LIABILITY FOR ANIMALS

CAUSING INJURY TO PERSONS OR PROPERTY:

A COMPARATIVE STUDY.

D.L. CAREY MILLER

1969

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University of Edinburgh.
ACKNOWLEDGMENTS

I am happy to acknowledge the invaluable counsel, encouragement and assistance received from Professor T.B. Smith, Q.C., D.C.L., LL.D., F.B.A., who has patiently and painstakingly supervised my writing of this thesis.

Grateful acknowledgments are also due to Mr. R.D. Leslie, B.A., LL.M., of Edinburgh University and my erstwhile colleagues Mr. J.M.J. Chorus, LL.M., of Leiden University, Mr. D.B. Meyers, B.A., J.D., LL.M., of the Californian Bar, Herr Erich Schanze of the Frankfort and Harvard Universities and Herr Graf von Ungern Sternberg of the University of Freiburg.
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PRINCIPAL WORKS CITED WITH MODE OF CITATION

AMOS and Walton, Introduction to French Law....

BANKTON, An Institute of the Laws of Scotland.

BELL, Principles of the Law of Scotland.

BUCKLAND, A Text-Book of Roman Law....

COHN, Manual of German Law.

ERSKINE, An Institute of the Laws of Scotland.

ENNECENUS-LEHMANN, Recht Der Schuldverhaltnisse....

FLEMING, An Introduction to the Law of Torts.


GANE, Huber's Jurisprudence....

GANE, The Selective Voet....

GLEGG, A Practical Treatise on the Law of Reparation.

GLOAG and Henderson, Introduction to the Law of Scotland.

GROENEWEGEN, De Legibus Abrogatis....

GROTIUS, Institutiones Juris Hollandici....

GUTHRIE, Bell's Principles of the Law of Scotland....


HALL /
HALL, Maasdorp's Institutes of South African Law.

HARPER and James, Torts....

HERBERT, Grotius' Dutch Jurisprudence....

HOLDSWORTH, A History of English Law.

HOLMES, The Common Law.

HUBER, Hedendaagsche Rechtsgeleerdheid.

JOLOWICZ, A Historical Introduction to Roman Law....

KAMES, Principles of Equity.

KASER, Roman Private Law....

KERR Wylie, Studi Riccobono....

KOTZE /
Sir John Kotze, Simon van Leerewel's Commentaries...

Karl Larenz, Lehrbuch Des Schuldrechts...

R.W. Lee, Elements of Roman Law...

Kuni H. M. Lee, The Elements of Roman Law with a Translation of the Institutes of Justinian...

H. L. M. Lee, The Law of Delict...

R.W. Lee, Introduction to Roman-Dutch Law...

Sir John Kotze, Simon van Leerewel's Commentaries...

Karl Larenz, Lehrbuch Des Schuldrechts...

R.W. Lee, Elements of Roman Law...

H. L. M. Lee, The Elements of Roman Law with a Translation of the Institutes of Justinian...

R.W. Lee, Introduction to Roman-Dutch Law...

Sir John Kotze, Simon van Leerewel's Commentaries...

Karl Larenz, Lehrbuch Des Schuldrechts...

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H. L. M. Lee, The Elements of Roman Law with a Translation of the Institutes of Justinian...

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WESSELS, *History of Roman-Dutch Law*.

WESTRUP, *Introduction to Early Roman Law*.

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ABSTRACT OF THESIS

This thesis attempts to present a picture of the diverse treatment which different legal systems have employed with regard to the problem of liability for animals. The solutions in three modern jurisdictions, England, Scotland and South Africa are surveyed in some detail and the approaches in a few Continental countries and some American states are canvassed in outline. Chapters on Roman and Roman-Dutch law are justified on the basis of their influence upon modern South African law and because the general problems were fully considered by Roman and Roman-Dutch jurists and legislators.

The work commences with a brief chapter on the solutions employed in Roman law. The forms of strict liability imposed by the actio de pauperie, Aedilitian action and the actio de pastu are dealt with in outline as is the general Aquilian remedy. The writer attempts no speculation as to the details of Roman law for this would be superfluous to the purposes of this thesis.

A full chapter on English law follows with detailed treatment of the three significant forms of redress; the strict type cattle-trespass and scienter actions and the tort of negligence. Applicable defences are considered. After brief mention of the obsolete remedy known as distress damage feasant the chapter concludes with a /
a critical consideration of the 1967 Law Commission report and recommendations.

In the third chapter the development of the Civil Law remedies in Roman-Dutch law is discussed. This chapter principally represents a collection of Roman-Dutch sources. Herein much has been gleaned from the judgment in O'Callaghan, M.O., v. Chaplin 1927 A.D. 310 in which a distinguished South African Appellate Division bench reviewed the old authorities fully. The sources are considered under the following heads: the general rule, damage by wild animals, trespassing and depasturing animals and the controverted recognition of noxal surrender in Roman-Dutch law.

Scots law is dealt with in the fourth chapter commencing with a survey of the Institutional authorities and proceeding to review early case law. In the second part of the chapter the Law Reform Committee report and aspects of modern Scots law are discussed. The writer has experienced some difficulty in establishing the remedies applicable to Scots law and ventures that legislation or comprehensive judicial scrutiny is warranted.

The final jurisdiction surveyed in depth is South Africa and, as the old authorities are fully dealt with in chapter III (supra) this chapter is restricted to coverage of the modern case law.
law. The semi strict *actio de pauperie*, the strict *actio de pastu* and the *lex Aquilia*, based on fault, are considered. Animals on the road are dealt with separately under the last head.

In the penultimate chapter the solutions, in skeleton outline alone, of France, the Netherlands, Germany, Italy and some American states are set out. The justification for this outline survey is to illustrate the preponderant preference for a strict rule in modern law.

The details of solutions employed in England, Scotland and South Africa are compared in the final chapter and aspects of Continental and American solutions are also considered. This comparison is carried out under the heads of (i) special strict liability actions (ii) general delict/tort actions and (iii) actions relevant to depasturization. The thesis concludes with proposals in regard to (i) the determination of a basis for liability and limitations thereof, if any, and (ii) the determination of parties who should be liable. The writer attempts to justify a strict rule, subject to certain limits, imposing liability on the animal owner.
CHAPTER I

ROMAN LAW

Actio de Pauperie:

The Early Law

The Twelve Tables of circa 450 B.C. introduced an action to cover the case of damage done by an animal. This action was in

simplem and the direct ascendant of the actio de pauperie of
developed Roman Law. It seems that the original action intro-

duced absolute liability independent of any fault on the owner's

part and only lay in respect of damage by quadrupeds — perhaps

originally restricted to res mancipi. Kerr Wylie in his searching

investigation of the matter submits that:

"... the 'actio de pauperie' originally did not apply to the case of damage done by grazing animals while in search of food: the primitive mind would not regard this as a wrong on the animals part and the 'actio de pauperie' may have continued in such cases even after its basis had ceased to be wrongdoing. It may be that here we find the explanation of the so-called 'actio de pastu' also granted by the 12 Tables." 5

The same writer maintains that originally the pauperian action did not lie in respect of bodily injury to free persons. According to /

1 Twelve Tables 8.6.
2 Buckland, A Text-Book of Roman Law, p.608.
3 Kerr Wylie, Studi Riccobono, p.466.
4 Ibid., p.469.
5 Ibid., p.475.
6 Ibid., p.510.
to Watson, however, nothing was said in the Twelve Tables as to
the circumstances of the injury. A feature of the early action
was its noxal character. As an alternative to paying damages the
owner of the malevolent animal could surrender it to the party who
had suffered loss. Surrender of the beast (dai id quod nocuit)
absolved the owner of his responsibility to indemnify the value
(aestimatio) of damages done (pauperies). It appears that the
ey early Roman law-makers imposed strict liability, somewhat eased
by the noxal surrender option, upon the owner of the offending
beast.

The original statute probably did not apply to wild animals
because these were generally res nullius and could not incur
liability in respect of their erstwhile owners. Nicholas intimates
that the statute of the Twelve Tables may have applied to wild
animals, but, for the reason proposed above, did not effectively
cover their case. Ashton-Cross writing in a journal states
that the action given by the Twelve Tables did not apply to wild
animals but does not furnish any authority for his proposition.
Whatever the position was, it seems clear that the Twelve Tables,
either by specifically excluding wild animals, or by reason of
the fact that the law was impossible to apply to them, did not in
fact /

7 Watson, Obligations, p.280.
8 But see Kerr Wylie, Injuries by Animals in Roman Law, 1934
S.A.L.J. (II) p.170 et seq.
10 Nicholas, Roman Law, p.224.
11 Ashton-Cross, Damage by Animals in Roman Law, C.L.J. 1953, 395
at pp.397-398.
fact provide a solution and the curile aediles accordingly found it necessary to introduce the aedilitian action, thereby providing for redress arising from damages caused by an animal at or near a public place.

The actio de pauperie of the Twelve Tables, was, it is submitted, partly penal in nature. The provision of noxal surrender demonstrates the ipso facto personification of the beast as criminal and if employed enabled the plaintiff to take his revenge. Kerr Wylie supports this theory in a journal article and states:

"The idea lying originally at the root of the actio de pauperie was no doubt that of vengeance. Natural instinct prompts a man who has suffered an injury to revenge himself on what he regards as the immediate cause thereof, whether a human being, an animal or even an inanimate object."

But unless the learned author was here referring to notions which preceded the early statute rather than actually formed a basis for it this statement by him is difficult to reconcile with a passage from his comprehensive treatment of the matter in his contribution to the Riccobonian studies. The Riccobonian passage reads as follows:

"... in the case of injuries by animals, the 'actio de pauperie', which lay against the owners, had, apparently even in the time of the Twelve Tables, abandoned this basis."

