

FENCE LAW.

SELECTIONS.

FENCE LAW.

At common law in England, no one was obliged to fence his land, except by force of prescription or contract. A person owning cattle must keep them on his own land at his peril, and is liable for damages caused by them if they escape; but he may confine them in any way he chooses. No one need take any precautions to prevent cattle from adjoining close from trespassing on his own land. The want of a fence is no objection to recovery for damages done by animals, except as it is made so by statute, contract or usage.¹ This doctrine of the common law of England is recognized as the common law of Maine, New Hampshire, Vermont, Massachusetts, New York, New Jersey, Delaware, Maryland, Indiana, Kentucky, Michigan, Minnesota, and perhaps some other States.² In several States this rule of the common law is not in force, and the owner of cattle is not obliged to confine them to his own property, but the occupant of land must, at his own peril, keep them out. This is the rule in Ohio, California, North Carolina, South Carolina, Georgia, Missouri, Mississippi, Texas, and Colorado.³ In these States, if he does not properly fence his land, the owner can not recover for damages done his property by his neighbour's cattle, but is himself liable to the owner of cattle for any injury they may receive on his premises, the same as if they entered with his permission. In Pennsylvania, Iowa, and Illinois, a rule midway between these two has been established. It is no trespass for cattle to enter on any unfenced lands; but the owner can not recover damages for injuries to his cattle caused by straying on another's land.⁴

The reason for not adopting the common law rule in many of our States are well given in the case of *Seely v. Peters*.⁵ In this case the court says:—"However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill-adapted to a new country like ours. If

the common law prevails now, it must have prevailed from the earliest settlement of the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, they brought with them, and adopted as applicable to their condition, a rule of law requiring every one to fence up his cattle? That they designed the millions of fertile acres stretched out before them to grow ungrazed, except as each purchaser from the government was able to inclose his part with a fence? This State is unlike any of the Eastern States in their early settlement; because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced, and their luxuriant growth, sufficient for thousands of cattle, must be suffered to decay where it grows, unless settlers upon their borders can be permitted to turn their cattle upon them." In accordance with this reasoning, we find that, as a rule, with several exceptions, however, in the newer States and Territories, and those adapted for grazing, either by the decisions of the courts or by statutes, cattle are allowed to range at will, and those cultivating the ground must fence their possessions to keep them out.⁶ In Utah, while, by the general law owners of cattle are liable for damages for trespassing on another's land, whether fenced or not, yet the inhabitants of any district may, by vote, allow cattle to range at large, and require owners of cultivated fields to fence them up.⁷ In most of the States the subject is regulated by statute.

In nearly all the States statutes have been passed concerning the building and maintenance of division fences on the boundary line between adjoining proprietors, and providing generally, that when the owners of the two estates can not agree, application may be made to fence viewers, who shall decide the disputed questions. These statutes generally provide what shall be considered a sufficient and lawful fence.

The object of fencing is to provide against damage caused by or to domestic animals properly restrainable by a common fence. One is not obliged to fence against such small animals as would pass through or under an ordinary fence, nor against such wild animals as would break through. If an animal breaks

1. 20 Edw., IV. 10.

2. *Harlow v. Stinson*, 60 Me. 347; *Lyon v. Merrice*, 105 Mass. 71.

3. *Cleveland, etc. R. Co. v. Elliott*, 4 Ohio St. 474; *Contraford v. Dupuy*, 17 Cal. 308.

4. *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Wagner v. Bissell*, 3 Iowa 306; *Stoner v. Shugart*, 45 Ill. 76.

5. *Seely v. Peters*, 5 Gilw. (Ill.) 130.

6. Colorado, *Morris v. Fraker*, 5 Colo. 425; Montana, Code Sts. 373, sect. 1; Nebraska, Comp. Sts. 49, sects. 19, 21; Washington Territory, Code, sect. 2590; Nevada, Comp. Laws, 3992, 3994.

7. Comp. Laws, chap. 3, sects. 1, 2.