty is proveable.

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 (*m*). As we have before stated (*n*), the knowledge of the defendant is in such case essential to the cause of action (*o*). 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 (*p*). 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 (*q*). But where the plaintiff relies on fraud alone and does not succeed, he cannot pick out facts which would otherwise have entitled him to relief apart from the fraud (*r*).

(*i*) See Chit. Contr. 11th ed. 601, 608, and the authorities there cited.
(*k*) *Osborn* v. *Thompson*, 9 C. & P. 337; 1 Tayl. Evid. 337.
(*l*) See *Mummery* v. *Paul*, 1 C.B. 327.
(*m*) *Ormrod* v. *Huth*, 14 M. & W. 651.
(*n*) Ante, pp. 150, 151.
(*o*) *Pasley* v. *Freeman*, 2 Sm. L.C. 8th ed. 66.
(*p*) Bullen & Leake's Pleadings, 4th ed. 428.
(*q*) *Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890, 921. Per Parke, B., *Thom* v. *Bigland*, 8 Ex. 725.
(*r*) *Hudson* v. *Lombard*, L. R., 1 H. L. 324; *London Chartered Bank of Australia* v. *Lempriere*, L. R., 4 P. C. 572; *Noad* v. *Murrow*, 40 L. T., N. S. 100.

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* (*s*); and it is essential to show that there was a *Sale* and also a *Misrepresentation* (*t*). But he must give proof of *Damage* whether general or special (*u*).

Proof of the Bargain and Sale.

A *Sale* may in all cases be implied *primâ facie* from evidence of a delivery to, and an acceptance by, the purchaser (*x*). We have seen, in the First Chapter, what is sufficient evidence of a contract for Sale, either where the value is under 10*l.* (*y*); or the agreement is not to be performed within a year (*z*); or the value is 10*l.* or upwards, within the 17th section of the Statute of Frauds (*a*). Where there is an agreement in writing, it should be put in and proved, and it is not necessary that it should be stamped (*b*). Where, however, the *Bargain and Sale* has been made by word of mouth, the plaintiff (*c*), or some witness (*d*) of the transaction must be called.

Proof of the Consideration.

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 (*e*). 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 a Sale*, the plaintiff may prove that the defendant took another Horse in part payment (*f*).

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 upwards (*g*); and if no Receipt was given, or it was unstamped or lost, the plaintiff, or some

(*s*) Per Cresswell, J., *Mummery* v. *Paul*, 1 C. B. 327.
(*t*) Per Erle, J., Ibid.
(*u*) Per Bramwell, B., *Eastwood* v. *Bain*, 28 L. J., Ex. 74.
(*x*) *Bennett* v. *Henderson*, 2 Stark. 550; and see *Smith* v. *Rolt*, 9 C. & P. 696.
(*y*) See ante, Chap. I.
(*z*) 29 Car. 2, c. 3, s. 4; and see ante, Chap. I.
(*a*) 29 Car. 2, c. 3, s. 17; and see ante, Chap. I.
(*b*) *Skrine* v. *Elmore*, 2 Camp. 407.
(*c*) 14 & 15 Vict. c. 99, ss. 1, 2.
(*d*) The plaintiff's husband or wife is now admissible as a witness, 16 & 17 Vict. c. 83, ss. 1, 4.
(*e*) *King* v. *Sears*, 2 Cr. M. & R. 48.
(*f*) *Hands* v. *Burton*, 9 East, 349.
(*g*) 33 & 34 Vict. c. 97, s. 120.

person who witnessed the transaction, must be put into the box (*h*).

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 (*i*).

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, &c., 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
			£1	7	0

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.

Proof of the Promise or Warranty.

The plaintiff brought an action of *Debt* for *Money had 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

(*h*) See *Rambert* v. *Cohen*, 4 Esp. 213.

(*i*) See per Wilde, C.J., *Hardingham* v. *Allen*, 5 C. B. 797.

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 (*k*).

A Warranty not contained in the Receipt.

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.

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:—

"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 (*l*).

Warranty in a Receipt not always conclusive.

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 formed any part of the bargain, or was inserted in the Receipt without authority, by an after-thought of the defendant's Servant (*m*).

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

(*k*) *Hardingham* v. *Allen*, 5 C. B. 796.
(*l*) *Allen* v. *Pink*, 4 M. & W. 140.
(*m*) *Fairmaner* v. *Budd*, 7 Bing. 575.

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 Mr. Justice Lawrence, in *Browne* v. *Frye* (*n*), Lord Ellenborough held that such a Receipt might be received to prove the Warranty, as well as the Payment of the Price of the Horse, with a Receipt Stamp only (*o*); 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 Merchandizes.

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 (*p*).

Where authority to warrant must be proved.

But the Warranty of a person merely entrusted to deliver a Horse, is not *primâ facie* binding on the Principal, but an express authority must be proved (*q*). So also where an Agent makes an alteration in a Warranty given by his Principal, a special or general authority must be shown (*r*).

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 (*s*). 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 conversation, it is inoperative, and the original Contract as proved still remains open (*t*).

Proof of Fraudulent Representation.

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 (*u*).

Proof of the

Where the Breach of Warranty (*x*) is *Unsoundness*,

(*n*) *Browne* v. *Frye*, cited in *Skrine* v. *Elmore*, 2 Camp. 407.
(*o*) *Skrine* v. *Elmore*, 2 Camp. 407.
(*p*) *Alexander* v. *Gibson*, 3 Camp. 555.
(*q*) *Woodin* v. *Burford*, 2 C. & M. 391; *S. C.* 4 Tyrw. 264.
(*r*) *Strode* v. *Dyson*, 1 Smith, 400.
(*s*) As to unfitness, see Breach of Warranty, ante, Chap. 8.
(*t*) *Payne* v. *Whale*, 7 East, 274.
(*u*) In the Exchequer Chamber, *Ormrod* v. *Huth*, 14 M. & W. 664.
(*x*) See Breach of Warranty, ante, Chap. 8.

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 (*y*). 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* (*z*). And where a Horse is warranted fit for some particular purpose, he must be proved to have been unfit for it in ordinary hands (*a*). 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 (*b*). Notice of the nature of the Unsoundness.

As there are a variety of particular causes of *Unsoundness* (*c*), 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 (*d*), 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 (*e*) after Sale, he must either prove its 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. Either Fact or Veterinary opinion.

Other cases, again, may be compounded *both* of *Fact* and *Veterinary opinion*; as where a Horse has a Splint (*f*) and is Lame, the question is whether the present Lameness (*g*) proceeds from the Splint; and if it does, whether the Splint actually existed or must have existed before or at the time of Sale. Both Fact and Veterinary opinion.

(*y*) *Eaves* v. *Dixon*, 2 Taunt. 343.
(*z*) *Scholefield* v. *Robb*, 2 M. & Rob. 210.
(*a*) *Geddes* v. *Pennington*, 5 Dow, 164.
(*b*) *Atterbury* v. *Fairmanner*, 8 Moore, 33.
(*c*) See Unsoundness and Vice, ante, Chap. 4.
(*d*) Curb, ante, p. 85.
(*e*) Spavin, ante, p. 103.
(*f*) Splint, ante, p. 103.
(*g*) Lameness, ante, p. 92.

Veterinary opinion alone.

Or a *pure question* of Veterinary opinion may arise, as where there is a dispute whether a Horse is Spavined (*h*) 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 (*i*), or a material alteration in the structure of the Hock joint.

Evidence as to Vice.

The proof of an alleged Vice (*j*) 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 (*k*) 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 (*k*).

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 (*l*); or that he sent the Horse to *Livery*, and informed the defendant that he had done so (*m*).

PLEADING AND EVIDENCE FOR THE DEFENDANT.

Admissions by pleading.

Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind not so found by inquisition. (Ord. XIX. r. 17.)

What must be specially pleaded.

By Ord. XIX. r. 18, the defendant must plead specially all facts not previously stated on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise, or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the Statute of Limitations, or has been released.

(*h*) Spavin, ante, p. 103.
(*i*) Capped Hocks, ante, p. 79.
(*j*) See Unsoundness and Vice, ante, Chap. 4.
(*k*) *Geddes* v. *Pennington*, 5 Dow, 164. See ante, p. 122, *Buckingham* v. *Reeve*.
(*l*) See *Towers* v. *Barrett*, 1 T. R., 138.
(*m*) *Chesterman* v. *Lamb*, 2 A. & E. 129.

Specific denials must be made.

By Ord. XIX. r. 20, it shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the Statement of Claim; but the defendant must deal specifically with each allegation of fact of which he does not admit the truth.

Denial of Contract.

By Ord. XIX. r. 23, when a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise. This rule requires the defendant specifically to allege in his defence that he relies on the objection to the contract arising under the Statute (*n*).

Allegation of malice, &c.

And by Ord. XIX. r. 25, whenever it is material to allege malice or fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Defence for detention of Goods.

The ordinary evidence of detention is that the defendant refused to deliver the goods when demanded (*o*). It is no defence to show that the goods were not in his possession when demanded if he had improperly parted with the possession (*p*), as where he had sold them, or lost them by carelessness (*q*).

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 (*r*).

Defence for Goods bargained and sold and for not accepting.

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 (*s*); or where he did not see the Horse before purchase he may show that it does *not correspond* with its description (*t*); 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 pur-

(*n*) *Clarke* v. *Callow*, 46 L. J., Q. B. 53—C. A.
(*o*) *Jones* v. *Dowle*, 9 M. & W. 19.
(*p*) Ibid.
(*q*) *Reeve* v. *Palmer*, 28 L. J., C. P. 168.
(*r*) *Taylor* v. *Chester*, L. R., 4 Q. B. 309; 38 L. J., Q. B. 225.
(*s*) *Johnson* v. *Dodgson*, 2 M. & W. 653; *Elliott* v. *Thomas*, 3 ibid. 170; *Buttermere* v. *Hayes*, 5 ibid. 456.
(*t*) See *Street* v. *Blay*, 2 B. & Ad. 456; *Parsons* v. *Sexton*, 4 C. B. 905.

pose (*u*); or that it was not the Horse which he bargained to purchase, though of the same name (*x*), or that the Contract was made without the proper formalities (*y*).

Defence in action for not delivering.

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 (*z*). 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 (*a*). And where no particular time has been specified for delivery, he may show that the plaintiff *never* made any demand (*b*).

Where evidence of the usage of trade is not admissible.

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 (*c*).

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 (*d*); that *no* absolute *Sale* took place; that there was *no Delivery* at all (*e*); or that the *Delivery* was for the purpose of a reasonable *trial*, and that the Horse did *not suit* (*f*); 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 must want of title (*g*).

Defence to action on a Cheque for the price.

Breach of Warranty is no answer to an action on a Cheque for the price; but a fraudulent representation is (*h*).

Evidence in

However, it is only reasonable and just that when an

(*u*) *Chanter* v. *Hopkins*, 4 M. & W. 406.

(*x*) *Raffles* v. *Wichelhaus*, 33 L. J., Ex. 160.

(*y*) *Frend* v. *Dennett*, 27 L. J., C. P. 314; *Bradley* v. *Bardsley*, 14 M. & W. 873.

(*z*) *Johnson* v. *Dodgson*, 2 M. & W. 653; *Elliott* v. *Thomas*, 3 ibid. 170; *Buttermere* v. *Hayes*, 5 ibid. 456.

(*a*) *Rawson* v. *Johnson*, 1 East, 203.

(*b*) *Bach* v. *Owen*, 5 T. R. 410.

(*c*) *Spartali* v. *Benecke*, 10 C. B. 212; and see *Humphrey* v. *Dale*, 27 L. J., Q. B. 390.

(*d*) *Broomfield* v. *Smith*, 1 M. & W. 542; *Webb* v. *Fairmanner*, 3 M. & W. 473; and see *Paul* v. *Dod*, 2 C. B. 800.

(*e*) See *Smith* v. *Rolt*, 9 C. & P. 696.

(*f*) *Street* v. *Blay*, 2 B. & Ad. 456; *Moss* v. *Sweet*, 16 Q. B. 493.

(*g*) *Walker* v. *Mellor*, 11 Q. B. 478.

(*h*) *Lewis* v. *Cosgreave*, 2 Taunt. 2.

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* (*i*). Reduction of Damages.

And 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 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 (*k*). Defence for Residue of the Price.

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 (*l*). 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. (*m*). 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 Mr. Baron Platt said, that if the Jury Surreptitious Warranty.

(*i*) *Poulton* v. *Lattimore*, 9 B. & C. 265; *Mondel* v. *Steel*, 8 M. & W. 858; *S. C.* 1 D. N. S. 8; *Parsons* v. *Sexton*, 4 C. B. 908; *S. C.* 16 L. J., C. P. 184.

(*k*) *King* v. *Boston*, cited 7 East, 481.

(*l*) *Street* v. *Blay*, 2 B. & Ad. 456; and see *Dawson* v. *Collis*, 10 C. B. 532.

(*m*) See evidence as to Unsoundness, Vice and Unfitness, ante, pp. 191, 192.

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 (*n*).

Condition annexed to a Warranty.

Where the defendant relies on a condition annexed to a Warranty according to a Notice of certain Rules of Sale, it appears that *unless* the matter relating to the Notice has been by way of *Proviso* upon the Warranty, such condition must be set out in the Statement of Defence. Thus, in an action of *Assumpsit* on a Breach of Warranty, the Declaration stated that, in consideration that the plaintiff would buy of the defendant a Mare at a certain price, the defendant promised that she was sound. The defendant pleaded, among other pleas, that the Mare was sent to Lucas's Repository, to be sold according to certain Rules, which were as follows: "Terms of private sale. A Warranty of Soundness, when given at this Repository, will remain in force until twelve o'clock at noon of the day next after the day of sale, when it will be complete, and the responsibility of the Seller will terminate, unless in the meantime a Notice of the contrary, accompanied by the Certificate of a Veterinary Surgeon, be delivered at the office of R. Lucas; such Certificate to set forth the cause, nature or description of any alleged Unsoundness;" that the Sale took place subject to those Rules, and that no Notice was delivered within the time specified. Mr. Baron Parke said, "It appears to me that such plea is not bad as amounting to the *General issue*. It admits the Contract and the Promise, but shows it to have been made subject to certain Rules, which have not been complied with. What is the meaning of those terms? It seems to me to be this, that the Warranty shall be deemed to have been complied with, unless a Notice and Certificate shall be delivered to the Vendor before twelve o'clock at noon of the day next after the day of sale. That is not a denial of the Warranty, but of a mere Condition annexed to it. No Notice and Certificate were delivered, and therefore the Contract is to be considered as complied with. 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. It is enough to say that every word of this plea is consistent with the Contract stated in the Declaration."

(*n*) *Bliss* v. *Snow*, before Mr. Baron Platt, Ex. N. P., May 12, 1853.

And Mr. Baron Alderson said, "The meaning of the plea is, that there was a sort of conventional Warranty of Soundness, and that the Warranty was to be considered as complied with, unless a Notice and Certificate of Unsoundness were given within a certain time, which was not done. That is not a denial of the Contract, as alleged in the Declaration." And in this opinion Barons Gurney and Rolfe concurred (*o*).

Evidence in Reduction of Damages.

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 proportionably so, and so also ought to be the *Damages;* and if they were very inconsiderable, the Judge might certify to deprive the plaintiff of costs (*p*).

Defence to an action for Fraudulent Representation.

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 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 (*q*).

Disputing the Warranty.

The defendant may show that he is not bound by the Warranty (*r*), as where it has been given by a person merely entrusted to deliver the Horse (*s*), or by a Servant after Sale (*t*). 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 (*u*), 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 *Vice*, 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 (*x*). The defendant may also show that the Horse was *not unfit*

(*o*) *Smart* v. *Hyde*, 8 M. & W. 723, 728.

(*p*) *Kiddell* v. *Burnard*, 9 M. & W. 670. See *Dawson* v. *Collis*, 10 C. B. 532.

(*q*) *Ormrod* v. *Huth*, 14 M. & W. 651.

(*r*) See Warranty, Chap. 5, ante.

(*s*) *Wooding* v. *Burford*, 2 Cr. & M. 391; *S. C.* 4 Tyrw. 264.

(*t*) *Helyer* v. *Hawke*, 5 Esp. 72.

(*u*) *Fenn* v. *Harrison*, 3 T. R. 761; and *Scotland* (*Bank*) v. *Watson*, 1 Dow, 45.

(*x*) Evidence as to Unsoundness, ante, p. 191; Patent Defects, Chap. 5, ante.

for the purpose for which he was bought; for instance, that he has answered his Warranty when used by persons of *ordinary* skill (*y*).

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 (*z*).

Competency of witnesses.

There was formerly a difference of opinion as to the competency of a Witness, on the ground of interest. Thus it was at one time held, that the former owner of a Horse, which he had sold with a Warranty to the defendant, was a competent Witness for him to prove that the Horse when so sold was Sound (*a*). And in a later case, Mr. Justice Alderson considered such a Witness incompetent on the ground that the effect of a verdict for the defendant would be to relieve the witness from an action (*b*).

Now, however, by the Acts of Victoria (*c*), no person is to be excluded, and the plaintiff or defendant, or the husband or wife of each or either, are competent witnesses.

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 (*d*).

Special damages.

But damages which *really* took place, but do *not necessarily* arise from the non-performance of the Contract, or 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.

Legal and natural consequences of the breach of Contract.

The Damages must be the legal and natural consequences of the Breach of Contract, or of the Injury which has been inflicted (*e*). Thus the costs of an action brought on a

(*y*) *Geddes* v. *Pennington*, 5 Dow, 164; see ante, p. 122, *Buckingham* v. *Reeve*.

(*z*) *Coates* v. *Stephens*, 2 M. & Rob. 157.

(*a*) *Briggs* v. *Crick*, 5 Esp. 99; *Baldwin* v. *Dixon*, 1 M. & Rob. 59.

(*b*) *Biss* v. *Mountain*, 1 M. & Rob. 302.

(*c*) 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99; 16 & 17 Vict. c. 83.

(*d*) See *Boorman* v. *Nash*, 9 B. & C. 152; Bullen & Leake's Pleadings, 4th ed. 19.

(*e*) See 1 Chit. Pleading, 6th ed. 395; also *Vicars* v. *Wilcocks*, 8 East, 3; *Smith* v. *Green*, L. R., 1 C. P. D. 92; 45 L. J., C. P. 28; *Randall* v. *Newson*, L. R., 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T., N. S. 164; 25 W. R. 313—C. 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 (*f*). But it is otherwise, when on the third person being communicated with, before action was brought, he said that the plaintiffs might safely go on with their action, and also professed to have authority as Agent for the Representations which he made (*g*).

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 (*h*). In *Hobbs* v. *London and South Western Railway Co.* (*i*), 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 Horses by exposure to the weather while he was engaged in finding other stables for them (*k*).

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 (*l*).

Damages arising from special circumstances.

In accordance with the rule that Damages should be estimated by the legal and natural consequences of the

(*f*) *Richardson* v. *Dunn*, 30 L. J., C. P. 44.

(*g*) *Randell* v. *Trimen*, 25 L. J., C. P. 307.

(*h*) *Hobbs* v. *London and South Western Railway Co.*, L. R., 10 Q. B. 117; 44 L. J., Q. B. 52; 32 L. T., N. S. 352; 23 W. R. 520; per Blackburn, J.

(*i*) *Ubi supra.*

(*k*) *McMahon* v. *Field*, L. R., 7 Q. B. D. 591; 50 L. J., Ex. 552—C. A.

(*l*) *Hadley* v. *Baxendale*, 23 L. J., Ex. 179; *Smeed* v. *Foord*, 28 L. J., Q. B. 178.

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* (*m*), 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 (*m*).

Effect of notice.

And it is held that generally the mere notice or knowledge of the special circumstances will not render the party liable for the special consequences of a Breach under such circumstances, or for the failure of the special purposes of the contract; unless he has expressly or impliedly contracted upon the basis of such special circumstances, and undertaken to be bound for the consequences. Thus, in an action against a carrier for not delivering a parcel of goods, the mere knowledge on his part that the parcel contained a part of the machinery of a mill, without which the mill could not be erected, was held not sufficient to charge him with the consequences of the stoppage of the mill until the machinery could be replaced; and the damages were restricted to the cost of replacing the part lost, with interest upon that amount whilst remaining unpaid (*n*). And it is said that "in order that the notice may have any effect, it must be given under such circum-

(*m*) *Hadley* v. *Baxendale*, 23 L. J., Ex. 179; *Smeed* v. *Foord*, 28 L. J., Q. B. 178.

(*n*) Leake on Contracts, 1046, 1047, and cases there cited.

stances as that an actual contract arises on the part of the defendant to bear the exceptional loss" (*n*).

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 (*o*). Special damages may be recovered in trover if laid. Therefore, where in trover for a Horse it was laid as special damage, that the plaintiff 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 be paid for hire, deducting what would have been the expense of keeping his own Horse for the time (*p*).

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 (*q*).

Damages *in tort*.

Whenever a party is liable for a Breach of a Contract, either express or implied, it seems that the plaintiff is entitled at all events to *nominal* Damages; although the action be framed in *Tort* for such Breach of Contract, and no actual Damage be proved (*r*). But in the case of actions framed in *Tort* for Breach of Contract (*s*), 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 (*t*).

In actions for a sum certain.

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 (*u*).

(*n*) Per Blackburn, J., in *Horne* v. *Midland Railway Co.*, L. R., 8 C. P. 131; 42 L. J., C. P. 54.

(*o*) Per Jervis, C. J., *Read* v. *Fairbanks*, 22 L. J., C. P. 206.

(*p*) *Davis* v. *Oswell*, 7 C. & P. 804; see further, *France* v. *Gaudet*, L. R., 6 Q. B. 199; 40 L. J., Q. B. 121.

(*q*) *Chinery* v. *Viall*, 29 L. J., Ex. 180; *Johnson* v. *Stear*, 33 L. J., C. P. 130.

(*r*) *Rolin* v. *Steward*, 23 L. J., C. P. 148; Chit. Contr. 10th ed. 813.

(*s*) The action for breach of contract of marriage is the only exception.

(*t*) Per Pollock, C. B., *Hamlin* v. *Great Northern Railway Co.*, 1 H. & N. 410.

(*u*) Chit. Contr. 10th ed. 813.

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* shall be payable in 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 special actions on Contracts, strictly 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. (*x*). 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 (*y*). 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, or of a written demand of the money containing a Notice that Interest from thenceforth will be claimed; 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.

17 & 18 Vict. c. 90.

By the Act to repeal the laws relating to usury (*z*), it is enacted, that, where Interest is now payable upon any Contract, express or implied, for payment of the legal or current rate of Interest; or where upon any debt or sum of money Interest is now payable by any rule of law, the same rate of Interest shall be recoverable as if that Act had not passed.

In Actions which sound in Damages.

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 specified and agreed upon is usually given, yet, if there be

(*x*) Chit. Contr. 10th ed. 599.

(*y*) *Hill* v. *South Staffordshire Railway Co.*, L. R., 18 Eq. 154; 43 L. J., Ch. 566.

(*z*) 17 & 18 Vict. c. 90, s. 3.

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 (*a*).

A Foolish bargain.

And 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; there were thirty-two nails, and this being doubled, every nail in a geometrical progression, came to five hundred quarters of barley; and on the cause being tried before Mr. Justice Hyde 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 (*b*).

An impossible contract.

And where in consideration of 2*s.* 6*d.* paid down, and 4*l.* 17*s.* 6*d.* to be paid at the end of the year, the defendant agreed to deliver two grains of rye on the then next Monday, and double in geometrical progression every succeeding Monday for a year, which it was stated would have amounted to a larger quantity of rye than existed in the whole world, the Court on demurrer seemed to consider the Contract good in law; and Mr. Justice Powell said, "That although the Contract was a foolish one, yet it would hold good in law, and that the defendant ought to pay something for his folly;" upon which the defendant agreed to return the plaintiff his half-crown and pay the costs, and so the case was compromised (*c*). And 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" (*d*). But where the law casts a duty on a man,

(*a*) Bac. Abr. Damages (D), 602.
(*b*) *James* v. *Morgan*, 1 Lev. 111; *S. C.* 1 Keb. 569; and Chit. Contr. 10th ed. 20.
(*c*) *Thornborow* v. *Whitacre*, 2 Ld. Raym. 1164.
(*d*) Per Williams, J., *Hale* v. *Rawson*, 27 L. J., C. P. 191.

which, without fault on his part, he is unable to perform, the law will excuse him for non-performance (*e*).

Cannot be higher than the amount laid.

The Jury cannot give higher Damages than the amount laid in the Statement of Claim; and if judgment be entered for the excess such judgment would be bad (*f*). But where the Jury find greater Damages than the amount laid, the plaintiff may enter a *remittitur* of the surplus before judgment (*g*), or he may amend his claim and have a new trial (*h*).

In goods bargained and sold.

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 an action for not accepting.

In an action for *not accepting* a Horse, the measure of damages is the difference between the contract price and the market price, on the day when the vendor ought to have received him (*i*).

In an action for not delivering.

In an action for *not delivering* a Horse according to a Contract, the Damages over and above what is laid specially, will be the *difference* between the price at which the Horse was *bought* and his *value* at the time he ought to have been delivered (*k*); even though the vendor in the interim have *resold* the Horse, provided that the vendee did not assent to rescind the contract (*l*). And this rule applies to each period of delivery, when more than one (*m*); even though the action is commenced before the periods of delivery have elapsed; for the repudiation of the Contract before the time for its fulfilment goes to the question of breach, but does not affect the damages (*n*). 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

(*e*) *Clark* v. *Glasgow Assurance Co.*, 1 Macq. H. of L. Cases, 668; *Inchbald* v. *Western Neilgherry Coffee Co.*, 11 L. T., N. S. 345.

(*f*) *Chevely* v. *Morris*, 2 Bla. R. 1300.

(*g*) *Perceval* v. *Spencer*, Yelv. 45; *Wray* v. *Lister*, 2 Stra. 1110, 1171.

(*h*) Tidd, 9th ed. 896, and note (*k*); Chit. Cont. 10th ed. 816; and see *Dunn* v. *Crump*, 2 B. & B. 300, 307; *S. C.* 7 Moore, 137.

(*i*) *Phillpotts* v. *Evans*, 5 M. & W. 475; *Boorman* v. *Nash*, 9 B. & C. 145; *Josling* v. *Irvine*, 6 H. & N. 512. See also *Bornes* v. *Hutchinson*, 13 W. R. 386.

(*k*) *Gainsford* v. *Caroll*, 2 B. & C. 624; *S. C.* 4 D. & R. 161.

(*l*) *Lee* v. *Paterson*, 8 Taunt. 540; *S. C.* 2 Moore, 588.

(*m*) *Brown* v. *Muller*, L. R., 7 Ex. 319; 41 L. J., Ex. 214; 27 L. T., N. S. 272.

(*n*) *Brown* v. *Muller*, L. R., 7 Ex. 319; 41 L. J, Ex. 214; 27 L. T., N. S. 272; *Roper* v. *Johnson*, L. R., 8 C. P. 167; 42 L. J., C. P. 65; 28 L. T., N. S. 296; Roscoe, N. P. 14th ed. 494.

buyer so enforces the contract, *e. g.*, by buying the goods in the market (*o*). 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 (*p*).

Nominal Damages.

Where there is no difference between the contract price and the market price, the *Damages* are only *nominal* (*q*). And where goods are 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* (*r*).

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.

In money had and received.

Where an action for *Money had and received* is brought for the Repayment of the Price, and there is a count 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 (*s*). 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 (*t*).

On breach of Warranty.

The Damages in the case of a *Breach of Warranty* must be treated in the same way as an action on a *Contract* (*u*).

General rule.

The general rule is this, that, where goods are delivered, which are inferior in quality to those contracted for, the measure of Damages is the difference between the value of the goods of the quality contracted for, and the amount produced by the resale of the goods actually delivered; that is, provided the goods are resold immediately on their being delivered, or if they cannot be resold immediately, then provided that they are resold within a reasonable time (*x*).

Where the Horse has been returned.

Where the Horse has been returned, and no special loss has accrued, the Damages consist of the price paid (*y*).

(*o*) *Ogle* 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., N. S. 751; and see Roscoe, N. P. 14th ed. 495.

(*p*) *Brady* v. *Oastler*, 3 H. & C. 112; 33 L. J., Ex. 300.

(*q*) *Valpy* v. *Oakeley*, 16 Q. B. 941.

(*r*) *Griffiths* v. *Perry*, 28 L. J., Q. B. 204.

(*s*) *Caswell* v. *Coare*, 1 Taunt. 566; *King* v. *Price*, 2 Chit. 416.

(*t*) See Interest, ante, p. 202.

(*u*) Per Tindal, C. J., *Watson* v. *Denton*, 7 C. & P. 90.

(*x*) *Loder* v. *Kekulé*, 27 L. J., C. P. 27.

(*y*) *Caswell* v. *Coare*, 1 Taunt. 566; *Heilbutt* v. *Hickson*, L. R., 7 C. P. 438; 41 L. J., C. P. 228.

Where the Horse has not 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 (*z*). But the rule in England is now settled as stated above, and the doctrine is the same in America (*a*). 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 mode of estimating what the real value of the Horse, if perfect, would have been; but the difference between the 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 (*b*).

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 (*c*). What length of time and sum of money is reasonable for the keep is a question for the Jury (*d*).

Expense of Keep.

The whole subject of Keep was fully considered in the case of *Chesterman* v. *Lamb* (*d*), 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 (*e*). 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.

(*z*) *Caswell* v. *Coare*, 1 Taunt. 566.

(*a*) See per Buller, J., 1 T. R. 136; per Lord Eldon, C. J., *Curtis* v. *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, 3rd ed. 162; Sedgwick on Damages, 7th ed. 606.

(*b*) *Clare* v. *Maynard*, 6 A. & E. 519; *Cox* v. *Walker*, ibid. 523, n.; Mayne on Damages, 3rd ed. 163.

(*c*) *M'Kenzie* v. *Hancock*, R. & M. 436.

(*d*) *Chesterman* v. *Lamb*, 2 A. & E. 129.

(*e*) Spavin, ante, p. 103.

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.

Mr. Justice Taunton, in leaving the case to the Jury, said, "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.

Seller liable for reasonable Keep.

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 thus laid down in Mr. Selwyn's Law of Nisi Prius (*f*). 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 resell the Horse to the best advantage."

What is reasonable.

"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" (*g*).

(*f*) Selwyn's N. P. 12th ed. vol. 1, p. 656, tit. Deceit, I. 2.

(*g*) *Chesterman* v. *Lamb*, 2 A. & E. 129.

Keeping the Horse till a Fair.

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.

Mr. Justice Coleridge, 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 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 (*h*).

Expense consequent on the Warranty.

In the case of *Cox* v. *Walker* (*i*), 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 reselling 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

(*h*) *Ellis* v. *Chinnock*, 7 C. & P. 169.

(*i*) *Cox* v. *Walker*, cited per Lord Denman, C. J., in *Clare* v. *Maynard*, 6 A. & E. 523.

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, Patteson, 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, Chief Justice Tindal in charging the Jury said, "You will give as damages the *difference* between the *Price* paid and the real *Value* of the Horse, and 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" (*k*).

Expenses in advancing the Horse's value.

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* (*l*), 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 resale (*m*).

Horse tendered and then sold by Auction.

And 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 (*n*).

Expense of Veterinary Certificate and Counsel's opinion.

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

(*k*) *Watson* v. *Denton*, 7 C. & P. 91.

(*l*) *Clare* v. *Maynard*, 6 A. & E. 523.

(*m*) *Cox* v. *Walker*, cited ibid.

(*n*) *Clare* v. *Maynard*, 7 C. & P. 741.

comfort, and to convince him that he could bring an action in safety (*n*).

Travelling Expenses.

But that he was entitled to be paid the expenses of bringing the Horse up to London, and of its Keep (*n*).

Loss of a good Bargain.

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" (*o*); and on this ground the Court of Queen's Bench gave their decision in *Clare* v. *Maynard* (*p*), because the Declaration there *merely* 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 (*q*).

Reselling with a Warranty.

If the buyer of a Horse with a Warranty, relying thereon, resells him with a Warranty, and being sued thereon by his vendee, offers the defence to the vendor, who gives no directions 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 (*r*). He may also recover not only a sum fairly and reasonably paid to the second vendee as compensation (*s*), 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 (*t*). But he cannot recover any such costs if, by a reasonable examination, he could have discovered the breach of Warranty before sale (*u*).

Damages for

Where there is a misrepresentation of the character or

(*n*) *Clare* v. *Maynard*, 7 C. & P. 741.

(*o*) *Flureau* v. *Thornhill*, 2 W. Bla. 1078; 1 Sug. Vend. & Purch. 14th ed. 237, and the cases there cited.

(*p*) *Clare* v. *Maynard*, 6 A. & E. 524; and see a form of Special Damage in such case given in Pears. Chit. Plead. 202.

(*q*) *Clare* v. *Maynard*, 6 A. & E. 524.

(*r*) *Lewis* v. *Peake*, 7 Taunt. 153; *S. C.* 2 Marsh. 43; and see *Rolph* v. *Crouch*, L. R., 3 Ex. 44; 37 L. J., Ex. 8.

(*s*) *Dingle* v. *Hare*, 7 C. B., N. S. 145.

(*t*) *Randall* v. *Roper*, 27 L. J., Q. B. 266.

(*u*) *Wrightup* v. *Chamberlain*, 7 Scott, 598; Chit. Contr. 10th ed. 816.

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 (*x*). 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 (*y*). Misrepresentation.

It is illegal to bring a glandered Horse into a public market or fair (*z*), 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 (*a*). 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 (*b*). 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 (*c*). 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 pur-

(*x*) *Mullet* v. *Mason*, L. R., 1 C. P. 559; 35 L. J., C. P. 299; Mayne on Damages, 3rd ed. 167; *Sherrod* v. *Longdon*, 21 Iowa, 518.

(*y*) *Smith* v. *Green*, L. R., 1 C. P. D. 92; 45 L. J., C. P. 28. And see *Bradley* v. *Lea*, 14 Allen, 20.

(*z*) 41 & 42 Vict. c. 74, s. 32, Ord. 442.

(*a*) *Hill* v. *Balls*, 2 H. & N. 299; 27 L. J., Ex. 45. And see per Willes, J., L. R., 1 C. P. 563.

(*b*) *Ward* v. *Hobbs*, L. R., 3 Q. B. D. 150; 47 L. J., Q. B. 90. Affirmed by H. L., L. R., 4 App. Cas. 13; 48 L. J., Q. B. 281. Reversing judgment of the Queen's Bench Division, L. R., 2 Q. B. D. 331; 46 L. J., Q. B. 473.

(*c*) Ibid. per Lord Cairns, C.

chaser to claim damages in respect of an injury he had suffered in consequence of their purchase (*d*). 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 (*e*).

Where the Damages are very small.

Of course if the Unsoundness be slight, so also ought to be the Damages; and if they be very inconsiderable, the Judge may make an order under Ord. LV. r. 1, that the costs shall not follow the event (*f*).

(*d*) *Ward* v. *Hobbs*, ante, note (*b*).
(*e*) Ibid. per Lord Cairns, C.
(*f*) *Turner* v. *Heyland*, L. R., 5 C. P. D. 432; 48 L. J., C. P. 535; 41 L. T., N. S. 556. See also *Garnett* v. *Bradley*, L. R., 3 App. Cas. 944; 48 L. J., Ex. 186; 39 L. T., N. S. 261. Reversing judgment of the Court of Appeal, L. R., 2 Ex. D. 349; 46 L. J., Ex. 545; 36 L. T., N. S. 725.

CHAPTER X.

INNKEEPERS, VETERINARY SURGEONS, FARRIERS, HORSE-BREAKERS, TRAINERS, ETC.

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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.

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*).

Definition of an Inn. 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*).

Derivation of Hostler. The word *Hostler* is derived *ab hostle;* 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*).

Who is a Guest. A *Guest* is properly a lodger or stranger at an Inn; and the word "*Guest*" 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*).

What an Innkeeper undertakes. 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*).

Hours of closing. By the 3rd section of the 37 & 38 Vict. c. 49, the hours of closing are thus provided for:—

"All premises in which intoxicating liquors are sold by retail shall be closed as follows (that is to say):

"(1) If situate within the metropolitan district—

"(a) On Saturday night from midnight until one o'clock in the afternoon on the following Sunday; and

(*a*) Palm. 374; 2 Rol. Rep. 345.
(*b*) Per Bayley, J., *Thompson* v. *Lacy*, 3 B. & Ald. 286.
(*c*) *Calye's case*, 8 Coke, 32.
(*d*) *Westbrook* v. *Griffith*, Mo. 876, 877; *Saunders* v. *Plummer*, Orl. Bridg. 227.
(*e*) See *Smith* v. *Dearlove*, 6 C. B. 132, n.
(*f*) *Jones* v. *Osborn*, 2 Chit. 484.

"(b) On Sunday night from eleven o'clock until five o'clock on the following morning; and

"(c) On all other days from half-an-hour after midnight until five o'clock on the same morning; and

"(2) If situate beyond the metropolitan district, and in the metropolitan police district, or in a town, or in a populous place as defined by this Act—

"(a) On Saturday night from eleven o'clock until half-an-hour after noon on the following Sunday; and

"(b) On Sunday night from ten o'clock until six o'clock on the following morning; and

"(c) On the nights of all other days from eleven o'clock until six o'clock on the following morning; and

"(3) If situate elsewhere than in the metropolitan district, or the metropolitan police district, or such town or populous place as aforesaid—

"(a) On Saturday night from ten o'clock until half-an-hour after noon on the following Sunday; and

"(b) On Sunday night from ten o'clock until six o'clock on the following morning; and

"(c) On the nights of all other days from ten o'clock until six o'clock on the following morning.

"Such premises, wherever situate, shall, save as hereinafter mentioned, be closed on Sunday afternoon from three or half-past two, according as the hour of opening shall be one o'clock in the afternoon or half-an-hour after noon, until six o'clock.

Such premises, wherever situate, shall be closed on Christmas Day and Good Friday, and on the days preceding Christmas Day and Good Friday respectively, as if Christmas Day and Good Friday were respectively Sunday, and the preceding days were respectively Saturday; but this provision shall not alter the hours during which such premises shall be closed on Sunday when Christmas Day immediately precedes or succeeds Sunday."

Section 6 gives power to the licensing justices to vary the hours of closing on Sunday afternoon; and section 7 makes provision for the granting of early closing licences. And the 44 & 45 Vict. c. 61, enacts, that all licensed premises in Wales shall be closed during the whole of Sunday.

Travellers and Lodgers.

The 10th section of the 37 & 38 Vict. c. 49, provides that nothing contained in the Licensing Acts shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to *bonâ fide* travellers or persons lodging in his house; but prohibits the holder of a six-day licence from selling any such liquor on Sunday to any person whatever not lodging in his house. The same section also provides, that nothing in the Act contained as to hours of closing shall preclude the sale at any time at a railway station of such liquor to persons arriving at or departing from such station by railroad (*g*). And a person, for the purposes of the Licensing Acts, is not to be deemed a *bonâ fide* traveller unless the place where he lodged the preceding night is at least three miles distant from the place where he demands to be supplied with liquor: such distance to be calculated by the nearest public thoroughfare.

In calculating the distance from one place to another by the nearest public thoroughfare, for the purpose of satisfying the above definition of a *bonâ fide* traveller, it is proper to measure it across a navigable estuary where there is a public ferry which can be used by any person on payment of a toll (*h*).

The circumstances under which the Guest is admitted and supplied are matters for consideration in deciding whether the *Innkeeper* had reason to believe and did believe that he was a *Traveller* within the description, either when he admitted him or when he supplied him, such as whether he was a stranger or a neighbour, or whether he delayed longer or took more than was consistent with the need of refreshment (*i*). But the *onus* of showing that the persons supplied with refreshment are *bonâ fide* travellers is on the Innkeeper (*k*).

Innkeeper compellable to receive a Traveller.

It is said that an *Innkeeper* may be compelled by the Constable of the Town to receive and entertain a Traveller as his *Guest* (*l*).

(*g*) See also *Fisher* v. *Howard*, 34 L. J., M. C. 42.

(*h*) *Coulbert* v. *Troke*, L. R., 1 Q. B. D. 1; 45 L. J., M. C. 7.

(*i*) *Taylor* v. *Humphries*, 13 W. R. 136; *S. C.* 34 L. J., M. C. 1; and see 37 & 38 Vict. c. 49, s. 10.

(*k*) *Roberts* v. *Humphreys*, L. R., 8 Q. B. 483; 42 L. J., M. C. 147; 29 L. T., N. S. 387; 21 W. R. 885. Previous to the Licensing Act, 1872, it was held, that the burden of proof lay on the informer, see *Taylor* v. *Humphries*, *ubi supra*; *Morgan* v. *Hedger*, L. R., 5 C. P. 485; 40 L. J., M. C. 13; *Copley* v. *Burton*, L. R., 5 C. P. 489; 40 L. J., M. C. 141.

(*l*) 5 Edw. 4, 2 b; Dalt. cap. 7 1 Show. 268.

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 (*m*). 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 (*n*). 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 (*o*). 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 (*p*). 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 (*q*). 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 (*r*); 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 for his Guests, but only convenient lodging-rooms and lodging (*s*). Traveller not entitled to select particular apartments.

An *Innkeeper* (*t*) was formerly *primâ facie* liable to any Liability of

(*m*) *Fell* v. *Knight*, 8 M. & W. 276; *Rex* v. *Ivens*, 7 C. & P. 219; *Rex* v. *Luellin*, 12 Mod. 445.

(*n*) *Rex* v. *Ivens*, 7 C. & P. 213.

(*o*) *Rex* v. *Luellin*, 12 Mod. 445; and see *Reg.* v. *Rymer*, L. R., 2 Q. B. D. 136; 46 L. J., M. C. 108; 35 L. T., N. S. 774; 25 W. R. 415.

(*p*) *Hawthorn* v. *Hammond*, 1 C. & K. 407; *Lane* v. *Cotton*, 1 Salk. 18; *Collin's case*, Godb. 346; Palm. 374; 2 Rol. Rep. 345; *Newton* v. *Trigg*, 1 Show. 270.

(*q*) *Dicas* v. *Hides*, 1 Stark 247.

(*r*) *Fell* v. *Knight*, 8 M. & W. 269.

(*s*) *Burgess* v. *Clements*, 4 M. & S. 306.

(*t*) As to the difference of liability existing between a Boarding-House Keeper and an Innkeeper, see *Dansey* v. *Richardson*, 3 E. & B. 144. The law casts no obligation on a Lodging-House Keeper to take care of the goods of his lodger, *Holder* v. *Soulby*, 29 L. J., C. P. 246.

Innkeeper limited by 26 & 27 Vict. c. 41.

amount for loss not occasioned by the act of God or the King's enemies (*u*). 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 sect. 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 sect. 1 of the 26 & 27 Vict. c. 41, must be read with "act" only, and not also with "fault or neglect" (*x*). A mere verbal error in a copy of sect. 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* (*y*). A notice was exhibited in an 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 (*z*).

Salaried manager not liable as Innkeeper.

The salaried manager of an 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 (*a*).

Goods to which his liability extends.

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 (*b*); nor before the

(*u*) Per Bayley, J., *Richmond* v. *Smith*, 8 B. & C. 9.

(*x*) *Squire* v. *Wheeler*, 16 L. T., N. S. 93, per Byles, J.

(*y*) *Spice* v. *Bacon*, L. R., 2 Q. B. D. 463; 46 L. J., Q. B. 713; 36 L. T., N. S. 896.

(*z*) Ibid.

(*a*) *Dixon* v. *Birch*, L. R., 8 Ex. 135; 42 L. J., Ex. 135; 28 L. T., N. S. 360.

(*b*) Per Bayley, J., *Richmond* v. *Smith*, 8 B. & C. 9.

Innkeepers' Liability Act (*c*) was passed was he compellable to receive every description of goods with a Guest, but only such as a person ordinarily travels with (*d*). 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.

How ousted.

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 (*e*); nor that there was no positive negligence on his part (*f*); but the negligence of the Guest is a good defence, if it is gross negligence (*g*), or 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" (*h*).

In *Oppenheim* v. *White Lion Hotel Co.* (*i*), the plaintiff, who was a Guest at the Inn, went to bed, having a bag containing about 27*l.* in his trouser's pocket. He left his trousers on the ground at the side of his bed farthest from the door. There was a key in the lock of the door, but he only shut the door and did not lock it. He had previously pulled the bag containing the money out of his pocket in the commercial room for the purpose of paying somebody some money. And the Court of Common Pleas held, that there was evidence of negligence on his part, which occasioned the loss in such a way that it would not have happened had he used the care that a prudent man might reasonably be expected to have taken under the circumstances.

(*c*) 26 & 27 Vict. c. 41.

(*d*) *Broadwood* v. *Granara*, 10 Ex. 417.

(*e*) *Cross* v. *Andrews*, Cro. Eliz. 622.

(*f*) *Morgan* v. *Ravey*, 30 L. J., Ex. 131.

(*g*) *Armistead* v. *White*, 20 L. J., Q. B. 524.

(*h*) Per Erle, C. J. (Ex. Ch.), *Cashill* v. *Wright*, 2 Jur., N. S. 1072.

(*i*) L. R. 6 C. P. 515; 40 L. J., C. P. 93; 25 L. T., N. S. 93. See also *Jones* v. *Jackson*, 29 L. T., N. S. 399.

Where a Guest's Horse is stolen.

If the Guest's Horse is stolen the *Innkeeper* is answerable in an action upon the custom of the realm (*k*), 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 (*l*). And inasmuch as 26 & 27 Vict. c. 41, s. 1, specially exempts Horses from the operation of that Act, the Innkeeper's liability as respects amount is not restricted with regard to them.

Where another person's Horse is stolen.

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 (*m*).

Principle upon which liability depends.

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 (*n*), 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 (*o*). 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 (*p*). 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 (*q*).

Horse out at grass by the Guest's desire.

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 (*r*): for instance, an action lies against

(*k*) Fitzherbert's Nat. Brev. 943; *Jelly* v. *Clark*, Cro. Jac. 189; *York* v. *Greenaugh*, 2 Lord Raym. 867; *S. C.* 1 Salk. 338.

(*l*) 1 Salk. 338; 1 Rol. Abr. 3; Moor, 877; Cro. Jac. 224; Yelv. 162; Bac. Abr. tit. Inns and Innkeepers.

(*m*) 1 Rol. Abr. 3.

(*n*) *Gelley* v. *Clerk*, Cro. Jac. 188.

(*o*) *York* v. *Grindstone*, 1 Salk. 388.

(*p*) *Bennet* v. *Mellor*, 5 T. R. 273.

(*q*) *Smith* v. *Dearlove*, 6 C. B. 132.

(*r*) *Saunders* v. *Plummer*, Orl. Bridg. 227.

an *Innkeeper* who voluntarily leaves open the gates of his close, whereby the Horse strays out and so is lost or stolen (*s*).

Horse out at grass without the Guest's desire.

But he is answerable if he has put the Horse out to grass without the owner requiring him to do so (*s*). And 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 Mr. Justice Taunton 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" (*t*).

Where a Guest's Horse is injured.

It is said in *Calye's case* (*u*), 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 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* (*x*). Where the *Guest's Horse* has 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 (*y*).

Presumption of negligence against the Innkeeper.

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* (*z*) has been

(*s*) Bac. Abr. tit. Inns and Innkeepers; *Calye's case*, 8 Coke, 32 b; Moor, 1229; Pop. 127; *Mosley* v. *Fosset*, 1 Rol. Abr. 3; 4 Leon. 96; 2 Brownl. 255; *Richmond* v. *Smith*, 8 B. & C. 11.

(*t*) *Jones* v. *Tyler*, 1 A. & E. 522; *S. C.* 3 N. & M. 576.

(*u*) *Calye's case*, 8 Rep. 32 a; *S. C.* 8 Co. 32.

(*x*) *Sandys* v. *Florence*, 47 L. J., C. P. 598, per Lindley, J.

(*y*) *Stannion* v. *Davis*, 1 Salk. 404; *S. C.* 6 Mod. 323. See also *Bather* v. *Day*, 32 L. J., Ex. 171; 2 H. & C. 14.

(*z*) *Dawson* v. *Chamney*, 13 L. J., Q. B. 33; *S. C.* 5 Q. B. 165; *S. C.*

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 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. *Ravey* (*a*), 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" (*b*).

Not rebutted by stables being out of his control.

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

7 Jur. 1037. See also *Cashill* v. *Wright*, 2 Jur., N. S. 1072.

(*a*) *Morgan* v. *Ravey*, 6 H. & N. 265; *S. C.* 30 L. J., Ex. 131.

(*b*) 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. *Ravey*, was that of the Jurist, and that Pollock, C. B., founded the only possible reconcilement 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 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. *Ravey*; 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.

the *Innkeeper* and his Guest no such private arrangement can be recognized, and the *Innkeeper's* liability towards him for injury done to the Horse remains unimpaired (*c*).

A Guest's goods not distrainable.

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. (*d*).

Even where he is accommodated out of the Inn.

If an *Innkeeper* takes his Guest to rooms that he has provided for him, on account of not having sufficient room in his Inn, these rooms are privileged from distress (*e*).

Or uses a stable provided for the occasion.

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 (*f*).

An *Innkeeper* has a general lien on all goods and chattels belonging to his Guest (*g*).

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 (*h*), 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 (*i*), as these he is compelled to receive. And in *Threfall* v. *Borwick* (*k*), 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.

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* (*l*), whether it be kept in the stable or put out to grass. For the pasture

(*c*) *Bather* v. *Day*, 32 L. J., Ex. 171; 8 L. T., N. S. 205.

(*d*) 1 Rol. Abr. 668; Co. Litt. 47.

(*e*) See per Pollock, C. B., *Williams* v. *Holmes*, 22 L. J., Ex. 284.

(*f*) *Crosier* v. *Tomkinson*, 2 Ld. Ken. 439; *S. C.* Barnes' Notes, 472.

(*g*) *Mulliner* v. *Florence*, L. R., 3 Q. B. D. 484; 47 L. J., Q. B. 700; 38 L. T., N. S. 167.

(*h*) *Broadwood* v. *Granara*, 10 Ex. 417.

(*i*) *Snead* v. *Watkins*, 26 L. J., C. P. 57.

(*k*) L. R., 10 Q. B. 210; 44 L. J., Q. B. 87; 32 L. T., N. S. 32; Ex. Ch. Affirming, L. R., 7 Q. B. 711; 41 L. J., Q. B. 266; 26 L. T., N. S. 794.

(*l*) *Smith* v. *Dearlove*, 6 C. B. 135; *S. C.* 12 Jur. 377.

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 (*m*).

Cannot detain a Guest for his bill.

An *Innkeeper* cannot detain a Guest, or take off his clothes, in order to secure payment of his bill (*n*).

But may detain his Horse.

But he may detain his Horse, or may bring an action for lodging, &c. without any special contract (*o*).

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 (*p*). But this doctrine was doubtful (*q*). And in a recent case (*r*), 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.

His right of lien.

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 (*s*). So in a case in which a Trainer of Racehorses went 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 (*t*).

Horses and carriages sent to livery at an Inn.

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 (*s*).

Cannot sell one Horse for the keep of others.

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;

(*m*) 2 Rol. Abr. 85; Cro. Car. 271; Carth. 150; 1 Salk. 388.

(*n*) Bac. Abr. Tit. Inns and Innkeepers, 451; *Sunbolf* v. *Alford*, 3 M. & W. 248.

(*o*) *Saunders* v. *Plummer*, Orl. Bridg. 227; *Smith* v. *Dearlove*, 6 C. B. 135.

(*p*) Bac. Abridg. Inns and Innkeepers.

(*q*) See Story on Bailments, 503, 504.

(*r*) *Florence* v. *Mulliner*, L. R., 3 Q. B. D. 484; 47 L. J., Q. B. 700; 38 L. T., N. S. 167.

(*s*) *Smith* v. *Dearlove*, 6 C. B. 135; *S. C.* 12 Jur. 377.

(*t*) *Allen* v. *Smith*, 9 Jur., N. S. 230, 1284; and see *Mulliner* v. *Florence*, L. R., 3 Q. B. D. 484; 47 L. J., Q. B. 700; 38 L. T., N. S. 167.

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 (*r*).

Has a lien on a Horse left by a wrongdoer.

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 meat; for the *Innkeeper* is not bound to inquire who is the owner of the property brought to his Inn (*s*). 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" (*t*).

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 (*u*).

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* (*x*).

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 (*y*).

A third party when answerable.

If a *third party* promise the Innkeeper to satisfy him for the meat 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 (*z*).

Horse re-

But where the owner of a Horse has fraudulently got

(*r*) *Moss* v. *Townsend*, 1 Bulst. 207. But see the Innkeepers' Act, 1878 (41 & 42 Vict. c. 38), s. 1, *post*.
(*s*) *Turrell* v. *Crawley*, 18 L. J., Q. B. 155.
(*t*) *Robinson* v. *Walter*, Pop. 127.
(*u*) *Johnson* v. *Hill*, 3 Stark. N. P. C. 172.
(*x*) *Binns* v. *Pigot*, 9 C. & P. 208.
(*y*) *Jones* v. *Thurloe*, 8 Mod. 172; *S. C. Jones* v. *Pearle*, 1 Str. 557.
(*z*) Hutton, 101.

moved to defeat the lien.

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 (*a*). 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 (*b*).

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 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, Chief Justice Holt 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 *pound 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 (*c*). But his first opinion appears to be consistent with the law (*d*).

He cannot use a Horse he detains.

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 (*e*).

He could not formerly sell a Horse he detained.

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. *Thurloe*, "he is not to be his own carver" (*f*). And even if the Horse "eat out the price

(*a*) *Wallace* v. *Woodgate*, Ry. & M. 193; *S. C.* 1 C. & P. 575.

(*b*) *Rosse* v. *Bramstead*, 2 Rol. Rep. 438.

(*c*) *Gelber* v. *Berkeley*, Skin. 648; and see *Scarfe* v. *Morgan*, 4 M. & W. 270.

(*d*) Co. Litt. 47 b; *British Empire Shipping Co.* v. *Somes*, 28 L. J., Q. B. 220 (Ex. Ch.); *S. C.* 30 L. J., Q. B. 229. See also *Scarfe* v. *Morgan*, 4 M. & W. 279, 284.

(*e*) *Westbrook* v. *Griffith*, Moor. 876; *Robinson* v. *Walter*, 3 Bulstr. 270; Bac. Abr. tit. Inns and Innkeepers.

(*f*) *Jones* v. *Thurloe*, 8 Mod. 172; *S. C. Jones* v. *Pearle*, Str. 556.

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 (*g*).

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 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*: **But may now sell Horse after six weeks.**

"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

(*g*) *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.

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."

Distrainor's power of sale by statute.

Under statute 5 & 6 Will. 4, c. 59, s. 4, requiring the distrainor of any Horse (which word "Horse" may by sect. 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 (*h*). 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.

VETERINARY SURGEON AND FARRIER.

No law peculiar to Veterinary Surgeons.

There is no law which applies to a *Veterinary Surgeon* in particular; and where there is no contract, he must go upon a *quantum meruit*. And an usage to charge for attendance, where there is not much medicine required, is too uncertain (*i*).

Farrier cannot refuse to shoe a Horse.

Where a man takes upon himself a *public* employment he is bound to serve the public as far as his employment

(*h*) *Layton* v. *Hurry*, 8 Q. B. 811.

(*i*) *Lane* v. *Cotton*, 1 Salk. 18. The Royal College of Veterinary Surgeons was founded in the year 1791, and received a Charter of incorporation in the year 1845. By its Charter, Veterinary Surgery is constituted a profession, and the registered members of its body are alone to be recognized as the members of the Veterinary profession. Its diploma is granted only to persons who have qualified themselves by a certain educational course tested by examination. 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 this or some other duly constituted body. This suggestion is carried out by the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), which by sects. 11, 12, imposes 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 sects. 13, 14, further provides for the registration of colonial or foreign practitioners possessing some recognized diploma; by sect. 16 imposes a penalty of 50*l.* on any person falsely representing himself to be a Member of the Royal College; and by sect. 17 imposes a like penalty on any person who, after 1883, practises without the necessary qualifications, and further incapacitates any such person from recovering any fee for performing any veterinary operation.

goes, or an action lies against him for refusing. Thus if a *Farrier* refuse to shoe a Horse (*j*), an Innkeeper to receive a guest, a Carrier to carry, when he *may* do it, an action lies (*k*).

When brought at a reasonable time.

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" (*j*).

Answerable for his own want of skill.

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 (*l*), because it is the duty of every artificer to exercise his art rightly and truly as he ought (*m*).

Where a third person is affected.

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" (*n*).

When answerable for his servant.

And where a Horse has been injured in shoeing from the *negligence* of a *Farrier's* servant, the master is liable (*o*). 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 (*p*).

Action against a Farrier for pricking a Horse.

An action lies against a Farrier for pricking a Horse, when shoeing him (*q*), 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 (*r*).

Collins v. *Rodway*.

The Rule of Law as to the extent of a *Farrier's* liability in shoeing a Horse, is fully and clearly laid down by Chief Baron Pollock in the case of *Collins* v. *Rodway* (*s*); and as that case does not appear in any of the Reports, it will

(*j*) 14 Hen. 6, 18.
(*k*) See note (*i*), ante.
(*l*) 2 Chit. Pleading, 6th ed. 262.
(*m*) *Rex* v. *Kilderby*, 1 Saund. 312, n. 2.
(*n*) *Everard* v. *Hopkins*, 2 Bulstr. 332; and see *Longmead* v. *Holliday*, 6 Exch. 764.
(*o*) 1 Bla. Com. 431; *Randleson* v. *Murray*, 8 A. & E. 109.
(*p*) *Jones* v. *Hart*, 2 Salk. 440.
(*q*) 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, 6, pl. 11.
(*r*) 12 Edw. 4, 13.
(*s*) *Collins* v. *Rodway*, before Pollock, C. B., Guildhall, Dec. 15, 1845; 14 Veterinarian, 102.

here be given at considerable length. The following is compressed from an exact 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 reshod 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 Mr. Field the 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.

Rule as to Farriers.

In summing up Chief Baron Pollock said to the Jury: "The 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 unskilfully and improperly, no doubt

the defendant is liable to the plaintiff for any mischief that may have resulted from such unskilfulness; 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 skilfulness, and in consequence of that the operation is performed in a bad and bungling manner, or if, having the requisite skilfulness, 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 unskilfulness 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 skilfulness 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 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 unseasonable 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.

Farrying, &c. in the street.

Under the Police of Towns Act every person who, in any street, to the obstruction, annoyance or danger of the residents, shoes, bleeds or farries any Horse or animal (except in cases of accident), or cleans, dresses, exercises, trains, or breaks, or turns loose any Horse or animal, is liable to a penalty not exceeding 40*s*. (*t*).

Horse standing to be shod not distrainable.

A Horse standing at a *Farrier's* to be shod is exempt from Distress on the ground of public utility (*u*).

Horse may be detained for the price of his shoeing.

As a party has a right to go to a Farrier's shop by the tacit permission of the law (*x*), 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 (*y*).

Such Lien is favoured by law.

Because the artificer to whom goods are delivered for the purpose of being worked into form,—the *Farrier* by whose skill an animal is cured of a disease,—the Horse-breaker by whose skill a Horse 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 (*z*).

Extends only

But the Horse can only be kept for work done at that

(*t*) 10 & 11 Vict. c. 89, s. 28.

(*u*) *Francis* v. *Wyatt*, 3 Burr. 1502, and the authorities there cited.

(*x*) *Lane* v. *Cotton*, 1 Salk. 18.

(*y*) Bac. Abr. Trover (E.) 816.

(*z*) *Scarfe* v. *Morgan*, 4 M. & W. 280; *Chase* v. *Westmore*, 5 M. & S. 189.

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" (*a*). to each particular time.

In the case of *Scarfe* v. *Morgan* (*b*) 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 (*c*). Liability to feed a Horse detained.

HORSEBREAKER, TRAINER, ETC.

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" (*d*). Horsebreaker liable for damage to the Horse.

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 (*e*). Horsebreaker'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* (*f*). In *Bevan* v. *Waters* (*g*) he was held to have a lien; and the question also arose in *Jacobs* v. Trainer's lien.

(*a*) *Rushforth* v. *Hadfield*, 7 East, 229.

(*b*) *Scarfe* v. *Morgan*, 4 M. & W. 280.

(*c*) See ante, p. 228; 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, s. 1; also ante, p. 226, *British Empire Shipping Co.* v. *Somes*, 28 L. J., Q. B. 220 (Ex. Ch.).

(*d*) Lib. Plac. 25.

(*e*) *Scarfe* v. *Morgan*, 4 M. & W. 276.

(*f*) See *Jackson* v. *Cummins*, post.

(*g*) *Bevan* v. *Waters*, 3 C. & P. 520. See also *Sanderson* v. *Bell*, 2 C. & M. 304.

Latour (*h*), 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 Mr. Baron Alderson 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" (*i*). Mr. Baron Parke, 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 formally decided; for in *Jacobs* v. *Latour* (*h*) the point was left undetermined. It is true there is a *Nisi prius* decision of Best, C. J., in *Bevan* v. *Waters* (*k*), 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 *Bevan* v. *Waters* (*k*) was wrongly decided; I only doubt if it 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" (*l*).

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 (*m*). 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 (*m*).

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

(*h*) *Jacobs* v. *Latour*, 2 M. & P. 205.

(*i*) *Scarfe* v. *Morgan*, 4 M. & W. 276.

(*k*) *Bevan* v. *Waters*, 3 C. & P. 520.

(*l*) *Jackson* v. *Cummins*, 5 M. & W. 350.

(*m*) *Forth* v. *Simpson*, 13 Q. B. 680; *S. C.* 18 L. J., Q. B. 266; *Lee* v. *Irwin*, 4 Ir. Jur. 372.

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 for 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 (*n*).

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 Mr. Baron Parke 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" (*n*).

(*n*) *Scarfe* v. *Morgan*, 4 M. & W. 270.

CHAPTER XI.

LIVERY-STABLE KEEPERS, AGISTERS, AND THE HIRING AND BORROWING HORSES.

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LIVERY-STABLE KEEPER.

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*).

Has no privilege.

But if a Horse in his keeping be lost or stolen, he is answerable for it (*c*).

Liable where the Horse is lost.

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 (*c*).

Horse at Livery distrainable.

But the case of a Horse sent to a Livery-stable *merely* to be cleaned and fed, is very different from one, where he

But not where he is merely to be cleaned and fed.

(*a*) Yelv. 66; *Chapman* v. *Allen*, Cro. Car. 271; *Yorke* v. *Greenaugh*, 2 Ld. Raym. 687; *S. C.* 1 Salk. 388; *Gelly* 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; *Colquit* v. *Kirkman*, 47 Ga. 555 (1873).

(*b*) *Parkhurst* v. *Foster*, 1 Salk. 387; *Barnard* v. *How*, 1 C. & P. 366.

(*c*) *Yorke* v. *Greenaugh*, 2 Ld. Raym. 866; *Francis* v. *Wyatt*, 3 Burr. 1498; *S. C.* 1 Bla. Rep. 485; *Parsons* v. *Gingell*, 4 C. B. 558; *S. C.* 16 L. J., C. P. 227.

is sent to remain during the owner's pleasure, the feeding and grooming being only incident to the principal object (*d*).

Distinction taken in *Parsons* v. *Gingell*.

In the case of *Parsons* v. *Gingell* (*e*), the following distinction was taken by Chief Justice Wilde: "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 (*f*).

May have a lien by agreement.

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 (*g*).

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 (*h*).

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-*

(*d*) See per Wilde, C. J., *Parsons* v. *Gingell*, 4 C. B. 558.

(*e*) *Parsons* v. *Gingell*, 4 C. B. 558.

(*f*) *Barnard* v. *How*, 1 C. & P. 366; *Yorke* v. *Greenaugh*, 2 Ld. Raym. 867; *Francis* v. *Wyatt*, 3 Burr. 1498; *S. C.* 1 Bla. Rep. 485; *Parsons* v. *Gingell*, 4 C. B. 558; *S. C.* 16 L. J., C. P. 227.

(*g*) *Donatty* v. *Crowder*, 11 Moore, 479.

(*h*) *Wallace* v. *Woodgate*, R. & M. 193; *S. C.* 1 C. & P. 575.

stable Keeper a lien for money expended upon a Horse standing at livery at the request of the owner (*i*).

What cannot be set off in an action for keep.

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 (*k*).

He must take reasonable care of the Horse.

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 (*l*). 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 (*m*).

In *Searle* v. *Laverick* (*n*) 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 evidence to prove that the fall of the shed was owing to its being

(*i*) *Orchard* v. *Rackstraw*, 9 C. B. 698.
(*k*) *Murray* v. *Mann*, 2 Ex. 538.
(*l*) *Searle* v. *Laverick*, L. R., 9 Q. B. 122; 43 L. J., Q. B. 43; 30 L. T., N. S. 89.
(*m*) Ibid.
(*n*) Ibid.

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 ordinary 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 (30 & 31 Vict. c. 142), s. 5, unless the Judge certifies that there was sufficient reason for bringing the action in the High Court (*o*).

AGISTER.

His 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 (*p*). He may also maintain an action of *trover* for Horses or other Cattle during their agistment (*q*). If a Horse so left be sold by him, it is no Larceny (*r*); and if it be stolen, and the thief prosecuted, the property may be laid as his (*s*).

Does not insure a Horse's safety.

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 (*t*).

He is answerable for Negligence.

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 cir-

(*o*) *Legge* v. *Tucker*, 1 H. & N. 500, decided under 13 & 14 Vict. c. 61, s. 11.

(*p*) See 4 Inst. 293; 2 Rol. Abr. 551; *Woodward's case*, 2 East's P. C. 653.

(*q*) *Clark* v. *Roe*, 4 Ir. C. L. Rep. 7.

(*r*) *Rex* v. *Smith*, 1 Mood. C. C. 473.

(*s*) *Woodward's case*, 2 East's P. C. 653.

(*t*) *Broadwater* v. *Blot*, Holt, 547. See *Corbett* v. *Packington*, 6 B. & C. 268; Lib. Plac. 14.

cumstances of the case, there be *gross general negligence*, to which the loss may reasonably be ascribed (*u*).

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 (*v*). If he leaves his Gates open.

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 (*x*), which the owner had a right to expect (*x*); as where, from not properly *Fencing* a Pond, the Horse stuck in the mud and died, the *Agister* is answerable for such negligence (*y*). 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 (*z*). Fences out of order, &c.

In the case of *Gaunt* v. *Smith* (*a*), 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 this case has recently been overruled by the case of *Smith* v. *Cook* (*b*), 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 Injury by another Horse, &c.

(*u*) See note (*t*), ante.

(*v*) *Broadwater* v. *Blot*, Holt, 547. Also per Byles, J., *Marfell* v. *South Wales Railw. Co.*, 8 C. B., N. S. 525.

(*x*) *Rooth* v. *Wilson*, 1 B. & Ald. 59.

(*y*) *Povey* v. *Purnell*, before Chief Justice Jervis, 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.

(*z*) *Stacey* v. *Livesay*, C. P., N. P., Nov. 14, 1856.

(*a*) *Gaunt* v. *Smith*, N. P., Ex., Dec. 11, 1856.

(*b*) L. R., 1 Q. B. D. 79; 45 L. J., Q. B. 122; 33 L. T., N. S. 722.

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 Horse's condition.

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.

Eatage let for a certain time.

It will be seen by a modern case that 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 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. Mr. Baron Parke 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 quæstio;* if not, the plaintiff has performed his engagement, and the defendant has had all he bargained for, namely, a demise of the *eatage* for six months, and must pay for all" (*c*).

Agister has no 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 (*d*). And the law on this subject was laid down and explained in the case of *Jackson* v. *Cummins* (*e*), in which Mr. Baron Parke said, "I think that by the common law *no lien* exists in the case of *Agistment*. The general Rule as laid down by

(*c*) *Sutton* v. *Temple*, 12 M. & W. 60.

(*d*) *Chapman* v. *Allen*, Cro. Car. 273; *Richards* v. *Symons*, 8 Q. B. 93.

(*e*) *Jackson* v. *Cummins*, 5 M. & W. 342.

Best, C. J., in *Bevan* v. *Waters* (*f*), and by this Court in *Scarfe* v. *Morgan* (*g*), 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* (*g*); he simply takes in the animal to feed it. In addition to which we have the express authority of *Chapman* v. *Allen* (*h*), 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* (*i*). The 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 (*k*). 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

May have a lien by agreement.

(*f*) *Bevan* v. *Waters*, 3 C. & P. 520; *S. C.* M. & M. 236.
(*g*) *Scarfe* v. *Morgan*, 4 M. & W. 283; *S. C.* 1 Horn. & Hurl. 292.
(*h*) *Chapman* v. *Allen*, Cro. Car. 278.
(*i*) *Judson* v. *Ethridge*, 1 Cr. & M. 743.
(*k*) *Richards* v. *Symons*, 8 Q. B. 90.

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 (*k*).

Horses and Cattle being agisted are distrainable.

Horses and Cattle put into a close to be agisted are liable to be taken in distress by the landlord, the general Rule being that all things on the land are distrainable for rent in arrear (*l*).

But not when taken in to rest for a night.

Horses or cattle driven to a distant Market, and put into 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 (*m*).

Decision of the Irish Court of Queen's Bench.

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 (*n*).

Distinction where Cattle enter by breaking fences.

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 (*o*).

HIRING HORSES.

Letting for hire.

Letting for *Hire* is a bailment of a thing to be used by the *Hirer*, for a compensation in money (*p*).

Warranty of fitness for journey.

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 (*q*).

(*k*) *Richards* v. *Symons*, 8 Q. B. 90.

(*l*) *Jones* v. *Powell*, 5 B. & C. 650; *S. C.* 8 D. & R. 416.

(*m*) *Tate* v. *Gleed*, C. B., H. T. 24 Geo. 3; 2 Christ. Bla. Com. p. 8, n. 4; and see *Poole* v. *Longuevill*, 3 Wms. Saund. 290, n. (*q*).

(*n*) *Nugent* v. *Kirwan*, 1 Jebb & Symes, 97 (Q. B. Ir.).

(*o*) *Poole* v. *Longuevill*, 3 Wms. Saund. 290; and see 2 Lutw. 1580; Gilb. Dist. 34, 2nd ed. See also Woolrych on Fences, 309, 310.

(*p*) Jones on Bailments, 118.

(*q*) Per Pollock, C. B., *Chew* v. *Jones*, 10 L. T. 231.

The fact that the defendant has taken all reasonable and proper care to provide a fit and proper Carriage is not sufficient, and this was so held in the recent case of *Hyman* v. *Nye* (*r*), in which 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 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 break down 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* (*s*), and as the railway company did in *Readhead* v. *Midland Rail. Co.* (*t*), he will not be

Hyman v. *Nye.*

(*r*) L. R., 6 Q. B. D. 685.
(*s*) 2 Camp. 80.
(*t*) L. R., 2 Q. B. 412; 36 L. J., Q. B. 181.

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 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.

"In many cases bearing on this subject, the expression 'reasonably fit and proper' is used. This is a little ambiguous, and requires explanation. In a case like the present, a Carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, *i. e.*, as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the Carriage was hired, or (if no journey was specified) along roads or over grounds reasonably fit for Carriages. A Carriage not fit and proper in this sense would not be reasonably fit and proper, and *vice versâ*. The expression 'reasonably fit' denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great.

"It was objected on the part of the defendant that the plaintiff had, in his statement of claim, based his case on negligence on the part of the defendant, and not on any breach of warranty express or implied, and consequently that the plaintiff could not recover in this action, at least without amending. But the absence of such care as a person is by law bound to take is negligence; and whether the plaintiff sues the defendant in tort for negligence in

not having supplied such a fit and proper Carriage as he ought to have supplied, or whether the plaintiff sues him in contract for the breach of the implied warranty that the Carriage was as fit and proper as it ought to have been, appears to me wholly immaterial. Upon this point I adopt the opinion of Baron Martin in *Francis* v. *Cockrell* (*u*), which is based upon and warranted by *Brown* v. *Boorman* (*x*).

"The plaintiff's pleadings would have been free from all objection if he had stated in his statement of claim that he hired the Carriage of the defendant, and not merely that the plaintiff was lawfully in the Carriage. But the defendant knew under what circumstances the plaintiff was lawfully in it, and there was no surprise or miscarriage of justice occasioned by the omission of the statement of the fact of hiring. It appears to me, therefore, that the plaintiff ought not to be precluded from recovering in this action as the pleadings stand, if the facts come out in his favour.

"For the above reasons I am of opinion that there should be a new trial, and that the costs of the first trial, and of this rule, should abide the event."

Where a particular Horse is selected.

And 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 (*y*).

But a Horse should not be used for a purpose other than that for which it was hired.

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 (*z*).

What care is required.

In contracts reciprocally beneficial to 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* (*a*). 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 (*b*).

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 pru-

(*u*) L. R., 5 Q. B. 509; 39 L. J., Q. B. 113.
(*x*) 11 Cl. & Fin. 1.
(*y*) *Chew* v. *Jones*, 10 L. T. 231, 308.
(*z*) *Gapp* v. *Giandonati*, C. P., N. P., Nov. 14, 1857, coram Cresswell, J.
(*a*) Jones on Bailments, 25.
(*b*) *Cooper* v. *Burton*, 3 Camp. 5, n.

dently 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 (*c*).

Secus 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 (*d*).

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 (*e*).

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 (*f*).

Where negligence must be proved.

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 (*g*).

Where Horse falls lame.

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 (*h*).

Where the Horse is exhausted.

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* (*i*), 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

(*c*) *Jennings* v. *Rundall*, 8 D. & R. 335.
(*d*) *Walley* v. *Holt*, 35 L. T., N. S. 631.
(*e*) Jones on Bailments, 121.
(*f*) See *Davis* v. *Garrett*, 6 Bing. 716.
(*g*) *Cooper* v. *Burton*, 3 Camp. 5, n.
(*h*) Per Pollock, C. B., *Chew* v. *Jones*, 10 L. T., Ex. 231.
(*i*) *Bray* v. *Mayne*, 1 Gow, 1.

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 refuses its feed.

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 Chief Justice Dallas directed the Jury accordingly (*j*).

Where the Horse is returned in worse condition.

His Lordship also held that the defendant was not entitled to return the Horse on payment of the 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 (*j*).

Expenses of curing Sick Horse.

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 (*k*).

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 (*l*).

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 (*m*).

Bailment de-

A bailee of goods for hire, by selling them determines

(*j*) *Bray* v. *Mayne*, 1 Gow, 1.
(*k*) Pothier, Louage, p. 129; Story on Bailments, 258.
(*l*) *Dean* v. *Keate*, 3 Camp. 4.
(*m*) See Pothier, Louage, pp. 107, 129; Story on Bailments, 258.

termined by selling the goods.

the bailment, and the bailor may maintain *Trover* against the purchaser, though the purchase was *bonâ fide* (*n*). Thus, where a person *hired* a Horse and sold it to a third party, it was held by Mr. Justice Bosanquet 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 (*o*).

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 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 (*p*).

Where the Horse is stolen by the Hirer.

If a person gets a Horse out of the possession of the *Owner* under the pretence of *hiring* it, and then go and offer it for sale, there will be *no Felony* at common law until the sale is actually effected. In the following case the prisoner was indicted for stealing a Horse and gig which he had *hired* of a Livery-stable keeper in Stratford Mews, near Manchester Square, London. It appeared that he drove it off for some distance, and offered it for sale at a small price to an Innkeeper, who, under pretence of getting him the money, procured a constable and gave him into custody (*q*).

On the trial *Pear's case* (*r*), *Charlewood's case* (*s*) and *Semple's case* (*t*) were referred to, and the following passage from the latter quoted:—"But, on the other hand, if the *hiring* was only a *pretence* made use of to get the Chaise out of the possession of the owner, without any intention to restore it, or to pay for it, in that case the law supposes the possession still to reside with the owner, though the property itself has gone out of his hands, *and then the subsequent conversion will be the Felony.*"

And Chief Justice Tindal said, "This case comes near to many of those which have decided that the appropriation of property, under circumstances in some degree similar to the present, amounts to Larceny. However,

(*n*) *Cooper* v. *Willomatt*, 1 C. B. 672.
(*o*) *Shelly, Administratrix*, v. *Ford*, 5 C. & P. 313; and see Stolen Horses, ante, Chap. 3.
(*p*) Jones on Bailments, 88.
(*q*) *Reg.* v. *Brooks*, 8 C. & P. 295.
(*r*) *Pear's case*, 1 Leach, 212.
(*s*) *Charlewood's case*, 1 Leach, 409.
(*t*) *Semple's case*, 1 Leach, 420.

there has been *no actual conversion* of the property, but only an offer to sell; therefore the prisoner must be acquitted (*u*).