Kerr /

---

12 Kerr Wylie, Studi Riccobono, pp.474-475 and post.
14 Kerr Wylie, Studi Riccobono, p.463.
Kerr Wylie is evidently referring to "the primitive vengeance idea" as "this basis". He proceeds:

"The legally minded Romans, it would seem, had at a comparatively early stage in their history perceived the futility of seeking to wreak an idle vengeance on brute beasts. When an animal caused an injury, what the injured party now desired was compensation for the loss sustained. If the owner were prepared to pay this compensation good and well; if he were not then the injured party claimed the animal for what it was worth as a patrimonial asset. In other words, the original liability of the animal to suffer vengeance has now practically become the liability of the owner to make a permanent transfer of the animal for the economic benefit of the injured party, as an alternative to payment of compensation." 15

It is clear from the text that the learned author is referring solely to the law at the time of the Twelve Tables. With respect it is doubtful whether the injured party could actually claim the animal - the option to free himself from pecuniary liability rested solely with the owner of the malevolent animal. 16

Although the Romans were undoubtedly "legally minded" at the time of the Twelve Tables historians do not generally credit them with sophistication. The Twelve Tables was a well defined primitive statute implemented to serve an organised rural society. Tendencies to prescribe revenge for offending animals adorn the statute /

15 Ibid., pp. 463-464.
statute books of many civilised societies as late as the fifteenth century. Kaser says "... Originally the demon of the animal was held to be the wrongdoer". It is accordingly respectfully submitted that the view expressed by Kerr Wylie in the South African Law Journal is to be preferred to the approach adopted by him in the Romanonian work.

Besides the retribution element an additional rationale for the noxal surrender alternative is the ancient idea that it is inequitable for a man's property to involve him in financial loss to an amount exceeding its value.

If the owner did not wish to surrender his animal he could pay damages, but in any event, if the injured party was mercenary rather than sadistic he could recoup his financial losses by selling the surrendered beast. He might, indeed, have his cake and eat it, by disposing of the wretched animal only after he had satisfied his aggrieved spirit by punishment. This, however, is conjectural.

The action under the Twelve Tables was, it is submitted partly objective, partly subjective in its operation. It was objective quoad determination of liability - no criteria of wrong existed, damage and liability were synonymous, with the possible exception /

17 Generally: Williams, Animals, p.9 et seq.
18 Kaser, Roman Private Law, (Translated by Dannenbring) p.211.
19 Note 9 supra loc.cit.
20 Note 10 supra loc.cit.
exception of the case of provocation. The subjective element is evidenced by noxal surrender with an opportunity for retribution.

**The Developed Law**

The Developed Roman Law recognised a standard of wrongful conduct as a pre-requisite to liability under the *actio de pauperie*. C.G. van der Merwe has traced the growth of the "*contra naturam*" standard in a recent paper. Before considering the introduction of the *contra naturam* requirement it is interesting to note that by classical times the action of the Twelve Tables had been extended to include "pecus" in the wide sense within its scope. So the law, on an analogy to the interpretation given to 'quadrupes' in the first chapter of the *lex Aquilia*, probably covered oxen, horses, mules, sheep and goats. According to Kotze J.A., in *O'Callaghan N.O. v. Chaplin* Justinian in his Institutes impliedly excluded wolves, bears and the like from the operation of the statute. However the remedy was subsequently extended to include harm by bipeds such as geese and poultry.

Regarding dogs /

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22 But although the *Digest* gives many examples the position in early law is obscure.
25 D.9.1.1.2 where Ulpian indicates that the action applied to all quadrupeds.
26 Inst. 4.3.pr. and 1; and *O'Callaghan N.O. v. Chaplin*, 1927 A.D. 310 at pp. 313 and 314.
28 D.9.1.4.
dogs Ashton-Cross mentions the *Lex Pesolanis de cane* as a special remedy for damage or injury by these animals.\(^{29}\) He states that it may have been analogous to the *Lex Romana Burgundiorum* and probably introduced liability where a dog was released on a public place and caused damage.\(^ {30}\) Buckland indicates that nothing is known of the statute\(^ {31}\) the only authority in regard to it being Paulus\(^ {32}\), where, as Watson points out,\(^ {33}\) it is merely referred to together with the *actio de pauperie* and the *actio de pastu* without distinction. It has also been suggested that the difficulty was overcome by the praetor who granted an "*actio de pauperie utilis*" in respect of damage done by a biped.\(^ {34}\) Although the question of the time and manner of the inclusion of dogs is controverted it is settled that by the time of Paulus, at latest, dogs were included in that diverse category of animals designated "*pecus*" for that jurist refers to the case of a fierce dog chained up in an inn.\(^ {35}\)

The texts of the early classical period indicate that the sole requirement at that stage was conduct by the animal motivated by inward vice.\(^ {36}\) Thus the owner was liable where his animal had acted /

\(^ {29}\) Ashton-Cross, *Damage by Animals in Roman Law*, C.L.J. 1953, p.401.
\(^ {30}\) Ibid.
\(^ {32}\) Sentences, 1.15.1.
\(^ {33}\) Watson, *Obligations*, p.282, n.2.
\(^ {34}\) Kerr Wylie, *Studi Riccoboni*, p.465.
\(^ {35}\) D.9.1.2.1.
\(^ {36}\) D.9.1.1.4; and D.9.2.52.2. Cf. Watson, *Obligations*, pp.280-281.
acted commota feritate. Examples from the texts include the cases of a horse that kicks, an ox that stampedes or a mule that gives vent to wildness. The subjective concept of "contra naturam" was only introduced by the later classical jurists and the phrase appears only twice in the Corpus Juris Civilis. Ulpiian indicates that the pauperian action normally lies where damage has been done by an animal acting contra naturam ("Et generaliter haec actio locum habet, quotiens contra naturam fera mota pauperiem dedit"). Dealing with the defence of provocation Ulpiian states that where a person provokes his dog and it does harm an action under the lex Aquilia or an actio in factum will lie. Clearly Ulpiian recognised that in this case no blame was attributable to the animal and thus the pauperian action was inappropriate. According to van der Merwe's view the majority of Romanists maintain that the contra naturam element was only introduced by post classical jurists who employed a subjective approach:

"Die meeste Romaniste meen dat hierdie verdere vereiste, nl. dat die gedra contra naturam moet wees, eers deur die Na-klasslike juriste bygevoeg is, veral omdat hierdie juriste meer subjectief was en meer geredelijk fond of skuld by diere sou soek, terwyl die klassike juriste die mening gehuldig het dat 'n dier, wat geen rede besit nie, nooit onregmatig kan handel nie (D.9.1.1.4 nec enim potest animal injuria fecisse, quod sensu caret)."

This /

37 D.9.1.1.7 and Inst. (4.9.pr.).
38 D.9.1.1.7.
39 D.9.1.1.5.
This view is supported by Kerr Wylie in his exhaustive treatment of the action:

"It is now established beyond all reasonable doubt that the restriction of the 'actio de pauperie' to cases where an animal - primarily at any rate a tame or domestic animal - has acted 'contra naturam', is entirely due to the compilers."

The learned writer goes on to state that the notion of an animal being responsible for a delict is a natural law concept and thus post classical.

The natural law did not lay down a comprehensive set of rules to govern the conduct of animals, on the contrary the standard was vague. van der Merwe suggests that the standard was obtained by reference to the general requirement in respect of people which was wide enough to include the examples of animal wrongdoing furnished by post-classical jurists - as an example he postulates the case of the horse which kicks the over affectionate human who strokes it roughly. According to van der Merwe's view the post-classical Romanists would judge this horse to act "contra naturam" because it acts in breach of the rules of natural law insofar as it reacts violently to a friendly advance. According to the same source the subjective approach of the Byzantine period was approved and accepted by the glossators who gave the contra naturam standard a /

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41 Kerr Wylie, Studi Riccobonii, p.471.
42 Ibid.
43 Note 31 supra op.cit. pp.8-9.
10.

a specific connotation by adding the words "sui generis". It seems that the expression "contra naturam sui generis" was first used by Azo and Accursius the twelfth/thirteenth century Italians. Literally the words mean "contrary to the nature of his own kind" and imply that a particular animal should act in a given manner. The concept has been adopted by some modern Roman systems.

It seems that in classical Roman Law and pauperian action only lay against the owner of an animal who was in possession at litis contestatio and if the animal died before litis contestatio the action failed. The owner of an offending beast who knowingly and falsely denied his ownership forfeited his right to noxal surrender.

As noted earlier noxae deditio was at the option of the animal owner. The plaintiff could not claim the animal which had caused the pauperies, his intentio was always for compensation and damages. So the jurists came to distinguish on the one hand the claim for compensation and the owner's liability to pay compensation and, on the other hand, the defendant's option of noxal surrender, as "in obligatione" and "in solutione" respectively.

Developed /

\[\text{Laid., p.9.}\]
\[\text{45 Gemeines Recht but not the B.G.B. (see post p.207); Nicholas, Liability for Animals in Roman Law, 1958 Acta Juridica, p.187.}\]
\[\text{46 D.9.1 passim., Inst. 4.9. and Paul Sentences. 1.15.1.}\]
\[\text{47 D.9.1.13.}\]
\[\text{48 D.9.1.15; but see Kerr Wylie, Studi Riccobono, p.501.}\]
\[\text{49 Evidently based on D.42.1.6.1. See O'Callaghan, N.O. v. Chaplin, 1927 A.D. 310 at p.352.}\]
Developed Roman Law recognised provocation as a good defence to a suit under the *actio de pauperie*. The *Digest* is prolific in examples. Ashton-Cross enumerates the examples under three heads:

(i) provocation by the person in charge of the animal, such as the mule driver who overloads his animal and thereby causes it to throw its load \(^{51}\) or the person who rides a horse negligently and thus causes damage \(^{52}\) or the person who sets his dog onto another. \(^{53}\)

(ii) Provocation by an 'outsider' who, for example, strikes \(^{54}\) or frightens \(^{55}\) an animal thereby causing it to do harm.

(iii) Provocation by another animal thus where one animal excites another so that the second one causes damage this is attributable to the first animal. \(^{56}\)

In the majority of the above cases the *Digest* prescribes redress by way of an *actio in factum* or the *lex Aquilia*. The latter, however, was only applicable in cases of direct physical causation \(^{57}\) - *quia non ipse suo corpore damnum dedit*.

