

another form of obligation in respect to fences. This is what we may call the duty imposed by law to fence against a common.

At common law the tenants of the manor had a right—and in many cases still have that right—of enlarging animals upon the common. Inclosing was said to be against common right. (The word "common," used here, has a different sense to that in which it is used previously.) Every commoner having a right to enlarge his animals on the waste of the manor as of common right, a person who inclosed against common right, although such inclosing was legitimate and rightful, was supposed to take his rights subject to the commoners' rights, or, rather, to acquire his rights on such a footing that the commoners were not to be prejudiced. We do not suggest that the newly inclosed lands were still subject to the commoners' rights of depasturing on those lands, for, in point of fact, ordinarily an inclosure to be rightful predicated that a sufficient amount of pasture remained to the commoners for the full enjoyment of their pasturing rights. But, inasmuch as previously the commoners were not liable for trespass in allowing their animals to roam over the land in question, it was laid down that the owner of the newly inclosed land ought to keep up the fence between his property and the common. "The purpose of inclosing lands is that they may be used as cultivated land," said Chief Justice Cockburn in the case of *Barber v. Whiteley* (1865, 13 W.R. 774, at p. 775), "and since such a use of them, beneficial to the person to whom it is permitted, makes it the more necessary that the land should not be open indifferently to grazing animals, it is more likely that the obligation of preventing a trespass was imposed upon the occupier than on the tenants of the manor, who had rights of common on the waste, formerly exercisable without any such risks of distress, and who were a varying and uncertain body. Therefore, granting it to be a principle of law that where no obligation to fence is shewn upon either of two adjoining land-owners, each must take care his own cattle do not stray; yet a different legal relation arises where there is, on the one hand, a person inclosing from common land, and, on the other, a body of persons entitled by law exercise commonable rights on the land adjacent."