If the Owner parts with the possession of a Horse for a special purpose, and the bailee, when that purpose is executed, neglects to return it, and afterwards disposes of it; if he had not a felonious intention when he originally took it, his subsequent withholding and disposing of it will not, at common law, constitute a new felonious taking, or make him guilty of *Felony* (*x*).

Must have been originally taken with a felonious intention at common law.

But these questions will not now arise in cases of the kind just referred to, as by 24 & 25 Vict. c. 96, s. 3 (*y*), the fraudulent appropriation of property by bailees is declared to be Larceny, and may be the subject of an indictment for Larceny.

Now bailee indictable for Larceny by 24 & 25 Vict. c. 96.

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 (*z*); for wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it (*a*).

Horse hired by a servant.

In general the *Owner* of a Horse is liable for any accident which may befall it when fairly used by the *Hirer* (*b*). 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* (*c*); unless it breaks down through some act of the *Hirer*, which is not within the Contract (*d*). 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.

Owner's liability in case of accident.

(*u*) *Reg.* v. *Brooks*, 8 C. & P. 295. But see post.

(*x*) *Rex* v. *Banks*, R. & R. 441. But see post.

(*y*) Founded on 20 & 21 Vict. c. 54, s. 4.

(*z*) *Rimell* v. *Sampayo*, 1 C. & P. 254.

(*a*) Per Ashurst, J., *Lickbarrow* v. *Mason*, 2 T. R. 70.

(*b*) See *Arbon* v. *Fussell*, 3 F. & F. 152; and *Holmes* v. *Onion*, 2 C. B., N. S. 790.

(*c*) *Sutton* v. *Temple*, 12 M. & W. 60.

(*d*) *Lygo* v. *Newbolt*, 23 L. J., Ex. 108.

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 postillion 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 (*e*).

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; and his lordship mentioned a case of the kind, in which damages were recovered against the *Owner* of a Chaise for an injury done by it when Mr. Burton, a Welsh Judge, was in it, and who was called as a witness (*f*).

And 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 (*g*).

Travelling post.

And in the case of Sir Henry Hoghton (*h*), Horses were hired by him to draw his Carriage, *travelling post*, and he was held not to be answerable for damage which had been done.

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 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.

Laugher v. *Pointer*.

In *Laugher* v. *Pointer* (*i*), where the able Judgments on both sides, as is observed by Mr. Justice Story in his book on Agency, "exhausted the whole learning of the subject,"

(*e*) Jones on Bailments, 88; *Samuel* v. *Wright*, 5 Esp. 263; *Smith* v. *Lawrence*, 2 M. & R. 1.

(*f*) *Dean* v. *Branthwaite*, 5 Esp. 35; and quoted by Mr. Justice Littledale in *Laugher* v. *Pointer*, 5 B. & C. 558.

(*g*) *Samuel* v. *Wright*, 5 Esp. 263.

(*h*) *Sir H. Hoghton's case*, cited 5 B. & C. 556.

(*i*) *Laugher* v. *Pointer*, 5 B. & C. 558.

the Judges of the Court of King's Bench were equally divided, Chief Justice Abbott and Mr. Justice Littledale holding that the *Hirer* of the Horses was not liable for an injury done, and Mr. Justice Bayley and Mr. Justice Holroyd being of the contrary opinion.

Owner held liable in *Quarman* v. *Burnett*.

In the case of *Quarman* v. *Burnett* (*k*), 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 2*s*. a drive, and provided him with livery, which he left at their house at the end of each drive. Mr. Baron Parke 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* (*l*). 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."

Wearing the Hirer's livery.

"The fact of the coachman wearing the defendants' *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 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 altered 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,

(*k*) *Quarman* v. *Burnett*, 6 M. & W. 499.

(*l*) *Laugher* v. *Pointer*, 5 B. & C. 547.

which the fact at once answers. We have fully considered the judgments on both sides in *Laugher* v. *Pointer* (*m*), and think that the weight of authority and legal principle is in favour of the view taken by Lord Tenterden (*n*) and Mr. Justice Littledale."

A Job-master'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" (*o*).

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 (*p*).

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 (*q*).

Hirer liable where he might have controlled his Servant.

When a *Master* and *Servant* are together in a Carriage, and an injury ensues, the *Master*, from his mere presence, is a *co-trespasser*, if the act of the Servant amount to a *trespass* (*r*). 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

(*m*) *Laugher* v. *Pointer*, 5 B. & C. 547.
(*n*) Then Chief Justice Abbott.
(*o*) *Reading* v. *Menham*, 1 M. & Rob. 234.
(*p*) *Davy* v. *Chamberlayne*, 4 Esp. 229.
(*q*) Per Parke, B., *Quarman* v. *Burnett*, 6 M. & W. 499.
(*r*) *Chandler* v. *Broughton*, 1 Cr. & M. 229.

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.

M'Laughlin v. *Pryor.*

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* (*s*), 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 postillions, to Epsom races on the 3rd of June, 1840. 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 postillions endeavoured to get into that line, in order that they might pass through the gate. The *plaintiff* and a friend of his, Mr. Mason, were driving in a small gig at that *particular* place where the postillions attempted to fall into the line. The man on the wheel Horses said to the other postillion, "Break 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 postillions 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 card.

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.* Chief Justice Tindal left it to the Jury to say whether the accident was the result of want of 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 discharged the defendant's

(*s*) *M'Laughlin* v. *Pryor*, 1 C. & Marsh. 354; *S. C.* 4 Scott, N. R. 655; 4 M. & G. 48.

the Court of Common Pleas.

rule *nisi* for a nonsuit, and Chief Justice Tindal 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 postillions 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 post-boys 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 that 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."

Hirer sitting outside liable.

"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 showed 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* (*t*) and *Chandler* v. *Broughton* (*u*), 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, Justices, concurred (*x*).

The Jury must decide whether the servant is acting for the Hirer or Owner.

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 so;* each case of this class must depend upon its own circumstances" (*y*).

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

(*t*) *Gregory* v. *Piper*, 9 B. & C. 591; 4 M. & R. 500.
(*u*) *Chandler* v. *Broughton*, 1 C. & M. 29.
(*x*) *M'Laughlin* v. *Pryor*, 1 C. & Marsh. 354; *S. C.* 4 Scott, N. R. 655; 4 M. & G. 48.
(*y*) *Brady* v. *Giles*, 1 M. & Rob. 496.

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 (z).

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 (a).

Duties of Borrower and Lender.

The duties of the *Borrower* and *Lender* are thus well laid down by Mr. Justice Coleridge in *Blackmore* v. *Bristol and Exeter Railway Company* (b):—"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 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."

Lender of a Horse.

"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."

Must not conceal defects.

"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."

What care is required.

In contracts from which a benefit accrues *only* to him

(z) *Jeffery* v. *Walton*, 1 Stark. N. P. C. 267.

(a) Jones on Bailments, 118.

(b) *Blackmore* v. *Bristol & Exeter Railway Co.*, 27 L. J., Q. B. 167. See also *M'Carthy* v. *Young*, 3 L. T., N. S. 785.

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 (*c*).

As much as the Borrower is capable of bestowing.

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 (*d*).

Showing a Horse for sale.

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 Mr. Baron Rolfe, 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 a Mr. Margetson. The defendant accordingly rode the Horse to Peckham, and, for the purpose of showing it, took it into the East Surrey Race Ground, where Mr. Margetson 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;

(*c*) Jones on Bailments, 65. See Exod. xxii. 14, 15.

(*d*) Jones on Bailments, 65; Dumoulin's Tract—De eo quod interest, 186; Story on Bailments, 161.

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 Mr. Baron Parke said, "The defendant was shown to be 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."

A gratuitous Bailee.

And Mr. Baron Rolfe 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" (*e*).

Negligence of a 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* (*f*).

Rule as to negligence of gratuitous Bailee.

And the principle upon which he is liable is thus well laid down in *Coggs* v. *Bernard* (*g*): "If a man will enter upon a thing, and take the trust upon himself, and miscarries 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."

Use strictly personal.

In cases of mere gratuitous loan, the use is to be deemed strictly a personal favour and confined to the *Borrower*,

(*e*) *Wilson* v. *Brett*, 11 M. & W. 113. See also per Willes, J., in *Grill* v. *General Iron Screw Colliery Co.*, L. R., 1 C. P. 612.

(*f*) 1 Smith's L. C. 8th ed. 221, 222; per Pollock, C. B., *Beal* v. *South Devon Railway Co.*, 5 H. & N. 881; *Austin* v. *Manchester Railway Co.*, 10 C. B. 454; *Giblin* v. *McMullen*, L. R., 2 P. C. 317.

(*g*) *Coggs* v. *Bernard*, 1 Smith's L. C. 8th ed. 199 et seq.; *Giblin* v. *McMullen*, L. R., 2 P. C. 317.

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 intended by the parties is the natural and ordinary use for which the thing is adapted (*h*).

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 (*i*).

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 (*k*).

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 (*l*). 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 befal the Horse in his journey to Bath, or after the expiration of the week (*m*).

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 (*n*).

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 (*o*).

Borrower

A party who *borrows* a Horse is bound to *feed it* during

(*h*) Story on Bailments, 161; and *Lord Camoys* v. *Scurr*, 9 C. & P. 386.

(*i*) *Bringloe* v. *Morrice*, 1 Mod. R. 210; *S. C.* 3 Salk. 271.

(*k*) Noy's Maxims, 91.

(*l*) Ibid.

(*m*) Jones on Bailments, 68; *Coggs* v. *Bernard*, Ld. Raym. 915; 2 Ld. Raym. 909; 3 Bract. c. 2, s. 1; 1 Smith's L. C. 8th ed. 199.

(*n*) Story on Bailments, 161.

(*o*) *Williams* v. *Lloyd*, Jones on Bailments, 179; *S. C.* nom. *Williams* v. *Hill*, Palm. 548.

bound to feed the Horse.

the time of the loan (*p*); 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 off in condition did not arise from any neglect on his part (*q*).

Where the Horse is exhausted.

Where the Horse is *exhausted* and *refuses his feed*, he must not be ridden or driven any further (*r*).

Where the Horse is killed.

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 (*s*).

Where the Horse dies from disease.

Where a *borrowed* Horse dies from disease, the *Borrower* is not answerable. Thus, in *Williams* v. *Hide et Uxor.* (*t*) the plaintiff declared that in consideration 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 Borrower is answerable for damage.

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 (*u*).

Bailment ended by misuser.

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 (*x*).

(*p*) *Handford* v. *Palmer*, 2 B. & Bing. 359.
(*q*) *Bray* v. *Mayne*, 1 Gow, 1.
(*r*) Ibid.; and see Hiring Horses, ante.
(*s*) Jones on Bailments, 68.
(*t*) *Williams* v. *Hide et Uxor.*, Palm. 548; cited in *Powel* v. *Salisbury*, 2 Y. & J. 394.
(*u*) *Wheatley* v. *Patrick*, 2 M. & W. 650; and see Hiring Horses, ante.
(*x*) See per Pollock, C. B., *Bryant* v. *Wardell*, 2 Ex. 482.

CHAPTER XII.

CARRYING HORSES.

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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 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

(*a*) *Coggs* v. *Bernard*, 1 Smith's L. C. 8th ed. 199; *Trent and Mersey Navigation* v. *Wood*, 3 Esp. 127; *S. C.* 4 Doug. 287.

(*b*) See *Coggs* v. *Bernard*, 1 Smith's L. C., 8th ed. 199, and cases there cited.

(*c*) *Coggs* v. *Bernard*, 1 Smith's L. C. 8th ed. 199; *Palmer* v. *Grand Junction Canal Co.*, 4 M. & W. 749; *Pickford* v. *Grand Junction Railway Co.*, 10 M. & W. 399; *Parker* v. *Great Western Railway Co.*, 7 Scott, N. R. 835.

(*d*) 17 & 18 Vict. c. 31; see post, p. 269.

(*e*) *Crouch* v. *London and North Western Railway Co.*, 23 L. J., C. P. 73.

(*f*) See *Coggs* v. *Bernard*, 1 Smith's L. C. 8th ed. 199; Chit. Contr. 7th ed. 433; *Pickford* v. *Grand Junction Railway Co.*, 10 M. & W. 399; *Parker* v. *Great Western Railway Co.*, 7 Scott, N. R. 835.

(*g*) *Taylor* v. *Great Northern Railway Co.*, L. R., 1 C. P. 385; 35 L. J., C. P. 210.

(*h*) *Crouch* v. *Great Western Railway Co.*, 11 Ex. 742.

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 Queen's enemies, for which he is not responsible. By the expression 'vice,' I do not, of course, mean the destructive [illegible] carried, and which is likely to lead to such a result. If such a course 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."

Can.

Duty of

Proof of.

Kendall v. *London and South Western Rail. Co.* (o) 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 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.

(o) L. R., 7 Ex. 373; 41 L. J., Ex. 184; 26 L. T., N. S. 735.

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. If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable. Since this was written, the case of *The Great Western Rail. Co.* v. *Blower* (*p*) has been decided in the Common Pleas to this effect."

Rule applies to Common Carriers by Sea.

In *Nugent* v. *Smith* (*q*) 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

(*p*) Ante, p. 265.
(*q*) L. R., 1 C. P. D. 423; 45 L. J., C. P. 697; 34 L. T., N. S. 827—C. A.

thing itself, or both taken together, formed the sole, direct and irresistible cause of the loss, he is discharged.

When Carrier may refuse to carry Animals.

In *Richardson* v. *The North Eastern Rail. Co.* (*p*), it was apparently assumed 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. There 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.

Onus of proof of non-liability.

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 (*q*).

Must carry for reasonable Charges.

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 (*r*).

Defects in carriages.

Railway Companies, being Common Carriers, are *primâ facie* liable at common law for defects in their Carriages or Trucks, by which damage accrues to the goods entrusted to them to carry (*s*).

A special contract to carry.

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 liability for any loss occasioned by his negligence, is binding upon both parties (*t*) *at Common Law.*

(*p*) L. R., 7 C. P. 75: 41 L. J., C. P. 60; 26 L. T., N. S. 131; and see *Lake Shore Railroad Co.* v. *Perkins*, 25 Mich. 329.

(*q*) *Hudson* v. *Baxendale*, 2 H. & N. 575.

(*r*) *Johnson* v. *Midland Railway Co.*, 4 Ex. 367; and *Coggs* v. *Bernard*, 1 Smith's L. C. 8th ed. 199, and cases there cited.

(*s*) See *Combe* v. *London and South Western Railway Co.*, 31 L. T., N. S. 613.

(*t*) *Carr* v. *Lancashire and Yorkshire Railway Co.*, 7 Ex. 707.

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 (*u*):—"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* (*x*), and it was admitted in *Morse* v. *Slue* (*y*). 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 (*z*).

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 (*a*), 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 (*b*).

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 (*c*).

Sections 1—6.

That Act by the first six sections provides for enforcing against these Companies the duty of making arrangements for receiving and forwarding traffic of every description without delay and without partiality (*d*).

Section 7.

By the 7th section it enacts 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

(*u*) Story on Bailments, 549.

(*x*) *Southcote's case*, 4 Rep. 83.

(*y*) *Morse* v. *Slue*, 1 Vent. 238.

(*z*) See Judgment of Court of C. P., *Austin* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, 21 L. J., C. P. 183.

(*a*) *Carr* v. *Lancashire and Yorkshire Railway Co.*, 7 Ex. 707; *Austin* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, 21 L. J., C. P. 183; *Chippendale* v. *Lancashire and Yorkshire Railway Co.*, 21 L. J., Q. B. 22.

(*b*) *Carr* v. *Lancashire and Yorkshire Railway Co.*, 7 Ex. 707, and cases there cited.

(*c*) 17 & 18 Vict. c. 31.

(*d*) As to the construction to be put upon these sections, see *Bridon* v. *Great Northern Railway Co.*, 28 L. J., Ex. 51; *Garton* v. *Bristol and Exeter Railway Co.*, 28 L. J., C. P. 306; also per Crowder, J., *Nicholson* v. *Great Western Railway Co.*, 28 L. J., C. P. 89; and *Ransome* v. *Eastern Counties Railway Co.*, 26 L. J., C. P. 91.

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 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."

It is also provided by this section that such percentage or increased rate of charge shall be publicly notified (*e*); 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 animals or goods for carriage."

Application of section 7.

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 (*f*). 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 (*g*).

(*e*) According to the provisions of the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68.

(*f*) *Zunz* v. *South Eastern Railway Co.*, L. R., 4 Q. B. 539; 38 L. J., Q. B. 209; 20 L. T., N. S. 873.

(*g*) *Kent* v. *Midland Railway Co.*, L. R., 10 Q. B. 1; 44 L. J., Q. B. 18; 31 L. T., N. S. 430.

Construction 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 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. *The North Staffordshire Railway Company* (*h*), 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

(*h*) *Peek* v. *North Staffordshire Railway Co.*, 32 L. J., Q. B. 241 (Dom. Proc.)

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 received on the above Condition; that such Condition, made by the defendants, and assented to by the plaintiff, was a just and reasonable Condition.

General Notices invalid.

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.

Condition limiting Liability.

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" and "Special Contract" synonymous terms.

It was held also by the Lord Chancellor (Lord Westbury) and by Lord Wensleydale, Lord Cranworth and Lord 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 (*i*). This question therefore remains as decided by *M'Manus* v. *Lancashire and Yorkshire Railway Company* (*k*), that in order to give this section (*l*) 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

(*i*) See also *Lewis* v. *Great Western Railway Co.*, L.R., 3 Q.B.D. 195.

(*k*) *M'Manus* v. *Lancashire and Yorkshire Railway Co.* (Ex. Ch.) 4 H. & N. 349.

(*l*) 17 & 18 Vict. c. 31, s. 7.

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 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 sect. 7 only applies to cases where the company seek to relieve themselves from liability by reason of there being a Special Contract (*m*).

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 (*n*). 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 (*o*).

As to reasonableness Court to decide.

It was also decided, in the case of *M'Manus* v. *Lancashire and Yorkshire Railway Company* (*p*), 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* (*q*), 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."

(*m*) *Baxendale* v. *Great Eastern Railway Co.*, L. R., 4 Q. B. 244; 38 L. J., Q. B. 137.

(*n*) *Kirby* v. *Great Western Railway Co.*, 18 L. T., N. S. 658, per Martin, B.

(*o*) *Foreman* v. *Great Western Railway Co.*, 38 L. T., N. S. 351.

(*p*) See note (*k*), ante.

(*q*) *Simons* v. *Great Western Railway Co.*, 26 L. J., C. P. 25.

General effect of these decisions.

Thus then the effect of the 7th section of the Railway and Canal Traffic Act (*q*) 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, 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.

What Conditions are just and reasonable, and what not.

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 (*r*).

To be free from all risks in respect of damage—Cattle suffocated.

In the case of *Pardington* v. *South Western Railway Company* (*s*), a person sending cattle by railway signed a Contract containing the following amongst other Condition:—"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 con-

(*q*) 17 & 18 Vict. c. 31, s. 7.

(*r*) Per Martin, B., in *Gregory* v. *West Midland Railway Co.*, 33 L. J., Ex. 155.

(*s*) *Pardington* v. *South Western Railway Co.*, 1 H. & N. 392; and see *Wise* v. *Great Western Railway Co.*, 1 H. & N. 63; 25 L. J., Ex. 258.

sidered 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.

To be free from all risks of Conveyance—Horse injured by unsound truck.

In the case of *M'Manus* v. *Lancashire and Yorkshire Railway Company* (*t*), 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 occassioned 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."

(*t*) *M'Manus* v. *Lancashire and Yorkshire Railway Co.* (Ex. Ch.), 4 H. & N 349.

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 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 (*u*).

Condition as to time within which loss should be declared to create claim.

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 untruly or incorrectly declared or described by the sender are reasonable, and binding (*x*).

Condition as to Special Rate.

A Condition that a Railway Company should not be responsible for loss or damage for any cause whatsoever *to goods conveyed at a special or mileage rate*, is reasonable.

As to package insufficiently packed.

A Condition that a Company should not be liable for the loss, detention or damage of any package insufficiently packed, is unreasonable (*y*).

As to non-liability for Loss of Market as to Fish.

In *Beal* v. *South Devon Railway Company* (*z*), the Company gave notice that they would only convey fish on their line by special agreement, and the Condition in question provided that the Company should not be responsible under any circumstances for Loss of Market, or for other loss or injury, from any cause whatsoever, other than gross negligence or fraud; and this condition was held to be reasonable, *dissentiente* Martin, B.

As to Cheese.

In the case of *White* v. *Great Western Railway Company* (*a*), in which the plaintiff delivered a quantity of cheese at a station of the defendants' Railway for a particular market, and the cheese was delayed in delivery, and thus lost a market, it was held that a Condition that "the

(*u*) *Robinson* v. *Great Western Railway Co.*, 35 L. J., C. P. 123; H. & R. 97; see also *D'Arc* v. *London and North Western Railway Co.*, L. R., 9 C. P. 325; 30 L. T., N. S. 763. See also *Harris* v. *Midland Railway Co.*, 25 W. R. 63—D. C. A.; and *Lewis* v. *Great Western Railway Co.*, L. R., 3 Q. B. D. 195; 47 L. J., Q. B. 131; 37 L. T., N. S. 774. Per Brett, L. J., L. R., 3 Q. B. D. 209.

(*x*) *Lewis* v. *Great Western Railway Co.*, 5 H. & N. 867.

(*y*) *Simons* v. *Great Western Railway Co.*, 26 L. J., C. P. 25.

(*z*) *Beal* v. *South Devon Railway Co.*, 5 H. & N. 875. See also *Allday* v. *Great Western Railway Co.*, 34 L. J., Q. B. 5, post.

(*a*) *White* v. *Great Western Railway Co.*, 26 L. J., C. P. 158; and see cases there cited, and *Allday* v. *Great Western Railway Co.*, 34 L. J., Q. B. 5, post. See also *Lord* v. *Midland Railway Co.*, L. R., 2 C. P. 339.

Company will not under any circumstances be liable for Loss of Market, or any other claim arising from delay or detention of any train, whether at starting, or at any of the stations, or in the course of the journey," was not an unreasonable one.

As to Loss of Market coupled with "Injury" to Cattle.

In the case of *Allday* v. *Great Western Railway Company* (*b*), 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 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

(*b*) *Allday* v. *Great Western Railway Co.*, 34 L. J., Q. B. 5.

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 Mr. Justice Crompton 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 Mr. Justice Mellor and Mr. Justice Shee 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 (*c*), 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* (*d*), 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.*, 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.

(*c*) *Beal* v. *South Devon Railway Co.*, 5 H. & N. 875, ante; *White* v. *Great Western Railway Co.*, 26 L. J., C. P. 158, ante.

(*d*) *Harrison* v. *London, Brighton and South Coast Railway Co.*, 29 L. J., Q. B. 209.

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 (*e*), and, as reversed, was the subject of some discussion in *Ashendon* v. *The London, Brighton and South Coast Railway* (*f*), 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 *Peek* v. *North Staffordshire Railway Company* (*g*).

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 (*h*).

Condition as to general non-liability.

In the case of *Gregory* v. *West Midland Railway Company* (*i*), a cow and a heifer had been placed by the defendants' servants without halters in a sheep or calf truck

(*e*) 31 L. J., Q. B. 113.
(*f*) L. R., 5 Ex. D. 190; 42 L. T., N. S. 586.
(*g*) Ante, p. 271.
(*h*) *M'Cance* v. *London and North Western Railway Co.*, 34 L. J., Ex. 39.
(*i*) *Gregory* v. *West Midland Railway Co.*, 33 L. J., Ex. 155.

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 waggon leaves the Station." In accordance with the decision of the Exchequer Chamber in *M'Manus* v. *The Lancashire and Yorkshire Railway Company* (*j*), these Conditions were held to be neither just nor reasonable.

In *Rooth* v. *The North Eastern Railway Company* (*k*), 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 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.

Condition as to non-liability beyond their own limits.

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

(*j*) *M'Manus* v. *Lancashire and Yorkshire Railway Co.* (Ex. Ch.) 4 H. & N. 327. See also *Peek* v. *North Staffordshire Railway Co.*, 32 L. J., Q. B. 241, ante, p. 271.

(*k*) L. R., 2 Ex. 173; 36 L. J., Ex. 83.

determined (*l*). 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 convenience of the Consignors, and for the purpose of being paid to the other Carrier" (*m*).

If part of special contract is reasonable, such part may be relied on.

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 (*n*).

Alternative Rates.

It has been said that the principle deducible from the authorities is, that a contract, *primâ 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 (*o*). But the principle would not be applied in a case where the higher rate is excessive, and the Court of Common Pleas refused to apply it to a case where wax-work was carried "at owner's risk" (*p*).

But it seems that it would apply where the expression "at owner's risk" is modified by an exception of the wilful misconduct of the defendants' servants (*q*).

Where alternative rates are charged for the conveyance of cattle or goods, the lower rate being at owner's risk, *à priori* the higher rate, if within the parliamentary limit,

(*l*) *Muschamp* v. *Lancaster and Preston Junction Railway Co.*, 8 M. & W. 421; *Watson* v. *Ambergate, Nottingham and Boston Railway Co.*, 15 Jur. 448.

(*m*) *Aldridge* v. *Great Western Railway Co.*, 33 L. J., C. P. 161.

(*n*) *M'Cance* v. *London and North Western Railway Co.*, 7 H. & N. 477.

(*o*) *Gallagher* v. *Great Western Railway Co.*, Ir. R., 8 C. L. 326; see also Hodges on Railways, 6th ed. 598.

(*p*) *D'Arc* v. *London and North Western Railway Co.*, L. R., 9 C. P. 325; 30 L. T., N. S. 763; and see *Robinson* v. *Great Western Railway Co.*, 35 L. J., C. P. 123.

(*q*) *Lewis* v. *Great Western Railway Co.*, L. R., 3 Q. B. D. 195, 203; 47 L. J., Q. B. 131; 37 L. T., N. S. 774.

is not necessarily unreasonable or prohibitory (*r*). It is a 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 (*s*).

What is wilful misconduct.

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, 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 (*t*). Thus, where a Railway Company contracted with the plaintiff to carry a van at a reduced rate, on the terms that the Company should not be liable for damage or delay, except such as was occasioned by wilful misconduct on the part of its servants; and the van was to be delivered at a station outside the Company's system, and on the line of another Company; and a delay was occasioned by the van having been loaded on a truck which was too high to allow of its passing under the other Company's gauge, although it passed under that of the Company; it was held that there was not sufficient evidence of wilful misconduct on the part of the Company's servants to go to a Jury, inasmuch as it was not proved that they knew that the truck was too high to carry the van under the other Company's bridge (*u*). But where a Railway Company had carried goods from one of its stations to another, and the station master at the place to which they were carried, without making inquiries of the Consignor, after a delay of a week, delivered the goods to a person of a very similar name to that of the person named as Consignee; and the Contract of Carriage was at a reduced tariff, conditioned to exclude all liability except for wilful misconduct; the delivery of the goods was held to amount to wilful misconduct (*x*).

(*r*) *Foreman* v. *Great Western Railway Co.*, 38 L. T., N. S. 851.

(*s*) Ibid.

(*t*) *Great Western Railway Co.* v. *Glenister*, 29 L. T., N. S. 422; 22 W. R. 72

(*u*) *Webb* v. *Great Western Railway Co.*, 26 W. R. 111. See also *Lewis* v. *Great Western Railway Co.*, L. R., 3 Q. B. D. 195; 47 L. J., Q. B. 131.

(*x*) *Hoare* v. *Great Western Railway Co.*, 37 L. T., N. S. 186; 25 W. R. 63.

Onus of proof.

The onus of proving that a Condition is reasonable, lies upon the Company (*y*).

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 (*z*).

Delivery by Carrier.

Very slight evidence of non-delivery is sufficient to call upon the defendant to prove delivery (*a*). 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 (*b*). 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 (*c*).

Notice of Consignee's refusal to Consignor.

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 (*d*). However, Bramwell, B., said in the case of *Hudson* v. *Baxendale* (*d*), that "the judgment of the majority of the Court" (from which however he dissented) "in *Crouch* v. *Great Western Railway Company* (*e*) 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

(*y*) *Harrison* v. *London, Brighton and South Coast Railway Co.*, 29 L. J., Q. B. 209.

(*z*) See Addison on Torts, 2nd ed. p. 403.

(*a*) *Griffiths* v. *Lee*, 1 C. & P. 110; *Hawkes* v. *Smith*, Car. & M. 72; Roscoe, N. P., 14th ed. 585.

(*b*) *M'Kean* v. *M'Iver*, L. R., 6 Ex. 36; 40 L. J., Ex. 30; 24 L. T., N. S. 559.

(*c*) *Shepherd* v. *Bristol and Exeter Railway Co.*, L. R., 3 Ex. 189; 37 L. J., Ex. 113.

(*d*) *Hudson* v. *Baxendale*, 27 L. J., Ex. 93.

(*e*) *Crouch* v. *Great Western Railway Co.*, 26 L. J., Ex. 418.

could recover from the owner of the Horse the reasonable charges which it had paid to the stable-keeper (*f*).

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 (*g*).

Compensation paid erroneously to Consignor no answer to action by Consignee.

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 (*h*).

Liability of Company when accident happens to a Horse in their yard.

In a case (*i*) in which the plaintiff sent a Horse of great value to the yard of the defendant's Railway Station at Worcester, for the purpose of its being carried by their Railway: 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*.

Opinion of Cockburn, C. J.

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 increase rate of charge as required

(*f*) *Great Northern Railway Co.* v. *Swaffield*, L. R., 9 Ex. 132; 43 L. J., Ex. 89; 30 L. T., N. S. 562.

(*g*) *Heugh* v. *London and North Western Railway Co.*, L. R., 5 Ex. 51; 39 L. J., Ex. 48; 21 L. T., N. S. 676.

(*h*) *Coombs* v. *Bristol and Exeter Railway Co.*, 27 L. J., Ex. 269.

(*i*) *Hodgman* v. *West Midland Railway Co.*, 33 L. J., Q. B. 233.

by the section; and thirdly, therefore, on both grounds, the plaintiff was entitled to recover the full value of the Horse.

Of Mellor, J.

Mr. Justice Mellor 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 50*l.*

Of Blackburn, J.

It was held by Mr. Justice Blackburn, 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 50*l.* 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 percentage of charge (*k*).

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 (*l*).

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 (*m*). 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 (*n*). And the question as to which company is liable will depend on the terms of the special contract in each individual case.

(*k*) *Robinson* v. *South Western Railway Co.*, C. P. Banc. May, 1865; 19 C. B., N. S. 51; 34 L. J., C. P. 234.

(*l*) *Slim* v. *Great Northern Railway Co.*, 14 C. B. 647.

(*m*) *Muschamp* v. *Lancaster, &c. Railway Co.*, 8 M. & W. 421; 3 H. & C. 771; 4 H. & C. 582, Exch. Ch.

(*n*) *Fowles* v. *Great Western Railway Co.*, 22 L. J., Ex. 76; 7 Exch. 699; and see Roscoe, N. P., 14th ed. 572.

Thus, in *Coxon* v. *Great Western Railway Company* (*o*), the plaintiff delivered cattle at a station of the Shrewsbury and Hereford Railway Company, to be conveyed to Birmingham, 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 Shrewsbury, and then on the defendants' line to Birmingham. Between Shrewsbury and Birmingham 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.

Gill v. *Manchester, &c. Rail. Co.*

In *Gill* v. *Manchester, Sheffield and Lincolnshire Railway Company* (*p*), 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 Doncaster to Sheffield, went to the station of the Great Northern Railway Company at Doncaster and booked her for Sheffield 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 Sheffield, 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

(*o*) 29 L. J., Ex. 165; 5 H. & N. 274.

(*p*) L. R., 8 Q. B. 186; 42 L. J., Q. B. 89; 28 L. T., N. S. 587.

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 Railway was not protected by the condition above set out, an action was maintainable against them.

Combe v. *London and South Western Rail. Co.*

In *Combe* v. *London and South Western Railway Co.* (*q*), the plaintiff sent off some Horses from Wadhurst, 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 Farnham, a station on the defendants' line. At Guildford was the junction with the defendants' railway, where it was necessary to book again, and whence there are two routes to Farnham. The groom, on going to take tickets, was told, in answer to his inquiries, that the train direct to Farnham 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 Wadhurst. At Farnham two porters came to unload the trucks, 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 Wadhurst 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 the 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 Guildford, and, by sending it on to Farnham, became liable for an accident caused by its defects.

Through carriage, partly by railway and partly by sea. Regulation of Railways Act, 1868.

The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), Part II., sect. 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

(*q*) 31 L. T., N. S. 613.

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 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.

Section 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; and also provides that "the provisions of the Railway and Canal Traffic Act, 1854," so far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby.

Company to furnish particulars of charges.

By section 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 section 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."

Regulation of Railways Act, 1871.

The Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78), section 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 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 extends the provisions of the 31 & 32 Vict. c. 119, s. 16, *ante*, p. 288, and therefore of 17 & 18 Vict. c. 31, s. 7, *ante*, p. 269, to the carriage of goods which the Company contract to carry in ships not belonging to them. In *Doolan* v. *The Midland Railway Company* (*r*), the defendants, an English Railway Company, having no special powers to work steam vessels, contracted at their office in Dublin to convey cattle by sea to Liverpool, and thence by railway to St. Ives. The cattle were lost on the passage to Liverpool through the negligence of the crew of the steam vessel, with the owners of which the Railway Company had a through booking arrangement for the conveyance of their traffic. The contract was made subject to a written condition exempting the Railway Company from liability for "loss of, or any damage or injury to, *animals*, goods, or property intrusted to them, arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels;" and it was held by the House of Lords, reversing the judgment of the Irish Exchequer Chamber (*s*), and restoring the judgment of the Irish Court of Common Pleas (*t*), that the contract was governed by the Railway and Canal Traffic Act, 1854, s. 7 (*u*), that its conditions were unreasonable, since they tried to exempt the Company from all liability for the negligence of its officers and servants, and therefore that the Railway Company was liable for the loss of the cattle.

Doolan v. *Midland Rail. Co.*

(*r*) L. R., 2 App. Cas. 792; 34 L. T., N. S. 317.
(*s*) 10 Ir. R., C. L. 47.
(*t*) 9 Ir. R., C. L. 20.
(*u*) Ante, p. 269.

Steamboat and Railway Companies, &c. to disinfect Carriages, Boats, &c.

Section 32 of the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), empowers the Privy Council from time to time to make such orders as they think fit, subject 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 Order in Council of August 16th, 1878 (the Cleansing and Disinfecting Order of 1878), 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, navigation, or river, after the landing of animals therefrom and before the taking on board of any fresh animals or other cargo—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—of every truck and every van on every occasion after an animal is taken out of the same, and before any other animal is placed therein—of every moveable gangway or other apparatus used for transit of animals on or from a truck or vessel as soon as practicable. For any contravention of these provisions the owner and master of the vessel in which; and the Railway 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.

"Reasonable time."

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 (*n*). 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 (*o*).

(*n*) *Briddon* v. *Great Northern Railway Co.*, 28 L. J., Ex. 51.

(*o*) *Taylor* v. *Great Northern Railway Co.*, L. R., 1 C. P. 385; 35 L. J., C. P. 210.

What is, or is not, reasonable time, must be judged with reference to the means at the Carrier's disposal for forwarding the goods (*p*); 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 (*q*). 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 (*r*).

A Ferryman.

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 moveable slip leading from the boat to a landing-barge. The slip had a handrail, 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 they 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 con-

(*p*) *Hales* v. *London and North Western Railway Co.*, 32 L. J., Q. B. 292.

(*q*) *Blakemore* v. *Lancashire and Yorkshire Railway Co.*, 1 F. & F. 76; *Hales* v. *London and North Western Railway Co.*, 32 L. J., Q. B. 292.

(*r*) *Myers* v. *London and South Western Railway Co.*, L. R., 5 C. P. 1.

sequence of their culpable negligence in allowing an improper slip to be used (*r*).

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 (*s*), 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 the Company, though the declared value is less than the real value (*t*)

Injury must not be too remote. 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 (*u*). 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 (*x*).

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 (*y*).

Failing to provide Horse-boxes for Horses to be sold at Auction. 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 realized 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

(*r*) *Willoughby* v. *Horridge*, 22 L. J., C. P. 90.
(*s*) 17 & 18 Vict. c. 31.
(*t*) *M'Cance* v. *London and North Western Railway Co.*, 31 L. J., Ex. 65; *S. C.* Ex. Ch. 34 L. J., Ex. 39.
(*u*) *Watson* v. *Ambergate, Nottingham and Boston Railway Co.*, 15 Jur. 448.
(*x*) *Black* v. *Baxendale*, 1 Ex. 410.
(*y*) *Hart* v. *Baxendale*, 16 L. T., N. S. 390, Martin, B.

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 (*z*).

(*z*) *Waller* v. *Midland Great Western Railway Co.*, L. R., 4 Ir. 376; reversing L. R., 1 Ir. 520.

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.

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NEGLIGENT DRIVING.

Definition of negligence.

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*).

Negligent driving.

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 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.

Where killing a person is held to be Murder.

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*).

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

(*a*) Per Alderson, B., *Blyth* v. *Birmingham Waterworks Co.*, 2 Jur., N. S. 333.

(*b*) *Knight's case*, 1 Lewin, C. C. 168.

(*c*) Spring Assizes, 1829, quoted 1 Lewin, C. C. 168.

(*d*) See per Alderson, B., *Reg.* v. *Cook*, Appendix; 1 Ld. Raym. 143.

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 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*). Furious driving.

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*). Carriages racing.

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:—Mr. Justice Driver unable to pull up.

(*e*) 1 Hale, 476; Fost. 263; 1 East's Pleas of the Crown, 263; and see *Reg.* v. *Cook*, Appendix.

(*f*) *Reg.* v. *Swindall*, 2 C. & K. 230.

(*g*) *Reg.* v. *Cavendish*, 8 Ir. R., C. L. 178—C. C. R.

(*h*) See the General Highway Act, 5 & 6 Will. 4, c. 50, s. 78; and for the Metropolis, 2 & 3 Vict. c. 47, s. 54.

(*i*) Per Garrow, B., *Rex* v. *Walker*, 1 C. & P. 32.

(*k*) *Reg.* v. *Swindall*, 2 C. & K. 230.

Patteson 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*).

Causing death of Passenger.

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 an accident (*m*).

Defence of contributory Negligence.

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*).

Where killing a person is held to be Accidental Death.

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*).

(*l*) *Rex* v. *Timmins*, 7 C. & P. 500.
(*m*) *Reg.* v. *Jones*, 22 L. T., N. S. 217; 11 Cox, C. C. 544—Lush, J.
(*n*) *Reg.* v. *Kew*, 12 Cox, C. C. 355—Byles, J.
(*o*) *Reg.* v. *Jones*, 22 L. T., N. S. 217; 11 Cox, C. C. 544—Lush, J.
(*p*) 1 Hale, 476; Fost. 263; 1 East's Pleas of the Crown, 263.

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, Chief Justice Holt, Justice Tracy, Baron Bury, 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, 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*). Remarks in East's Pleas of the Crown.

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 Streets are unusually crowded.

(*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.

(*t*) 1 East's Pleas of the Crown, 263.

(*u*) *Reg.* v. *Murray*, 5 Cox, C. C. 509 (Ir.).

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 40*s*.

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 is 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 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*).

Where party injured by negligent driving may maintain an action.

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*).

Duty of drivers of public and private vehicles.

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

(*x*) Re-enacting 1 Geo. 4, c. 4.
(*y*) 2 & 3 Vict. c. 47, s. 54.
(*z*) *Justice* v. *Gosling*, 16 J. P. 105 (C. P.); *S. C.* 21 L. J., C. P. 94; 2 & 3 Vict. c. 47, s. 63.
(*a*) *Justice* v. *Gosling*, 16 J. P. 105 (C. P.); *S. C.* 21 L. J., C. P. 94.
(*b*) See per Coltman, J., *Thorogood* 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., N. S. 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., N. S. 560; 21 W. R. 595; and *Manzoni* v. *Douglas*, L. R., 6 C. P. D. 145, 151.

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. Mr. Justice Byles 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.

Action lies for negligence in the care of vicious Horses, &c.

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*).

Where another person strikes a Horse.

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*).

Damages recovered in *Trespass*.

A man and his wife brought an action of *Trespass* for 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.

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*).

Mail cart rapidly entering Post Office Yard.

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*).

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

(*d*) See Com. Dig. Action upon the Case for Negligence, A. 5; and Ferocious and Vicious Animals, post, Part 2, Chap. 2; see also *Michael* v. *Alestree*, 2 Lev. 173.

(*e*) *Gibson* v. *Pepper*, 2 Salk. 637.

(*f*) *Dodwell* v. *Burford*, 1 Mod. 24.

(*g*) See *Mayor of Colchester* v. *Brooke*, 7 Q. B. 359.

(*h*) *Smith* v. *M'Namara*, cor. Lord Campbell, C. J., Queen's Bench, N. P., May 12, 1853; and see *Bowden* v. *Sherman*, Appendix.

person so placing it is liable. Thus, in the following case, the plaintiff, a carman, was proceeding with his master's cart, heavily laden, along Angel Lane, Stratford, when the Horse took fright at a Fire-basket, on which some asphalte was boiling, started to one side, and, notwithstanding the plaintiff's catching hold of the bridle, threw him down, so that the wheel passed over his leg and produced a compound fracture of the bone. He was taken to the London Hospital, where the bone was set, but hospital gangrene supervened, and he was for some days in danger of losing his leg. He, however, gradually recovered, was discharged after twelve weeks, and continued as an outpatient for a long time. Eventually he was able to walk about with the help of a stick, and earn 10*s.* a-week, but at the time of the accident he was in the receipt of 1*l.* a-week, on which he supported himself and two young daughters. The defendant had contracted to lay the floor of a room in the Angel Inn with asphalte, which he caused to be boiled in the lane, as the smell was too powerful for the house. He had been warned of the danger of having the Fire-basket in the street, and had removed it to a different part of the lane, but did not place it in the yard of the Inn, where it had been suggested it would be more out of the way. The Jury returned a verdict for the plaintiff—damages 60*l.* (*i*).

By Van left on Roadside.

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 plaintiffs' 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

(*i*) *Lambert* v. *Harrison*, cor. Talfourd, J., Guildhall (C. P.), Feb. 25, 1853.

vice of the Mare combined, and that there was no contributory negligence. Denman, J., in delivering judgment for the plaintiff said, "It was, I think, clearly made out at the trial, that the Mare which the deceased was driving was a vicious Mare, in the sense that she was a kicker. It must, however, be taken that the Jury negatived any knowledge in the deceased of this habit, such as would have rendered it negligent in him to drive the Mare. Contributory negligence on any other ground was negatived. The immediate cause of the accident was clearly that the Mare in kicking got her leg over the shaft which caused her to fall, and in falling, the deceased received the kick which ultimately caused his death. The Jury found that the accident was due to the van being there (which must be taken to mean 'to the van being unreasonably left on that part of the highway so as to cause some danger to vehicles passing by'), combined with the vice of the Mare. I understood this finding to mean that the accident would not have happened but for both these causes combined —an unreasonable and dangerous user by the defendants of that part of the road by their van and plough so as to cause danger to vehicles passing by,—and an exceptionally dangerous animal shying, and running away from fright at the van and plough, and then kicking the vehicle whether from fright or vice, the kicking being an exceptional vice in the Mare. This finding must also, if possible, be reconciled with the other finding that the accident was not a mere accident, which was explained to the Jury as meaning one for which no one was to be fairly considered to blame.

Judgment in *Harris* v. *Mobbs.*

"The plaintiffs' counsel argued that, inasmuch as the defendant was guilty of an unauthorized and dangerous act in derogation of the public rights, by which the Mare had been frightened, this must be taken to be the only material cause of the mischief, the deceased being guilty of no wrong at all, and the whole transaction being one flowing directly from the alarm caused by the defendant's unauthorized act.

"On the other hand, it was contended that the *causa proxima* of the injury was the kicking of the Mare, which was not a necessary or natural consequence either of the shying or of the running away, so that, although it might be true that, in some sense, the van and plough being there led to the accident, it was not true that their being there was material to the accident, or caused it, in such a sense, so to make the defendant responsible for it.

"Though, not without hesitation, I have come to the conclusion that the plaintiffs are entitled to have the verdict and judgment entered for them. Looking at the undisputed facts in the case, I think it is clear that, although the immediate cause of the accident was the kicking of the Mare, still the unauthorized and dangerous appearance of the van and plough on the side of the highway was, within the meaning of the law, the proximate cause of the accident. It cannot, I think, be laid down that no one is entitled to recover damages for an injury caused by a kicking horse, in the absence of any knowledge on his part that it is such. In the present case it must be taken that the deceased was not aware that the horse was a kicker. Then was the kicking which caused the death a natural and necessary consequence of the act complained of? I think, upon the whole, that it was. The van was there, and it in fact frightened the deceased's Mare so that she shied and swerved to run away, and, having got one wheel on the footpath, kicked violently, and within 150 yards fell and injured the deceased so that he died. The whole transaction is within a few seconds, and originates in the fright of the Mare caused by the van. I think it cannot be laid down as having been the duty of the deceased to abstain from driving the Mare. On the other hand, it cannot be laid down as the right of the defendant to assume that no nervous or runaway or kicking Horse would come along the highway. It is only in the case of Horses liable to be frightened that any danger exists, and where a Horse has once been frightened by a dangerous apparition unlawfully placed on the highway, running away and kicking can hardly be considered unusual or unnatural consequences of the fright. The wrongdoer has no right to lay down the measure of his own wrong, or to limit the free use of the highway to Horses which shall only shy when frightened and do no further mischief. On the whole, I think that the finding of the jury only amounts to this, that the accident was caused by the van, but that if the Horse was not a kicker it would not have happened. Looking at the finding and the facts together, I come to the conclusion that the plaintiffs were entitled to the verdict. I therefore direct it to be entered for them for the amount assessed by the jury, and give judgment for that amount with costs" (*k*).

(*k*) *Harris* v. *Mobbs*, L. R., 3 Ex. D. 268; 39 L. T., N. S. 164; 27 W. R. 154; and see *Clark* v. *Chambers*, L. R., 3 Q. B. D. 327; 47 L. J., Q. B. 427; 38 L. T., N. S. 454.

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 (*l*). By Engine-Driver blowing off Steam at a Crossing.

Where damage has been caused by collision, there may be *Negligence on one side only* (*m*); or *Negligence on both sides* (*n*). *Both parties may be to blame* (*o*); or it may be *Altogether an accident* (*p*). 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. Rules as to civil liability.

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.

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 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, Mr. Justice Coleridge said, "If the *Negligence on one side only.*

(*l*) *Manchester and Altrincham Railway Co.* v. *Fullarton*, 14 C. B., N. S. 54.

(*m*) Negligence on one side only, *infra*.

(*n*) Negligence on both sides, post, p. 307.

(*o*) Both parties to blame, post, p. 320.

(*p*) Altogether an accident, post, p. 322.

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" (*q*).

Passenger thrown from an Omnibus.

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 (*r*).

Horse and Cart left standing in the street.

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, Chief Justice Tindal said, "If a man chooses to leave a Cart standing in the street, he must take the risk of any mischief that may be done" (*s*). And in like manner a master is liable if his Cart be so left by his servant (*t*).

(*q*) *Woolf* v. *Beard*, 8 C. & P. 373.
(*r*) *Rigby* v. *Hewitt*, 5 Ex. 242.
(*s*) *Illidge* v. *Goodwin*, 5 C. & P. 193.
(*t*) *Lynch* v. *Nurdin*, 1 Q. B. 33. See also *Lygo* v. *Newbolt*, 9 Ex. 302.

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 (*u*); and where, in consequence of the reins breaking, a foot passenger was run over and injured (*x*). Damage from tackle breaking.

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 (*y*). Or from a defect in the carriage.

The subject of *Negligence on both sides* was fully considered by the Court of Exchequer in *Bridge* v. *The Grand Junction Canal Company* (*z*), and Mr. Baron Parke there said, "The Rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* (*a*), 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 (*b*) 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 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 *Negligence on both sides.*

(*u*) *Welsh* v. *Lawrence*, 2 Chit. 262.
(*x*) *Cotteril* v. *Turley*, 8 C. & P. 693.
(*y*) *Templeman* v. *Haydon*, 19 L. T. 218.
(*z*) *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W. 246.
(*a*) *Butterfield* v. *Forrester*, 11 East, 60.
(*b*) *Tuff* v. *Warman*, 27 L. J., C. P. 322.

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."

Where negligence of the injured party did not contribute to the accident.

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 (*c*).

Where such negligence occasioned part of the mischief.

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 (*d*).

A wrongdoer not without the pale of the law.

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 (*e*).

Driving against an Ass left fettered on the road.

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, Mr. Justice Erskine 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.

The Court of Exchequer refused a rule for a new trial which was applied for on the ground of misdirection; and Mr. Baron Parke said, "The correct rule is laid down in *Bridge* v. *The Grand Junction Railway Company* (*f*),

(*c*) See *Greenland* v. *Chaplin*, 5 Ex. 248. See also *Brownlow* v. *Metropolitan Board of Works*, 2 F. & F. 604.

(*d*) *Greenland* v. *Chaplin*, 5 Ex. 243.

(*e*) See per Lord Denman, C. J., *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

(*f*) *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W. 246.

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 (*g*).

Question of ordinary care on the part of the Plaintiff.

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 (*h*).

On the part of the defendant.

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 (*i*).

Circumstances 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 (*h*).

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 (*h*).

(*g*) *Davies* v. *Mann*, 10 M. & W. 546.
(*h*) *Clayards* v. *Dethick*, 12 Q. B. 439.
(*i*) *North* v. *Smith*, 10 C. B., N. S. 572.

Horse and Cart left in the street.

The following is an important decision in a case where both parties were wrongdoers, but where the negligence of the plaintiff would not *necessarily* have been followed by damage, had there not been great negligence on the part of the defendant's servant, who had carelessly left a Horse and Cart standing for some time in the street, and the plaintiff, a young child, was injured when playing about the wheel. The defendant was held liable by a Jury, and the Court of Queen's Bench, after taking time to consider, discharged a rule *nisi* for a new trial applied for on the ground of misdirection, and Lord Denman delivered the following important judgment:—

Judgment of the Court of Queen's Bench.

"This case was tried before my brother Williams at the sittings in Easter Term, 1839. It was an action of *Tort* for Negligence by the defendant's servant, in leaving his Cart and Horse half-an-hour in the open street, at the door of a house in which the servant remained during that period. The evidence for the plaintiff proved that at the end of the first half-hour, he, a child of very tender age, being between six and seven years old, was heard crying, and on the approach of the witnesses was found on the ground, and a wheel of the defendant's Cart going over his leg, which was thereby fractured. The defendant first applied for a nonsuit. The learned Judge refused the application; and no question was made before us that these facts afforded *primâ facie* evidence of the mischief having been occasioned by the negligence of the defendant's servant in leaving the Cart and Horse. Witnesses were then called to establish a defence by a fuller explanation of the facts that had occurred. They proved that after the servant had been about a quarter of an hour in the house, the plaintiff and several other children came up, and began to play with the Horse and climb into the Cart and out of it. While the plaintiff was getting down from it, another boy made the Horse move, in consequence of which the plaintiff fell, and his leg was broken as before mentioned. On this undisputed evidence (for there was no cross-examination of the witnesses) the defendant's counsel claimed the Judge's direction in his favour, contending that as the plaintiff had obviously contributed to the calamity, it could not be said, in point of law, to have been caused by the Negligence of the defendant's servant. My learned brother, however, thought himself bound to lay all the facts before the Jury, and take their opinion on that general point. They found a verdict

for the plaintiff. It is now complained that such direction was not given; and, at all events, the Jury are said to have given a verdict contrary to the evidence. The case came on in the new trial paper last term, and has been fully argued before us."

"It is urged that the mischief was not produced by the mere Negligence of the servant, as asserted in the declaration, but at most by that Negligence, in combination with two other active causes, the advance of the Horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the Cart, and so committing a *trespass* on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell upon it at any length; for if I am guilty of Negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example, a Gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of schoolboys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of them should playfully fire it off at a schoolfellow and maim him, I think it will not be doubted that the Gamekeeper must answer in damages to the wounded party. This might possibly be assumed to be clear in principle, but there is also the authority of the present Chief Justice (*l*) of the Common Pleas in its support in *Illidge* v. *Goodwin*" (*m*).

"But in the present case an additional fact appears. The plaintiff himself has done wrong; he had no right to enter the Cart; and, by abstaining from so doing, he would have escaped the mischief. Certainly he was a co-operating cause of his own misfortune by doing an unlawful act; and the question arises, whether that fact alone must deprive the child of his remedy. The legal proposition that one who has by his own Negligence contributed to the injury of which he complains, cannot maintain his action against another in respect of it, has received some qualifications. Indeed Lord Ellenborough's

(*l*) Chief Justice Tindal. (*m*) *Illidge* v. *Goodwin*, 5 C. & P. 190.

doctrine in *Butterfield* v. *Forrester* (*n*), which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress. Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation; and this would evidently be very small indeed in so young a child. But this case presents more than the want of care; we find in it the positive misconduct of the plaintiff, an active instrument towards the effect. We have here express authorities for our guidance. In *Ilott* v. *Wilkes* (*o*), a decision which excited great attention both in Westminster Hall and beyond it, this Court indeed held that a trespasser in a wood, where he *well knew* spring-guns to be placed, could not sue for the injury received by him from the explosion of one of them. But Lord Tenterden and his three brethren cautiously and repeatedly declared that their opinion was founded on the plaintiff's *knowing* of the danger and *voluntarily* incurring it. Best, J., who was supposed to carry to the greatest extent the right of protecting property against invaders by placing dangerous instruments, took infinite pains, when Chief Justice of the Common Pleas, to explain that his opinion in *Ilott* v. *Wilkes* (*o*) rested exclusively on the Notice. In *Bird* v. *Holbrook* (*p*) his expressions are most remarkable; and so far is his Lordship from avowing the doctrine that the plaintiff's concurrence in producing the evil debars him from his remedy, that he considers *Ilott* v. *Wilkes* (*o*) an authority in favour of the action. He also expresses an inclination to agree with the two learned judges who held the action maintainable in *Deane* v. *Clayton* (*q*). There the plaintiff's dog had been killed by a spike, placed on defendant's land for the protection of his preserves, while in pursuit of a hare. Park and Burrough, JJ., gave judgment in favour of the plaintiff; Gibbs, C.J., and Dallas, J., for the defendant. The present argument does not require any particular discussion of that case, because *Bird* v. *Holbrook* (*r*) is a decisive authority against the general proposition that misconduct, even wilful and culpable misconduct, must *necessarily* exclude the plaintiff who is guilty of it from the right to sue. I remember being present at

(*n*) *Butterfield* v. *Forrester*, 11 East, 60.

(*o*) *Ilott* v. *Wilkes*, 3 B. & Ald. 304.

(*p*) *Bird* v. *Holbrook*, 4 Bing. 628.

(*q*) *Deane* v. *Clayton*, 7 Taunt. 489.

(*r*) *Bird* v. *Holbrook*, 4 Bing. 628.

a trial at Warwick, before Lord Chief Baron Richards, where the same law prevailed. The case is *Jay* v. *Whitfield* (*s*), mentioned in *Bird* v. *Holbrook* (*t*). A boy having received serious injury from a spring-gun placed in a garden where he was trespassing, recovered a verdict for 120*l.* damages, which was much considered and never disturbed."

"A distinction may here be taken between the wilful act done by the defendant in those cases, in deliberately planting a dangerous weapon in his ground, with the design of destroying trespassers, and the mere Negligence of the defendant's servant in leaving his cart in the open street. But between *wilful Mischief* and *gross Negligence* the boundary line is hard to trace; I should rather say impossible. The law runs them into each other, considering such a degree of negligence some proof of malice. It is then a matter strictly within the province of a Jury deciding on the circumstances of each case. They would naturally inquire whether the Horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the Horse; whether the street was at that hour likely to be clear or thronged with a noisy multitude (*u*): especially whether large parties of young children might be reasonably expected to resort to the spot. If this last-mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established."

"But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the Jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty Cart and deserted Horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them.

(*s*) *Jay* v. *Whitfield*, cited 4 Bing. 644.

(*t*) *Bird* v. *Holbrook*, 4 Bing. 628.

(*u*) It appeared in the present case that Compton Street was more thronged than usual in consequence of a neighbouring street having been stopped up.

His misconduct bears no proportion to that of the defendant which produced it."

"For these reasons we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the Jury, with whose opinion we fully concur" (*v*).

Where no negligence on the part of the defendant.

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 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*).

Law deducible from these decisions.

The law then deducible from these decisions is, that where there is only so much negligence and so little ordinary care on the part of the child, as it is natural the child should possess, if negligence, and a want of ordinary care, be shown by the defendants, the child is entitled to recover. But if no negligence, and no want of ordinary care, be proved against the defendants, the child is not entitled to recover.

Abbott v. *Macfie.*

But in a more recent case it was held by the Court of Exchequer (*y*), that the contributory negligence of an infant has the same effect in disentitling him to maintain an action as that of an adult. For, in a case in which the defendants placed the shutter of their cellar against the wall of a public street, and the dress of a child, who was playing in the street and jumping off the shutter, caught the corner of the shutter, which fell upon and injured him, it was held that the defendants were not liable to an action, and Pollock, C. B., said, "Had the plaintiff been an adult, it is clear that he could maintain no action; he voluntarily meddled for no lawful purpose with that which, if left alone, would not have hurt him; he would therefore, at all events, have contributed by his own negligence to his damage. We think that the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose, and if he could maintain the action, he could equally do so, if the flap had been placed inside the defendant's premises within sight of the child. As far as the child's act is concerned, he had no more right to touch the flap

(*v*) *Lynch* v. *Nurdin*, 1 Q. B. 33. See also the case of *Lygo* v. *Newbolt*, 9 Ex. 302.

(*x*) *Singleton* v. *Eastern Counties Railway Co.*, 7 C. B., N. S. 287.

(*y*) *Abbott* v. *Macfie*, 33 L. J., Ex. 177. See also *Mangan* v. *Atterton*, L. R., 1 Ex. 239; 4 H. & C. 388.

for the purpose for which he did touch it than he would have had it been on the defendant's premises." This decision presents a different view of the law from the foregoing ones, inasmuch as it appears to rest upon the fact that the contributive act of the child was an unlawful one, rather than upon the absence of proof of negligence or of a want of ordinary care upon the part of the defendants. But it is questionable whether a decision not only at variance with the current of authority, but also containing no allusion to the law as deducible from the former cases, can be entitled to great weight (*z*).

A heap left on the Highway.

If a person using ordinary care is injured by falling over a heap on a Highway, the person who left it there is liable.

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 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" (*a*).

Running over stones at night.

The opportunity, however, of seeing Stones during the day is no defence to an action for damage caused by running over them at night (*b*).

Leaving the Highway.

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, Mr. Justice Cresswell 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*).

(*z*) And see observations of Cockburn, C. J., in *Clark* v. *Chambers*, L. R., 3 Q. B. D. 338, 339; 47 L. J., Q. B. 427.

(*a*) See *Butterfield* v. *Forrester*, 11 East, 61.

(*b*) Per Rolfe, B., *Grieve* v. *Milton*, Carlisle Spr. Ass. 1850.

(*c*) *Firth* v. *Ackroyd*, before Mr. Justice Cresswell, York Spr. Ass. March 10, 1853.

Excavation a public nuisance.

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 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*).

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 (*f*).

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 or Carriage, who might by the sudden starting of a 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 (*e*).

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 persons 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 where

(*d*) *Barnes* v. *Ward*, 9 C. B. 392; *Hadley* v. *Taylor*, L. R., 1 C. P. 53.

(*e*) *Hardcastle* v. *South Yorkshire Railway Co.*, 28 L. J., Ex. 139. See also *Hounsell* 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., N. S. 362; 22 W. R. 631.

(*f*) *Sadler* v. *Henlock*, 24 L. J., Q. B. 138; *Blake* v. *Thirst*, 2 H. & C. 20; *Butler* v. *Hunter*, 7 H. & N. 826.

the injury was caused by negligently lowering goods from the warehouse, under which the private way passed (*g*).

Even where injury caused by intervening act of third party.

In *Clarke* v. *Chambers* (*h*) the defendant, who was in the occupation of certain premises abutting on a private road consisting of a carriage and footway, 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. Some person, without the defendant's authority, removed a 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 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 (*h*).

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 (*i*). But a Contractor lawfully employed to construct a sewer under a road, is not liable for injury caused to an in-

(*g*) *Gallagher* v. *Humphery*, 6 L. T., N. S. 684.

(*h*) *Clark* v. *Chambers*, L. R., 3 Q. B. D. 327; 47 L. J., Q. B. 427; 38 L. T., N. S. 454.

(*i*) *Ellis* v. *Sheffield Gas Co.*, 23 L. J., Q. B. 42; *Gray* v. *Pullen*, 32 L. J., Q. B. 169.

dividual, through a hole having formed in the roadway from the natural subsidence of the ground, the work having been properly completed by the defendant (*k*).

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 (*l*).

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 (*m*). And where a duty is imposed on the defendant by common law (*n*), or by a statute (*o*), he cannot excuse himself by throwing the blame on his Contractor.

What is the question in such cases.

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 case the employer would be liable to an action, and in the second he would not (*p*). 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 (*q*).

Drain repaired by an ordinary but skilful labourer.

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.

(*k*) *Hyams* v. *Webster*, L. R., 2 Q. B. 264; L. R., 4 Q. B. 138—Ex. Ch.

(*l*) *Peachey* v. *Roland*, 13 C. B. 182. See, too, *Cleveland* v. *Spier*, 16 C. B., N. S. 399.

(*m*) *Ellis* v. *Sheffield Gas Co.*, 23 L. J., Q. B. 42. And see *Whiteley* v. *Pepper*, L. R., 2 Q. B. D. 276; 46 L. J., Q. B. 436; 36 L. T., N. S. 588; 25 W. R. 607.

(*n*) *Tarry* v. *Ashton*, L. R., 1 Q. B. D. 314; 45 L. J., Q. B. 260; 34 L. T., N. S. 97; 24 W. R. 581. See also *Bower* v. *Peate*, L. R., 1 Q. B. D. 321; 45 L. J., Q. B. 446; 35 L. T., N. S. 321.

(*o*) *Hole* v. *Sittingbourne Railway Co.*, 6 H. & N. 488; 30 L. J., Ex. 81.

(*p*) *Knight* v. *Fox*, 5 Ex. 725; *Overton* v. *Freeman*, 21 L. J., C. P. 52.

(*q*) *Sadler* v. *Henlock*, 24 L. J., Q. B. 138; *Blake* v. *Thirst*, 2 H. & C. 20; *Butler* v. *Hunter*, 7 H. & N. 826.

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 (*r*).

Stones left by a Sub-Contractor.

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 (*s*).

Statutory duty. Surveyor of Highways.

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 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 (*t*).

Performance of an ordinary domestic duty.

And where an action *on the Case* for Negligence was brought against A. by B., a Car proprietor, for damage occasioned to a vehicle of the latter, in consequence of a heap of rubbish having been left in a Street, near the dwelling-house of A., by a man employed by him to clear out his ashpit, and the Jury found the man had contracted with A. not only to remove the rubbish to the Street, but to carry it away altogether; it was held by the Irish Court of Queen's Bench, that the subject-matter of the contract

(*r*) *Sadler* v. *Henlock*, 24 L. J., Q. B. 138; *Blake* v. *Thirst*, 2 H. & C. 20; *Butler* v. *Hunter*, 7 H. & N. 826.

(*s*) *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; and Roscoe's N. P. 14th ed. 689.

(*t*) *Taylor* v. *Greenhalgh*, 24 W. R. 311—C. A.; reversing L. R., 9 Q. B. 487; 43 L. J., Q. B. 168; 31 L. T., N. S. 184; 23 W. R. 4; and see *Pendlebury* v. *Greenhalgh*, L. R., 1 Q. B. D. 36; 45 L. J., Q. B. 3; 33 L. T., N. S. 372; 24 W. R. 98—C. A.

being the performance of *an ordinary domestic duty*, the defendant was liable for the injury sustained (*u*).

Manure left on a road.

In another case, some Manure left on a Highway for A. was not removed, and a carriage was upset by it at night. No great damage was done to the carriage, and it was driven home; but about an hour after arriving there, one of the Horses died suddenly, and it was proved that the death was caused by an injury sustained by falling over the Manure. An action was brought against A. for the damage, and a verdict obtained against him; but it was afterwards doubted on the evidence, whether he or the person who left it was responsible (*x*).

With regard to 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 skillfully 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 (*y*).

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, Chief Justice Tindal 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 (*z*). And where an action was brought for an injury to the plaintiff's Chaise by the defendant's Carriage, Mr. Justice Alderson 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 (*a*).

(*u*) *M'Keon* v. *Bolton*, 3 Ir. Jur. 288 (Q. B. Ir.).

(*x*) *Gassiot* v. *Carpmael*, 19 L. T. 64, 94.

(*y*) *Clothier* v. *Webster*, 31 L. J., C. P. 316; *Ohrby* v. *Ryde Commissioners*, 33 L. J., Q. B. 296.

(*z*) *Hawkins* v. *Cooper*, 8 C. & P. 473.

(*a*) *Pluckwell* v. *Wilson*, *Bart.*, 5 C. & P. 375.

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 (*b*).

Identification of child with person in charge of it.

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 (*c*).

Identification of passenger with driver.

In the case of *Thorogood* v. *Bryan* (*d*), 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* (*e*).

Remarks in Smith's Leading Cases.

Upon this last case the following remarks are made in Smith's Leading Cases:—"If two drunken Stage Coachmen were to drive their respective carriages against each other and injure the passengers, each would have to pay for his own carriage no doubt; but it is inconceivable that each set of passengers should, by a fiction, be identified with the Coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer (*f*). And "why in this particular case both the wrongdoers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question

(*b*) See *Reed* v. *Tate*, post, p. 328.
(*c*) *Waite* v. *North-Eastern Railway Co.*, E. B. & E. 719.
(*d*) *Thorogood* v. *Bryan*, 8 C. B. 130.
(*e*) *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W. 244.
(*f*) 1 Sm. L. C., 8th ed. 315.

which seems to deserve more consideration than it received in the case of *Thorogood* v. *Bryan*" (*g*).

Power of selection.

And indeed it seems absurd to say that the Driver of an Omnibus is the servant of the passenger on account of his "selecting the particular conveyance." An omnibus is a carriage plying between two *termini*, and subject to various regulations, over which the passenger has no control. By these the Driver is governed, and for a breach of them he is punished under an Act of Parliament, the passenger in no case being able either to alter or modify the regular routine of the Driver's employment. And it would be idle to say that a passenger going from Charing Cross to the Eyre Arms selects his Carriage, for the only Omnibuses which run there are those of the Atlas Company. And indeed all London Omnibuses being under the same regulations, each must be supposed to have been selected for the public service, so that in point of law there can be no difference between one and another.

Altogether an Accident.

Where the injury arises *altogether* from *accident* the defendant is not liable (*h*). 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 (*i*).

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

(*g*) 1 Sm. L. C., 8th ed. 316; and see also *Child* v. *Hearn*, L. R., 9 Ex. 176; 43 L. J., Ex. 100.

(*h*) Per Alderson, J., *Pluckwell* v. *Wilson*, 5 C. & P. 375.

(*i*) *Goodman* v. *Taylor*, 5 C. & P. 410.

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 Chief Baron Pollock 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 the Chief Baron's ruling was correct, and that the facts clearly showed that the injury sustained by the plaintiff was the result of the purest accident (*k*).

Where it is the result of a sudden fright of a Horse.

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 (*l*). 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 (*m*).

Hammack v. *White*.

And in the case of *Hammack* v. *White* (*n*), in which the defendant bought a Horse at Tattersall's, and the next day took him out to try him in Finsbury Circus, a much-frequented thoroughfare; and 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. And Erle, C. J., said, "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

(*k*) *Bird* v. *Sharpe*, Ex. Nov. 5, 1853.

(*l*) *Wakeman* v. *Robinson*, 1 Bing. 213.

(*m*) *Gibbons* v. *Pipper*, 1 Ld. Raym. 38.

(*n*) *Hammack* v. *White*, 11 C. B., N. S. 588.

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 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 *primâ facie* evidence of negligence" (*o*).

Manzoni v. *Douglas.*

And 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 it was also held, 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 (*p*).

Horse running away.

In all cases, therefore, where a Horse *runs away* and inflicts an injury, if the rider or driver have not acted in such a manner as would lead a Jury to suppose that his

(*o*) *Hammack* v. *White*, 11 C. B., N. S. 588.

(*p*) *Manzoni* v. *Douglas*, L. R., 6 C. P. D. 145; 50 L. J., C. P. 289; upholding *Hammack* v. *White*, *ubi sup.*

conduct must have contributed to the accident, he is not answerable (*q*).

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 (*r*), he would have been held responsible. So, also, in *Simson* v. *London General Omnibus Company* (*s*), where a passenger in an Omnibus was injured by a blow from one of the Horses, which had kicked through the 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.

Proof of negligence must be affirmative.

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* (*t*), 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.

(*q*) See ante, *Rex* v. *Timmins*, 7 C. & P. 500; and see *Holmes* v. *Mather*, L. R., 10 Ex. 261; 44 L. J., Ex. 176; 33 L. T., N. S. 361.

(*r*) See judgment of Willes, J., *Hammack* v. *White*, 11 C. B., N. S. 597.

(*s*) L. R., 8 C. P. 390; 42 L. J., C. P. 112; 28 L. T., N. S. 560; 21 W. R. 595.

(*t*) *Cotton* v. *Wood*, 8 C. B., N. S. 568.

The only circumstance which 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 the cry of a bystander, when it was too late to avert the mischief.

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 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 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 (*u*). 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.

And in the same case (*x*) 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."

(*u*) Quoting from Williams, J., in *Toomey* v. *London, Brighton and South Coast Railway Co.*, 3 C. B., N. S. 146; and see *Cornman* v. *Eastern Counties Railway Co.*, 4 H. & N. 781.

(*x*) *Cotton* v. *Wood*, 8 C. B., N. S. 568, ante, p. 325.

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 inferring that the defendant had been guilty of actionable negligence (*y*). When a Horse standing in a highway kicked a child.

In *Abbott* v. *Freeman* (*z*), 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 where 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.

But there are cases in which the mere occurrence of an accident is *primâ 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 Accident itself sometimes affirmative proof of negligence.

(*y*) *Cox* v. *Burbridge*, 13 C. B., N. S. 430.

(*z*) 35 L. T., N. S. 783—C. A. Reversing 34 L. T., N. S. 544—Ex. D.

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." (*a*).

Evidence identical with that required for manslaughter.

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 (*b*).

As to demand of particulars in actions for negligent driving.

In an action of *tort* for an injury to the person, as by careless driving, it is within the discretion of the Judge at Chambers, upon application by the defendant on affidavit, to order *particulars* as to the nature and extent of the injuries or of the claim for compensation (*c*).

RULE OF THE ROAD.

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 (*d*). 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 (*e*).

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 (*f*).

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 (*g*).

(*a*) *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 Railway Co.*, L. R., 5 Q. B. 411; affirmed in Ex. Ch., L. R., 6 Q. B. 759.

(*b*) See judgments of Williams, J., and Wilde, J., *Hammack* v. *White*, 11 C. B., N. S. 588.

(*c*) *Wicks* v. *Macnamara*, 27 L. J., Ex. 419.

(*d*) See *Alexander* v. *Laidley*, Appendix; and *Pluckwell* v. *Wilson*, 5 C. & P. 375.

(*e*) *Lloyd* v. *Ogleby*, 5 C. B., N. S. 667.

(*f*) See *Handayside* v. *Wilson*, 3 C. & P. 530; *Alexander* v. *Laidley*, Appendix; *Elvin* v. *Chapman*, Appendix. See also *Leame* v. *Bray*, 3 East, 593.

(*g*) Per Patteson, J., *Reed* v. *Tate*, Newcastle Spr. Ass. 1846; and see

And where an action was brought for negligently driving against the plaintiff's Horse, 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 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 (*h*). Does not justify a wanton injury.

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 (*i*). Rule of the Road not inflexible.

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 (*k*), and that a lightly-loaded vehicle must, in like manner, give way to a heavily-loaded one (*l*). Light load meeting heavy.

Though the rule of the road is not to be adhered to, if Parties meet-

Case of the Commerce, 3 Rob. Adm. Cas. 287.

(*h*) *Clay* v. *Wood*, 5 Esp. 42.

(*i*) *Wayde* v. *Lady Carr*, 2 D. & R. 256; *Lloyd* v. *Ogleby*, 5 C. B., N. S. 667.

(*k*) *Beach* v. *Parmeter*, 23 Penn. St. 196.

(*l*) *Grier* v. *Sampson*, 27 Penn. St. 183.

ing on a sudden.

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 (*m*).

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 (*n*).

Ordinary vehicles meeting street or tramcars.

In America it has been held that the rule of the road has 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 (*o*). 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 (*p*). This rule appears to be dictated by common sense, and to be applicable to similar cases of collision between an ordinary vehicle and a tramcar in England.

Foot passengers.

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 Mr. Justice Patteson said to the Jury, "A *Foot passenger* has a right to cross a highway; and it was held in one case (*q*) 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

(*m*) *Chaplin* v. *Hawes*, 3 C. & P. 554.

(*n*) *Turley* v. *Thomas*, 8 C. & P. 103.

(*o*) *Hegan* v. *Eighth Avenue Railway Co.*, 15 N. Y. 380.

(*p*) *Suydam* v. *Grand St. Railway Co.*, 41 Barb. 365; *Siegel* v. *Eisen*, 41 Cal. 109.

(*q*) *Boss* v. *Litton*, 5 C. & P. 407.

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."

Rule of the Road does not apply.

"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" (*r*).

Going over a crossing.

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 (*s*).

Nuisance on public highway.

If there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it 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 (*t*).

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 (*u*).

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

(*r*) *Cotteril* v. *Turley*, 8 C. & P. 693. See also *Lloyd* v. *Ogleby*, 5 C. B., N. S. 667.

(*s*) See per Pollock, C. B., *Williams* v. *Richards*, 3 C. & K. 82; and see *Bowden* v. *Sherman*, Appendix. See also *Cotton* v. *Wood*, 8 C. B., N. S. 568.

(*t*) See Judgment of Court of Queen's Bench, *Dimes* v. *Petley*, 15 Q. B. 288; *Bridge* v. *Grand Junction Railway Co.*, 3 M. & W. 244; *Davies* v. *Mann*, 10 M. & W. 546; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339.

(*u*) *Slater* v. *Swann*, 2 Str. 872.

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 Mr. Justice Patteson 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 (*x*).

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 (*y*).

Limpus v. *The General Omnibus Company.*

In the case of *Limpus* v. *The General Omnibus Company* (*y*), decided in the Exchequer Chamber, which fixed and defined the law on this subject, the driver of the defendant's 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.

Acts done within employment and for Master's interest.

Mr. Baron Martin, 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 defendant's 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 pur-

(*x*) *Lyons* v. *Martin*, 8 A. & E. 515; *S. C.* 3 Nev. & P. 509; and see *M'Manus* v. *Cricket*, 1 East, 106.

(*y*) *Limpus* v. *The General Omnibus Co.*, 1 H. & C. 526.

pose of his own, the defendants were not responsible." This direction was held to be right by all the Judges with the exception of Mr. Justice Wightman.

If Servant vindictively strikes a Horse with his whip.

Mr. Justice Williams 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."

Instructions of Master, if disregarded, immaterial.

Mr. Justice Willes said, with reference to the question whether 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.

Mr. Justice Byles, after expressing his agreement with the direction of Mr. Baron Martin, 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 Mr. Justice Blackburn 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."

Liability of Cab Proprietor.

Generally, the Registered Proprietor and the Licensed Driver of a cab stand in the relation of a Master and Servant *quoad* the public, and therefore the Proprietor is liable

for the loss of a Passenger's luggage through the negligence of the driver (*z*), or for personal injury to the passenger or a stranger, where there is no wrongful user of the cab by the driver. Thus, where a driver who had no specified time for starting from 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 (*a*). But the relationship of Master and Servant does not necessarily exist between the proprietor and the driver of a cab; there is only a *primâ facie* presumption that such is their relation (*b*), which may be rebutted by the circumstances of the case; as in *King* v. *Spurr* (*b*), where the defendant was proprietor of a cab and had let it to the driver for a weekly payment, the Horse, harness, and whip being provided by the driver; and it was held, that the defendant was not liable for injuries done to the plaintiff's cart and Pony owing to the negligence of the driver.

Master and Servant driving together.