**The Aedilitian Action:**

Jolowicz describes the development of the Aedilitian College

\(^{50}\) Damage by Animals in Roman Law, C.L.J. 1953, p. 401.
\(^{51}\) D.9.1.4.
\(^{52}\) D.9.2.57 and D.9.2.8.1.
\(^{53}\) D.9.2.11.5.
\(^{54}\) D.9.1.1.7.
\(^{55}\) D.9.2.9.3.
\(^{56}\) D.9.1.1.8.
\(^{57}\) D.9.1.1.7.
and states that its duties were mainly municipal and included responsibility for the *cura urbis*. The *curule aediles* were responsible for introducing legislation to deal with harm done by wild animals kept at or near public places. The date of the action does not appear from the authorities and civilians are not unanimous in regard to the terms and extent of the original edict. It seems, however, to be settled that the edict prohibited the keeping of certain categories of wild animals in public places and prescribed a penalty in the case of injury, payable by the owner of the wild beast to the injured party.

The edictal provisions are summarised in the Institutes from which it appears that the keeping of a dog, boar, bear or lion is prohibited in places used by the public and that if the provision is violated and a free man is killed or injured a penalty or damages is payable by the animal owner. Where a free man is killed a money penalty of two hundred solidi was payable, if a free man were injured damages in the discretion of the index (*quod bonum et aequum indici videtur*) were payable, for all other harm the minimum reparation of double damages applied. The

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Digest extends the category of animals to include the wolf and the panther. The terms of the edict quoted by Ulpian indicate that the prohibition was not absolute:

"no-one is to keep the named animals 'qua vulgo iter fiet' in such a way that loss or injury can result to anyone" 64

so liability only arose if harm was done. According to Buckland the action under the edict was subsequently extended to cover misdeeds by all classes of wild animals in public places. 65

Ashton-Cross in the journal article already cited states that the Aedilitian action only applied in cases where the animal was owned at the time it caused the damage. This deduction is criticised by Nicholas who says:

"such a restriction would moreover largely frustrate the obvious purpose of the aediles as magistrates charged with the cura urbis". 67

It is respectfully submitted that the Nicholas approach is preferable and consistent with the probable basis for the action, viz., to satisfy the deficiency in the law regarding wild animals, which was not being covered by the provisions of the pauperian law (see supra). It is unlikely that the Roman legislators would have introduced /

63 D.21.1.40,1 and 42.
65 Buckland, A Text-Book of Roman Law, p.603.
66 Ashton-Cross, Damage by Animals in Roman Law, C.L.J. 1953, p.396.
68 Kerr Wylie, Studi Riccobono, pp.473-475.
introduced a manifestly paradoxical statute not covering harm done by wild animals which escaped. The same authors take opposite views in a controversy concerning the question whether the edict applied to all animals or only to wild beasts. Kerr Wylie does not hold with the notion that the edict related to all animals for he says:

"This edict forbade the keeping of dogs and certain specified categories of wild animals" 70.

The writer prefers this approach and would respectfully suggest that the apparently anomalous inclusion of the dog and the domestic boar is attributable to the propensity for mischief for which these animals are notorious. Dogs and boars are defined by Brissonius as "animal domesticum sed ferox". The edict was probably introduced to serve a double purpose, viz., (1) to partly overcome the anomaly that existed in Roman Law regarding wild animals which escaped and thus severed the nexus of their masters responsibility for the harm they did, (ii) to introduce absolute liability in respect of wild animals and two classes of animals with a recognised dangerous propensity.

Justinian's insistence that the action under discussion and the pauperian action are alternative is difficult to understand. 72

Inst. /

70 Kerr Wylie, Studi Riccoboni, p.474.
71 O'Callaghan N.O. v. Chaplin, 1927 A.D. 310 at p.337.
Inst. 4.9. Pr and the latter part of 4.9.1 are, with respect, ambiguous. The text of the former indicates that wild animals are excluded from the operation of the pauperian action because the ferocity of wild animals is innate and therefore a ferocious act is not contra naturam or because the master ceases to be master on the escape of the wild animal. In the latter, however, Justinian is at pains to set out that the actions are alternative because they are penal. Perhaps by Justinian’s time the actions were alternative in respect of harm by a dog or a domestic boar but it is difficult to envisage the duality going any further for the very reasons enunciated in Inst. 4.9. Pr (supra).

The final sentence of Inst. 4.9. Pr indicates that the Aedilitian action was not noxal — indeed logical for who would wish a defending owner’s black panther as an alternative to his lucra.

The Actio de Pastu:

The actio de pastu (or the actio de Pastu Pecoris) provided relief to the occupier of land who suffered damages resulting from the trespass of another’s cattle. According to Buckland the action was of the ordinary delictal type and thus not analogous to /

73 Inst. 4.9. Pr.
to the actio de pauperis. Although on analysis this may become apparent the actio de pastu is generally regarded as a relic of the Twelve Tables. Voet also subscribes to this approach and Gane's translation reads as follows:

"But if one man's animal grazes on another man's ground without anyone letting him in, then there is room under the law of the Twelve Tables for a civil action on the grazing of cattle." 76

Kerr Wylie is of the opinion that the actio de pastu was originally limited to the case where a cattle owner had deliberately caused his animals to trespass:

"a person who deliberately sent his cattle (in the widest sense) on to the lands of another, or even knowingly permitted them to go there, for grazing purposes." 77

In regard to the original motivation of this action the same author writes:

"The originating cause of the action was thus an act of the owner of the cattle, not of the cattle themselves. Hence, the prestation due by the defendant was payment of pecuniary damages ('noxiam sacrile') in respect of his own act, without any alternative of surrendering his cattle." 78

Lee, conversely, in his brief reference to the action, states that /

74 Buckland, A Text-Book of Roman Law, p.585, n.3.
77 Kerr Wylie, Studi Riccobono, p.475.
78 Ibid.
that it was noxal and Ashton-Cross concurs.

Liability in developed law was probably strict and plaintiff would not be required to prove dolus or culpa. It seems, however, that the action may have been restricted to damage done by animals mansuetae naturae acting secundam naturam:

"In the case of damage caused by ordinary animals mansuetae naturae according to their natural disposition, as for example by cattle depasturing on another man's herbage, the owner was liable to the action de pastu pecorium under the law of the Twelve Tables."

Kerr Wylie writes that although eventually the scope of the pauperian action was extended in developed Roman Law:

"Nevertheless, an injury done by cattle in search of food must be treated as 'non-natural pauperies', the actio de pauperie would be excluded and the actio de pastu admitted, whenever the trespass could be in any way attributed to the owner of the cattle."

The accuracy of this statement of the law, is, with respect, open to doubt, for surely the actio de pastu was only available for damage done by a domesticated animal acting in accord with its natural tendencies (mansuetae naturae acting secundam naturam). If this is accepted then an action for 'injuries' would clearly be /

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79 Lee, Elements of Roman Law, p.407.
80 Ashton-Cross, Damage by Animals in Roman Law, C.L.J. 1953, p.400 but see p.400 n.23.
81 Ibid., p.402.
82 Ibid., p.400 and Le Roux and Others v. Fick, 1879 Buck. 29, at p.37.
83 Kerr Wylie, Studi Riccobono, p.475.
84 Le Roux and Others v. Fick, 1879 Buck. 29, at p.37.
be beyond the scope of the *actio de pastu* as 'injuries' attributable to animals *mansuetae naturae* would be *per se contra naturam*. In developed Roman Law it was not necessary for the trespass to be attributed to the owner of the cattle for he was strictly liable for *mansuetae naturae* damages at least. As for 'injuries' it is submitted that the *actio de pauperie* would be apposite and here the question of trespass by the animal was irrelevant.

Whether or not the *actio de pastu* was obsolete by Justinian's time is a matter for conjecture. Although it may not have been widely used it seems unlikely that it was obsolete for it is referred to in the *Digest*, was adopted by the Roman Dutch Jurists and to-day forms an integral part of South African Law.

The *Lex Aquilia*:

The fourth form of redress available in Roman Law for harm by animals was the Aquilian action, generally attributed to a plebiscite of 287 B.C. For a direct *actio legis Aquiliae* to lie the /

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85 D.19.5.14.3.
87 D.9.2.39.1. and D.19.5.14.3.
88 Post Chapter III, p.117 et seq.
the damage must have been caused by the defendant "corporo suo". The sophisticated classical jurisprudence interpreted this as damage caused via an intact nexus of physical causation, however, according to Kerr Wylie in many cases of damage or injury by animals purely physical causation was excluded - in these cases the direct action was inappropriate but redress could be obtained by resort to the actio legis Aquilae levis (or actio in factum). 91

The Aquilian action was appropriate regardless of whether the harm was attributable to a wild or "owned" animal. Clearly, however, the action was only viable in respect of wild animals if some element of duty/control could be established quoad the defendant. Ashton-Cross dealing with actions arising from damage or injury by "owned" wild animals postulates the responsibility, ex legis Aquilia, of the careless elephant rider or the circus owner who:

"fails adequately to fence the animals he has on show." 92

The action under the lex Aquilia in developed Roman Law entitled a plaintiff to claim damages arising out of the legal wrong (damnum injuria datum) of the defendant. Negligence sufficed /

91 Kerr Wylie, Studi Riccobono, pp.469 and 470, and Ashton-Cross Damage by Animals in Roman Law, C.L.J. 1953, p.401.
92 Ibid., p.396.
sufficed and the case of damage done by an animal resulting from the negligence of a man was appropriate. The *lex Aquilia* could serve as a valuable residual action in the following animal cases; (1) where the offending animal had died before *litis contestatio* and the owner was thus immune from proceedings under pauperian law, (11) where the harm done by the animal could not be designated *contra naturam*; in short, where the animal had been provoked. So the pauperian action did not apply in the case of damage caused by a mule overloaded by the negligence of its driver or where damage is attributable to the negligence of the rider or dog owner or to an intervening third party who strikes or frightens the animal. In all these cases the *lex Aquilia* would be apposite. The Aquilian action was based upon the fault of the defendant and was not designed to impute fault to the animal, it was sophisticated insofar as it provided for reparation and did not envisage revenge. The action was not noxal.

