* * * But if a servant leaves open the stable door, and a coach-horse runs out and does mischief, it is otherwise."

Perhaps the distinction meant, is, that when the animal in the highway attacks or injures a passenger, the owner is not liable, without previous knowledge of the beast's ferocity; but that if such an animal trespass on lands, the owner is liable.

My brother Morrison has fortunately noticed a very late case, reported in 34 L. J., N. S., C. P. 31, but much more fully in 17 C. B., N. S. 245, *Read* v. *Edwards*. There the distinction between trespasses by dogs and by animals like oxen seems clearly recognised. A case in the Year Book 20 Edw. IV., fol. 10, *b*., is cited. Littleton says: "If a common road lies over the land of divers men, and if a drover comes with his beasts and some of them go out of the way, he shall be punished in an action of trespass; and so here." The case in the Year Book was trespass for depasturing the plaintiff's land with beasts. There was a commom from which defendant's beasts got into the plaintiff's adjoining lands without his knowledge, and immediately he knew it he (defendant) drove them out.

In *Read* v. *Edwards*, after very elaborate argument, *Willes*, J., delivers judgment, and says, "The question was much argued, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account,—first, of the difficulty or impossibility of keeping the latter under restraint,—secondly, the slightness of the damage which their wandering ordinarily causes,—thirdly, the common usage of mankind to allow them a wider liberty,—and, lastly, there not being considered in law so absolutely the chattels of the owner as to be the subject of larceny. It is not, however, necessary in the principal case to answer this question."

We cannot see our way to deciding that the opinion of that very careful and experienced judge, Sir James Macaulay, was not resting on binding authority, and we therefore think the appeal fails on this point also.

We see no difficulty in the objection that the verdict is general, and that the plaintiff was not put to his election. As we understand *Haacke* v. *Adamson*, 14 U.C.C.P. 207, it is not held that the election must be necessarily made at the trial, but that in term the plaintiff can be forced to elect on which count to enter his verdict, where only one cause of action is proved, and the verdict is general. Here we find two counts, on either of which the plaintiff could recover damages. We suppose in strictness he may be said to have a cause of action on each, for the trespass to the realty, and for the damage done by the defendant keeping a mischievous bull. In any event it is no ground (as we understand the rule) for nonsuit or arrest of judgment, where there is no misjoinder, and where each count shews a good cause of action, or for new trial. The court can always make the plaintiff elect on which count to enter up his verdict; and after all it is a mere question of distribution of costs.

Appeal dismissed, with costs.

HERBERT QUI TAM V. DOWSWELL.*

Magistrates—Oath of qualification—Consol. Stat. C. ch. 100.

Under Consol. Stat. C. ch. 100, section 3, the oath of qualification by a Justice of the Peace must be taken before some J. P. of the County for which he intends to act. It cannot be administered by the Clerk of the Peace for such County, under the writ of *Dedimus Potestatem* issued with the Commission of the Peace.

[Q. B., E. T. 1865.]

This was an action of debt brought to recover from defendant, a Justice of the Peace for the United Counties of Lanark and Renfrew, a penalty of $100, under Consol. Stat. C. ch. 100, and a penalty of $80 under ch. 124, Con. Stat. U. C.

The declaration contained three counts. 1st, for acting as a J. P. without taking the oath required by the third section of the act first mentioned before a J. P. of the United Counties of Lanark and Renfrew. 2nd, for acting as a J. P. without having the necessary property of qualification required by that statute. 3rd count, defendant having convicted the plaintiff upon a certain charge, for wilfully receiving from plaintiff a larger amount of fees than by law authorized in respect of such conviction, contrary to the provisions of Con. Stat. U.C. ch 124.

Pleas—Not guilty, by statute, to all the counts.

At the trial before *Morrison*, J., at the last Perth assizes, it appeared from the testimony of Mr. Berford, the Clerk of the Peace for the United Counties of Lanark and Renfrew, that the defendant's name was in the commission of the peace for those counties: that after the issuing of the commission, on the 17th of June, 1859, he made oath to his property qualification before him, the Clerk of the Peace, who stated that he administered the oath to defendant under the authority of the writ of *Dedimus Potestatem* (which the Crown issues with and which accompanies the Commission of the Peace) directed to those named therein, to take the oath of office of the justices named in the commission, and it also appeared that the defendant took no other oath of qualification except the one referred to.

Evidence was also given to shew that the defendant acted as a Justice of the Peace, under the first count. The evidence given to establish the second and third counts was not sufficient.

The defendant's counsel moved for a nonsuit, contending that the oath of qualification sworn before the Clerk of the Peace was a good and valid oath, notwithstanding the provisions of sec. 3, of Consol. Stat. C. ch. 100; and it was agreed that a nonsuit should be entered, with leave reserved to the plaintiff to move to enter a verdict for him on the first count for the penalty of $100, if the court should be of opinion that the defendant should have taken the oath of qualification before a Justice of the Peace.

Robert A. Harrison obtained a rule *nisi* to set aside the nonsuit and to enter a verdict for the plaintiff on the first count for $100, in the pursuance of the leave reserved, on the ground that the oath of qualification of defendant should have been taken before a Justice of the Peace.

Deacon shewed cause.

MORRISON, J., delivered judgment.

By the third section of ch. 100, of the Consol. Stat. C. it is enacted, that when not otherwise

* See the act of last session, at page 147, introduced to obviate the difficulty.—EDS. L. C. G.