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* (*c*). 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 (*d*).

Servant entrusting the reins to a Stranger.

A Master is liable in an action for damage resulting from the Negligence with which his Cart has been driven,

(*z*) *Powles* v. *Hider*, 25 L. J., Q. B. 331. See also *Fowler* v. *Lock*, L. R., 7 C. P. 272; 41 L. J., C. P., 99; 26 L. T., N. S. 476; and 1 & 2 Will. 4, c. 22; 6 & 7 Vict. c. 86.

(*a*) *Venables* v. *Smith*, L. R., 2 Q. B. D. 279; 46 L. J., Q. B. 470; 36 L. T., N. S. 509; 25 W. R. 584.

(*b*) See per Bowen, J., in *King* v. *Spurr*, L. R., 8 Q. B. D. 104, 108.

(*c*) *Chandler* v. *Broughton*, 1 Cr. & M. 29.

(*d*) *M'Laughlin* v. *Pryor*, 4 Scott, N. R. 655; *S. C.*, 4 M. & G. 48.

although it should appear 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 (*e*).

Servant striking the Horse of another.

If a Servant driving his Master's Carriage, in order to effect some purpose of his own, *wantonly* strike 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 (*f*).

Servant striking passenger.

The fact that a Passenger in an Omnibus is struck by the driver's whip is *primâ 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 (*g*).

Guard of Omnibus using undue violence to a passenger.

It was held by the Exchequer Chamber in the case of *Seymour* v. *Greenwood* (*h*) 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 place because it is not convenient for him personally to conduct the

(*e*) *Booth* v. *Mister*, 7 C. & P. 66.

(*f*) Per Curiam in *Croft* v. *Alison*, 4 B. & Ald. 592.

(*g*) *Ward* v. *General Omnibus Co.*, 42 L. J., C. P. 265; 28 L. T., N. S. 850—Ex. Ch., affirming the decision of C. P., 27 L. T., N. S. 761; 21 W. R. 358.

(*h*) *Seymour* v. *Greenwood*, 7 H. & N. 355.

Omnibus, if the Guard forms a wrong judgment, the Master is responsible (*i*).

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 (*k*). **Servant removing an obstruction.**

If a Servant does what his Master employs him to do in a negligent, improper or round-about way, and damage is done, his Master is liable (*l*). **Servant acting improperly.**

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, his Master will be answerable in damages for any injury occasioned by his careless driving while so out of his road (*m*). Because wherever the Master has intrusted the Servant with the control of the Carriage, it is no answer that the Servant acted improperly in the management of it; but the Master in such case will be liable, because he has put it in the Servant's power to mismanage the Carriage by entrusting him with it. And this was so held by Mr. Justice Erskine, 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 (*n*). **Making a *detour* for his own purposes.**

So, in *Whatman* v. *Pearson* (*o*), 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 were not permitted to go home to dine, or leave their

(*i*) Per Williams, J., *Seymour* v. *Greenwood*, 7 H. & N. 355.
(*k*) *Lamb* v. *Lady Elizabeth Palk*, 9 C. & P. 629.
(*l*) See per Cresswell, J., *Mitchell* v. *Crassweller*, 22 L. J., C. P. 104.
(*m*) *Joel* v. *Morrison*, 6 C. & P. 501.
(*n*) *Sleath* v. *Wilson*, 9 C. & P. 608.
(*o*) L. R., 3 C. P. 422; and see *Burns* v. *Poulson*, L. R., 8 C. P. 563; 42 L. J., C. P. 302.

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 (*p*).

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 intrusted him with the Cart or Carriage (*q*). 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 (*r*).

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 negligence, in the course of his employment as a Ser-

(*p*) See per Cresswell, J., *Mitchell* v. *Crassweller*, 22 L. J., C. P. 104.

(*q*) *Joel* v. *Morrison*, 6 C. & P. 501; *Sleath* v. *Wilson*, 9 C. & P. 608.

(*r*) *Mitchell* v. *Crassweller*, 22 L. J., C. P. 100.

vant (*s*). But Cockburn, C. J., in delivering judgment in this case, said, "I think that the judgments of Maule and Cresswell, JJ., in *Mitchell* v. *Crassweller* (*t*), 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* (*u*), 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."

Re-entering on duty.

The case of *Rayner* v. *Mitchell* (*v*) 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 1*d.* 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 1*d.*: 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.

Taking the Horse of another.

And 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 injury on the plaintiff, Mr. Justice Park said, "I cannot bring myself to go the length of sup-

(*s*) *Storey* v. *Ashton*, L. R., 4 Q. B. 476; 38 L. J., Q. B. 223; 17 W. R. 727.

(*t*) See note (*r*), ante.

(*u*) See note (*g*), ante.

(*v*) L. R., 2 C. P. D. 359; 25 W. R. 633.

posing 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" (*x*).

No express authority of Master necessary.

But where (*y*) 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 (*z*). And it was also held in the same case (*y*) 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.

If it appear that the Master holds 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, 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 (*a*).

Giving an address.

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 (*b*).

Action for bodily hurt.

Where a party has received a bodily hurt from negli-

(*x*) *Goodman* v. *Kennell*, 3 C. & P. 167.

(*y*) *Patten* v. *Rea*, 26 L. J., C. P. 235.

(*z*) *Turberville* v. *Stampe*, 1 Lord Raym. 264.

(*a*) *Stables* v. *Eley*, 1 C. & P. 614.

(*b*) *Beamon* v. *Ellice*, 4 C. & P. 586.

gent driving, he may of course personally recover damages for the injury done to him.

Liability of Master and Servant respectively.

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) (*c*), 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 (*d*).

Negligence of fellow-servant.

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 (*e*). 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 (*f*). But a person who, with the consent of a Railway Company, assists in unloading goods consigned to him by their line, is not a volunteer within this rule (*g*).

Master bound to use due care in selection of Servants.

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 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 (*h*).

Liability of Cab Proprietor to Driver.

The usual terms on which a Cab Proprietor lets a cab to a driver are, that the owner feeds the horse, and exercises

(*c*) *Limpus* v. *General Omnibus Co.*, ante, p. 332.

(*d*) See per Parke, B., *Gordon* v. *Rolt*, 4 Ex. 366; *S. C.* 18 L. J., Ex. 433.

(*e*) *Tarrant* v. *Webb*, 25 L. J., C. P. 261; *Waller* v. *South Eastern Railway Co.*, 32 L. J., Ex. 205; *Hall* v. *Johnson*, 13 W. R. 411; *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.

(*f*) *Potter* v. *Faulkner*, 31 L. J., Q. B. 30.

(*g*) *Wright* v. *London and North Western Railway Co.*, L. R., 10 Q. B. 298; L. R., 1 Q. B. D. 252; 45 L. J., Q. B. 570; 33 L. T., N. S. 830—C. A.

(*h*) *Tarrant* v. *Webb*, 25 L. J., C. P. 261; *Waller* v. *South Eastern Railway Co.*, 32 L. J., Ex. 205; *Hall* v. *Johnson*, 13 W. R. 411; *Wiggett* v. *Fox*, 25 L. J., Ex. 188.

no control over the driver after he leaves the yard, for which the driver pays a fixed sum a day. It is doubtful whether the relation between the parties is that of bailor and bailee, or of Master and Servant (*h*). But 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 (*i*).

Action by representatives of a person killed.

Formerly, if a person were killed, no action could be maintained by his representatives. Now, however, Deodands are abolished (*j*), and under Lord Campbell's Act (*k*) 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 (*l*). A Child *en ventre sa mère* is entitled to sue under this Act on the death of its Father by negligence (*m*).

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 (*n*). By the second Section, the money paid into Court may be paid in one sum, without regard to its division into Shares (*o*).

Construction to be put upon the condition in 9 & 10 Vict. c. 93.

The condition contained in Lord Campbell's Act (*k*), that the action is maintainable in all cases when the party injured might himself have maintained one, if death had not

(*h*) *Fowler* v. *Lock*, L. R., 7 C. P. 272; 41 L. J., C. P. 99; 26 L. T., N. S. 476. But see *Venables* v. *Smith*, L. R., 2 Q. B. D. 279; 46 L. J., Q. B. 470; 36 L. T., N. S. 509; *King* v. *Spurr*, L. R., 8 Q. B. D. 104; and ante, p. 335.

(*i*) *S. C.* on motion for second new trial, 43 L. J., C. P. 394, n.; 30 L. T., N. S. 800—Ex. Ch.

(*j*) 9 & 10 Vict. c. 62.

(*k*) 9 & 10 Vict. c. 93.

(*l*) 9 & 10 Vict. c. 93, ss. 1, 2, 3.

(*m*) *The George and Richard*, L. R., 3 Adm. 466; 24 L. T., N. S. 717.

(*n*) *Holleran* v. *Bagnell*, L. R., 4 Ir. 740—C. P. D.

(*o*) 27 & 28 Vict. c. 95.

ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect or default complained of. 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 (*p*). 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 (*q*), 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 (*r*). 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 (*s*).

Plan of the locality.

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 (*t*).

Conviction for furious driving a bar to subsequent action.

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 Metropolitan Police Act), 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

(*p*) 9 & 10 Vict. c. 93.

(*q*) 27 & 28 Vict. c. 95, s. 1.

(*r*) Per Cockburn, C. J., *Pym* v. *Great Northern Railway Co.*, 2 B. & S. 767; and per Erle, C. J., *S. C.* 4 B. & S. 406. See also *Franklin* v. *South Eastern Railway Co.*, 3 H. & N. 211; *Dalton* v. *South Eastern Railway Co.*, 27 L. J., C. P. 227; and *Rowley* v. *London and North Western Railway Co.*, L. R., 8 Ex. 221, Ex. Ch.; 42 L. J., Ex. 153; 29 L. T., N. S. 180.

(*s*) *Sykes* v. *North Eastern Railway Co.*, 44 L. J., C. P. 191; 32 L. T., N. S. 199; 23 W. R. 473.

(*t*) *Beamon* v. *Ellice*, 4 C. & P. 586.

where he did not lay the information, or, in the first instance, request the magistrate to award compensation (*t*).

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 (*u*).

Responsibility for "all possible consequences." But it is doubtful whether a person guilty of negligence is responsible *for all possible consequences* of it, although they could not have been reasonably foreseen or expected. For instance, if a person chooses to walk in a crowded street with an open knife under his coat, and another person negligently runs against him, is that other person to be responsible for all the injury which the knife may inflict on the person who carries it (*x*) ?

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 (*y*). And Bovill, C. J., said, "No doubt, one who commits a wrongful act is responsible for the ordinary 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

(*t*) *Wright* v. *London General Omnibus Co.*, L. R., 2 Q. B. D. 271; 46 L. J., Q. B. 429; 36 L. T., N. S. 590; 25 W. R. 647.

(*u*) *Rigby* v. *Hewitt*, 5 Ex. 243.

(*x*) See quære per Pollock, C. B., *Greenland* v. *Chaplin*, 5 Ex. 243, 246.

(*y*) *Sharp* v. *Powell*, L. R., 7 C. P. 253; 41 L. J., C. P. 95; 26 L. T., N. S. 436.

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" (*z*).

Injury done to a Carriage.

A 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 (*a*).

Measure of damages where a Horse has been injured.

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 Mr. Justice Coleridge, 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 (*b*).

Damages where a person has been killed.

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 made, and cannot take into their consideration the mental suffering or the loss of society occasioned to the survivors by his death (*c*).

How limited.

Such an action cannot be maintained without some evidence of actual pecuniary damage (*d*), or the loss of the reasonable probability of pecuniary benefit from the continuance of the life of the deceased (*e*).

(*z*) See note (*y*), ante.

(*a*) *Gilbertson* v. *Richardson*, 5 C. B. 502.

(*b*) *Hughes* v. *Quentin*, 8 C. & P. 703; and see *Percival* v. *Dudgeon*, Appendix.

(*c*) *Blake* v. *Midland Railway Co.*, 21 L. J., Q. B. 233; *Pym* v. *Great Northern Railway Co.*, 4 B. & S. 396.

(*d*) *Duckworth* v. *Johnson*, 4 H. & N. 653.

(*e*) *Pym* v. *Great Northern Railway Co.*, 4 B. & S. 396.

The expectation of life of the deceased is an element to be considered by the Jury in assessing Damages (*f*). But the Jury are to give a fair compensation, and not to treat the Damages on the footing of the value of an annuity (*g*).

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 (*h*).

Damages not given to a class but to individuals.

The remedy given by Lord Campbell's Act (*i*) is not given to a class but to individuals; and, therefore, on the death of a person, whose income arose from land and personalty independent of any exertion of his own, although no portion of it was lost to his family, *as a 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 (*k*).

(*f*) *Rowley* v. *London and North Western Railway Co.*, L. R., 8 Ex. 221; 42 L. J., Ex. 153—Ex. Ch.

(*g*) *Armsworth* v. *South Eastern Railway Co.*, 11 Jur. 758; Surrey Summer Assizes, 1847, *cor.* Parke, B., cited L. R., 8 Ex. 230; Roscoe, N. P., 13th ed. 753.

(*h*) *Dalton* v. *South Eastern Railway Co.*, 27 L. J., C. P. 227.

(*i*) 9 & 10 Vict. c. 93.

(*k*) *Pym* v. *Great Northern Railway Co.*, 4 B. & S. 396.

CHAPTER II.

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FEROCIOUS AND VICIOUS ANIMALS.

Wild and tame animals.

It is laid down that "there is a difference between things *ferœ naturœ*, as Lions, Bears, &c., which a man must always keep up at his peril, and beasts that are *mansuetœ naturœ*, and break through the tameness of their nature, such as Oxen and Horses (*a*).

(*a*) *Rex* v. *Huggins*, 2 Ld. Raym. 1583.

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. Mr. Justice Crowder 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 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 negligenee disentitling her to recover." The Jury found for the plaintiff.

What ought to be the liability of the person keeping them.

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 know 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.

The Athenian and Roman laws.

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

(*b*) *Besozzi* v. *Harris*, 1 F. & F. 92.

that which should determine the degree of care which ought to be exercised (*c*).

The French Code.

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 (*d*).

Argument in *Mason* v. *Keeling*.

In arguing the case of *Mason* v. *Keeling* (*e*), 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 keep 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?"

Decision in Scotland.

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 until it is done. This would allow each Dog to have one worry with impunity" (*f*).

Reversed in the House of Lords.

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,

(*c*) See *Card* v. *Case*, 5 C. B. 627, n.

(*d*) Code Civil, No. 1385; *Card* v. *Case*, 5 C. B. 627, n.; see also Exodus, chap. 21, vv. 21, 29, 30, 31, 32, 36.

(*e*) *Mason* v. *Keeling*, 12 Mod. 333; *S. C.* 1 Ld. Raym. 606.

(*f*) *Orr* v. *Fleming*, 1 W. R. 339.

and which I am inclined to think that we in England have sometimes too readily acted on" (*g*).

In England a *scienter* is held necessary.

By the law of England, as laid down in a large number of cases, a *scienter* is held necessary (*h*); 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. 352), 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* (*i*) 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.

Where a Dog bites a person.

Thus, where the plaintiff was severely bit 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 (*k*).

Not enough to show that the Dog was of a fierce disposition.

And it was held by Lord Ellenborough in an action *on the Case* for keeping a Dog, which bit the plaintiff, that it was not sufficient to show that the Dog was of a fierce and savage disposition, that he was usually tied up by the defendant, and that the defendant promised to make a pecuniary satisfaction to the plaintiff after the latter had been bitten by the Dog (*l*). But, in the later case of *Thomas* v. *Morgan* (*m*), such an offer to make satisfaction was held to be evidence, though slight, of the defendant's knowledge of the habits of the animal.

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 (*n*).

Where Dog had bitten a child.

It was held also in the case of *Gething* v. *Morgan* (*o*), that where a Dog had bitten a girl four years before he worried the plaintiff's Sheep, an action would lie.

(*g*) *Orr* v. *Fleming*, 25 L. T. 73.

(*h*) But see dictum of Mr. Justice Maule, post, in *Card* v. *Case*, 5 C. B. 634. See, however, per Erle, C. J., and Willes, J., *Cox* v. *Burbridge*, 13 C. B., N. S. 430, 436.

(*i*) L. R., 1 Q. B. D. 79; 45 L. J., Q. B. 122; 33 L. T., N. S. 722; 24 W. R. 206.

(*k*) *Mason* v. *Keeling*, 12 Mod. 332.

(*l*) *Beck* v. *Dyson*, 4 Camp. 198.

(*m*) 2 C., M. & R. 496.

(*n*) *Jones* v. *Perry*, 2 Esp. 482.

(*o*) *Gething* v. *Morgan*, N. P., Q. B., May 1, 1857.

And 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 (*p*). Not necessary to show that Dog had bitten another man.

Where the defendants have done all that is reasonable to get rid of a stray dog which has come on to their premises, they are not liable for injury it may do (*q*). Stray Dog on defendant's premises.

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 on the premises, to be communicated to the husband, was evidence of *scienter* (*r*). So, where complaint was made to two men serving customers behind the bar of the defendant's public-house out of which the dog had come; notwithstanding that there was no evidence that these complaints were communicated to the defendant; or that either of the men spoken to had the general management of the defendant's business or had the care of the dog (*s*). These two cases appear to have been decided upon the inference that the persons to whom notice of the Dog's ferocity had been given had communicated such notice to the defendant. Evidence of *Scienter*.

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 (*t*). But notice to an ordinary servant is not sufficient (*u*).

An action may be maintained against a person for 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 (*x*). Damage done by Dog to game ground of action.

And in a case in which the plaintiff's Horse took fright, and damaged itself, in consequence of the defendant's Dogs running out and barking at him, a verdict was given for the plaintiff with damages to the amount of 53*l.* 10*s.* (*y*). Horse frightened by Dogs and thereby damaged.

(*p*) *Worth* v. *Gilling*, L. R., 2 C. P. 1.

(*q*) *Smith* v. *Great Eastern Railway Co.*, L. R., 2 C. P. 4.

(*r*) *Gladman* v. *Johnson*, 36 L. J., C. P. 153.

(*s*) *Applebee* v. *Percy*, L. R., 9 C. P. 647; 43 L. J., C. P. 365; 30 L. T., N. S. 785; 22 W. R. 704. Per Lord Coleridge, C. J., and Keating J. (Brett, J., dissenting).

(*t*) *Baldwin* v. *Casella*, L. R., 7 Ex. 325; 41 L. J., Ex. 167; 26 L. T., N. S. 707; 21 W. R. 16.

(*u*) Ibid. And see judgments of Lord Coleridge, C. J., and Brett, J., in *Applebee* v. *Percy*, *ubi supra*.

(*x*) *Read* v. *Edwards*, 11 L. T., N. S. 311.

(*y*) *Read* v. *King*, N. P., Guildhall, Jan. 26, 1858.

Where a Dog worries Sheep.

Where an action *on the Case* was brought for injury done to the plaintiff's Sheep by a ferocious Dog kept by the defendant, it was held that the ferocity of the Dog and the *scienter* were the substance of the charge, and that an allegation of duty in the defendant, to use due and reasonable care and precaution in keeping the animal, was immaterial (*z*).

Dictum of Mr. Justice Maule.

In this case, however, Mr. Justice Maule is reported to have said, "It may be that the allegation of negligence, coupled with the consequent damage to the plaintiff, would show a cause of action" (*a*).

Evidence of mischievous propensity unnecessary under 28 & 29 Vict. c. 60.

But now, by the statute 28 & 29 Vict. c. 60, 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 is unnecessary; and the act also simplifies in such cases the proof of the ownership of the Dog.

"Cattle" includes Horses and Mares.

By sect. 1, "the owner of every Dog shall be liable in damages for injury done to any Cattle or Sheep by his Dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such Dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of the owner." The word "Cattle" in this section includes Horses and Mares (*b*).

Proof of ownership.

By sect. 2, "The occupier of any house or premises, where any Dog was kept or permitted to live or remain at the time of such injury, shall be deemed to be the owner of such Dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such Dog at the time the injury complained of was committed, and that such Dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge; provided always, that where there are more occupiers than one in any house or premises, let in separate apartments or lodgings or otherwise, the occupier of that particular part of the premises in which such Dogs shall have been kept or permitted to live or remain at the time of such injury shall be deemed to be the owner of such Dog."

Scienter may be proved against a Corporation.

In the case of *Stiles* v. *Cardiff Steam Navigation Company* (*c*), the plaintiff was a passenger by one of the

(*z*) *Card* v. *Case*, 5 C. B. 622.

(*a*) Ibid. 634. But see *Orr* v. *Fleming*, 25 L. T. 73, and *Cox* v. *Burbridge*, 13 C.B., N.S. 436—439.

(*b*) *Wright* v. *Pearson*, L. R., 4 Q. B. 582; 38 L. J., Q. B. 312; 20 L. T., N. S. 849; 17 W. R. 1099.

(*c*) *Stiles* v. *Cardiff Steam Navigation Co.*, 10 Jur., N. S. 1199.

defendants' boats, and having gone to their premises for the purpose of inquiring for his luggage, which had been left there with their consent, found them closed, but was directed to inquire at other premises of the defendants close at hand. He went there, and while there was bitten by a Dog of the defendants chained up round an angle of the building, so as to be previously out of sight of the plaintiff. The Dog had to the knowledge of persons in the employ of the defendants (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 defendants to be aware of the dangerous nature of the Dog, they (there being no difference in this respect between a corporation and individuals) were liable in damages, but that there was no evidence in this case of *scienter* to enable the plaintiff to maintain his action, inasmuch as the knowledge was not brought home to any person competent to bind the defendants by his admissions, and who was entrusted with the control of their business. And Crompton, J., said, "It may be doubted whether the knowledge should not be brought home to somebody who kept and had the care of the Dog, and also the power of putting an end to the keeping of him."

The Dogs Act, 1871.

Sect. 1 of the 34 & 35 Vict. c. 56 (The Dogs Act, 1871), provides that any police officer may take possession of any Dog that he has reason to suppose to be savage or dangerous straying on any highway, and not under the control of any person, and may detain such Dog until the owner has claimed the same, and paid all expenses incurred by reason of such detention. By sect. 2, 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 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. Under this section the Court may order a dangerous Dog to be destroyed, without giving the owner the option of keeping it under proper control (*d*). By sect. 3, power is given to

(*d*) *Pickering* v. *Marsh*, 43 L. J., M. C. 143; 22 W. R. 798.

the local authority to place restrictions upon Dogs being at large, if danger from mad Dogs is apprehended (*d*).

Where a Horse bit some other Horses.

Where it was stated in a Declaration, 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 spoilt and died," a verdict was found for the plaintiff, but Judgment was arrested because no *scienter* was alleged (*e*). 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 the plaintiff's Horse, it was held that the plaintiff was entitled to recover, as the damage resulted from a trespass for which the defendant was responsible, and, therefore, proof of *scienter* was unnecessary (*f*).

Breaking Horses in a public place.

Where, however, 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 Horse-breaking (*g*).

Where a Mad Bull wounds a person.

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 (*h*).

Where a Bull singled out a person wearing red.

And where a Bull passing along a highway, seeing the plaintiff with a red handkerchief, 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 (*i*).

Where a Ram injured a person.

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 (*k*).

Where a vicious beast kills a person.

If through negligence a vicious beast goes abroad, after warning or *Notice* of his condition, and kills a

(*d*) As to proof of ownership under this section, see *Wren* v. *Pocock*, 34 L. T., N. S. 697.

(*e*) *Scotchett* v. *Eltham*, Freem. 534 (C. P.).

(*f*) *Lee* v. *Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212. See also *Ellis* v. *Loftus Iron Co.*, L. R., 10 C. P. 10; 44 L. J., C. P. 24; 31 L. T., N. S. 483; 23 W. R. 246.

(*g*) *Michael* v. *Alestree*, 2 Lev. 172; *S. C.* 1 Vent. 295.

(*h*) *Baynting* v. *Sharp*, 1 Lutw. 90.

(*i*) *Hudson* v. *Roberts*, 6 Ex. 697.

(*k*) *Jackson* v. *Smithson*, 15 M. & W. 563.

person, it is the opinion of Hale, that it is *Manslaughter* in the owner (*l*). 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 (*l*).

Owner bound to secure a vicious animal at all events.

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 (*m*).

He is liable to an action for damage.

A person who keeps an animal accustomed to attack and bite mankind, with *knowledge* that it is so accustomed, is *primâ facie* liable in an action at the suit of any person attacked and injured by such animal (*n*).

The gist of the action.

The gist of the action being the keeping of the animal after knowledge of its mischievous propensities (*n*).

Not necessary to prove negligence.

And it is not necessary to prove negligence or default in the securing or taking care of it (*n*).

An unruly Horse escaping from a Stable.

If a man has an unruly Horse in his Stable, and leaves open the Stable Door, and the Horse in consequence escapes and does mischief, the owner is liable in an action (*o*).

Turning a dangerous animal loose, Manslaughter.

If a man turn an animal, which he knows to be a dangerous one, out of a place where he may be restrained, into a public thoroughfare, and the animal afterwards kills a man, it will be Manslaughter, unless the person accused can show that the act was done in self-preservation (*p*).

Turning a vicious Horse out on a Common.

If a man turn out a Horse, which he knows to be vicious, upon a Common with a footpath across it, and it kills a child, he is guilty of Manslaughter (*q*).

Injury occasioned by a vicious Bull.

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 (*m*).

Shooting a Dog for worrying Sheep.

To justify a person in shooting a Dog for worrying his Sheep, it is not necessary to prove that he was shot in the

(*l*) See judgment—*Rex* v. *Huggins*, 2 Ld. Raym. 1583, cited *May* v. *Burdett*, 9 Q. B. 107.

(*m*) *Blackman* v. *Simmons*, 3 C. & P. 138.

(*n*) *May* v. *Burdett*, 9 Q. B. 101. See also *Besozzi* v. *Harris*, 1 F. & F. 92, ante, p. 348. See also *Fletcher* v. *Rylands*, L. R., 1 Ex. 265, 281.

(*o*) *Michael* v. *Alestree*, 1 Vent. 295.

(*p*) Per Bramwell, B., *Reg.* v. *John Child*, C. C. C. Feb. 4, 1858.

(*q*) *Reg.* v. *Dant*, C. C. C. April 29, 1865.

act; but 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 (*r*).

Shooting a Dog for worrying Fowls.

It has, however, 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 (*s*). 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 (*t*).

(*r*) *Kellett* v. *Stannard*, 4 Ir. Jur. 50 (Ex. Ir.).

(*s*) *Janson* v. *Brown*, 1 Camp. 41.

(*t*) *Wadhurst* v. *Damme*, Cro. Jac. 44.

CHAPTER III.

THE LIABILITIES OF PARTIES HUNTING OR TRESPASSING UPON THE LANDS OF ANOTHER.

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HUNTING AND TRESPASSING.

Fresh pursuit over another's land.

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.

Pursuing Vermin.

It is laid down that one may justify hunting foxes over the ground of another because they are noisome *Vermin* (*a*);

(*a*) *Nicholas* v. *Badger*, 3 T. R. 259, n.; *Gedge* v. *Minue*, 2 Bulst. 62.

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."

No unnecessary damage.

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*).

Digging for a Fox, &c.

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.

Hunting for amusement.

Persons hunting for their own amusement, and going over the lands of another, are *trespassers;* and Fox-hunters, like all other Hunters, may be warned off (*f*).

Earl of Essex v. *Capel.*

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

(*b*) Com. Dig. Pleader, 3 M. 37.

(*c*) *Gundry* v. *Feltham*, 1 T. R. 337.

(*d*) *Earl of Essex* v. *Capel*, Hertford Summer Assizes, 1809.

(*e*) Com. Dig. Pleader, 3 M. 37, and the authorities there cited.

(*f*) *Earl of Essex* v. *Capel*, Hertford Summer Assizes, 1809; *Bowyer* v. *Cook*, 4 C. B. 236; *S. C.* 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*, L. R., 4 Q. B. D. 9; 48 L. J., M. C. 33; 39 L. T., N. S. 574; 27 W. R. 215, in which this case was discussed and approved.

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 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* (*h*) 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.

Huntsman liable for damage done by the field.

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*).

Master of Hounds, when responsible for 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,

(*h*) *Gundry* v. *Feltham*, 1 T. R. 337.

(*i*) 12 Hen. 8, p. 9.

(*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.

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*).

Killing a Hare on another's land.

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*).

Taking a Stag 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*).

Hunting a stray Deer.

But where a Deer strayed from a Park on to the plaintiff's land, and eat 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*).

Dead Game property of owner.

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 (*q*).

He has a right to have his Game undisturbed.

Cattlegate owners have not the right of shooting.

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 (*r*).

Reservation of rights of Lords of the Manor under Enclosure Acts.

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* (*s*), in which Sir James Graham 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,

(*m*) *Baker* v. *Berkley*, 3 C. & P. 32.

(*n*) *Sutton* v. *Moody*, Ld. Raym. 250.

(*o*) *Barrington* v. *Turner*, 3 Lev. 28.

(*p*) *Blades* v. *Higgs*, 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., N. S. 311.

(*r*) *Rigg* v. *Earl of Lonsdale*, 1 H. & N. 923.

(*s*) *Graham* v. *Ewart*, 26 L. J., Ex. 97.

reversing the decision of the Court below, and overruling *Greathead* v. *Morley* (*t*), 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 preserve the former right unimpaired by the consequences of the enclosure. It was also held in this case, that a subsequent concurrent enjoyment of sporting for more than twenty years by the owners of the allotments, claiming to do so as of right, did not deprive the original Lord of his exclusive right.

Who may kill Hares without a Game Certificate.

Persons in the occupation of enclosed Ground, and in certain cases owners, may kill (*u*) Hares without a Game Certificate (*x*). 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 (*y*).

Ground Game Act, 1880.

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 (sect. 1); where the occupier is otherwise entitled to kill Ground Game on land in his occupation, he cannot divest himself wholly of such right (sect. 2); and all agreements in contravention of the right of the occupier to destroy Game are declared void (sect. 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 (sect. 4).

Any person may hunt Hares.

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 (*z*).

Continued trespass.

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

(*t*) *Greathead* v. *Morley*, 3 M. & G. 139.

(*u*) Not to authorize the laying of poison, 11 & 12 Vict. c. 29, s. 5.

(*x*) Ibid. s. 1.

(*y*) Ibid. s. 2.

(*z*) Ibid. s. 4.

may be continued as well as spoiling, consuming or cutting grass (*a*).

Two persons engaged in a common purpose.

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 (*b*).

Trespass in search of Game.

Under 1 & 2 Will. 4, c. 32 (*c*), *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 (*c*).

Hunting with Hounds or Greyhounds.

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* (*d*).

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, as 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 (*e*). 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 *bona fides* is immaterial; but where a *bonâ fide* and probable right of property is set up, the Justices are bound to hold their hands (*f*). The mere belief, however,

(*a*) *Monkton* v. *Pashley*, 2 Salk. 639.

(*b*) *Stacey* v. *Whitehurst*, 13 W. R. 384; *Mayhew* v. *Wardley*, 14 C. B., N. S. 550.

(*c*) 1 & 2 Will. 4, c. 32, s. 31.

(*d*) Ibid. s. 35.

(*e*) *Cornwell* v. *Sanders*, 3 B. & S. 206.

(*f*) *Reg.* v. *Kayley*, 10 L. T., N. S. 339. See also *Watkins* v. *Major*, L. R., 10 C. P. 662; 44 L. J., M.

on the part of the alleged trespasser that he has such a right, is not a *bonâ fide* claim of right (*g*).

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 sect. 30 (*h*).

Persons employed by a tenant to kill Rabbits upon his farm, the right of shooting on which is reserved to the landlord, cannot be proceeded against under this section, inasmuch as the tenant himself could not thus be convicted, but was entitled to kill the Rabbits himself, and, as they were acting by his directions, they had the same rights as he had (*i*).

Persons employed to kill Rabbits by tenant.

It is a *trespass in pursuit of Game* within the meaning of this statute to fire at it from the Highway (*j*). But 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 (*k*).

Trespass from the highway.

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 (*l*). 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 (*m*).

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 (*n*).

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,

Laying hands on a trespasser.

C. 164; 33 L. T., N. S. 352; 24 W. R. 164; *Lovesey* v. *Stallard*, 30 L. T., N. S. 792.

(*g*) Per Wightman, J., *Cornwell* v. *Sanders*, 3 B. & S. 213. See also *Leatt* v. *Vine*, 30 L. J., M. C. 207; *R.* v. *Cridland*, 7 E. & B. 853; *Morden* v. *Porter*, 7 C. B., N. S. 641; *Legg* v. *Pardoe*, 9 C. B., N. S. 289; *Adams* v. *Masters*, 24 L. T., N. S. 502; *Reg.* v. *Critchlow*, 26 W. R. 681; *Birnie* v. *Marshall*, 35 L. T., N. S. 373.

(*h*) *Jones* v. *Williams*, 46 L. J., M. C. 270; 36 L. T., N. S. 559; 25 W. R. 501.

(*i*) *Spicer* v. *Barnard*, 28 L. J., M. C. 176.

(*j*) *Mayhew* v. *Wardley*, 14 C. B., N. S. 550.

(*k*) *R.* v. *Pratt*, 24 L. J., M. C. 113.

(*l*) *Osborn* v. *Meadows*, 12 C. B., N. S. 10.

(*m*) *Kenyon* v. *Hart*, 13 W. R. 406.

(*n*) *Evans* v. *Botteril*, 33 L. J., M. C. 50; and see as to this Statute, *Brown* v. *Turner*, 13 C. B., N. S. 485; *Hall* v. *Knox*, 33 L. J., M. C. 1; *R.* v. *Parker*, 33 L. J., M. C. 135.

which cannot be justified on the ground of a person breaking into the close, without a request (*o*).

Opposing force to force.

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 (*o*).

Defence to an action.

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 (*p*). 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 (*q*).

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 (*r*). And indeed if a man or woman be riding a Horse, it cannot be distrained at all (*s*).

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 invasion of his property, and the other has no right to come there (*t*).

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 (*u*).

Notice under 3 & 4 Vict. c. 24, s. 3.

Under 3 & 4 Vict. c. 24, s. 3, the "Notice not to *trespass* thereon or therein" must be "served, by or on behalf of the Owner or Occupier of the land trespassed over, upon, or left at the last reputed place of abode of the defendant or defendants."

Notice trans-

In the case of *Bowyer* v. *Cook* (*x*) the Notice, although

(*o*) *Green* v. *Goddard*, 2 Salk. 640.

(*p*) *Weaver* v. *Bush*, 8 T. R. 78.

(*q*) *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.

(*r*) *Storey* v. *Robinson*, 6 T. R. 138.

(*s*) Co. Litt. 47 a, cited *Parsons* v. *Gingell*, 4 C. B. 550; and see *Webb* v. *Bell*, 1 Sid. 440.

(*t*) See per Holt, C. J., *Ashby* v. *White*, 1 Smith's L. C. 125.

(*u*) See per Parke, J., *Brown* v. *Giles*, 1 C. & P. 119; *Read* v. *Edwards*, 11 L. T. 311.

(*x*) *Bowyer* v. *Cook*, 4 C. B. 237, n.

not "served on the defendant or left at his last reputed or known place of abode," but transmitted to his address by Post, was admitted under a Judge's Order, and read at the trial. mitted by Post.

The obligation to make and maintain Fences, both at common law and by the Railway Clauses Consolidation Act (*y*), 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 (*z*), nor can the tenants of the land (*a*). 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 killed; it was held by the Court of Common Pleas that the plaintiff could not recover (*b*). Maintenance of fences.

But a person using the lands of an adjoining owner by his permission is in the same position as he is (*c*).

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 (*d*). 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 Gate of a Railway crossing left open where there is a statutable obligation.

(*y*) 8 & 9 Vict. c. 20, s. 68; and see *Buxton* v. *North Eastern Railway Co.*, L. R., 3 Q. B. 549; 37 L. J., Q. B. 258; 18 L. T., N. S. 795; 16 W. R. 1194.

(*z*) *Child* v. *Hearn*, L. R., 9 Ex. 176; 43 L. J., Ex. 100; 22 W. R. 864.

(*a*) *Wiseman* v. *Booker*, L. R., 3 C. P. D. 184; 38 L. T., N. S. 392; 26 W. R. 634.

(*b*) *Ricketts* v. *East and West India Docks and Birmingham Junction Railway Co.*, 21 L. J., C. P. 201.

(*c*) *Dawson* v. *Midland Railway Co.*, L. R., 8 Ex. 8; 42 L. J., Ex. 49; 21 W. R. 56.

(*d*) See per Patteson, J., *Fawcett* v. *York and North Midland Railway Co.*, 16 Q. B. 617; *S. C.*, 20 L. J., Q. B. 222.

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 Statute 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 (*e*).

Gate of Station left open where there is no statutable obligation.

In the preceding case it will be observed that there was an express statutable 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 the Railway Clauses Consolidation Act (*f*), s. 68, 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 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 8 & 9 Vict. c. 20, s. 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 (*g*). 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 (*h*). 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

(*e*) *Fawcett* v. *York and North Midland Railway Co.*, 16 Q. B. 610; *S. C.*, 15 Jur., Q. B. 173; *S. C.*, 20 L. J., Q. B. 222.

(*f*) 8 & 9 Vict. c. 20.

(*g*) *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Wallis*, 14 C. B. 213.

(*h*) *Midland Railway Co.* v. *Daykin*, 17 C. B. 126.

the Railway, or in a yard belonging to the Company, and stray thence on the line, and are injured (*i*).

Fence within Station Yard.

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 (*k*).

(*i*) *Marfell* v. *South Wales Railway Co.*, 29 L. J., C. P. 315.

(*k*) *Roberts* v. *Great Western Railway Co.*, 4 Jur., N. S. 1240.

PART III.

RACING, WAGERS, AND GAMING.

CHAPTER I.

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The time of the Pharaohs.

DURING the Pharaoh Dynasty the Egyptians seem to have been well acquainted with the use of the War-horse, and from dealers out of Egypt Solomon derived a great supply of Horses, not only for his own use, but also for the purposes of resale to the people living between Palestine and the Euphrates (*a*). It has been thought, from the name given by the Egyptians to the Horse, that it was introduced into Egypt originally from Persia (*b*).

Used mostly for warlike purposes.

The most striking feature in the Biblical notices of the Horse is the exclusive application of it to warlike purposes (*c*), with one exception, when it is mentioned as employed in threshing by trampling upon the strewed grain (*d*).

(*a*) 1 Kings, x. 28.
(*b*) Smith's Dictionary of the Bible, tit. Horse.
(*c*) Ibid.
(*d*) Isa. xxviii. 28.

The first mention of the British Horse is made by Julius Cæsar; and when he invaded the Island, he was opposed by a host of war-Chariots, which must have been drawn by active powerful Horses. They seem to have been pretty numerous, as Cassivelaunus, on dismissing the main body of his army, retained four thousand war-Chariots (*e*). The time of Julius Cæsar.

Athelstan, who was second in succession from Alfred the Great, received from Hugh Capet of France, as an acceptable present, several German *Running Horses* (*f*); and in A.D. 930, he decreed that no Horses should be sent abroad for sale, or on any account, except as Royal presents (*g*). Reign of Athelstan.

William the Conqueror was very much indebted to his superiority in Cavalry for the Victory at Hastings; he introduced the Spanish Horse, and his favourite charger was a Spaniard. In his Reign there was a marked improvement in the breed of Horses, and about A.D. 1066, we have on a piece of tapestry wove at Bayonne, the figure of a man driving a Horse and harrow, being the earliest notice of the use of Horses in Field labour (*g*). Reign of William the Conqueror.

In the Reign of Henry the First, A.D. 1121, the first Arabian Horse on Record was introduced by Alexander King of Scotland, who presented it and its furniture to a Church (*g*). Reign of Henry the First.

In the reign of Henry the Second, forty years afterwards, Smithfield was celebrated as a Horse Market. Fitz Stephen gives the following animated account of the manner in which *Hackneys* and *Charging Steeds* were tried there by racing against one another: "When a Race is to be run by this sort of Horses, and perhaps by others, which also in their kind are strong and fleet, a shout is immediately raised and the common Horses are ordered to withdraw out of the way. Three jockeys, or sometimes only two, as the match is made, prepare themselves for the contest. The Horses on their part are not without emulation; they tremble and are impatient, and are continually in motion. At last the signal once given, they start, devour the course, and hurry along with unremitting swiftness. The jockeys, inspired with the thought of applause and the hope of victory, clap spurs Reign of Henry the Second.

(*e*) See Cæs. Bell. G. 5, &c., and Lib. U. K. "The Horse," 22.

(*f*) See Markham's Maister-Peece, 16th edition.

(*g*) Lib. U. K. "The Horse," 23.

to their willing Horses, brandish their whips and cheer them with their cries" (*h*).

Reign of Richard the First.

An old Metrical Romance records the excellence and great value of two Horses belonging to Richard Cœur de Leon, which he purchased at Cyprus, and which therefore were probably of Eastern origin (*i*).

Reign of John.

John accumulated a very numerous and valuable stud of Horses; and he formed our breed of draught Horses by importing one hundred chosen Flemish Stallions (*j*).

Reign of Edward the Second.

Edward the Second, one hundred years afterwards, in the beginning of the fourteenth century, purchased thirty Lombardy *War Horses*, and twelve heavy draught Horses. Lombardy, Italy and Spain at that time supplied the most valuable Cavalry or Parade Horses (*j*).

Reign of Edward the Third.

Edward the Third devoted one thousand marks to the purchase of fifty Spanish Horses, and formal applications were made to the Kings of France and Spain for their safe conduct. The King had many *Running Horses* (*k*), the precise meaning of which term is not quite clear; and he prohibited the exportation of Horses under very heavy penalties (*l*).

Reign of Richard the Second.

In the Reign of Richard the Second, the price of Horses rapidly increased, and to such an extent, that in A.D. 1386, a proclamation was issued regulating their price; and it was ordered to be published in Lincolnshire, Cambridgeshire, and the East and West Ridings of Yorkshire (*m*). In this Reign Games are first mentioned in the Statute Book; and we find that in A.D. 1389, Servants in husbandry or Labourers were prohibited wearing any sword, buckler, or dagger; or playing at Tennis, Football, Quoits, Dice, Casting of Stone kails, and such like *importune* Games (*n*).

Reign of Henry the Fourth.

This Statute was confirmed and extended in the Reign of Henry the Fourth, A.D. 1409, and an additional penalty of six days' imprisonment was imposed (*o*).

Reign of Henry the Seventh.

In the Reign of Henry the Seventh, A.D. 1494, we find the Legislature paying much attention to the breed of Horses, as being of great importance to the defence of the kingdom. It appears that Horses had at this time become

(*h*) See Fitz Stephen, and Lib. U. K. "The Horse," 24.
(*i*) Lib. U. K. "The Horse," 24.
(*j*) Ibid. 25.
(*k*) See Markham's Maister-Peece, 16th edition, and Lawrence on "The Horse," vol. 1, cap. 5.
(*l*) Lib. U. K. "The Horse," 25.
(*m*) Ibid. 26.
(*n*) 12 Ric. 2, c. 6; see 26 & 27 Vict. c. 125.
(*o*) 11 Hen. 4, c. 4, repealed by 33 Hen. 8, c. 9.

scarce and expensive, and it was supposed to be the consequence of many Horses and Mares having been exported. To remedy this evil an Act was passed, which prohibited any Horse or Mare being carried out of the Realm without the King's Licence. But any Denizen might carry a Horse beyond the sea on making oath that it was for his own use; and any Mare of three years old or upwards, whose price was not above six shillings and eight pence, might be exported, the owner, however, being compelled to sell her at the port to any person who should bid him seven shillings (*p*).

Reign of Henry the Eighth.

In the Reign of Henry the Eighth, A.D. 1530, it was further enacted, that any person conveying any Horses, Geldings or Mares to any parts beyond the sea, without the King's Licence, should forfeit forty shillings for every Poll (*q*). It appears, however, that notwithstanding these enactments, good Horses continued to be scarce, and the breed of "good, swift and strong Horses" was supposed to have decayed on account of "little Horses and Nags of *small* stature and value being suffered to depasture and also to cover Mares and Felys of *very small* stature." To remedy this, an Act was passed in A.D. 1535, compelling the owners and occupiers of Deer-parks of a mile or upwards in circumference, to keep a certain number of foal Mares, in proportion to the extent of their grounds, such Mares to be at least thirteen hands in height, and to be covered by Horses of fourteen hands or upwards (*r*). This Act did not extend to the counties of Westmoreland, Cumberland, Northumberland and the Bishoprick of Durham (*s*).

The breed, however, still continued to decay and diminish; and it was supposed to be in consequence of "little stoned Horses and Nags, of small stature and of little value," being suffered to depasture in "the Forests, Chases, Moors, Marshes, Heaths, Commons and waste Grounds in the Realm," and also to cover Mares feeding there. The legislature, to remedy this evil, passed another Act in A.D. 1540, which prohibited any stoned Horse, under fifteen hands, being pastured on such lands throughout the greater part of England and the whole of Wales, or under fourteen hands elsewhere (*t*). Any person, on

(*p*) 11 Hen. 7, c. 13, repealed by 25 Car. 2, c. 6.
(*q*) 22 Hen. 8, c. 7.
(*r*) 27 Hen. 8, c. 6, ss. 2, 4, repealed by 26 & 27 Vict. c. 125.
(*s*) 27 Hen. 8, c. 6, s. 5.
(*t*) 32 Hen. 8, c. 13, s. 2, repealed by 19 & 20 Vict. c. 64.

measuring a Horse which was under the lawful height, might seize and retain it for his own use (*u*); the pastures were to be driven once a year, and any unlikely-looking beasts were to be killed (*v*); and the owner of every Horse, Mare or Gelding infected with the Scab, at any time pasturing on these grounds, was to forfeit ten shillings (*w*). An Act was also passed prescribing the number of stoned *trotting Horses* for the saddle each man was to keep, according to his degree (*x*). However, these enactments do not seem to have had the desired effect, as the breed of Horses had sadly degenerated; for Blundeville, who wrote in the Reign of Queen Elizabeth, tells us that they consisted principally of strong clumsy beasts, the few lighter ones being weak and without bottom.

It appears that in this Reign Races were first established in various parts of England, and the first meetings were held at Chester and Stamford, but there was no regular system, and all sorts of Horses ran. The Prize was usually a wooden bell adorned with flowers; and this afterwards was exchanged for a silver bell, and "given to him who should run the best and furthest on Horseback on Shrove Tuesday." Hence the phrase of "bearing away the bell" (*y*).

In this Reign also a variety of regulations were made with regard to *Gaming*, some of which are in force at the present day. The object of the legislature was to encourage Archery, and in A.D. 1511 it was enacted, that "all sorts of men under the age of forty years" should "have bows and arrows and use shooting," and that "unlawful Games" should not "be used." This, however, was followed by a much more comprehensive Act, which was passed in A.D. 1541; namely, 33 Hen. 8, c. 9, being a "Bill for the maintaining Artillery and the debarring unlawful Games." It professes in its preamble to be founded on a petition from the Bowmen and others concerned in the making of implements of Archery; and they complained that "many and sundry new and crafty Games and Plays, as Logetting in the field, Slide-thrift, otherwise called Shove-groat," had caused the decay of Archery (*z*). It made various regulations concerning the use of bows and

(*u*) 32 Hen. 8, c. 13, s. 3.
(*v*) Ibid. ss. 6, 7.
(*w*) Ibid. s. 9.
(*x*) 33 Hen. 8, c. 5, now virtually repealed by 21 Jac. 1, c. 28.
(*y*) Lib. U.K. "The Horse," 28.
(*z*) 33 Hen. 8, c. 9 (now virtually repealed by 3 Geo. 4, c. 41, s. 4, and 8 & 9 Vict. c. 109, s. 1), ss. 1, 2. See Appendix.

arrows, and imposed a penalty of forty shillings a day for the maintenance of "any common House, Alley or Place of Bowling, Coyting, Cloyshcayles, Half-bowl, Tennis, Dicing Table or Carding," or any Game previously prohibited by Statute, or any unlawful new Game which might afterwards be invented (*a*).

There was a penalty of six shillings and eightpence each time for using and haunting any of the above-mentioned "Houses or Plays and there playing" (*b*).

Any Justice of the Peace, Mayor, Sheriff, Bailiff, &c. had authority to enter any houses or places where unlawful Games were suspected to be held, and take and imprison both the keepers and persons resorting and playing there, until the keepers should find sureties and the other parties should give security to abstain from such practices for the future (*c*). The chief authorities in Towns were to make weekly search in such places as were suspected of being Gaming-houses, or, at the furthest, once a month, under a penalty of forty shillings (*d*); and the Leases of Houses used for unlawful Games were to be void (*e*).

"No manner of artificer or craftsman, husbandman, apprentice, labourer, servant at husbandry, journeymen, mariners, fishermen, watermen or any serving man," was to play at "the Tables, Tennis, Dice, Cards, Bowles, Closh, Coyting, Logating, or any other unlawful Game out of Christmas, under the pain of twenty shillings forfeit each time;" and in Christmas they were to play in "their master's houses or in their master's presence," and no person was to play at any "Bowl or Bowls in open places out of his garden or orchard," under the penalty of six shillings and eightpence (*f*).

Under certain restrictions and regulations, however, and on giving sufficient security, a person might sue for a Placard to have common Gaming in his house (*g*). And a master might license his servant to play with him or any other gentleman at his own house or in his presence (*h*). Also a nobleman or person with an income of 100*l.* a-year might license his servants to play among themselves at his or their houses, gardens or orchards (*i*).

(*a*) 33 Hen. 8, c. 9, s. 11.
(*b*) Ibid. s. 12.
(*c*) Ibid. s. 14.
(*d*) Ibid. s. 15.
(*e*) Ibid. s. 21, repealed by 26 & 27 Vict. c. 125.
(*f*) Ibid. s. 16.
(*g*) Ibid. s. 13.
(*h*) Ibid. s. 22.
(*i*) Ibid. s. 23.

Reign of Edward the Sixth.

In the Reign of Edward the Sixth, it was found that a great many Horses had been exported to foreign countries, and particularly to Scotland, which was supposed to have been "the occasion of strength to the King's enemies," and to have caused the decay of the breed of good Horses; and consequently the Legislature in A.D. 1547 passed "An Act for not conveying Horses out of the Realm;" by which every person endeavouring to convey a Horse into Scotland, not only forfeited the animal, but became liable to a penalty of forty pounds (*j*). But every person was permitted to take abroad with him Horses or Geldings, on making oath that he took them for his own use on the journey, and not with intent to sell them (*k*); and any Mare whose value did not exceed ten shillings might be exported (*l*).

Reign of Philip and Mary.

It appears that so far the Statutes on the subject of *Gaming* had been directed against it, because it was supposed to withdraw men from the practice of Archery, which seems to have been neglected, where these other sports had obtained popularity. But in the Reign of Philip and Mary, *Gaming* had become very inconvenient on other grounds; for it appeared, that "by reason of divers sundry licenses theretofore granted to divers persons, as well within the City of London and the Suburbs, as elsewhere," for "keeping of houses, gardens and places for Bowling, Tennis, Dicing, White and Black, Making and Marring, and other unlawful Games, many unlawful assemblies, conventicles, seditions, and conspiracies," had been daily and secretly practised, and robberies and other misdemeanours had been committed by idle and misruled people resorting there. To remedy these evils an Act was passed in A.D. 1555, "to avoid divers Licenses for houses where unlawful Games be used," and all Placards, Licenses or Grants were made void (*m*). In the same year of the Reign an Act was passed, "Against the buying of Stolen Horses," and certain regulations were prescribed for the sale of Horses at Markets and Fairs (*n*).

Reign of Queen Elizabeth.

Notwithstanding the regulations made in the Reign of Edward the Sixth, it appears that a large number of Horses were exported by persons who unscrupulously took the

(*j*) 1 Edw. 6, c. 5, s. 1, now repealed by 3 Geo. 4, c. 41.
(*k*) Ibid. s. 6.
(*l*) Ibid. s. 9.
(*m*) 2 & 3 Ph. & M. c. 9, repealed by 26 & 27 Vict. c. 125.
(*n*) 2 & 3 Ph. & M. c. 7, Appendix; and see Stolen Horses, ante, Part 1, Chap. 3.

required oath, and the difficulty of punishing then was so great, that in the Reign of Queen Elizabeth, A.D. 1562, the permission to persons to take Horses abroad for their own use was repealed (*o*).

It was now found that in the Isle of Ely and in the Counties of Cambridge, Huntingdon, Northampton, Lincoln, Norfolk and Suffolk, the fens were so wet and rotten that they could not carry Stoned Horses of the size mentioned in the Act of Henry the Eighth (*p*), without danger of their being mired or drowned. The Horses of many poor men had been seized as being beneath the statutable height, and the breed of Horses and all the tillage and carriage within the district had been very much hindered. To remedy these evils, an Act was passed in this Reign, A.D. 1565, by which the statutable height of Stoned Horses in those fen Counties was reduced to thirteen hands (*q*).

We have seen that in the Reign of Philip and Mary, certain forms were prescribed to give publicity to the sale of Horses at Markets and Fairs, so that if the Horse had been stolen, the owner might have an opportunity of claiming it (*r*). But these forms seemed to have entirely failed in their object, because in this Reign, Horse-stealing had grown so common, that Horses were not safe in Pastures or Closes, and hardly so in their Stables; and there was always a ready sale for them in distant Fairs and Markets. However, in A.D. 1589, an Act was passed prescribing certain additional forms to be observed in sales at such places, and making it a matter of greater difficulty to sell a stolen Horse (*s*). This is the Act now in force, and which we have already considered.

Reign of James the First.

In the Reign of James the First, an immaterial and trifling alteration was made in the Law of *Gaming* by the repeal of the Statute of Richard the Second in A.D. 1623 (*t*). But an important change took place with regard to Horse Racing. Before this time, Horse Races were mere trials of speed and strength, without any acknowledged system, and were mixed up with other exercises of skill and activity. The pastime had continued on the same footing since the time of Henry the Eighth, but this Reign may be considered the era in which Racing began to be ranked as a

(*o*) 5 Eliz. c. 19, repealed by 26 & 27 Vict. c. 125.
(*p*) 32 Hen. 8, c. 13.
(*q*) 8 Eliz. c. 8, repealed by 19 & 20 Vict. c. 64.
(*r*) 2 & 3 Ph. & M. c. 7.
(*s*) 31 Eliz. c. 12, Appendix; and see Stolen Horses, ante, Part 1, Chap. 3.
(*t*) 21 Jac. 1, c. 28, s. 11, repealed by 19 & 20 Vict. c. 64.

distinct sport. James the First was extremely fond of field sports; he established Races on a new footing; under his patronage Rules were promulgated for their regulation, and his favourite courses were Croydon and Enfield Chase. From this period also began the practice of breeding a distinct kind of Horse for the especial purpose. And we find that about this time an Arabian Horse, and also the White Turk, the Helmsly Turk, and Fairfax's Morocco Barb, were brought into the kingdom; and a considerable improvement in the breed of the animal was thus effected (*u*).

Reign of Charles the First.

Charles the First established Races in Hyde Park and at Newmarket; yet, although these were discontinued during the Protectorate, attention was not withdrawn from breeding, and Cromwell had his stud of Race Horses (*x*).

Reign of Charles the Second.

On the Restoration, a new impulse was given to gaiety and amusement of every kind, and the Newmarket meetings were revived. Charles, who was a great patron of Horse Racing, encouraged it by the gift of Royal Plates at the principal Courses. He purchased brood Mares and Stallions in the Levant, which were principally Barbs and Turks; and the breed was also much improved by Horses brought over from Tangiers, as part of the Dowry of his Queen, Catherine of Braganza (*y*).

No sooner had Horse Racing been fully established, than we find an Act was passed to endeavour to prevent the evils which have unfortunately always attended it. The Act was 16 Car. 2, c. 7, which came into operation A.D. 1664, and in it Horse Racing is mentioned for the first time in the Statute Book. It is intituled "An Act against *deceitful*, *disorderly* and *excessive Gaming*," and recites that "all lawful Games and exercises should not be otherwise used than as innocent and moderate recreations, and not as constant trades or callings to gain a living or make unlawful advantage thereby; and that by the immoderate use of them many mischiefs and inconveniences arise, to the maintaining and encouraging of sundry idle, loose and disorderly persons in their dishonest, lewd and dissolute course of life, and to the circumventing, deceiving, couzening and debauching of many of the younger sort, both of the Nobility and Gentry, and others, to the loss of their precious time and the utter ruin of their

(*u*) Lib. U. K. "The Horse," 28; and 31 Law Mag. 65.

(*x*) Lawrence on "The Horse," vol. i. p. 218; and Lib. U. K. "The Horse," 28.

(*y*) Lib. U. K. "The Horse," 29; and Martin *arguendo*, *Applegarth* v. *Colley*, 10 M. & W. 728.

estates and fortunes, and withdrawing them from noble and laudable employments and exercises" (*z*). By this Act persons winning by fraud, or cheating at Cards, Dice, Tables, Tennis, Bowles, Kittles, Shovel-board, Cock-fightings, Horse Racings, Dog-matches, Foot Races, and all other Games and Pastimes, were to forfeit treble the sum or value of the money so won (*a*).

Every person losing above 100*l.* on ticket or credit at these or any other Games and Pastimes, either by bearing a part in them or betting, was discharged from paying any part of the money; all securities given for it were to be void; and the winner was to forfeit treble the sum above 100*l.* so won (*b*); and it was held that an agreement to run a Horse Race for more than 100*l.* a-side was prohibited by this statute (*c*).

Reign of William the Third.

In the Reign of William the Third, A.D. 1699, it appears that certain Games called Lotteries had been set up throughout England and Wales, by means of which great sums of money had been fraudulently got from unwary persons, and from the Children and Servants of several Gentlemen and Merchants; to remedy this, an Act was passed "for suppressing Lotteries," which declared them to be public nuisances, and imposed a penalty of 500*l.* on every keeper of a Lottery, and 20*l.* on every player (*d*).

Reign of Queen Anne.

In the Reign of Queen Anne the Darley Arabian was introduced by Mr. Darley, which tended very much to form our present breed of Horses. People began to pay more attention to Pedigree and Breed, and we find it noticed as remarkable, that a Horse called Bay Bolton was got by a farmer's Horse without a Pedigree (*e*).

It was found in this Reign that the Act of Charles the Second was insufficient to prevent the mischiefs arising from the spirit of Gambling then existing, and which it appears had become so very prevalent that further legislation was required. Therefore, in A.D. 1710, 9 Anne, c. 14, was passed, being "An Act for the better preventing of *excessive and deceitful Gaming*." It recited that "the laws now in force for preventing the mischiefs which may happen by *Gaming* have not been found suf-

(*z*) 16 Car. 2, c. 7, now repealed by 9 Anne, c. 19, and 5 & 6 Will. 4, c. 41.
(*a*) Ibid. s. 2.
(*b*) Ibid. s. 3.
(*c*) *Edgebury* v. *Rosindale*, 2 Lev. 94; *S. C.* 1 Ventr. 253.
(*d*) 10 & 11 Will. 3, c. 17.
(*e*) Lawrence on "The Horse," vol. i. p. 222.

ficient for that purpose;" and enacted, that all mortgages and securities, where the consideration was for money won by Gaming or Betting, or for repayment of money lent at Gaming or Betting, were to be void; that all property so encumbered was to devolve to such person as would have been entitled to it in case the owner were dead; and that all grants or conveyances made to prevent this were to be deemed fraudulent and void (*f*).

The loser of 10*l.* or upwards by playing or betting at any Game might sue for the money so lost within three months; and if he did not sue within that time any other person might do so, and recover treble the value, one moiety to go to the informer and the other to the poor of the parish where the offence was committed (*g*); any person winning by fraud by betting or playing at any Game, or any person winning above 10*l.* at one sitting, might be indicted, and on conviction forfeit five times the value so won, and if he had cheated, be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury (*h*).

Two Justices might cause persons suspected of having no visible estate or calling, and who appeared to support themselves by *Gaming*, to be brought before them, and find sureties for their good behaviour for the space of twelve months (*i*); during which time, if they played or betted to the amount of twenty shillings at any one time or sitting, they were to forfeit their recognizances (*j*); and any person assaulting or challenging another on account of money won at play was to forfeit all his goods, and be imprisoned two years (*k*). But this Act was not to prevent Gaming in any of the Queen's Palaces during her residence there (*l*). The word "*Games*" used in this Act was held to comprehend *Horse Races* (*m*) and other *Games* mentioned in 16 Car. 2, c. 7, and therefore any race for 10*l.* a-side or upwards was illegal. In this Reign two Acts were passed to enforce 10 & 11 Will. 3, c. 17, with regard to Lotteries (*n*).

Reign of

In A.D. 1721, and the following year of the Reign of

(*f*) 9 Anne, c. 14, s. 1.
(*g*) Ibid. s. 2; *Frederick, Bart. v. Lookup*, 4 Burr. 2018.
(*h*) Ibid. s. 5.
(*i*) Ibid. s. 6.
(*j*) Ibid. s. 7.
(*k*) Ibid. s. 8.
(*l*) Ibid. s. 9.
(*m*) *Blaxton v. Pye*, 1 Wils. 309; *Clayton v. Jennings*, 2 W. Bla. 706.
(*n*) These were 9 Anne, c. 6, ss. 56, 57, now virtually repealed; and 10 Anne, c. 26, s. 109, repealed by 49 Geo. 3, c. 109, and 1 & 2 Will. 4, c. 36.

George the First, an attempt was made by further legislation to suppress unlawful Lotteries (*o*), and to prevent foreign Lotteries being carried on in this kingdom (*p*). George the First.

In the Reign of George the Second it appears that there was an excessive increase in *Gaming*, and to remedy the evil, 12 Geo. 2, c. 28, was passed, A.D. 1739, being "An Act for the more effectual preventing of *excessive and deceitful Gaming*." This Act declares the Games of the Ace of Hearts, Pharaoh, Bassett and Hazard to be Games or Lotteries by cards or dice within the meaning of the Act, and imposes a penalty of 200*l.* on every person setting up such Games or Lotteries, and a penalty of 50*l.* on every person adventuring at them (*q*). An Act was also passed to make more effectual 33 Hen. 8, c. 9 (*r*); and another to prevent the selling chances in Foreign Lotteries (*s*). Reign of George the Second.

It was found after the passing of 9 Anne, c. 14, that the number of Horse Races had very much increased; and in consequence of their being run under 10*l.* a-side, and therefore for small Plates, they had contributed very much to the encouragement of idleness, and the breed of strong and useful Horses was supposed to have been much prejudiced. The Legislature, endeavouring to remedy these evils, passed 13 Geo. 2, c. 19, in A.D. 1740, which was "An Act to restrain and prevent the *excessive* increase of Horse Races." By this Act all Horses were to be entered by their real owners, and no person was to start more than one for the same Plate, under pain of forfeiting the Horse (*t*). No Plate was to be run for under the value of 50*l.*, and any person starting a Horse for a Plate of smaller value was to forfeit 200*l.*, and any person advertising such a Race was subject to the penalty of 100*l.* (*u*). An arbitrary standard of weights was fixed, a five-year-old Horse was to carry ten stone, a six-year-old eleven stone, and a seven-year-old twelve stone, under a penalty of 200*l.* (*x*), and every Race was to be begun and ended in the same day (*y*). The entrance money was

(*o*) 8 Geo. 1, c. 2, ss. 36, 37.
(*p*) 9 Geo. 1, c. 19, virtually repealed by 7 Geo. 3, c. 48, ss. 4, 5.
(*q*) 12 Geo. 2, c. 28, ss. 1, 2, 3.
(*r*) 2 Geo. 2, c. 28, s. 9, Appendix.
(*s*) 6 Geo. 2, c. 35, ss. 29, 30.
(*t*) 13 Geo. 2, c. 19, repealed in so far as it relates to Horse-Racing by 3 & 4 Vict. c. 5.
(*u*) 13 Geo. 2, c. 19, s. 2.
(*x*) Ibid. s. 3.
(*y*) Ibid. s. 4.

to be repaid to the second best Horse (*z*). And gifts left for annual Races were not to be altered (*a*).

There appears to have been a distinction in this statute between a Match and a Race, for at whatever place a Race might be run, it must always have been for a Plate of 50*l.* or upwards (*b*). But it seems that a Match was either to be run at Newmarket or Black Hambleton, *or* the Plate was to be worth 50*l.* or upwards (*c*). This Act also prohibited a Game called Passage, which had just then been invented, and was in great vogue, and also all Games with Dice except Backgammon (*d*).

These enactments with regard to weights were probably found so very inconvenient and useless, that in A.D. 1745, 18 Geo. 2, c. 34, was passed, which was "An Act to explain, amend and make more effectual the Laws in being to prevent *excessive* and *deceitful Gaming;* and to restrain and prevent the *excessive increase* of Horse Races." It appears that a Game called Roulet or Roly-poly was then very much played, and though many had been ruined by it, the law was found insufficient to prevent it. This statute therefore enacted, that any person keeping a place for playing Roulet or other Games with Cards or Dice, or himself playing at any of these Games, should be liable to the several penalties of 12 Geo. 2, c. 28 (*e*). The privilege of Parliament was taken away from persons against whom proceedings had been commenced either for keeping a common Gaming-house, or for playing at unlawful Games (*f*). And any person winning or losing by play or by betting the value of 10*l.* at one time, or 20*l.* within twenty-four hours, might be indicted and fined five times the value so won or lost (*g*).

It appears that the circumstance of thirteen Royal Plates of one hundred guineas each being annually given to be run for, and the high prices which were constantly paid for Horses of strength and size, was considered a sufficient encouragement to breeders to raise their cattle to the utmost possible size and strength; and, therefore, some of the restrictions which had been thought favourable to the breed of Horses were removed, and it was

(*z*) *13 Geo. 2, c. 19, s. 7.*
(*a*) Ibid. s. 8.
(*b*) Ibid. s. 2.
(*c*) Ibid. s. 5.
(*d*) Ibid. s. 9, Appendix.
(*e*) *18 Geo. 2, c. 34, ss. 1, 2, Appendix, repealed by 8 & 9 Vict. c. 109, s. 15.*
(*f*) Ibid. s. 7.
(*g*) Ibid. s. 8.

made lawful for a person to run any Match, or to start and run for any Plate worth 50*l.* or upwards, at any weights, and at any place, without being liable to the penalties of 13 Geo. 2, c. 19, relating to weights (*h*), and in the same manner as if that Act had not been made. And it was held that this sum might be made up by two parties staking 25*l.* a-side (*i*).

Reign of George the Third.

In the Reign of George the Third, A.D. 1774, it having been found by experience that making Insurances on lives or other events in which the Assured had no interest, had introduced a mischievous kind of Gambling, an Act was passed "for regulating Insurances upon lives, and for prohibiting all such Insurances, except in cases where the persons insuring shall have an interest in the life or death of the person insured" (*k*). In the same Reign, A.D. 1787, an Act was passed to render more effectual the laws then in being for suppressing unlawful Lotteries (*l*); but the Government raised money by State Lotteries. In A.D. 1802 an Act was passed to suppress certain Games or Lotteries called *Littlegoes*, under very heavy penalties (*m*). In this Reign there was no legislative interference with regard to Racing, but the breed of Horses continued to improve. In A.D. 1809 an Act was passed by which the duty payable on the exportation of a Horse, Mare or Gelding was fixed at two guineas each (*n*), and on the importation at four guineas each (*o*). But in ten years this Act was repealed, and six pounds thirteen shillings was fixed as the duty payable on importing a Horse, Mare or Gelding, and they were not mentioned in the table of commodities paying duty on exportation (*p*).

Reign of George the Fourth.

George the Fourth was a great patron of Horse-racing, and was owner of some first-rate Horses. In this Reign, A.D. 1823, an act was passed authorizing the infliction of imprisonment and hard labour on persons convicted of keeping a common Gaming House (*q*); and people playing or betting on any Game of chance in the Street or Highway are to be deemed rogues and vagabonds, and be liable

(*h*) 18 Geo. 2, c. 34, s. 11.
(*i*) *Bidmead* v. *Gale*, 4 Burr. 2432.
(*k*) 14 Geo. 3, c. 48.
(*l*) 27 Geo. 3, c. 1, repealed by 46 Geo. 3, c. 148, s. 64.
(*m*) 42 Geo. 3, c. 119.
(*n*) 49 Geo. 3, c. 98, Sched. (A.), Outwards, repealed by 6 Geo. 4, c. 105.
(*o*) Ibid. Inwards.
(*p*) 59 Geo. 3, c. 52, s. 1, and Table (B.), Inwards, repealed by 6 Geo. 4, c. 105.
(*q*) 3 Geo. 4, c. 114.

to imprisonment with hard labour for any term not exceeding three calendar months (*r*).

Reign of William the Fourth.

In the Reign of William the Fourth an Act was passed, A.D. 1835, which is now in force. It is 5 & 6 Will. 4, c. 41, being "An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious, and certain other illegal Transactions." It repealed so much of 16 Car. 2, c. 7, and 9 Anne, c. 14, as made *void* any Note, Bill or Mortgage given for any illegal consideration, or made such securities enure for the benefit of parties in remainder, and enacted that such securities should *not* be deemed *void*, but to have been *given* for an *illegal consideration* (*s*). So that money, paid to the holder of any such security, shall be deemed and taken to have been paid on account of the person to whom the same was originally given on such illegal consideration, and to be deemed a debt due from the last-named person to the person who has paid the money, and be recoverable accordingly in an action at law (*t*). In this Reign also an Act was passed to prevent the advertising of any foreign or illegal Lottery under a penalty of 50*l.* (*u*).

Reign of Queen Victoria.

When Queen Victoria ascended the throne, the law of Racing, Wagers and Gaming was in a most unsatisfactory condition; but the Judges began to look more favourably upon Sporting transactions. Formerly, the tendency of the Courts was towards an extension of the prohibitory enactments, and a corresponding strict construction of any relaxations of them. But now the current of judicial opinion took another direction, and a different view of the subject prevailed. Racing and matters connected with it were no longer regarded in Westminster Hall with an unfavourable eye, and it is, perhaps, hardly going too far to assert, that some transactions were supported which former Judges would barely have allowed to be argued (*x*). Steeplechases were held to be legal (*y*), as also Trotting matches along a road (*z*). We have at length, however, had the law on these subjects simplified and put upon a rational footing; and for this change we are indebted to the common informers who brought *qui tam* actions against certain influential individuals.

(*r*) 5 Geo. 4, c. 83, s. 4, Appendix.

(*s*) 5 & 6 Will. 4, c. 41, ss. 1, 3, Appendix.

(*t*) Ibid. s. 2, and see Gaming, post, Chap. 4.

(*u*) 6 & 7 Will. 4, c. 66.

(*x*) 31 Law Mag. 72.

(*y*) *Evans* v. *Pratt*, 4 Scott, N. R. 378; *S. C.*, 1 Dowl., N. S. 505.

(*z*) *Challand* v. *Bray*, 1 Dowl., N. S. 783.

In A.D. 1840, 3 & 4 Vict. c. 5 was passed, which repealed so much of 13 Geo. 2, c. 19, as relates to the subject of Horse Racing (*a*); and persons sued for penalties under that Act might, on application to the Court, have an order granted for the discontinuance of the suit (*b*). At this period then the statutes in force with regard to Racing and Gaming were nearly the whole of 33 Hen. 8, c. 91, so much of 16 Car. 2, c. 7, and 9 Anne, c. 14, as had not been repealed and altered by 5 & 6 Will. 4, c. 41; 2 Geo. 2, c. 28, s. 9; 12 Geo. 2, c. 28; so much of 13 Geo. 2, c. 19, as does not relate to Racing; 18 Geo. 2, c. 34; 5 & 6 Will. 4, c. 41; and 3 & 4 Vict. c. 5.

Such being the state of the law, the famous case of *Applegarth* v. *Colley* (*c*) came before the Court of Exchequer on special demurrer; and after taking time to consider, an elaborate judgment was delivered by Mr. Baron Rolfe, in which it was held that at that time a Horse Race for money of any amount whatever, given by third persons by way of Prize, was not illegal; that a Horse Race might be run for a sweepstakes of 2*l.* each, as there could not be any loser to the amount of 10*l.*; and therefore it was not within sect. 2 of 9 Anne, c. 14, and probably not within sect. 5 of the same statute; and that, though in balancing the earlier decisions there might be some doubt whether, under 9 Anne, c. 14, not only the *securities* given for a gaming debt, but the *contract* itself, was avoided, at all events this must be taken to be the case since 5 & 6 Will. 4, c. 41.

Soon after this decision, numerous *qui tam* actions were brought by common informers and others for penalties incurred under 16 Car. 2, c. 7, and 9 Anne, c. 14, by betting on Horse Races and running Coursing matches, &c.; and to stop these proceedings 7 & 8 Vict. c. 3 was passed, which was afterwards extended by 7 & 8 Vict. c. 58. By these Acts all proceedings were to be stayed, on application to the Court, which had been commenced by common informers or persons other than the actual losers, for penalties incurred by playing at, or betting on, certain sports, pastimes and games, viz., Horse races, Foot races, Boat races, Regattas, Rowing matches, Sailing matches, Coursing matches, Fencing matches, Golf, Wrestling matches, Cricket, Tennis, Fives, Rackets, Bowls,

(*a*) 3 & 4 Vict. c. 5, s. 1.
(*b*) Ibid. s. 2.
(*c*) *Applegarth* v. *Colley*, 10 M. & W. 728; and see post, Chap. 4.

Quoits, Curling, Putting Stone, Football or any *bonâ fide* variety, or any *similar* description of these sports, pastimes and games (*d*); no common informers, but only the actual loser, or his representatives, were to commence any proceedings for penalties under 16 Car. 2, c. 7; 9 Anne, c. 14, or any other Act, for playing at, or betting on, any of the sports or pastimes above enumerated (*e*). And if such proceedings were in the nature of an indictment, the consent in writing of her Majesty's Attorney-General must first have been obtained (*f*).

These Acts were to continue in force until the end of that Session of Parliament. Before the expiration of that time, however, 8 & 9 Vict. c. 109 was passed, intituled "An Act to amend the Law concerning Games and Wagers," and received the Royal Assent on the 8th of August, 1845. It recites that "The Laws heretofore made in restraint of unlawful Gaming have been found of no avail to prevent the mischief which may happen therefrom, and also apply to sundry Games of skill from which the like mischiefs cannot arise." It repeals so much of 33 Hen. 8, c. 9, whereby any Game of mere skill is declared unlawful, or which enacts a penalty for playing at any such game, or for lacking Bows or Arrows, or for not making and continuing Butts, or which regulates the making, selling or using of Bows and Arrows, and also so much of the Act as requires the Mayors, Sheriffs, Bailiffs, Constables and other head officers within every City, Borough and Town in the Realm, to make search weekly, or, at the furthest, once a month, in all Places where Houses, Alleys, Plays, Places of Dicing, Carding or Gaming shall be suspected to be had or kept, and also so much of the Act as makes it lawful for every master to license his servant, and for every Nobleman or other person worth 100*l.* a year, to license his servants or family to play (*g*). It repeals the whole of 16 Car. 2, c. 7, and so much of 9 Ann. c. 14, as was not altered by 5 & 6 Will. 4, c. 41, and also so much of 18 Geo. 2, c. 34, as relates to 9 Ann. c. 14, or as renders any person liable to be indicted and punished for winning or losing at play or by betting at any one time the sum or value of 10*l.*, or within the space of twenty-four hours the sum or value of 20*l.* (*h*).

(*d*) 7 & 8 Vict. c. 3, s. 1.
(*e*) Ibid. s. 3.
(*f*) Ibid. s. 4.
(*g*) 8 & 9 Vict. c. 109, s. 1, Appendix.
(*h*) Ibid. s. 15, Appendix.

This Statute and the 17 & 18 Vict. c. 38, which is supplementary to it, make a variety of regulations and enactments which will be considered, both with reference to the decisions which have been come to under the old law, and as showing the present state of the law of Racing and Gaming.

It may here be mentioned, that the Statutes now in force with reference to Racing and Gaming, are 33 Hen. 8, c. 9, sections 11, 12, 14, 16, 17, 18, 19, 20, 21; but only so far as they relate to unlawful Gaming; 2 Geo. 2, c. 28, s. 9; 12 Geo. 2, c. 28; 13 Geo. 2, c. 19, sections 9 and 10; 18 Geo. 2, c. 34, sections 1, 2, 4, 5, 6, 7, 9; 5 & 6 Will. 4, c. 41, which incorporates and alters 9 Ann. c. 14, s. 1, and given in the Appendix; 8 & 9 Vict. c. 109; 16 & 17 Vict. c. 119; 17 & 18 Vict. c. 38, which is a supplementary Act to 8 & 9 Vict. c. 109; and 37 & 38 Vict. c. 15.