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94 D.9.1.4.
95 D.9.2.57 and D.9.2.8.1.
96 D.9.2.11.5.
97 D.9.1.1.7.
Cattle Trespass:

**Historical development:**

Salmond describes cattle-trespass as "one of the oldest grounds of liability in English Law". The foundation of the rule which by its current operation imposes a duty upon the owner of domestic animals to keep them under control and pay damages if they stray and cause damage is not unanimously recognised by legal historians. Holdsworth writes that:

"it may have originated in the primitive idea that animals which have done damage were in some way guilty, and that the owner must be made liable as a means of getting at the animal which was the immediate cause of the offence."

According to Sir Frederick Pollock the rule was established on public grounds because:

"it is the nature of cattle and other livestock to stray if not kept in, and to do damage if they stray."

Professor Glanville Williams refers to the reason usually assigned to the introduction of the cattle trespass rule as:

"a /

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"a fanciful rule of early law (supposedly eaten away by modern exceptions) that an owner was liable for all damage caused by those things which were his". 4

According to this reasoning, criticised by Williams, the cattle trespass law is a survival of the archaic idea that an individual is liable for the harm done by his inanimate possessions and slaves. 5

Although this is conjectural it is probable that cattle trespass began at about the time when it became regular practice for an owner to pay ransom money for the "lives" of his straying live stock. This phase in the history of an owner's liability arising from the trespass of his cattle had superseded the pre-Anglo-Saxon practice of killing malfeasant animals. 6

According to Salmond 7 the cattle trespass action was initiated by a case in 1352; although this may be true of the action as we know it to-day; viz., as a remedy for cattle escape and straying, it is probable that an action was well established in local courts before that date, at least in respect of incursions attributable to intention on the part of the keeper. 8 Prior to the fourteenth century no Royal writs of trespass have been found alleging a bare discovery of /

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4 Williams, Liability for Animals, p.127.
5 But see Williams' further objections to this generalisation supra op.cit., p.265.
6 This thesis is fully expounded by Williams, Animals, pp.12 et seq., and 127 et seq.
7 Note 1 supra loc.cit.
8 Williams, Animals, p.130.
of defendant's cattle in plaintiff's ground. In the majority of the writs discovered the "dépastus fuit" was generally elaborated "dépastus fuit, conculcavit et consumpsit". The first application of the trespass action to depasturing cattle is to be found in the Curia Regis Rolls and is dated 1214. From that date until 1353, however, the action was only employed where the basis was intentional trespass by the cattle keeper. Most significant in the development of the action was its extension to cover cattle straying - unmotivated by any intent on the owner's part. The writ is recorded in full by Williams.

The 1353 development of trespass made the phrase "action of cattle trespass" ambiguous, so that same could connote either (a) the general trespass action for intentionally putting cattle onto land or (b) the developed action to cover straying or escaped cattle. In this chapter the writer is concerned with the latter connotation which, it is submitted, is definable as nuisance rather than trespass in the technical sense. Holdsworth writes that by the fifteenth century the cattle trespass action was clearly established and could be supported by analogy to the rule which protected possession by making inroads against it actionable. The same writer maintains /

9 Ibid., pp.131-132.
10 Ibid., pp.131-132.
11 Ibid., p.130.
12 (1353), 27 Lib. Ass. pl.56 (Fitz, Trespass 197; Bro Trespass 239).
13 Williams, Animals, p.133.
14 Note 2 supra op. cit., p.470.
maintains that by this time the basis of the action was proprietary and in effect liability for nuisance based on 'sic utere tuo ut alienum non laedas'. In the early eighteenth century case of Tenant v. Goldwin the cattle trespass rule was associated with this principle:

"Every one must so use his own, as not to do damage to another. And as every man is bound so to look after his cattle, as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house or office, that it may not flow in upon and damage his neighbour." 17

Holdsworth concludes by remarking that the proprietary ground is the true basis for the action rather than the:

"archaic one that trespass by a man's cattle is equivalent to trespass by himself." 18

Glanville Williams concurs in this judgment:

"The so-called 'archaic' principle that the acts of a man's cattle are his own acts is little better than a myth." 19

Scope of the cattle trespass action:

With the early application of the trespass law in the form described above the local courts in England did not restrict their jurisdiction to specific categories of animals:

"Man /

15 Note 2 supra op.cit., p.171 and note 11 supra op.cit., p.134.
16 (1704), 92 E.R. 222 at p.223.
17 Supra loc.cit., per Holt C.J.
19 Williams, Animals, p.132.
"Man might be held liable for the acts of all animals that belonged to them..." 20

Examples of the early application of the law can be found in the Selden Society Volumes 21 but was apparently never extended to the Royal courts where the writs were restricted to cases of trespass by animals designated *a veria* — a French term connoting such animals as oxen, cows, sheep, goats, pigs, horses, asses and poultry. When the action had developed to cover the field illustrated in (b) *supra* it only covered trespass by these animals and this is still the case to-day. 22 It seems that there was some reservation to include turkeys, 23 while bees are probably not covered by the action. 24

Most controversy regarding this aspect of the scope of the action was in respect of dogs and cats. Here it seems that the courts had, from earliest times, been unanimous in excluding them but for multifarious reasons. In 1700 the court in *Mason v. Keeling* refused to admit dogs on the basis that they were not larcenable at common law because there is no property in them. 25 Willes J's criticism of this reasoning seems justified and his own suggestion that dogs are not normally kept under the same surveillance as cattle are is a more feasible basis for the limitation of the action. 26

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21 E.g., *The Court Baron*, S.S.(4)131, in regard to the vicar's dog which chased hares in a field.
In Beckwith's case decided in 1767 the court felt that a dog's occasional excursions should be reckoned as mere involuntary accidents which, with respect, is a surprisingly negative standpoint especially when one considers that by the middle of the eighteenth century the majority of cattle trespass suits were for unintentioned escape and straying. Wigmore's explanation for the exclusion of dogs is interesting:

"The explanation seems to be that in the Germanic days, from which the traditions came down, the dog was not a domesticated animal, - was only a half-savage hanger-on in the human communities, as he is to-day in many parts of the world. Belonging to nobody, nobody was responsible for him; and by the time man's relation to him could be said as a usual thing to be one of control or possession, the tradition was all against making his owner responsible (barring wilfulness) for his trespasses to land." 28

The criticism of this thesis by Glanville Williams is, however, convincing. 29

The approach of Willis J., in Cox v. Burbidge 30 was approved by Banks L.J., in Buckle v. Holmes 31 where that learned judge went on to point out that trespass by a horse or an ox is likely to cause substantial damage:

"even when merely wandering about and eating what attracts it,"

"but /

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29 Williams, Animals, pp. 137 and 138.
30 Note 26 supra loc. cit.
31 (1926) 2 K.B. 125.
"but regarding dogs ... it is different ... because the trespass by a dog following its natural propensity to roam about is not likely to cause substantial damage."

This case according to Williams represents the modern attitudes that:

"the absence of liability is based upon grounds of common sense and public necessity." 32

No direct judicial pronouncement excluded cats until the modern case of *Buckle v. Holmes* 33 where a roaming ravaging cat was held to fall into the same category as a dog and escape liability *quoad* its owner.

Tame deer warrant special mention. During the middle-ages all deer were designated *ferae naturae* and accordingly excluded from cattle trespass. 34 When however the courts recognised tame deer as property transmissible from estate to heir 35 the approach changed and in the Irish case of *Brady v. Warren* a deer keeper was held liable for damage done to plaintiff's crops. 36 Williams is unable to justify Johnson J's intimation in *Brady's case* that the law of cattle trespass should be extended to cover pigeons. 37

The scope of the rule in relation to the object injured must /

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32 Williams, *Animals*, pp. 146 et seq.
33 Note 31 supra loc. cit.
34 Williams, *Animals*, p. 147.
36 (1900) 2 I.R. 632.
must be considered at this stage. At the outset it is relevant to note that it was established early that all trespass is actionable and it is unnecessary to prove actual damages.\textsuperscript{38} There is authority to support the view that the cattle trespass action was not restricted to trespass to land only but was also applicable where chattels had been damaged.\textsuperscript{39} However Williams is of the opinion that any extension in this direction would only envisage chattels which are the produce of land (e.g. hay).

The case of \textit{Manton v. Brocklebank} seems to have restrained any possibility of the action being extended to encompass wrongs by cattle not first trespassing on land.\textsuperscript{41} In \textit{Manton's case} the Court of Appeal found that the plaintiff could not succeed on the basis of cattle trespass because he was unable to show that the rule included trespass to chattels where there had been no prior trespass to land. Clearly cases of kicking, biting, goring and tossing if unaccompanied by trespass fall beyond the scope of cattle trespass and should be dealt with under \textit{scienter}.

In the case of trespass by cattle mere ownership creates liability and motivation by the defendant as in the case of inanimate /

\textsuperscript{38} \textit{Ellis v. Loftus Iron Co.} (1874), L.R. 10 C.P. 10 and Williams, \textit{Animals}, p. 150.
\textsuperscript{39} \textit{Pitts v. Collibear} (1634) 2 Ro. 4b. 568(N)2 and Williams \textit{Animals}, p. 154.\textsuperscript{40} Williams, \textit{Animals}, p. 155.
\textsuperscript{42} Williams, \textit{Animals}, p. 156.
Although in general the owner of cattle is liable whenever trespass occurs there are qualifications of the rule. So he will not be liable in the case where his cattle's straying is attributable to neglect on the part of the plaintiff to fence his land the duty being owed to the defendant; but this only applies in the case where the duty is owed to the defendant. If the cattle stray onto a highway only the owner of the land on which the highway is built will have an action on cattle trespass. Finally if cattle are lawfully using a highway there can be no liability for their trespass onto adjacent land in the absence of negligence attributable to the person in charge of them. Williams deals with this matter under the separate head of "Cattle Trespass and the Highway".

The early writs prove conclusively that originally the action of cattle trespass was restricted to remedy only damage done by depasturing and tramping down land or the produce thereof. According to Williams the Registram Brevium contains no writ of cattle trespass framed to cover damage beyond this narrow field and the earliest evidence of a departure from these

43 Ibid., p.151.  
44 Winfield, Torts, 8th Ed., p.458.  
45 Holgate v. Bleazard (1917) 1 K.B. 443.  
48 Williams, Animals, p.367.  
49 Ibid., p.158.
these confines was in 1718. Herein the successful plaintiff after making the usual allegation regarding trespass alleged that defendant's cattle had infected his stock. No further extension of the cattle trespass rule came until the middle of the nineteenth century when Cox v. Burbidge was decided. In this case the plaintiff, a child of tender years who had been lawfully on the highway, was kicked by defendant's straying horse. A comprehensive investigation of this case, and the trilogy that followed it, is to be found in Williams's book.

The author summarises the effect of Cox's case as follows:

"Instead of saying that the action of cattle-trespass was confined to cases of depasturing and trampling down and that in other cases the action of scienter had to be used, it was said in effect that damage caused by cattle was too remote unless it was (a) consonant with the ordinary nature of the class of animal concerned or (b) the result of a vicious propensity of the particular animal, known to its owner." 53

In short it seems that Cox v. Burbidge extended the rule from its narrow confines to cover trespass damage resulting from natural and probable consequences for as Williams J., said in his judgement:

"If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass." 55

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51 (1863), 143 E.R. 171.
52 Williams, Animals, pp.157-173.
53 Ibid., p.159.
54 Ibid., p.159 et seq.
55 Note 51 supra op.cit., p.174.
In *Lee v. Riley* damages were awarded against defendant whose horse had trespassed upon plaintiff's land and attacked plaintiff's horse so savagely that it had to be destroyed. In *Ellis v. Loftus Iron Co.*, the same result was reached on similar facts. Williams writes that although the courts in applying the rule in *Cox v. Burbidge*:

"normally look only to the ordinary nature of the class of animal concerned, they are usually quite ready to take into account the particular circumstances of the case. The 'ordinary nature' of an animal does not function in vacuo, and an animal may act in different ways under different conditions." 58

In the Canadian case of *Patterson v. Fanning* a horse which had been frightened took to flight and injured the plaintiff, here the plaintiff succeeded in an action on negligence and Osler J.A., stated that he considered that the act conformed with the ordinary nature of a horse as described in *Cox v. Burbidge*. In *Whalley v. Vandergrand* the Saskatchewan Court of Appeal found for the plaintiff in a case where a trespassing horse had kicked the plaintiff while he himself was on horseback. 60 It has now been held that the owner of trespassing cattle, which cause personal injuries to the occupier of land - not through any vicious propensity but merely in accord with their natural behaviour of "blundering /

56 (1865), 144 E.R. 629.
57 Note 38 supra loc. cit.
58 Williams, Animals, p.169.
"blundering about", is liable on a cattle trespass action.

Liability in cattle-trespass now includes damages in respect of injury to other animals, by kicking or biting, or by infection, and injury to goods and the person of the occupier. From earliest times it has been established that where the wrong complained of is an injury to land the only person who can sue is the possessor of the land at the time of the trespass.

A commoner was not permitted to sue in a cattle trespass action but had an action of case. In 1918 it was held that a possessor with a right of action can be one who has an exclusive right to the pasture damaged (but is not necessarily the possessor of the land on which the pasture is).

As to who can be sued normally the owner and possessor are one and the same, but if not, who would be liable? Williams indicates that even the words used in the earliest writs (cum averiis suis) do not rule out the possessor and those used later (cum quibusdam averiis) are clearly consistent with the inclusion of the possessor. This contention is supported by the early case of Dawtry v. Huggins. Williams also refers to an old case which is authority for the proposition that in the case of cattle trespass the owner of cattle even though out of possession is...

63 Williams, Animals, p.175.
64 Ibid., pp.47-48.
65 Wellaway v. Courtier (1918) 1 K.B. 200.
66 Williams, Animals, p.176.
67 (1635) Claty. 32 cited in Williams, Animals, p.176.
is himself jointly and severally liable with the possessor but according to the same writer old cases exist which indicate that a claim may be made against possessor or owner on the election of the injured party - whoever pays the damages does so in full satisfaction of plaintiff's claim. The 1405 case is the only authority for the view that the owner out of possession is liable but as Williams points out in practice the matter is unlikely to arise for the defence of "intervention by a third party" could in any event be available to the owner (see post).

There is scant English authority regarding apportionment of damages in cattle trespass cases but according to Williams where the damage is committed by animals belonging to different owners the court is not confined to awarding merely nominal damages. In two Canadian cases it was held that the court simply had to do its best to arrive at a justified apportionment. A later case was more satisfactory and approved of the United States rule that the court might be guided by the proportion of one defendant's cattle to those of the other and apportion accordingly. In this case however it was held that as all the cattle were under the charge of the same herdsman, appointed /

68 (1405) Y.B.M.7H.4.31b, pl.14 (Fitz Barre 176; Bro.Arbitrement 48, Trespas 85) cited in Williams, Animals, p.177.
69 Williams, Animals, p.177 and authorities cited there.
70 Ibid., p.178.
71 In regard to scienter cases see post.
72 Williams, Animals, p.173.
appointed jointly by the respective owners, the owners were all joint tortfeasors and thus jointly and severally liable for the whole damage.

Defences:

(a) Act of the plaintiff or contributory negligence has long been recognised as a defence to cattle trespass. In a case decided in 1443 the defendant pleaded that plaintiff in an attempt to extort money from him had ordered his servants to drive the beasts into his (plaintiff's) land. This is a straightforward case of the plaintiff being author of his own damages. Williams furnishes other examples of the defence such as failing to fence a haystack on another's land held under licence. Adjoining owners are under no reciprocal duty to fence their properties and thus keep their neighbour’s cattle out and the lack of a fence does not prevent the landowner from exercising his right to grow crops although he may realise the possibility of a trespass. The owner of land is, however, under a duty to mitigate the damage caused by trespassing beasts by driving them off. It is no defence to allege that the plaintiff was under a duty owed to his landlord to keep the fence through /

75 (1443) Y.B.P. 21 H.6. 39b.pl.6 (Fitz, Barre 156; Bro. Generall Issue 58, Trespas 148) cited by Williams, Animals, p.179.
76 Plummer v. Webb (1619) 74 E.R. 1064 cited by Williams, Animals, p.179.
78 Williams, Animals, pp.179 et seq.
through which the cattle strayed in a state of good repair for 

res inter alias acta.  79 The defence is, however, good if the 
duty to maintain the fence was imposed by law  or prescription. 
The defence of 'act of the plaintiff' will not avail the defendant 
where the principle of 'dilemma' operates, so if the occupier of 
land drives out trespassing cattle with reasonable care and is 

injured in person or property as a result he is entitled to claim 
damages for his personal injury (subject to Cox v. Burbidge  supra) 
even though if he had left the cattle where they were less damage 
would have resulted. 

In English law special rules exist in regard to the duty 
to fence.  Williams covers the matter comprehensively in his 

book.  

(b) The act of a third party has not been unanimously re-
cognised as a defence to cattle trespass and Williams says: 

"... whether 'act of third party' is a defence 
is not completely certain, for the cases that 
we are about to examine alternate for and 
against its validity in a perplexing way."  84 

The first case quoted by Williams is one of 1469.  The 

inconclusive / 

79 Holgate v. Bleazard (1917) 1 K.B. 443. 
80 Singleton v. Williamson (1861), 158 E.R. 533 and Salmond, 
81 (1441) Y.B. 19 Hen.6, 33, pl.68 and Salmond, supra loc.cit. 
82 Williams, Animals, p.180. 
83 Ibid., pp.230 et seq. 
84 Ibid., pp.181-182. 
85 (1469) Y.B.P. 9E.4, pl.17 (Bro.Trespas 179).
inconclusive authority of a remnant scrap of dialogue between
counsel is the only evidence ascertainable for this case to
indicate the possible validity of the defence. In a 1480
86 case it was held that the defendant could not excuse himself
by alleging that his cattle had been chased into the plaintiff's
land by another's dogs, but in 1496 a case reverted to the
principle that third party intervention is a defence. 87
Williams states that in what is apparently a year book version
of the same case the following statement is recorded

"I shall not be punished for it but my servant."

The learned author goes on to remark that a servant was clearly
in the position of a third party as no theory of vicarious
liability had developed at that stage in English law. 88 The
inability of the early courts to settle this matter indicates
that the whole basis of liability in cattle trespass was undeter-
mined and in a state of flux. The statement quoted by Williams
(supra) seems to indicate, either (i) a basis of culpa rather
than strict liability or (ii) strict liability imposed upon the
keeper or person in charge rather than the owner in all cases.

In the Irish case of McGibbon v. McCurry 89 the defence
was /

86 (1480) Y.B.M. 20 E. 4. 10b, pl. 10 (Bro. Trespas 345).
87 (1496) 72 E.R. 156 and Williams, Animals, p. 182.
88 Williams, Animals, p. 182.
89 (1909) 43 I.L.T. 132.
was approved but the rule seems to have been qualified by *Sutcliffe v. Holmes* 90 where it was held that a defence could not avail itself to a defendant who had been aware of the act or default of a third party or had negligently failed to anticipate the act. Williams envisaged a case of Sutcliffe's type when he wrote:

"Still it is possible to conceive cases where the defendant should have foreseen the act of the stranger, and where such act is not of a kind to break the chain of causation commenced by the defendant's negligence." 91

With uncanny foresight this statement sums up the principle of Sutcliffe's case decided nearly a decade after the publication of Williams's book.