By the 19 & 20 Vict. c. 82, the duty of 3*l.* 17*s.* payable on every Horse kept or used for the purpose of Racing (*i*) was made payable for every Horse which should start or run for any Plate, Prize or sum of money or other thing (*k*).

The whole of this Act is, however, repealed by the 37 & 38 Vict. c. 16, ss. 11, 21, and the duty on Race Horses is abolished. Repeal of Duty on Race Horses.

By an Act passed in this Reign the duty on importing a Horse was reduced to 1*l.* (*l*); and now Horses may be imported duty free (*m*). Acts were passed from time to time to indemnify persons connected with Art Unions from certain penalties (*n*); and at last an Act was passed under which they may be legalized by charter (*o*), which was supplemented by another Act to remove certain doubts which had arisen as to their legality (*p*). The 6 & 7 Will. 4, c. 66, was also amended so as more effectually to prevent the advertising of foreign and other illegal Lotteries (*q*).

After the passing of 8 & 9 Vict. c. 109, an attempt was made to set up Racing Lotteries and Sweeps, and it was suggested during the argument of the case of *Gatty* v. *Field* (*r*), that under the proviso of the 18th section of the above Statute, Derby Lotteries were no longer illegal.

(*i*) 16 & 17 Vict. c. 90.
(*k*) 19 & 20 Vict. c. 82, s. 2.
(*l*) 5 & 6 Vict. c. 47, Table (A), Class 1, repealed by 8 & 9 Vict. c. 84.
(*m*) 9 & 10 Vict. c. 23, Table (IV.).
(*n*) 7 & 8 Vict. c. 109; 8 & 9 Vict. c. 57.
(*o*) 9 & 10 Vict. c. 48, Appendix.
(*p*) 21 & 22 Vict. c. 102, repealed.
(*q*) 8 & 9 Vict. c. 74.
(*r*) *Gatty* v. *Field*, 9 Q. B. 431; *S. C.* 15 L. J., Q. B. 408.

They were however held to be on the same footing as other Lotteries, and after that time were gradually superseded by Offices kept for the purpose of Betting. In these places Lists were exhibited and Odds given in sums high or low, to suit each customer. Every person was required to stake his money at the time, and leave it to abide the event of the Race. The natural consequence ensued; persons entrusted with money, embezzled it, to make a venture, and clerks, servants and mere children were thus corrupted and ruined.

16 & 17 Vict. c. 119.

To remedy these evils, 16 & 17 Vict. c. 119 was passed, being "An Act for the Suppression of Betting Houses," which received the Royal Assent on the 20th of August, 1853. It recites that "a kind of Gaming has of late sprung up, tending to the injury and demoralization of improvident persons, by the opening of places called Betting Houses or Offices, and the receiving of money in advance by the owners or occupiers of such Houses or Offices, or by other persons acting on their behalf, on their promises to pay money on events of Horse Races and the like contingencies." It prohibits any such Betting Houses being kept (*s*), and makes them Gaming Houses within 8 & 9 Vict. c. 109 (*t*). It forbids any person using a place for the purpose of betting with persons resorting there, or using a place for the purpose of receiving deposits on Bets (*u*), and imposes penalties on persons connected with Betting Houses (*x*), or exhibiting placards or advertising them (*y*). This most stringent Act (*z*), containing various other provisions, has had the effect of putting down Betting Houses in those parts of Great Britain to which it extends. It does not extend to Scotland (*a*).

37 Vict. c. 15.

The 37 Vict. c. 15 (The Betting Act, 1874), amends the 16 & 17 Vict. c. 119, and extends its provisions to Scotland, and by sect. 1 it shall be construed as one with that Act, which is referred to as the Principal Act. By sect. 3, where any letter, circular, telegram, placard, handbill, card or advertisement is sent, exhibited or published, (1) whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will, on application, give information or advice for the purpose of or with respect to any such Bet or Wager, or any such event

(*s*) 16 & 17 Vict. c. 119, s. 1, Appendix.
(*t*) Ibid. s. 2.
(*u*) Ibid. ss. 1, 3, Appendix.
(*x*) Ibid. ss. 3, 4.
(*y*) Ibid. s. 7.
(*z*) See post, Chap. 5.
(*a*) Ibid. s. 20.

or contingency as is mentioned in the Principal Act, or will make on behalf of any other person any such Bet or Wager as is mentioned in the Principal Act; or (2) with intent to induce any person to apply to any house, office, room or place, or to any person, with the view of obtaining information or advice for the purpose of any such Bet or Wager, or with respect to any such event or contingency as is mentioned in the Principal Act; or (3) inviting any person to make or take any share in, or in connexion with, any such bet or wager; every person sending, exhibiting or publishing, or causing the same to be sent, exhibited or published, shall be subject to the penalties provided in the seventh section of the Principal Act with respect to offences under that section (*b*).

Racecourses Licensing Act, 1879.

The 42 & 43 Vict. c. 18, after reciting that "the frequency of Horse Races in the immediate neighbourhood of the Metropolis is productive of much mischief and inconvenience, and the holding of such Races in thickly-populated places near the Metropolis is calculated to cause, and does in fact cause, annoyance and injury to persons resident near to places where such Races are held;" and (sect. 1) enacting that "a Horse Race within the meaning of this Act shall mean any Race in which any Horse, Mare or Gelding shall run, or be made to run, in competition with any other Horse, Mare or Gelding, or against Time, for any prize of what nature or kind soever, or for any Bet or Wager made or to be made in respect of any such Horse, Mare or Gelding, or the riders thereof, and at which more than twenty persons shall be present," proceeds (sect. 2) to declare all Horse Races unlawful within ten miles of Charing Cross unless licensed pursuant to the provisions contained in sects. 3 and 4 of the Act. The Act also imposes certain penalties on persons convicted of taking part in unlicensed Horse Races, and on the owners and occupiers of the ground where the unlicensed Horse Races take place; and (sect. 7) enacts that every Horse Race held or taking place in contravention of the provisions of the Act shall be deemed to be a nuisance, and shall be liable accordingly (*c*).

(*b*) 37 Vict. c. 15, Appendix.

(*c*) 42 & 43 Vict. c. 18, Appendix.

CHAPTER II.

RACING, STAKEHOLDERS, AND STEWARDS.

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RACING.

THERE are now no longer any restrictions with regard to Racing, and transactions of this description are governed by the same laws as all other contracts. The law as to racing.

Race Horses may be owned by two persons as tenants in common, claiming under different titles, and each having the right to take the Horse, and to use it exclusively, not destroying it. And such being their rights, money expended by one according to a previous arrangement for their common benefit, is recoverable from the other (*a*). Thus in a case in which the plaintiff and defendant, owning a Horse in this way, agreed that the plaintiff should have the entire management of the Horse, and that the expenses of keeping, training, and running him should be borne, and his winnings shared, by both equally; and the Horse having won nothing, the plaintiff paid the whole expenses; it was held that even if a partnership existed between the plaintiff and defendant (and it was held by Cockburn, C. J., that it did) in the management and running of the Horse, half the sum expended by the plaintiff was in the nature of an advance by him of capital on behalf of the defendant, and which he was entitled to recover from the defendant (*a*). Rights of part-owners.

A custom for the freemen and citizens of a particular town to enter upon a certain piece of land on a particular day for the purpose of Horse-Racing is a good custom, and in pleading it, it is not necessary to aver that the particular day was a seasonable one (*b*). But such a customary right can only be applicable to certain inhabitants of the district where the custom is alleged to exist, and cannot be claimed by the public at large; and therefore if alleged to be in all the Queen's subjects, it is bad (*c*). Custom to race.

A right to race, and a right to resort to races, are on the same footing; accordingly where a person pleaded to an action of *trespass* on Newmarket Heath during the Races a common right *for all persons* to go and remain for a reasonable time for the purpose of witnessing the Races, the plea was held to be a bad one (*c*). Nor does a right of highway include a right to race (*d*), or a right in the public to resort to Races (*c*). To resort to races.

(*a*) *French* v. *Styring*, 26 L. J., C. P. 181.

(*b*) *Mounsey* v. *Ismay*, 1 H. & C. 729.

(*c*) *Earl of Coventry* v. *Willes*, 9 L. T., N. S. 384.

(*d*) *Sowerby* v. *Wadsworth*, 3 F. & F. 734.

But though a good Custom, not an Easement within the Prescription Act.

But though it is a good custom at Common Law for the citizens of a particular town to enter upon a certain piece of land on a particular day for the purpose of Horse-Racing, this is not "an easement" within the Prescription Act (*e*), the words of which are "no claim which may be lawfully made at common law by custom, prescription, or grant, to any way or other easement, or to any water-course, or to the use of any water to be enjoyed upon any land, &c., when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for twenty years, shall be defeated or destroyed by showing only that such way, &c. was first enjoyed at any time prior to such period of twenty years." To make this custom to race a claim of right within the term "easement" in this section, it must be one analogous to that of a right of way, and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement (*f*).

STAKEHOLDERS.

Sweepstakes.

A Sweepstakes is a Stake or Fund for which at least three entrances must be made. There may be any number of Subscribers or Contributors, and the whole Stake or Fund becomes, under certain regulations, the property of the Winner (*g*).

Matches.

Many Races run with Horses are *Matches*, that is, where the Horse of one person runs against the Horse of another for certain Stakes to be awarded to the Winner. Such Matches are no doubt lawful, but it seems that the Winner would not be entitled to recover the Stakes from the Stakeholder, or from the Loser, if they were in his hands, as the transaction is simply a Wager and void under the 8 & 9 Vict. c. 109, s. 18 (*h*).

The Act for the suppression of Betting Houses.

The "Act for the Suppression of Betting Houses" (*i*) does not "extend to any person receiving or holding any money or valuable thing by way of Stakes or Deposit to

(*e*) 2 & 3 Will. 4, c. 71, s. 2.

(*f*) Per Martin, B., *Mounsey* v. *Ismay*, 34 L. J., Ex. 52.

(*g*) *Batty* v. *Marriott*, 5 C. B. 831.

(*h*) *Batson* v. *Newman*, L. R., 1 C. P. D. 573; 25 W. R. 85; and see *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721. A contrary opinion was expressed in the third edition of this work; but the authority for that opinion, viz., *Batty* v. *Marriott*, 5 C. B. 831, has since been overruled by *Diggle* v. *Higgs*. See post, p. 394.

(*i*) 16 & 17 Vict. c. 119, s. 6, Appendix; and see Wagers, post, Chap. 5; Betting Houses, post, Chap. 6.

be paid to the winner of any Race, or lawful Sport, Game or Exercise, or" to be paid "to the Owner of any Horse engaged in any Race," as, for instance, to the second Horse.

Entry for a Race.

The 18th section of 8 & 9 Vict. c. 109, which makes void all contracts or agreements by way of Gaming or Wagering, and prohibits the Winner in such transactions from recovering either at Law or Equity, does not "apply to any Subscription or Contribution, or agreement to subscribe or contribute, for or towards any Plate, Prize or Sum of Money to be awarded to the Winner or Winners of any lawful Game, Sport, Pastime or Exercise," and the entry for a Race which is to be run within a year of the time of such entry may be effected in the usual manner.

Race not to be run within a year.

Many of the great Races are not run within a year from the time the Horses are entered, and therefore to attach a liability to a loser who has not paid his entrance, it would appear necessary under 29 Car. 2, c. 3, s. 4, that some memorandum or note in writing of the agreement to pay the entrance money, signed by the party to be charged, or by some other person lawfully authorized by him to do so, should be given to the Stakeholder at the time of entry (*k*). However, this need not cause any trouble, as it may be effected by letter (*l*).

"Scratching" a Race Horse.

The owner of a Horse entered for a Race can withdraw, or, as it is termed, "scratch" him before the Race is run. A curious application was made to Vice-Chancellor Knight Bruce on this point. The Racing Stud of the late William Charles Earl of Albemarle, including a valuable Racehorse and the stallion "Emperor," was bequeathed to his wife Charlotte Susannah Countess of Albemarle. The executor filed a Bill, alleging, among other things, that the personal estate of the late Earl was insufficient to pay his debts, and considering that the two Horses in question and the Racing Stud, unless sold immediately, would be greatly depreciated in value, and that the Countess was unwilling they should be sold, it was prayed that a sufficient part of them might be sold, and that the Countess might be restrained from withdrawing or erasing the above-mentioned Racehorse from the Book in which his name was entered for the Derby or St. Leger Stakes, or any other Race.

(*k*) See *Bentinck* v. *Connop*, 5 Q. B. 693; *S. C.* 1 Dav. & M. 536.

(*l*) See Requisites of the Statute of Frauds, ante, Part 1, Chap. 1.

The Countess also filed a Bill in the Court of the Vice-Chancellor of England, stating that the personal estate was sufficient, and praying the executor might be restrained from selling or removing the Racehorse, or the stallion "Emperor," or the Racing Stud of the late Earl.

The executor by his petition prayed the direction of Vice-Chancellor Knight Bruce's Court as to the manner in which these two Horses and the Stud should be dealt with, and that the Dowager Countess might be ordered to concur in any sale which the Court might direct, and for the injunction as to erasing the name of the Racehorse from the Race Book, or otherwise depreciating his value.

An arrangement was eventually made between the parties, and in the meantime an undertaking was given on behalf of the Countess, that no step should be taken to "scratch" or withdraw the Racehorse from the Book (*m*).

Clerk of the Course usually Stakeholder.

The *Clerk of the Course* is usually the Stakeholder at Races, and he is bound to retain the Stake till some party be clearly entitled to receive it; and if he pays it to a party not entitled to it, he is still liable to pay it to the party who has a proper title to it, and until all disputes are settled he is the proper person to keep it (*n*).

Has no right to the stakes.

But he has no *right* to the Stakes till he gets the money into his hands; he is never more than a mere Stakeholder. Indeed, if he could bring actions for unpaid Stakes, he would be liable to have actions brought against him for every Stake that was won, whether he had received it or not; and his situation would not be a very enviable one (*o*).

Ground of action against Stakeholder.

In order to enable one of the parties to maintain an action against a Stakeholder to recover the amount of Stakes deposited with him to abide the determination of the Stewards, the plaintiff must either have the decision in his favour, or show that it was no longer practicable to obtain it (*p*).

Position of Stakeholder towards the parties, if the Race is not to be, or cannot be, run.

The position of the Stakeholder towards the parties, where the Race has not and cannot be run, is that of a debtor to each party for the amount deposited by each. It appears, therefore, that in that case a specific demand of the Stake from the Stakeholder is unnecessary; but

(*m*) *Keppel* v. *Countess Dowager of Albemarle*, before Vice-Chancellor Knight Bruce, Feb. 18, 1850.

(*n*) *Burrough* v. *Skinner*, 5 Burr. 2639; *Marryat* v. *Broderick*, 2 M. & W. 369.

(*o*) Per Patteson, J., *Charlton* v. *Hill*, 5 C. & P. 147.

(*p*) *Brown* v. *Overbury*, 25 L. J., Ex. 169.

where the Race might still be run and decided, each party must make a specific demand of his Stake from the Stakeholder before he can recover from him, because in this case it is necessary to inform the Stakeholder, that the authority given to him to keep the money has been revoked (*q*).

Cannot set off an unpaid Stake.

He cannot set off a claim of an unpaid Stake due from a person on one Race against a Stake won by the same person in another Race (*r*).

Where he may cash a Cheque.

If he cashes a Cheque deposited with him, he is not guilty of a breach of duty, if the parties agreed to treat the Cheque as money (*s*).

Stake must abide the event of a legal Contract.

When the entrance money has been paid or agreed to be paid to the Stakeholder, it must, according to the general principle of all contracts, abide the result of the Race, which, being a legal contract, it cannot be recovered by the party who has made the entry, unless there be a mutual agreement for the rescission of the contract, which is called being "off by consent." On this point an opinion was expressed by Mr. Baron Parke, where an action had been brought by a party to recover back his own entrance money, after a Race had been run, for which his Horse had not started. It was held he could not recover it, because he had given no Notice before the Race; and his Lordship said, "Even if the plaintiff had given notice in due time that he should require his Stake to be returned, this being a legal Horse Race, I have great doubts that it would be recoverable, the agreement being that it should be deposited to abide the event, which agreement cannot, as it seems to me, be varied without the assent of all parties. But here there was no demand made; no rescission of the contract before the Race" (*t*).

A Foot Race.

And where before 8 & 9 Vict. c. 109, the sum of ten shillings was deposited with a Stakeholder to abide the event of a Foot Race, Mr. Baron Parke said, "The transaction is valid and the contract binding; and therefore one of the parties cannot determine it by a simple countermand, without the consent of all the other parties depositing" (*u*).

After the passing of 8 & 9 Vict. c. 109, where two

(*q*) *Carr* v. *Martinson*, 28 L. J., Q. B. 126.

(*r*) *Charlton* v. *Hill*, 5 C. & P. 147.

(*s*) *Wilkinson* v. *Godefroy*, 9 A. & E. 536.

(*t*) *Marryat* v. *Broderick*, 2 M. & W. 369. See also *Brown* v. *Overbury*, 25 L. J., Ex. 169.

(*u*) *Emery* v. *Richards*, 14 M. & W. 729.

Batty v. *Marriott* overruled by *Diggle* v. *Higgs*.

persons agreed to run a Foot Race, and each of them deposited 10*l.* with the third person, the whole 20*l.* to be paid by him to the Winner of the Race; it was held by the Court of Common Pleas that the loser could not recover back his deposit from the Stakeholder (*x*).

This case appears to have been decided on the ground that the game was not an unlawful one, and that there was nothing in the case that was struck at by the Act of Parliament; but the true test appears to be whether the deposit was in the nature of a wager or of a subscription or contribution to a prize to be awarded to the winner of any lawful game, sport, pastime, or exercise. And this has been so held by the Court of Appeal in the recent case of *Diggle* v. *Higgs* (*y*), overruling *Batty* v. *Marriott* (*z*), on very similar facts. The law on the subject being very clearly laid down in the following judgment of Lord Cairns, L. C.:—

Judgment of Lord Cairns, L. C.

"The first question which we must ask ourselves is, was this contract a Wager? It seems to me beyond a doubt that it was a Wager; it was a Wager between two men for a walking match. They agreed to walk at the Higginshaw Grounds for 200*l.* a-side; it is not the less a Wager because the money was deposited with the defendant as Stakeholder. When the Wager was decided, the winner would be paid the 200*l.* deposited by the loser, and receive back his own 200*l.* Now upon that, what is the construction of sect. 18 of 8 & 9 Vict. c. 109? Is a contract of this kind excepted by the proviso? We start with this, that the contract was clearly a Wager, and was within the first part of the section. But the section says all contracts and agreements, whether by parol or in writing, by way of Gaming or Wagering, shall be null and void; and then there is a proviso which follows upon an intervening sentence in these words—'And no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any Wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.' Then comes the proviso on which this question mainly rests—'Provided always, that this enactment shall not be deemed to apply

(*x*) *Batty* v. *Marriott*, 5 C. B. 818.

(*y*) L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27; 25 W. R. 777. Reversing the decision of Huddleston, B., 25 W. R. 607. And see *Trimble* v. *Hill*, L. R., 5 App. Cas. 342.

(*z*) 5 C. B. 818.

to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise.'

"It is clear that there may be in scores of forms 'subscriptions or contributions' towards a plate or prize without there being any Wager, and I cannot read this proviso, which has a natural and intelligible meaning, in a different way, and one which would have the effect of neutralizing the enactment. The legislature, I think, never intended to say that there should be no action brought to recover a sum of money which shall have been deposited in the hands of any person to abide the event on which any Wager shall have been made, and yet that if the Wager is in the form of a subscription or contribution the winner may recover it. I read the proviso thus—'Provided that so long as there is a subscription which is not a Wager, the second part of the section shall not apply to it.' There is no authority in favour of the view of the defendant, except *Batty* v. *Marriott* (*a*), and if that authority is to be followed, it cannot be denied it is a very strong authority for the defendant. What the Court had in their minds in that case was the question whether the Game was a lawful or an unlawful Game, and having come to the conclusion that it was a lawful Game, they were of opinion that there was nothing in the case which was struck at by the Act of Parliament, and that the Act was only intended to strike at unlawful Games. That view seems to me to be erroneous, and I think that the Court overlooked the first part of the section, which applies to all contracts, lawful or unlawful, by way of Gaming or Wagering. When *Batson* v. *Newman* (*b*) came before this Court, although there was a certain degree of difference between that case and *Batty* v. *Marriott* (*a*), yet it is obvious that *Batty* v. *Marriott* did not meet with approval. I cannot follow that case. I therefore think that, although there was a deposit of money, the contract in this case was a Wager, and that all the consequences which are imposed by sect. 18 on contracts by way of Wagering follow.

"Then it is said that this is an action by a party to the contract, and that he has revoked the authority given to the defendant to pay over the money, on the ground that the contract is void, and that section 18 has taken away his

(*a*) 5 C. B. 818. (*b*) L. R., 1 C. P. D. 573.

right to maintain an action under that part of the section which says no suit shall be brought for recovering money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. On that I must observe that in *Hampden* v. *Walsh* (*c*) the Queen's Bench Division appeared to have been of opinion that an action under similar circumstances could be maintained; and in *Batty* v. *Marriott* (*d*), the objection was not taken. Be that as it may, I am of opinion that that objection cannot be maintained. The section amounts to this: All contracts by way of gaming and wagering are null and void; and then, dealing with those contracts, it says that no action shall be brought with respect to them; that is to say, all gaming contracts are void, and the winner of the game or wager shall not maintain a suit against his antagonist or the stakeholder. This construction makes one member of the section in unison with the other. What legal right there may be to recover back money paid under a contract that is void, the statute leaves it untouched. The decision of the learned Judge was wrong, and I think that judgment ought to be entered for the plaintiff."

Recovery of money paid on an illegal Contract.

If two parties enter into an illegal or void contract, and money is paid upon it by one to the other, or to a Stakeholder, it may be recovered back before the execution of the contract, but not afterwards (*e*): unless, if paid to a Stakeholder, the Stakeholder has paid it over contrary to notice given to him by one of the parties not to do so (*f*).

What the party should do.

A person who has staked his money on an illegal or void transaction, and wishes to recover it, should do some act to put an end to the affair. And he should demand back his deposit before the illegal or void transaction has taken place (*g*), and the money has reached the other party's hands (*f*), because if he does not, he permits the Stakeholder to dispose of it (*h*).

Demand before the money is paid over.

It was held in the case of *Hastelow* v. *Jackson* (*f*) that where the event in such case has been decided, but before the money has been paid over, and one party expresses his

(*c*) L. R., 1 Q. B. D. 189.
(*d*) 5 C. B. 818.
(*e*) *Hastelow* v. *Jackson*, 8 B. & C. 226; and see *Mearing* v. *Hellings*, 14 M. & W. 712; *Varney* v. *Hickman*, 5 C. B. 281. See also *Bone* v. *Ekless*, 5 H. & N. 925.
(*f*) *Hastelow* v. *Jackson*, 8 B. & C. 226; *Bone* v. *Ekless*, 5 H. & N. 925.
(*g*) *Martin* v. *Hewson*, 10 Ex. 737.
(*h*) See *Gatty* v. *Field*, 9 Q. B. 440.

dissent from the payment, he may recover it from the Stakeholder. For although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done (*i*). Some doubt indeed has been thrown upon this case, Mr. Baron Alderson, in *Mearing* v. *Hellings* (*k*), saying of it, "I accede to its authority, though I think it a very strong decision. It does not convince me. It overcomes me." And Pollock, C. B., in the same case said, "With respect to the case of *Hastelow* v. *Jackson*, I forbear saying anything about it at present; it is binding upon us until reviewed by a Court of Error. If the same question arose before me, I should certainly advise a bill of exceptions." And, in the case of *M'Elwaine* v. *Mercer* (*l*), *Hastelow* v. *Jackson* was held by the Irish Court of Common Pleas to be irreconcilable with the law as established by 8 & 9 Vict. c. 109, s. 18. But it has never been expressly overruled, and indeed with these exceptions it has been treated uniformly, both from the Bench and by text writers, as an authority (*m*).

Bringing an action not sufficient.

If it be pleaded to an action, for *Money had and received*, that the money was staked on an illegal Game, the plaintiff must show in answer that he demanded back the Stake before it was paid over, the mere bringing an action before payment over not being a sufficient demand (*n*).

Where the money is paid over without dispute.

But although the contract be illegal or void, yet if the event happens, and the money is paid over by the Stakeholder without dispute, there is a complete execution of the contract, and the money cannot be reclaimed (*o*).

Where a

If a person pays his entrance money to the Clerk of the

(*i*) *Hastelow* v. *Jackson*, 8 B. & C. 227. And see *Hampden* v. *Walsh*, L. R., 1 Q. B. D. 189; 45 L. J., Q. B. 238; 33 L. T., N. S. 852; 24 W. R. 607; *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27; 25 W. R. 777—C. A.

(*k*) *Mearing* v. *Hellings*, 14 M. & W. 712.

(*l*) *M'Elwaine* v. *Mercer*, 9 Ir. Com. Law Reps. 13. The judgment in this case appears to be founded upon a misconception of the principle which rules the English decisions, and of the facts in the case of *Hastelow* v. *Jackson*.

(*m*) Per Bramwell, B., *Bone* v. *Ekless*, 5 H. & N. 928. Per Cockburn, C. J., *Hampden* v. *Walsh*, L. R., 1 Q. B. D. 195; 45 L. J., Q. B. 238; 33 L. T., N. S. 852; 24 W. R. 607; *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27; 25 W. R. 777—C. A. See also Selw. N. P. 12th ed. 97, and 2 Sm. L. C. 7th ed. 530.

(*n*) *Gatty* v. *Field*, 9 Q. B. 431.

(*o*) *Hastelow* v. *Jackson*, 8 B. & C. 226; and see *Moore* v. *Cooper*, before Mr. R. Gurney, Sheriffs' Court, Dec. 10, 1853. And per Erle, J., Q. B., N. P., Guildhall, in *Pike* v. *Alcock*, Jan. 26, 1858.

Horse is disqualified.

Course *bonâ fide* and without any attempt to impose upon the other subscribers, and then finds his Horse disqualified, he may recover his Stake (*p*).

Where Owner knows the disqualification.

But the owner cannot recover his own Stake after the Race, if before the Race he *knew* that his Horse was disqualified. Thus where the conditions of a Race were that the Horses were not to be thorough-bred, nor to have started against thorough-bred Horses, nor to have run for a Plate, the plaintiff started his Mare *Funny*, and she came in first, but the Clerk of the Course refused to pay the Stakes, as it appeared that under the name of *Flashy Moll* she had started against thorough-bred Horses, run for Plates, and had won many Races. Upon this the plaintiff brought an action to recover back his own entrance money. However, Mr. Baron Vaughan said to the Jury, "It will be for you to say whether the plaintiff has been guilty of an attempt to impose upon the other subscribers to the Race by a misrepresentation of his Mare; for if so, he will not be entitled to recover back any share of the Stake. If the plaintiff *knew* of the disqualification of his Mare, the law will not assist him in the recovery of the deposit." A verdict was found for the defendant (*p*).

Proper party to receive the Stakes.

A Stakeholder should pay the Stakes to the Winner or his Agent. For where the holder of a Ticket in a Derby Lottery sold it to the Plaintiff before the Race, and the Horse named in it was ultimately declared the Winner, it was held that, even supposing the Lottery were legal, the plaintiff could not sue the Stakeholder, in an action for *Money had and received*, for the amount to which the holder was by the conditions of the Lottery entitled. Because a Ticket of this sort could not be negotiable like a Promissory note, and parties could not, by agreement among themselves simply, make a transfer of such a Ticket, so as to give the assignee a right of action (*q*). But now, by sect. 25, sub-sect. 6 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the owner of any debt or other chose in action may assign the same to a third person absolutely, and place such person in the position he himself was in at the time of the transfer, and with the same legal and equitable rights.

Under what circumstances

The actual Winner may maintain an action against a Stakeholder for all moneys actually in his hands, and

(*p*) *Weller* v. *Deakins*, 2 C. & P. 618; *Goldsmith* v. *Martin*, 4 M. & G. 5.

(*q*) *Jones* v. *Carter*, 15 L. J., Q. B. 96.

against the party who has agreed to subscribe or contribute to the Stakes, where it has not been paid up, and this however great the amount may be; provided that the game is lawful and that the transaction is not in the nature of a Wager. But it is a good answer to an action for money had and received, that the money was deposited in the hands of the defendant to abide the event on which a Wager was made, and was claimed by the plaintiff as the Winner of the Wager, and that he did not repudiate the Wager, or demand back his money before the event thereof, and had never repudiated the Wager, or claimed the money on any ground than as Winner of the Wager, and that no part of the money was a subscription or contribution, or due on any agreement to subscribe or contribute towards any plate, prize or sum of money to be awarded to the Winner or Winners of any lawful Game, Sport, Pastime, or Exercise (*r*). Winner may maintain an action.

An action might probably be maintained for the Stakes or Prize by the Winner in every lawful Sport, Pastime, or Exercise, which a Judge in his discretion might not think too frivolous to try. And he would probably allow an action to be tried, should its subject-matter be a claim by the Winner of Stakes in any of the sports mentioned in 7 & 8 Vict. c. 3 (*s*).

Where five shillings a head had been staked by the eleven players on each side in a *Cricket Match*, an action was tried, and the Winners recovered the Stake from the Stakeholder (*t*). A Cricket Match.

But Lord Tenterden refused to try an action to recover back a deposit on a *Wrestling Match* (*u*). A Wrestling Match.

So also Abbott, C. J., refused to try an action brought against the Stakeholder on a *Dog Fight*, and said, "The time of the Court is not to be wasted in trying which Dog or which Man won a battle" (*x*). A Dog Fight.

Where fraud has been practised the loser of a Race may recover his Stake from the Stakeholder, and produce the agreement without a Stamp. In the following case the plaintiff entered into a written agreement with a third party to race their Horses upon certain terms, and he de- Loser may recover his Stake where there has been Fraud.

(*r*) *Savage* v. *Madder*, 36 L. J., Ex. 78; 16 L. T., N. S. 600; 16 W. R. 910; and see *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27.

(*s*) See Gaming, post, Chap. 4.

(*t*) *Walpole* v. *Saunders*, 7 D. & R. 130.

(*u*) *Kennedy* v. *Gad*, 3 C. & P. 376.

(*x*) *Egerton* v. *Furzeman*, 1 C. & P. 613.

posited the amount of his Stake with the defendant. The Race was run and the plaintiff's Horse was beaten; but he afterwards discovered that the whole transaction was a concocted fraud. After Notice had been given not to pay over the amount, an action was brought to recover the Stakes, and it was held by the Court of Exchequer, that the written instrument, although unstamped, was properly admitted in evidence in proof of the fraud (*y*).

How he may waive his Claim.

But if a person once affirms the contract by claiming the Stake, he cannot afterwards turn round and claim a return of his money on the ground of the agreement being void by reason of fraud (*z*).

Where a Stakeholder may recover from the Winner.

Where, however, the Stakes have been paid over to a fraudulent winner, they may even then be recovered from him in an action by the Stakeholder. Thus a Bitch called Emily Deans was entered for the "Great Open Puppy Stakes" in Northumberland. The Stakes were run for and a Bitch described as Emily Deans won them, and the money was paid over by the Secretary to the defendant. It was subsequently ascertained that the Bitch which had run was not Emily Deans, but one called Miami. An action was brought by the Secretary, who was also Stakeholder, to recover the Stakes from the defendant. It was submitted by the counsel for the defendant that the plaintiff was not the proper person to bring the action, and also that Miami being in every way qualified in point of age to run for the Stakes, there was no fraud committed. But Mr. Baron Martin was of opinion that Emily Deans being the animal entered for the match, the defendant had no more right to substitute another Dog in her place, than a person entering a Hunter for a Sweepstakes, had to run a Racehorse instead. A verdict was found for the plaintiff, and a rule for a new trial was refused by the Court (*a*).

Money in the hand of Stakeholder does not pass as "his moneys" under the Depositor's will.

A sum of money deposited with Stakeholders, to abide the result of a Wager, which sum was repaid by them on the death of the party depositing to the Administratrix, does not pass under the words "I give all *my moneys*, household furniture, &c., &c.," because this sum of money being in the hands of Stakeholders, could not be said, after being so deposited, to have been in the possession or power of the Testator at any subsequent moment of his existence (*b*).

(*y*) *Holmes* v. *Sixsmith*, 7 Ex. 802.

(*z*) See per Pollock, C. B., *Holmes* v. *Sixsmith*, 7 Ex. 808.

(*a*) *Emerson* v. *Dickson*, before Mr. Baron Martin, Durham Spr. Ass. March 4, 1853.

(*b*) *Manning* v. *Purcell*, 24 L. T. 317.

STEWARDS.

Their duties.

The Stewards are generally the proper parties to decide all disputes in a Race, and all matters which, according to the conditions of the Race, are to be referred to them. In order to their award being a satisfactory one, they should hear both sides and all join in making it; or if one make an award for all, the disputing parties, and probably also the Clerk of the Course or Stakeholder, should expressly submit themselves to his authority; though it would appear that without a strict adherence to this procedure their award might be a legal one (*c*). The judgment of the Stewards should, if possible, be obtained; and recourse should not be had to legal proceedings, unless it can be shown that it is no longer practicable to get judgment from the Stewards (*d*). But if the Stewards are unable or incompetent to determine it, the case must go to a Jury, and the Stakes in the meantime must remain in the hands of the Clerk of the Course where he is the Stakeholder. The law as to the decision of Stewards is fully laid down in the following cases.

Disputes to be settled by them.

There was a Sweepstakes at Newport Pagnell Races for Horses *not thorough-bred*. Before the Race was run, the plaintiff, who was owner of a Horse afterwards second in the Race, gave Notice to the defendant, who was Clerk of the Course, that a Horse belonging to one Shaw, which afterwards came in first for the Race, was *thorough-bred*, and therefore disqualified to start. The Rule of the Races was, that all disputes were to be settled by the Stewards A. and B., whose decision was to be final; and B. had agreed to acquiesce in whatever A. did as Steward. Neither of the Stewards were present, and on A. being referred to, he submitted the question to the Jockey Club, who refused to entertain it, on the ground that it was a mere question of fact, and referred it back to the decision of the Stewards. A. afterwards wrote a letter to the plaintiff, saying he considered him entitled to the Stakes; but no proof was given that the first Horse was *thorough-bred*.

Award should be made by all.

It was decided that the letter was no authority, but that there ought to have been an express award by both Stewards; or to make an award by A. binding, there ought to be clear proof that both the disputing parties,

(*c*) See post, p. 403.

(*d*) *Brown* v. *Overbury*, 25 L. J., Ex. 169.

and probably also the Clerk of the Course, submitted to his authority. And Mr. Baron Parke said,—

Custody of Stakes in the meantime.

"The Stakes, therefore, remain in the defendant's hands until it be determined by due course of law who is winner; that is, by the Stewards, if they are competent to determine it, if not, by a Jury. The plaintiff may now submit the case to the Stewards if they are competent to entertain it; if not, he may bring an action and show himself the winner, by showing that Shaw's Horse was *thorough-bred* and that his own was not" (*e*).

Legal position of Stewards.

The decision of the Stewards is not invalidated by the fact of one of them being interested in the decision, inasmuch as it does not appear to be in the contemplation of the parties, that they should be excluded on that ground, nor are they arbitrators in the strict legal sense (*f*), the intention of the parties being to constitute a tribunal for the termination of any dispute without litigation of any kind either by arbitration or action, and therefore the principle of law as to interested judges is not applicable to them.

Decision not necessarily invalidated by one of them being interested.

Thus in the case of *Ellis* v. *Hopper* (*g*), where a Steeplechase was run according to certain rules and conditions, one of which was that all disputes should be settled by the Stewards, whose decision was to be final, it was held that the fact that one of the Stewards joined in the award, where the winning or not of his own Horse was in question, did not render the award void. And Bramwell, B., said in his judgment, "If in the betting code no such implied condition exist, that the appointed arbitrators or judges shall cease to be empowered to act, if one of them becomes interested in the event; the only remaining question is, is there a general proposition of law, that whenever a matter is referred to one or several persons, his or their powers shall cease, if one of them becomes interested in the event? I know of no such rule. When parties agree to refer a matter, they may, if they please, put in a condition to that effect; but if they do not, why should the law make such a condition for them."

Decision of two out of three Stewards held binding.

It appears to be at present undecided whether, on one of the Stewards becoming *disqualified*, the tribunal would still be in its integrity (*h*). But it has been held that a de-

(*e*) *Marryat* v. *Broderick*, 2 M. & W. 369.

(*f*) *Ellis* v. *Hopper*, 4 Jur., N. S. 1025; *S. C.* 28 L. J., Ex. 1; *Parr* v. *Winteringham*, 28 L. J., Q. B. 123.

(*g*) *Ellis* v. *Hopper*, 4 Jur., N. S. 1025; *S. C.* 28 L. J., Ex. 1.

(*h*) Ibid.

cision made by two of the Stewards, three having been appointed, was valid and binding, although it was made *in the absence* of the third Steward, and although he dissented from that decision (*i*).

In the case of *Parr* v. *Winteringham* (*i*), Lord Campbell, C. J., thus defined the position of Stewards:—"If Stewards were in the position of arbitrators, they would have to meet together, to deliberate together, and to give a joint judgment. But they are judges of a peculiar character, and to avoid the technicality of a legal proceeding, it is intended that each should give a final judgment, and not that they should give a joint judgment. Accordingly it is not necessary that they should meet together and make a joint decision. And it may be stated as a general principle, that if that decision is a fair and honest one, it will be upheld by the Courts of Law" (*i*). Stewards differ from legal arbitrators.

Although the Judge of a Horse-race has power to decide finally who is entitled to the Stakes as Winner, such power does not accrue to him, until the Race has been run; and the Race has not been run, if, what has been made a Condition Precedent to the running, *e. g.* that a certain person should be the Starter, has not been performed (*k*). Judge's powers do not accrue, when Race is invalid.

Where the printed conditions of a Steeple Chase in 1843 contained the following (amongst other) stipulations: "*No Groom or Professional Jockey will be allowed to ride*," and "all disputes and other matters shall be decided by the Steward, whose decision shall be final, and who shall have the power of appointing an umpire:" the plaintiff who had a Horse to run, which he intended should be ridden by one Walker, was informed by order of the Steward, before the day of the Race, that the Steward considered Walker as a *Professional Jockey*, and that the Horse, if ridden by him, would be no Horse in the Race. On the day of the Race, Walker appeared in the field, mounted and prepared to ride the plaintiff's Horse, when the Steward intimated to the plaintiff and others near him that his Horse would be no Horse in the Race, as Walker had been forbidden to ride. Notwithstanding this intimation, Walker rode the plaintiff's Horse, and came in first. On the following day the Steward pronounced the second Horse to be the winner and entitled to the Stakes. The Steward's decision maintained by the Court of Exchequer.

(*i*) *Parr* v. *Winteringham*, 5 Jur., N. S. 787; *S. C.* 28 L. J., Q. B. 123.

(*k*) *Carr* v. *Martinson*, 28 L. J., Q. B. 126.

plaintiff then brought an action against the defendant, who was Secretary to the Race Committee, and holder of the Stakes. A verdict was found for the plaintiff, reserving leave to the defendant to enter a nonsuit. The Court of Exchequer made the rule absolute to enter a nonsuit, and Chief Baron Pollock said, "The question is, whether the Steward has decided this point, and whether his decision is good in point of law. I am of opinion that he has come to a decision, and that that decision is sufficient." And Mr. Baron Alderson said, "It would be strange, if in a case like this a formal and solemn decision was necessary; if, for instance, it were requisite that a point should be regularly raised before the Steward, that witnesses should be examined upon oath, and the same strictness required as in arbitrations under the sanction of a Court of Justice"(*l*).

Newcomen v. *Lynch.*

At a Steeple Chase, weight for age—run under certain rules, one of which made the decision of the Stewards final, and another required that upon entering a Horse his age should be stated—the defendant's Horse was entered as "aged;" he came in first, but was objected to as being a "six-year-old," and not an "aged" Horse; the Stewards decided that, though, as a matter of fact, the Horse was a "six-year-old," and not "aged," the misstatement in the entry was immaterial, inasmuch as the weight imposed on a "six-year-old" and on an "aged" Horse was the same. The Irish Court of Exchequer Chamber held, that the Stewards had not exceeded their jurisdiction, that there being no question as to the *bona fides* of their judgment, their decision on the construction of the rules, as well as on the matters of fact, was final and conclusive between the parties, and accordingly that the defendant's Horse was entitled to the Stakes (*m*).

Provisional decision.

Where by the conditions of a Race the decision of the Stewards in all cases of dispute is to be final, they need not decide on the whole case at once, but may come to a provisional decision on the facts before them, and subsequently reopen the question and decide on the whole case, and such ultimate decision will be final. Thus, in *Smith* v. *Littledale* (*n*), the plaintiff's Horse ran in a Race subject to the following conditions, viz.:—that he had been fairly hunted with certain hounds during the season, that he had been

(*l*) *Benbow* v. *Jones*, 14 M. & W. 193; *S. C.* 14 L. J., Ex. 257.

(*m*) *Newcomen* v. *Lynch*, 10 Ir. R., C. L. 248—Ex. Ch. Reversing the decision of the Queen's Bench, 9 Ir. R., C. L. 1.

(*n*) 15 W. R. 69—C. P.

a certain time in the possession of his owner; and the Stewards were to disqualify any Horse that they did not consider to have been hunted in a genuine *bonâ fide* manner, and their decision in all cases of dispute to be final. The Horse came in first, and the owner claimed the Stakes. On an objection that the Horse had not been fairly hunted, the Stewards at once went into the question in the weighing-room, and held that he had, leaving the question whether the plaintiff was owner within the conditions for future decision. They subsequently decided that he was such owner, but at the same time disqualified the Horse as not being fairly hunted because he had not been ridden by his owner. In an action for the Stakes, the Jury found that the decision in the weighing-room was in favour of the Horse subject to the question of ownership, and that the Stewards afterwards decided that question in favour of the plaintiff, and at the same time disqualified the Horse. Cockburn, C. J., told the Jury that in his opinion the Stewards could not make a conditional decision, and that the decision in the weighing-room was a provisional decision only, and directed the verdict to be entered for the defendant, leaving it to the plaintiff to move to enter it for him, if on the findings of the Jury on the facts of the case the Court should think him entitled to it. The plaintiff's counsel moved accordingly, and contended that the decision of the Stewards in the weighing-room was conclusive, and that as no further evidence was brought before them, they could not reopen it. Erle, C. J., said, "I am of opinion that there should be no rule: the action is against a Stakeholder; the Race was run, and the Stewards decided that the Stakes should not be given to the plaintiff, but to another person. The Race was subject to this condition: 'The Stewards will strictly carry out the object of this meeting by disqualifying any Horse they do not consider to have been hunted in a genuine and *bonâ fide* manner, and their decision in all cases of dispute will be final.' That makes them absolute judges of fact and law, and they have ultimately decided against the plaintiff's Horse. The decision in the weighing-room was an inchoate decision only. A Stakeholder is not to be made liable to an action where there is a stipulation in such terms as these." Willes and Keating, JJ., concurred, and the rule was therefore discharged.

Appointment of a Judge.

The Stewards of a Race are the proper parties to appoint the Judge, who may decide which is the winning

Horse; and if they are paid for their trouble, or enter upon their duties, they are liable to an action for not doing so (*o*).

Negligence in not appointing one.

But a person gratuitously undertaking the duties of Steward of a Horse Race, is not liable for negligent nonfeasance in not appointing a Judge, unless it appears that he commenced to perform the duties of the office (*p*).

Decision of the Umpire or Committee.

Where by the conditions of a Race the decision of the Umpire or Committee is to be final, the parties are bound by it in the same way as in the case of Stewards. Thus where a Match was made between two Mares under the following agreement:—

"PRATT *and* EVANS.

"Thomas Holyoake, Esq., Umpire.

"Frederick Pratt bets Thomas Evans 100*l.* to 25*l.* P.P. [*play or pay*], Mr. Ryley's brown Mare [late his property] beats Thomas Evans's Mare, Matilda, four miles across a country, thirteen stone each. To come off 1st March, 1841. *The Umpire's decision to be final.*

(Signed) "THOMAS EVANS,
"FREDERICK PRATT."

The Match came off on the day appointed. Mr. Ryley's brown Mare came in first; but Mr. Holyoake, the Umpire, decided that the other Mare was the winner, in consequence of the former having passed through a gateway instead of going over the hedge, which the rules of Steeplechasing seem to require. It was held that it was not competent to either party to dispute the decision of the Umpire, as they had constituted him Judge of the law and the fact (*q*).

When Jurisdiction has not attached.

But it may be that the jurisdiction of the Referee has not properly attached, in which case his decision will not be final, and the party against whom his award has been made will be entitled to recover in an action against the Referee for the Stakes (*r*). In *Sadler* v. *Smith*, the plaintiff and Kelley, watermen on the Thames, agreed to row a right-away Sculler's Race, according to the recognized rules of boat racing, the decision of the Referee to be final. The stakes were deposited with the defendant. In

(*o*) See the principle stated in Smith's Merc. Law, 112, and cited by Jervis, C. J., *Balfe* v. *West*, 22 L. J., C. P. 176.

(*p*) *Balfe* v. *West*, 22 L. J., C. P. 175; *S. C.* 1 C. L. Rep., C. P. 225.

(*q*) *Evans* v. *Pratt*, 4 Scott, N. R. 378.

(*r*) *Sadler* v. *Smith*, 10 B. & S. 17; L. R., 5 Q. B. 40; 39 L. J., Q. B. 17; 21 L. T., N. S. 502; 18 W. R. 148—Ex. Ch.

Sculling Races between professional watermen it is the custom for the competitors to start themselves, but if either should make default in starting, and any question should in consequence arise, it would be in the power of the Referee to determine that question. The plaintiff and Kelley attempted, unsuccessfully, to start, and Kelley rowed to the Referee, who ordered him to tell the plaintiff that if he would not start Kelley must start without him. Kelley rowed over the course without the plaintiff, and the Referee awarded the Race and Stakes to him, without hearing any evidence or taking any steps to ascertain if his order had been communicated to the plaintiff, and without having any means of acquiring the knowledge of the fact. The plaintiff brought an action to recover his deposit. The Jury found that the order of the Referee was not communicated to him, and that he had not a fair opportunity of starting. It was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the jurisdiction of the Referee never attached, and therefore his decision was not final, and the plaintiff was entitled to recover. And Kelly, C. B., said, "In giving judgment in the present case, the Court has no desire to cast the slightest doubt upon the principle that whenever a Referee, Arbitrator or Umpire has given a decision upon a question within his jurisdiction, a Court of Law has no power to interfere. And if the Referee in the case now before us, having the materials before him, had pronounced a decision, it would not have been within the province of any Judge or any Jury to overrule it. But on examining the facts of the case it will appear that the Referee had no jurisdiction, his jurisdiction was to be founded upon the performance of a condition which he himself prescribed, and that condition never was performed. Kelley was to tell the plaintiff that if he did not start, Kelley was to start without him. The Referee thereby imposed a specific condition, upon the fulfilment of which, but not otherwise, the start might take place. If the plaintiff, on receiving the message from the Referee, had refused or forborne to start, and Kelley had started, the condition imposed by the Referee would have been so far complied with as to give him jurisdiction to determine that a start had taken place. But we must assume that the message from the Referee was never communicated by Kelley to the plaintiff, who therefore had no means of knowing that he was to start at the time at which Kelley started. Therefore the start,

which according to the terms imposed by the Referee was to be a condition precedent to the Race, never took place."

Also where a Race was run, subject to certain conditions, one of which was, that the riders should be "gentlemen, farmers or tradesmen, being persons never having ridden as *regular Jockeys or paid Riders.*" Another, that the decision of the Committee on any dispute that might arise should be final. At the trial it appeared that the rider of the plaintiff's Horse, which came first to the winning chair, had been in the habit of riding at Races, sometimes receiving *his expenses*, but *never having been paid for his services*, and that the plaintiff's right to the Stakes was disputed on the ground of an alleged cross. Immediately after the Race, the Jockey was required to attend before the Committee, but omitted to do so. The Committee therefore entered upon the inquiry, and ultimately came to the resolution, that unless the plaintiff would produce evidence before them on the following morning to induce them to alter their minds, their decision was that the second Horse was the winner. This was communicated to the plaintiff, but no evidence was offered, and nothing more was done.

Mr. Justice Coleridge told the Jury, that they must consider, first, whether the Committee had, before the commencement of the action, decided the dispute; secondly, whether or not the Jockey was a rider qualified within the language of the issue; thirdly, whether he unfairly crossed. And he further told them, that if the Committee had decided the matter, their decision would be conclusive, but that it must have been come to before action brought, as to which the evidence was not satisfactory; and, in his opinion, the Jockey's disqualification had not been established. The Jury returned a verdict for the plaintiff, and the Court of Common Pleas discharged a rule for a new trial (*s*).

Terms of a Race.

All the parties whose Horses are entered must of course adhere to the terms of the Race, such as the weights, payment of entrance money, &c., because no single condition can be waived without the unanimous consent of the Subscribers (*t*).

Rules of a Regatta.

According to the Rules by which a Regatta was regulated, and which had been signed by all the parties taking

(*s*) *Walmsley* v. *Matthews*, 3 Scott, N. R. 584.

(*t*) *Weller* v. *Deakins*, 2 C. & P. 618; and see *Lacey* v. *Umbers*, 2 C. M. & R. 116.

part in the Race, the Prize, which was a Boat, was not to be delivered up, unless it was fairly won to the satisfaction of the Managers. In consequence of some Fouling the Managers were dissatisfied, and called upon both parties to stop the Race. One of the parties, however, continued to row on alone, until he reached the Goal; and then, assisted by his friends, he took possession of the Prize Boat, and deposited it in the defendant's yard. An action of *Trover* was brought against the defendant by the Managers to recover the Boat, and Lord Denman being of opinion that the evidence of conversion on the part of the defendant was very strong, the Jury found a verdict for the plaintiff (*u*).

Stewards, &c. cannot waive any condition of a Race.

Neither the Stewards, Clerk of the Course, nor any other persons, can waive or vary the published conditions of any Race without the consent of all the Subscribers. Thus where an action for *Money had and received* was brought against the defendant, who was Clerk of the Course at the Mostyn Hunt Races, for the amount of Stakes held by him as the Stakeholder on a Race won by a Mare of the plaintiff's called Funny: the following was the printed advertisement of the Race:—"A Sweepstakes of ten guineas each, five forfeit, for Horses not thorough-bred *that have never started against a thorough-bred one or run for a Plate;* that have been *regularly* hunted with Sir Thomas Mostyn's, the Duke of Beaufort's or the Duke of Grafton's hounds, up to the day of naming, and are *bonâ fide* the property of the Subscribers, &c. One guinea entrance. Horses to be named by Mr. E. Deakins on or before the 22nd of March." The plaintiff paid his share of the Stake, and his Mare came in first; but it appeared that the Mare had been only once hunted with the hounds of Sir Thomas Mostyn. A witness proved that about half-an-hour before the Race was run, the plaintiff said to the defendant, that he hoped he was satisfied about the Mare's hunting, and that the defendant replied, "Quite so: you run your Mare, we have arranged that." But Mr. Baron Vaughan said, "It must be shown that the Clerk of the Course had authority from the Subscribers to waive the conditions of the Race. It is not enough for the Clerk of the Course to say, half-an-hour before the running, that he would waive a par-

(*u*) *Cheeseman* v. *Hart*, before Lord Denman, C. J., Guildhall, Dec. 23, 1847.

ticular condition. I take it that there was a printed proposal to run Horses on certain terms; what the Clerk said after this was published cannot have the effect of waiving any of those terms without all the other Subscribers are proved to have consented to it" (*x*).

Rules of the Jockey Club.

On those Courses which are governed by the Rules of the Jockey Club (*y*), the Stakeholders, Stewards, and all persons concerned in the Races, must regulate their proceedings accordingly, unless there be a waiver of any of these Rules by mutual consent. But the Jockey Club will not entertain any mere matter of fact submitted to them, but will send it back for the decision of the Stewards (*z*); and the Courts will receive the Rules of the Jockey Club as evidence with respect to the laws of Racing (*a*).

Arbitration of the Jockey Club.

A submission to the Arbitration of the Jockey Club of a disputed account, amounts to an agreement which cannot be impeached under the Acts against Gaming, if any part of the accounts between the parties is legal.

Thus, the plaintiff in 1833 gave a *post obit* security on his expectancy in a certain Fund, payable on the death of his Father to W., in consideration of certain Gaming debts. He subsequently won a larger sum of W. by Bets on Horse Races, and both parties having submitted to the arbitration of the Jockey Club in 1837, the Steward decided that one debt should be set off against the other, and the security given up. And on the plaintiff filing his Bill to have the Security delivered up to be cancelled, the Master of the Rolls received in evidence the entry of the transaction in the Books of the Jockey Club, and also the testimony of Mr. Greville, the Steward (*b*).

Sporting phraseology.

The Courts will not take judicial notice of *sporting phraseology*, but they will admit evidence to explain it. Thus, where a Match was made between two Mares "*across a country*," it was held that although the Court could not take judicial notice of such phrase, yet evidence was admissible to show that in Sporting phraseology it means over all obstructions, and prohibits the rider from availing himself of an open gate (*c*). And in another case

(*x*) *Weller* v. *Deakins*, 2 C. & P. 618.

(*y*) For the Rules of the Jockey Club, see Racing Calendar for 1882.

(*z*) *Marryat* v. *Broderick*, 2 M. & W. 369.

(*a*) *Greville* v. *Chapman*, 5 Q. B. 745; and see the Rules of Racing, Appendix.

(*b*) *Hawker* v. *Wood*, 1 W. R. 316 (M. R.).

(*c*) *Evans* v. *Pratt*, 4 Scott, N. R. 378.

evidence was admitted to show that the letters "P. P." signified that the parties were bound either to run the match or forfeit the Stakes (*d*).

A "Selling" Race.

So, also, where the Race was what is termed a "Selling" Race, evidence was admitted to explain that it meant a Race for which Horses were entered upon the terms that the Horse which won the Race was to be sold by Auction to the highest bidder, but the owner was only to receive the price put upon the Horse when it was entered, the balance going to the Racing Fund. That Horses thus entered were weighted according to the amount put upon them, those of the highest price carrying the greatest weight (*e*).

A professional Jockey.

Where by the terms of a Race the riders were to be persons who had never ridden as *Regular Jockeys* or *Paid Riders*, it was held by Chief Justice Tindal, in the Court of Common Pleas, that a *Regular Jockey* or *Paid Rider* is a person who follows the business of a Jockey or Rider as a *means* of gaining a *livelihood*. But that a person who had sometimes received his expenses, but had never been paid for his services, was clearly not disqualified (*f*).

Horse regularly hunted with Hounds.

Where by the terms of a Race the Horse must have been *regularly hunted* with some particular Hounds, it is not necessary to qualify a Horse to run that he should have been hunted *every* day the Hounds went out. It is sufficient to show that the Horse has been hunted *frequently*, but one day's hunting is decidedly not enough (*g*).

Match for a particular Meeting.

Where a *Match* is made for a particular Meeting which depends upon weather or other circumstances, of course the *Match* must be run when such Meeting actually takes place. Thus where an agreement in writing was made between the plaintiff and the defendant to run a Match with Greyhounds "on the Wednesday during the Newmarket Meeting, 1841, P. P." It appeared that the Newmarket Meetings were Meetings of a Coursing Club; that the power of appointing and adjourning them was vested in the Stewards, who were governed by printed Rules; and that the practice of the Club was to hold the February Meetings on the first or second Tuesday in that month, *weather permitting;* and if at the Meeting the ground proved unfit for Coursing, their practice was to

(*d*) *Daintree* v. *Hutchinson*, 10 M. & W. 89.

(*e*) See *Hadland* v. *Price*, Appendix.

(*f*) *Walmesley* v. *Matthews*, 3 Scott, N. R. 584.

(*g*) *Weller* v. *Deakins*, 2 C. & P. 618.

adjourn to a given day, or the first open day. At the time when the contract in question was made, the day appointed for the February Meeting was Tuesday the 2nd of February, 1841. On Wednesday the 3rd, the plaintiff and defendant were there, but frost prevented the Meeting from being then held, and it was adjourned to Tuesday the 9th, *weather permitting*. The frost, however, continued beyond that day, and the Meeting was ultimately held on Tuesday the 16th. On Wednesday the 17th the plaintiff came with his Dog ready to run the Match, but defendant did not appear.

It was held, first, that the construction of the contract was, that the Match should be run on the Wednesday during the February Meeting, whenever it should be actually held, and that the plaintiff performed his part of the contract by being ready to run on Wednesday the 17th; secondly, that the plaintiff was not bound to produce the printed Rules, but that it was enough for him to show that the February Meeting was then actually held; and also that evidence was admissible to show what the parties intended by the letters "P. P." subjoined to the agreement (*h*).

Ordering off the Grand Stand.

The Steward of a Race-course can order any person off the Grand Stand or Inclosure, though he has paid for his Ticket; but in such case the Steward or his Agent had better tender the price of the Ticket to the party at the time of giving him Notice to quit the Stand or Inclosure to which the Ticket had giving him admittance. But the person who had sold it to him should return the money, for otherwise the holder of it would probably have a right of action against the person from whom he had purchased it, or against those who had authorized its being issued and sold; such action however would be founded on a breach of contract, and not on his having acquired by the Ticket any right to go on the Stand or Inclosure in spite of the owner of the soil. The authority of the Steward was confirmed in the following case, where the question was fully discussed before the Court of Exchequer.

In 1843, Lord Eglinton being Steward of Doncaster Races, Tickets were sold in Doncaster at one guinea each, which were understood to entitle the holders to admission into the Grand Stand and its Inclosure, and to remain there during the Races. They were issued with Lord

(*h*) *Daintree* v. *Hutchinson*, 10 M. & W. 87, 89.

Eglinton's privity, but they were not sealed nor signed by him. It appeared that the plaintiff, Wood, having purchased one of these Tickets, came to the Stand during the Races of the year 1843, and was there or in the Inclosure while the Races were going on; and while there, and during the Races, the defendant, by the order of Lord Eglinton, desired him to depart, and gave him Notice that if he did not go away force would be used to turn him out. The plaintiff had in no respect misconducted himself; and it was admitted that, if he had not been required to depart, his coming upon and remaining in the Inclosure would have been an act justified by his purchase of the Ticket. The plaintiff refused to go, and thereupon the defendant, by order of Lord Eglinton, forced him out, using no unnecessary violence. It was held, that even assuming the Ticket to have been sold to the plaintiff under the sanction of Lord Eglinton, still it was lawful for Lord Eglinton, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the Inclosure; and that if the Jury were satisfied that Notice was given to the plaintiff requiring him to quit the ground, and that before he was forcibly removed by the defendant a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of the removal, on the place in question by the *leave and licence* of Lord Eglinton.

On this direction a verdict was found for the defendant, and a rule *nisi* having afterwards been obtained by the plaintiff to have this verdict set aside on the ground of misdirection, the Court of Exchequer, after hearing both sides and taking time to consider, in an elaborate judgment delivered by Mr. Baron Alderson, discharged the rule (*i*).

Ordering goods.

In ordering goods or work for the purpose of Races, the Stewards should expressly inform the parties who it is that intends to be answerable for the payment, otherwise they will be personally liable. In the case of *Storr and another* v. *Scott, Bart.* (*k*), it appeared that the defendant, being one of the Stewards of Lichfield Races, at the request of the Clerk of the Course chose a Gold Cup at Storr and Mortimer's, who brought an action against him for the price; it being, however, shown that they had given credit for it to the Clerk of the Course, and had accordingly sent him an invoice, a verdict was found for the defendant.

(*i*) *Wood* v. *Leadbitter*, 13 M. & W. 838.

(*k*) *Storr and another* v. *Scott, Bart.*, 6 C. & P. 241.

CHAPTER III.

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WAGERS.

Wagers at common law.

ALL *Wagers* which were not against the principles of morality, public decency or sound policy, were held good at common law; and a *Wager* or *Bet* was defined to be a contract entered into without colour or fraud, between two or more persons, for a good consideration, and upon mutual promises to pay a stipulated sum of money, or to deliver some other thing to each other, according as some prefixed and equally uncertain contingency should happen within the terms upon which the contract was made (*a*).

(*a*) *Jones* v. *Randall*, Cowp. 39; 2 Hawk. c. 92.

A *Wager* by which A. received from B. one hundred guineas on the 31st of May, 1802, in consideration of paying him a guinea a day so long as Napoleon Bonaparte (then First Consul of the French Republic) should live, was held to be *void* on the grounds of immorality and impolicy. This Bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise (*b*). Wager on the life of Napoleon.

So also a *Wager* made, before the poll began, between two voters with respect to the event of an election of a member to serve in Parliament, was held to be void, as such contract is corrupt in the eye of the law and against the fundamental principles of the constitution (*c*). Wager on the result of an election.

Until the late Act of Victoria (*d*), *Wagers* above a certain amount were declared to be illegal by Statute; now, however, the illegality no longer exists, and therefore *Betting* on a Race may now be practised to any extent without any penalty being incurred (*e*). Betting on a Race no longer illegal.

But by the above-mentioned Act (*f*) it is provided, that "all contracts or agreements, whether by parol or in writing, by way of Gaming or Wagering, shall be *null and void;* and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be *won* upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any Wager shall have been made; but this enactment is not "to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any Plate, Prize or sum of Money, to be awarded to the winner or winners of any lawful Game, Sport, Pastime, or Exercise" (*f*). Bets not recoverable.

However, a party depositing a sum of money with a Stakeholder, by way of *Wager* and not as a *Stake* (*g*), may recover his money back, if he give Notice to the Stakeholder, before the event comes off, that he shall break off the *Bet*, and require him to return his money. In a case tried before Chief Justice Wilde at Nisi Prius in the Court of Common Pleas, Westminster, Nov. 30th, 1846, it appeared that a match in harness had been made between one Isaacs, a Jew dustman, and the plaintiff, who was a Cab Deposit recoverable before the event.

(*b*) *Gilbert* v. *Sykes*, 16 East, 150.
(*c*) *Allen* v. *Hearn*, 1 T. R. 56.
(*d*) 8 & 9 Vict. c. 109, s. 15.
(*e*) See the Rules of Racing, Appendix, Part 3.
(*f*) 8 & 9 Vict. c. 109, s. 18.
(*g*) Distinction taken in *Connor* v. *Quick*, cited 2 W. Bla. 708.

owner, and on the event of this Race they had made a Wager of 20*l.* a-side, which each party had deposited with the defendant, a Publican. Previous to the Race, the plaintiff gave Notice to the defendant that he should "break off" the *Bet*, and he should require back his money. The defendant however did not return it, but paid the whole deposit to the other party after he had walked over the course; an action was then brought to recover the 20*l.* which had been deposited by the plaintiff.

At the trial, it was contended on the part of the defendant that, under 8 & 9 Vict. c. 109, s. 18, the action was not maintainable. But the learned Judge overruled the objection, and held that the Statute was not meant to apply to a case like the present, in which the party depositing the money had given Notice to the Stakeholder to pay him it back before the time had arrived for the Wager to be decided. And the Jury, on the evidence, found a verdict for the plaintiff (*h*).

Decision of the Court of Common Pleas.

A rule *nisi* for a new trial, on the ground of misdirection, was afterwards obtained in the Court of Common Pleas, and in discharging the rule Mr. Justice Maule said:—"Looking at the whole section (*i*), critically and grammatically, I am of opinion that it does not apply to any action like this, where a party seeks to recover *his deposit* from a Stakeholder upon a repudiation of the *Wager*. This cannot be considered as an action brought for recovering a sum of money alleged to be won upon a *Wager*; nor do I think it is an *action* brought to recover a sum deposited in the hands of the defendant to abide the event of a *Wager*. That must necessarily mean an action to be sustained on the ground of the existence and the determination of the *Wager*. Here the money is not claimed on that ground. Quite the reverse. The plaintiff insists that the sum he seeks to recover is money which belongs to him, and which the defendant has no right to keep, and which he is under no legal or moral obligation to pay to anybody else. As soon as the defendant received *Notice* from the plaintiff that he declined to abide by the *Wager*, the money ceased to be money deposited in the hands of the former to abide the event, and became money of the plaintiff's in his hands, without any good reason for detaining it. Upon these grounds I think this point

(*h*) *Varney* v. *Hickman*, Nov. 30, 1846; 5 C. B. 281.

(*i*) 8 & 9 Vict. c. 109, s. 18, Appendix.

ought to be determined in favour of the plaintiff. It was said in the course of the argument that the general scope of the Act is to prohibit *Gaming and Wagering;* and that this object would be best attained by holding moneys deposited with Stakeholders not to be recoverable in this way. But I see no pretence for construing the Act to mean anything so penal without express words." And in this opinion Cresswell and V. Williams, JJ., agreed (*j*).

What is a Wagering contract.

The test applicable in some cases to the determination of the question whether a Contract is a Wagering Contract or not within this Statute, is, whether the price of the subject-matter is to vary according to the issue of an event totally unconnected with its actual value. Thus in a case in which the plaintiff and defendant, while conversing as to some rags, which the plaintiff proposed to sell, and defendant to buy, disputed as to the price of a former lot of rags, the plaintiff asserting the price to have been lower than the defendant asserted it to have been. They agreed that the question should be referred to M., a spirit merchant, and that whichever party was wrong, should pay M. for a gallon of brandy, and that if the plaintiff was right, the price of the lot now on sale should be 6*s.* per cwt., but, if the defendant was right, it should be 3*s.* per cwt. M. decided that the plaintiff was right. The plaintiff thereupon sent the rags to the defendant, but the defendant refused to accept them at 6*s.*, offering 5*s.* An action having been brought for goods bargained and sold, it was held by the Court of Queen's Bench that this was a Wagering Contract, which could therefore not be enforced by legal process, and that it made no difference that there was a real intention to part with the goods (*k*).

Money advanced with stipulation.

If money is advanced upon the security of a deed in pursuance of a stipulation or agreement between the plaintiff and defendant, that out of it money lost by the defendant to the plaintiff on betting transactions should be paid to the plaintiff, it is a mere colourable loan and evasion of the Statute, and the deed is invalid; but if there be no such stipulation or agreement, and the plaintiff advance the money as a loan for the defendant to dispose of as he pleased, though the plaintiff expected to be paid out of the money so lent, the deed is valid (*l*).

(*j*) *Varney* v. *Hickman*, 5 C. B. 282. And see further, ante, pp. 393—397, "Stakeholders."

(*k*) *Bourke* v. *Short*, 5 E. & B. 904. And see *Wilson* v. *Cole*, 36 L. T., N. S. 702.

(*l*) *Hill* v. *Fox*, 4 H. & N. 359 (Ex. Ch.).

Price of Mare to be increased, if she won, by her winnings.

In a case where the plaintiff and defendant agreed th the plaintiff should take the defendant's Mare in exchan for that of the plaintiff; and that the defendant shou give the plaintiff half of the winnings of her first two race or, in case she should be sold before then, that the defe dant should pay the plaintiff one-third of what she shoul have been sold for; it was held by the Irish Court Common Pleas, that the above agreement, being or simply to give an increased price for the Mare, upo the occurrence of a state of facts, which might add to h value, was a legal Contract, and not in the nature of Wager (*m*).

Billiard Match.

Where an action was brought to recover a sum of mone lost by playing in the ordinary way with two persons a billiards, the players having staked sums of money on suc cessive games; it was held that such a transaction was no within the proviso of the 8 & 9 Vict. c. 109, s. 18, inas much as the players did not contribute or agree to contri bute any sum to be awarded to the winner (*n*).

Rotundity of earth.

Where the plaintiff and W. deposited each 500*l.* wit the defendant, on an agreement that if W. on or befor the 15th of March, 1870, proved the convexity or curvatur to and fro of the surface of any canal, river, or lake, b actual measurement and demonstration to the satisfactio of the defendant, W. would receive the two sums de posited; but if W. failed in doing this, the two sums wer to be paid to the plaintiff—it was held that the agreemen was a wager, and consequently null and void within th statute (*o*).

Trotting against time.

So where H. and the plaintiff deposited 50*l.* each wit the defendant and entered into a written agreement tha the 100*l.* should be paid to H. if his horse trotted eighteer miles in an hour, and if not then to the plaintiff; it wa held that the transaction was simply a wager, and did no come within the proviso in 8 & 9 Vict. c. 109, s. 18, as t contributions to a prize or sum of money to be awarded t the winner of any lawful game, sport, pastime or exer cise (*p*).

Agreement with Tipster.

And a wager under the disguise of a contract to pay a

(*m*) *Crofton* v. *Colgan*, 10 Ir. Com. Law. Reps. 133.

(*n*) *Parsons* v. *Alexander*, 1 Jur., N. S. 660.

(*o*) *Hampden* v. *Walsh*, L. R., 1 Q. B. D. 189; 45 L. J., Q. B. 238; 33 L. T., N. S. 852; 24 W. R. 607.

(*p*) *Batson* v. *Newman*, L. R., 1 C. P. D. 573; 25 W. R. 85. And see *Coombs* v. *Dibble*, L. R., 1 Ex. 248; 35 L. J., Ex. 167; 14 L. T., N. S. 415.

reward for information will not evade the Act. In *Higginson* v. *Simpson* (*q*), the plaintiff was a tipster, *i.e.* gave information as to the probable winners of Horse races. Upon his giving the name of a Horse to the defendant as the probable winner of a certain race, it was agreed between them that the plaintiff should have 2*l.* on the Horse at 25 to 1, that is to say, that if the defendant backed the Horse and won, the plaintiff should have 50*l.* out of his winnings, but if the Horse lost the plaintiff should pay the defendant 2*l.* The defendant did back the Horse and it won, and the plaintiff thereupon claimed 50*l.* out of the defendant's winnings; and it was held that the agreement was void, and that the 50*l.* could not be recovered.

Walking Match.

It was laid down in the case of *Batty* v. *Marriott* (*r*), that though there be but two subscribers to a plate, prize, or sum of money to be awarded to the winner of a lawful game, and those two subscribers the competitors themselves, yet it is not less a contribution within the exception in the statute, (8 & 9 Vict. c. 109, s. 18,) if the agreement be, that the whole sum subscribed shall be paid over to the winner, and if it be a *bonâ fide* subscription or contribution on the part of those two persons. But what the court had in their minds in that case was the question whether the game was a lawful or unlawful game, and having come to the conclusion that it was a lawful game, they were of opinion that there was nothing in the case which was struck at by the Act of Parliament, and that the Act was only intended to strike at unlawful games (*s*). This view has, however, been recently held by the Court of Appeal to be erroneous (*t*); and it has been decided that an agreement to walk a match for 200*l.* a-side, the money being deposited with a stakeholder, is a wager, and null and void under the statute; and that the deposit of the money is not a subscription or contribution for a sum of money to be awarded to the winner of a lawful game within the proviso.

Contribution to person nominating winner not within proviso.

And in a case in which the plaintiff agreed with B. and others, that a match should be made between a Mare, the property of M., and a Mare, the property of the plaintiff, and that the party nominating the winner should receive from the others 100*l.*, and that 100*l.* should be forfeited

(*q*) L. R., 2 C. P. D. 76; 46 L. J., C. P. 192; 36 L. T., N. S. 17; 25 W. R. 303.
(*r*) 5 C. B. 832.
(*s*) See per Lord Cairns, L. C., *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27; 25 W. R. 777—C. A., and ante, p. 394.
(*t*) *Diggle* v. *Higgs*, *ubi supra*.

by the party making default in causing the Mare nominated by him to run, it was held by the Irish Court of Queen's Bench that no action was maintainable upon such an agreement, inasmuch as it did not come within the proviso of the Section (*u*), which excepts "any Subscription or Contribution, or agreement to subscribe or contribute, for or toward any plate, Prize, or Sum of Money, to be awarded to the Winner or Winners of any lawful Game, Sport, Pastime, or exercise," from the operation of the previous part of the Section; and that this Contract was a mere Wager depending upon an accidental circumstance, and not upon the running of a Race (*x*).

Second Horse may receive part of the Stakes within the proviso.

The proviso that the foregoing part of this Section shall not apply to any Subscription or Contribution, for or towards any plate, &c. to be awarded to the *Winner* or *Winners* of any lawful game, is not the less applicable where the entire sum of money subscribed is not awarded to the first Horse. Therefore where the conditions of a Race were that a subscription should be made up of the sum of 3*l.* each, subscribed by the owners of the Horses, and a sum of thirty sovereigns added thereto out of the Race Fund, out of which the expenses and a sum of 1*l.* 10*s.* were to be deducted and paid to the Treasurer, and 3*l.* 3*s.* to the owner of the second Horse, they were held to be good, and satisfied the requirements of the proviso (*y*).

Effect of wagers being void on note given in payment.

The onus of proving the consideration to be a good one does not lie with the subsequent holder of a promissory note given in payment of money lost on a wager, such wager not being within the statutes to which the 5 & 6 Will. 4, c. 41, is applicable, and being therefore simply void within 8 & 9 Vict. c. 109, s. 18. Thus in a case (*z*) in which a promissory note was given in payment of a bet (upon the amount of hop duty payable in 1854, which was not therefore within 5 & 6 Will. 4, c. 41 (*a*)), and an action was brought upon it, it was held that it lay upon the defendant to prove the absence of consideration for it; for, though proof that a negotiable instrument was affected with fraud or illegality in the hands of a previous holder raises a presumption that he would indorse it away to an agent without value, and consequently calls on the plaintiff

(*u*) 8 & 9 Vict. c. 109, s. 18.

(*x*) *Irwin* v. *Osborne*, 5 Ir. Com. Law Reps. 404.

(*y*) *Crofton* v. *Colgan*, 10 Ir. Com. Law Reps. 133.

(*z*) *Fitch* v. *Jones*, 5 E. & B. 238; *S. C.*, 24 L. J., Q. B. 293.

(*a*) As to the scope of this Statute, see post, Chap. 5, and see also the Statute, Appendix.

for proof that he gave value, yet the presumption does not arise, when the previous holder merely held without consideration. "The note was given to secure payment of a Wagering Contract, which even before 8 & 9 Vict. c. 109, the law would not enforce, but it was not illegal, and there is no penalty attached to such a Wager; it is not in violation of any Statute nor of the common law, but is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all" (*b*).

Wagering Contracts by Brokers void but not illegal.

In accordance with the same principle it was held by the Exchequer Chamber in the case of *Smith* v. *Lindo* (*c*), that although an unlicensed person who assumes to act as a broker (in London) in the buying of shares in a public Company, is, by reason of 6 Anne, c. 16, incapacitated from suing for commission, yet he may recover money which by the usage of the share-market he has been obliged to pay to the seller as the price of the shares; there being nothing to show that the payment was made in pursuance of any *illegal* Contract, or that it was a necessary part of the duty of a broker, *as such*, to pay the money.

Contracts may be illegal, which are not void.

A Contract may be illegal without being void. Thus by 1 & 2 Vict. c. 106, s. 29, it is rendered illegal for any spiritual person holding a benefice to engage in trade, except in certain cases. And by section 31 it is expressly provided that no Contract shall be deemed to be void by reason only of the same having being entered into by a spiritual person trading or dealing; but that every such Contract may be enforced by or against such spiritual person. The effect of this Statute is to allow a Contract, which it pronounces to be illegal, to be enforced, although the party with whom it was made was at the time aware that the other party was a spiritual person holding a benefice. The party offending is liable to the penalty, but at the same time must perform the Contract (*d*).

Money paid on void Contract.

The fact that the Contract was originally void cannot be set up as a defence to an action for money paid, in satisfaction of that Contract, to the defendant for the

(*b*) Per Lord Campbell, C. J., *Fitch* v. *Jones*, 5 E. & B. 238. And see *Lynn* v. *Bell*, 10 Ir. R., C. L. 487; *Pyke, Ex parte, Lister, In re*, L. R., 8 Ch. D. 754; 47 L. J., Bk. 100; 38 L. T., N. S. 923; 26 W. R. 806—C. A.

(*c*) *Smith* v. *Lindo*, 5 C. B., N. S. 587.

(*d*) *Lewis* v. *Bright*, 24 L. J., Q. B. 191.

use of the plaintiff (*e*), and where money has been paid by a third party for the Loser of a Wager to the Winner, it is no answer to an action for money paid by the third party for the use of the Loser at his request (*f*), or without his request, if the third party is his agent for making bets, unless deprived of the authority to do so in express terms (*g*), that the money was paid in respect of losses on Wagering Contracts made void by 8 & 9 Vict. c. 109, s. 18.

Decision in Equity.