(c) *Vis major* or act of God could conceivably precipitate a cattle trespass - a hurricane tears a gate from its hinges and terrified cattle storm into neighbours adjoining land. Williams is of the opinion that 'act of God' is a defence for this proposition. He states, however, that on an analogy with *Rylands v. Fletcher* (and the admission of act of God as a defence to that strict rule) it is reasonable to postulate that the defence should be allowed in cattle trespass which is not a stricter form of liability than *Rylands v. Fletcher*. 92

(d) The defence of inevitable accident has been recognised in /

90 (1947) K.B.147.
in particular circumstances in a number of cases the first of which was decided in 1481. Herein the defendant while turning his plough had scraped the corner of the plaintiff's land and one of his oxen had taken a mouthful of plaintiff's grass. Clithero v. Higgs and Glenham v. Hanby are subsequent cases in which the defence was upheld. In the last mentioned case it was held that a party who lets land excepting the trees has no action in trespass against the lessee who does not restrain his cattle from barking the trees. These authorities are in conflict with the only modern one: Ellis v. Loftus Iron Co., where the plaintiff recovered trespass damages arising from an incident in which defendant's horse had stretched over the dividing fence and kicked and bitten plaintiff's mare. According to Winfield:

"It is doubtful whether this is a defence at the present day, except as in other actions of trespass, where the act is involuntary, in the sense that the defendant has lost control of the animal." 97

(e) It is valid defence for defendant to allege that landowner's cattle are lawfully entitled to be on the plaintiff's land. In a 1443 case mentioned by Williams it was held (in

94 (1636), 82 E.R. 203.
95 (1700), 91 E.R. 1395.
96 (1874), L.R.10 C.P.10.
Williams' words) that:

"a prescription is valid that the defendant and his predecessor is title have been used to 'have the escape' into the plaintiff's close, so that the person for the time being entitled to the latter shall have no action if the beasts are freely retaken." 98

Regarding unlawful depasturing of chattels the lawful presence of cattle on the land is no defence.

(f) It was first laid down in *Vaspor v. Edwards* 100 that distress of an animal damage feasant operated to preclude the plaintiff from a suit in cattle trespass in respect of the damage and this rule operates even though the animal subsequently escaped from the pound. Williams writes that the rule in *Vaspor v. Edwards* is qualified in two respects; (i) the distraint of one or more animals does not preclude an action under cattle trespass in respect of others. (ii) an action suspended by distraint revives on the death (presumably by natural causes) of the animal, because this is an act of God, or if it is stolen or escapes through no fault of the impounder. 101 The rule in *Vaspor v. Edwards* was followed in *Boden v. Roscoe*. 102 Williams' footnote query:

"Could /

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98 Note 92 *supra op.cit.*., p.194.
99 *supra loc.cit.*.
102 (1894) 1 Q.B. 608.
"Could the plaintiff have elected to distrain the pony only for the damage to his land, and then sued for the damage to his filly?" 103

can surely be answered by stating that cattle trespass is a single cause of action and diverse wrongs attributable to the same trespass are only relevant in regard to measure of damages. The plaintiff has a choice of remedies in respect of the single cause of action and he is not entitled to split the latter and apply both remedies. His election is between remedies, not between causes of action because of these there is only one.

(g) In 1505 104 it was held that the tender of amends was no defence in a cattle trespass action and this rule was followed in subsequent cases. 105 In 1623, however, a statute was passed whereby the defendant in a cattle trespass action quare clausum frigidus was given the right to plead a disclaimer of title to the land, that the trespass was by negligence or involuntary, and that he tendered sufficient amends before the action was brought. 106 Following the decision in Basely v. Clarkson 107 it seems that the application of the statute is limited to cattle escape.

Scienter /

103 Note 92 supra op.cit., p.195.
104 Y.B.M.21 H.7.30a, pl.9 (Bro Trespas 214) and Williams, Animals, p.196.
105 Williams, Animals, p.196.
106 21 Jac.1.c.16, s.5., supra loc.cit.
107 (1681), 83 E.R.565.
41.

**Scienter:**

**Historical development and the basis for liability.**

The scienter principle of English law is a concept which envisages the liability of a human being for certain harm done by his animal where knowledge of the animal’s vicious propensity can be imputed or inferred. Many eminent lawyers have considered the primordial basis of animal liability. Traces of the scienter doctrine are widespread in legal systems and probably represent a development in imposing personal liability as opposed to primitive thing responsibility. The scienter idea developed after cattle trespass in England (see supra) and according to Williams an action on case with an allegation including the words "scienter retenuit" is to be found in the plea rolls as early as 1387. This represented an extension of the existing law in regard to liability for animals in the Royal Courts at that stage limited to cattle trespass. Scienter was accepted by the early courts as a logical limit to absolute liability in cases of animal malfeasance but was not a criterion of negligence as Holdsworth intimates when he says:

"... and /

109 (1387), De Banco Roll, C.P. 40, No.506, m.92 (Trin,11R.2) and Williams, *Animals*, p.278.
110 Supra p.19 et seq.
... and the rule that a defendant was not liable for damage done by an ordinary tame animal, unless **scienter** was proved, involves the idea that liability was founded upon negligence." 111

With respect it is difficult to envisage a blurring of **scienter** and negligence as the basis for liability as the plain-tiff would not, even in earliest times (see post), succeed in a **scienter** action on proof of negligence alone.

Latterly it has been suggested that the strict liability introduced by the **scienter** action depends, in effect, upon escape of the animal from control. Thus in *Hands v. McNeil* Jenkins L.J. said:

"from its place of incarceration or from the control of its keeper ... the allowing of such an escape being according to modern authority the true basis of the absolute liability." 112

In *Murphy v. Zoological Society of London* one of the grounds of the decision was that there had been no 'escape' by the lion. 113

Likewise in *Behrens v. Bertram Mills Circus Ltd.*, Devlin J., said:

"if an elephant slips or stumbles its keeper is (not) responsible for the consequences. There must be a failure of control."

These suggestions in regard to the constituent elements of the **scienter** /

112 (1955) 1 Q.B. 253 at p. 267.
113 (1962) C.L.Y. 66.
114 (1957) 2 Q.B. 1.
scienter action are not at one with the statement of the law by Evershed L.J., in Pearson v. Coleman Bros., where it was stated, avoiding reference to "escape" or "control", that defendants were obliged "to keep (the) beast so confined as to be incapable of doing damage." It is submitted that this last mentioned approach is the true basis of the action which envisages acceptance of risk in certain cases (see post). The question of escape from control is not relevant.

As to whether the allegation of scienter was a fiction in early law it is respectfully submitted that the view of Williams is to be preferred to that of Holdsworth who maintains that the phrase "scienter retenuit" found in early writs did not connote a specific principle of liability. Williams writes as follows:

"But to suppose that such a curious and important allegation as that of scienter was fictitious from the outset seems to be without warrant."

The requirement of knowledge in scienter actions was clearly settled by the sixteenth century thus in 1536 Fitzherbert and Shelley concurred in a case of sheep worrying and the following statement of the law emerged:

"... the /

115 (1948) 2 K.B. 359 at p.380.
116 Note 111 supra op.cit., p.381.
117 Williams, Animals, p.282.
118 (1536/7), 73 E.R. 56 and Williams, Animals, p.284.
"... the master of the dog being ignorant of such quality and propensity of the dog, the master shall not be punishable for that killing; otherwise it is, if he has notice of the quality of the dog."

In Buxendin v. Sharp it was held that the absence of an allegation of scienter in the plaintiff's declaration was fatally defective to his cause.

**Scope of the Scienter Action:**

The scienter action was introduced to cover harm done by all species of 'animals' not only mammals but also birds, reptiles and insects. What has always been important is the question of whether the particular animal falls into the category of *ferae naturae* or *mansuetae naturae*.

*Animals mansuetae naturae* include domesticated animals which normally display no vicious propensity towards humans. *Animals of this class:*

"are /

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121 But Glanville Williams prefers the distinction 'harmless' or 'dangerous' and states that the civil law terminology has no relevance to scienter but is only apposite in the law of property. (40 L.Q.R. at p. 355). His argument is persuasive but it seems that the *ferae/mansuetae* distinction is now part and parcel of English law (Behrens v. Bertram Mills Circus Ltd., (1957) 2 Q.B. 1) and, indeed, accepted terminology by the Law Commission in their recent report (Law Com. No. 13 dated 24th October, 1967, 'Civil Liability for Animals').
"are conclusively presumed to be harmless until they have manifested a savage or vicious propensity; proof of such a manifestation is proof of scienter and serves to transfer the animal, to so speak, out of its natural class into the class ferae naturae ..." 122

Animals falling into this class include dogs, cats, horses, cows, bulls and rams. Camels also fall into the category of animals mansuetae naturae, here the court took into account experience with camels in countries in which they are normally found (not England) and used for domestic purposes. Williams criticises the tendency to 'whitewash' the character of domestic animals regarding all possible damage, for, according to his thesis, this may be logical in the case of injuries to humans but is clearly optimistic when it comes to chattles or land. The above learned writer attributes this illogicality thus:

"The reason for it was simply this, that there was originally no liability for the acts of animals, and that in an effort to introduce some remedy lawyers seized upon a glaring example of negligent keeping and fashioned it into a form of action.

By /1

124 Fletcher v. Rylands (1866), L.R.1 Ex.265 at p.280 where Blackburn J., said "it is not the general nature of horses to kick or bulls to gore".
125 Supra loc.cit.; Hudson v. Roberts (1851), 115 E.R. 724, and Williams, Animals, pp.287, 289 and 290.
128 Williams, Animals, p.287.
By a ruthless process of excision they selected from the many elements that might go to establish negligence in any particular case the two simple questions: (1) Has the vice broken out before; (2) Did the defendant know of it? All other facts in the case were crudely ignored."

So *scienter* must be proved even in the case of harm in accord with the ordinary nature of the animal. It has been suggested that liability for an animal *mansuetae naturae* is limited where the vice or ferocity displayed is not contrary to the nature of the species to which it belongs.

Regarding animals *ferae naturae* or, as Glanville Williams prefers them to be designated, dangerous animals, Hale, writing in the seventeenth century notes that the category includes lions, bears, wolves, apes and monkeys. The same writer contrasted this group of animals with bulls, cows, horses, dogs and the like and stated that in respect of the latter *scienter* was necessary whereas with the former it was not required to establish:

"particular notice that he did any such thing before".

Hale evidently cites Andrew Baker’s case in which a child was attacked by a monkey that had broken its chain.

In /

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129 Supra loc.cit.
130 Buckle v. Holmes (1926) 2 K.B. 125.
131 Note 121 supra.
133 Supra loc.cit.
134 Hale, note 132 supra loc.cit.
In 1858 the rule was applied for the first time in a reported civil case in which although the plaintiff alleged *scienter* the court directed the jury to find that the allegation was proved as it was common knowledge that a bear is of savage nature. In a trilogy of cases up to the beginning of the twentieth century the rule was first reaffirmed in regard to bears and confirmed in respect of elephants and zebras. No animal indigenous to England has ever been placed in the category *ferae naturae* although Glanville Williams is of the opinion that a viper undoubtedly would.

Whether an animal belongs to one or other of the above two classes is a matter of law. The question is not one of fact because judicial notice must be taken of the category into which the particular animal falls. The supposed basis for this approach being that it is deemed a matter of common knowledge whether a particular species of animal is dangerous or otherwise. Evidence may be received by the court but only on the basis that the judge wishes to inform himself. Subject to the latitude afforded by the rule of precedent a court is bound /

135 Besozzi v. Harris (1858), 175 E.R. 640.
137 Williams, Animals, p. 293.
bound to abide by an earlier classification.

Some criticism of scienter and in particular the dichotomy are justified. (see post).

Proof of Scienter:

Glanville Williams describes the action as 'technical' and maintains that once the case goes to the jury scant attention is paid to the scienter principle. It is accordingly important for the judge to take special care in deciding whether there is some reasonable evidence upon which the jury may find scienter and the rules of law which have been developed on the subject are in the main concerned with the minimum evidence that may be left to the jury. The above learned writer investigates the law under two heads (i) the vicious act, (ii) the knowledge.

Regarding (i) the prior act which the plaintiff relies upon to establish scienter must show viciousness. So in Line v. Taylor Earle C.J., admonished the jury to the effect that the propensity of a dog to bound about and jump up at people was insufficient to sustain the action. Williams is of the opinion that the test is as follows;

"Is the evidence such as the jury may reasonably hold to prove vice? If so, the case must be left to them, otherwise not." 143

The /


141 Williams, Animals, p.299.

142 (1862), 176 E.R. 335.

143 Note 141 supra op.cit., p.301.
The act alleged to establish *scienter* must prognosticate the particular kind of viciousness complained of. This rule was suggested in *Hartley v. Harriman* \(^{144}\) but was not established until *Osborne v. Chocqueel* \(^{145}\) wherein it was held that evidence of a dog's propensity to attack goats is no indication of propensity to bite human beings. The matter is taken from the sublime to the ridiculous in a modern case where it was ruled that a person who had been injured by a dog should show not that the dog had merely developed a taste for human beings but human beings of the plaintiff's "class or type".

One prior exhibition of viciousness brought to the notice of the defendant suffices - the rule is sometimes, in fact, referred to as the "one free bite rule of English law". The act which gives rise to the alleged knowledge may have occurred at any time before the incident on which the plaintiff claims. So it has been held that the elapse of four years will not effect the matter. Again a quotation from Williams is apposite:

"... and to hold the owner of a dog not liable in *scienter* if it tears a lady's dress during puppyhood, but liable if it repeats the exploit in its declining years, is a curious inversion of the usual ideas of probable consequences." \(^{149}\)

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144 (1818), 106 E.R. 228.
145 (1896) 2 Q.B. 109.
147 *Jenkins v. Turner* (1696), 91 E.R. 969 and Williams *supra loc.cit*.
The so-called "one free bite rule" is misleading where inchoate acts are concerned because these may be sufficient to establish vicious propensity. So in *Worth v. Gilling* a *scienter* action for dog-bite succeeded where it was established that the owner knew that his dog was fierce because it attempted to bite anyone that passed close to its kennel. 150 On the *prima facie* irreconcilability of the "one free bite" and the rule as to inchoate acts the jury should be directed that:

"the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of." 151

It was held in *Jenkins v. Turner* 152 that evidence of an outbreak of vice of which the defendant had no knowledge was inadmissible however subsequent cases have not followed this rule. 153

As to vicious acts committed subsequent to the injury complained of these are irrelevant.

Regarding (ii) *supra* it is essential to establish that the defendant or his servant was aware of the vicious propensity. 154 Knowledge connotes actual knowledge and constructive or inferred knowledge will not suffice but possession of the means to obtain knowledge /

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150 (1866), L.R.2 C.P.1.
152 (1696), 91 E.R. 564, 661, 969 and *Williams, supra loc.cit.*
153 *Williams, Animals*, p.304.
knowledge may be evidence from which the jury will infer actual knowledge. The knowledge may be competently acquired by hearsay and in these circumstances it is no defence for the defendant to aver that he did not believe what he was told. The owner of an animal may well be deemed to have knowledge of its vice through the agency of another. A dicta in Stiles v. Cardiff Steam Nav. Co. is the earliest authority for the rule that knowledge will be imputed to the defendant if acquired by his servant who had general charge of the animal. In the case of Applebee v. Percy where the belligerent dog was kept at a public house notice to two barmen and a barmaid was held sufficient to fix the publican with knowledge. In this case the servants were in sole charge of the dog and this fact distinguished the case from Golget v. Norris where it was found that the servant was not in charge of the dog but only carried out certain duties in respect of the animal. In the latter case it was held that notice to the servant could not be construed as notice to the master. In Gladman v. Johnson evidence of defendant's wife's knowledge was allowed to go to the jury in a case where defendant was a milkman and his wife occasionally helped him in his business.

155 Williams, Animals, p. 305.
157 (1864), 33 L.J.Q.B. 310 and Williams, Animals, p. 306.
158 (1874), L.R. 9 C.P. 647 and Williams, supra loc.cit.
159 (1866), 2 T.L.R. 414 and Williams, Animals, p. 307.
160 (1867), 36 L.J.C.P. and Williams, supra loc.cit.
business. According to Williams the rationale was not that the wife's knowledge was in law imputable to the husband but that the jury were in the circumstances justified in inferring that the wife had told her husband about the attack. It is difficult to extract a principle however Williams sums the matter up as follows:

"... notice to a servant who has charge of the animal, of the place where the animal is, or of the business at which the animal is kept, amounts in law to notice to the master, even if it be shown conclusively that the servant did not communicate his knowledge to the master. Notice to other servants does not in itself amount in law to notice to the master, and is not even evidence from which a jury may properly infer notice to the master in fact. Notice to the husband or wife of the defendant seems to be sufficient evidence in itself from which the jury may infer notice in fact; but the point is not well settled." 162

Both the vicious act and the defendant's knowledge may be proved by the defendant's conduct or by a general admission made by the defendant. So in Judge v. Cox 163 the judge left the case to the jury; here it was established that defendant had warned a witness before the incident to take care of the dog lest he should be bitten. In a later case an admission that a dog had been acquired for the purpose of protection of property was taken as /

161 Williams, Animals, p.307.
162 Williams, Animals, p.308.
163 (1816), 171 E.R. 474.
as material. In the Canadian case of *Arnold v. Diggdon* the defendant's statement "that people said his bull was cross" was held sufficient to fix him with *scienter*. The order of a cabman "stand back; the horse can't stand the sight of policemen" was held not to represent evidence of the cabman's knowledge that the horse was unfit to be driven. *Williams* is doubtful whether an offer of compensation in itself warrants the jury to ascribe knowledge.

**Wrongs which may be remedied by *scienter***:

The only general principle which has emerged regarding wrongs remediable by *scienter* is to the effect that the damage must be caused by some mischievous or vicious propensity which can be attributed to the animal. *Glanville Williams*, however, states that he considers the following analysis of the rules more satisfactory.

(a) "the wrong must be direct and not indirect"

(b) "the damage must have been in some way intended by the animal".

The learned author adds, without any real conviction, that there may be a special rule in respect of dogs and cats.

The /

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165 (1887), 20 N.S.R. 303 and *Williams, Animals*, p.308.
166 *Williams v. Avey* (1867), 3 T.L.R. 812 and *Williams, Animals*, p.309.
167 *Williams, Animals*, p.309.
The action covers all direct injuries to an individual, by biting, kicking, tossing, scratching, goring etc. In the same way direct injuries to chattels are covered as when a stallion kicks a mare or a dog attacks sheep. As to injuries to land the action under cattle trespass (supra) is usually apposite, however, it may be that upon proof of knowledge of propensity an animal owner will be held liable for damages caused to the land of another. The rule that the harm done must be direct excludes stinking pigs, yelping dogs or roaring bulls where nuisance or negligence would be appropriate. So in the American case of Scribner v. Kelly it was held that the plaintiff whose horse bolted and caused damage when it saw defendant's circus elephant on the road could not succeed in scienter because the damage had not been caused by any vicious propensity on the part of the elephant but from its appearance (i.e. indirect). What of the case where an individual is knocked down by a runaway horse, according to Williams it is not a prerequisite to success in a scienter action to establish that the animal should have used the particular form of attack with which nature had endowed it, and no one can deny the directness of the damage in this case. It has been held that where a dog runs at horses and causes /

171 (1862), 38 Barb. 14, and Williams, Animals, p.312.
172 Williams, Animals, p.312.
causes them to bolt the owner may be liable in the \textit{scienter} action. 173

The question of the animal's malevolence (rule (b) \textit{supra}) is only relevant to cases of damage by harmless animals. The injury must result from the animal's vicious propensity but the vice or viciousness need not be of a kind that is alien to the nature of the animal. This discussion is only in relation to the actual act complained of, the acts upon which \textit{scienter} is based have been dealt with (\textit{supra}). Williams is of the opinion that the action probably does not lie where a good-natured but frisky dog brushes against a person and knocks him over - even though it has been known to do this before. 174 The matter is largely one of animal psychology and it is difficult to establish a rule from the casuistic approach of the cases. Williams however sums the matter up as follows:

"... it may be said that while the law frowns upon malevolence and excessive zeal or high spiritedness, it usually understands and condones awkwardness, playfulness, nervousness and blind obedience." 175

Regarding the rule relating to dogs and cats tentatively suggested above it seems that indecisive authority exists to support the theory that minor feline and canine misdemeanors may be /
be beyond the scope of **scienter**. The point is mooted in *Buckle v. Holmes* but was not necessary for a decision in that case.