But in the case of *Beyer* v. *Adams* (*h*), in which the amount of a bet lost at a race was paid by the Loser into the hands of a third party, who was the Betting Agent of the Winner, and who died before he had paid it to the Winner, it was held by Vice-Chancellor Stuart, upon a claim being made by the Winner for payment out of the deceased's estate of the amount due to him, and which had been paid to the deceased, that this case was within the words of the Statute that "no action or suit shall be brought for recovering any sum of money won upon any wager" (*i*), and the claim was thereupon disallowed. It must be observed that this decision is contrary to the whole current of authority embodied in the decisions of the Courts of Common Law (*k*).

Money paid on illegal game not recoverable.

When the game itself is illegal, or the money has been won by some fraud or unlawful device, so as to render the winning of it illegal under the 8 & 9 Vict. c. 109, s. 17, it is probable that an action would not lie to recover money knowingly paid by the plaintiff (being a third party), at the defendant's request, to a person to whom the defendant has thus lost it (*l*).

The Act for the suppres-

The Act for the Suppression of Betting Houses (*m*), which is treated of in the Chapter on Betting Houses and

(*e*) *Johnson* v. *Lansley*, 12 C. B. 468.

(*f*) *Knight* v. *Cambers*, 15 C. B. 562; *Knight* v. *Fitch*, 15 C. B. 566; *Jessop* v. *Lutwytch*, 24 L. J., Ex. 65; *Lyne* v. *Siesfield*, 1 H. & N 278; *Rosewarne* v. *Billing*, 10 Jur. N. S. 496.

(*g*) *Oulds* v. *Harrison*, 24 L. J., Ex. 66; *Bubb* v. *Yelverton*, *Ker*, *In re*, 24 L. T., N. S. 822; 19 W. R. 739; *Oakham* v. *Ramsden*, 44 L. J., C. P. 309; 32 L. T., N. S. 825.

(*h*) *Beyer* v. *Adams*, 26 L. J., Ch. 841.

(*i*) 8 & 9 Vict. c. 109, s. 18.

(*k*) *Knight* v. *Cambers*, 15 C. B. 562; *Knight* v. *Fitch*, 15 C. B. 566; *Jessop* v. *Lutwytch*, 24 L. J., Ex. 65; *Oulds* v. *Harrison*, 24 L. J., Ex. 66; *Lyne* v. *Siesfield*, 1 H. & N. 278; *Rosewarne* v. *Billing*, 10 Jur., N. S. 496.

(*l*) Chitty on Contracts, 11th ed. 548. See *M'Kinnell* v. *Robinson*, 3 M. & W. 434; also post.

(*m*) 16 & 17 Vict. c. 119, Appendix.

Gaming Houses (*n*), has made various important provisions with respect to Betting, and with respect to receiving money, &c., as the consideration for any assurances, &c., to pay money, &c. (*o*)—or as a Deposit on any Bet, on condition of paying any money, &c.—"on the happening of any event or contingency of or relating to a Horse Race, or any other Race, or any Fight, Game, Sport or Exercise" (*p*). sion of Betting Houses.

The Stock-Jobbing Act (7 Geo. 2, c. 8), which is intituled "An Act to prevent the infamous Practice of Stock-Jobbing," was passed with a view to prevent a common practice which had been found destructive to the interests of the country. It rendered illegal all Time bargains in the Public Funds (*q*), but Time bargains relating to Shares (*r*), or in Foreign Funds (*s*), were held not to be void either under the Act or at Common Law. The Act was repealed in 1860 by the 23 & 24 Vict. c. 28. The Stock-Jobbing Act.

Where each party means to break the contract, but to give the other a remedy against him for the difference of price, according as the Market may rise or fall, it is a Gambling transaction, being a mere Bet upon the future price, and the contract is therefore void under 8 & 9 Vict. c. 109 (*t*). Gaming on the Stock Exchange.

Thus in a Time bargain in Shares, it is understood by both parties that the Shares are never to be delivered into the hands of the purchaser. It is nothing more than a *Wager* made between the parties upon the difference of the price at the time that the supposed purchase is made, and the price on the settlement day. If the shares rise one party is to receive, and if they fall he is to be at a loss. As in a time bargain.

And the question to be left to the Jury in such case is, whether it be a *bonâ fide* contract, which each party at the time meant to perform, or whether the transaction was not a mere *Bet* upon the future price of the commodity. And that if neither party intended to buy or sell, it would be no bargain, but a mere Gambling transaction (*u*). Question to be left to the Jury.

But the statute only affects the contract which makes Statute only

(*n*) See Betting Houses and Gaming Houses, post, Chap. 5.

(*o*) 16 & 17 Vict. c. 119, s. 1, Appendix.

(*p*) Ibid. ss. 3. 5.

(*q*) *Oakley* v. *Rigby*, 3 Scott, 194.

(*r*) *Hewitt* v. *Price*, 4 M. & G. 355; *Williams* v. *Trye*, 23 L. T. 72.

(*s*) *Wells* v. *Porter*, 3 Scott, 141.

(*t*) *Grizewood* v. *Blane*, 11 C. B. 540. And see *Barry* v. *Croskey*, 2 J. & H. 1; *Cooper* v. *Neil*, 27 W. R. 159.

(*u*) Ibid. 541; *Bennett* v. *Hall*, before Mr. Justice Crompton, Guildhall, Jan. 23, 1853. See *Hill* v. *Fox*, 4 H. & N. 359.

affects Contract which makes Wager.

the Bet or Wager (*x*). Thus where the plaintiff, a broker, was employed by the defendant to speculate for him on the Stock Exchange; to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him; and the plaintiff accordingly entered into contracts on behalf of the defendant upon which he became personally liable, and sued the defendant for indemnity against the liability incurred by him, and for commission as a broker; it was held by the Court of Appeal, affirming the judgment of Lindley, J., that the contract was not illegal at common law, and was not in the nature of a Gaming and Wagering contract against the provisions of the statute (*y*).

Statute against Wagering Policies.

It is enacted by 14 Geo. 3, c. 48, s. 1, that "No Insurance shall be made by any Person or Persons, Bodies Politic or Corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such Policy or Policies shall be made, shall have no interest, or by way of *Gaming or Wagering;* and that every Assurance made, contrary to the true intent and meaning hereof, shall be *null and void* to all intents and purposes whatsoever."

What held to be such a Policy.

An engagement, in consideration of forty guineas, to pay 100*l.* in case Brazilian Shares should be done at a certain sum on a certain day, subscribed by several persons, each for themselves, is a Policy void under 14 Geo. 3, c. 48 (*z*).

Wager as to declaration of War.

Where a *Wager* was made that war would be declared against France within three months, it was held by the Courts of Queen's Bench and Common Pleas, although the Court of Exchequer was of a contrary opinion, that the *Wager* was void under 14 Geo. 3, c. 48. No Judgment, however, was ever given on the case (*a*).

What was held not to be such a Policy.

Where money was advanced upon an Assignment of an expected devise, with a condition that if there should not be such a devise, then that the money should be re-

(*x*) Per Brett, L. J., *Cooper* v. *Nisl*, 27 W. R. 159.

(*y*) *Hardy* v. *Thacker*, L. R., 4 Q. B. D. 685; 48 L. J., Q. B. 289; 39 L. T., N. S. 595; 27 W. R. 158—C. A.

(*z*) *Paterson* v. *Powell*, 9 Bing. 320.

(*a*) See *Foster* v. *Thackeray*, cited in *Allen* v. *Hearn*, 1 T. R. 57, n.

paid without interest; it was held not to be a Policy on the life of the testator within 14 Geo. 3, c. 48 (*b*).

As no *Wager* can be tried in any Court of Law or Equity, the Winner cannot compel payment from the Loser (*c*); and therefore if the money be paid, it is in fact giving a gratuity. Paying a Bet.

If a Note, Bill or Mortgage be taken as a security for money, either won by betting *on the sides and hands* of persons Gaming, or *knowingly* lent for the purpose of such *betting*, or where such *betting* is going on, the consideration is *illegal* under 5 & 6 Will. 4, c. 41. But any other security under seal would appear to be good, where the Gaming is not illegal (*d*). Giving a security.

A bond given to persons to whom the obligor has lost Bets on Horse-races, which he is unable to pay, in order to prevent them from taking the steps which, under the conventional code established among betting men, they are entitled to take, and which would be followed by consequences involving the obligor in considerable pecuniary loss, is valid (*e*).

So that if a Note or Bill be given in payment of any Bet, except such as has been made on the sides or hands of persons Gaming, it is in reality a gift, and its value will depend upon circumstances. Thus where a bill had been given gratuitously, Lord Abinger, C. B., in delivering the Judgment of the Court of Exchequer, in *Easton* v. *Pratchett* (*f*), said, "If a man give money as a gratuity, it cannot be recovered back, because the act is complete; yet a man who promises to give money cannot be sued on such promise; and if so, I do not see how a promise in writing not under seal can have any binding effect. The law makes no difference between such a promise and a verbal one. There is the same distinction as to a Bill of Exchange. If a party gives to another a negotiable instrument on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill; but it is a very different question Where a note or bill is a gift.

(*b*) *Cook* v. *Field*, 15 Q. B. 475.

(*c*) 8 & 9 Vict. c. 109, s. 18. And see per Lord Cairns, L. C., *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27.

(*d*) See Gaming, post, Chap. 4.

(*e*) *Bubb* v. *Yelverton*, L. R., 9 Eq. 471; 39 L. J., Ch. 428; 22 L. T., N. S. 258; 18 W. R. 512.

(*f*) *Easton* v. *Pratchett*, 1 C. M. & R. 798; *S. C.* 3 Dowl. 472; 1 Gale, 83; and see the same case in error, 2 C. M. & R. 542; 4 Dowl. 549; 1 Gale, 250; 6 C. & P. 736.

whether the giver binds himself by the indorsement so as to make himself liable thereupon to the person to whom he gives it. There is no decision that he does, and there is a strong authority the other way; and the prevailing opinion in the profession is, that a parol promise of a gift, whether verbal or in writing, will not be binding."

Taking a stolen Bank Note in payment.

A Race Course is a mart where stolen or lost Notes may be readily disposed of, and therefore a party should always use due caution in taking a Bank Note from a stranger, either in payment of a *Bet*, or in change out of payment for *Bets* lost, and the larger the amount of the Note the greater the care required.

Taking stopped Note in payment.

A *bonâ fide* holder of a stopped note, or other negotiable security, that is to say, a person who has given value for it, and who has had no notice at the time that the party from whom he takes it has no title, is entitled to recover upon it, even although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself. Thus, where a money-changer at Paris, twelve months after he had received notice of a robbery of bank-notes at Liverpool, took one of the stolen notes (for 500*l.*) at Paris, giving cash for it, less the current rate of exchange, from a stranger, whom he merely required to produce his passport, and write his name on the back of the note, it was held that the circumstance of his forgetting or omitting to look for the notice was no evidence of *mala fides* (*g*).

What invalidates the holder's right.

In *Goodman* v. *Harvey* (*h*), the Court of Queen's Bench held that there must be actual *mala fides* to invalidate the right of the holder of a Bill or Bank Note, received from a person having no title to it. And also that the existence even of *gross* negligence was unimportant, except so far as it might be evidence of *mala fides* (*h*).

Mala fides must be distinctly proved.

This decision was confirmed by the case of *Uther* v. *Rich* (*i*), where the Court of Queen's Bench held that *mala fides* in the holder of a negotiable security, if relied on, must be distinctly alleged. And that the only proper way of implicating him in an alleged fraud, is by averring that he had *Notice* of it, and that an allegation that he was not a *bonâ fide* holder, is not equivalent to an averment of such *Notice*.

(*g*) *Raphael* v. *Bank of England*, 17 C. B. 161.

(*h*) *Goodman* v. *Harvey*, 4 A. & E. 870.

(*i*) *Uther* v. *Rich*, 10 A. & E. 784; and see *Arboin* v. *Anderson*, 1 Q. B. 498.

Money borrowed to pay Bets.

Formerly money borrowed for the express purpose of settling losses on a Race to the amount of 10*l.* or upwards could not be recovered by the lender, although he bore no part in the transaction (*k*). This was so held on the ground of illegality; but as that no longer exists, it would appear that a person borrowing money for the purpose of paying his betting losses on a Race, whatever their amount may be, is as completely indebted to the lender as if he had borrowed it for any other purpose whatsoever. For in a case where an I O U afforded *primâ facie* evidence of a debt, and an injunction was sought to restrain the party from suing on it, on the ground that a great part of the consideration was money lent for gambling purposes; on its appearing that the transaction had taken place in a foreign country, where such Games were not illegal, the injunction was refused (*l*).

A Betting Agent.

An Agent authorized by a party to lay Bets for him on a Race to the amount of 10*l.* or upwards, could not if he lost pay the winner without an express direction so to do (*m*). But now since 8 & 9 Vict. c. 109, has done away with the illegality of all wagers on Races, a Betting Agent may pay all losses within the scope of his commission, and recover the money so disbursed from his Principal (*n*). And an agreement between a Principal and his Agent that the Agent shall employ moneys of the Principal in betting on Horse-races, and pay over the winnings therefrom to his Principal, is not a contract by way of Gaming and Wagering, and it is not illegal (*o*).

A Betting Partner.

The Act (*p*) does *not* make gaming contracts *illegal*, but *null and void*, and therefore it would be contrary to public morality to lay down that a party who has received money lost in a *Wager* should by pleading this statute escape paying over the fair share to his partner (*q*). Where therefore a Bill of Exchange was given as a security for a share of money won in betting transactions a plea of Gaming under 8 & 9 Vict. c. 109, s. 18, was held to be bad (*q*).

(*k*) *M'Kinnell* v. *Robinson*, 3 M. & W. 434; *Canne* v. *Bryan*, 3 B. & Ald. 179.

(*l*) *Quarrier* v. *Colsten*, 1 Turn. & Ph. 147. And see *Pyke*, *Ex parte*, *Lister*, *In re*, L. R., 8 Ch. D. 754; 47 L. J., Bk. 100; 38 L. T., N. S. 923; 26 W. R. 806—C. A.

(*m*) *Clayton* v. *Dilly*, 4 Taunt. 165.

(*n*) *Knight* v. *Cambers*, 15 C. B. 562; *Knight* v. *Fitch*, 15 C. B. 566; *Oulds* v. *Harrison*, 24 L. J., Ex. 66; *Bubb* v. *Yelverton*, *Ker*, *In re*, 24 L. T., N. S. 822; 19 W. R. 739. See ante, p. 422.

(*o*) *Beeston* v. *Beeston*, L. R., 1 Ex. D. 13; 45 L. J., Ex. 230; 33 L. T., N. S. 700; 24 W. R. 96.

(*p*) 8 & 9 Vict. c. 109, s. 18.

(*q*) *Johnson* v. *Lansley*, 12 C. B. 468. See ante, pp. 420, 422.

Cheating wager.

In the case of *Reg.* v. *Orbell* (*r*), it was held to be an indictable offence to get a person to lay money on a Race, and prevail with the party to run booty; for though the *Cheat* was *private* in this particular, yet it was *public* in its consequences. *Cheating*, however, is now specially provided against by the 17th section of 8 & 9 Vict. c. 109, where it is enacted that "every person who shall by any *fraud* or *unlawful device* or *ill practice*, in *wagering* on the event of any Game, Sport, Pastime or Exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a *False pretence* with intent to *cheat* or *defraud* such person of the same, and being convicted thereof shall be punished accordingly;" and therefore every such person is guilty of a misdemeanor, and on conviction is liable at the discretion of the Court to Penal Servitude for the term of five years (*s*), or to be imprisoned for any term not exceeding two years (*t*), and the prosecutor is entitled to his costs under 7 Geo. 4, c. 64, s. 23 (*u*).

(*r*) *Reg.* v. *Orbell*, 6 Mod. 42.
(*s*) 24 & 25 Vict. c. 96, s. 88, amended by 27 & 28 Vict. c. 47, s. 2.
(*t*) 24 & 25 Vict. c. 96, s. 88.
(*u*) Per Patteson and Talfourd, JJ., *Reg.* v. *Gardner*, Worcester Spr. Ass. 1851.

CHAPTER IV.

GAMING.

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GAMING.

GAMING, by playing at Cards, Dice, or any other Games, and all exercises, when practised without fraud and as a

Gaming not unlawful.

recreation, are not offences at common law; such transactions, however, have never met with much encouragement when brought into a Court (*a*).

Where a London apprentice "frequents" Gaming.

By the custom of London, it is a sufficient cause for a Master to turn away his Apprentice, that he frequents Gaming, and he may justify it before the Chamberlain (*b*).

Where a Clergyman plays at unlawful Games.

But it is laid down that the Bishop cannot refuse to induct a Clergyman when presented to a living, merely because he is a Player at unlawful Games, or a Haunter of Taverns (*c*); because, as Sir Simon Degge says, each of these is not *malum in se*, but only *malum prohibitum* (*d*).

Unfair or excessive Gaming.

An Indictment lies for unfair or excessive Gaming, which has always been considered illegal (*e*).

Using false Dice.

"Common players and hazarders with false Dice" are indictable (*f*), and even an infant may be indicted for cheating with false Dice (*g*).

Winning exorbitant sums.

The winning of exorbitant sums of money has been discouraged both by Courts of Law and Equity. Thus, in the case of *Sir Bazil Firebrasse* v. *Brett* (*h*), it appeared that the defendant and Sir William Russell dined with the plaintiff at his house, and after dinner fell into play. When they began, the defendant and Sir William Russell had not above eight guineas between them, but they won about 900*l.* in ready money, which the defendant brought away with him. The plaintiff, upon losing this, being somewhat inflamed by wine, brought down a bag of guineas, containing about 1,500*l.*, which the defendant also won; but as he was leaving the house with it in his possession, the plaintiff and his servants seized upon it, and took it from him. The plaintiff had brought an information against the defendant for playing with false Dice, but he was acquitted. The defendant then brought an action of *Trespass* against the plaintiff for taking from him in a forcible manner this bag of guineas. The Lord Chancellor granted an injunction to stay these proceedings at law, though the defendant had by answer denied all the circumstances of fraud charged in the Bill. And his Lordship said, that he thought the sum very exorbitant for a

(*a*) Bac. Abr. tit. Gaming, A.; Dalton, c. 23; *Sherbon* v. *Colebacke*, 2 Vent. 175; *Crockford* v. *Lord Maidstone*, Appendix.

(*b*) *Woodroffe* v. *Farnham*, 2 Vern. 291.

(*c*) *Specot's case*, 5 Rep. 58 a, p. 118.

(*d*) Degge's P. C., Part 1, Chap. 1.

(*e*) 2 Rol. Abr. 78.

(*f*) *Leeser's case*, Cro. Jac. 497.

(*g*) Bac. Abr. Infant (H.).

(*h*) *Sir Bazil Firebrasse* v. *Brett*, 1 Vern. 489; *Sir Bazill Firebrass* v. *Brett*, 2 Vern. 70.

man to lose at play in one night, and that if it was in his power he would prevent it; and cited the case of *Sir Cecil Bishop* v. *Sir John Staples* in the time of Lord Chief Justice Hale, about a Wager upon a Foot race, and that the Chief Justice said, in that case, that those great Wagers *proceeded from avarice and were founded in corruption*, and decided that he would give the defendant leave to imparl from time to time. His Lordship then said, that if such discouragement was given to Gaming at Common Law, it ought much more to be done in a Court of Equity.

Losses by a bankrupt.

By 12 & 13 Vict. c. 106, s. 201, no Bankrupt was entitled to his Certificate if he should have lost by any sort of Gaming or Wagering in one day 20*l.*, or within one year next preceding his Bankruptcy 200*l.*, either by Gaming or Wagering, or "by any Contract for the purchase or sale of any Government or other Stock, when such contract was not to be performed within one week after the contract, or where the Stock bought or sold was not actually transferred or delivered, in pursuance of such contract" (*i*). But this clause was repealed by 24 & 25 Vict. c. 134.

Cheating in a Game or at Play.

Cheating in a Game or at Play is now an indictable offence; for by the 17th section of 8 & 9 Vict. c. 109, it is enacted, "that every person who shall by any *fraud* or *unlawful device* or *ill practice* in playing at or with Cards, Dice, Tables, or other Games, or in bearing a part in the Stakes, Wagers, or Adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any Game, Sport, Pastime, or Exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a *False Pretence* with intent to *cheat* or *defraud* such person of the same, and being convicted thereof shall be punished accordingly" (*j*).

Tossing coins for wagers is a sport, pastime or exercise if not a game within this section (*k*).

The fraud or unlawful device.

The "fraud or unlawful device" must be practised during the Game itself to support an indictment for *obtaining money by a false pretence*, under 8 & 9 Vict. c. 109,

(*i*) 12 & 13 Vict. c. 106, s. 201.

(*j*) 8 & 9 Vict. c. 109, s. 17; and see Cheating in a Wager, ante, Part 3, Chap. 3. In the case of *Burnett* v. *Allen* (4 Jur., N. S. 488), the Court of Exchequer were equally divided as to whether the term "blackleg" was *per se* defamatory or not.

(*k*) *Reg.* v. *O'Connor*, 45 L. T., N. S. 512—C. C. R.

s. 17; and it is not sufficient that a fraud was resorted to, to induce the prosecutor to play (*l*).

Conspiracy to cheat at Skittles.

Where several persons confederated and combined together to play at Skittles, so that the play of one of them should betoken his skill to be much less than it really was, in order that the prosecutor (a looker-on) might be induced to play with him, and thereby lose to him his money: it was held to be an indictable conspiracy (*m*).

Conspiracy to cheat at Cards.

So, also, where C. and J. were indicted for conspiring to cheat certain persons out of money by playing at Cards, it appeared that J. went first into an Inn and sat down to drink; after some time C. made his appearance with a bag of nuts: he took not the slightest notice of J., but in a short time he pulled some cards out of his pocket, and proposed to play for the nuts. There were three Cards, and any person who selected the highest was to have a pennyworth of nuts for a halfpenny. Several persons played, and were allowed to win until all the nuts were gone. C. then proposed that they should play for a shilling; J. played and lost the first shilling; he then played again and won. Others played, but eventually C., who had won some money, was discovered cheating in concert with J.; upon this C. left the room, but was afterwards apprehended in J.'s company. It was shown that they were travelling and lodging together, notwithstanding they had pretended that they were strangers. The Jury found them both guilty (*n*).

Where a criminal information was refused.

A Criminal information was refused by the Court of Queen's Bench for a conspiracy to cheat, where it appeared that the persons making the application, as well as the other parties against whom it was made, were a set of Cheats and Gamblers (*o*).

Contracts for Gaming.

By 8 & 9 Vict. c. 109 (*p*), "all contracts or agreements, whether by parol or in writing, by way of *Gaming* or wagering," are null and void.

Money deposited for Gaming.

And where money has been paid to a Stakeholder, in pursuance of a contract by way of Gaming, either party may recover back his *share* before it has been paid over (*q*). But in no case can the *whole* be recovered by the Winner.

(*l*) *Reg.* v. *Bailey*, 4 Cox, C. C. 397.

(*m*) *Reg.* v. *Bailey*, 4 Cox, C. C. 390.

(*n*) *Reg.* v. *Clark and Jervis*, before Mr. Justice Erle, Bodmin Spr. Ass. March 23, 1853.

(*o*) *Rex* v. *Peach*, 1 Burr. 548.

(*p*) 8 & 9 Vict. c. 109, s. 18. Appendix.

(*q*) *Cotton* v. *Thurland*, 5 T. R. 408; *Smith* v. *Bickmore*, 4 Taunt. 474; *Hastelow* v. *Jackson*, 8 B. & C. 221; *Hodson* v. *Terrell*, 1 C. & M.

The French law does not allow an action for a debt at play. But *Games* proper in the exercise of Feats of arms, Foot races, Horse or Chariot races, Tennis, and other sports of the same nature, which require address and agility of body, are excepted, subject to the power of the Court to reject the demand where the sum appears to be excessive (*r*). French law as to the recovery of Stakes.

Under the Proviso in the 18th section of 8 & 9 Vict. c. 109, the enactment in that section is "not to be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any Plate, Prize, or Sum of money to be awarded to the winner or winners of any lawful *Game*, Sport, Pastime or Exercise" (*s*). It is not clear what is excepted by the word *Game* in that Proviso, but it seems probable that the "Sum of money to be awarded to the winner" at the termination of "any lawful Game, Sport, Pastime, or Exercise," is meant to be a sum *ascertained* before the commencement of such Game, &c., as distinguished from the case where it is *uncertain* what sum may be won or lost until the Game has concluded. It would appear, therefore, that so long as the money won is a *Stake* and not a *Bet*, and the Game, &c. is *lawful*, and perhaps the sum *ascertained* before the commencement of such Game, &c., the winner may maintain an action against a loser for his Subscription or Contribution to the *Stake* (*t*). English law as to the recovery of Stakes.

The following are lawful Games, Sports, Pastimes or exercises:—Horse Races (*u*), Steeple Chases (*x*), Trotting Matches (*y*), Coursing Matches (*z*), Foot Races (*a*), Boat Races (*b*), Regattas (*c*), Rowing Matches (*c*), Golf, Wrest- Lawful Games, &c.

802; *Hampden* v. *Walsh*, L. R., 1 Q. B. D. 189; 45 L. J., Q. B. 238; 33 L. T., N. S. 852; 24 W. R. 607; *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27; 25 W. R. 777—C. A.; *Trimble* v. *Hill*, L. R., 5 App. Cas. 342. See ante, p. 396.

(*r*) Code Civil, Book 3, tit. 3, Chap. 1, art. 1965, 1966.

(*s*) 8 & 9 Vict. c. 109, s. 18, Appendix; and see Wagers, ante, Part 3, Chap. 3.

(*t*) The distinction between a Stake and a Bet was taken in *Connor* v. *Quick*, cited 2 W. Bla. 708. See also *Batty* v. *Marriott*, 5 C. B. 818; *Diggle* v. *Higgs*, L. R., 2 Ex. D. 422; 46 L. J., Ex. 721; 37 L. T., N. S. 27; 25 W. R. 777—C. A., ante, p. 394.

(*u*) See the Law as to Racing, ante, Part 3, Chap. 2.

(*x*) See *Evans* v. *Pratt*, 4 Scott, N. R. 378.

(*y*) See *Holmes* v. *Sixsmith*, 7 Exch. 802.

(*z*) See *Daintree* v. *Hutchinson*, 16 M. & W. 87; *Emerson* v. *Dickson*, ante, p. 400.

(*a*) See *Batty* v. *Marriott*, 5 C. B. 818; *Coates* v. *Hatton*, 3 Stark. 61.

(*b*) See *Cheeseman* v. *Hart*, ante, p. 409.

(*c*) See *Bostock* v. *North Staffordshire Railway Co.*, 4 E. & B. 798.

ling Matches (*d*), Cricket (*e*), Tennis, Fives, Rackets, Bowls (*f*), Skittles (*g*), Quoits, Curling, Putting Stone, Football (*h*), and every *bonâ fide* variety, or *similar* description of such Games, &c. (*i*). The winner therefore, in any of these, may recover from the loser, or each of the losers, his Subscription or Contribution to the Stake (*k*).

Lawful Gaming or Play.

The following lawful Games when played for money (*l*) may be called Lawful *Gaming* or *Play*:—Whist and other lawful Games at Cards, Backgammon (*m*), Billiards (*n*), Bagatelle (*n*), Chess (*o*), Draughts (*o*), Dominoes (*o*), &c.

"Game" under the Highway Act.

By the 72nd section of the Highway Act (*p*) a penalty is imposed upon any person "who shall play at Football or any other Game on any part of the Highway, to the annoyance of any passenger or passengers." Therefore where a number of persons assembled together in a public Highway to enjoy a diversion called "a Stag-hunt," which consisted in one of the number representing a Stag, and the others chasing him, whereby an obstruction was caused, it was held that this was "a Game" within the meaning of the Act (*q*).

Unlawful Games.

A variety of Games are prohibited by Statute. Thus all Lotteries are declared to be *public nuisances* in whatever way they may be drawn or arranged (*r*). The Games of The Ace of Hearts, Pharaoh, Basset and Hazard (*s*) are to be deemed Games, or Lotteries by Cards or Dice, and are *unlawful*, whether played at a public table or in private (*t*). Also the Game of Passage and every other Game with Dice, except Backgammon and other Games played with Backgammon tables, are to be deemed

(*d*) See *Kennedy* v. *Gad*, 3 C. & P. 376; *Manby* v. *Scott*, 1 Mod. 136.

(*e*) See *Jeffreys* v. *Walter*, 1 Wils. 220; *Walpole* v. *Sanders*, 7 D. & R. 130; *Hodson* v. *Terrill*, 1 C. & M. 797; *Holmes* v. *Bagge*, 17 Jur. 1095.

(*f*) See *Sigel* v. *Jebb*, 3 Stark. 2.

(*g*) See *Foot* v. *Baker*, 5 M. & G. 339; *Batty* v. *Marriott*, 5 C. B. 818; *Reg.* v. *Bailey*, 4 Cox, C. C. 396.

(*h*) See *Manby* v. *Scott*, 1 Mod. 136.

(*i*) See 7 & 8 Vict. c. 3.

(*k*) See 8 & 9 Vict. c. 109.

(*l*) If money is not staked, it is not Gaming, *Reg.* v. *Ashton*, 22 L. J., M. C. 1, Q. B.

(*m*) See 13 Geo. 2, c. 19, s. 9, Appendix.

(*n*) See 8 & 9 Vict. c. 109, s. 13, Appendix. See *Parsons* v. *Alexander*, 1 Jur., N. S. 660.

(*o*) See *Reg.* v. *Ashton*, 22 L. J., M. C. 1, Q. B.

(*p*) 5 & 6 Will. 4, c. 50.

(*q*) *Pappin* v. *Maynard*, 9 L. T., N. S. 327.

(*r*) 10 & 11 Will. 3, c. 17, s. 1.

(*s*) See *Crockford* v. *Lord Maidstone*, Appendix; *Rex* v. *Liston*, 5 T. R. 240.

(*t*) 12 Geo. 2, c. 28, s. 2, Appendix; and see *M'Kinnell* v. *Robinson*, 3 M. & W. 441; *Rex* v. *Liston*, 5 T. R. 240.

Games or Lotteries by Dice within 12 Geo. 2, c. 28 (*u*). The Game of Rolypoly, or Roulet, is also prohibited under the same penalties (*v*).

Lotteries.

The Statutes containing provisions concerning Lotteries and Littlegoes are 10 & 11 Will. 3, c. 17; 9 Ann. c. 6; 10 Ann. c. 26; 8 Geo. 1, c. 2; 9 Geo. 1, c. 19; 6 Geo. 2, c. 35; 12 Geo. 2, c. 28 (*w*); 13 Geo. 2, c. 19; 42 Geo. 3, c. 119; 46 Geo. 3, c. 148; 6 & 7 Will. 4, c. 66; and 7 & 8 Vict. c. 109; and are to be found in Burn's Justice (*x*), under the head of "Gaming and Lotteries." Also see the late Acts 8 & 9 Vict. c. 74, with regard to advertising Lotteries, and 9 & 10 Vict. c. 48, for legalizing Art Unions.

Lotteries declared nuisances.

The statute 10 & 11 Will. 3, c. 17, recites the mischiefs arising from *Lotteries* under colour of certain patents and grants; and then enacts, not only that all such *Lotteries*, but also that *all other Lotteries*, are public nuisances (*y*).

Penalty for keeping a Lottery.

It imposes a Penalty of 500*l.*, to be recovered in any of her Majesty's Courts at Westminster, upon every person who may "exercise, expose, open or show to be played, thrown or drawn at, any such Lottery, Play, or Device, or other Lottery" (*z*).

Penalty for drawing at a Lottery.

Also a Penalty of 20*l.* to be recovered in like manner upon every person who "shall play, throw or draw at any such Lottery, Play or Device, or other Lotteries" (*a*).

Littlegoes declared nuisances.

The statute 42 Geo. 3, c. 119, recites the mischiefs occasioned by certain Lotteries called *Littlegoes*, and declares that "all such Games or Lotteries *called Littlegoes* are public nuisances" (*b*).

Penalty for keeping a place for a Lottery or Littlego.

And it is enacted that no person "shall publickly or privately keep any Office or Place, to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by Dice, Lots, Cards, Balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any Game or Lottery called a *Littlegoe*, or any other Lottery whatsoever not authorized by Parliament," under a Penalty of 500*l.*, to be recovered in the Court of Exchequer at the suit of the Attorney-General (*c*).

(*u*) 13 Geo. 2, c. 19, s. 9, Appendix.
(*v*) 18 Geo. 2, c. 34, s. 1, Appendix.
(*w*) See Appendix.
(*x*) 3 Bere & Chitty's Burn's Justice, 322.
(*y*) 10 & 11 Will. 3, c. 17, s. 1; and see *Allport* v. *Nutt*, 1 C. B. 989.
(*z*) 10 & 11 Will. 3, c. 17, s. 2.
(*a*) 10 & 11 Will. 3, c. 17, s. 3.
(*b*) 42 Geo. 3, c. 119, s. 1; and see *Allport* v. *Nutt*, 1 C. B. 989.
(*c*) 42 Geo. 3, c. 119, ss. 1, 2; and see *Allport* v. *Nutt*, 1 C. B. 989.

Penalty for suffering any Lottery to be drawn, &c.

The same Penalty is also incurred by any person who "shall knowingly suffer to be exercised, kept open, shown, or expose to be played, drawn, or thrown at or in, either by Dice, Lots, Cards, Balls, or by Numbers or Figures, or by any other Way, Contrivance, or Device whatsoever, any such Game or Lottery, in his or her House, Room, or Place" (*d*).

Justices have summary jurisdiction.

Before the passing of the Vagrant Acts, 3 Geo. 4, c. 40, and 5 Geo. 4, c. 83, Offenders not proceeded against for the above Penalty were punishable as *Rogues and Vagabonds*, under 17 Geo. 2, c. 5. But though by 5 Geo. 4, c. 83, s. 1, it is enacted "That all provisions heretofore made relative to *Rogues and Vagabonds*" are repealed, yet it would appear that the combined operation of 3 Geo. 4, c. 40, s. 21, and 5 Geo. 4, c. 83, s. 21, continues to Justices of the Peace their jurisdiction under 42 Geo. 3, c. 119 (*e*).

5 Geo. 4, c. 83, s. 4, "Instruments of Gaming."

By 5 Geo. 4, c. 83, s. 4, people playing or betting "in any street, road, highway, or other place, at or with any table or instrument of Gaming, at any Game or pretended Game of Chance, are to be deemed Rogues and Vagabonds," and to be liable to imprisonment with hard labour for any term not exceeding three calendar months. The words "instruments of gaming" here signify things destined for that purpose, and therefore were held not to apply to halfpence used for pitch and toss (*f*); nor to cards, as, in a case in which the defendant was seen to play with three cards, they were held by Erle, J., not to come within this designation in this statute (*g*). But it is now provided by the Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3, that "every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of 5 Geo. 4, c. 83, and as such may be convicted and punished under the provisions of that Act, or in the discretion of the Justice or Justices trying the case, in lieu of such punishment, by a penalty for the first

(*d*) 42 Geo. 3, c. 119, s. 2.

(*e*) *Case of H. King*, Bristol, Dec. 6, 1853; *S. C.* nom. *Reg.* v. *Justices of Bristol*, Jan. 11, 1854, Q. B.

(*f*) *Watson* v. *Martin*, 13 W. R. 144.

(*g*) *R.* v. *Roach*, Judge's Chambers, July 12, 1856.

offence not exceeding forty shillings, and for the second or any subsequent offence not exceeding five pounds." Where the defendants were charged with being on a Racecourse taking deposits on the bets made and amounts staked on the several Horses, and soliciting bystanders to make bets, charging ten per cent. on the amounts won, for the use of an instrument which displayed the state of the odds, and by a mechanical arrangement varied the announcement from time to time according to the bets made, and they having been convicted, it was held, that such a machine was "an instrument or means of wagering" (*h*). But betting odds on one of several Dogs about to run in a race and paying half a sovereign, is not playing or betting with a coin as an instrument of gaming (*i*). It would appear that a railway carriage (*k*), no less than an omnibus (*l*), is an "open and public place" within this statute (*k*). And a field belonging to a company which they allow their workmen and their families to use for recreation and bowling matches, and where strangers are also allowed to play and are not turned away, is a place to which "the public have access" (*m*).

Racing Sweeps.

Derby Lotteries or *Sweeps* on Races, &c. are illegal, and within the express words, and clear intention, of the Statutes against Lotteries (*n*). And this was so held by the Court of Queen's Bench in a case, where subscribers paid 1*l.* each, on condition that the subscriber whose name should be drawn out of a box, next after the name of the Horse, which afterwards should be placed first in the Race, was drawn out of another box, should be entitled to receive 100*l.* (*o*).

Sale of Property by Lot

The mischief intended to be remedied by the Laws against *Lotteries* was not the gain acquired by the individual keeping a *Lottery*, but the introduction of a spirit of speculation and gambling, tending to the ruin and impoverishment of families. Therefore if a Horse were sold by Tickets amounting in the aggregate to no more than his *true value*, that would be a *Raffle* or *Lottery* (*p*).

(*h*) *Reg.* v. *Wolverhampton* (*Justices*), *Tollett* v. *Thomas*, L. R., 6 Q. B. 514; 40 L. J., M. C. 209; 24 L. T., N. S. 508; 19 W. R. 890.

(*i*) *Hirst* v. *Molesbury*, L. R., 6 Q. B. 130; 40 L. J., M. C. 76; 23 L. T., N. S. 55; 19 W. R. 246.

(*k*) *Ex parte Freestone*, 25 L. J., M. C. 121.

(*l*) *Reg.* v. *Holmes*, 22 L. J., M. C. 122.

(*m*) *Turnbull* v. *Appleton*, 45 J. P. 469.

(*n*) The proviso in s. 18 of 8 & 9 Vict. c. 102, has no relation to Racing Lotteries, and therefore does not make them legal; *Gatty* v. *Field*, 15 L. J., Q. B. 408.

(*o*) *Allport* v. *Nutt*, 1 C. B. 988.

(*p*) See *Allport* v. *Nutt*, 1 C. B. 984.

Attempt to evade the Law.

Where an announcement was made by a dramatic performer that the holder of a certain Ticket of admission to the Theatre should be entitled to a gold watch of a specified value, and the price of Tickets had been consequently raised, it was held that the holder of the Ticket could not recover the value of the watch, as such a proceeding was in point of fact a *Lottery* (*q*).

So, too, the distribution of presents, according to a previous announcement after a musical entertainment to persons occupying certain numbered seats, who with the rest of the audience had paid a sum of money for admission generally to the room, the numbers of the fortunate recipients being called out, and the presents handed to them, was held to be a Lottery within 42 Geo. 3, c. 119, s. 2 (*r*).

Art Unions.

By the Act legalizing Art Unions (*s*), it is provided that voluntary associations constituted for the distribution of works of art by lot are to be deemed legal, where a royal charter has first been obtained.

A Lottery of Houses.

An action was brought to recover a sum of money upon a covenant contained in a deed which the defendant had executed on the 27th of October, 1849, whereby he covenanted to pay the plaintiff the sum of 630*l.* on the 27th of April, 1850. The defendant pleaded that the deed in question was founded upon, and was executed in pursuance of, an unlawful agreement which had previously been entered into between the parties, whereby it was agreed that certain Houses should be conveyed by the plaintiff to the defendant, to the intent and for the purpose that they should be disposed of by the defendant by *Lottery*. The defendant contended that the agreement was *illegal* under 10 & 11 Will. 3, c. 17, and the deed founded upon it *void*. The issue being upon the defendant, the defendant himself was put into the box, and stated that a scheme had been adopted at Manchester for disposing of house property by *Lottery*, and that he had entered into an agreement with the plaintiff for the purchase of seventeen houses in Sheffield, which, it was understood between them, were to be disposed of in the same manner. The shares were publicly advertised at Sheffield, and the first drawing took place in August, 1849, when a portion of the property was disposed of by the defendant, with the concurrence and assistance of the

(*q*) *Roddy* v. *Stanley*, 5 Ir. Jur. 10.

(*r*) *Morris* v. *Blackman*, 10 Jur., N. S. 520.

(*s*) 9 & 10 Vict. c. 48, s. 1.

plaintiff. It was then agreed that the remaining portion of the property should be transferred to the defendant, which was done accordingly, and on the same day the deed was executed upon which the present action was brought. All this was done, as the defendant stated, with the full knowledge of the plaintiff that the houses were to be disposed of by *Lottery;* and, in fact, the price which he was to pay for the same was much exaggerated by the illegal nature of the contract. The plaintiff had taken a book containing shares which he sold, and accounted for the proceeds to the defendant, who, at the time of the purchase, had no other means of paying for the property, except from any proceeds which he might obtain from the sale of the shares, and that was well known to the plaintiff. The Jury, upon this statement, immediately found a verdict for the defendant (*t*).

Ballot in Land Societies.

A question arises whether the Ballot which takes place in Land Societies for the choice of allotments constitutes a *Lottery* within the meaning of the Lottery Acts, and particularly 12 Geo. 2, c. 28 (*u*).

Allotment or Partition by Lots.

It is provided by the 11th section of this Act (*x*) that nothing contained in it is to affect any interest in lands, &c., held by any Allotment or partition by lots. But that all who may at any time become "part owners, joint tenants or tenants in common" of any land, &c., may take such interest as they might have done by virtue of any "Lot, scroll, chance or allotment whatsoever," if this Act had never been passed (*y*).

Choice of Allotments.

Where there are a great many subscribers to a Land Society, and Allotments only for a few, it may very fairly be said that it shall be decided by *Lot* whether a particular shareholder, A., shall have the choice of one of these Allotments, or whether he shall remain for the present *in statu quo*, that is, without the land, but with the same account in the books of the Society as before the Allotment.

The Conservative Land Society.

The plan of drawing by Ballot for priority of the right of choice, as adopted by the Conservative Land Society, is not unlawful. This balloting, which does no more than determine and regulate the order and priority in which the members are to be entitled to the right of selecting

(*t*) *Fisher* v. *Bridges*, before Lord Campbell, C. J., Queen's Bench, Feb. 1, 1853.

(*u*) See Appendix.

(*x*) 12 Geo. 2, c. 28, s. 11, Appendix.

(*y*) See *O'Connor* v. *Bradshaw*, 5 Exch. 890.

allotments, and to advances upon them when selected, does not appear to fall within the words or spirit of the *Lottery Acts*.

Periodical Drawings.

A Society constituted avowedly for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts (*z*).

Repayment of money.

And the only system of allotment which could be considered a *Lottery*, is where there are a number of subscribers who absolutely pay over their money for the chance of obtaining by the Ballot a portion of Land, but who have not the option of receiving back again the money after they have lost their chance.

Cock-fighting, Bull-baiting, &c.

Cock-fighting is illegal, and indictable at common law (*a*). *Cock-fighting* and a variety of other cruel sports were prohibited under a penalty by 5 & 6 Will. 4, c. 59, s. 3, which however was repealed by 12 & 13 Vict. c. 92, s. 1. By the 2nd section of this Act it was enacted that any person "cruelly beating, ill-treating, over-driving, abusing, or torturing, or causing or procuring to be cruelly beaten, ill-treated, over-driven, abused or tortured, any animal, shall pay a penalty not exceeding 5*l*." A cock has been held to be "an animal" within this section, and therefore a person who takes an active part in a cock-fight after one or both is disabled, is liable to be convicted under this section for causing or procuring a cock to be cruelly ill-treated, abused or tortured (*b*).

Keeper of a place for this purpose.

And by s. 3 of this Act it is enacted, that "every person who shall *keep or use or act in the management of* any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other bird or animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l*. for every day he shall so keep or use or act in the management of any such place, or permit or suffer any place to be used as aforesaid: provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed to be the keeper thereof; and

(*z*) *Wallingford* v. *Mutual Society*, L. R., 5 App. Cas. 685; 43 L. T., N. S. 258; 29 W. R. 81—H. L. And see *Smith* v. *Anderson*, L. R., 15 Ch. D. at p. 269, disapproving *Sykes* v. *Beadon*, L. R., 11 Ch. D. 170.

(*a*) Bac. Abr. Gaming (A.); 3 Keb. 403, 510.

(*b*) *Bridge* v. *Parsons*, 32 L. J., M. C. 95.

every person who shall in any manner encourage, aid or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding *5l.* for every such offence." It has been held to be no offence under this section to assist at a cock-fight unless in a place kept or used for the purpose (*c*).

Within the Metropolitan District.

By the Metropolitan Police Act (2 & 3 Vict. c. 47), s. 47, it is enacted, "that every person who within the Metropolitan Police District shall keep or use or act in the management of any House, Room, Pit, or other Place for the purpose of fighting or baiting Lions, Bears, Badgers, Cocks, Dogs, or other Animals, shall be liable to a penalty of not more than *5l.*, *or* in the discretion of the magistrate may be committed to the House of Correction, with or without hard labour, for a time not more than one calendar month; and it shall be lawful for the Commissioners of Police, by order in writing, to authorize any Superintendent belonging to the Metropolitan Police Force, with such Constables as he shall think necessary, to enter any Premises kept or used for any of the purposes aforesaid, and take into custody all persons who shall be found therein without lawful excuse, and every person so found shall be liable to a penalty of not more than *5s.*, and a conviction under this Act of this offence shall not exempt the owner, keeper, or manager of any such House, Room, Pit or Place from any penalty or penal consequence to which he may be liable for the nuisance thereby occasioned."

Gaming in a Public House.

It is an offence against the tenor of a Publican's Licence to suffer any gaming or any unlawful game to be carried on on his premises (*d*).

Where money is staked.

If money is staked at a lawful Game played in a Public House it is an offence against the tenor of the Licence (*e*). Accordingly it is an offence against the tenor of his Licence, if a licensed person allow private friends of his own, in his own private room in the Licensed Premises, to play at Cards for money (*f*).

But it is no offence on the part of a private friend of a licensed person entertained by him after the hours of closing at his own expense within the Licensing Act, 1874

(*c*) *Morley* v. *Greenhalgh*, 32 L. J., M. C. 93; *Clarke* v. *Hague*, 29 L. J., M. C. 105; *Coyne* v. *Brady*, 9 L. T., N. S. 30.

(*d*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17.

(*e*) *Reg.* v. *Ashton*, 22 L. J., M. C. 2, Q. B. Decided under 9 Geo. 4, c. 61.

(*f*) *Patten* v. *Rhymer*, 29 L. J., M. C. 189. See also *Hare* v. *Osborne*, 34 L. T., N. S. 294.

(37 & 38 Vict. c. 49), s. 30, that he was playing Cards for money on the Licensed Premises (*g*). If a licensed person permits on the Licensed Premises a Game to be played, in which each person contributes a certain sum towards the purchase of a prize to be given to the winner, he is properly convicted of unlawfully suffering Gaming to be carried on on his licensed premises contrary to s. 17 of the 35 & 36 Vict. c. 94 (*h*). But in order to support a conviction under s. 17 it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that Gaming was carried on on his premises (*i*). The offence may, however, be committed by connivance, either on the part of the principal or the person in charge (*j*).

Where money is not staked.

But not if there is no money staked. Therefore a conviction was held to be bad which stated that the keeper of a Public House licensed under 9 Geo. 4, c. 61, had been "Guilty of an offence against the tenor of his Licence, that is to say, that he knowingly suffered a certain unlawful Game, to wit, the Game of Dominoes, to be played in his house;" because the Game of Dominoes is not itself unlawful, and playing at Dominoes does not necessarily amount to "Gaming" within the meaning of the Licence (*k*).

Money lent for Gaming.

Money lent for the purpose of Gaming would appear to be now recoverable, unless it is lent where the Gaming is unlawful; as, for instance, by a licensed Publican to game on his own premises (*l*); or by any party to play Hazard, &c. And the principle is, that the repayment of money lent for the express purpose of accomplishing an illegal act cannot be enforced (*m*).

Money lent for the Stakes of a Prize-fight.

Thus in a case in which an action was brought to recover a sum of money which was lent for the express purpose of making up to the required sum the stakes to be deposited by one of the parties to a Prize-fight, Mr. Justice Shee nonsuited the plaintiff, on the ground that it was money deposited by the plaintiff for an unlawful purpose (*n*).

Test where the transaction is illegal.

The Test whether a demand connected with an illegal transaction is capable of being enforced at law, is,

(*g*) *Cooper* v. *Osborne*, 35 L. T., N. S. 347.

(*h*) *Bew* v. *Harston*, L. R., 3 Q. B. D. 454; 39 L. T., N. S. 233; 26 W. R. 915.

(*i*) *Bosley* v. *Davies*, L. R., 1 Q. B. D. 84; 45 L. J., M. C. 27; 33 L. T., N. S. 528; 24 W. R. 140.

(*j*) *Redgate* v. *Haynes*, L. R., 1 Q. B. D. 89; 45 L. J., M. C. 65; 33 L. T., N. S. 779.

(*k*) *Reg.* v. *Ashton*, 22 L. J., M. C. 1, Q. B.

(*l*) *Foot* v. *Baker*, 5 M. & G. 339; and see ante, p. 427.

(*m*) *M'Kinnell* v. *Robinson*, 3 M. & W. 441. See ante, p. 422.

(*n*) *Walker* v. *Langham*, Bail Court, Feb. 9, 1865.

whether the plaintiff requires any aid from the illegal transaction to establish his case (*o*). As where illegality appeared upon the plaintiff's own showing, who was unable to establish his case, without setting up an illegal agreement (*p*).

Securities for Money lent for Gaming.

Bills of Exchange, Promissory Notes, or Mortgages given for money lent knowingly for the purpose of Gaming, or playing at any Game, or lent at the time and place of such play (*q*), to persons who during any part of the time may play, are to be deemed to have been given for an illegal consideration (*r*).

Action on a Promissory Note.

Thus where an action was brought to recover the sum of 25*l.* on a Promissory Note given by the defendant to the plaintiff, the defendant pleaded that he had given the Note as security for a sum of money which the plaintiff had given him to enable him to carry out a gambling purpose on their joint account, namely—to enable him to make certain Bets on a Horse Race. And on this plea being proved, the Jury found a verdict for the defendant (*s*).

Identification of a Promissory Note.

To an action on a Promissory Note, the defendant pleaded that it was given for a Gambling transaction, but gave the plaintiff no Notice to produce it, and it was not produced. At the trial, the defendant gave evidence that he had never given the plaintiff any other Note than the Note in question. It was held that in the absence of the production of the Note, this was not sufficient to identify the Note referred to in the plea with the Note sued on (*t*).

An I O U.

An I O U being a mere acknowledgment of a debt, does not amount to a Promissory Note. It is *primâ facie* evidence of an account stated, but not of money lent (*u*). And it has been held that a Bill in Equity will lie to discover whether an I O U was given for money lent for the purpose of Gaming (*v*).

Money lost at Play.

Money lost at Play when paid cannot be recovered back

(*o*) *Simpson* v. *Bloss*, 7 Taunt. 246; *Fivaz* v. *Nicholls*, 2 C. B. 501, 513; Broom's Maxims, 4th ed. 692, 693.

(*p*) See *Martin* v. *Smith*, 6 Scott, N. R. 272.

(*q*) If the money is lent at the time and place, the purpose of the loan is assumed; *Foot* v. *Baker*, 5 M. & G. 339.

(*r*) 5 & 6 Will. 4, c. 41; and see Giving a Security for a Bet, p. 425.

(*s*) *Meynell* v. *Bone*, before Mr. Baron Alderson, Middlesex Sittings, E. T. 1853.

(*t*) *Meynell* v. *Bone*, 21 L. T. 158.

(*u*) *Fesenmayer* v. *Adcock*, 10 M. & W. 449; *Croker* v. *Walsh*, 4 Ir. Jur. 293 (Ex. Ir.); Byles on Bills, 13th ed. 29, and the cases there cited.

(*v*) *Wilkinson* v. *L'Eaugier*, 2 Y. & C. 366.

again by the loser (*w*). But if it has not been paid, the winner cannot maintain any action for it, because the contract is null and void (*x*).

Securities for money so lost.

All Securities under seal, except *Mortgages*, given for Money lost at lawful Play, or at any legal Game, would now appear to be good (*y*). But where a Promissory Note, a Bill of Exchange, or a Mortgage, has been given for money so lost, it is not *void* as formerly, but is to be deemed and taken to have been given for an *illegal consideration* (*z*). The consequence of which is, that they are still *void* as between the original parties, and also as against all persons who have taken them with Notice of the illegality, or after they have become overdue, or without giving value for them; but *good* in the hands of every person who has given value, and taken the instrument *bonâ fide*, and before it was due (*a*).

Accordingly where a bond was assigned for a valuable consideration without notice of objection to its validity, the obligor having applied to the assignee for a further advance, and offering to give a mortgage for the whole, but stating no objection to the validity of the bond, was not allowed afterwards to endeavour to avoid the bond by evidence that it was given to secure money lost by a bet on a Horse Race; for the Court will not allow a person to set up an objection to the validity of his own obligation upon grounds which he suppressed at the time, but against which, if divulged, the obligee could have protected himself (*b*). It appears, therefore, that bonds are within the equity of 5 & 6 Will. 4, c. 41, which makes securities valid in the hands of *bonâ fide* holders without notice that the consideration was a gaming debt (*c*).

General effect of 5 & 6 Will. 4, c. 41.

The effect of the Act, therefore, seems to be, that where a sum of money is won as a Stake in a lawful Game, or under other circumstances therein mentioned, and a Promissory Note, Bill of Exchange or Mortgage is given in payment, or as a security, not only is the instrument *void* as between the parties themselves, but the circumstance of its

(*w*) *M'Kinnell* v. *Robinson*, 3 M. & W. 441; *Thistlewood* v. *Cracroft*, 1 M. & S. 500; Smith, Contr. 188.

(*x*) 8 & 9 Vict. c. 109, s. 18.

(*y*) Formerly *void* under 9 Ann. c. 14, s. 1, which is altered and repealed by 5 & 6 Will. 4, c. 41, ss. 1, 2, and 8 & 9 Vict. c. 109, s. 15.

(*z*) 5 & 6 Will. 4, c. 41, Appendix.

(*a*) Smith, Contr. 186; *Fadenilke* v. *Holroyd*, before Chief Justice Wilde, Common Pleas Sittings, Nov. 30, 1846.

(*b*) *Hawker* v. *Halliwell*, 3 Sm. & Giff. 194. See also ante, p. 417, *Hill* v. *Fox*, 4 H. & N. 359.

(*c*) See post, p. 446.

having so been given *avoids the contract* on which it is founded. In such case, therefore, the Winner not only loses the benefit of his security in writing, but is deprived of his claim to the *consideration* upon which it was given.

The Court of Exchequer, however, appear to have gone further in their construction of the Statute; for Mr. Baron Rolfe, in delivering the Judgment of the Court in *Applegarth* v. *Colley* (*d*), and speaking of 5 & 6 Will. 4, c. 41, says, "That Act, while it repeals so much of the Statute of Anne as makes the securities *void*, expressly enacts that they shall be deemed to have been given on an *illegal* consideration, and it is impossible to impute to the Legislature an intention so absurd as that the consideration should be good and capable of being enforced until some security is given for the amount, and then that, by the giving of the security, the consideration should become bad."

The necessary conclusion is then arrived at, namely, "that the Statute of Anne, in connection with the 5 & 6 Will. 4, c. 41, must be taken to avoid all contracts for the payment of money won at play;" and of course all other contracts within the first section of 9 Anne, c. 14.

According to this view, then, every possible *consideration* within 5 & 6 Will. 4, c. 41, for any Note, Bill or Mortgage is *void*, and we are reduced to the dilemma of being obliged to hold that the Winner of a Stake or the lender of money in any lawful Game, where his right to recover could never otherwise be disputed, is precluded from his remedy on account of the existence of the possibility of his taking a Note, Bill or Mortgage within the Statute as security for his Stake or Loan. And therefore the sum agreed to be paid to the Winner of a Horse Race could never be recovered, if we hold that such a Race is now meant by the word Game. However, if the point had come directly before the Court, perhaps a different opinion might have prevailed.

In *Thorpe* v. *Colman* (*e*), the Court of Common Pleas studiously guarded themselves against expressing an opinion on the construction put by the Court of Exchequer upon 5 & 6 Will. 4, c. 41, and the case was decided on another ground.

In a later case (*f*), however, Mr. Justice Coltman makes the following remarks:—"It certainly does seem to be a

(*d*) *Applegarth* v. *Colley*, 10 M. & W. 732.

(*e*) *Thorpe* v. *Colman*, 1 C. B. 199.

(*f*) *Batty* v. *Marriott*, 5 C. B. 828.

singular anomaly, that the Winner of a Race should be entitled to recover the Stakes, and yet that by the combined operation of 9 Anne, c. 14, and 5 & 6 Will. 4, c. 41, if a Promissory Note or other Security were given for the amount, he would be precluded from availing himself of it, by reason of the illegality of the consideration."

The 5 & 6 Will. 4, c. 41, is "An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious and certain other illegal Transactions." It is founded on 16 Car. 2, c. 7, and 9 Anne, c. 14, both of which are Acts to prevent *excessive* Gaming; and the notion upon which the sections with regard to securities in writing were probably framed appears to have been, that there would be less danger of excessive and immoderate Gaming, if people were kept as much as possible to playing for ready money. The Legislature therefore having encouraged cash or money transactions, it is quite conceivable that a contract should be good so long as a money payment was contemplated, but become *void* between the parties immediately on security being given. This construction of the statute seems much more reasonable, than that all contracts within 5 & 6 Will. 4, c. 41, in connection with 9 Anne, c. 14, before any security is given, should be *void* between the actual parties.

Action against acceptor of Bill of Exchange.

To an action against the acceptor of a Bill of Exchange, drawn by the plaintiff, the defendant pleaded that a *Bet* was lost by the defendant to A. B., and that the said Bill of Exchange was, at the request of A. B., given and accepted by the defendant in consideration of the said *Bet*, and to secure payment thereof, contrary to the Statute, &c., and that there never was any other consideration for the acceptance of the said Bill; and that the plaintiff at the time when he drew, and the defendant accepted, the same, had Notice of the premises. The evidence was, that the defendant had accepted a prior Bill drawn by the plaintiff in consideration of the *Bet* lost to A. B., and that the Bill sued upon was given in renewal of that prior Bill. The Jury found that the Bill declared upon was given in consideration of the *Bet*, and that the plaintiff had Notice of it. And the Court of Queen's Bench held that the plea was good, and was an answer to the action under 5 & 6 Will. 4, c. 41 (*g*).

(*g*) *Hay* v. *Ayling*, 20 L. J., Q. B. 171; and see *Boulton* v. *Coghlan*, 1 Bing. N. C. 640.

Action by acceptor of Bill of Exchange.

Under 5 & 6 Will. 4, c. 41, s. 2, money paid to the indorsee by the acceptor of a Bill of Exchange, given for a Gaming consideration, may be recovered from the person in whose favour the Bill was originally accepted, in an action for *Money paid* by the plaintiff to the use of the defendant at his request (*h*).

Recovery of principal and interest.

And where such a Bill paid by the plaintiff bore Interest upon the face of it, it was held by the Court of Queen's Bench that the plaintiff was entitled to recover back the Interest paid, as well as the principal money, both being "secured" by the Bill (*i*).

Evidence of Owner of a Gaming House.

In an action on a Bill of Exchange, the defence was, that the money for which the Bill was given had been lost in a Gaming transaction. The person who let the Room in which the Gambling took place, was asked a question tending, if answered, to render him liable to be proceeded against under 8 & 9 Vict. c. 109, when the Judge interfered. On a motion for a new trial, on the ground of misdirection, the Court of Common Pleas held that the Judge was right, and refused the rule (*j*).

Summons to set aside a Warrant of Attorney.

In *Barnett* v. *Ravenshaw* (*k*), an order was made by a Judge at Chambers, on a summons to show cause why a certain Warrant of Attorney, alleged to have been given for a Gambling debt, should not be set aside.

A *Post Obit* Security held good.

In 1833, a *Post Obit* security was given in consideration of certain Gaming debts. In 1842, it was assigned to another party for valuable consideration, who gave Notice to the trustees of the fund. It was held in 1853, by the Master of the Rolls, that, after the lapse of time, the Deed must be considered to have been given for good consideration (*l*).

Deed substituted for one tainted with illegality.

In the case of *The Attorney-General* v. *Hollingworth* (*m*), it was held, that where, upon an advance of money, a security has been taken, which is tainted with usury (*n*) or other illegality, and afterwards another security is taken for the same advance, not tainted with the illegality, and obviating any necessity for resorting to the former one for the recovery of the money, such substituted security is valid, and the money really advanced can be recovered thereon.

(*h*) *Gilpin* v. *Clutterbuck*, 13 L. T. 71.

(*i*) Ibid. 159.

(*j*) *Fisher* v. *Ronalds*, 22 L. J., C. P. 62.

(*k*) *Barnett* v. *Ravenshaw*, 21 L. T. 63.

(*l*) *Hawker* v. *Wood*, 1 W. R. 316, M. R.

(*m*) *Att.-Gen.* v. *Hollingworth*, 27 L. J., Ex. 102.

(*n*) The 17 & 18 Vict. c. 90, s. 1, repeals all existing laws against usury.

CHAPTER V.

BETTING HOUSES AND GAMING HOUSES.

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BETTING HOUSES.

A Common Betting House.

IT is quite clear that any practice which has a tendency to injure the public morals, is an offence at common

law (*a*). And it is equally clear that the keeping of a common Betting House has such a tendency. For it is found that persons are tempted by such places, not only to spend more of their own money than they can properly afford to lose, but also to embezzle the property of their employers. It would appear therefore that by law a common Betting House is a public nuisance.

Act for the suppression of Betting Houses.

By the "Act for the Suppression of Betting Houses" (*b*), various stringent provisions are made, and it would appear that persons *using* any "House, Office, Room or other place," not excepting the Room at Tattersalls or Newmarket, or the Stand at Epsom, for certain purposes mentioned in the Act, are liable to the Penalties which it specifies (*c*).

"Using" under this Act.

It is not quite clear what is meant by the word "*using*," but as a "person using" a Place is distinguished from "persons resorting thereto," it is presumed that a *person using* a Place within the meaning of this Act, must be a person who uses the Place habitually not as a private individual, but as a person who makes a business of attending there for the purpose of holding himself out as ready to bet with "persons resorting thereto," or to receive money, &c., as the consideration for any assurance, &c. to pay money, &c. "on any event or contingency of or relating to any Horse Race, or other Race, Fight, Game, Sport or Exercise" (*c*).

"Place" within this Act.

In the case of *Doggett* v. *Catterns* (*d*), the defendant, a Betting agent and Bookmaker, was in the habit of standing under certain trees in Hyde Park, and there making bets on Horse Races, and receiving deposits. The plaintiff having made a bet with him, and paid his deposit, brought an action for the return of the deposit, and it was held by the Court of Common Pleas that the defendant had brought himself within the meaning of this Act, quite as much as if he had carried on his betting transactions in a room or booth, and that the plaintiff was therefore, under sect. 5 (*e*) entitled to recover back his deposit in an action for *money had and received*. But this decision was reversed by the Exchequer Chamber, and Pollock, C. B., was of opinion that such a construction of the Act was supplemental legislation ; but concurred with

(*a*) See *Rex* v. *Rogier*, 1 B. & C. 272; *S. C.* 2 D. & R. 431.
(*b*) 16 & 17 Vict. c. 119, Appendix.
(*c*) Ibid. ss. 1, 3.
(*d*) *Doggett* v. *Catterns* (Ex. Ch.), 13 W. R. 390; 19 C. B., N. S. 767.
(*e*) 16 & 17 Vict. c. 119. See post, p. 453.

the Judges in the Court below in thinking that a mere spot, although not a "house," "office" or "room," would not alone prevent it from being a place within the Act. But he thought it must be a place capable of having an owner or occupier, which that was not. There the defendant resorted to a spot by a tree. The crowd might push him away in moving about. There was no fixity of tenure even for the daytime. He had no more exclusive occupation of the spot than anyone else in the park (*f*).

Moveable Desk.

In *Shaw* v. *Morley* (*g*), the facts were as follows: On land adjoining a Race-course, and just outside an inclosure reserved for ticket holders, was a long strip of ground of six feet wide, bounded on one side by an iron railing, which surrounded the inclosure, on the other side by a permanent wooden paling facing the open ground. Within this strip were placed temporary wooden structures, in which during the Races the business of betting was carried on. They had desks fronting both ways, and at each desk was a clerk with a book, and a person standing in front of each desk conducted the business on behalf of the person who rented the strip of land, and the bets were recorded by the clerk. At one of these structures the defendant conducted this business, and, on appeal from a conviction under section 3, it was held that this was an "office" and a "place" within the meaning of the statute, and that the appellant was rightly convicted. And Kelly, C. B., expressly said that it did not matter whether there was a roof or none, or whether the structure was moveable or fastened to the earth.

Cricket ground.

A ground used for Cricket, Foot-racing, and other Games or Sports, is a place within the meaning of the Act, and the Owner, Occupier or Keeper, may be convicted under the Act for knowingly permitting any other person to use any such place for the purpose of betting with persons resorting to it, though the person so using it is in no sense the Occupier or Keeper of the premises (*h*).

Pigeon shooting.

In *Eastwood* v. *Miller* the defendant was the Occupier of enclosed grounds, in which a pigeon shooting match between two persons for 10*l.* a-side, and afterwards a foot-race, took place: and into which the public were admitted on payment of money. The persons who were admitted into the grounds

(*f*) *Doggett* v. *Catterns*, 19 C. B., N. S. 767; and see per Grove, J., *Gallaway* v. *Maries*, L. R., 8 Q. B. D. 280, 281.

(*g*) L. R., 3 Ex. 137; 37 L. J., M. C. 105.

(*h*) *Haigh* v. *Sheffield* (*Corporation*), L. R., 10 Q. B. 102; 44 L. J., M. C. 17; 31 L. T., N. S. 536; 23 W. R. 547.

made bets with each other, both on the pigeon match and on the foot-race. It was held that the grounds were a "place," and that they were kept and used by the defendant for the purpose of betting within the meaning of the statute (*i*).

In *Bowes* v. *Fenwick* (*k*), the appellant, Bowes, was on a Race-course, standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and it was fastened in the ground with a spike. The umbrella, when opened, was seven or eight feet high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters, "G. Bowes, Victoria Club, Leeds." There was also a card exhibited on which were the words "we pay all Bets first past the post." Bowes was calling out offering to make Bets; and he was seen to make Bets, the money being deposited with him, and for which he gave a ticket. On a case stated by Justices, the question for the opinion of the Court was, whether the stool and umbrella, used as aforesaid by the appellant, did constitute a "place" within the terms of section 3 of the Act. The Court held that they did, and the conviction was therefore affirmed; and Lord Coleridge, C. J., in delivering judgment, said, "It is plain that the appellant was (provided the stool and umbrella constituted an office, room or place within the meaning of the Act) publicly using them for a purpose prohibited by the Act. The only question raised before us was, whether or not they did constitute an office, room or other place. Now the thing described clearly was not a house or room. Was it an office or other place? Possibly it might be said to be in some sense an office: but I am of opinion that, at all events, it was a 'place.' It was an ascertained spot where the appellant, for the time at least, carried on the business of betting with all persons who might resort thither for that purpose. The card connected with the umbrella and inscription upon it clearly indicated a fixed and ascertained place used by the appellant for a purpose prohibited by the Act." Race-course, umbrella.

In *Gallaway* v. *Maries* (*l*), the respondent and a com- Moveable

(*i*) *Eastwood* v. *Miller*, L. R., 9 Q. B. 440; 43 L. J., M. C. 139; 30 L. T., N. S. 716; 22 W. R. 799.
(*k*) L. R., 9 C. P. 339; 43 L. J., M. C. 107; 30 L. T., N. S. 524; 22 W. R. 804.
(*l*) L. R., 8 Q. B. D. 275; 30 W. R. 151.

Box within Ring.

panion, having paid for admission, were in a railed inclosure of the grand stand at a Race-meeting. The companion stood on a small wooden box not attached to the ground, and he and the respondent called out offering to make and making Bets with other persons. The companion received the money for Bets made, and the respondent booked the same. They stood together in one place within the inclosure during the Races; and it was held that the fixed and ascertained spot, defined in the inclosure by the box at which the respondent orally advertised his willingness to bet, was a "place" used by him for the purpose of betting with persons resorting thereto; and Grove, J., in the course of his judgment, said, "Therefore I think all the cases show that a 'place' to be within the statute must be a fixed ascertained place, occupied or used so far permanently that people may know that there is a person who stands in a particular spot indicated by a certain definite mark with whom they may bet. I do not decide whether a person standing on a carriage step or in a circle where the turf was cut away, or where a little heap of stones was put down during the Races, would be within the Act if he offered to bet there. But I am far from saying that he would not be so. Here, however, in my opinion, was a place within the meaning of the Act."

Betting at Club.

But a Club, whose members habitually bet, is not within the meaning of the Act (*m*).

Purposes for which Houses or Places are not to be used.

No House, &c. or other Place is to be opened, kept or used for the purpose of the Owner, &c. or of any person *using* the same, or of any person employed or acting on behalf of such Owner, &c. or person *using* the same or any person managing or conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such Owner, &c. or person, or as or for the consideration for any assurance, &c. "to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any Horse Race or other Race, Fight, Game, Sport or Exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event," &c. Every such House or Place is declared to be a common nuisance (*n*), and is to be deemed a common Gaming House within 8 & 9 Vict. c. 109 (*o*).

(*m*) *Oldham* v. *Ramsden*, 44 L. J., C. P. 309; 32 L. T., N. S. 825.

(*n*) 16 & 17 Vict. c. 119, s. 1, Appendix.

(*o*) Ibid. s. 2.

Any Owner or Occupier, or person *using* any House, &c. or other Place, opening, keeping or using the same for any of the above-mentioned purposes, or being Owner or Occupier wilfully permitting the same to be opened, kept or used for any such purposes, or any person managing or assisting in conducting the business of any Houses, &c. or Place opened, kept or used for any such purposes, is on summary conviction before two Justices of the Peace (*p*) liable to a penalty not exceeding 100*l.*, and payment of costs, *or* to imprisonment not exceeding six calendar months (*q*). **Penalty for using them for such purposes.**

Any Owner or Occupier, or person acting on his behalf, or managing or assisting in conducting the business of any House, &c. or Place opened, kept or used for any of the above-mentioned purposes, who shall receive any money or valuable thing as a Deposit on any Bet on condition of paying any money or valuable thing, on the happening of any event "relating to a Horse Race, or any other Race, or any Fight, Game, Sport or Exercise," or as or for the consideration for any agreement, &c. to pay or give any money or valuable thing on any such event, and any person giving any acknowledgment, security, &c. on the receipt of any money or valuable thing so paid or given, purporting or intended to entitle the bearer or any other person to receive any monies or valuable thing on the happening of any such event, is on summary conviction before two Justices of the Peace (*p*) liable to a Penalty not exceeding 50*l.*, and payment of costs, *or* to imprisonment not exceeding three calendar months (*r*). **Penalty for receiving money, &c. on certain conditions.**

Any money or valuable thing received by any such person as a Deposit on any Bet, or as or for the consideration for any such agreement, &c. is to be deemed to have been received for the use of the person from whom it was received, and may be recovered with full costs in any Court of competent Jurisdiction (*s*). **Money, &c. so received may be recovered from the holder.**

The Act is not to extend to the Holder of any "Stakes or Deposit to be paid to the Winner of any Race or lawful Sport, Game or Exercise," or to be paid "to the Owner of any Horse engaged in any Race" (*t*); as where, for instance, the Owner of the Second Horse is entitled to receive back his Stake. **Act does not extend to Stakes in a Race, &c.**

Any person exhibiting or publishing, or causing to be **Penalty for**

(*p*) Or a Police Magistrate within the Metropolitan Police District, 2 & 3 Vict. c. 71, s. 14.
(*q*) 16 & 17 Vict. c. 119, s. 3, Appendix.
(*r*) Ibid. s. 4.
(*s*) Ibid. s. 5.
(*t*) Ibid. s. 6.

advertising, &c.

exhibited or published, any Placard, Advertisement, &c. making it to appear that any House, &c. or Place is opened, kept or used for the purpose of making Bets in manner above mentioned, or for the purpose of exhibiting Lists for Betting, or with intent to induce any person to resort to such House, &c. or Place, for the purpose of making Bets or Wagers in manner above mentioned, or any person who on behalf of the Owner or Occupier, or person using any such House, &c. or Place, may invite other persons to resort therein for the purpose of making any Bets or Wagers as above mentioned, is on summary conviction before two Justices of the Peace (*u*) liable to a Penalty not exceeding 30*l.*, and payment of costs, *or* to imprisonment not exceeding two calendar months (*x*).

Provisions of Betting Act, 1874, as to advertising.

And section 3 of the Betting Act, 1874 (37 Vict. c. 15), further provides that where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published—(1) whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will, on application, give information or advice for the purpose of or with respect to any such Bet or Wager, or any such event or contingency as is mentioned in the principal Act, or will make on behalf of any other person any such Bet or Wager as is mentioned in the principal Act; or (2) with intent to induce any person to apply to any house, office, room or place, or to any person, with the view of obtaining information or advice for the purpose of any such Bet or Wager with respect to any such event or contingency as is mentioned in the principal Act; or (3) inviting any person to make or take any share in or in connection with any such Bet or Wager—every person sending, &c., or causing the same to be sent, &c., shall be subject to the penalties provided as above in the 7th section of the principal Act with respect to offences under that section.

Power to search suspected Houses.

A Justice of the Peace, upon complaint made on oath, may authorize the search of any suspected House or Place by special warrant to a constable, who may obtain necessary assistance, and also use force if required to make an entry, and arrest, search and bring before a Justice of the Peace all persons found there, and seize all Lists, Cards or other documents relating to Racing or Betting (*y*). But the warrant and arrest above provided for do not dispense with the necessity of a regular information and summons giving

(*u*) Or a Police Magistrate within the Metropolitan Police District, 2 & 3 Vict. c. 71, s. 14.

(*x*) 16 & 17 Vict. c. 119, s. 7, Appendix.

(*y*) Ibid. s. 11.

the defendant notice of the charges made against him; and the want of such information and summons will render the proceedings on the hearing invalid (*z*). The information need not, however, be laid before two Justices —one is sufficient (*a*).

Power of Commissioners of Police.

Within the Metropolitan Police District, and the Dublin Metropolitan Police District, a Commissioner of Police may authorize any Superintendent of Police, accompanied by such Constables as may be directed to assist him, to enter any suspected House, &c. or Place, and to use force if necessary, and take into custody all persons found there, and to seize all Lists, Cards or other documents relating to Racing or Betting (*b*).

The levy and application of Penalties.

Penalties and costs may be levied by distress (*c*). Half of every pecuniary penalty is to be paid to the Informer, and the remaining half to be applied in aid of the Poor Rate of the parish or extra-parochial place where the offence was committed (*d*).

Where party neglects to prosecute.

In case a person who has laid any complaint or information do not appear at the time at which the defendant may have been summoned to appear, or on the adjournment of the summons, or neglect to prosecute, any Justices having authority to adjudicate may authorize some other person to proceed on such summons, or take out a fresh one, as if the previous summons had not been granted (*e*).

No objection allowed on matter of form.

An Appeal is given to Quarter Sessions (*f*), and no objection is to be allowed to the Information or Conviction on matter of form (*g*). Thus, in a case in which the information charged the defendant with having "on the 5th of October, and on divers other days and times between the said 5th of October, and the laying the information (Nov. 16), being then the occupier of a certain House in the said city knowingly and wilfully kept and used the same for the purpose of his betting with persons resorting thereto;" a conviction for so keeping and using the house on the 8th of November was held to be good and valid (*h*).

No appeal

A conviction before justices under this Act is a "criminal

(*z*) *Blake* v. *Beech*, L. R., 1 Ex. D. 320; 45 L. J., M. C. 111; 24 L. T., N. S. 764.
(*a*) *Lee* v. *Gold*, 44 J. P. 395—Q. B. D.
(*b*) 16 & 17 Vict. c. 119, ss. 12, 18, Appendix.
(*c*) Ibid. s. 8.
(*d*) Ibid. s. 9.
(*e*) Ibid. s. 10.
(*f*) Ibid. s. 13.
(*g*) Ibid. s. 14.
(*h*) *Onley* v. *Gee*, 30 L. J., M. C. 222.

from High Court.

cause or matter" within sect. 47 of the Judicature Act, 1873, and the Court of Appeal has, therefore, no jurisdiction to hear an Appeal from a judgment of the High Court quashing the Conviction on a case stated by Justices (*i*).

The remaining Provisions.

In this Act the *certiorari* is taken away (*k*), and a distress is not to be unlawful for want of form (*l*). In any action amends may be tendered (*m*), but one month's Notice of Action must be given, and it must be brought within three months of the doing of the alleged damages (*n*). This Act, which came into operation on the 1st of December, 1853 (*o*), did not extend to Scotland (*p*).

Extension to Scotland.

But now by s. 4 of the Act of 1874 (37 Vict. c. 15), the Act is extended to Scotland with the following modifications and provisions:—(1) The term "distress" shall mean poinding and sale. The term "misdemeanor" shall mean a crime and offence. (2) All offences or penalties under the Acts shall be prosecuted and recovered before the Sheriff of the County, or his substitute in the Sheriff Court, at the instance of the Procurator Fiscal, or of any private person, under the provisions of the Summary Procedure Act, 1864, and all the jurisdictions, powers, and authorities necessary for the purposes of this section are hereby conferred on the Sheriffs and their substitutes. (3) Every pecuniary penalty which is adjudged to be paid under either of the Acts is to be paid to the Clerk of the Court and by him accounted for and paid to the Queen's and Lord Treasurer's Remembrancer on behalf of Her Majesty. (4) The 13th and 14th sections of the principal Act are not to apply to Scotland, but any person who is convicted under either of the Acts may appeal against such conviction to the High Court of Justiciary, in the manner prescribed by such of the provisions of the 20 Geo. 2, c. 43, and any Acts amending the same, as relate to Appeals in matters criminal, and by and under the rules, limitations, convictions and restrictions contained in the said provisions.

GAMING HOUSES.

A common Gaming House.

All common Gaming Houses are nuisances in the eye of the law, not only because they are great temptations to

(*i*) *Blake* v. *Beech*, L. R., 2 Ex. D. 335; 36 L. T., N. S. 723.
(*k*) 16 & 17 Vict. c. 119, s. 14, Appendix.
(*l*) Ibid. s. 15.
(*m*) Ibid. s. 16.
(*n*) Ibid. s. 17. And see *Blake* v. *Beech*, L. R., 1 Ex. D. 320; 45 L. J., M. C. 111; 34 L. T., N. S. 764.
(*o*) 16 & 17 Vict. c. 119, s. 19, Appendix.
(*p*) Ibid. s. 20. Repealed by 37 Vict. c. 15, s. 4.

idleness, but because they are apt to draw together great numbers of disorderly persons; they promote cheating and other corrupt practices, and incite to idleness and avaricious ways of gaining property (*q*).

Indictment for keeping one.

The Keeper of a common Gaming House is indictable and punishable as for a misdemeanor with fine or imprisonment, or both; and his wife may be joined with him, or they may be indicted severally (*q*).

Charge in the Indictment.

The Indictment would seem to be good if it merely charges the defendant with keeping a common Gaming House (*r*); as where the person is indicted for the offence of keeping a House where people assembled to play *Rouge et Noir* (*s*).

Any person may go on with it.

And as it is an Indictment for a public Nuisance, and not for any matter in the nature of a private injury, any person may go on with it even against the consent of the original prosecutor, if he has discontinued it (*t*).

Statutory Provisions for an Indictment.

Under 25 Geo. 2, c. 36 (*u*), provision is made for the indictment of "any person who shall act or behave himself as master or mistress, or as the person having the care, government or management of any Gaming House, &c."

Notice by two inhabitants.

To encourage prosecutions for keeping Gaming Houses, &c., two inhabitants of any Parish or Place may give Notice in writing to the constable of any person there keeping a Gaming House, &c., upon which Notice the constable is to go with such inhabitants to a Justice of the Peace, who on making oath that they believe the contents of such Notice to be true, are each to enter into a recognizance in the sum of 20*l.* to give evidence, and the constable into a recognizance in the sum of 30*l.* to prosecute at the next General or Quarter Sessions or Assizes (*x*).

Binding over the party accused.

After the constable has entered into such recognizance to prosecute, the Justice is to make out his warrant to bring the accused person before him to be bound over to appear at the General or Quarter Sessions or Assizes, there to answer such bill or indictment (*y*) as may then be found for the offence. And the Justice may, in his dis-

(*q*) Hawk. c. 32, tit. Common Nuisances, 66; *Rex* v. *Dixon*, 10 Mod. 336; *Rex* v. *Mason*, Leach, C. C. 548; *Rex* v. *Rogier*, 1 B. & C. 272; *S. C.* 2 D. & R. 431.

(*r*) *Rex* v. *Rogier*, 1 B. & C. 272; *S. C.*, 2 D. & R. 431.

(*s*) Ibid.

(*t*) *Rex* v. *Wood*, 3 B. & Ad. 657.

(*u*) 25 Geo. 2, c. 36, ss. 6, 8.

(*x*) Ibid. s. 5.

(*y*) The *certiorari* in all cases is taken away by s. 10. See *Reg.* v. *Sanders*, 9 Q. B. 235.

cretion, take security for such person's good behaviour in the meantime (*z*).

Duty of Overseers of the poor.

The Overseers of the Poor of the parish or place are to pay the constable the reasonable expenses of prosecution, and on conviction 10*l.* to each of the two inhabitants, on penalty of forfeiting double the sum (*a*).

Penalty where Constable neglects his duty.

Any constable who may neglect or refuse upon such Notice to go before any Justice of the Peace, or to enter into such recognizance, or may be wilfully negligent in carrying on such prosecution, is for every offence to forfeit 20*l.* to each inhabitant giving such Notice (*b*).

Setting up or playing at Hazard, &c.

Any person setting up the Games of the *Ace of Hearts*, *Pharaoh*, *Basset or Hazard*, is liable on summary conviction before a Justice of the Peace to a penalty of 200*l.* And any person playing or staking at any of the Games is liable in the same manner to a penalty of 50*l.* (*c*).

Sufficient evidence that Hazard has been played.

On an information before two Magistrates under this Statute (*d*) "for setting up, maintaining and keeping a certain Game, to be determined by the chance of Dice, called Hazard," the proof was that certain persons were found in the House playing at Hazard with Cards; that a Dice-box and Dice were found on the table the subsequent day, and these facts were held sufficient to warrant the Justices to conclude that the Game of Hazard was there played (*e*).

Rent of a Gaming House.

If a person knowingly lets a House for the purpose of its being used as a Gaming House, he cannot recover the rent. This defence was set up in the case of *Parsey* v. *Edmonds* (*f*), but as it was not proved the Jury found a verdict for the plaintiff.

A subscription Club.

An establishment which is carried on as an ordinary Club, the members being regularly balloted for, and chargeable with an entrance fee of ten guineas, and the like for a yearly subscription, is held not to be a common Gaming House, though it appear that in part of the House Whist is generally played at 3 o'clock in the afternoon, and Hazard at night after supper, which is provided gratuitously for the members by the proprietor (*g*). But

(*z*) 25 Geo. 2, c. 36, s. 6.
(*a*) Ibid. s. 5.
(*b*) Ibid. s. 7.
(*c*) 12 Geo. 2, c. 28, ss. 2, 3, Appendix; *M'Kinnell* v. *Robinson*, 3 M. & W. 438.
(*d*) 12 Geo. 2, c. 28, s. 2, Appendix.
(*e*) *Rex* v. *Liston*, 5 T. R. 390.
(*f*) *Parsey* v. *Edmonds*, before Mr. Baron Martin, Ex. N. P. Jan. 20, 1853.
(*g*) *Crockford* v. *Lord Maidstone*, 8 L. T. 217; and see *S. C.*, Appendix.

if the rules are a mere sham, and no one is called on to pay if he plays, while all who choose to go there gain access, then the case is different (*h*).

What is a common Gaming House, under 8 & 9 Vict. c. 109

Under 8 & 9 Vict. c. 109, a common Gaming House, "contrary to law," may be a place either where people play an unlawful Game against a Bank, or where a lawful Game is so arranged that the chances are in favour of the Table. This is set out with particularity in the 2nd section of the Statute (*i*), which after *reciting* that "whereas doubts have arisen whether certain houses, alleged or reputed to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common Gaming Houses," *Declares and Enacts*, "that in default of other evidence proving any house or place to be a common Gaming House, it shall be sufficient in the support of the allegation in any indictment or information, that any house or place is a common Gaming House, to prove that such house or place is kept or used for playing therein at any unlawful Game, and that a Bank is kept there by one or more players exclusively of the others, or that the chances of any Game played therein are not alike favourable to the players, including among the players the Banker or other person by whom the Game is managed, or against whom the other players stake, play or bet" (*j*).

Power of Justices.

In every case, except within the Metropolitan Police District, in which the Justices of Peace in every Shire, and Mayors, Sheriffs, Bailiffs and other head officers within every City, Town and Borough, now have by law authority to enter into any house, room or place where unlawful Games are suspected to be held (*k*); any Justice of the Peace, upon complaint made before him on oath that there is reason to suspect any house, room or place to be kept and used as a common Gaming House, may by his warrant, at any time in his discretion, authorize any Constable, together with necessary assistance, to make an entry in the same manner as might have been done by such Justices, Mayors, &c. in person. Permission is also given to use force if necessary in making such entry, either by breaking open doors or otherwise, and authority is given to arrest,

(*h*) See note (*g*), ante.

(*i*) 8 & 9 Vict. c. 109, s. 2, Appendix.

(*j*) Ibid. For form of indictment, see Archbold's Criminal Pleading. As to other evidence of a house being a common Gaming House, see post, pp. 461, 462.

(*k*) 33 Hen. 8, c. 9, s. 14, Appendix.

search and bring before a Justice of the Peace both "the keepers and the persons resorting and playing there" (*l*), to be dealt with according to law (*m*).

In the Metropolitan District.

Within the Metropolitan District, if any Superintendent belonging to the Metropolitan Police Force report in writing to the Commissioners of Police of the Metropolis that there are good grounds for belief, and that he believes that a house, room or place within the Metropolitan Police District is kept or used as a common Gambling House; either of these Commissioners, by their order in writing, may authorize the Superintendent to make an entry, with such Constables as the Commissioner may direct to accompany him, and if necessary to use force to effect such entry, either by breaking open the doors or otherwise, and to take into custody all persons there found, and to seize all Tables and Instruments of Gaming, and all Monies and Securities for money found in such house or premises (*n*). He may also search all parts of the house or premises where he shall suspect that Tables or Instruments of Gaming are concealed, as well as all persons there found, and seize all Tables and Instruments of Gaming he may happen to find (*o*).

Penalties on Gaming House Keepers under 8 & 9 Vict. c. 109.

Under 8 & 9 Vict. c. 109, the owner or keeper, and every person having the care or management of such Gaming House, and also every banker, croupier and other person, in any manner conducting the business of it, on conviction, either by his own confession or by the oath of a credible witness before any two Justices of the Peace, besides being liable, under 33 Hen. 8, c. 9, to pay a fine of forty shillings for each day (*p*), and to be imprisoned till he shall have found sureties to abstain from such practices for the future (*q*), is liable to such an additional penalty of not more than 100*l.* as might be adjudged by the Justices before whom he may be convicted; *or*, in the discretion of such Justices, he may be committed for not more than six calendar months to the House of Correction, with or without hard labour. On non-payment of any penalty so adjudged, and of the reasonable costs and charges attending the conviction, one of the convicting Justices may, by his warrant, authorize the same to be levied by distress and sale of the goods and chattels of the offender (*r*).

(*l*) 8 & 9 Vict. c. 109, s. 3, Appendix. See post, p. 462.
(*m*) 33 Hen. 8, c. 9, s. 14.
(*n*) 8 & 9 Vict. c. 109, s. 6.
(*o*) Ibid. s. 7.
(*p*) 33 Hen. 8, c. 9, s. 11.
(*q*) 8 & 9 Vict. c. 109, s. 4.
(*r*) Ibid. See post, p. 462.

Penalty for playing.

The penalty under 33 Hen. 8, c. 9, for using and haunting and playing in Gaming Houses, was six shillings and eightpence for each time of so doing (*s*), and such persons when taken might be imprisoned till they gave security to abstain from such practices for the future (*t*).

Evidence of Gaming.

And where any Cards, Dice, Balls, Counters, Tables or other Instruments of Gaming used in playing any unlawful game are so found, it is evidence, until the contrary is made to appear, that such house, room or place is used as a common Gaming House, and that the persons so found were there playing; although no play was actually going on in the presence of such Superintendent or Constable or those accompanying him on his entry. And the Police Magistrate or Justices, before whom any person is taken by virtue of the warrant or order, may direct all such Tables and Instruments of Gaming to be forthwith destroyed (*u*).

Difficulty of obtaining Evidence.

But the difficulty of obtaining such evidence of Gaming was so great, that this portion of the Act proved to be practically a dead letter; for all Gaming Houses were found to be provided with the means of secretly making away with the Instruments of Gaming on any alarm being given; and the penalties inflicted were insufficient to correct the evil.

17 & 18 Vict. c. 38.

Accordingly to remedy these defects in the operation of the 8 & 9 Vict. c. 109, and the other Acts for the prevention of unlawful Gaming, a supplementary Act was passed in the year 1854, intituled "An Act for the Suppression of Gaming Houses" (*x*), which has been completely successful in accomplishing that object. It *recites* that "the keepers of common Gaming Houses contrive, by fortifying the entrances to such houses, or by other means, to keep out the officers authorized to enter the same until the Instruments of Gaming have been removed or destroyed, so that no sufficient evidence can be obtained to convict the offenders, who are thereby encouraged to persist in the Violation of the Law; and" that "it is expedient that the Law shall be made more efficient for the Suppression of Gaming Houses."

Persons sum-

With this object persons may be summarily convicted

(*s*) 33 Hen. 8, c. 9, s. 12. See post, p. 462, as to the penalties, which may be adjudged under 17 & 18 Vict. c. 38.

(*t*) Ibid. s. 14.

(*u*) 8 & 9 Vict. c. 109, s. 8.

(*x*) 17 & 18 Vict. c. 38, Appendix.

marily convicted of obstructing Officers.

under this Act before two Justices of the Peace of thus obstructing the officers, and, in the discretion of the Justices, may be fined a sum of money not exceeding 100*l.*, or be imprisoned, with or without hard labour, for any period not exceeding six calendar months (*y*). And the mere fact of obstructing the officers is to be evidence of the House being a common Gaming House (*z*).

Persons giving false Names or Addresses.

Persons found there, and giving false names or addresses, or refusing to give their names and addresses, may, upon summary conviction, be fined 50*l.*, or imprisoned for one month (*a*).

Owner or Occupier may be fined 500*l.* or imprisoned.

The Owner or Occupier, or any person "having the use of any House, Room, or Place, who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein, and any person, who being the Owner or Occupier of any House or Room, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purpose aforesaid, any person having the care or management of or in any manner assisting in conducting the business of any House, Room or Place opened, kept or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such House, Room or Place," may be summarily convicted before two Justices of the Peace, and be adjudged to pay any sum not exceeding 500*l.* and costs, or may be imprisoned, with or without hard labour, for twelve calendar months (*b*).

Persons apprehended may be made Witnesses.

Under this Act the Justices of the Peace, before whom persons found in a Room or Place of this description shall be brought, may require any of the persons apprehended to be sworn and to give evidence under a penalty for refusal (*c*); but persons making a full discovery may be freed from all penalties (*d*).

Penalties and Costs.

The Penalties and Costs inflicted under this Act may be levied by distress (*e*), which shall not be unlawful for want of form (*f*). And one-half of each Penalty shall be applied in aid of the Poor Rate of the Parish in which the offence shall have been committed, and the other half shall be paid to the person laying the information (*g*).

(*y*) 17 & 18 Vict. c. 38, s. 1, Appendix.
(*z*) Ibid. s. 2.
(*a*) Ibid. s. 3.
(*b*) Ibid. s. 4.
(*c*) Ibid. s. 5.
(*d*) Ibid. s. 6.
(*e*) Ibid. s. 7.
(*f*) Ibid. s. 12.
(*g*) Ibid. s. 8.

On the neglect of the person laying the information to prosecute the summons, the Justices may authorize any other person to proceed thereon, or to lay a fresh information (*h*). On neglect to prosecute, another Person may be authorized to do so.

An appeal is given to Quarter Sessions (*i*), but no objection is to be allowed to matters of form at the hearing of that appeal (*k*). And the judgment of the Justices thus given is not removable by *certiorari* (*l*). Remaining provisions.

By 8 & 9 Vict. c. 109, s. 10, a Licence is required for every House (*m*), Room or Place where a public Billiard table, or Bagatelle board or instrument used in any Game of the like kind is kept, at which persons are admitted to play, *except* in Houses or premises specified in a Victualler's licence (*n*). Billiards, Bagatelle, &c.

Justices of the Peace are authorized at their general annual licensing meeting to grant Billiard Licences to such persons as, in their discretion, they deem fit and proper to keep such public Billiard tables, on payment of six shillings, and such licences are to continue a year (*o*). And no appeal lies against a refusal by Justices to grant a Billiard Licence (*p*). The words "LICENSED FOR BILLIARDS" are to be legibly painted in some conspicuous place on the outside of the House and near the door (*q*). Regulations regarding Billiard Licences.

Every person neglecting to comply with these regulations may be proceeded against as the keeper of a common Gaming House, and in addition to the penalty to which he is liable for that offence, he may be fined any sum the Non-compliance with these regulations.

(*h*) 17 & 18 Vict. c. 38, s. 9, Appendix. By the 22 & 23 Vict. c. 17, s. 1, no bill of indictment for keeping a Gambling House (amongst other offences) shall be presented to or be found by any Grand Jury, unless the Prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear in answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a Judge of one of the Superior Courts or of Her Majesty's Attorney-General or Solicitor-General.

(*i*) 17 & 18 Vict. c. 38, s. 10, Appendix.

(*k*) Ibid. s. 11.

(*l*) Ibid.

(*m*) If a Billiard Table stands in a House, and the House should, in respect of such Table, let at a higher sum, it is rateable, while the Table continues there and it is so let at a higher rate; per Willes, J., *Rex* v. *St. Nicholas, Gloucester*, cited in *Reg.* v. *South Western Railway Co.*, 1 Q. B. 581.

(*n*) 8 & 9 Vict. c. 109, s. 11, Appendix.

(*o*) Ibid. s. 10.

(*p*) *Ex parte Chamberlain*, 8 E. & B. 644.

(*q*) 8 & 9 Vict. c. 109, s. 11.

Justices may fix upon of not more than 10*l.* for every day in which such Billiard table, &c. has been used; or in the Justices' discretion may be committed to the House of Correction, with or without hard labour, for any term not exceeding one calendar month. A power of distress is given for non-payment of any penalty; but no person summarily convicted can be indicted for the same offence (*r*).

Offences against the tenor of the Licence.

Persons offending against the tenor of their Licences are liable to the same penalties and punishments in the case of a first, second or third offence as keepers of Inns, Alehouses and Victualling Houses, under 9 Geo. 4, c. 61, and all the provisions of that Act with respect to convictions, penalties, &c. are to apply to convictions for offences against the tenor of the Licences under this Act, and to the consequent proceedings (*s*).

When Billiard playing is not allowed.

No keeper of any public Billiard table, &c., whether he have a Victualler's Licence or not, is to allow any person to play between one and eight in the morning of any day, or at any time on Sundays, Christmas Day, Good Friday, or any day appointed to be kept as a Public Fast or Thanksgiving, and no Victualler is to allow any person to play during the time his premises are not by law allowed to be opened for the sale of liquors; and during the hours that play is prohibited, every licensed house and every Billiard room in every licensed Victualler's must be closed (*t*).

Constables may visit licensed Houses.

All Constables and Officers of Police may enter any public Billiard room, &c. when and so often as they think fit, and the non-compliance with these regulations is to be deemed an offence against the tenor of the keeper's Licence (*u*).

(*r*) 8 & 9 Vict. c. 109, s. 11, Appendix.
(*s*) Ibid. s. 12. But see 35 & 36 Vict. c. 94, s. 75.
(*t*) Ibid. s. 13.
(*u*) 8 & 9 Vict. c. 109, s. 14, Appendix.

APPENDIX.

PART I.

UNREPORTED CASES.

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PETTINGALL *v.* PETTINGALL.

Before Vice-Chancellor Sir J. L. Knight Bruce, February 12th, 1847.

Annuity bequeathed to keep a favourite Mare.

THIS was a petition presented by five reversionary legatees of a fund which it was sought to have distributed among them, security being given to provide for the object of the testator's bounty, namely, a favourite black Mare, aged twelve years. The testator bequeathed to his executor, the plaintiff (who was his nephew), the sum of 50*l.* a year, to be expended for the keep of his favourite black Mare, which was to be "properly and comfortably kept in some park or paddock," to have her "shoes taken off, and never to be ridden or harnessed." "My executor," the testator said, "is to consider himself in honour bound to fulfil my wish, and to see that she is well provided for, and to be removable at his will, and at the Mare's death all payments to cease." The fund had been carried to an account called "The Black Mare's Account."

It had been declared that the executor was entitled to the annuity of 50*l.*, commencing from the death of the testator, for the proper and comfortable support and maintenance of the Mare, the executor undertaking to employ so much as was necessary for her support. The Mare had been placed in Holland Park, Kensington, and it was stated that the executor had fully complied, not only with the letter but with the spirit of the testator's will, and expended 30*l.* or 40*l.* annually in this way. Three of the reversioners were *femmes sole*, advanced in life, and were willing to give a sum of money to the executor in order to have the immediate benefit of the legacies; and the executor expressed his willingness to accept the offer, giving such security as the Court might require for the proper fulfilment of the testator's wishes.

The VICE-CHANCELLOR said, "I shall require not only a security for the executor's life but for the life of the Mare. Here is a trust in favour of the testator's favourite Mare, and this Court will take care that it shall be executed. Suppose the Mare to be ill-treated or neglected; suppose the Mare to be put into a cart, would the Court allow the executor to receive the annuity? The Court would find somebody else to take proper care of the animal."

Mr. *Wigram*, on the part of the petitioners, said that the residuary legatees might probably come and allege that the condition upon which the executor held the annuity had not been fulfilled.

The VICE-CHANCELLOR said, "Is it not the duty of this Court to fulfil the lawful intention of the testator? This animal, if well treated, may live for thirty years. I have a Horse myself which does not work, and which is considerably above thirty years of age."

Mr. *Wigram* stated that the executor had great affection for animals, and had provided the Mare in question with every comfort and luxury that could be required.

His HONOR said he would make the order asked for by the petitioners, who were unmarried, the executor giving security for the care of the animal. The security must be equal to that of the consols. It was possible that the price of corn or grass might before the Mare's death be so high that 50*l.* per annum might not be too large a sum necessary to be expended in carrying out the testator's wishes. He ultimately referred it to the Master to approve of a security, directing that the case should come again before the Court for its sanction of such security.

ALEXANDER AND ANOTHER *v.* LAIDLEY AND OTHERS.

Before Mr. Baron Alderson, Carlisle Spring Assizes, 1847.

Grainger, *Temple* and *Perronet Thompson* for the plaintiffs.
Atherton and *Vance* for the defendants.

Rule of the Road.

This was an action *on the Case* against the defendants for running down the ship of the plaintiffs.

Plea, not guilty.

ALDERSON, B., in summing up, said to the Jury, "If there be no peculiar circumstances to the contrary, it is the duty of each party to keep his side. A person must act upon a reasonable and sensible course. If you see a man's carriage standing on the wrong side, you have no business to run it down. If the night be dark and the circumstances are not perceptible, the parties must follow the rule."

SIMPSON *v.* POTTS.

Before Mr. Baron Rolfe, Carlisle Spring Assizes, 1847.

Pashley and *Unthank* for the plaintiff.
Temple for the defendant.

Sidebones.

This was an action for *Money had and received* to recover back the price of a Mare, which had been sold to the plaintiff by the defendant warranted sound. The Warranty was a verbal one, and the plaintiff's case was, that there was a condition in it authorizing a return of the Mare, if she should prove unsound, on which ground she had been sent back to the defendant; or that, at any rate, there had been an actual rescission by consent.

Mr. Brockbank, a Veterinary Surgeon, proved that the Mare was brought to him by both parties to be examined, as she was lame at that time, and they wished him to say whether it was an unsoundness. He said that the lameness was produced by *Sidebones*, which is in fact *Ossification of the Cartilages* (*a*), and is an unsoundness, whether it produce lameness or not. If the Mare had absolute rest for any length of time, the lameness would leave her, but quick work and a hard road would bring it on again; if she were ploughed, it would not so soon be shown.

It was contended for the defendant that there was no condition in the Warranty authorizing a return, and that the defendant had taken her back to sell her on behalf of the plaintiff.

ROLFE, B., told the Jury, "that they must be satisfied, either that the contract was rescinded, or that there was a

(*a*) Ossification of the Cartilages, ante.

condition in the Warranty authorizing a return of the Horse if it turned out unsound, and that in either of these cases *Money had and received* would lie." The Jury returned a verdict for the plaintiff.

HALL *v.* ROGERSON.

Before Mr. Baron Alderson, Newcastle Spring Assizes, 1847.

Knowles, Q.C., and *Mulcaster*, for the plaintiff.

Granger and *Otter* for the defendant.

Laminitis. This was an action of *Assumpsit* on a breach of the Warranty of a Horse.

Pleas, 1st. *Non Assumpsit.*
2nd. *Traverse* of the unsoundness.

The plaintiff bought a Horse of the defendant at the Newcastle August Fair, 1846, warranted sound and quiet. The Horse was re-sold with a Warranty to a Mr. Bramley at the Newcastle October Fair and taken to Nottingham; but on turning out lame, he was taken back by the plaintiff to Newcastle, and sold by auction in December. The Horse, before the first sale, had been twice burned for Sandcrack (*b*), which had been removed, and he had Cracked heels some time after sale. The alleged unsoundness was *Laminitis* (*c*).

To prove the unsoundness Mr. King, Veterinary Surgeon and Livery Stable-keeper, stated that he had seen the Horse in his forge a week or two before the first sale; that he had directed his shoes to be taken off, and on examining his feet, had observed a slight Convexity of Sole, which he pointed out to the defendant. The defendant then asked him if he would be justified in warranting the Horse as it had been warranted to him. The witness asked if he was satisfied the Horse went sound; he replied, "Perfectly so." The witness then said he was justified. The witness next saw the Horse at his own stables, where he was kept after he had been purchased by the plaintiff. He observed him *go short* and *crippled in his action*, and he then had *Cracked heels* (*d*). A man was instructed to poultice the forelegs, the heels were very tedious, and an ointment was applied. The Horse never got better of the crippled action while he stood there. He left October 29 and came back December 12. He was examined more carefully after he was returned by Mr. Bramley. The hoof was then very much contracted at the coronary ring, just at the junction of the hoof. The soles continued *convex*, the heels hit the ground first, he went lame at that period, and was not a sound Horse.

(*b*) Sandcrack, ante.
(*c*) See Laminitis and Pumiced Feet, ante.
(*d*) See Grease, ante.

The witness's opinion was that he had *Laminitis* (*e*), or inflammation of the *Laminæ* of the feet, namely, of the connecting medium between the Coffin-bone and the interior of the foot, which is admitted to be the supporter of the foot, there being numerous fleshy plates. That *inflammation of the foot* (*f*) includes many other diseases, and produces an alteration in the structure of the hoof and sole. (ALDERSON, B.: No doubt that is an unsoundness, and a very fatal one.) It is called *Chronic Founder* (*g*), and must have lasted some time, several months, most probably in August; it generally produces lameness, and is a disease. (*Alderson*, B.: I hold whatever *disease* a Horse has, which renders it less capable of working, is an unsoundness.) 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." He then stated that after an inflammation of the *Laminæ*, the feet are never thoroughly restored. *Convexity of sole* (*e*) comes on some time after a Horse is foaled; in this case he must originally have had a thin sole. It can never resume its natural appearance after being once *convex*, and amounts to an unsoundness. Inflammation of the *viscera* or of any important organ is known to settle in the feet.

Mr. Pluyes, a Veterinary Surgeon, and partner of the last witness, remembered the Horse coming to their Stables in August, and frequently saw him exercised in the yard; he went *crippled*, and did not put out his *fore feet freely* at that time; he thought it proceeded from *Cracked heels* (*h*). In December they examined him and found a great alteration of structure in his feet, which might take place in a short time if the inflammation were *very acute*.

Mr. Bramley, a Horse-dealer and Publican at Nottingham, bought the Horse of the plaintiff for 55*l*. at the Newcastle October Fair warranted sound. The morning after purchase, he came out lame at Ferry Hill, about twenty miles off; it was supposed to proceed from *Cracked heels* (*h*). (ALDERSON, B.: That would be an unsoundness.) When the Horse arrived at Nottingham he was still lame, and the witness had him examined by Mr. Taylor, a Veterinary Surgeon, and in a few days the *Cracked heels* got well.

To prove the expense of bringing back the Horse, a Porter on the York and Newcastle Railway was called, who, in December, saw the Horse at the Railway Station, and received the fare for him from the plaintiff.

On the part of the defendant witnesses were called to prove the antecedent History of the Horse, and to show that he

(*e*) See Laminitis and Pumiced Feet, ante.
(*f*) See Contraction, ante.
(*g*) See Founder, ante.
(*h*) See Grease, ante.

never had inflammation before sale, but only a *Sandcrack* (*k*), which had been burnt and cured. It was also proved that the Horse, when in the plaintiff's possession, had been hard driven by a servant, and that the Horse and gig had rolled down a bank of eighteen feet, after which the Horse could hardly walk home; it had been found necessary to bleed him, and the defendant's case was that there had been a *metastasis* of the inflammation from the *viscera* to the feet.

Mr. Taylor, a Veterinary Surgeon, examined the Horse at Nottingham on the 10th of November; he then was lame in both feet, the sole was flat and partially *convex*, and decidedly unsound. The feet had all the appearance of *Laminitis* (*l*) having existed for some time, which had produced an alteration in the shape of the foot. The *Coronary Ring* was contracted, which is a symptom of *Laminitis* (*l*). It generally makes a Horse put his heels first to the ground, and go short. The witness gave a Certificate of unsoundness. On cross-examination the witness stated that a Horse might so far recover as to ordinary observation to appear sound, but that the lameness would return when he was put to the ordinary work. (ALDERSON, B.: It must be *ordinary work*, because more than ordinary would not be fair.)

The Horse was sent for to be inspected, and the Judge allowed the Jury to go out and see him.

In summing up, ALDERSON, B., said to the Jury—"The plaintiff must make out the Horse unsound on the 29th of August, namely, at the time of sale. The only doubt is on the second issue: if the plaintiff leaves it in doubt, the verdict must be for the defendant. Where a person seeks to show that an unsound Horse has been sold to him, he should give notice pretty soon. Here it was not from August till November, and the examination was made in December. You must be certain that this disease had its origin as a formed disease at the time of sale. It is unfair for a party if he has no Notice; therefore a case should be very clearly proved. There may be a *metastasis* or change of position, either in the human frame or in that of animals. If you find for the plaintiff, you must give the difference between the value of the Horse when sold and when returned. How much worse was he for the disease? If the plaintiff has improvidently sold him, the defendant is not to suffer. You must add 3*l*. 19*s*., the cost of bringing him back from Nottingham." The Jury found a verdict for the defendant.

(*k*) Sandcrack, ante.
(*l*) See Laminitis and Pumiced Feet, ante.

REGINA *v.* COOK.

Before Mr. Baron Alderson, Liverpool Spring Assizes, 1847.

Furious riding.

The Prisoner was indicted for *Manslaughter* in having furiously ridden over and killed a person on the road.

ALDERSON, B., in summing up, said to the Jury—"The Prisoner is indicted for *Manslaughter;* are you satisfied that his act and his negligence caused death? If a man runs against another with a Horse at an *improper pace*, and so causes his death, it is *Manslaughter;* if it is *reckless*, it is *Murder*. In the same way as it has been held where bricks were thrown from the top of a House into a thoroughfare, and killed a person; if a man rides recklessly a wild Horse into a crowd and kills a person, it will be *Murder*. If he has not used the caution or care of a reasonable man it will be *Manslaughter*."

"It is a serious question whether a drunken man riding a Horse and killing another is not guilty of *Manslaughter*. Had the Prisoner in this case, by his previous acts, incapacitated himself from taking care of the Horse, or by his own conduct made it unmanageable?"

"If the accident arose from the Horse's bad temper, the Prisoner's conduct not contributing to the accident, the Prisoner must be acquitted." The Jury acquitted the Prisoner.

MATTHEWS *v.* PARKER.

Before Mr. Justice Maule, Gloucester Spring Assizes, April 8th, 1847.

Godson, Q.C., and *Cripps*, for the plaintiff.
Whately, Q.C., and *Cooke*, for the defendant.

Navicular disease.

This was an action on the Warranty of a Horse. It appeared that in May, 1846, the plaintiff bought at Stow Fair of the defendant a bay Horse warranted sound. On the day after its arrival at Cirencester, where the plaintiff resided, it exhibited symptoms of lameness, which increased till the 23rd of June, when it was examined by an experienced Veterinary Surgeon, who pronounced it to have *Navicular disease* (*m*) in both the fore feet, of which fact the defendant had Notice. The Horse was sold by auction as a lame Horse, and bought by the defendant, who was in the habit of attending Cirencester Market.

For the defendant witnesses were called to prove that the Horse was sound, and could therefore never have had the *Navicular disease* (*m*), as it is incurable. It transpired during

(*m*) Navicular Joint Disease, ante.

the trial that the defendant was a member of a Horsedealer's club in London, the funds of which were devoted to pay the expenses of trials. The Jury found a verdict for the plaintiff.

ATKINSON *v.* HORRIDGE.

Before Mr. Justice Coltman, Chester Spring Assizes, April 9th, 1847.

Townsend and *Egerton* for the plaintiff.
Chilton, Q.C., and *Welsby*, for the defendant.

Thick-wind. This was an action of *Assumpsit* on the Warranty of a Horse.

Pleas, 1st. *Non assumpsit.*
2nd. *Traverse* of the unsoundness.

It appeared that the plaintiff was a gentleman living at Leeds, and the defendant a gentleman well known in the Cheshire Hunt. At Chester October Races, the defendant's Horse Paragon was standing at the Albion Hotel, at the price of 150 guineas, and another Horse at 60 guineas. The plaintiff bought them for 210*l.* Paragon was warranted, but the other was not. The plaintiff's groom fetched the Horses to Leeds, where they arrived on the 5th of October. At the end of a canter next morning the groom detected that the Horse breathed thick. The plaintiff immediately submitted the Horse to Mr. Yates, a Veterinary Surgeon, who pronounced the Horse to be suffering from a *Chronic* affection, arising from a *Thickening of the mucous membrane* (*n*), which was incurable and an unsoundness, although it would not prevent the Horse being hunted. The plaintiff then wrote to the defendant inclosing Mr. Yates's Certificate, and stating that he would send the Horse to Manchester to meet his groom on any day he might appoint. No reply was received; and the plaintiff wrote a second letter again requesting that the groom might be sent to Manchester. The defendant wrote that he had submitted the Certificate to a competent surgeon and a good sportsman, who said that no specific unsoundness had been alleged. He offered to refer the matter to a sportsman and a gentleman. The plaintiff submitted the Horse to other Veterinary Surgeons, who confirmed the opinion of Mr. Yates, and certified that he had a *Chronic disease* in the air passages, constituting *Thick breathing* (*o*). This Certificate was also forwarded to the defendant. Some additional correspondence then took place, and at last the Horse was sold for 56*l.*, which sum was reduced by expenses to 48*l.*, and it was for the dif-

(*n*) See Thick-wind, ante. (*o*) Ibid.

ference between this sum and the purchase-money that the action was brought.

The defendant called several Veterinary Surgeons, but the Jury found for the plaintiff 101*l.* 5*s.* damages.

On the first day of the Easter Term following, *Chilton*, Q.C., moved for a new trial, on the ground that the verdict was against evidence, and also that the Horse, though *Thick-winded* (*p*), was not unsound; as the celebrated Horse Eclipse was known to be *Thick-winded* (*p*), though the Veterinary Surgeons called by the plaintiff professed themselves ignorant of such having been the fact.

Lord DENMAN, C. J.—"We will see the learned Judge on the subject."

CROCKFORD *v.* LORD MAIDSTONE.

Before the Court of Exchequer (*Sittings in Banco*), *May 7th*, 1847.

Humfrey for the plaintiff.

E. James for the defendant.

A common Gaming House.

This was an action brought by the widow of the late Mr. Crockford to recover the price of some dinners supplied to the defendant from Crockford's Club at his lodgings in Bolton Street, for some suppers in the Club House, and for two years' subscription to it at ten guineas a year.

The defendant paid into Court the price of the dinners supplied in Bolton Street, and to the residue pleaded that the plaintiff kept a *Common Gaming House*, and let him have the use of it to the end that he might be enabled to play at certain unlawful games, and that he did accordingly play.

The case was tried before the Lord Chief Baron at the sittings after Michaelmas Term, when his Lordship, in summing up, said to the Jury, "That although money lost at play in a *Common Gaming House* was not recoverable at law, still the common law of the land did not make it illegal to play at Whist, Chess or any other Game; and in this case there was not a tittle of evidence to show that the Club kept by the late Mr. Crockford was a Common Gaming House. That, however, was a question for them to decide. If they decided that it was not a Common Gaming House, then they would give a verdict for the plaintiff, provided they were satisfied the money was due."

The Jury found a verdict for the plaintiff.

A rule *nisi* for a new Trial was subsequently obtained, on the ground of misdirection, in consequence of the Lord Chief Baron having told the Jury, that there was no evidence that the Club was a *Common Gaming House*.

(*p*) See Thick-wind, ante.

It was contended for the defendant, that as Hazard, which is an illegal Game (*q*), was played in the House, it was therefore a *Common Gaming House.*

The Court, however, seemed to be of opinion, that as there was no evidence that the defendant was admitted into the Club *for the purpose* of engaging in unlawful Games, or that he had joined in them, and that as a subscription was required, which excluded all but elected members of the Club, it could not be said to be a *Common Gaming House.*

The case, however, was settled without any formal decision on the subject.

SMART *v.* ALLISON.

Before Lord Chief Justice Wilde, Guildhall, December 17th, 1847.

Cockburn, Q.C., *James* and *Bramwell*, for the plaintiff.
Knowles, Q.C., and *Addison*, for the defendant.

Alteration of structure in the Feet.

This was an action brought to recover damages for the alleged breach by the defendant of a written Warranty given by him on the sale to the plaintiff of a Black Gelding for 150*l.*, which Warranty stated that the Horse was "warranted sound and free from vice," and was dated November 23rd, 1846.

It appeared that the plaintiff and defendant were both Horsedealers, the former residing at Cricklade, in Wiltshire, and the latter near Darlington. On the 22nd of September, 1846, the servant of the plaintiff being at Howden Fair, for the purpose of purchasing Horses, saw there the Black Gelding in question, and, after some bargaining, bought him for 150*l.*, upon the defendant's giving the above-mentioned written Warranty. Before the completion of this bargain it was proved by the servant himself, that he observed to the defendant that the fore feet of the Horse presented appearances very like those consequent on fever, although when trotted and cantered on soft ground he showed no symptoms of lameness. From Howden the animal was taken by railway to the plaintiff's residence, where he remained for about ten days, during which time nothing more was done with him than merely to give him a little physic and moderate exercise in a neighbouring paddock. At the end of that time he was sold by the plaintiff to a Mr. Hardy, who resided in Warwickshire, for 200*l.*, with a Warranty of soundness. That gentleman had the Horse taken safely home, and kept for about a month on gentle daily exercise. At the end of that time the Horse, on being one

(*q*) See Hazard, ante.

day trotted on hard ground, was for the first time found to go lame. A Veterinary Surgeon's opinion was then taken, and he declared the Horse to be unsound from disease in the hoof, produced by previous acute fever, and thereupon the Horse was, with his Certificate, returned to plaintiff, who paid back to Mr. Hardy the 200*l.* purchase-money. On the 6th of November, 1846, the defendant was made aware by letter of what had taken place, and called upon to receive back the Horse, otherwise he would be sold by auction, and the defendant held responsible for any difference in price. At first the defendant did not reply, but at length he wrote to regret what had happened, and to say that the Horse had been in his possession since he was two years old, and never had been lame except for a day from a thorn picked up when hunting, and that he had had no disease at all whilst in his possession. The defendant declining to take back the Horse, he was ultimately sold at Dickson's Repository for 50*l.* 13*s.* 6*d.* net, and for the difference between that sum and his cost price the present action was brought.

To prove the alleged unsoundness a number of Veterinary Surgeons were examined, and the substance of their evidence was, that, judging from the flatness of the Horse's soles, and the sunken and ribbed appearance of the wall of the hoof of both the fore feet, they were affected by disease, the off one being the most so of the two. That the disease *Chronic Laminitis* consisted of a partial destruction by acute inflammation of the *laminæ* of the foot, being that internal substance which connected the sensitive parts with the insensitive horny covering; and there was a consequent unnatural pressure downwards of the coffin bone, which in time caused the sole of the hoof to become flat. This disease they also proved rendered the Horse decidedly unsound and liable to frequent attacks of lameness, and must have existed for some considerable time, eight or ten months; and they added, that, as previous acute inflammation was the original cause of the disease, the Horse must have shown lameness before, and to such an extent as to be at once perceived. The further evidence was that of four or five Horsedealers, of whom the two first proved that whilst on different occasions looking at the Horse, with the object of purchasing him before he was sold to the plaintiff, each observed particularly to the defendant the appearance of his fore feet, upon which the defendant said to one of them that the Horse had never been lame except once, when he had the fever in his feet. Two other witnesses then proved that in 1845 the same Horse had been sold to one of them with a Warranty of Soundness, and that when the other went to receive him at a place about twenty-two miles distant from the plaintiff's residence, he found the Horse quite lame, and refused to accept him; and the result was, that the Horse

was taken back to the defendant's, and an end put to the purchase.

The case for the defendant rested on the ground that the Horse had been in his possession since he was two years old, and never had any such disease as that stated by the plaintiff's witnesses; that his feet had always remained of the same appearance from birth, and that the Horse had never been lame with him but once from the prick of a thorn. To make out this defence the person who bred the Horse was called, and he said that at eighteen months old the Horse got two prizes as being well formed; that he had good strong feet when the defendant purchased him at two years old, in 1842; and in 1844, when the witness again saw him, his feet had not been altered by any disease. The next witness was the Groom of the defendant in whose care the Horse had always been, and he said the Horse was rather flat-footed, and his hoof was a little ribbed outside and sunk. He had, however, always been so, and had never had fever in his feet or any other disease, or shown any lameness except on the occasion when he was proved to have been first returned, and then only, as was at the time discovered, from the effects of a thorn, which was perfectly cured in a few days. The Horse had been hunted frequently before the defendant sold him, as also after having lately come back into the defendant's possession, without exhibiting any lameness whatever. This witness also stated, that, although in the defendant's yard on the occasion alluded to by some of the plaintiff's witnesses, he had never heard the defendant say to any one that the Horse had had fever in his feet, or talk particularly about the Horse's feet. Other witnesses were called to prove that no alteration from disease had taken place in the Horse's feet, and that, though often seen out, the Horse had never been observed lame, one of the witnesses who proved this latter circumstance being the son of the party who purchased the Horse at Dickson's.

The Lord Chief Justice left it to the Jury to say whether or not when the Horse was sold to the plaintiff, the structure of his feet had been altered by disease to such an extent as to cause lameness, and render him unfit for ordinary purposes. If they thought such had been the case, then they ought to find for the plaintiff, but if otherwise then for the defendant. The amount of damage, if any, should be the difference between the cost price to the plaintiff and that for which the Horse was sold.

The Jury found a verdict for the plaintiff. Damages 99*l.* 6*s.* 6*d.*

HYDE *v.* DAVIS.

Before Mr. Justice Coleridge, Liverpool Spring Assizes, March 24th, 1849.

Wilkins, Serjt., and *Aspinall*, for the plaintiff.
Martin, Q.C., and *Atkinson*, for the defendant.

This was an action on the Warranty of a Horse. Disease of the Lungs.

The plaintiff and defendant were both Horsedealers, the plaintiff carrying on business in Liverpool, and the defendant at Stratton-on-Harrow, in Herefordshire.

On the 23rd of August, 1848, the plaintiff purchased a young Chesnut Gelding of the defendant for 62*l.*, with the following Warranty: "This is to certify that I have this day sold to Mr. James Hyde, Horsedealer, a Chesnut Gelding; the said Gelding I warrant sound, free from vice, steady in harness, no crib-biter, and no wind-sucker." Next day the Horse was sent to Liverpool, and appeared to have a little Cough. On being put into the plaintiff's stables the Horse looked depressed, and his Cough continued. It was then found that he had a sore throat, and it being supposed that he had taken cold he was treated accordingly, and had some stimulating application given to him for his throat, after which he seemed better. The Horse was afterwards, on the 22nd of September, sold at Howden Fair, to Mr. Widdows, Veterinary Surgeon, who took him to Bristol, where he died on the 12th of October.

After death there was a *post-mortem* examination of the Horse, and his Lungs were found to be extensively diseased, to be full of tubercles, and of the substance of liver. The Liver was also double its proper size. The Veterinary Surgeons called in were of opinion, and gave evidence to the effect, that the Horse died from disease of the Lungs, and that the disease was of long standing, and that a Horse having such a disease was not sound.

For the defendant it was contended that the Horse was sound when sold; that he had been bred by a farmer, who sold him to the defendant; that the Horse had never done any work, and was five years old. That the greatest care had been taken of him, as he had been bred to sell; that the cause of his death was sudden inflammation from a cold caught after he had been sold, when travelling to and from Fairs.

To prove this several Veterinary Surgeons of eminence were called, and among them Professor Dick, of the Veterinary College, Edinburgh, founded by him in 1817, who gave evidence to the following effect:—That Disease in the Lungs had frequently come under his notice, as it frequently happens in Horses; the ordinary causes being changes of temperature, particularly a transition from cool air to a close

confined stable, and more especially during the prevalence of particular winds. The disease is usually ascertained by a Cough, there being commonly a slight shivering. It always affects the skin more or less, the coat stares, the animal seems unthrifty, and is never in sleek condition. The breathing and pulse are always more or less affected. The Lungs become liverlike, and have tubercles and abscesses, which run into one another and are two different stages. When the Lungs are much diseased or hepatized, there is an interruption of blood and consequent enlargement of the Liver. Hepatization takes place very rapidly in the Lungs, in consequence of their extreme vascularity. It seldom happens that both Lungs are equally affected. When inflammation has taken place sufficiently to produce hepatization, there is an invariable tendency to produce tubercles and abscesses. Then the disease commonly runs its course from ten days to a fortnight, depending in some measure upon the treatment. If he had found the Lungs hepatized with tubercles and abscesses, and the Liver double its weight, containing cheesy matter, he should have said it had lasted for a week. He had however met with many cases of tubercles, abscesses, and hepatization, which must have lasted longer. He had known a Liver enlarged twice its natural dimensions in less than a week. This arises from distension with blood. He should expect the Liver to be congested. If it was very pale the complaint must have been chronic. Purging carried to excess increases inflammation of the Lungs. The functions of the Liver is to separate the bile from the blood. He should expect to find irritation of the bowels when the Liver is enlarged. The Liver in this case weighed 32 lbs. instead of 15 lbs. The disease is like a galloping consumption in a human being.

In answer to a question put by the learned Judge the witness said,—"I consider the disease in the Lungs began within a fortnight of his death, but that there had been a Catarrh from the time the man led him home."

Mr. Justice COLERIDGE told the Jury that the question they had to consider was, had the Horse the seeds of the disease on the 23rd of August? The plaintiff must make out this proposition. The defendant maintained that the Horse was sound at the time of delivery. The Horse had been sold a short time before his death, and both the plaintiff and the buyer had been taken in.

The Jury found a verdict for the plaintiff. Damages 62*l*.

Buckingham *v.* Rogers.

Before Martin, B., Guildhall, Dec. 13th, 1864.

Huddleston, Q.C., and *Barnard,* for the plaintiff.

H. James and *Talfourd Salter* for the Defendant.

Disease of the Lungs.

This was an action on the Warranty of a Horse.

The plaintiff, a Horsedealer, on the 2nd of June, 1864, purchased at Rugby Fair a grey Mare, fit for cartwork, from the defendant, who was farm bailiff under Mr. Nash, the manager of Lord Shrewsbury, to whom the Horse belonged. A written Warranty was given with the Mare, which was sold for 29*l.* The plaintiff brought her up to London, and according to his case, she shortly after appeared ill, whereupon he called in a farmer to doctor her. She seemed at first to recover, but eventually, on the 26th of July, she died, when it was discovered that her lungs, liver and spleen were most extensively diseased. The plaintiff's witness swore that the animal must have been greatly diseased at the period she was purchased by the plaintiff.

The defence was, that the animal had been in perfect health up to the time the Warranty was given, and that the disease was the effect of her being put into a hot stable and fed upon stimulating food.

The Jury found a verdict for the defendant.

Elvin *v.* Chapman.

Before Lord Campbell, C. J., Norwich Spring Assizes, 1853.

O'Malley, Q.C., and *Evans,* for the plaintiff.

Prendergast, Q.C., and *Bulwer,* for the defendant.

Negligent driving in the dark.

This was an action *on the Case* for damage sustained by the plaintiff, in consequence of being thrown out of his cart by a collision occasioned by the negligent driving of the defendant's son.

The plaintiff was a small tradesman living at Marsham, a village between Aylsham and Norwich, to and from which city a coach runs daily, the defendant being its owner, and his son the driver. On the 7th of February the plaintiff was driving home in his Pony cart from Aylsham in the evening, when as he approached the last gas-lamp he was suddenly apprised by a friend, to whom he was giving a lift, of the approach of the coach on its wrong side and without lamps. The plaintiff stated that he called out and drew up to the wall on his proper side to avoid the coach, but the coachman seemed to be ignorant of, or indifferent to, the call, and drove on till the splinter-bar struck the cart-wheel with such violence as to force the cart against the wall and project the

plaintiff from his seat to the road, when he received such injuries as "unsensed him" and rendered it necessary that he should be taken to a neighbouring Chymist. From that time to the present the plaintiff had continued to suffer much from lameness, caused by the fall, and his business had diminished through his inability to attend to it as heretofore. It further appeared that when the accident occurred the defendant's son laid the blame on the improper site chosen for the gas-lamp by the authorities, and that the defendant, on being applied to for compensation by the plaintiff, offered to repair the cart, but refused to pay anything for the personal injury received by the plaintiff.

For the defendant witnesses were called to prove that the coach was going at its usual pace into Aylsham, and that the gas-lamp was so improperly placed as to prevent any one from seeing beyond it, and that the coach had just passed it when a shout arose, which was immediately followed by a collision, the coach being then somewhere about the middle of the road. That the driver was a very steady man, and that in consequence of this accident the lamp had been removed to a more suitable site; and that every attention was paid by the driver to the plaintiff.

The Jury found a verdict for the plaintiff. Damages 30*l.*

BOWDEN *v.* SHERMAN.

Before Lord Campbell, C. J., Guildhall, July 2, 1853.

James, Q.C., and *Phinn*, for the plaintiff.

Wilkins, Serjt., and *Willes*, for the defendant.

Negligent driving at a crossing.

This was an action *on the Case* to recover compensation for injuries sustained by the plaintiff by reason of the negligent driving of the defendant's Servant.

It appeared that about two o'clock in the afternoon of the 22nd of October the plaintiff, who was sixty years of age, was in the Hampstead Road, near Southampton Street. It was raining at the time, and she had her umbrella up. According to her statement, she looked up Southampton Street, and seeing nothing coming, she proceeded to cross the street, but while doing so she was knocked down by the shaft of a Cart driven by one of the defendant's Servants. The defendant was a carrier, but he had, in fact, sold his carrying business to the Great Western Railway Company. The driver was not by the side of his Horse, but was in the Cart, driving the Horse with reins. The plaintiff was immediately assisted by the bystanders, and carried into the surgery of a neighbouring surgeon, where she was attended to. She was then taken home and confined to her bed for six weeks. During this

time she suffered great pain from the laceration of the muscles of the leg and the injury done to the arteries.

For the defendant witnesses were called to prove that the driver was a careful and experienced man; that he was going at the time at a rate of only about four or five miles an hour; and that he called out to the plaintiff, but that she, instead of paying attention, ran against the shaft and was knocked down. It also appeared that there was a descent in that part of Southampton Street, which, it was suggested, had accelerated the pace of the Horse and rendered it more difficult to pull up.

The Jury found a verdict for the plaintiff. Damages 150*l*.

Lord CAMPBELL said, now that the case was over, he thought it right to say that these vehicles ought not to go at the pace they did, especially when turning the corners of streets. It was impossible to go along the streets without seeing her Majesty's subjects in imminent peril. Only a short time ago Mr. Commissioner Phillips had met with a very similar accident, which was near proving fatal. It was not enough to shout out, which might have the effect of depriving a person of presence of mind; but these vehicles ought to go at a reasonable pace, particularly when turning corners.

The question now was whether the plaintiff or the defendant was the purchaser.

According to the evidence given by the plaintiff and Manning, the Clerk of the Newmarket Jockey Club, who was standing by the Auctioneer, the Horse was knocked down to the plaintiff. The plaintiff then discovered that he had only 45*l.* in his pocket, and, not wishing it to be known that he was the purchaser, he borrowed 23*l.* 5*s.* of the defendant, and giving him the 45*l.*, got him to pay for the Horse, and to take a receipt for the price in his name. According to the plaintiff's evidence, the defendant, when he had thus got the Horse, refused to give it up to the plaintiff, unless he would pay him 5*l.* for his trouble; but the plaintiff refused to give him more than a half-sovereign. The defendant then kept the Horse. The next day the plaintiff again went down to Chatham, and then found that the Horse Economy had been entered for the West Kent Stakes in the name of a person named Hitchin. The plaintiff protested against this, and claimed his Horse, but it was allowed to run, and won the stakes, value at 50*l.*, and was again sold the same day for an increased price. Evidence was also given to show that the defendant, on the day of the first sale, admitted the plaintiff had bought the Horse, but stated that he (the defendant) had got an offer of 15*l.* for the bargain, and that if the plaintiff would not give him 5*l.* he would stick to the Horse. The defendant sold the Horse the same day.

For the defence, the defendant himself came into the witness box and said that he had several times bid for the Horse, and that it was at last knocked down to him. He stated that, though he had a cheque for a considerable amount in his pocket at the time, he had only 23*l.* 5*s.* in cash, and that he borrowed the sum of 45*l.* from the plaintiff to make up the amount required. He offered to return the borrowed money the same evening, but the plaintiff refused to accept it, alleging that he was the purchaser. The Auctioneer who sold the Horse was called, and he deposed that the defendant was the purchaser; but it appeared there was a large concourse of people, and considerable confusion at the time of the sale.

The Jury found a verdict for the plaintiff. Damages 100 Guineas, reduced by the set-off to 82*l.*

the persons there so found be in like case bound by themselves, or else with sureties, by the discretions of the justices, mayors, sheriffs, bailiffs or other head officers, no more to play, haunt or exercise from thenceforth in, at or to any of the said places, or at any of the said games. Further provisions relating hereto, 2 Geo. 2, c. 28, s. 9.

16. Be it also enacted by the authority aforesaid, That no manner of artificer or craftsman of any handicraft or occupation, husbandman, apprentice, labourer, servant at husbandry, journeyman or servant of artificer, mariners, fishermen, watermen or any serving-man, shall from the said Feast of the Nativity of St. John Baptist, play at the tables, dice, cards, or any other unlawful game, out of Christmas, under the pain of twenty shillings, to be forfeit for every time; and that all justices of peace, mayors, bailiffs, sheriffs and all other head officers, and every of them, finding or knowing any manner of person or persons using or exercising any unlawful games, contrary to this present statute, shall have full power and authority to commit every such offender to ward, there to remain without bail or mainprise until such time that they so offending be bounden by obligation to the king's use in such sums of money as by the discretions of the said justices, mayors, bailiffs or other head officers shall be thought reasonable, that they or any of them shall not from henceforth use such unlawful games. Persons prohibited to play at unlawful games out of Christmas (c).

17. Be it further enacted by the authority aforesaid, That all other statutes made for the restraint of unlawful games, or for the maintenance of artillery, as touching the penalties or forfeitures of the same, shall be from henceforth utterly void; and that all informations, plaints, actions or suits that shall be taken or sued upon any part of this statute, shall be commenced within the year after the offence committed and done, or otherwise no advantage or suit thereof to be taken. All other statutes made against unlawful games, and for the maintenance of artillery repealed.

18. And where any such forfeitures shall happen to be found within the precinct of any franchise, leet or lawday, then the lord of the same franchise, leet or lawday to have the one moiety thereof, and the other moiety thereof to any of the king's subjects that will sue for the same in any of the king's courts, by action, information, bill or otherwise, in which action or suit the defendant shall not be admitted to wage his law, nor any protection nor essoin shall be allowed; and where such forfeiture shall be found out of the precinct of any franchise, leet or lawday, that the moiety of all such forfeitures shall be to the king, our sovereign lord, and the other moiety thereof to any the king's subjects that will sue for the same by bill, plaint, action, information or otherwise, in any of the king's courts, in which suit or action the defendant shall not be admitted to wage his law, nor any protection or essoin shall be allowed. Within what time any suit shall be prosecuted upon this statute and who shall have the forfeitures.

(c) 1 Lutw. 1.

Proclamation of this statute.

19. And to the intent that every person ... may have knowledge of this act, and avoid the danger and ... enalties of the same, be it enacted by the authority aforesaid, That ... at all mayors, bailiffs, sheriffs and all other head officers shall ... our times in the year, that is to say, every quarter once, make ... open proclamation of this present act in every market to ... be holden within their several jurisdictions and authorities.

20. And also that the justices of gaol delivery, at ... ssizes and justices of peace, do cause the same to be proclaimed ... d in their several circuits and sessions before them holden, and ... that this statute shall begin to take his effect concerning the ... penalties of the same from the said Feast of St. John Baptist ... ow next coming, and to continue and endure for ever.

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.

"Forasmuch as stolen horses, mares and gelding ... thieves and their confederates, be for the most parts ... by exchanged, given or put away in houses, stables, back ... or sold, and other secret and privy places of markets and fairs ... rides the toll also privily paid for the same, whereby the ... and owners thereof being not able to try the falsehood and ... a true betwixt the buyer and seller of such horse, mare or geld ... kewin is by the common law of this realm without remedy:" ... dng,

In what manner horses shall be sold in fairs or markets.

2. Be it therefore enacted by the authority of this pres... parliament, That the owner, governor, ruler, fermor, stewa... ent bailiff or chief keeper of every fair and market overt with... rd, this realm, and other the queen's dominions, shall before ... ain feast of Easter next, and so yearly, appoint and limit out ... e certain and special open place within the town, place, field ... ca circuit where horses, mares, geldings and colts have been an... s, r shall be used to be sold in any fair or market overt; in which ... l 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,

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.

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 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.

A note of all horses sold in a fair or market.

3. And the said toll-gatherer or keeper of the said book shall within one day next after every such fair or market deliver his said book to the owner, governor, ruler, 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, and forfeit for every default forty shillings, and also to lose the party grieved by reason of the same his negligence in every behalf.

The using of a stolen horse in a fair, &c. before the owner's property shall be taken away.

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.

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 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 anywise 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.

The justices of peace shall hear and determine the offences aforesaid.

7. And be it enacted by the authority aforesaid, that the justices of peace of every place and 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 estatute, and may do any other matter triable before them.

The allowance of the keeper of the book where no toll is due.

8. Provided alway, that in every such fair or market before any toll is nor shall be due nor leviable by reason of the freedom, liberty or privilege of the said fair or market, the grant or keepers of the book, touching the execution of this present act, shall take nor exact but one penny upon and for any contract for his labour in writing the entry concerning the premises, in manner and form as is before declared.

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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 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 by pursuit 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 or avoiding of horse stealing as was expected:"

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 of 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

11 Hen. 7, c. 13. 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 toller's book.

person, and of the name, surname, mystery dwelling or resiancy of the same person, and place of the price or value that shall be *bonâ fide* taken or had for any such horse, mare, gelding, colt or filly so sold, also the true changed or put away, so far as he can understand, given, exand then give to the party so buying or taking the same, change 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 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, 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 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; 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.

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.

3. And be it further enacted, That the justices of peace upon every place and 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 of other matter triable before them.

The justices of peace may hear and determine the offences aforesaid.

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 sha 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 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, or 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 minister 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 *bonâ 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.

2 Geo. II. Cap. 28.

An Act (among other things) *for more effectual debarring of unlawful Games.*

9. "And whereas a good and profitable statute was made in the three-and-twentieth year of the reign of King Henry the Eighth, (among other things) for the debarring of unlawful games; And whereas by the said statute no power is given unto the justices of the peace to demand and take from persons found playing contrary to law any other security than their own recognizances that they or any of them shall not from thenceforth use such unlawful games, unless such persons are found playing contrary to law upon the view of one or more justice or justices of the peace;" for remedy thereof, be it further enacted, that where it shall be proved upon the oath of two or more credible witnesses, before any justice or ...tices of the peace, as well as where such justice or justices sh... ...ud upon his or their own view that any person or persons ... or hath used or exercised any unlawful game contrary to ... ...id statute, the said justice or justices shall have

Act 33 Hen. 8, c. 9, against unlawful games made more effectual.

full power and authority to commit all and every such offender and offenders to prison, without bail or mainprize, unless and until such offender and offenders shall enter into one or more recognizance or recognizances, with sureties or without, at the discretion of the said justice or justices of the peace, that he or they respectively shall not thenceforth play at or use such unlawful game.

12 Geo. II. Cap. 28.

An Act for the more effectual preventing of excessive and deceitful Gaming.

"And whereas it is found by experience that the said good and wholesome laws have not effectually answered the good ends, intents and purposes in and by the said acts (*d*) designed; but that, contrary to the true intent and meaning of the said recited acts, several deceitful games and subscriptions are daily carried on under the denomination of sales of houses, lands, plate, jewels, goods and other things; and that several printers have printed, published, or caused to be printed and published, proposals or schemes for the sale of such houses, lands, plate, jewels, goods and other things, to be determined by *Raffles*, by mathematical machines or engines, and by other indirect ways and means, tending to evade the said good and wholesome laws before mentioned; and whereas several persons have for many years past carried on and set up certain fraudulent games and lotteries, to be determined by the chance of cards and dice, under the denomination of the games of the ace of hearts, pharaoh, basset and hazard, and thereby defrauded several of his majesty's subjects ignorant of the great disadvantage adventures in the said games and lotteries so denominated the games of *the ace of hearts, pharaoh, basset or hazard* (*e*), are under, subject and liable to; and whereas several doubts have arisen whether the said games of *the ace of hearts, pharaoh, basset and hazard* (*e*) are within the descriptions of the lotteries prohibited by the said recited acts of parliament (*d*); and whereas great difficulties have arisen upon the methods of conviction of the offenders against the said acts of parliament; for remedy whereof, and for explaining and making more effectual the said acts of parliament, may it please your most excellent majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spi-

(*d*) 10 & 11 Will. 3, c. 17; 9 Anne, c. 6, s. 56; 8 Geo. 1, c. 2, s. 36, prohibiting Lotteries.

(*e*) *Rex* v. *Liston*, 5 T. R. 340; *M'Kinnell* v. *Robinson*, 3 M. & W. 434.

ritual and temporal, and commons, in the present parliament assembled, and by the authority of the same, That if any person or persons shall, after the twenty-fourth day of June, one thousand seven hundred and thirty-nine, erect, set up, continue or keep any office or place under the denomination of a sale or sales of houses, land, advowsons, presentations to livings, plate, jewels, ships, goods or other things by way of lottery, or by lots, tickets, numbers or figures, cards or dice; or shall make, print, advertize or publish, or cause to be made, printed, advertized or published, proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by chances of the prices in some public lottery or lotteries established or allowed by act of parliament, or shall deliver out, or cause or procure to be delivered out, tickets to the persons advancing such sums, to entitle them to a share of the money so advanced, according to such proposals or schemes; or shall expose to sale any houses, lands, advowsons, presentations to livings, plate, jewels, ships or other goods by any game, method or device whatsoever, depending upon or to be determined by any lot or drawing, whether it be out of a box or wheel, or by cards or dice, or by any machine, engine or device of chance of any kind whatsoever; such person or persons, and every or either of them, shall, upon being convicted thereof before any one justice of the peace for any county, riding or division, or before the mayor or other justice or justices of the peace for any city or town corporate, upon the oath or oaths of one or more credible witness or witnesses (which said oaths the said justices of the peace and mayor are hereby authorized, empowered and required to administer), or upon the view of such justice or justices, or the mayor, justice or justices for any city or town corporate, or on the confession of the party or parties accused, shall forfeit and lose the sum of *Two hundred pounds*, to be levied by distress and sale of the offender's goods, by warrant under the hands and seals of one or more justice or justices of the peace of such county, riding, division, city or town where the offence shall be committed; which said forfeitures, when recovered, after deducting the reasonable charges of such prosecution, shall go and be applied, one-third thereof to the informer and the remaining two-thirds to the use of the poor of the parish where such offence shall be committed, excepting the said two-thirds of such forfeitures which shall be incurred by and recovered upon any person or persons within the city of Bath, which said two-thirds shall go and be applied to and for the use and benefit of the poor residing within the hospital or infirmary lately erected for the use and benefit of poor persons resorting to the said city for the benefit of the mineral waters, after deducting the charges of conviction as aforesaid.

200*l.* penalty on any offence against this act.

The same how to be levied and applied.

Games within intent of the act.

2. And it is hereby enacted and declared, That the said games of the *ace of hearts, pharaoh, basset and hazard* (*f*), are and are hereby declared to be games or lotteries by cards or dice within the intent and meaning of the said in part recited acts; and that all and every person or persons who shall set up, maintain or keep the said games of the ace of hearts, pharaoh, basset and hazard shall be subject and liable to all and every the penalties and forfeitures in and by this act inflicted upon any person or persons who shall erect, set up, continue or keep any of the said games or lotteries in this present act mentioned; and shall be prosecuted and convicted, and the penalties and forfeitures shall be sued for and recovered, in like manner as the said penalties and forfeitures are by this act directed to be sued for and recovered.

50*l.* penalty on the adventurers.

3. And be it further enacted by the authority aforesaid, That all and every person and persons who shall be adventurers in any of the said games, lottery or lotteries, sale or sales; or shall play, set at, stake or punt at either of the said games of *the ace of hearts, pharaoh, basset and hazard* (*f*), and shall be thereof convicted in such manner and form as in and by this act is prescribed, every such person or persons shall forfeit and lose the sum of *Fifty pounds*, to be sued for and recovered as aforesaid.

Sales by lotteries void;

4. And it is hereby further enacted by the authority aforesaid, That all and every such sale or sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods or other things by any game, lottery or lotteries, machine, engine or other device whatsoever, depending upon or to be determined by chance or lot, shall and are hereby declared to be void to all intents and purposes whatsoever; and all such houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods or other things set up and exposed to sale in manner and form aforesaid shall be forfeited to such person or persons who shall sue for the same, by action, bill, plaint or information, in any of his majesty's courts of record, or at the assizes for any county where the offence shall be committed; in which action, bill, plaint or information no essoin, protection, wager of law, or more than one imparlance shall be allowed.

and lands, &c. forfeited.

Appeal.

5. Provided always, and it is hereby declared and enacted, That if any person or persons shall think him, her or themselves aggrieved by the judgment or determination of any justice or justices of the peace or mayor as aforesaid, upon any conviction of or for any of the offences in this act, such person or persons may appeal from the said judgment of the said justice or justices or mayor to the next general quarter sessions of the peace for the said county, riding, division, city

(*f*) *Rex* v. *Liston*, 5 T. R. 340; *M'Kinnell* v. *Robinson*, 3 M. & W. 434.

or place where such person or persons was or were convicted; but the person and persons so appealing shall, and he, she and they are hereby directed to give reasonable notice to the prosecutor or prosecutors of such person or persons as shall so appeal, of such his, her or their intention of bringing and prosecuting such appeal, and shall enter into a recognizance before some justice of the peace for the county, riding, division, city or place wherein the conviction or judgment was made or given, with two sufficient sureties, on condition to try such appeal at the next quarter sessions which shall be held in and for the county, riding, division, city or place wherein such conviction or judgment was made or given, next and immediately after the bringing such appeal; and every such appeal and appeals shall, by the court at the said next general quarter sessions, to which such appeal and appeals is or are made, be then examined, and the matter then finally heard and determined, and not afterwards; and in case such judgment, determination or conviction as aforesaid shall be then and there affirmed, the party appealing shall pay unto the prosecutor or prosecutors his, her or their treble costs; and such prosecutor and prosecutors shall have such remedy for the same as any defendant or defendants hath or have for costs of suit in any other cases by law.

Convictions.

6. Provided always, and be it further enacted by the authority aforesaid, That no such conviction made, or judgment given as aforesaid, by this act, shall be set aside by the said court of quarter sessions for want of form, in case the facts alleged in the said conviction shall be proved to the satisfaction of the said court; nor shall such conviction or judgment be removed or removable by certiorari, or any other writ or process whatsoever, into any of his majesty's courts of record at Westminster, until such order or other proceedings shall have been first removed to, and judgment and determination given and made thereupon, by such court of quarter sessions as aforesaid.

Offenders not able to pay the penalties to be imprisoned.

8. And it is hereby further enacted and declared, That if any person or persons who shall be convicted of erecting, setting up, maintaining or keeping any of the said lotteries, or the said games of *the ace of hearts, pharaoh, basset or hazard*, or therein or in either of them shall adventure, and shall not have sufficient goods and chattels whereon to levy the penalties inflicted by this act, or shall not immediately pay the said penalties, or give security for the same, it shall and may be lawful for the said justice or justices, before whom such person shall be convicted as aforesaid, to commit such person or persons to the common gaol of the county, riding, division, city or place where such offence shall be committed, there to continue and remain for any time not exceeding *six* months.

Penalty on neglect of justices or mayors.

9. And be it also enacted, That if any justice of the peace, or any other justice hereinbefore described, or mayor of any corporation, shall neglect or refuse to do what is required of him and them by this act, such justices and mayors so neglecting or refusing shall respectively forfeit and pay the sum of *Ten pounds* for each offence; one moiety whereof to be paid to any person or persons who shall sue for the same, and the other moiety thereof to the poor of the parish or place where such offence shall be committed (*g*), and shall be recovered with full costs of suit, by action, bill, plaint or information in any of his majesty's courts of record, or at the assize for any county; in which action, bill, plaint or information no essoign, protection or wager of law, nor more than one imparlance shall be allowed; such prosecution being commenced within *six* months next after such refusal of such justices or mayor.

This act not to hinder any games in palaces where the king resides;

10. Provided always, and it is hereby enacted and declared, That nothing in this act or in any former acts against gaming contained shall extend to prevent or hinder any person or persons from gaming or playing at any of the games in this or in any of the said former acts mentioned within any of his majesty's royal palaces, where his majesty, his heirs and successors shall then reside.

nor to affect the right to any lands, &c. held by lot.

11. Provided always, and it is hereby further enacted and declared, That nothing herein contained shall extend, or be any ways construed, deemed or taken to extend, or in any sort to affect or prejudice any estate or interest in, out of, or to any manors, honours, royalties, lands, tenements, advowsons, presentations, rents, services and hereditaments whatsoever, which shall or may at any time or times hereafter be according to the laws now in being legally allotted to, or held by, or by means of any allotment or partition by lots (*h*); but that all persons who now are, or that shall hereafter become really and truly seised as part owners, joint tenants, and tenants in common of any manors, honours, royalties, lands, tenements, advowsons, presentations, rents, services, and

(*g*) But see 46 Geo. 3, c. 148, s. 59.
(*h*) See Ballot in Land Societies, ante, Part 3, Chap. 4.

hereditaments shall, and he, she and they and his, her and their heirs and assigns is and are hereby made and continued capable to accept and take such estates and interest, and parts therein, in such and the like manner, and to such and the like uses, as he, she or they might, would or could have done by or by virtue or in consequence of any lot, scroll, chance or allotment whatsoever had this present act never been made, any thing herein contained to the contrary thereof notwithstanding.

Limitations of actions.

12. And be it further enacted by the authority aforesaid, That if any suit or action shall be commenced or prosecuted against any person or persons for anything done in pursuance of this act, every such suit or action shall be commenced within *three* calendar months next after the fact was committed, and not afterwards; and shall be laid or brought in the county, city or place where the cause of action shall arise, and not elsewhere; and the defendant and defendants therein shall and may plead the general issue, and give this act and the special matter in evidence at the trial to be had thereupon, and that the same was done in pursuance of or by the authority of this act; [and if the plaintiff or plaintiffs shall become nonsuited or discontinue his, her or their action or actions, suit or suits, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover *treble* costs, and have like remedy for the same as any defendant or defendants hath or have for costs in any other cases by law] (*a*).

General issue.

Treble costs.

13 Geo. II. Cap. 19.

An Act to restrain and prevent the excessive Increase of Horse Races, *and for amending an Act made in the last Session of Parliament, intituled "An Act for the more effectual preventing of excessive and deceitful Gaming."*

12 Geo. 2, c. 28.

9. "And whereas a good and wholesome law was made in the twelfth year of the reign of his present Majesty King George the Second, intituled 'An Act for the more effectual preventing of excessive and deceitful Gaming;' but contrary to the true intent and meaning thereof, some fraudulent and deceitful games have been invented, and a certain game called *passage* is now daily practised and carried on, to the ruin and impoverishment of many of his Majesty's subjects;" it is therefore hereby enacted and declared, that the said game of *passage*, and *all* and every other game and *games* invented or to be invented, *with one or more die or dice*, or with any other instrument, engine or device, in the nature of dice, having one or more figures or numbers thereon (*backgammon* and the

Game of passage, and other games with dice, prohibited.

(*a*) Repealed, 5 & 6 Vict. c. 97, s. 2.

other games now played within the backgammon tables only *excepted*) are and shall be deemed to be games or lotteries by dice, within the intent and meaning of the said in part recited act; and all and every person and persons who shall set up, maintain or keep any office, table or place (save and except as in the said in part recited act is provided and declared), for the said game of passage, or for any other such game or games as aforesaid (backgammon and the other games now played with the backgammon tables only excepted), shall severally forfeit, be subject and liable to, all and every the penalties and forfeitures in and by the said in part recited act inflicted upon any person or persons who shall erect, set up, continue or keep any of the games or lotteries in the said in part recited act mentioned; and all and every person or persons who shall play, set at stake or adventure at the said game of passage, or at any such other game as aforesaid (backgammon and the other games now played with the backgammon tables only excepted), save and except as in the said in part recited act is provided and declared, he and they respectively shall severally forfeit, be subject and liable to all and every the penalties and forfeitures in and by the said in part recited act inflicted upon any person or persons who shall play, set at stake or adventure at any of the said games in the said in part recited act mentioned; and all and every such offenders respectively shall be prosecuted and convicted, and the several penalties and forfeitures shall be sued for and recovered and disposed of in like manner, and to such uses, as the several penalties and forfeitures in either of such cases are by the said in part recited act directed to be sued for and recovered, and disposed of.

Under penalties of 12 Geo. 2, c. 28.

10. And be it further enacted, by the authority aforesaid, That in any action, bill, plaint or information, to be brought or commenced by virtue of this act, no essoin, protection, wager of law, or more than one imparlance shall be allowed; [and that over and above the penalties and forfeitures to be recovered by virtue of this act, the plaintiff or informer shall recover his or her *double* costs] (*a*).

Double costs.

18 Geo. II. Cap. 34.

An Act to explain, amend, and make more effectual the Laws in being, to prevent excessive and deceitful Gaming; and to restrain and prevent the excessive Increase of Horse Races.

"Whereas notwithstanding the many good and wholesome laws now in being for preventing excessive and deceitful gaming, many persons of ill fame and reputation, who have no visible means of subsistence, do keep houses, rooms, and

(*a*) Repealed, 5 & 6 Vict. c. 97, s. 2.

other places for playing, and do permit persons therein to play at cards, dice and other devices, for large sums of money, by means whereof divers young and unwary persons and others are drawn in to lose the greatest part, and sometimes all their substance; and it frequently happens they are thereby reduced to the utmost necessities, and betake themselves to the most wicked courses, which end in their utter ruin: And whereas a certain pernicious game called *roulet*, or *roly-poly*, is daily practised, and the laws now in being have by experience been found ineffectual to put a stop to such pernicious practices:" For remedy whereof may it please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the twenty-fourth day of June, one thousand seven hundred and forty-five, no person or persons, of what condition soever, shall keep any house, room or place for playing, or permit or suffer any person or persons whatsoever, within any such house, room or place, to play at the said game of roulet, otherwise roly-poly, or at any other game, with cards or dice, already prohibited by the laws of this realm; and in case any person or persons whatsoever shall keep any such house, room or place for playing, or permit or suffer any person or persons as aforesaid to play at the said game of *roulet*, otherwise *roly-poly*, or at any other game, with cards or dice already prohibited by law, such person or persons so offending shall incur the pains and penalties, and be liable to such prosecution as is directed in and by an act made in the twelfth year of the reign of his present majesty, intituled "An Act for the more effectual preventing excessive and deceitful Gaming."

No person shall keep a place for playing roly-poly, or other game with cards or dice, under penalties of 12 Geo. 2, c. 28.

2. And be it further enacted, by the authority aforesaid, That if any person or persons whatsoever shall after the said twenty-fourth day of June, one thousand seven hundred and forty-five, play at the said game of *roulet*, otherwise *roly-poly*, or at any game or games with cards or dice, already prohibited by law, every such person or persons so offending shall also incur the pains and penalties, and be liable to such prosecution, as is directed in and by an act made in the twelfth year of the reign of his present majesty, intituled "An Act for the more effectual preventing excessive and deceitful Gaming."

Persons playing shall incur the penalties of 12 Geo. 2, c. 28.

4. And for the more easy conviction of persons offending against this or any other former act, for preventing excessive and deceitful gaming, be it enacted by the authority aforesaid, That it shall and may be lawful to and for such person or persons who have jurisdiction to hear and determine informations upon the statutes against excessive and deceitful

On information for any offence against this act, or 12 Geo. 2, c. 28, or 13 Geo. 2, c. 19,

gaming, upon any information exhibited before them, for any offence committed against this act, or against the statute made in the twelfth year of his present majesty, intituled "An Act for the more effectual preventing of excessive and deceitful Gaming;" or against one other act made in the thirteenth year of the reign of his present majesty, intituled "An Act to restrain and prevent the excessive Increase of Horse Races, and for amending an Act made in the last Session of Parliament, intituled 'An Act for the more effectual preventing excessive and deceitful Gaming;'" to summon any person or persons, other than the party accused, to appear before them at a certain day, time and place, to be inserted in such summons, and to give evidence for the discovery of the truth of the matter in the said information contained; and in case of neglect or refusal to appear, or if upon appearance such person or persons shall refuse to give evidence, or shall give any false evidence, every such person or persons so offending shall forfeit and lose the sum of *Fifty pounds*, to be levied by distress and sale of the offender's goods and chattels, by warrant under the hands and seals of such persons issuing such summons as aforesaid; and in case such person or persons not appearing, or neglecting, or refusing to give such evidence, or giving any false evidence, shall not have sufficient goods and chattels whereon to levy the said sum of *Fifty pounds*, every such person or persons shall be by such person or persons having jurisdiction as aforesaid committed to the common gaol for the county, city or place where such offence shall be committed, there to remain for the space of *six* months without bail or mainprize.

persons may be summoned to give evidence.

No person incapable of being a witness, &c.

5. And be it further enacted by the authority aforesaid, That from and after the twenty-fourth day of June, one thousand seven hundred and forty-five, no person or persons other than the parties plaintiff and defendant in the cause shall be incapacitated from being a witness, touching any offence committed against the laws for preventing excessive and deceitful gaming, by reason of having played, betted or staked at any game prohibited by this or any of the said statutes.

Proviso for royal palaces, &c.

6. Provided also, and it is hereby enacted and declared, That nothing in this act contained shall extend to prevent or hinder any person or persons from playing at any game whatsoever within any of his majesty's royal palaces wherein his majesty, his heirs and successors, shall then actually reside.

No privilege of parliament, &c.

7. And be it further enacted by the authority aforesaid, That no privilege of parliament shall be allowed to any person or persons whatsoever against whom any prosecution or proceedings shall be commenced or had for keeping of any public or common gaming-house, or any house, room or place for playing at any game or games prohibited by this

or any other act now in being against excessive or deceitful gaming, any law, usage or custom to the contrary in anywise notwithstanding.

5 Geo. IV. Cap. 83.

An Act for the Punishment of idle and disorderly Persons, and Rogues and Vagabonds, in that part of Great Britain called England.

Persons committing certain offences herein mentioned to be deemed rogues and vagabonds.

Sect. 4. And be it further enacted, That every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person; every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects; every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself; every person wilfully exposing to view in any street, road, highway or public place any obscene print, picture or other indecent exhibition; every person wilfully, openly, lewdly and obscenely exposing his person in any street, road or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female; every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence; every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable, to any parish, township or place; every person *playing or betting in any street, road, highway or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance;* every person having in his or her custody or possession any picklock key, crow, jack, bit or other implement, with intent feloniously to break into any dwellinghouse, warehouse, coachhouse, stable or outbuilding, or being armed with any gun, pistol, hanger, cutlass, bludgeon or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act; every person being found in or upon any dwellinghouse, warehouse, coachhouse, stable or outhouse, or in any enclosed yard, garden or area, for any unlawful purpose; every suspected person or reputed thief, frequenting any river, canal or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining

thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway or place adjacent, with intent to commit felony; and every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended, *shall be deemed a rogue and vagabond, within the true intent and meaning of this act;* and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to *hard labour* for any time *not exceeding three calendar months;* and every such picklock key, crow, jack, bit and other implement, and every such gun, pistol, hanger, cutlass, bludgeon or other offensive weapon, and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to the king's majesty.

3 & 4 Will. IV. Cap. 42.

An Act for the further Amendment of the Law, and the better Advancement of Justice.

Allowing amendments to be made on the record in certain cases.

Sect. **23.** And whereas great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances as to some particular or particulars between the proof and the record or setting forth, on the record or document on which the trial is had, of contracts, customs, prescriptions, names and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record: And whereas it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause; be it therefore enacted, That it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth, on the record, writ or document on which the trial is proceeding, of any contract, custom, prescription, name or other matter, in any particular

or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at nisi prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet.

Power for the court or judge to direct the facts to be found specially.

24. And be it further enacted, That the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the

said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

Power to state a special case without proceeding to trial.

25. And be it further enacted, That it shall be lawful for the parties in any action or information, after issue joined, by consent and by order of any of the judges of the said superior courts, to state the facts of the case, in the form of a special case, for the opinion of the court, and to agree that a judgment shall be entered for the plaintiff or defendant, by confession or of nolle prosequi, immediately after the decision of the case, or otherwise as the court may think fit; and judgment shall be entered accordingly.

5 & 6 WILL. IV. CAP. 41.

An Act to amend the Law relating to Securities given for Considerations arising out of gaming, usurious and certain other illegal Transactions.

16 Car. 2, c. 7. Whereas by an act passed in the sixteenth year of the reign of his late majesty King Charles the Second, and by an act passed in the parliament of Ireland in the tenth year of the
10 Will. 3, (I.) reign of his late majesty King William the Third, each of such acts being intituled "An Act against deceitful, disorderly and excessive Gaming," it was enacted, that all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which should be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for any money or other thing lost at play or otherwise as in the said acts respectively is mentioned, or for any part thereof, should be
9 Ann. c. 14. utterly void and of none effect: and whereas by an act passed in the ninth year of the reign of her late majesty Queen Anne, and also by an act passed in the parliament of Ireland
11 Ann. (I.) in the eleventh year of the reign of her said late majesty, each of such acts being intituled "An Act for the better preventing of excessive and deceitful Gaming," it was enacted, that from and after the several days therein respectively mentioned all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities should be for any money or other valuable thing whatsoever won by *gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever*, or *by betting on the sides or hands of such as did game at any of the*

games aforesaid, or *for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid*, or *lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid*, or *that should, during such play, so play or bet*, should be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; and that where such mortgages, securities, or other conveyances should be of lands, tenements, or hereditaments, or should be such as should encumber or affect the same, such mortgages, securities, or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the said grantor or grantors thereof, or the person or persons so incumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so encumbering the same; and that all grants or conveyances to be made for the preventing of such lands, tenements, or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid should be deemed fraudulent and void and of none effect, to all intents and purposes whatsoever: and whereas by an act passed in the twelfth year of the reign of her said late majesty Queen Anne, intituled "An Act to reduce the Rate of Interest without any prejudice to Parliamentary Securities," it was enacted, that all bonds, contracts, and assurances whatsoever made after the twenty-ninth day of September, one thousand seven hundred and fourteen, for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of five pounds in the hundred, as therein mentioned, should be utterly void: and whereas by an act passed in the parliament of Ireland in the fifth year of the reign of his late majesty King George the Second, intituled "An Act for reducing the Interest of Money to Six per Cent.," it was enacted, that all bonds, contracts and assurances whatsoever made after the first day of May, one thousand seven hundred and thirty-two, for payment of any principal or money to be lent or covenant to be performed upon or for any loan, whereupon or whereby there should be taken or reserved above the rate of six pounds in the hundred, should be utterly void: and whereas by an act passed in the fifty-eighth year of the reign of his late majesty King George the Third, intituled "An Act to afford Relief to the *bonâ fide* Holders of negotiable Securities without Notice that they were given for a usurious Consideration," it was enacted, that no bill of exchange or promissory note that should be drawn or made after the passing of that act

12 Ann. st. 2, c. 16.

5 Geo. 2, (I.)

58 Geo. 3, c. 93.

should, though it might have been given for a usurious consideration or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the time of discounting or paying such consideration for the same actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration or upon a usurious contract: and whereas by an act passed in the parliament of Ireland in the eleventh and twelfth years of the reign of his said late majesty King George the Third, intituled "An Act to prevent Frauds committed by Bankrupts," it was enacted, that every bond, bill, note, contract, agreement or other security whatsoever to be made or given by any bankrupt or by any other person unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration or to the intent to persuade him, her or them to consent to or sign any such allowance or certificate, should be wholly void and of no effect, and the monies there secured or agreed to be paid should not be recovered or recoverable: and whereas by an act passed in the forty-fifth year of the reign of his said late majesty King George the Third, intituled "An Act for the Encouragement of Seamen, and for the better and more effectually manning his Majesty's Navy during the present War," it was enacted, that all contracts and agreements which should be entered into, and all bills, notes and other securities which should be given by any person or persons for ransom of any ship or vessel, or of any merchandize or goods on board the same, contrary to that act, should be absolutely null and void in law, and of no effect whatsoever: and whereas by an act passed in the sixth year of the reign of his late majesty King George the Fourth, intituled "An Act to amend the Laws relating to Bankrupts," it was enacted, that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue, and give that act and the special matter in evidence: and whereas securities and instruments made void by virtue of the several hereinbefore recited acts of the sixteenth year of the reign of his said late majesty King Charles the Second, the tenth year of the reign of his said late majesty King William the Third, the ninth and eleventh years of the reign of her said late majesty Queen Anne, the eleventh and

11 & 12 Geo. 3, (I.)

45 Geo. 3, c. 72.

6 Geo. 4, c. 16.

twelfth years of the reign of his said late majesty King George the Third, the forty-fifth year of the reign of his said late majesty King George the Third, and the sixth year of the reign of his said late majesty King George the Fourth, and securities and instruments made void by virtue of the said act of the twelfth year of the reign of her said late majesty Queen Anne and the fifth year of the reign of his said late majesty King George the Second, other than bills of exchange or promissory notes made valid by the said act of the fifty-eighth year of the reign of his said late majesty King George the Third, are sometimes indorsed, transferred, assigned or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given; and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice: For remedy thereof be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That so much of the hereinbefore recited acts of the sixteenth year of the reign of his said late majesty King Charles the Second, the tenth year of the reign of his said late majesty King William the Third, the ninth, eleventh and twelfth years of the reign of her said late majesty Queen Anne, the fifth year of the reign of his said late majesty King George the Second, the eleventh and twelfth and the forty-fifth years of the reign of his said late majesty King George the Third, and the sixth year of the reign of his said late majesty King George the Fourth, as enacts that any note, bill or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every *note, bill or mortgage*, which if this act had not been passed would, by virtue of the said several lastly hereinbefore mentioned acts or any of them, have been absolutely *void*, shall be deemed and taken to have been made, drawn, accepted, given or executed for an *illegal consideration*, and the said several acts shall have the same force and effect which they would respectively have had if instead of enacting that any such note, bill or mortgage should be absolutely void, such acts had respectively provided that every such note, bill or mortgage should be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration: Provided always, that nothing herein contained shall prejudice or affect any note, bill or mortgage which would have been good and valid if this act had not been passed.

Securities given for considerations arising out of illegal transactions not to be void, but to be deemed to have been given for an illegal consideration.

2. And be it further enacted, That in case any person shall, after the passing of this act, make, draw, give or execute any note, bill or mortgage for any consideration on account of which the same is by the hereinbefore recited acts of the six-

Money paid to the holder of such securities shall be deemed to be

paid on account of the person to whom the same was originally given.

teenth year of the reign of his said late majesty King Charles the Second, the tenth year of the reign of his said late majesty King William the Third, and the ninth and eleventh years of the reign of her said late majesty Queen Anne, or by any one or more of such acts, declared to be void, and such person shall actually pay to any indorsee, holder or assignee of such note, bill or mortgage the amount of the money thereby secured, or any part thereof, such *money so paid* shall be deemed and taken to have been paid for and on account of the person to whom such note, bill or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall have so paid such money, and shall accordingly be *recoverable* (*i*) by action at law in any of his majesty's courts of record.

Repealing so much of recited acts of 9 & 11 Ann. as enacts that securities shall enure for the benefit of parties in remainder.

3. And be it further enacted, That so much of the said acts of the ninth and eleventh years of the reign of her said late majesty Queen Anne as enacts that where such mortgages, securities or other conveyances as therein mentioned should be of lands, tenements or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the grantor or grantors thereof, or the person or persons incumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same, and that all grants or conveyances to be made for the preventing of such lands, tenements or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid, should be deemed fraudulent and void and of none effect, to all intents and purposes whatsoever, shall be and the same is hereby repealed; saving to all persons all rights acquired by virtue thereof previously to the passing of this act.

8 & 9 Vict. Cap. 109.

An Act to amend the Law concerning Games and Wagers.

Whereas the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games

(*i*) Both principal and interest are recoverable; *Gilpin* v. *Clutterbuck*, Q. B., May 8, 1849.

of skill from which the like mischiefs cannot arise; be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That so much of an act passed in the thirty-third year of the reign of King Henry the Eighth, intituled "The Bill for maintaining Artillery, and the debarring of unlawful Games," whereby any game of mere skill, such as bowling, coyting, cloyshcayls, half bowl, tennis, or the like, is declared an unlawful game, or which enacts any penalty for playing at any such game of skill as aforesaid, or which enacts any penalty for lacking bows or arrows, or for not making and continuing butts, or which regulates the making, selling or using of bows and arrows, and also so much of the said act as requires the mayors, sheriffs, bailiffs, constables, and other head officers within every city, borough and town within this realm, to make search weekly, or at the farthest once a month, in all places where houses, alleys, plays, or places of dicing, carding or gaming shall be suspected to be had, kept and maintained, shall be repealed, and also so much of the said act as makes it lawful for every master to license his or their servants, and for every nobleman and other having manors, lands, tenements, or other yearly profits for term of life, in his own right or in his wife's right, to the yearly value of a hundred pounds or above, to command, appoint or license, by his or their discretion, his or their servants or family of his or their house or houses to play at cards, dice or tables, or any unlawful game, as therein more fully set forth, shall be repealed; and that no such commandment, appointment or licence shall avail any person to exempt him from the danger or penalty of playing at any unlawful game or in any common gaming house.

Repeal of part of 33 Hen. 8, c. 9.

2. And whereas doubts have arisen whether certain houses, alleged or reputed to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming houses (*k*); be it declared and enacted, That, in default of other evidence proving any house or place to be a common gaming house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against

What shall be sufficient evidence that a house is a common gaming house.

(*k*) See *Crockford* v. *Lord Maidstone*, Appendix.

actually going on in the presence of the superintendent or constable entering the same, under a warrant or order issued under the provisions of this act, or in the presence of those persons by whom he shall be accompanied as aforesaid; and it shall be lawful for the police magistrate or justices before whom any person shall be taken by virtue of the warrant or order to direct all such tables and instruments of gaming to be forthwith destroyed.

Indemnity of witnesses.

9. And for the more effectual prosecution of the keepers of common gaming houses, be it enacted, That every person who shall have been concerned in any unlawful gaming, and who shall be examined as a witness by or before any police magistrate or justice of the peace, or on the trial of any indictment or information against the owner or keeper or other person having the care or management of any common gaming house, touching such unlawful gaming, and who upon such examination shall make true and faithful discovery to the best of his or her knowledge of all things as to which he or she shall be so examined, and shall thereupon receive from the magistrate or justice of the peace or judge of the court by or before whom he or she shall be so examined a certificate in writing to that effect, shall be freed from all criminal prosecutions, and from all forfeitures, punishments and disabilities, to which he or she may have become liable for any thing done before that time in respect of such unlawful gaming.

Justices may grant billiard licences at licensing sessions.

10. And be it enacted, That the justices in every division, district and place in England, for which a special session of the justices of the peace (called the general annual licensing meeting) is holden annually for granting licences to persons keeping or being about to keep inns, alehouses and victualling houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises therein specified, shall have authority at such general annual licensing meeting, or at any adjournment thereof, to grant billiard licences to such persons as the said justices shall in their discretion deem fit and proper to keep public billiard tables and bagatelle boards, or instruments used in any game of the like kind, and at the special sessions holden for transferring licences to keep inns shall have authority to transfer such billiard licences to such other persons as they in their discretion shall deem fit and proper to continue to hold the same, and who in each case shall be required to give the like notice of their intention to apply for such billiard licence, and entitled to receive the like notice of the licensing days, as is required in the case of persons intending to apply for a licence or the transfer of a licence to sell exciseable liquors by retail to be drunk or consumed on the premises, or as near thereto as the case will allow; and every such billiard licence shall be in the form given in the third schedule annexed to this act, and shall continue in force in

the counties of Middlesex and Surrey from the fifth day of April, and elsewhere from the tenth day of October, after the granting thereof, for one whole year thence respectively next ensuing, and no longer; and the clerk of the justices shall be entitled to demand and receive from every person licensed under this act, for the petty constable or other peace officer for serving notices and other services required of him, the sum of *One* shilling, and for the clerk of the justices, for the licence, the sum of *Five* shillings; and every clerk who shall demand or receive from any person for such fees more than the said sums, being together *Six* shillings, shall for every such offence, on conviction before one justice, forfeit and pay the sum of *Five* pounds.

Places kept for public billiard tables to be licensed.

11. And be it enacted, That after the fifth day of April, in the year one thousand eight hundred and forty-six, in the counties of Middlesex and Surrey, and elsewhere after the tenth day of October next after the passing of this act, every house (*m*), room, or place kept for public billiard playing, or where a public billiard table or bagatelle board, or instrument used in any game of the like kind is kept, at which persons are admitted to play, except in houses or premises specified in any licence granted under an act passed in the ninth year of the reign of King George the Fourth, intituled "An Act to regulate the granting of Licences to Keepers of Inns, Alehouses, and Victualling Houses in England," hereinafter called a Victualler's Licence, shall be licensed under this act; and after the said fifth day of April in Middlesex and Surrey, and elsewhere after the said tenth day of October, every person keeping any such public billiard table or bagatelle board, or instrument used in any game of the like kind for public use, without being duly licensed so to do, and not holding a victualler's licence for the house or premises where such billiard table, bagatelle board, or other instrument as aforesaid is kept or used, and also every person licensed under this act who shall not during the continuance of such billiard licence put and keep up the words "Licensed for Billiards," legibly painted in some conspicuous place near the door and on the outside of the house specified in the licence, shall be liable to be proceeded against as the keeper of a common gaming house, and, beside any penalty or punishment to which he may be liable if convicted of keeping a common gaming house, shall, on conviction of keeping such unlicensed billiard table, bagatelle board, or other instrument as aforesaid, by his own confession, or by the oath of one or more credible witnesses before any police magistrate or any two justices of the peace, be liable to pay such penalty, not

9 Geo. 4, c. 61.

Notice that such places are licensed for billiards to be put up.

(*m*) As to rating a House containing a Billiard Table, see Part 3, Chap. 5.

more than *Ten* pounds for every day on which such billiard table, bagatelle board, or instrument as aforesaid shall be used, as shall be adjudged by the magistrate or justices before whom he shall be convicted, *or*, in the discretion of the magistrate or justices, may be committed to the house of correction, with or without hard labour, for any time not more than *one* calendar month; and on nonpayment of any penalty so adjudged, and of the reasonable costs and charges of the conviction, the same shall be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of the magistrate or one of the convicting justices; but no person who shall have been summarily convicted of any such offence shall be liable to be further proceeded against by indictment for the same offence.

Penalties for offences against tenor of licences.

12. And be it enacted, That every person licensed under this act, who shall be convicted before a police magistrate or two justices acting in and for the division or place in which shall be situated the house kept or theretofore kept by such person of any offence against the tenor of the licence to him granted, shall be liable to the same penalties and punishments in the case of a first, second or third offence respectively to which persons licensed under an act passed in the ninth year of the reign of King George the Fourth, intituled 9 Geo. 4, c. 61. "An Act to regulate the granting of Licences to Keepers of Inns, Alehouses, and Victualling Houses in England," are respectively liable on conviction of a first, second or third offence, against the tenor of the licence granted to them under the last-recital act, or as near thereunto as the nature of the case will allow; and all the provisions of the last-recited act with respect to convictions and penalties for offences against the last-recited act, and the proceedings for enforcing the same, and to the expenses of prosecution and penalties on witnesses for not attending and the recovery and application of penalties, and the proceedings on appeals against convictions, and the award of costs on appeals, and in actions against justices, constables or other persons, for any thing done in the execution of the last-recited act, shall be deemed to apply, so far as they are applicable, to convictions for offences against the tenor of the licences granted under this act, and to the proceedings consequent thereupon or connected therewith, as if they were herein re-enacted.

When billiard playing shall not be allowed.

13. And be it enacted, That every person keeping any public billiard table or bagetelle board, or instrument used in any game of the like kind, whether he be the holder of a victualler's licence or licensed under this act, who shall allow any person to play at such table, board or instrument, after one and before eight of the clock in the morning of any day, or at any time on Sundays, Christmas Day, or Good Friday, or any day appointed to be kept as a public fast or thanks-

giving; and every person holding a victualler's licence who shall allow any person to play at such table, board or instrument, kept on the premises specified in such victualler's licence at any time when such premises are not by law allowed to be open for the sale of wine, spirits or beer, or other fermented or distilled liquors, shall be liable to the penalties herein provided in the case of persons keeping such public billiard table, bagatelle board or instrument as aforesaid for public use without licence; and during those times when play at such table, board or instrument, is not allowed by this act, every house licensed under this act, and every billiard room in every house specified in any victualler's licence, shall be closed, and the keeping of the same open, or allowing any person to play therein or thereat, at any of the times or on any of the days during which such play is not allowed by this act, shall be deemed in each case an offence against the tenor of the licence of the person so offending.

Empowering constables to visit licensed houses.

14. And be it enacted, That it shall be lawful for all constables and officers of police to enter into any house, room or place where any public table or board is kept for playing at billiards, bagatelle or any game of the like kind, when and so often as such constables and officers shall think proper; and every person licensed under the said act of the ninth year of the reign of King George the Fourth, or under this act, who shall refuse to admit or who shall not admit any such constable or officer of police into such house, room or place shall, on conviction thereof before a police magistrate or any two justices of the peace, be deemed guilty of an offence against the tenor of his licence, whether the same be a billiard licence or a victualler's licence, and in the case of a first, second, third or subsequent offence shall be punished accordingly.

Repeal of 16 Car. 2, c. 7. 10 Will. 3, (I 9 Anne, c. 1 11 Anne, (I.) 5 & 6 Will. c. 41, and part of 18 Geo. 2, c. 34.

15. And be it enacted, That an act passed in the sixteenth year of the reign of King Charles the Second, and an act passed by the parliament of Ireland in the tenth year of the reign of King William the Third, each of such acts being entituled "An Act against deceitful, disorderly and excessive Gaming," and so much of an act passed in the ninth year of the reign of Queen Anne, and of an act passed by the parliament of Ireland in the eleventh year of the same reign, each of such acts being intituled "An Act for the better preventing of excessive and deceitful Gaming," as was not altered by an act passed in the sixth year of the reign of his late majesty, intituled "An Act to amend the Law relating to Securities given for Considerations arising out of gaming, usurious and certain other illegal Transactions," and so much of an act passed in the eighteenth year of the reign of King George the Second, intituled "An Act to explain, amend and make more effectual the Laws in being to prevent excessive and

deceitful Gaming, and to restrain and prevent the excessive Increase of Horse Races," as relates to the first-recited act of Queen Anne, or as renders any person liable to be indicted and punished for winning or losing, at play or by betting, at any one time, the sum or value of ten pounds, or within the space of twenty-four hours the sum or value of twenty pounds, shall be repealed, except as to any penalties incurred on or before the fifth day of March, in the year one thousand eight hundred and forty-four, for recovering which any suit shall have been commenced before the said fifth day of March, and the proceedings for recovery and application of the same.

Cheating at play to be punished as obtaining money by false pretences.

17. And be it enacted, That every person who shall, by any *fraud or unlawful device or ill practice* (*n*), in playing at or with cards, dice, tables or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person *by a false pretence* (*o*), with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly.

Wagers not recoverable at law.

18. And be it enacted, That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be *null and void* (*p*); and that no suit (*q*) shall be *brought or maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made (*r*): provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise (*s*).

Proceedings under feigned issues abolished.

19. And whereas many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the

(*n*) This must be in the Game; *Reg.* v. *Bailey*, 4 Cox, C. C. 390.

(*o*) Prosecutor entitled to costs under 7 Geo. 4, c. 64, s. 23; *Reg.* v. *Gardner*, Worcester Spr. Ass. 1851; *S. C.* 17 L. T. 7.

(*p*) Wagers declared void in India by the act of the Governor in Council, Oct. 10, 1848. See *Ramboll* v. *Soojumnull*, 6 Moore's P. C. 314. See ante, Part 3, Chap. 3.

(*q*) See *Varney* v. *Hickman*, ante, Part 3, Chap. 3.

(*r*) This should be specially pleaded; *Varney* v. *Hickman*, 5 C. B. 282. Plea to this effect bad for Generality, *Grizewood* v. *Blane*, 11 C. B. 538. See ante, p. 423.

(*s*) This proviso has no relation to Derby lotteries. See *Gatty* v. *Field*, 15 L. J., Q. B. 408.

affirmative and the negative of certain propositions; but such questions may be as satisfactorily tried without such form (*t*); be it therefore enacted, That in every case where any court of law or equity may desire to have any question of fact decided by a jury, it shall be lawful for such court to direct a writ of summons to be sued out, by such person or persons as such court shall think ought to be plaintiff or plaintiffs, against such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this act annexed, with such alterations or additions as such court may think proper; and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue.

Appeal to quarter sessions.

20. And be it enacted, That any person who shall be summarily convicted under this act may appeal to the next general or quarter session of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person at the time of the conviction, or within *forty-eight* hours thereafter, shall enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the said session to try such appeal, and to abide the further judgment of the court at such session, and to pay such costs as shall be by the last-mentioned court awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made to bind over the witnesses who shall have been examined in sufficient recognizances to attend and be examined at the hearing of such appeal; and that every such witness, on producing a certificate of being so bound, under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or place, in like manner as in cases of misdemeanor, under the provisions of an act passed in the seventh year of the reign of King George the Fourth, intituled "An Act for improving the Administration of Criminal Justice in England," and in case the appeal shall be dismissed, and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the said treasurer by the appellant.

7 Geo. 4, c. 64

Distress not unlawful for want of form.

21. And be it enacted, That when any distress shall be made for any money to be levied by virtue of the warrant of any justice under this act, the distress shall not be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, warrant of apprehension, conviction,

(*t*) This form may still be used; see *Luard* v. *Butcher*, 15 L. J., C. P. 187.

warrant of distress, or other proceeding relating thereto, nor shall such party be deemed a trespasser from the beginning on account of any irregularity which shall be afterwards committed by him; but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage by an action *on the Case* in any of her majesty's courts of record.

Plaintiff not to recover after tender of amends.

22. And be it enacted, That no plaintiff shall recover in any action for any irregularity, trespass or other wrongful proceeding made or committed in the execution of this act, or in, under or by virtue of any authority hereby given, if tender of sufficient amends shall have been made, by or on behalf of the party who shall have committed such irregularity, trespass or other wrongful proceeding, before such action brought; and in case no tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall think fit; whereupon such proceeding, order and adjudication shall be had and made in and by such court as in other actions where defendants are allowed to pay money into court.

Limitation of actions.

23. And be it enacted, That no action, suit or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this act, or in the execution of the authorities under this act, unless notice in writing shall be given by the party intending to prosecute such suit, information or other proceeding, to the intended defendant, *one* calendar month at least before prosecuting the same, nor unless such action, suit, information or other proceeding shall be brought or commenced within *three* calendar months next after the act or omission complained of, or in case there shall be a continuation of damage, then within *three* calendar months next after the doing such damage shall have ceased.

Construction of terms.

24. And be it enacted, That in Ireland the term "metropolitan police force," and the terms "commissioners of the police of the metropolis," and the terms "metropolitan police district," shall mean and include respectively the Dublin metropolitan police force, the commissioners of police of Dublin metropolis, and the police district of Dublin metropolis.

Conviction, &c. not to be quashed for informality, &c.

25. And be it enacted, That no information, conviction or other proceeding before or by any justice or justices under this act shall be quashed or set aside, or adjudged void or insufficient, for want of form, or be removed by certiorari into her majesty's court of Queen's Bench.

The First Schedule to which the foregoing Act refers.

Form of Warrant.

County of } To the constable

Whereas it appears to me, *J. P.*, one of the justices of our lady the queen, assigned to keep the peace in the said county, by the information on oath of *A. B.* of ——, in the county of ——, yeoman, that the house ["room" *or* "place"] known as [*here insert a description of the house, room or place by which it may be readily known and found*], is kept and used as a common gaming house within the meaning of an act passed in the —— year of the reign of her majesty Queen Victoria, intituled [*here insert the title of this act*]:

This is, therefore, in the name of our lady the queen, to require you, with such assistants as you may find necessary, to enter into the said house ["room" *or* "place"], and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and there diligently to search for all instruments of unlawful gaming which may be therein, and to arrest, search and bring before me, or some other of the justices of our lady the queen assigned to keep the peace within the county of ——, as well the keepers of the same as also the persons there haunting, resorting and playing, to be dealt with according to law; and for so doing this shall be your warrant.

J. P. (L.S.)

Given under my hand and seal at ——, in the county of ——, this —— day of ——, in the —— year of the reign of ——.

The Second Schedule to which the foregoing Act refers.

In the Court of Queen's Bench ["Common Pleas," or "Exchequer," *or in any inferior court, as the case may be*].

Middlesex to wit, [*or such other county as may be directed.*]

Whereas *A. B.* affirms and *C. D.* denies [*here state fully the fact or facts in issue*], and the lord chancellor [*or such other court, &c.*] is desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same may be inquired of by the country: Now let the jury, &c.

The Third Schedule to which the foregoing Act refers.

Form of Licence.

At the general licensing annual meeting [*or* "an adjournment of the general annual licensing meeting," *or* "at a special petty session"] of her majesty's justices of the peace acting for the division [*or* "liberty," &c., *as the case may be*], of ——, in the county of ——, holden at —— on the —— day of ——, in the year ——, for the purpose of granting billiard licences, we being —— of her majesty's justices of the peace acting for the said county [*or* "liberty," &c. *as the case may be*], and being the majority of those assembled at the said sessions, do hereby authorize and empower A. L., now dwelling at ——, in the parish of ——, to keep a house for public billiard playing at [*here specify the house*], provided that he [*or* "she"] put and keep up the words "licensed for billiards" legibly painted in some conspicuous place near the door and on the outside of the said house, and do not wilfully or knowingly permit drunkenness or other disorderly conduct in the said house, and do not

knowingly allow the consumption of exciseable liquors therein by the persons resorting thereto, and do not knowingly suffer any unlawful games therein, and do not knowingly suffer persons of notoriously bad character to assemble and meet together therein, and do not open the said house for play or allow any play therein after one and before eight of the clock in the morning, or keep it open or allow any play therein on Sundays, Christmas Day, or Good Friday, or on any day appointed for a public fast or thanksgiving, but do maintain good order and rule therein; and this licence shall continue in force from the —— day of —— next until the —— day of —— then next following, and no longer.

Given under our hands and seals on the day and at the place first written.

9 & 10 Vict. Cap. 48.

An Act for legalizing Art Unions.

Whereas certain voluntary associations have been and may hereafter be formed in various parts of the United Kingdom, under the name of Art Unions, for the purchase of paintings, drawings, or other works of art, to be afterwards allotted and distributed, by chance or otherwise, among the several members, subscribers or contributors forming part of such associations, or for raising sums of money by subscription or contribution, to be allotted and distributed, by chance or otherwise, as prizes, amongst the members, subscribers, or contributors forming part of such associations, on the condition, nevertheless that such sums of money so allotted and distributed be expended solely and entirely in the purchase of paintings, drawings or other works of art, and whereas such allotment and distribution of paintings, drawings, or other works of art, or of sums of money for their purchase, and the proceedings taken to carry the same into effect, may be deemed and taken to come within the provisions of the several acts of parliament passed for the prevention of lotteries, littlegoes, and unlawful games, whereby the members, subscribers, or contributors of such associations as aforesaid, or persons acting under their authority or on their behalf, may be liable or subjected to certain pains and penalties imposed by law on persons concerned in lotteries, littlegoes, and unlawful games: and whereas it is expedient that all members of and subscribers and contributors to such voluntary associations as aforesaid, and all persons acting under their authority or on their behalf, so long only as their proceedings are carried on in good faith for the encouragement of the fine arts, shall be discharged and protected from any pains and penalties to which they may have rendered themselves liable, or may hereafter render themselves liable, by reason of any such their proceedings as aforesaid: be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual

and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all such voluntary associations as aforesaid, now constituted, or which may hereafter be constituted according to the provisions hereinafter contained, shall be deemed to be lawful associations; and the members of and subscribers and contributors to all such lawful associations, and all person acting under their authority or on their behalf for the purposes aforesaid, shall be freed and discharged from all pains and penalties, suits, prosecutions and liabilities, to which by law they would be liable but for the passing of this act, as being concerned in illegal lotteries, littlegoes, or unlawful games, by reason of any thing done or which may be done by them or any of them in furtherance of the allotment or distribution, by scheme or otherwise, of paintings, drawings, or other works of art, or of the allotment or distribution of sums of money as prizes to be expended for their purchase: provided always, that a royal charter or charters shall have been first obtained for the incorporation of any such association, or provided that the deed of partnership, or other instrument or instruments constituting such association, and the rules and regulations relating to the proceedings of such association for such purposes as aforesaid, shall have first been submitted to the consideration and be approved of by a committee of her majesty's most honourable privy council, and a copy thereof deposited with such committee; and that it shall be expressed in every such charter, deed or instrument, that it shall be lawful for any committee of her majesty's privy council to whom the consideration of art unions shall be referred by her majesty, whenever it shall appear to them that any such association is perverted from the purposes of this act, to certify the fact to her majesty, and thereupon it shall be lawful for her majesty to revoke or annul the charter, deed or instrument under which the association so offending shall have been constituted; and nothing in this act contained shall be deemed to apply to any association whose charter, deed of partnership, or other instrument constituting the same, shall have been so revoked or annulled.

Voluntary associations constituted for the distribution of works of art by lot deemed legal, provided a royal charter shall have been first obtained, &c.

16 & 17 Vict. Cap. 33.

An Act for the better Regulation of Metropolitan Stage and Hackney Carriages, and for prohibiting the Use of advertising Vehicles.

Whereas it is desirable to improve the condition of the metropolitan stage and hackney carriages, and to alter and amend the system of licensing such carriages: be it therefore enacted by the Queen's most excellent majesty, by and with

the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that—

Persons desirous of obtaining a licence to keep a hackney carriage, &c. to make application to commissioners of police, who, if carriage is found fit, shall grant a certificate.

1. From and after the first day of October next every person desirous of obtaining a licence to keep, use, and let to hire any metropolitan stage or hackney carriage (*a*) within the limits of this act (*b*) must apply in writing to the commissioners of police of the metropolis, in order that they may cause an inspection to be made of every carriage to be kept, used, or let to hire by virtue of such licence, and upon such application the said commissioners shall cause an inspection to be made of every such carriage, and if such carriage or carriages shall be found by the said commissioners to be in a fit and proper condition for public use, they shall grant a certificate to that effect, and shall specify in such certificate the number of persons to be carried in and by such carriage, in the form given in schedule (B.) to this act annexed, and upon production of such certificate at the office of the board of inland revenue, a licence shall be granted; but it shall not be lawful for the said board of inland revenue to grant or issue any licence for any metropolitan stage or hackney carriage, within the limits of this act, unless the person applying for the same shall produce such certificate as aforesaid.

No licence to be granted by board of inland revenue without such certificate.

Commissioners of police may cause carriages, &c. to be inspected, and if not in fit condition may suspend licences and recall stamp office plate.

2. It shall be lawful for the said commissioners of police to cause an inspection to be made, as often as they deem it necessary, of all metropolitan stage and hackney carriages, and of the horse or horses used in drawing the same, within the limits of this act; and if any such carriage, or the horse or horses used in drawing the same, shall at any time be in a condition unfit for public use, the said commissioners shall give notice in writing accordingly to the proprietor thereof, which notice shall be personally served on such proprietor, or delivered at his usual place of residence; and if, after notice as aforesaid, any proprietor shall use or let to hire such carriage as a metropolitan stage or hackney carriage, or use or let to hire such horse or horses whilst in a condition unfit for public use, the said commissioners shall have power to suspend, for such time as they may deem proper, the licence of the proprietor of such carriage, and to recall and take away the stamp office plate belonging to the same, and to retain the same during the suspension of such licence; and a notice shall be given to the board of inland revenue, according to the form in the schedule (C.) to this act annexed, in every case by the said commissioners of the suspension of any such licence, and of the time for which it is suspended.

Notice to be given to inland revenue.

Penalty for using carriage not in fit condition.

3. Every proprietor or driver of a metropolitan stage or hackney carriage who shall use or let to hire within the limits

(*a*) See 6 & 7 Vict. c. 86, s. 2.
(*b*) See post, s. 20; 16 & 17 Vict. c. 127, s. 13, Appendix.

of this act any carriage as a metropolitan stage or hackney carriage which has not been certified by the said commissioners of police to be in a fit and proper condition for public use, or who shall use or let to hire within the limits of this act any carriage as a metropolitan stage or hackney carriage for which such a certificate had been granted, after notice given to him as hereinbefore required by the said commissioners that such carriage was no longer in a fit and proper condition for public use, shall be liable to a penalty not exceeding *Three* pounds for each day that he shall so use or let to hire such carriage, or in default of payment may be imprisoned for any time not exceeding one month.

As to rates and fares to be taken for hackney carriages.

4. The proprietor or driver of any hackney carriage within the limits of this act shall be entitled to demand and take for the hire of such carriage the fares set forth in the schedule (A.) to this act annexed: provided always, that when the proprietor or driver of any hackney carriage to be paid a fare calculated according to the distance shall be required by the hirer thereof to stop such carriage for fifteen minutes, or for any longer time, it shall be lawful for the proprietor or driver to demand and receive from the hirer so requiring him to stop a further sum (above the fare to which he shall be entitled calculated according to the distance) of sixpence for every fifteen minutes completed that he shall have been so stopped (*c*); and no proprietor or driver shall demand or receive over and above the said fare any sum, for or by way of back fare, for the return of such carriage from the place at which such carriage shall be discharged (*d*).

No back fare to be taken or demanded.

Table of fares to be put up distinctly inside and outside of hackney carriages.

5. The proprietor of every hackney carriage within the limits of this act shall put up, and at all times keep, distinctly painted or marked, in such a manner and in such a position as shall be directed by the said commissioners of police, both on the inside and outside of such hackney carriage, the amount of fare according to distance and time which may legally be demanded and taken from the hirer of such carriage; and the driver of every hackney carriage within the limits of this act shall have with him at all times when plying for hire a book or table in such form as shall be directed by the said commissioners of police of the fares for the hire of such carriage, which book or table the driver shall produce when required for the information of any person hiring or intending to hire such carriage.

Driver to produce book of fares when required.

As to settlement of disputes as to distances.

6. In case of disputes as to the fare to be calculated according to the distance, any table or book signed by the said commissioners of police shall, on proof of such signature, be deemed and taken to be conclusive evidence of all the distances therein stated to have been measured by the authority

(*c*) See post, s. 7.
(*d*) See 16 & 17 Vict. c. 127, s. 13, Appendix.

of the said commissioners of police; and it shall be lawful for the said commissioners to cause to be placed or erected at the several standings for hackney carriages or elsewhere within the metropolitan district, as they may deem convenient, tables of distances and fares, and such other information as may be useful to persons hiring such carriage.

As to distance drivers of hackney carriages shall be required to drive.

7. The driver of every hackney carriage which shall ply for hire (*e*) at any place within the limits of this act shall (unless such driver have a reasonable excuse, to be allowed by the justice before whom the matter shall be brought in question), drive such hackney carriage to any place to which he shall be required by the hirer thereof to drive the same, not exceeding six miles from the place where the same shall have been hired (*f*), or for any time not exceeding one hour from the time when hired: provided always, that when any hackney carriage shall have been hired by time, the driver thereof may be required to drive at any rate not exceeding four miles within one hour, and if the driver of such carriage shall be required to drive more than four miles within one hour, then in every such case the driver thereof shall be entitled to demand, in addition to the fare regulated by time in schedule (A.) to this act annexed, for every mile or any part thereof exceeding four miles, the fare regulated by distance as set forth in the same schedule.

Driver to deliver a ticket to hirer of carriage.

8. Every driver of a hackney carriage within the limits of this act shall, on each occasion when such carriage shall be hired, deliver to the hirer thereof a card, on which shall be printed, in legible letters and figures, the words "hackney carriage," and the number of the stamp office plate affixed on such hackney carriage, or such other words or figures as the said commissioners of police may direct (*g*).

Number of persons to be carried to be painted or marked on hackney carriage.

9. The proprietor of every hackney carriage within the limits of this act shall put up and at all times keep distinctly painted or marked on such carriage, in such a manner and in such a position as shall be directed by the said commissioners of police, the number of persons to be carried thereby as specified in the certificate granted by the said commissioners for such hackney carriage, and the driver of any such hackney carriage shall, if required by the hirer thereof, carry in and by such carriage the number of persons painted or marked thereon, or any less number of persons.

As to quantity of luggage to be carried without extra charge.

10. The driver of every hackney carriage within the limits of this act shall carry in or upon such carriage a reasonable quantity of luggage for every person hiring such carriage without any additional charge, except as provided in schedule (A.) to this act annexed.

(*e*) See 1 & 2 Will. 4, c. 22, s. 35.
(*f*) See 16 & 17 Vict. c. 127, s. 13, Appendix.
(*g*) See post, s. 17.

11. The driver of every hackney carriage within the limits of this act wherein any property shall be left by any person shall within twenty-four hours carry such property, if not sooner claimed by the owner thereof, in the state in which he shall find the same, to the nearest police station, and shall there deposit and leave the same with the inspector or other officer on duty, upon pain that every such driver making any default herein shall be liable to a penalty not more than *Ten pounds*, or at the discretion of the magistrate may be imprisoned for any time not exceeding one month; and the said officer with whom any such property shall be deposited shall forthwith enter in a book to be kept for that purpose the description of such property, and the name and address of the driver who shall bring the same, and the day on which it shall be brought; and the property so entered shall be returned to the person who shall prove, to the satisfaction of the commissioners of police, that the same belonged to him, such person previously paying all expenses incurred, together with such reasonable sum to the driver who brought the same as the said commissioners shall award: provided always, that if such property shall not be claimed by and proved to belong to some person within one year after the same shall have been deposited, the said commissioners shall cause such property to be sold or otherwise disposed of, and the proceeds thereof to be paid over to the receiver-general of inland revenue, to be carried to the public account, all expenses incurred about such property, together with such reasonable sum to the driver who brought the same as the said commissioners shall award, being first paid thereout; and all property left by any passenger in any metropolitan stage carriage shall be given up to the conductor of such carriage, or, if there be no conductor, to the driver, upon pain of a penalty of *Ten pounds*, to be paid by any person refusing or neglecting to give up any such property belonging to another person; and the conductor or driver of every such carriage to whom any such property shall be given up, or who shall himself find it in the carriage, shall within twenty-four hours carry the property, if not sooner claimed by the owner thereof, in the state in which he shall find the same, to the nearest police station, and shall there deposit and leave the same with the inspector or other officer on duty, upon pain that every such driver or conductor making default herein shall be liable to a penalty not more than *Ten pounds*, or at the discretion of the magistrate may be imprisoned for any time not exceeding *One month*; and the property so deposited by any conductor or driver shall be dealt with in the same manner as property left in hackney carriages and deposited by the drivers of such carriages.

Property left in hackney carriages to be deposited at the police office.

Penalty on driver for default.

Property not claimed to be disposed of.

Penalty on refusing or neglecting to give up property left in stage carriages.

12. It shall be lawful for the said commissioners of police, from time to time to appoint a sufficient number of fit men to

Commissioners of police

to appoint persons to enforce good order at hackney carriage stands, &c.

enforce good order at the standings for hackney carriages (*h*) and at the places at which metropolitan stage carriages or hackney carriages shall call or ply for passengers, and at such places of public resort within the metropolitan police district, as they may deem necessary; and the said commissioners may from time to time make such orders and regulations as they shall deem expedient, subject to the approval of one of her majesty's principal secretaries of state given in writing relative to the duties to be performed by such persons and the places at which each shall act; provided that the said commissioners shall not have authority to appoint any such person to act within or upon the premises belonging to any railway company, unless with the consent of the directors of the company.

Power to commissioners, with consent of treasury, to pay wages to such persons, and also to direct water rates to be paid.

13. The said commissioners of police, subject to the approbation of the commissioners of her majesty's treasury, shall appoint wages to be paid to the said persons appointed by them to keep good order at the standings for hackney carriages and at the places at which metropolitan stage carriages or hackney carriages shall call or ply for passengers, and at such places of public resort as they may deem necessary; and the said commissioners shall also, in such cases as they think fit, direct the water-rates and the expenses of the necessary apparatus for laying on the water at the standings for hackney carriages and at places where metropolitan stage carriages usually call or ply for hire, to be paid.

Lamps to be placed inside metropolitan stage carriages.

14. The proprietor of every metropolitan stage carriage shall cause to be placed inside such carriage, a lamp, in such a position and manner as shall be directed by the said commissioners of police; and the conductor, or, if there be no conductor, the driver of such carriage shall keep the said lamp properly lighted whenever such carriage shall be used to ply for hire or carry passengers at any time after sunset and before sunrise.

Printed bills, &c. not to be put on metropolitan stage or hackney carriages, so as to obstruct light, &c.

15. It shall not be lawful for the proprietor of any metropolitan stage or hackney carriage to suffer any notice, advertisement, or printed bill, or any names, letters or numbers, to appear upon the outside of any such carriage, in such a manner as to obstruct the light or ventilation of such carriage, or on the inside of any such carriage, in such a position that any such notice, advertisement or printed bill shall obstruct the light or ventilation of such carriage or cause annoyance to any passenger therein.

Advertising vehicles, &c. prohibited.

16. It shall not be lawful for any person to carry about on any carriage or on horseback or on foot in any thoroughfare or public place within the limits of this act, to the obstruction or annoyance of the inhabitants or passengers, any picture,

(*h*) See 13 Vict. c. 7, s. 4.

placard, notice or advertisement, whether written, printed or painted upon or posted or attached to any part of such carriage or on any board or otherwise.

Drivers and conductors of metropolitan stage carriages, and drivers of hackney carriages, liable to penalties for offences herein named.

17. The driver or conductor of any metropolitan stage carriage or the driver of any hackney carriage, who shall respectively commit any of the following offences within the limits of this act, shall be liable to a penalty not exceeding *Forty shillings* for each offence, or, in default of payment, to imprisonment for any time not exceeding one calendar month (*i*):

1. Every driver of a hackney carriage who shall demand or take more than the proper fare as set forth in schedule (A.) to this act annexed, or who shall refuse to admit and carry in his carriage the number of persons painted or marked on such carriage or specified in the certificate granted by the said commissioners of police in respect of such carriage, or who shall refuse to carry by his carriage a reasonable quantity of luggage for any person hiring or intending to hire such carriage;
2. Every driver of a hackney carriage who shall refuse to drive such carriage to any place within the limits of this act (*k*), not exceeding six miles, to which he shall be required to drive any person hiring or intending to hire such carriage, or who shall refuse to drive any such carriage for any time not exceeding one hour, if so required by any person hiring or intending to hire such carriage, or who shall not drive the same at a reasonable and proper speed, not less than six miles an hour, except in cases of unavoidable delay, or when required by the hirer thereof to drive at any slower pace;
3. Every driver of a hackney carriage who shall ply for hire with any carriage or horse which shall be at the time unfit for public use, or who shall refuse or neglect to deliver to the hirer of his carriage a ticket with the number of the stamp office plate on such carriage printed thereon.

Power to police magistrates or justices of the peace to hear and determine offences.

18. It shall be lawful for any one of the police magistrates at any of the metropolitan police courts, to hear and determine all offences against the provisions of this act, and also all disputes or causes of complaint that may arise out of the same; or if the offence, dispute or cause of complaint shall be committed or occur in any place not comprised within the limits of a police court district, the same may be heard and determined by two justices of the peace for the county; or if the offence, dispute or cause of complaint shall be committed or occur within the city of London, the same shall be heard and determined by one justice of the peace for the said

(*i*) See 1 & 2 Will. 4, c. 22, s. 42.
(*k*) See 16 & 17 Vict. c. 127, s. 17.

In case of disputes the hirer may require the driver to drive to a police court, &c., or to a police station.

city, or by a metropolitan police magistrate sitting at the police court in Bow Street; and in case of any dispute between the hirer and driver of any hackney carriage, the hirer may require the driver forthwith to drive to the nearest metropolitan police court or justice room, where complaint may be made to the magistrate then sitting, who shall hear and determine the same, without requiring any summons to be issued for that purpose; and if such dispute should arise at a time when the police court or justice room shall not be open, the hirer may require the driver to drive to the nearest police station or justice room, where the complaint shall be entered, and notice given to both parties that the matter in dispute shall be heard by the magistrate at his next sitting.

Penalty for offences against this act for which no penalty is appointed.

19. For every offence against the provisions of this act, for which no special penalty is hereinbefore appointed, the offender shall be liable to a penalty not exceeding *Forty shillings, or* in default of payment be imprisoned for any time not exceeding *One month* in any gaol or house of correction within the jurisdiction of the magistrate before whom the conviction shall take place.

Meaning of certain words used in this act.

20. All things herein authorized to be done by the said commissioners of police of the metropolis shall be done by such one of the said commissioners as one of her majesty's principal secretaries of state shall from time to time be pleased to appoint; and the words "the limits of this act" shall include every part of the metropolitan police district (*l*) and city of London.

This act to be construed with 6 & 7 Vict. c. 86, and 13 & 14 Vict. c. 7.

21. This act shall be construed as one act with the act passed in the seventh year of the reign of her majesty queen Victoria, chapter eighty-six, and the act passed in the thirteenth year of the reign of her majesty, chapter seven; and all the provisions of the said acts, except so far as is herein otherwise provided, shall extend to this act, and to all things done in execution of this act.

Commencement of act.

22. This act shall commence and take effect from and after the tenth day of July, one thousand eight hundred and fifty-three, except as herein otherwise specially provided.

(*l*) See 10 Geo. 4, c. 44, s. 4; 2 & 3 Vict. c. 47, s. 2; 16 & 17 Vict. c. 127, s. 17, Appendix.

SCHEDULES referred to in the foregoing Act.

RATES and FARES to be paid for any HACKNEY CARRIAGE hired at any Place within the Limits of this Act (*a*).

SCHEDULE (A).

DESCRIPTION OF CARRIAGE.	FARE BY DISTANCE.		FARE BY TIME.	
	For any Distance within and not exceeding one Mile.	For any Distance exceeding One Mile.	For any Time within and not exceeding One Hour (*b*).	
With Four or Two Wheels, drawn by One Horse.	6*d*.	After the Rate of *Sixpence* for every Mile, and for any part of a Mile over and above any Number of Miles completed.	2*s*.	And for every Hackney Carriage drawn by Two Horses, One Third above the Rates and Fares hereinbefore mentioned.

The above fares to be paid according to distance or time, at the option of the hirer, to be expressed at the commencement of the hiring; if not otherwise expressed, the fare to be paid according to distance.

Provided, that no driver shall be compellable to hire his carriage for a fare to be paid according to time at any time after eight o'clock in the evening and before six o'clock in the morning.

When more than two persons shall be carried inside any hackney carriage, one sum of 6*d*. is to be paid for the whole hiring in addition to the above fares (*c*). Two children under ten years of age to be counted as one adult person.

When more than two persons shall be carried inside any hackney carriage with more luggage than can be carried inside the carriage, a further sum of twopence for every package carried outside the said carriage is to be paid by the hirer in addition to the above fares.

SCHEDULE (B).

CERTIFICATE.

I, do hereby certify, that on the application of , now living at , I have caused the carriage known by the following marks or description [*here state marks or description by which the carriage may be identified*], to be inspected, which the said desires to use and let to hire as a [metropolitan stage carriage, *or* as a hackney carriage]; and I certify that the said carriage is in a fit and proper condition for public use, and that persons are to be carried thereby [*if the carriage be a metropolitan stage carriage, the number of passengers to be carried inside and outside thereof respectively is to be specified, exclusive of the driver and conductor.*]

(Signed) ——

Commissioner of the police of the metropolis.

(*a*) The fares in this schedule, as amended by 16 & 17 Vict. c. 127, *post*, are minimum fares. A secretary of state may raise them by order under 32 & 33 Vict. c. 115, s. 9.

(*b*) 16 & 17 Vict. c. 127, s. 15.

(*c*) Ibid. s. 14.

SCHEDULE (C).

CERTIFICATE.

I, do hereby certify, that I have caused the carriage now used and let to hire as a [*state whether a metropolitan stage or hackney carriage*], and known by the following marks or description [*here state marks or description by which the carriage may be identified*], to be inspected, and find the said carriage not to be in a fit and proper condition for public use; and I do hereby suspend the licence granted to to keep and use the said carriage as a [*state whether a metropolitan stage or hackney carriage*] for the period of from this date.

(Signed) ———
Commissioner of the police of the metropolis.

16 & 17 Vict. Cap. 127.

An Act to reduce the Duties payable in respect of Hackney Carriages used in the Metropolis, and to amend the Laws relating to the granting of Licences and Payment of Duties in respect of Metropolitan Stage and Hackney Carriages, and to make Provision as to the Charge for the Hire of Hackney Carriages in certain Cases.

1*s.* a mile to be paid for every mile beyond the circumference of a circle four miles from Charing Cross if carriage be discharged beyond such circumference.

13. It shall be lawful for the driver of any hackney carriage within the limits of this act to charge *One shilling* per mile for every mile (or part of a mile) which he shall be required to drive beyond the circumference of a circle the radius of which shall be four miles from Charing Cross, provided such carriage shall be discharged beyond such circumference, anything contained in the thirty-third chapter of an act of the sixteenth and seventeenth year of the reign of her present majesty, or in the schedule thereto, notwithstanding.

Addition to the fare to be paid for each person above two.

14. Whenever more than two persons shall be conveyed by any hackney carriage drawn by one horse only, a sum of *Sixpence* for each person above the number of two shall be paid for the whole hiring in addition to the fare now directed to be paid for two persons under the said act of the sixteenth and seventeenth years of the reign of her present majesty, chapter thirty-three; and two children under ten years old shall be considered as one adult person for the purposes of this clause.

When carriage hired by time, 6*d.* to be paid for every fifteen minutes, or portion thereof, over ¼ hour.

15. When any hackney carriage within the limits of this act hired for a fare to be paid according to time shall be hired or used by the hirer thereof for any longer time than one hour, *Sixpence* shall be paid for every fifteen minutes, or any portion of fifteen minutes not completed, above one hour.

Proprietors of hackney carriages

16. The proprietor of every hackney carriage or metropolitan stage carriage licensed to ply for hire within the limits of this act who shall withdraw his carriage from hire for two

consecutive days, or for any two days in one week, without just cause, of which the magistrate before whom the complaint is heard shall be the judge, shall be liable to a penalty of a sum not exceeding *Twenty shillings* in respect of every carriage for each day he shall so withdraw the same, and the licence of such proprietor shall be suspended or recalled and taken away at the discretion of the said commissioners of police: Provided always, that it shall be lawful for such proprietor, upon giving ten days' notice to the commissioners of police, to withdraw his carriage from hire.

withdrawing carriages from hire beyond a certain time liable to a penalty.

17. The limits of this act shall be deemed to be and to include every part of the metropolitan police district and the city of London; and all provisions of any former act in force referring to hackney carriages licensed under the said act of the first and second years of his late majesty, or to hackney carriages kept, used, employed, or let to hire within the distance of five miles from the General Post Office in the city of London, or to any act, matter, or thing committed or done in relation to such hackney carriages within the said distance, shall from and after the passing of this act be deemed to refer and apply to hackney carriages licensed under this act, or to hackney carriages kept, used, employed, or let to hire within the limits of this act, and to any act, matter, or thing committed or done in relation to hackney carriages within the said limits.

"The limits of this act" defined.

16 & 17 Vict. Cap. 119.

An Act for the Suppression of Betting Houses.

Whereas a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies: for the suppression thereof, be it enacted, by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows:—

1. No house, office, room, or other place shall be opened, kept or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting

No house, &c. to be kept for purpose of owner or occupier betting with other persons.

thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing, on any event or contingency of or relating to any horse race, or other race, fight, game, sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing, on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

Betting houses to be gaming houses within 8 & 9 Vict. c. 109.

2. Every house, room, office or place opened, kept or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house within the meaning of an act of the session holden in the eighth and ninth years of her majesty, chapter one hundred and nine, "to amend the "law concerning games and wagers."

Penalty on owner or occupier of betting house.

3. Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room or place opened, kept or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding *One hundred pounds*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding *Six calendar months*.

Penalty on persons receiving money on condition of paying money on event of any bet.

4. Any person, being the owner or occupier of any house, office, room or place opened, kept or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet, on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or re-

lating to a horse race or any other race, or any fight, game, sport or exercise, or as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security or draft on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall, upon summary conviction thereof before two justices of the peace, forfeit and pay such penalty, not exceeding *Fifty pounds*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable ; and on the nonpayment of such penalty and costs, or in the first instance, if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding *Three calendar months*.

Money so received may be recovered from the persons receiving the same.

5. Any money or valuable thing received by any such person aforesaid, as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction.

This act not to extend to stakes due to owner of horse winning a race.

6. Provided always, that nothing in this act contained shall extend to any person receiving or holding any money or valuable thing, by way of stakes or deposit to be paid to the winner of any race or lawful sport, game or exercise, or to the owner of any horse engaged in any race.

Penalty on persons exhibiting placards or advertising betting houses.

7. Any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign or advertisement, whereby it shall be made to appear that any house, office, room or place is opened, kept or used for the purpose of making bets or wagers in manner aforesaid, or for the purpose of exhibiting lists for betting, or with intent to induce any person to resort to such house, office, room or place for the purpose of making bets or wagers in manner aforesaid, or any person who, on behalf of the owner or occupier of any such house, office, room or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers, in manner aforesaid, shall, upon summary conviction thereof before two justices of the peace, forfeit and pay a sum not exceeding *Thirty pounds*, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and

costs, or in the first instance if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding *Two calendar months*.

Penalties and costs may be levied by distress.

8. If any person convicted under this act on information before justices shall be adjudged to pay any penalty, or any costs and charges attending the conviction, and shall fail to pay such penalty or costs, the same may be levied by distress and sale of the goods and chattels of the offender by warrant under the hand and seal of one of the convicting justices: Provided always, that if any person shall be committed to prison for default of payment of any penalty and costs, then the costs alone may be levied by distress as aforesaid.

Application of penalties.

9. One half of every pecuniary penalty which shall be adjudged to be paid under this act shall be paid to the informer, and the remaining half shall be applied in aid of the poor rate of the parish in which the offence shall have been committed, and shall be paid for that purpose to the overseer or other person authorized to receive poor rates in such parish, or if the place wherein the offence shall have been committed shall be extra-parochial, then the justices by whom such penalty shall be adjudged to be paid shall direct such remaining half thereof to be applied in aid of the poor rate of such extra-parochial place, or if there shall not be any poor rate therein, in aid of the poor rate of any adjoining parish or district.

On neglect to prosecute any summons, justices may authorize some other person to proceed.

10. In case any person who shall have laid any complaint or information in respect of any offence against this act shall not appear at the time at which the defendant may have been summoned to appear, or at any time to which the hearing of the summons may have been adjourned, or, in the opinion of any justices having authority to adjudicate with respect to the offence charged in such information or complaint as aforesaid, shall otherwise have neglected to proceed upon or prosecute such information or complaint with due diligence, it shall be lawful for such justices to authorize any other person to proceed on such summons instead of the person to whom the same may have been granted, or if such justices think fit to dismiss the summons already granted, and authorize any person to take out a fresh summons in respect of the offence charged in such information or complaint, in like manner as if the previous summons had not been granted.

Justices may authorize search of suspected houses.

11. It shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, office, room, or place to be kept or used as a betting house or office, contrary to this act, to give authority by special warrant under his hand, when in his discretion he shall think fit, to any constable or police officer, to enter, with such assistance as may be found necessary, into such house, office, room, or place, and, if necessary, to use

force for making such entry, whether by breaking open doors, or otherwise, and to arrest, search, and bring before a justice of the peace all such persons found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises; and any such warrant may be according to the form given in the first schedule annexed to the before-mentioned act "to amend the law concerning games and wagers."

Commissioner of police may authorize superintendent of police to enter and search suspected houses.

12. If any superintendent belonging to the metropolitan police force shall report in writing to the commissioners of police of the metropolis that there are good grounds for believing and that he does believe that any house, office, room, or place within the metropolitan police district is kept or used as a betting house or office, contrary to this act, it shall be lawful for either of the said commissioners by order in writing to authorize the superintendent to enter any such house, office, room, or place, with such constables as shall be directed by the commissioners to accompany him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who shall be found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises.

Appeal to quarter sessions.

13. Any person who shall be summarily convicted under this act may appeal to the next general or quarter session of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person at the time of the conviction give notice of his intention to appeal, and shall at the time of such conviction, or within forty-eight hours thereafter, enter into a recognizance with two sufficient sureties conditioned personally to appear at the said session to try such appeal, and to abide the further judgment of the court at such session, and to pay such costs as shall be by the last-mentioned court awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made to bind over any party who shall have made information against the party convicted, and any witnesses who shall have been examined, in sufficient recognizances to attend and be examined at the hearing of such appeal; and every such witness, on producing a certificate of being so bound under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble, and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or place in like manner as in cases of misdemeanor under the provisions of an act passed in the seventh year of the reign of King George the Fourth, intituled "An Act for improving the Administration of Criminal Justice in England;" and in case any such appeal shall be dismissed and

7 & 8 Geo. 4, c. 28.

the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the said treasurer by the appellant.

No objection in matter of form and certiorari taken away.

14. On any such appeal no objection shall be allowed to the information whereon the conviction has taken place, or to such conviction, on any matter of form or on any insufficiency of statement, provided it shall appear to the justices in quarter sessions that the defendant has been sufficiently informed of the charge intended to be made against him, and that such conviction was proper on the merits of the case; and no information, conviction, or judgment of the justices in general or quarter sessions shall be removed by certiorari into the Court of Queen's Bench.

Distress not unlawful for want of form.

15. When any distress shall be made for any money to be levied by virtue of the warrant of any justice under this act, the distress shall not be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, warrant of apprehension, conviction, warrant of distress, or other proceeding relating thereto, nor shall such party be deemed a trespasser from the beginning on account of any irregularity which shall be afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage by an action on the case in any of her majesty's courts of record.

Tender of amends, &c.

16. No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding before such action brought; and in case no tender shall have been made it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined to pay into court such sum of money as he shall think fit, whereupon such proceeding, order, and adjudication shall be had and made in and by such court as in other actions where defendants are allowed to pay money into court.

Limitation of actions.

17. No action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this act, or in the execution of the authorities under this act, unless notice in writing shall be given by the party intending to prosecute such suit, information or other proceeding to the intended defendant one calendar month at least before prosecuting the same, nor unless such action, suit, information or other proceeding shall be brought or commenced within three calendar months next after the act or omission complained of,

or in case there shall be a continuation of damage then within three calendar months next after the doing such damage shall have ceased.

18. In Ireland the term "metropolitan police force," and the terms "commissioners of the police of the metropolis," and the terms "metropolitan police district," shall mean and include respectively the Dublin metropolitan police force, the commissioners of police of Dublin metropolis, and the police district of Dublin metropolis. Interpretation of terms.

19. This act shall commence and come into operation on the first day of December, one thousand eight hundred and fifty-three. Commencement of act.

37 Vict. Cap. 15.

An Act to amend the Act of sixteenth and seventeenth Victoria, chapter one hundred and nineteen, intituled "An Act for the Suppression of Betting Houses."

Whereas it is expedient to amend the act of the session of the sixteenth and seventeenth years of the reign of her present majesty, chapter one hundred and nineteen, intituled "An Act for the Suppression of Betting Houses," and to extend the provisions of such act to Scotland:

Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. This act shall be construed as one with the act of the session of the sixteenth and seventeenth years of the reign of her present majesty, chapter one hundred and nineteen, intituled "An Act for the Suppression of Betting Houses" (in this act referred to as the principal act), and the principal act and this act may be cited together as the Betting Acts, 1853 and 1874, and each of them may be cited separately as the betting act of the year in which it was passed. Act to be construed with 16 & 17 Vict. c. 119. Short title.

2. This act shall not come into operation until the thirty-first day of July, one thousand eight hundred and seventy-four. Commencement of act.

3. Where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published,— Penalty on persons advertising as to betting.

(1.) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager, or any such event or contingency as is mentioned in the principal act, or will make on behalf of any other person any such bet or wager as is mentioned in the principal act; or,

(2.) With intent to induce any person to apply to any house, office, room, or place, or to any person, with the view of obtaining information or advice for the purpose of any such bet or wager or with respect to any such event or contingency as is mentioned in the principal act; or,

(3.) Inviting any person to make or take any share in or in connection with any such bet or wager;

every person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, shall be subject to the penalties provided in the seventh section of the principal act with respect to offences under that section.

Extension to Scotland.

4. The twentieth section of the principal act is hereby repealed, and the principal act, as amended by this act, shall extend to Scotland, with the following modifications and provisions:

(1.) The term "distress" shall mean poinding and sale: The term "misdemeanour" shall mean a crime and offence:

(2.) All offences or penalties under this act and the principal act shall be prosecuted and recovered before the sheriff of the county or his substitute in the sheriff court, at the instance of the procurator fiscal, or of any private person, under the provisions of the Summary Procedure Act, 1864, and all the jurisdictions, powers, and authorities necessary for the purposes of this section are hereby conferred on the sheriffs and their substitutes:

(3.) Every pecuniary penalty which is adjudged to be paid under this or the principal act, shall be paid to the clerk of the court, and shall be by him accounted for and paid to the Queen's and lord treasurer's remembrancer on behalf of her majesty:

(4.) The thirteenth and fourteenth sections of the principal act shall not apply to Scotland, but it shall be competent to any person who is convicted under this act or the principal act to appeal against such conviction to the high court of justiciary, in the manner prescribed by such of the provisions of the act of the twentieth year of the reign of King George the Second, chapter forty-three, and any acts amending the same, as relate to appeals in matters criminal, and by and under the rules, limitations, convictions, and restrictions contained in the said provisions.

17 & 18 Vict. Cap. 38.

An Act for the Suppression of Gaming Houses.

Whereas divers statutes have been made from time to time for the prevention of unlawful gaming; and particularly by the act of the session holden in the eighth and ninth years of her majesty, chapter one hundred and nine, powers are given to justices of the peace in places beyond the metropolitan police district to authorize constables, and to either of the commissioners of police within such district to authorize superintendents belonging to the metropolitan police force, to enter houses suspected to be kept as common gaming houses, and to arrest all persons found therein: and it is thereby enacted, that where any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game shall be found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under the provisions of that act, or about the person of any of those who shall be found therein, it shall be evidence, until the contrary be made to appear, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such tables or instruments of gaming shall have been found were playing therein: and whereas the keepers of common gaming houses contrive, by fortifying the entrances to such houses, or by other means, to keep out the officers authorized to enter the same until the instruments of gaming have been removed or destroyed, so that no sufficient evidence can be obtained to convict the offenders, who are thereby encouraged to persist in the violation of the law; and whereas it is expedient that the law shall be made more efficient for the suppression of gaming houses; be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows:

8 & 9 Vict. c. 109.

Penalty on persons obstructing the entry of constables authorized to enter any house suspected to be a common gaming house.

1. Any person who shall wilfully prevent any constable or officer authorized under the provisions of the said act of the eighth and ninth years of her majesty to enter any house, room or place, from entering the same or any part thereof, or who shall obstruct or delay any such constable or officer in so entering, and any person who, by any bolt, bar, chain or other contrivance shall secure any external or internal door of or means of access to any house, room or place so authorized to be entered, or shall use any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer authorized as aforesaid into any such house, room or place, or any part

thereof, may for every such offence, on a summary conviction of the same before two justices of the peace, be adjudged by such justices to forfeit and pay any penalty not exceeding one hundred pounds, together with such costs attending the said conviction as to the said justices shall appear reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any period not exceeding six calendar months.

Obstructing entry of constables to be evidence of house being a common gaming house.

2. Where any constable or officer authorized as aforesaid to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof, or where any external or internal door of or means of access to any such house, room or place so authorized to be entered shall be found to be fitted or provided with any bolt, bar, chain or any means or contrivance for the purpose of preventing, delaying or obstructing the entry into the same or any part thereof of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room or place is used as a common gaming house within the meaning of this act and of the former acts relating to gaming, and that the persons found therein were unlawfully playing therein.

Penalty on persons apprehended for giving false names or addresses.

3. If any person found in any house, room or place entered by any constable or officer authorized as aforesaid to enter the same, upon being arrested by any such constable or officer, or upon being brought before any justices, on being required by such constable or officer or by such justices to give his name and address, shall refuse or neglect to give the same, or shall give any false name or address, he may, upon summary conviction thereof before the same or any other justices, be adjudged to pay any penalty not exceeding fifty pounds, together with such costs as to such justices shall appear reasonable, and on the nonpayment of such penalty and costs, or in the first instance, if to such justices it shall seem fit, may be imprisoned in the common gaol or house of correction for any period not exceeding one month.

Penalties on persons keeping gaming houses.

4. Any person, being the owner or occupier, or having the use of any house, room or place, who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purpose aforesaid, and any person having the care or

management of or in any manner assisting in conducting the business of any house, room or place opened, kept or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house room or place, may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty not exceeding five hundred pounds as to such justices shall seem fit, and may be further adjudged by such justices to pay such costs attending such conviction as to them shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding twelve calendar months.

Justices may require any of the persons apprehended to be sworn and give evidence.

5. It shall be lawful for the justices before whom any persons shall be brought who have been found in any house, room or place entered in pursuance of any authority granted under the provisions of the said act of the eighth and ninth years of her majesty, to require of any such persons to be examined on oath and give evidence touching any unlawful gaming in such house, room or place, or touching any act done for the purpose of preventing, obstructing or delaying the entry into such house, room or place or any part thereof of any constable or officer authorized as aforesaid; and no person so required to be examined as a witness shall be excused from being so examined when brought before such justices as aforesaid, or from being so examined at any subsequent time, by or before the same or any other justices, or by or before any court, on any proceeding, or the trial of any indictment, information, action or suit in anywise relating to such unlawful gaming or any such acts as aforesaid, or from answering any question put to him touching the matters aforesaid, on the ground that his evidence will tend to criminate himself; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any such question as aforesaid, shall be subject to be dealt with in all respects as any person appearing as a witness before any justices or court in obedience to a summons or subpœna, and refusing, without lawful cause or excuse, to be sworn or to give evidence, may by law be dealt with.

Penalty on refusing to be sworn.

Persons required to be examined as witnesses, and making a full discovery, to be freed from all penalties, &c.

6. Every person so required to be examined as a witness as aforesaid, who upon such examination shall make true and faithful discovery to the best of his knowledge of all things as to which he is so examined, shall receive from the justices or judge of the court by whom he is examined a certificate in writing to that effect, and shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures and punishments to which he may have

become liable for anything done before that time in respect of the matters touching which he has been so examined; but such witness shall not be indemnified under this act unless he receive from such justices or judge a certificate in writing under their hands, stating that such witness has on his examination made a true disclosure touching all things as to which he has been examined; and if any action, information or indictment be at any time pending in any court against any person so examined in respect of any act of gaming touching which he was so examined, and if any action, information or indictment be at any time pending in any court against any person so examined as a witness in manner before mentioned, for any such matter or thing, such court shall, on the production and proof of such certificate, stay the proceedings in any such action, information or indictment, and may, in its discretion, award to such person such costs as he may have been put to by such action, information or indictment.

Penalties and costs may be levied by distress.

7. If any person convicted under this act on information before justices shall be adjudged to pay any penalty or any costs and charges attending the conviction, and shall fail to pay such penalty or costs, the same may be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of one of the convicting justices: provided always, that if any person shall be committed to prison for default of payment of any penalty and costs, then the costs alone may be levied by distress as aforesaid.

Applications of penalties.

8. One half of any pecuniary penalty which shall be adjudged to be paid under this act shall be paid to the person laying the information upon which the conviction takes place, and the remaining half shall be applied in aid of the poor rate of the parish in which the offence shall have been committed, and shall be paid for that purpose to the overseer or other person authorized to receive poor rates in such parish, or if the place wherein the offence shall have been committed shall be extra-parochial, then the justices by whom such penalty shall be adjudged to be paid shall direct such remaining half thereof to be applied in aid of the poor rate of such extra-parochial place, or if there shall not be any poor rate therein, in aid of the poor rate of any adjoining poor rate or district.

On neglect to prosecute any summons, justices may authorize some other person to proceed.

9. In case any person who shall have laid any information in respect of any offence against this act shall not appear at the time at which the defendant shall have been summoned to appear, or at any time to which the hearing of the summons may have been adjourned, or if such person, in the opinion of any justices having authority to adjudicate with respect to the offence charged in such information as aforesaid, shall otherwise have neglected to proceed upon or prose-

cute such information with due diligence, it shall be lawful for such justices to authorize any other person to proceed on such information and summons instead of the person to whom the same may have been granted, or such justices may dismiss the first information and summons, and authorize any person to lay a fresh information in respect to the offence charged in such first information, in like manner as if the previous summons had not been granted.

Appeal to quarter sessions.

10. Any person who shall be summarily convicted under this act may appeal to the next general or quarter session of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person, at the time of such conviction, or within forty-eight hours thereafter, enter into a recognizance, with two sufficient securities, conditioned personally to appear at the said session to try such appeal, and to abide the further judgment of the court at such session, and to pay such costs as shall be by the last-mentioned court awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made to bind over any party who shall have made information against the party convicted, and any witnesses who shall have been examined, in sufficient recognizances, to attend and be examined at the hearing of such appeal; and every such witness, on producing a certificate of being so bound, under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or place, in like manner as in cases of misdemeanor, under the provisions of an act passed in the seventh year of the reign of King George the Fourth, intituled "An Act for improving the administration of Criminal Justice in England," and in case any such appeal shall be dismissed, and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the said treasurer by the appellant.

7 & 8 Geo. 4, c. 28.

No objection allowed to information whereon conviction has taken place, &c. in matter of form. Judgment not removable by certiorari.

11. On any such appeal no objection shall be allowed to the information whereon the conviction has taken place, or to such conviction, on any matter of form or on any insufficiency of statement, provided it shall appear to the justices in quarter sessions that the defendant has been sufficiently informed of the charge intended to be made against him, and that such conviction was proper on the merits of the case; and no information, conviction or judgment of the justices in general or quarter sessions shall be removed by certiorari into the Court of Queen's Bench.

Distress not unlawful for want of form.

12. When any distress shall be made for any money to be levied by virtue of the warrant of any justice under this act,

the distress shall not be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, warrant of apprehension, conviction, warrant of distress or other proceeding relating thereto, nor shall such party be deemed a trespasser from the beginning on account of any irregularity which shall be afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage by an action on the case in any of her majesty's courts of record.

Tender of amends.

13. No plaintiff shall recover in any action for any irregularity, trespass or other wrongful proceeding made or committed in the execution of this act, or in, under or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass or other wrongful proceeding before such action brought; and in case no tender shall have been made it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined to pay into court such sum of money as he shall think fit, whereupon such proceeding, order and adjudication shall be had and made in and by such court as in other actions where defendants are allowed to pay money into court.

Limitation of actions.

14. No action, suit or information, or any other proceeding of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this act, or in the execution of the authorities under this act, unless notice in writing shall be given by the party intending to prosecute such suit, information or other proceeding to the intended defendant, one calendar month at least before prosecuting the same, nor unless such action, suit, information or other proceeding shall be brought or commenced within three calendar months next after the act or omission complained of, or in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased.

Commencement of act.

15. This act shall commence and come into operation on the first day of August, one thousand eight hundred and fifty-four.

26 & 27 Vict. Cap. 41.

An Act to amend the Law respecting the Liability of Innkeepers, and to prevent certain Frauds upon them.

Whereas it is expedient to amend the law concerning the liability of innkeepers in respect of the goods of their guests

in manner hereinafter mentioned: be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows; (that is to say,)

Innkeeper not to be liable for loss, &c. beyond 30*l.*, except in certain cases.

1. No innkeeper shall, after the passing of this act, be liable to make good to any guest of such innkeeper any loss of or injury 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 thirty pounds, except in the following cases; (that is to say,)

(1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ:

(2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper:

Provided always, that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.

Obligation to receive property of guests for safe custody.

2. If any 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.

Notice of law, &c. to be conspicuously exhibited.

3. Every innkeeper shall cause at least one copy of the first section of this act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited.

Interpretation of terms.

4. The words and expressions hereinafter contained, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "inn" shall mean any hotel, inn, tavern, public house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests; and the word "innkeeper" shall mean the keeper of any such place.

42 & 43 Vict. Cap. 18.

An Act for the Licensing of Metropolitan Suburban Racecourses.

Whereas the frequency of horse-races in the immediate vicinity of the metropolis is productive of much mischief and inconvenience, and the holding of such races in thickly populated places near the metropolis is calculated to cause, and does in fact cause, annoyance and injury to persons resident near to the places where such races are held:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows; (that is to say,)

Definitions.

1. A horse-race within the meaning of this act shall mean any race in which any horse, mare or gelding shall run or be made to run in competition with any other horse, mare or gelding, or against time, for any prize of what nature or kind soever, or for any bet or wager made or to be made in respect of any such horse, mare or gelding, or the riders thereof, and at which more than twenty persons shall be present.

Horse-races unlawful within ten miles of London unless licensed.

2. From and after the twenty-fifth day of March, one thousand eight hundred and eighty, it shall not be lawful that any horse-race be held or take place on any pretext whatsoever within a radius of ten miles from Charing Cross, in the City of Westminster, unless in a place for which a licence for horse-racing has been obtained pursuant to the provisions hereinafter contained.

Power to justices to license at Michaelmas quarter sessions.

3. Any person desirous of obtaining a licence for horse-racing for any open or enclosed land or place, being the owner, lessee or occupier of such land or place, may apply to the justices assembled at any Michaelmas quarter sessions of the peace to be holden for the county, city, riding, liberty or division in which such land or place is situate, which justices are hereby empowered to grant or withhold a licence at their discretion, such licence to be of force and valid for twelve months dating from the twenty-fifth day of March next following the date of such application.

Mode of making application for licence.

4. Every such application shall be made to the justices in the same manner as applications for licences for places to be kept for public dancing, music, or other entertainment under the provisions of an act passed in the twenty-fifth year of his late Majesty King George the Second.

Penalty on persons taking part in unlicensed horse-races.

5. Any person who after the said twenty-fifth day of March, one thousand eight hundred and eighty, shall take part in any horse-race in any open or enclosed land or place for which a licence is required under this act, and for which a licence has not been obtained, shall upon summary conviction

be liable to a penalty of ten pounds, or an imprisonment not exceeding two months.

Penalty on owners and occupiers of ground where unlicensed horse-races take place.

6. Any person who shall be the owner or lessee or in possession or occupation of any open or enclosed land or place for which a licence for horse-racing is required under this act, and upon which any horse-race shall be held after the said twenty-fifth day of March, one thousand eight hundred and eighty, without such licence having been obtained, shall be guilty of a misdemeanor, and on conviction thereof shall be punishable for every such offence with fine or imprisonment at the discretion of the court, such fine not to be less than five pounds nor more than twenty-five pounds, and such imprisonment not to be less than one month nor more than three months.

Unlicensed horse-races to be deemed a nuisance, and liable accordingly.

7. Every horse-race held or taking place in contravention of the provisions of this act shall be deemed to be a nuisance, and any person injured or inconvenienced thereby shall have all such rights and remedies against all persons taking part in the same, and against owners, lessees, and occupiers of the land or place, as he would have in case of a nuisance at common law.

Short title.

8. This act may be cited as the Racecourses Licensing Act, 1879.

PART III.

MISCELLANEOUS.

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QUEEN'S PLATE ARTICLES (*a*).

[It is Her Majesty's Command, that these following Rules be observed by the Owners and Riders of all such Horses and Mares as shall run for Her Majesty's Plates at Newmarket and elsewhere.]

1. Every horse, or mare, that runneth for any of the said Plates, shall carry the weight appointed in the Schedule hereunto annexed.

2. Every person that putteth in a horse, or mare, for any of the said Plates, shall enter the same with the name of the owner, and the age, name, pedigree, or sufficient description of the horse, according to the Rule of the Jockey Club regarding nominations, at the time and place appointed by the Steward or Stewards of the Races at which such Plate is to be run for. The charge for such entry shall not exceed five shillings, and no further charge shall be made on the winner of the Plate.

3. Horses that run for any of Her Majesty's Plates shall start at the time appointed by the Steward or Stewards of the Races at which such Plate is run for.

4. Each horse's or mare's place, as he or she come by the ending-post, shall be determined by the Judge appointed by the Steward or Stewards of the Races at the place where the said Plate is run for.

5. Every rider shall, immediately after the race be run, be obliged to come to the usual place of weighing, with his horse or mare, then and there to alight, and not before, and there to weigh to the satisfaction of the person appointed for that purpose.

6. And in case of neglect or refusal thereof, such owners and riders shall immediately be declared incapable of running or riding any more for this or any of Her Majesty's Plates hereafter.

7. No horse or mare that runneth on the wrong side of the post or flags shall have any claim to the said Plates.

8. None of Her Majesty's Plates to be run for in heats.

9. When the age or qualification of a horse entered for any of Her Majesty's Plates shall be objected to, either before or after running, the Stewards of the Races at which such Plate

(*a*) From the Racing Calendar, 1881.

is run for shall have the power to order an examination of the horse's mouth by competent persons, and to call for all such evidence as they may require, and their decision to be final unless they shall think fit to refer the matter to the Stewards of the Jockey Club for the time being, in which case the decision of the said Stewards of the Jockey Club shall be final. A Certificate shall not be granted to any horse objected to until the question of his qualification shall be decided in the manner herein prescribed.

10. Her Majesty's Plates to be run for between the 25th of March and the week which includes the 22nd of November, both inclusive, in each year.

11. The distance shall not be less than two miles, and the weights, regulated according to the months in which the races are run, are to be according to the subjoined Schedule.

12. And in case any difference shall arise in running, or respecting any matters not hereinbefore provided for, or as to the interpretation of these Her Majesty's orders, the same shall be determined by the Master of the Horse, or by such person or persons as he shall appoint.

The following regulations were published by order in November, 1875:—

The Master of the Horse gives notice that after 1875, with a view to encourage a greater number and a higher class of horses running for Her Majesty's Plates, the number of plates will be reduced and their value doubled.

No plate to be given at a meeting not held annually and otherwise supported by public money.

No geldings to be allowed to run, and no plate to be confined to mares.

(Signed) BRADFORD, Master of the Horse.

Until further notice they will be given as follows:—

Newmarket (every year)			300 gs.
York	,,		200
Stockbridge	,,		200
	In alternate years:		
Newcastle	and	Carlisle	200
Manchester	,,	Liverpool	200
Chester	,,	Shrewsbury	200
Lichfield	,,	Warwick	200
Nottingham	,,	Leicester	200
Lewes	,,	Ipswich	200
Weymouth	,,	Plymouth	200
Winchester	,,	Salisbury	200
Hampton	,,	Egham	200
Goodwood	,,	Epsom	200
Lincoln	,,	Doncaster	200
Northampton	,,	Huntingdon	200

Richmond, 200 every other year.

The places mentioned in the first column will have the Plates in 1882. Richmond commenced in 1877.

(Signed) WESTMINSTER, Master of the Horse.

The Plates for Scotland, viz., for Edinburgh and Royal Caledonian Hunt come from a different fund from the above, are granted annually, and are only of the value of 100gs.

Queen's Plate Weights.

From this date, the weights for Her Majesty's Plates will be in accordance with the new Scale of Weight-for-age and Distance approved by the Stewards of the Jockey Club.

London, *March 2nd*, 1880. (Signed) Bradford.

Age.	March and April.	May.	June.	July.	August.	September.	October & Nov.
	TWO MILES AND UNDER THREE:						
	st. lb.	st. lb.	st. lb.	st. lb.	st. lb.	st. lb.	st. lb.
Three yrs.	7 4	7 7	7 8	7 10	7 13	8 0	8 1
Four yrs.	9 0	9 0	9 0	9 0	9 0	9 0	9 0
Five, six, and aged.....	9 6	9 5	9 4	9 3	9 2	9 1	9 0
	THREE MILES AND UPWARDS:						
Three yrs.	7 1	7 4	7 5	7 7	7 9	7 11	7 13
Four yrs.	9 0	9 0	9 0	9 0	9 0	9 0	9 0
Five yrs.	9 8	9 7	9 6	9 5	9 5	9 4	9 3
Six and aged	9 10	9 8	9 7	9 6	9 5	9 4	9 3

Form of Certificate of having won a Queen's Plate.

These are to certify, that Her Majesty's Plate of Two Hundred Guineas was won at the day of 188 , by 's horse called .

A. B. Steward.
C. D. Clerk of the Course.

E. } * Lord Lieutenant of the County.

The Duke of Westminster,
Master of the Horse to Her Majesty.

N.B. The certificate, when properly signed, is payable at three days' sight to the winner of the Plate (or to any other person, if endorsed by the winner) at the Office of the Clerk of Her Majesty's Stables, in the Royal Mews, Pimlico.

The Plates at Chester, Hampton, Goodwood, Huntingdon, Shrewsbury, Leicester, Liverpool, Northampton, Egham and Plymouth, and the 100gs. added to the Whip at the Curragh, are given from a different fund, and the Certificates are to be addressed to the Keeper of the Privy Purse.

☞ The Clerk of the Stables requires the person presenting a certificate for payment to pay for a receipt stamp.

* If the Lord Lieutenant be *officially* out of the kingdom, the signature of the Vice-Lieutenant is admissible.

RULES OF RACING (a).

At a Special Meeting of the Jockey Club, held in London on Monday, the 18th of December, 1876, to take into consideration the new Rules of Racing as submitted by the Committee appointed for that purpose, and discussed during the preceding Houghton Meeting, it was resolved that the following Rules should come into operation on the 1st of January, 1877, and that all former rules be repealed on and from that day.

*** The alterations made in the Rules during the year 1881 are printed in *italics*.

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RULES OF RACING MADE BY THE JOCKEY CLUB AT NEWMARKET.

PART I.—*Interpretation and Application of these Rules.*

General definitions.

1. "Race" includes plate, match or sweepstakes, but does not include or refer to a steeplechase or hurdle race, or a hunters' race on the flat.

"Horse" includes mare or gelding.

"Plate" means a race to be run for money or other prize given without any stake being made by the owners of the horses engaged to go to the winner.

"Sweepstakes" means a race in which stakes are to be made by the owners of three or more horses to go to the winner; and any such race is still a sweepstakes, even although the number is reduced by death to two subs., or although money or any other prize be added, and although the word "plate" be used in the official or ordinary name or description of such race.

"Recognised meeting" or "recognised race," used with reference to a foreign meeting or race, means a meeting or race included in the list of foreign meetings and races to be made as directed in these rules.

A "maiden" means a horse which has never won a plate or sweepstakes at any meeting in Great Britain, or at any recognised meeting in any other country.

A match at "catch weights" means a match in which the riders need not weigh before or after the race. Catch weights are permissible only for matches.

"Registry office" means such office as is for the time being appointed as the registry office by the Jockey Club; and ex-

(a) From the Racing Calendar, 1881.

pressions in these Rules or in the programme or conditions of any meeting or race referring to Messrs. Weatherby's mean the registry office as herein defined.

The "Racing Calendar" and the "Stud Book" mean the works published under those names respectively for the time being authorized by the Jockey Club.

The "Sheet Calendar," the "Monthly Calendar," and the "Book Calendars" of "Races Past" and of "Races to Come" mean the parts or editions of the "Racing Calendar" as published under or usually known by those names respectively.

The Channel Islands and the Isle of Man are not included in the expression "Great Britain," but they are included (with Ireland) in the expression "the United Kingdom."

"Month" means a calendar month.

Application of these Rules.

2. (i.) These Rules apply to all meetings held under the control of the Jockey Club, or advertised in the "Racing Calendar" to be held subject to these Rules.

(ii.) If a horse run in a race at any meeting in Great Britain which is not so advertised, he is perpetually disqualified for all races to which these Rules apply.

(iii.) The Stewards of the Jockey Club may at their discretion prohibit the advertisement of any meeting in the "Official Racing Calendar."

Commencement of these Rules.

3. These rules shall come into operation on the first day of January, 1877, and any other Rules of Racing shall be annulled as from that day, without prejudice to then existing rights or liabilities.

PART II.—*Management of Meetings and Powers of Stewards.*

Meetings.

4. (i.) Every meeting must be advertised in the "Racing Calendar."

(ii.) The advertisement must state that the meeting is to be subject to the Rules of Racing, and must state as soon as practicable the days on which the meeting is to begin and end, the dates for closing the stakes (which shall always be on a Tuesday, except for races closing within six days of, or during, a meeting), and, in every advertisement, all fees payable at the meeting, and the names of two or more persons as Stewards, and of the Judge, Starter, Clerk of the Course, Handicapper, Stakeholder, and Clerk of the Scales, *and the Clerk of the Course, or corresponding official, shall be the sole person responsible to the Stewards for the general arrangements of the meeting.*

(iii.) No meeting shall be advertised in the "Racing Calendar" unless the money added be not less than 300 sov. per day, 150 of which at least shall be added to races of a mile and upwards, and the minimum so required to be added shall be given notwithstanding any condition to the contrary, if there be five entries, and three horses the property of different owners start.

(iv.) No race shall be run earlier than in the week which includes the 25th of March, or later than in the week which includes the 22nd of November. Exception.—If the week including the 25th of March be the week next before Easter Sunday, races may be run in the week next but one before Easter Sunday.

(v.) A meeting shall be deemed to commence at ten in the morning of the day for which the first race is advertised, and to conclude at ten in the evening of the last day of the races.

(vi.) The Stewards in case of urgent necessity may from time to time put off any races from day to day until a Sunday intervenes.

Powers of Stewards.

General powers of stewards.

5. (i.) The Stewards of a meeting shall have full power to make all such arrangements for the conduct of the meeting as they think fit; and to regulate and control the conduct of all officials, and of all jockeys, grooms and persons attendant on horses; and to determine all questions or disputes arising between any persons at or in relation to anything done or omitted in reference to racing, except only disputes or claims relating to bets.

(ii.) They shall have power to punish at their discretion any official or jockey or other person subject to their control with fine or with suspension from acting or riding at the same meeting, and to report to the Stewards of the Jockey Club any further punishment which they consider necessary.

Provided that they shall not fine any person more than 50*l.* (unless they are Stewards of the Jockey Club, in which case they may impose any fine not exceeding 100*l.*)

(iii.) They shall exclude from the stands, enclosures, saddling paddocks, weighing rooms, and other places under their control, every person who has been warned off Newmarket Heath, *and every person whose name is in the Unpaid Forfeit List, and which has been twice so published in the Racing Calendar, also* every jockey who has been suspended for corrupt practices on the turf, so long as the sentence against such person or jockey remains in force. They shall in like manner exclude any person who has been declared by the Turf Club in Ireland, or by the stewards of any recognised meeting in any country, to have been guilty of any corrupt or fraudulent practice on the turf. *They shall further have power to exclude at their discretion any person from all or any places under their control.*

(iv.) If any case occur which is not, or which is alleged not to be, provided for by these Rules, it shall be determined by the Stewards in such manner as they think just, and they shall report the case with their decision (and with their consent to an appeal, if they give such consent) to the Stewards of the Jockey Club for confirmation.

(v.) The decision of the Stewards, or of the Stewards of the Jockey Club in case of appeal, shall be final, and shall not be questioned in any court except by leave of the Stewards by whom it was made.

Stewards and deputies.

6. A Steward may appoint a deputy at any time.

Powers of Stewards after conclusion of meeting.

7. The powers of the Stewards continue after the meeting for all purposes relating to disputes, objections, penalties and disqualifications.

Judges, Starters, and other Officials.

Judges, starters, &c.

8. *The Stewards shall appoint an adequate staff of officials for every meeting.*

The following officials shall require a licence to be granted by the Stewards of the Jockey Club annually before they can act, viz., Judge, Starter, Clerk of the Course, and Clerk of the Scales, and one of each shall be named for each meeting advertised in the Calendar; but, in case of emergency, the Stewards may, during a meeting, appoint an unlicensed deputy to fill any of such offices, in which case they shall make a special report to the Stewards of the Jockey Club.

A race cannot be decided unless the judge or his authorized deputy or substitute, or a steward, occupy the judge's box at the time when the horses pass the winning-post.

The judge shall send a report of the result of the race, signed by him, to the registry office.

PART III.—*General Conditions and Restrictions.*

Age of Horses.

General Rules with respect to age.

9. (i.) The age of a horse shall be reckoned as beginning on the 1st of January in the year in which he is foaled.

(ii.) Yearlings shall not run for any race. Two-year-olds shall not run for any handicap before the 1st of September, nor after that date with any but two-year-olds.

(iii.) Two-year-olds shall not run more than six furlongs before the 1st of July, nor less than five furlongs at any time.

(iv. Three-year-olds and upwards shall not run less than five furlongs for a plate or sweepstakes.

Weights and Allowances.

Weights and allowances.

10. (i.) No horse shall carry less than 5st. 7 lb. in any plate or sweepstakes.

(ii.) The top weight in a handicap shall not be less than 8st. 12lb., and if the highest weight accepting be less than this it shall be raised to 8st. 12lb., and the other weights shall be raised in proportion.

(iii.) No horse shall receive allowance of weight, or be relieved from extra weight, for having been beaten in one or more races; provided that this rule shall not prohibit maiden allowances.

(iv.) No horse shall carry extra weight for having run second, or in any lower place in any race or races; provided that this rule shall not exempt a horse which has received 100*l.* or upwards for having been placed, from being debarred from maiden allowance by the conditions of any particular race.

(v.) Allowances and extra weights shall not be allowed or incurred in respect of matches or private sweepstakes, and penalties are not cumulative unless so declared by the conditions of the race.

(vi.) Where winners of selling races are exempted from penalties, only such horses as have run to be sold shall be entitled to the allowance.

Miscellaneous.

Miscellaneous Rules with respect to conditions of races.

11. Subject to the express provisions of the conditions of a race, the following rules shall apply to all conditions of races:

(i.) Winnings during the year shall include all prizes from the commencement of the racing season to the time appointed for the start, and shall apply to all recognized races in any country, and winning shall include walking over or receiving forfeit.

(ii.) The value of prizes not in money must be advertised.

(iii.) In estimating the value of a race, there shall be deducted the amount of the winner's own stake and entrance, and any money payable to other horses, or out of the stakes by the conditions of the race, or by the general conditions of the meeting, except discount, Clerk's fees, stakeholding and weighing fees.

(iv.) Conditions referring to maidens shall mean maidens at the time of the start.

Minimum value of plate or stakes.

12. No plate or sweepstakes shall be run for unless the clear value to the winner (calculated under Rule II.), in case the race be run by two or more horses, will amount to 100*l.* But if the value would amount to 100*l.*, if the race were so run, a horse may walk over, although he thereby receives less than 100*l.*

Fees.

13. (i.) No entrance fee to any fund but that devoted to the winner of the race shall exceed 3 per cent. on the added money.

(ii.) The Stakeholder shall be allowed to retain, out of the stakes in his hands, the following fees for expenses, viz.:—

For every match, 1*l.*

For every plate, 1*l.*

For every subscription or sweepstakes where the lowest forfeit amounts to 20 sov. ½ per cent. on the whole stake, and on all other races 1 per cent.

(iii.) 2*s.* 6*d.* shall be the maximum charge for Clerk's fee for entry, and the same for weighing.

(iv.) Provided that in the case of any meeting at which it shall be proved to the satisfaction of the Stewards of the Jockey Club, that no more than a reasonable interest upon capital invested is applied to any purpose other than the support of the races, and that the scale upon which the officials are remunerated is not excessive, they may sanction such modification of this Rule as they may consider expedient.

PART IV.—*Entry and Subscription for Races.*

Horses must be duly entered for plate or sweepstakes.

14. A horse shall not be qualified to run for any plate or sweepstakes unless he has been and continues duly entered for the same.

Time and place of entry.

15. A time and place or places for the entry of horses for every plate or sweepstakes must be advertised in the "Sheet Racing Calendar:" Provided that if the time so advertised fall during a Newmarket race week, any entry to be made at Messrs. Weatherby's may be made at Newmarket, whether so advertised or not.

The list of entries shall be closed at the advertised time, and no entry shall be permitted in any case or on any terms to be made after that time.

If no hour be fixed for closing, the list shall not be closed till midnight on the advertised day.

No declaration of forfeit, except for races of the current week, shall be fixed to be made at noon or any hour earlier than the end of the day.

All entries made elsewhere than at Messrs. Weatherby's office (except entries made during the week of the meeting or on the Saturday preceding the meeting) shall be lodged at that office on or before the seventh day after the day of closing, or the receiver of nominations shall be fined 10 sov. and the nomination shall be void unless the nominator can prove to the satisfaction of the Stewards of the Jockey Club that the entry was made in due time.

Entry, how made.

16. Entry shall be made by writing, signed by the owner of the horse or by some person deputed by him, or by telegraph, which shall be equally binding. Entries by telegram must, however, be confirmed in writing at the earliest possible opportunity, and in all cases before the time of weighing, or the horse shall not be allowed to start.

It shall state the name of the owner and the name or description of the horse, and (if the race be for horses of different ages) the age which the horse will be at the time of the race.

Entrance money must (if so required) be paid at the time of entry.

Allowances must be claimed at the time of entry, except when otherwise specified, or they shall not be allowed.

17. In entering a horse for the first time he shall be described by stating his colour (when possible), and whether he is a horse, mare or gelding, and the Calendar or Stud-book names of his sire and dam. If the dam was covered by more than one stallion the names of all must be stated, and by which stallion the mare was last covered. If the sire or dam has no name in the Calendar or Stud-book, such further pedigree and description must be added as will clearly distinguish the horse entered from all other horses, and if the pedigree of the sire or dam be unknown, such further particulars as to where they were purchased or obtained must be given as will identify them. Description of horse in first entry.

18. The description as in the last rule mentioned must be repeated in every entry of the horse until an entry of him by description, with a proposed name, has been published in the "Racing Calendar." In any entry after such publication it will be sufficient to enter him by such name without description. Name or description in subsequent entries.

If a horse be entered with a proposed name for the first time in several races closing on the same day, the description need not be added in more than the first of such entries.

19. Whenever the name of a horse which has run is changed, his old name as well as his new name must be given in every entry until the change has been published in two Monthly Calendars or the Book Calendar. Change of name.

20. A name may be claimed for a horse, either by entry and publication as mentioned in the foregoing rules, or at any time by sending the pedigree to the Registry Office. When a name has been claimed for a horse in either of the above ways, any other horse for which the same name is afterwards claimed must be distinguished by the addition of the numerals II. or III. &c., and on the first time of entry with numerals, by the names of the sire and dam. If the same name is proposed or claimed for two or more horses at the same time, the order of priority shall be determined by lot by Messrs. Weatherby. Any person entering a horse in contravention of this rule shall be liable to a fine not exceeding 50*l.* Similar names.

21. No assumed name of an owner shall be used in any subscription or entry unless such assumed name is duly registered, as follows:— Assumed names of owners.

(i.) The person intending to use an assumed name must register it annually at the Registry Office. A registration continues effectual during the current year.

(ii.) A person cannot have more than one assumed name registered at the same time, nor can he use his real name in any subscription or entry so long as he has a registered assumed name.

(iii.) An assumed name may be changed at any time by registering a new assumed name.

(iv.) A person cannot register as his assumed name a name which has been already registered by any other person, or the real name of any other person who runs horses in races in such other person's real name.

(v.) On every registration or change of an assumed name there must be paid at the Registry Office, to the credit of the Jockey Club, a fee of twenty-five guineas.

(vi.) Out of the fees received under this Rule, a percentage, to be fixed from time to time by the Jockey Club, shall be paid to the Bentinck Benevolent Fund, and the remainder shall be carried to the Racing Fund of the Jockey Club.

Subscriptions are transferable.

22. A person who subscribes to a sweepstakes has the right of transferring the right of entry under any one or more of his subscriptions to any other person or persons.

Subscriptions and entries cannot be struck out.

23. A subscription cannot be withdrawn, but an entry of a horse under a subscription may, before the time of closing, be altered by substituting another horse.

24. Subscriptions and all entries or rights of entry under them become void on the death of the subscriber.

Death of person who has made a subscription or entry.

Entries (except entries made under another person's subscription) become void on the death of the persons in whose names they are made.

If either party to a match die the match is off.

No alteration of entry after closing.

25. No alteration or addition shall be made in any entry after the time fixed for closing except that when a horse has been duly described a name or number may be added.

In the event of a horse being entered for a race with the wrong age, or an incorrect or imperfect description according to Rule 17, it may be corrected on the payment of a fine of 5*l.* for each entry, provided it be proved to the satisfaction of the Stewards that it was accidental, and provided also that the correction is made, and the fine paid, before the Calendar following that in which the wrong entry appears.

This Rule will allow of an entry being omitted, on the payment of a fine, from a race for which it was not qualified at the time of entry, *e.g.* a colt for a filly stakes, but will not admit of any correction amounting to the substitution of another animal, which would be of the nature of a post entry.

The fines under this Rule to go to the winner, unless the winner be the person fined, when it shall go to the second horse.

Partnership in horses.

26. A horse cannot be entered in the real or assumed name of any person as his owner unless that person's interest or property in the horse is at least equal to that of any other one person.

Part V.—*Stakes and Forfeits.*

Liability for stakes and forfeits.

27. A person entering a horse for a race thereby becomes liable for the entrance money and stake or forfeit.

A subscriber to a sweepstakes is liable for the stake or forfeit; but if he transfer the right of entry to any other person he is liable only in case of default by the transferee, and in that case he may recover it from the transferee.

A person taking an entry under another person's subscription, where forfeit must be declared by a particular time, if he do not declare forfeit by that time, shall be considered to have taken the engagement upon himself, and the original subscriber shall cease to be liable.

Payment and application of stakes and forfeits.

28. Entrance money, stakes and forfeits must be paid in cash (if required) to the clerk of the course or authorized stakeholder. If any clerk of the course allow a horse to start in a race without his stake for that race having been paid, such clerk shall be liable for it himself.

Stakes and forfeits in a race belong to the winner, except as otherwise declared in the conditions, and the stakeholder shall render an account to him, or his agent, and pay over all stakes and added money within fifteen days of the conclusion of the meeting. If the race be never run or be void, they shall be returned.

Entrance money shall be paid into the race-fund of the meeting, except in the case of a sweepstakes where no money or less than 50*l.* is given from the race-fund or other public source, in which case the entrance money shall go to the winner, or to some other horse or horses in the race.

Stake, arrears, and jockey's fee must be paid before starting.

29. A horse shall not start for a race unless there have been duly paid before weighing (1) any stake, entrance money or fee payable in respect of that race; (2) all arrears due from any person for such horse, or due for the same or any other horse from any person by whom such horse is wholly or partly owned, or in whose name or under whose subscription he is entered, and (3) the jockey's fee under Rule 53.

In this rule "arrears" includes any sums payable for fines, fees, entrance money, stakes, or forfeits in respect of any race at the same or any other meeting in the United Kingdom, and any sum in respect of which a person has been declared a defaulter: Provided that arrears of forfeits in respect of a meeting at any other place than the place at which the race is run shall not be included, unless notice of such forfeits being overdue has been published in the Unpaid Forfeit List or Steeple Chase Forfeit List, or delivered in writing, signed by the party claiming the arrears, to the clerk of the course or stakeholder or to the person indebted, before ten in the evening preceding the race.

This rule shall apply to arrears at the Curragh and other recognized meetings in Ireland, or at any steeplechase meeting in the United Kingdom held under the Grand National Steeplechase Rules, or Irish National Hunt Steeple Chase Rules.

The Unpaid Forfeit List.

Unpaid forfeit list.

30. (i.) An Unpaid Forfeit List shall be kept at the registry office, and shall be published in the Sheet Calendar after the Newmarket July Meeting and again at the conclusion of the Racing season in every year. It shall include all due and unpaid entrances, stakes, fines, and forfeits which have been notified as hereinafter mentioned, and shall state the real name or names, and also the assumed name or names (if any), of the persons from whom, and the horses (if any) in respect of which the same are due. Entrances, stakes, fines and forfeits which have been so published must be paid directly into the registry office, and until so paid they shall not be removed from the list.

(ii.) Any person to whom any entrance, stake, fine, fee, or forfeit is payable (whether as an official or otherwise) may (or shall, if he be an official, within a month of the publication of the next Forfeit List) notify the same in writing, signed by him, to the registry office, or to the clerk of the course, and every such statement received by the clerk of the course shall be forthwith transmitted by him to the registry office.

(iii.) So long as the name of a person is in the Unpaid Forfeit List he cannot subscribe to any sweepstakes, and no horse can be entered by him or under his subscription for any race, whether acting as an agent or otherwise, and no horse which has been entered by him, or in his name, or under his subscription, or of which he is wholly or partly the owner, or which, after his default has been twice published in the Racing Calendar, shall be proved to the satisfaction of the Stewards to be under his care, training, management, or superintendence, shall be qualified to run for any race; and so long as any horse is in the Unpaid Forfeit List, such horse shall not be entered or run for any race.

(iv.) A corrected alphabetical Index of the horses and owners in the last Forfeit List and Irish Forfeit List shall be published in the first Calendar of every month during the racing season. Such monthly list shall commence not less than three years before the time at which it is published, and shall be carried down to and include the latest Forfeit List which has been published in the Sheet Calendar as above mentioned.

The Clerk of the Course at every meeting shall put up in his office during such meeting two copies of the last Monthly List for the time being.

(v.) If any horse which, or the owner of which, is in any Forfeit List be allowed to start the Clerk of the Course shall be fined 10*l.*

(vi.) If a horse which, or the owner of which, is in any Forfeit List be entered for any race, the owner of such horse shall be fined 50*l.*

PART VI.—*The Race.*

Weighing out and starting.

Weighing out and starting.

31. (i.) A horse shall not be qualified to run in a race unless his name has been notified as a starter to the clerk of the scales on the day of the race, and his number exhibited one quarter of an hour before the time appointed for the race. If any alteration be made in a number after it has been exhibited, the stewards may call upon the owner, trainer, or jockey, for an explanation, and if no satisfactory explanation be given, the owner, trainer, or jockey, may be fined, and the horse shall not be allowed to start nor the jockey to ride again until the fine is paid.

(ii.) Every jockey who is to ride in the race shall weigh at the appointed or usual place, unless especially excused by the Stewards.

(iii.) No person shall, without special leave from the Stewards in writing, be admitted to the weighing-room except the owner, trainer and jockey, or other person having the care of a horse engaged in the race.

(iv.) If a jockey intend to carry overweight exceeding by more than two pounds the weight at which his horse is to run, he must declare the amount of such overweight. The declaration must be made to the clerk of the scales not later than twenty minutes before the time appointed for the start; and the clerk shall exhibit the amount of such extra weight with the number of the horse.

(v.) If a horse carry more than two pounds overweight, which has not been duly declared, he is disqualified, *unless the Stewards be satisfied that such excess of weight has been caused by wet weather.*

(vi.) Any overweight exceeding two pounds which has been carried, whether it has been duly declared or the horse has been disqualified, shall be published in the "Racing Calendar," and the clerk of the scales shall send a return thereof to the Registry Office.

(vii.) Every trainer shall have his horse at the post, ready to start, at the time appointed by the Stewards; and every jockey is to be there, ready to start at the same time. Every trainer or jockey making default herein shall be fined.

(viii.) The horses must be started by the official starter or his authorized deputy or substitute. No horse when once under the starter's hands shall be allowed to go back and correct his weight, unless some accident has occurred to him.

(ix.) The starter may give all such orders and take all such measures as are necessary for securing a fair start; and in particular he may, if he think it necessary, order the horses to be drawn up in a line as far behind the starting post as he thinks necessary.

(x.) The horses must be started from a walk. If the starter allow a start to take place in front of the starting post, the start is void, and the horses must be started again, and the starter shall forfeit a sum not exceeding 50*l.*

(xi.) The horses shall (so far as is practicable) be drawn up before the start in an order (reckoned from the whip hand) to be determined, when the Stewards think fit, by lots to be drawn by the jockeys at the time of weighing out.

(xii.) The person appointed to start the horses shall mark in his list the time when the horses in each race actually started; and if there have been any false starts, the first of them shall be considered as the time of starting for that race, and he shall make a report thereof to the Stewards in the afternoon of the day the races are run. And if any delay shall have taken place, he shall state by whom, or by what cause, the delay was occasioned.

(xiii.) Every horse which comes up to the post in time to start shall be liable for his whole stake.

Running.

Crossing, jostling, &c. in the race.

32. (i.) A horse which crosses another is disqualified, unless it be proved that he was two clear lengths ahead of the other when he crossed.

(ii.) If a horse or his jockey jostle another horse, or the jockey of another horse, the jockey which jostles the other is disqualified, unless it be proved that the jostle was wholly caused by the fault of some other jockey, or that the other horse or his jockey was partly in fault.

(iii.) If a horse run the wrong side of a post he must turn back and run the course from the post at which he left it.

Running over again.

33. If a race has been run by all the horses at wrong weights, or a wrong distance, or when the Judge is not in the box, the Stewards shall order it to be run after the advertised time of the last race of the same day.

Weighing in.

Weighing in.

34. (i.) Every jockey must, immediately after pulling up, ride his horse to the place of weighing, and there immediately dismount and be weighed by the clerk of the scales: Provided that, if a jockey be prevented from riding to the place of weighing by reason of accident or illness, by which he or his horse is disabled, he may walk or be carried to the scales.

(ii.) If a jockey do not weight in, or be short of weight, or be guilty of any fraudulent practice with respect to weight or weighing, or dismount before reaching the scales, or touch (except accidentally) any person or thing other than his own equipments before weighing in, his horse is disqualified, unless he can satisfy the Stewards that he was justified by extraordinary circumstances.

(iii.) It is optional for the jockey to weigh out or in with his bridle, and the clerk of the scales shall allow one pound for a curb or double bridle; but no weight shall be allowed for a snaffle bridle unless it is put into the scales before the horse is led away, and no whip or substitute for a whip shall be allowed in the scales.

If a horse run in a hood or clothing it must be put into the scale and included in the jockey's weight.

The clerk of the scales shall always put 2lb. extra into the scale to prove that the horse has not carried too much weight under Rule 31 (v.).

Dead Heats.

Dead heats

35. (i.) A dead heat for the first place shall be run off after the last race on the same day (except by special permission of the Stewards) unless the owners agree to divide. The other horses shall be deemed to have been beaten, but they shall be entitled to their places (if any) as if the race had been finally determined the first time.

(ii.) If a dead heat be run by two or more horses for second or any lower place in a race, the owners shall divide, subject to the provisions of Part VII., where the winner is objected to, and if they cannot agree as to which of them is to have a cup or other prize which cannot be divided, the question shall be determined by lot by the Stewards.

(iii.) When owners divide they shall divide equally all the moneys or other prizes which any of them could take if the dead heat were run off.

(iv.) Horses running a dead heat for a race or place shall be deemed winners of the race or place until the dead heat is run off or the owners agree to divide, and if the owners agree to divide, each horse which divides shall be deemed a winner of the race or place for which he divides.

Second Money.

Second money.

36. Any money or prize which by the conditions is to go to the horse placed second, or in any lower place in the race, shall, if the winner has walked over or no horse has been so placed, be dealt with as follows, namely:—

(i.) If it be part of the stakes or plate, it shall go to the winner; or

(ii.) If it was to be given as a separate donation from the race fund, or any other source, it shall not be given at all; or

(iii.) If it is entrance money for the race, it shall go to the race fund of the meeting.

PART VII.—*Objections and Complaints.*

Judge's decision final, subject to objections.

37. The determination of a judge, declaring a horse to have won or to be entitled to a place shall be final, unless an

objection is made and allowed on the ground of disqualification: Provided that this Rule shall not prevent a judge from correcting any mistake.

Objections. (i.) Every objection must be made by the owner, jockey or groom of some other horse engaged in the same race [or by the starter], or by a Steward, and must be made to one of the Stewards, or to the Judge, clerk of the course or clerk of the scales. The person to whom it is made may require it to be put in writing and signed.

(ii.) If an objection to a horse engaged in a race be made not later than half-past ten in the morning of the day for the race, the Stewards may require his qualification to be proved before the race; and in default of such proof being given to their satisfaction, they may declare him disqualified.

(iii.) An objection to a horse, on the ground of a cross or jostle, or of his not having run the proper course, or of any other matter occurring in the race, must be made within a quarter of an hour after the finish.

(iv.) An objection on the ground of fraudulent, or wilful mis-statement or omission in the entry under which a horse has run, or on the ground that the horse which ran was not the horse which he was represented to be in the entry or at the time of the race, or was not of the age which he was represented to be, or on the ground that he is disqualified by reason of any default entered in the Unpaid Forfeit List, may be received at any time within twelve months after the race.

(v.) In any other case an objection shall be made before the conclusion of the meeting.

(vi.) Every objection shall be determined by the Stewards, and their determination shall (if they are not the Stewards of the Jockey Club) be subject to appeal to the Stewards of the Jockey Club, through the Stewards of the meeting and with their consent and that of the Stewards of the Jockey Club, and not otherwise.

(vii.) If an objection to a horse which has won or been placed in a race be declared valid, the horse shall be regarded as having been last in the race, and the other horses shall take positions accordingly.

(viii.) When a dead heat is run for second place, and an objection is made to the winner of the race, if such objection be declared valid in time for the dead heat to be run off on the day of the race, the Stewards may direct it to be run off accordingly. Otherwise the horses which ran the dead heat shall divide.

(ix.) Every objection which cannot be decided by the Stewards during a meeting must be made in writing and lodged with the clerk of the course.

(x.) An objection made in writing cannot be withdrawn without leave of the Stewards.

(xi.) All costs and expenses in relation to determining an objection shall be paid by the person decided against.

(xii.) If the Stewards decide an objection to be frivolous they may order the person making it to pay a fine not exceeding 20*l.* to the Bentinck Benevolent Fund.

Effect of pending objection.

38. Pending the determination of an objection, any money or prize which the horse objected to may have won or may win in the race shall be withheld until the objection is determined, and any forfeit payable by the owner of any other horse shall be paid to and held by the clerk of the course for the person who may be determined to be entitled to it.

When any race is in dispute both the horse that came in first and any horse claiming the race shall be liable to all the penalties attaching to the winner of that race till the matter is decided.

Stewards may order examination and call for proofs.

39. (i.) The Stewards shall have power at any time, and either upon or without objection made, to order an examination by such person or persons as they think fit, of the mouth of any horse entered for a race, or who has run in a race.

If a horse be declared to be of the wrong age, the expense of such examination shall be paid by his owner. Otherwise, it shall be paid by the person (if any) at whose request the examination is ordered, or out of the race fund of the meeting, as the Stewards direct.

(ii.) The Stewards shall also have power to call on any person in whose name a horse is entered to produce proof that the horse entered is not the property either wholly or in part of any person whose name is in the Unpaid Forfeit List or otherwise disqualified, or to produce proof of the extent of his interest or property in the horse, and in default of such proof being given to their satisfaction they may declare the horse disqualified.

PART VIII.—*Special Conditions (claiming and selling Races: Produce Races: Post Races: Handicaps: Sale with Engagements).*

Horses entered to be sold.

40. Any horse running for any race "to be sold," shall, if the winner, be liable to be claimed for the selling price, and if it be a condition of the race that the winner is to be sold by auction the sale shall take place immediately after the race, and the surplus over the selling price shall be divided between the owner of the second horse and the race fund of the meeting. If sold the horse shall not leave the place of sale until authorized by the clerk of the course to do so; and if the horse be not paid for, or the clerk of the course satisfied with the security, within a quarter of an hour, he may order the horse to be put up a second time, and the purchaser at the

first sale shall be responsible for any deficiency arising from the second sale, and shall be declared a defaulter until it is paid.

All other horses running to be sold may be claimed for the selling price and the amount of the stakes or plate by the owners of horses running in the race.

In no selling race shall the lowest selling price be less than 50 sov.

Owners of horses placed shall have priority in the order of their places, and if the owners of two or more horses having equal rights claim, they are to draw lots. The owner of the winner has the last claim.

No person can claim more than one horse.

Every claim must be made to the clerk of the scales within a quarter of an hour after the race.

The price of every horse claimed or sold, or bought in, must be paid to the clerk of the course, and an order given by him for the delivery of the horse.

In the case of a horse being claimed, if the price be not paid before seven o'clock in the evening of the day of the race, the claimant forfeits his right. If none of the other persons entitled accept the horse, the owner may insist on the first claimant taking and paying for it, and if he refuse or neglect to do so, he shall be declared a defaulter in respect of the price. If a horse walk over for a selling race he shall not be liable to be sold unless the added money be given.

Provision in case of Objection or Dead Heat.

Special Rule where horse objected to.

41. The foregoing Rules relating to claiming and selling races shall be subject to the following provisions in cases where a horse is objected to under the provisions of Part VII. of these Rules:—

(i.) If the objection has not been made until after the horse has been claimed or bought, the person who claimed or bought him shall, if the objection be declared valid, have the option of returning him or retaining him at the price of a beaten horse.

(ii.) If the objection be made before the horse has been claimed or bought, the time for delivering him is thereby postponed until such time after the determination of the objection as the Stewards appoint, and if the objection be declared valid, the person who has claimed or bought him shall have the same option as in the last-mentioned case.

Special Rule where dead heat.

42. If a dead heat be declared for the first or any other place in a race, the time for claiming or selling the horses running the dead heat is thereby postponed until the dead heat is run off, as the Stewards appoint. In case of a division, each of the horses dividing is a winner for the purposes of these Rules relating to claiming and selling, and any

surplus (in the case of a selling race) shall be divided between those horses and the Race Fund.

Produce Races.

Produce Races.

43. (i.) A produce race is one for which horses are named by whose produce the race is to be run.

(ii.) The produce is entered by entering the dam and sire, or sires.

(iii.) If the produce of a mare be dropped before the 1st of January, or if there be no produce, or if the produce be dead when dropped, the entry of such mare is void, and the entrance money (if any) shall be returned.

(iv.) Conditions of a produce race referring to allowances to the produce of untried horses, extend only to the produce of horses whose produce never won a recognized race in any country up to the day previous to that fixed for claiming allowances, and any such allowance must be claimed before the expiration of the time for naming.

Post Races.

Post Races.

44. A post race is a race for which a subscriber must enter two or more horses, and may run any one or more of them, as the conditions prescribe.

Handicaps.

Handicaps.

45. (i.) A "handicap" is a race in which the weights which the horses are to carry are to be adjusted after the time limited for entering or naming according to the handicapper's judgment of the merits of the horses, for the purpose of equalizing their chances of winning.

(ii.) In a handicap (other than a free handicap) the horses must be entered in the usual way, and the person entering a horse becomes liable for the stake or forfeit whether he accepts or not.

(iii.) A free handicap is one in which no liability for stake or forfeit is incurred until acceptance, and no entry need be made; and acceptance shall be considered as equivalent to an entry and as a representation that the horse is of the age and description stated in the list of weights; and if the horse be not in fact of that age and description he shall be disqualified.

There shall not be a greater difference than 4st. 7lb. between the highest and lowest weight in a handicap to which there is a second forfeit.

Sale with Engagements.

Liability for engagements of horses sold.

46. When a horse is sold with his engagements, or any part of them, the seller cannot strike the horse out of any of such engagements, and he remains liable for the amount of the forfeits in each of the engagements, but he may, if

compelled to pay them by the purchaser's default, place the forfeit on the Forfeit List, as due from the purchaser to himself.

In all cases of sale by private treaty, the written acknowledgment of both parties that the horse was sold with the engagement is necessary to entitle the seller or buyer to the benefit of this Rule, and if certain engagements be specified it is to be understood that those only are sold with the horse; but when the horse is sold by public auction the advertised conditions of the sale are sufficient evidence, and if certain engagements only be specified, it is to be understood these only are sold with the horse, and if he has been claimed as the winner of a race of which it was a condition that the winner was to be sold with his engagements, this also is sufficient.

When a person is entitled by purchase or otherwise to start for any engagement a horse which was entered by another person, and he is prevented by these Rules from starting the horse without paying forfeits or fees to which he would not otherwise be liable, he may, if he pay such forfeits and fees, start the horse and place the forfeits or fees on the Forfeit List, with the names of the horses in respect of which they are due as due to himself.

PART IX.—*Miscellaneous.*

Foreign Horses.

Foreign certificates, &c.

47. A horse foaled out of the United Kingdom shall not be qualified to start for any race until there have been deposited at the Registry Office (1) such a foreign certificate, and (2) such a certificate of age as are next mentioned, that is to say:—

(i.) The foreign certificate must state the age, pedigree and colour of the horse, and any mark by which it may be distinguished, and must be signed by the secretary or other officer of some approved racing club of the country in which the horse was foaled, or by some magistrate, mayor or public officer of that country.

The Stewards of the Jockey Club may from time to time approve any racing club for the purposes of this Rule, and prescribe the magistrate, mayor or public officer by whom a foreign certificate must be signed. They may also require any further proof or confirmation in any particular case, and may declare any horse disqualified in default thereof.

(ii.) The certificate of age must be signed by a veterinary surgeon in the United Kingdom, approved for this purpose by the Stewards of the Jockey Club either by general order or in the particular case.

NOTE.—The Stewards of the Jockey Club have approved

generally of certificates given by the Royal College of Veterinary Surgeons, and by persons holding the Highland and Agriculture Society's diploma.

A horse which has been out of the United Kingdom (otherwise than as a foal at the foot of his dam) before having run for any public plate or sweepstakes in Great Britain, shall not be qualified to start for any public race until a certificate of age signed as in the last Rule mentioned has been deposited at the Registry Office.

Corrupt Practices and Disqualifications.

Penalties for corrupt practices on the Turf.

48. (i.) If any person corruptly give or offer any money, share in a bet, or other benefit to any person having official duties in relation to a race or to any jockey; or

(ii.) If any person having official duties in relation to a race, or any jockey, corruptly accept or offer to accept any money, share in a bet, or other benefit; or

(iii.) Wilfully enter or cause to be entered or to start for any race a horse which he knows to be disqualified; or

(iv.) If any person be detected watching a trial, or proved to the satisfaction of the Stewards of the Jockey Club to have employed any person to watch a trial, or to have obtained surreptitiously information respecting a trial from any person or persons engaged in it, or in the service of the owner or trainer of the horses tried, or respecting any horse in training from any person in such service; or

(v.) If any person be guilty of any other corrupt or fraudulent practices on the Turf in this or any other country;

Every person so offending shall be warned off Newmarket Heath and other places where these Rules are in force.

Disqualification for corrupt practices.

49. When a person is warned off Newmarket Heath and so long as his exclusion continues, he shall not be qualified, whether acting as an agent or otherwise, to subscribe for or to enter or run any horse for any race either in his own name or in that of any other person, and any horse of which he is wholly or partly the owner, or which after the fact of his being warned off has been twice published in the Racing Calendar, shall be proved to the satisfaction of the Stewards to be under his care, training, management, or superintendence, shall be disqualified.

If a person be so excluded for any fraudulent practice in relation to a particular horse wholly or partly belonging to him, such horse shall be perpetually disqualified for all races, and such person shall return all money or prizes which such horse has won in any race at any meeting.

Disqualification for default in bets.

50. If any person be reported by the Committee of the Subscription Rooms at Newmarket or at Tattersall's as being a defaulter in bets, he shall be disqualified as in the last Rule mentioned until his default is cleared.

Fines. 51. All fines shall be paid to the Bentinck Benevolent Fund.

Omission of Conditions.

Omissions, how supplied, of weight; 52. (i.) When any match or sweepstakes is made, and no weight mentioned, the horses shall carry 8st. 10lb. each, and if any weight be given the highest weight shall be 8st. 12lb.

of course; (ii.) When any match or sweepstakes is made, and no course mentioned, the course shall be as follows:—

	If at Newmarket.
If two years old, six furlongs.....	T.Y.C.
If three years old, one mile	R.M.
If four years old, two miles	D.I.
If five years old, or upwards, four miles	B.C.

And if the horses be of different age, the course shall be fixed by the age of the youngest.

of day. (iii.) If no day be mentioned for a race, it shall be run on the last day of the meeting, unless otherwise agreed by all the parties engaged.

Jockeys' Fees.

Jockeys' fees. 53. In the absence of special agreement the fee to a winning jockey shall be five guineas, and to a losing jockey three guineas, and no further charge except for expenses shall be allowed.

All jockeys' fees shall be paid to the stakeholder or clerk of the course at the same time as the stakes, as by Rule 28.

In the absence of special agreement, a jockey who accepts a retainer cannot terminate it otherwise than by three months' notice in writing, ending at the close of a season; and failing such notice, his retainer continues for the next season, and so on from season to season until duly terminated by such notice as above mentioned, provided the same or any agreed retaining fee is paid in advance in respect of each season before the commencement thereof.

Employers retaining the same jockey have precedence according to the priority of their retainers. A retainer which is continued as above mentioned has priority as from the date of its first commencement.

If a jockey be prevented from riding by suspension for fraudulent practices or other misconduct, any person who has retained him may cancel the retainer.

The Stewards of the Jockey Club shall have power to release a jockey from his retainer for any cause appearing to them sufficient.

No jockey shall ride in races on Newmarket Heath, or elsewhere where these Rules are in force, until he shall have obtained a licence from the Stewards of the Jockey Club, on

application at the Registry Office, but no rider will be required to take out a licence until the last day of the week in which he shall have ridden a winner for the first time.

Every jockey shall, on application for a licence, furnish Messrs. Weatherby with his full name and address. A list of the licensed jockeys shall be published annually in the Racing Calendar.

Any rider who shall infringe these Rules will be reported to the Stewards of the Jockey Club, who may suspend him from riding.

Any owner, or trainer, or both, who shall knowingly employ an unlicensed jockey, shall be fined not less than 25*l.* each.

54. No trainer shall engage any lad or other stable servant without previously referring to his last employer in England, France, *Austria* or *Hungary*, and receiving a satisfactory reply in writing.

Any trainer infringing this Rule and continuing to employ such boy after notice has been served on him, shall not be allowed to train or run horses where these Rules are in force; and any lad leaving his master before the terms of his engagement are complete shall be disqualified from riding in any race.

Any boy prevented from obtaining employment by this Rule shall have the right of appeal to the Stewards of the Jockey Club.

Every jockey at the termination of his apprenticeship is free to form engagements for himself, irrespective of any which may have been made for him during such apprenticeship.

Calculation of Time.

55. When the last day for doing anything in relation to a race falls on a Sunday, it may be done on the following Monday, unless the race to which such act relates is appointed for that day, in which case it must be done on the previous Saturday. Sundays omitted.

Foreign Meetings.

56. The Stewards of the Jockey Club shall cause a list to be from time to time published and kept, as they think fit, of meetings and races in countries other than Great Britain, which are to be deemed recognized meetings and races for the purposes of these Rules. Foreign meetings.

New Rules.

57. No new Rule of Racing can be passed, nor can any existing Rule be rescinded or altered without being previously advertised three times in the "Sheet Calendar," and notice given of the meeting of the Jockey Club at which it is to be proposed; and no new Rule, or repeal or alteration of a Rule, shall take effect until it has been confirmed at the meeting New Rules.

ensuing that at which it was passed, and until it has been twice published in the Sheet Calendar. Any owner of race-horses or persons affected by such new Rule, rescission or alteration, may, before it is made, petition the Jockey Club through the Secretary. All such petitions shall be laid before the meeting before the question is put.

RULES AND ORDERS OF THE JOCKEY CLUB.

[These are only applicable to races run at Newmarket.]

Respecting the Stewards.

Mode of annual election.

1. The three Stewards of the Jockey Club shall be continued in their office till the next annual financial meeting (which takes place in the Craven) when the senior Steward shall vacate after settling the accounts made up to the 31st of December preceding, and shall then name a member of the Jockey Club to succeed him, subject to the approbation of the Members of the Jockey Club then present, and at every subsequent financial meeting the senior Steward shall, in like manner, retire and propose his successor.

In case of death or resignation.

2. If any of the Stewards shall die or resign, the remaining Stewards may appoint a member of the Club to succeed the deceased or declining Steward, but such nomination shall be notified to the Club at the first general meeting, and if the appointment meet their approval, the said member shall remain in office until the expiration of his predecessor's time.

Substitute for absent Stewards.

3. When only one Steward is present, and neither of the absent Stewards shall have appointed a substitute, the member of the Jockey Club present who has last served the office shall act *ex officio*.

The Stewards have power —to appoint officers:

4. The three Stewards shall have the power of appointing all the public officers and the servants of the Club; the Keeper of the Match-book to receive the stakes and collect the entrance-money, and all other funds belonging to the Jockey Club; and the Stewards shall produce an account of the funds and disbursements of the Club at the annual financial meeting, and they shall be responsible to the Club for the correctness of the annual accounts, and for all the money collected as belonging to the Jockey Club.

to fix time of starting:

5. The Stewards shall fix the hour of starting for each race at or before nine o'clock in the evening preceding the day of running, and notice of the time of starting is to be fixed up in the Coffee-room immediately afterwards.

to manage the Course and Exercise ground:

6. The Stewards have full power to make such regulations as they may think proper in regard to the Course and Exercising-ground.

to settle disputes at Newmarket:

7. All disputes relating to racing at Newmarket shall be determined by the three Stewards; if only two Stewards be

present they shall fix upon a third person, being a member of the Club, in lieu of the absent Steward, but the Stewards, if they think fit, may call in any other members of the Jockey Club to their assistance, or may refer the case to a general meeting, if the importance or difficulty of the matter in dispute shall appear to them to require it. The witnesses examined shall be required to sign their evidence, and if either party desire to have a short-hand writer engaged to take down the evidence, the Stewards may (if they think proper) engage a writer at the expense of the person making the request.

may decide cases referred to them from other places:

8. If any dispute arising elsewhere shall be referred to the Stewards of the Jockey Club, and they shall think fit to take it into consideration, the matter must relate to horse-racing, and be sent by the Stewards of the Meeting where the matter in question occurred.

not to decide betting cases:

9. The Jockey Club and the Stewards thereof take no cognizance of any disputes or claims with respect to bets.

may warn off the Course:

10. The Stewards have a discretionary power to warn any person off the Race-course at Newmarket, or any premises belonging to the Jockey Club, and in case of such notice being disregarded, to take legal proceedings against the offenders.

to call Meetings of the Club.

11. All meetings of the Club shall be called by the Stewards at their discretion. Notice of Meetings at Newmarket for the transaction of general business, and the days upon which they are to be held, must be given in the Sheet Calendar published during the previous week.

Meetings for the election of candidates for the New Rooms and Coffee Room may be called by a notice in writing, which must be put up in the Coffee Room the day preceding such meeting.

All meetings at Newmarket shall be held about an hour after the last race of the day. Special meetings for the election of Honorary Members of the New Rooms, may be held, without notice, at any time during a Newmarket week.

12. If a member of the Jockey Club shall impugn or object to any act or decision of the Stewards, he shall give notice of it in writing to the Keeper of the Match-book, who will immediately request the Stewards to fix an early day to assemble the members for the purpose of hearing the objection.

Upon the request of not less than twenty members given in writing to the Keeper of the Match-book, the Stewards shall call a General Meeting of the Jockey Club in London, within twenty-eight days of such requisition being presented.

Act at Epsom, Ascot, and Goodwood.

13. The Stewards of the Jockey Club are *ex officio* Stewards of Epsom, Ascot, and Goodwood.

Respecting the Admission of New Members.

To be by Ballot.

14. The election of Members for the Jockey Club, New Rooms, and Coffee Room shall be by ballot.

Ballots may take place during any of the Newmarket Meetings, and must be held at a General Meeting of the Club. Nine Members at least shall ballot, and two black balls shall exclude; but for the New Rooms and Coffee Room, when eighteen Members vote, there must be three black balls to exclude.

The number of Members for the New Rooms are limited to 280, the Stewards having the power to propose special names for election to exceed that number.

For the Jockey Club.

15. For the Jockey Club, each candidate must be proposed and seconded by two Members of the Club. Notice of his being a candidate must be given at a meeting previous to that in which the ballot is to take place, or in the Calendar published during the week preceding the ballot. The name of the candidate, as well as the day of the meeting, must be put up in the Coffee Room on the Monday preceding the ballot. Members of the Jockey Club being abroad for two or more whole years from the 1st of January, shall not be liable for their subscription during their absence. Honorary Members have not the power of voting at meetings of the Club.

16. A member of the Jockey Club may be admitted a Member of the New Rooms without ballot, by applying to Mr. Weatherby, Keeper of the Match-book, and paying the same sum for his admission, and the same subscription, as are required of Members chosen by ballot.

For the New Rooms and Coffee-room.

17. For the New Rooms and Coffee Room each candidate must be proposed and seconded by a Member of the Jockey Club, and the name of the candidate, with his usual place of abode, as well as the name of the Member proposing him, must be put up in the Coffee Room on the day preceding the Ballot.

Honorary Members of the New Rooms are elected for the current year only, *and shall not be liable for any admission fee, but for the subscription only for that year.*

Members abroad from the 1st of January to the end of the year, on giving notice, shall continue to be Members without paying subscription.

Arrears of subscription.

18. A person, though chosen, shall not be considered as a Member of any of these Clubs until he shall have paid the usual sums for the admission and subscription of a new Member. And the name of every Member whose subscription shall be in arrear for one year shall be placed over the chimney-piece in the New Rooms and in the Coffee Room at Newmarket, in the Craven Meeting in each year. And if such arrear be not paid at the end of the following Spring Meetings, he shall cease to be a Member, and shall not be again admitted as a Member until his arrears be paid, and until he be again chosen by ballot.

If any Member of the Rooms or Stands at Newmarket

shall leave his bill for household expenses unpaid two months after the same shall have been delivered to him, the Keeper of the Rooms is to report his default to the Stewards, who will cause notice to be sent to him, that if it be not cleared by a time to be mentioned in the said notice (not to exceed three months), his name will be erased from the list of Members, and he will be warned off the Heath.

Admission to the Stands.

19. Gentlemen not Members of the New Rooms or Coffee Room may be admitted to the Stands on Newmarket Heath, for any one meeting on the nomination of the Stewards, provided that they be ballotted for in the same manner as the Members of the New Rooms at the next ensuing meeting of the Club.

20. If any Member of the Jockey Club, or of the New Rooms or Coffee Room at Newmarket, should appear in the published Forfeit List as a defaulter for stakes or forfeits, or be reported by the Committee of the Subscription Rooms at Newmarket or at Messrs. Tattersall's, as being a defaulter for bets lost on horse racing, the Stewards shall cause notice to be sent to him that if his default be not cleared by a time to be stated in the said notice (not to exceed three months) his name will be erased from the list of Members; and if a Member of any of these Clubs should be convicted of fraudulent practices on the Turf, or should compound with his creditors, he shall cease to be a Member.

Trials.

How to engage the ground.

21. The day, with respect to the engaging of the ground for trials, is divided into five periods, from the first day of the Craven Meeting to the last day of the Houghton Meeting, viz., from five to seven o'clock, and from seven to eight in the morning; from one to half-past two, from half-past two till four, and from four till five in the afternoon. During the rest of the year it is divided into three periods—viz., previous to nine in the morning, from one to half-past three, and after half-past three in the afternoon.

No trainer shall have the ground for trying horses more than one portion of the morning and one portion of the afternoon in the same week, and trainers having less than ten horses shall be allowed to have the ground only for one period of time. A trainer not having more than five horses in training can only have his name down once at the same time; a trainer not having more than ten horses only twice; and a trainer with more than ten only three times.

Notice for engaging the ground shall, at least one day before the day it is used, be entered in a book to be kept for that purpose at the Keeper of the Match-book's Office in Newmarket. And no notice or warning shall be deemed sufficient unless given as before directed.

For the future the ground will be kept clear during trials by a person appointed by the Stewards, unless he is requested to retire by the owner or trainer of the horses being tried.

The Challenge Cup and Whip.

The Cup. 22. The Cup may be challenged for on the Tuesday or Wednesday in the July Meeting in each year, to be run for over the B.C. on Thursday in the Houghton Meeting following, by horses, &c., the property of Members of the Jockey Club or of the rooms at Newmarket; four years old carrying 8st. 7lb. five years old, 9st. 1 lb. six years old and aged, 9st. 4lb. Each person, at the time of challenging, is to subscribe his name to a paper to be hung up in the Coffee-room at Newmarket, and deliver to the Keeper of the Match-book the name or description of the horse, &c. sealed up, which shall be kept till six o'clock on the Saturday evening of that week; and if not accepted, or only one challenger, to be returned unopened; but if accepted, or if more than one challenger, to be then opened and declared a match, or sweepstakes of 200 sov. each, play or pay. If the challenge be not accepted, the Cup to be delivered to the Keeper of the Match-book in the Meeting ensuing the challenge, for the person who may become entitled to the same.

The Whip. 23. The Whip may be challenged for twice in each year, viz.: on the Tuesday after the July Meeting, when the acceptance must be signified or the Whip resigned on the Tuesday following, or challenged for on Monday or Tuesday in the Second October Meeting, when the acceptance must be signified, or the Whip resigned, before the end of the same meeting. If challenged for and accepted in July, to be run for on the *Friday* in the Second October Meeting following; and if in the October, on the Thursday in the First Spring Meeting following; B.C. weight 10st., and to stake 200 sov. each, play or pay.

Charges at Newmarket.

Discount on Forfeits. 24. Five pounds per cent. shall be allowed on all forfeits under 100*l.* and not less than 20*l.* declared to the Keeper of the Match-book, at or before ten o'clock the evening before running; and if the forfeit amount to 100*l.* and upwards, 10*l.* per cent. shall be allowed. All forfeits shall be paid before twelve o'clock at night of the day fixed for the race, and on those forfeits which shall not be so paid, the deduction for the timely declaration of such forfeit shall not be allowed.

No horse shall be considered as struck out of his engagement, unless the owner, or some person authorized by him, shall give notice to the Keeper of the Match-book, or to his clerk, or to one of the Stewards present.

25. The Stakeholder at Newmarket is allowed to retain, out of the stakes in his hands, the following fees for his trouble, viz.— The Stakeholder.

For every match one pound.

For every plate one pound.

For every subscription or sweepstakes where the lowest forfeit amounts to 20 sov. ½ per cent. on the whole stake, and on all other races 1 per cent.

[The charges for stake-holding at Ascot and Goodwood are the same as at Newmarket.]

26. The Keeper of the Match-book is entitled to charge a fee of 2*s.* 6*d.* on all nominations at Newmarket, if published in the Racing Calendar before running, but not on the entries which are made at Newmarket during the week of running. Fees for nominations.

27. Towards defraying the expense of repairing the Course and Exercise-ground, five guineas annually shall be paid in respect of every horse that shall be trained at Newmarket. Any horse remaining at Newmarket more than a week before or after any Race meeting there, shall be considered as trained at Newmarket, and his trainer shall apply for a licence under Rule 28. All yearlings broken on the Heath and Exercise-ground to be charged two guineas. And the same shall be paid by the stable-keeper or servant having the care of such horse, and be charged by him to the owner of such horse. The Stewards shall make such orders as they think fit relative to the returns to be made by the stable-keepers or servants of horses under their care, and if any stable-keeper or servant shall fail to make a true return according to this order, he will be surcharged one guinea for each horse omitted in his list. Heath tax.

N.B.—At present all trainers are required to send in on the 1st of February, a list of the horses which have been under their charge from the 1st of January, and on the 1st of every succeeding month a list of any additional horses that have been under their care since the preceding return.

28. Every trainer who wishes to train horses on the lands belonging to, or in the occupation of, the Jockey Club, must apply annually to the Stewards for a licence, and on making such application must specify the horses then under his charge, and the names of their owners. Licence to train at Newmarket.

A trainer shall be liable to have his licence withdrawn for breaking the rules laid down by the Stewards for the management of the ground, or for any misconduct on the Turf, or in matters connected with it, and the prohibition to use the lands of the Jockey Club attached to the refusal or withdrawal of a licence shall extend to the Race meetings.

The payment of Heath Tax shall not be taken to confer on the person paying the same any legal rights which shall interfere or be inconsistent with the absolute control the Club now has over all persons using or going on to their grounds.

Should the Stewards find it necessary to refuse or withdraw a licence from any trainer, they will report that they have done so at the next General Meeting of the Club.

Plates and Sweepstakes walked over for.

29. When fewer than three horses, the property of persons having different interests, start for any plate or race in which money is advertised to be given by the Club, only half the amount shall be paid, and in case of a walk-over for a Sweepstakes, no money shall be given.

Relating to other matters not before specified.

Races for Gentlemen Riders.

30. No races for gentlemen riders are allowed at Newmarket during the regular meetings without the sanction of the Stewards, and, that accorded, such races must be the first or last of the day.

31. Any member of a Racing Club riding in with the leading horses in a race shall be fined to the amount of 25*l.*, and all other persons to the amount of 5*l.*

Raising weights in handicaps.

32. Rule 10 (ii.) of the Rules of Racing, extends at Newmarket to the highest weight left in at ten o'clock the preceding evening in handicaps for plates and stakes, where there is no declaration of forfeit, and where the weights are fixed the night before running.

33. No rule or alteration of a rule of the Jockey Club takes effect until it has been published in the Racing Calendar, unless specially ordered to the contrary at the time the said rule or alteration is adopted; and no new rule of the Jockey Club can be passed, and no rule be rescinded without previous notice being given in the Sheet Racing Calendar, *except when it relates to the private business of the Club, when notice shall be sent by circular to all the members in the week preceding the meeting*, nor at any meeting at which less than nine members are present.

POST HORSES.

The acts of parliament as to Stage Coaches and Post Horses are 2 & 3 Will. 4, c. 120; 3 & 4 Will. 4. c. 48; 5 & 6 Vict. c. 79; and 32 & 33 Vict. c. 14. The acts of parliament regulating Hackney Coaches, Omnibuses, Carts, Waggons, Drays, and Public Carriages in or near London, are 1 & 2 Will. 4, c. 22; 6 & 7 Vict. c. 86; 13 & 14 Vict. c. 7; 16 & 17 Vict. c. 33; 16 & 17 Vict. c. 127; 30 & 31 Vict. c. 134; 32 & 33 Vict. c. 115; and the Police of Towns Clauses Act (10 & 11 Vict. c. 89). The 32 & 33 Vict. c. 14, s. 17, repeals the Excise duties upon licences to let Horses for hire and to keep Hackney and Stage Carriages.

SLAUGHTERING HORSES.

Regulations as to the Slaughtering of Horses, &c., are contained in 26 Geo. 3, c. 71; and 7 & 8 Vict. c. 87; and are to be found in Burn's Justice (*a*), under the head "Horses and Horse Racing."

ALDRIDGE'S, UPPER ST. MARTIN'S LANE, LONDON, PUBLIC SALES BY AUCTION OF HORSES AND CARRIAGES, &C.

CONDITIONS OF SALE.

1. The highest bidder to be the buyer, and if any dispute arise between two or more bidders respecting any Lot, before the same is returned into the Stable, or place of such Lot, it may be immediately put up again for sale, or the Auctioneer may declare which bidder he thinks proper to be the Purchaser.

2. No person to advance less than Five Shillings above One Pound; Ten Shillings and Sixpence above Ten Pounds; and One Guinea after Twenty Guineas, and so on in proportion.

3. Buyers are to state their names and places of abode, and pay a deposit of 25 per cent. on each Lot at the time of purchase, and the remainder of the purchase-money on the day of sale and before delivery of the Lot; and in case of non-payment the Seller may either rescind the contract, in which case the deposit will be forfeited, or resell the Lot by Public Auction on the Buyer's behalf with or without notice to him, in which case the Buyer will be liable to pay to the Seller the difference (if any) between the sum agreed to be paid by him for the Lot and the amount realized by such resale, also the commission on the resale, the keep of the Lot, and all other charges whatever, deducting the deposit.

4. Any Horse sold at this Establishment with a warranty, must, in case the Buyer contend that it does not correspond with such warranty, be returned before Five o'clock P.M. on the second day after the Sale (Sunday excluded), otherwise it shall be deemed and taken to be in all respects as warranted as between all persons, and the non-return within the time limited shall be a bar to any claim on account of any breach of warranty, and the Buyer shall be bound to keep and pay for the Horse whether it be or be not according to the warranty.

5. Should a horse, warranted quiet in harness or to ride, be returned, it shall be tried by an impartial person to be named by the Proprietors of this Establishment, whose decision shall be final and conclusive upon all persons, and a fee of Ten Shillings for the trial shall be paid by the party in error.

6. Should any horse, sold here, warranted to ride or draw, be considered by the Buyer to be incapable of working, from

(*a*) Burn's Justice, vol. ii. p. 1351.

any infirmity or disease, it may be returned here before Five o'clock on the second day after the Sale, with a certificate from a Veterinary Surgeon to that effect; if not so returned with such certificate it shall be taken not to have been returned within the meaning of the 4th Condition; and if such certificate be not confirmed by another, to be furnished by the Vendor within two days, or in case the Vendor shall neglect or refuse to furnish such certificate, the Auctioneer shall immediately appoint a Veterinary Surgeon, whose decision shall be final and binding, and the whole expense must be paid by the party in error.

7. No horse considered to be affected with Glanders, Mange, or other infectious or contagious disorder, must, under any circumstances, be returned in accordance with the 4th Condition, but in lieu of such return a notice in writing of the fact of the Horse being so affected, and of the place where it stands, must be given at this establishment within the time mentioned in that condition, accompanied with the certificate of a Veterinary Surgeon that the Horse is so affected; and in case of omission to give such notice, accompanied by such certificate within such time, the said Horse shall be deemed and taken to be as between all persons not affected with any such disorder, and such omission shall be a bar to any claim on account of the said Horse being so affected, and the Buyer shall be bound to keep and pay for the same whether it be or be not so affected.

8. If such notice from the Buyer, accompanied by a certificate be given, the Vendor will immediately be required to procure a certificate from his Veterinary Surgeon; and in case of non-agreement of these two opinions, or in case the Vendor neglect or refuse to furnish a certificate within two days after his receiving the notice, then the Auctioneer shall appoint a Veterinary Surgeon, whose decision shall be final and binding upon all parties, and all expenses must be paid by the party in error.

9. The seller shall in no case be entitled to receive payment of any money before it has been received from the Buyer; but if received he shall be entitled to the net proceeds of the property sold at the Wednesday's sale, on the following Monday, and on property sold on Saturdays, on the following Thursday, between Ten and Four o'clock.

10. A right is reserved to the Vendor of any Horse, Carriage, or other property sent to or left at this Establishment, to bid by or through the Auctioneer, and unless such property is protected by a written reserve, it shall be considered to have been sent or left for the purpose of Sale by Auction, and may be sold by Public Auction without reserve, at the next Sale day after it shall have been sent in, or if any Horse, Carriage, or other property, protected by a written reserve, be not sold or removed within one month from the date of such reserve,

the same may be sold by Public Auction without reserve, at the next Sale day, with or without notice to the owner, who may receive the net proceeds of such Sale on either of the days as above.

11. The Commission on all Sales is five per cent., except for Dogs which is ten per cent., and the same will be charged on any Lots returned as not answering warranty, but there shall not be a less charge than Five Shillings for any Horse or Carriage sold. An Auction fee of Five Shillings is charged on each Horse, Five Shillings on each Carriage, Two Shillings and Sixpence on Harness or Saddle and Bridle, and Ten Shillings on each Dog entered on the Books, whether the Lots be put up for Sale or not.

3s. 6d. is charged for the keep of each Horse per Day and Night, *6d.* for Ostlers, and if sold *1s. 6d.* for Halter, Dog's keep, *6d.* each per Day and Night, Collar and Chain *1s. 6d.* each, unless supplied by Vendor.

5s. is charged per Week for the standing of four-wheel Carriages; and *3s.* per Week for the standing of two-wheel Carriages, and *1s.* for washing.

12. The above Conditions apply to all Horses, Carriages, &c., brought to this Repository for Sale, whether they be sold by Auction, or privately by the owner, or by any person employed by him.

13. No Horses, Carriages, &c., shall be taken away until all expenses are paid.

LASTLY. The name, description and address given by the Vendor will in all cases be furnished to a Purchaser if requested; and in case of dispute the remedy of the Buyer shall be against such Vendor only, and in no case or under any circumstances against the Auctioneer or Proprietors of this Establishment, who are to be regarded to all intents and purposes as agents for a disclosed principal.

WILLIAM & STEWART FREEMAN, Proprietors.

ALBERT GATE, HYDE PARK, OCTOBER 23rd, 1780.

CONDITIONS OF EVERY SALE BY AUCTION AND PRIVATE CONTRACT AT THIS PLACE.

1st. The highest Bidder to be the Buyer; and if any Dispute arise between any Two or more Bidders, the Lot so disputed shall be immediately put up again and re-sold.

2nd. No person to advance less than Five Shillings; above Ten Pounds, Ten Shillings, and so on in proportion.

3rd. The Purchasers to give in their Names and Places of Abode (if required) and to pay down Five Shillings in the Pound (if required) as Earnest and in part of Payment; in Default of which, the Lot so purchased may be immediately put up again and re-sold if the Auctioneer shall think fit.

4th. The Lots to be taken away within *One Day* after the Sale is ended, at the Buyer's Expense, and the remainder of the Purchase-money to be absolutely paid before the delivery of the Lot.

5th. Upon failure of complying with the above Conditions, the Money deposited in part of Payment shall be forfeited to the Owner of the Lot, he paying thereout all just Expenses, and the Lot shall be re-sold by public or private Sale, and the Deficiency (if any) attending such Re-sale shall be immediately made good by the Defaulter at this Sale.

6th. If any Person shall purchase a Lot, and not pay for it within the Time limited by the 4th Condition, nothing contained in the 5th Condition shall prevent the Auctioneer, or Owner of the Lot, from compelling the Purchaser to pay for it, if the Auctioneer or Seller shall so think fit.

7th. The Vendor shall be entitled to receive the Purchase-money of each Lot not warranted on the third Day from the Sale Day; and all Horses sold with a warranty of any description on Monday will be paid for on Friday: and all Horses sold with a warranty of any description on Thursday will be paid for on Tuesday, provided that the Auctioneer shall then have received the Purchase-money, or delivered the Lot out of his Custody, but not before.

8th. The Purchaser of any Lot warranted in any way, and not answering the warranty given, must return the same on or before the Evening of the second Day from the Sale, otherwise the Purchaser shall be obliged to keep the Lot with all faults.

9th. All Horses, Carriages, &c., brought to this Repository for Sale, and sold or advertised to be sold by *Private Contract*, either by Messrs. Tattersall, the Owner, or any one acting as Agent for the Owner of such Horses, Carriages, &c., shall pay the usual Commission; and no Person shall take away his Horses, Carriages, &c., until the Commission, Keep and other Expenses are paid, whether the same have been sold by Public Auction or Private Contract, &c., or are not sold.

10th. All Horses, Carriages, &c., advertised by Messrs. Tattersall (though not upon the Premises at the time of Sale, either by Private Contract or Public Auction) shall pay the usual Commission.

Lastly. The Conditions of Sale are:

If sold by Public Auction, One Shilling in the Pound;
If by Private Contract, One Shilling in the Pound; and
If not sold, 2½ per cent. on the reserve price up to 200 guineas.

No Lot will be offered for less than Five Shillings.

The Days of Payment are, for Unwarranted Horses sold on Mondays, Wednesdays; for Warranted Horses, Fridays only, between the Hours of Ten and Four o'clock.

N.B.—No Money paid without a written Order.

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