Although the case of *Jackson v. Smithson* did not specifically turn on the matter, Alderson B., canvassed the question of a defence based upon the proposition that the act complained of is in accord with the ordinary nature of harmless animals. Perhaps this suggested limitation is an unauthorised import from Roman Law - *contra naturam sui generis* - proof of which was an ingredient of success in the 'analogous' pauperian action. It seems clear that Williams is correct in his conclusion that it is no defence to simply show that the injury results from the inborn tendencies of a harmless animal.

**Remoteness and Apportionment:**

Although the **scienter** action sounds in case it is competent for the plaintiff to prove damages arising from the prospective consequences of the harm done. The action is subject to the ordinary rules of remoteness. Some of the dicta in the case of *Filburn v. People's Palace Co.*, regarding damages by animals *ferae naturae* seem to support the view that these can never /

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176 (1926) 2 K.B. 125.
177 (1846), 153 E.R. 973.
178 Williams, Animals, p.319.
180 (1890), 25 Q.B.D. 282.
In Behrens v. Bertram Mills Circus Devlin J. held that the keeper of an elephant which gets out of control is liable not only for the injury naturally attributable to its vicious or savage propensity, but, subject to the ordinary rules of remoteness of damages, for any injury it causes. In the case of Brook v. Cook a girl who had fallen after she had been frightened by the sight of a pet monkey (ferae naturae) was held unable to succeed in scienter. It is submitted that the same decision could have been reached on the basis of Scribner v. Kelley, as well as remoteness.

Regarding animals where proof of propensity is required it seems that the keeper is liable for all injuries caused as a result of vicious propensity but not for those which are accidental and not due to vice. Williams states the position as follows:

"provided that there is a direct wrong by an animal to begin with, there is no reason why the scienter action should not cover consequential damages that are of an 'indirect' nature subject to the ordinary rules of remoteness."

It is respectfully submitted that although this principle remains intact since the decision in the Wagon Mound the hypothetical case posed by Williams might be decided the other way.

In respect of apportionment of damages in the early case of

Lewis /

181 (1957) 2 Q.B. 1.
183 Note 71 supra loc.cit.
184 Winfield, Torts, 8th Ed., p. 475.
186 Williams, Animals, p. 320.
Lewis v. Jones it was held that the owners of dogs which had worried sheep were each liable for a proportionate amount of the damages. In Piper v. Winnifrith, however, it was held that damages could be apportioned between dog owners although the respective owners of the dogs were not joint tort feasors. Both judges in Piper's case made the reservation that if the dogs had so worked together that each caused the whole of the damage the defendants would each be liable for the full damage. This reservation received the stamp of approval of the House of Lords in Arneil v. Paterson where it was held to be part of English and Scottish law.

Williams summarises the rules under two heads: (a) where the animals make separate 'incursions' in such a way that the actual damage done by each cannot be assessed, then the damages must be divided equally; and (b) where the animals act in concert the owners are each liable for the whole damage. All that is required for the dogs to be acting in concert is a joint expedition.

Parties:
The matter of the plaintiff presents no difficulty, he is normally /

187 (1881), 1 T.L.R. 153 and Williams, Animals, p.322.
188 (1917), 34 T.L.R. 108 and Williams, supra loc.cit.
189 (1931) A.C. 560.
190 Williams, Animals, pp.322-323.
normally the person attacked by the animal or the owner of the chattel or land, damaged or destroyed, or some person with a valid legal interest in the property.

Establishing the proper defendant is, however, more complex and the limitation of the scope of defendants is important in any action involving strict liability. Under normal circumstances the possessor is liable in *scienter* for the harm done by the animal - that this has always been the position is evident from the words used in the old writs; "*scienter retinuit*". In *Walker v. Hall* a trainer who kept another's horse in his stable was held liable in *scienter* because he had control of it. In *M'Kone v. Wood* the defence that a vicious dog was not owned by the defendant but had merely been left on his premises by a former servant was held to be of no avail. Lord Tenterden admonished the jury to the effect that:

"the harbouring of a dog about one's premises, or allowing him to be or resort there, is sufficient keeping of the dog to support this form of action."

In *Smith v. G.E.Ry. Co.*, however, it was held that the mere fact that a stray dog strays for a few hours on a railway station is no evidence of harbouring by the railway company. The rule that the possessor is liable does not fix the occupier of premises with liability.

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191 Ibid., p. 324.
192 (1876), 40 J.P. 456 and Williams, *Animals*, p. 324.
194 (1866), L.R. 2 C.P. 4 and Williams, supra loc. cit.
liability unless he is also the possessor. North v. Wood illustrates the type of injustice which can arise in English law where a minor person owns and exercises control over an animal which causes damage.

The question whether an animal owner ceases to be responsible if he parts with control (and possibly possession) has not been finally decided. Referring to this problem Lord Wright made the following remarks in the case of Brackenborough v. Spalding U.D.C.:

"In the case of dangerous animals, a transfer of actual possession and control would not necessarily terminate his responsibility."

Or as Sitken L.J., posed the problem in an earlier case:

"Can the person who has acquired a tiger, so long as he remains its owner, relieve himself of responsibility by contracting with a third person for its custody?"

In the latest edition of Winfield on Torts the learned authors conclude their discussion of 'persons liable' by remarking that

"as the liability is analogous to that of Rylands v. Fletcher, it seems that the owner cannot escape responsibility by delegating the performance of his duty of control to an independent contractor."

To date no judicial pronouncement has settled the matter.

Williams suggests:

"Perhaps /"

195 North v. Wood (1913) 1 K.B. 629, Knott v. London County Council (1934) 1 K.B. 126 and Williams, Animals, p.325.
195a (1914) 1 K.B. 629. But see the Law Commission recommendations post. p.82.
"Perhaps the matter could best be dealt with by drawing a distinction between the voluntary transfer of the animal to a bailee, and its involuntary loss." 199

**Defences:**

To commence on a negative note it seems that a plea of inevitable accident is not a good defence to a *sciente* action. The possessor of an animal will not be excused by averring that his beast effected the damage against his will and without any negligence on his part. 200 The early case of *Smith v. Pelah* 201 is informative for here Lee C.J., held that although the proximate cause of the harm may have been attributable to "such persons treading on the dog's toes" this was held to be no defence because "... it was owing to his not hanging the dog on the first notice."

(a) Contributory negligence or the act of the plaintiff is a good defence to a *sciente* action despite Lee's dicta in *Smith's case*. Williams expresses the principle, which he considers has evolved, as follows:

"... the plaintiff cannot recover if he brought the injury upon himself wilfully or negligently; but reasonable conduct on his part does not affect the defendant's liability." 202

In a case where a child had put its arms around the neck of a vicious /

199 Williams, Animals, p.326.
200 Ibid., pp.326-327.
201 (1746/7), 93 E.R.1171 and Williams, Animals, pp.327 and 331.
202 Williams, Animals, p.331.
vicious dog an action under scienter succeeded but in a much later case a child who was bitten by a dog (tied in a car) after she had been warned by her father not to approach the dog, failed in an action on scienter. The fact that a warning was given may be the distinguishing feature between these two cases.

Volenti non fit injuria is also a good defence and according to Behren's case no less applicable to animals than to other dangerous things of which the plaintiff has agreed to run the risk. In a recent case it was held that an individual who intervenes in a dog fight may find his action met with this defence. Difficulties can arise in both these defences where the master is identified with his animal in an "animal fight". Williams is of the opinion that animals should be denied the privilege of involving their owners in negligence or volenti by their own unknowing acts, but, the learned author continues:

"the owner of a vicious cat ought not to be held liable if, hostilities having been opened by a dog, the cat manages to give as good as it gets. This is not because of the negligence or consent of the dog but because a cat that fights in self defence is not acting viciously." 207

Both these defences should be read subject to the dilemma principle /

207 Williams, Animals, p.333.
principle (see under cattle trespass supra).

Williams states that common employment is not a general defence to liability under the *scienter* law, but in each case the defendant would have to prove that the plaintiff in fact consented to run the risk. The recent case of *Rands v. McNeil*, however, supports the opposite view and tends to severely limit strict liability as between employer and employee in animal cases. The Law Commission have commented unfavourably upon the effect of this decision (see post).

(b) Regarding the much debated defence of act of a third party the authorities are not conclusive although on an analogy with *Rylands v. Fletcher* (and it has often been stated that the *scienter* rule is an extension of *Rylands v. Fletcher*) it would not be illogical if the defence were permitted. In *Baker v. Snell* two members of the court favoured the view that this was no defence on the basis that the keeping of a vicious animal was *per se* wrongful and the act of a third party could only upset liability if it constituted a *novus actus interveniens* and thus broke the chain of causation. The third member /

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212 (1866), L.R. 1 Ex. 265 and Williams, *Animals*, p.334.
213 (1908) 2 K.B. 825.
member of the court regarded \textit{scienter} as a form of liability and was thus disposed to permit the inclusion of all defences commonly associated with strict liability (including act of a third party). In \textit{Behren's case} \textsuperscript{215} Devlin L.J., held that the majority judgement in \textit{Paker v. Shell} was authority for the proposition that the wrongful act of a third party is no defence. It is, however, difficult to see why the defence should not be employed in the same manner as it is in \textit{Rylands v. Fletcher} where the definition of third party is restricted. \textsuperscript{216}

(c) The validity of the defence of 'act of God' to a \textit{scienter} action is also open to doubt. Williams states that it is justifiable both in justice and on the basis of the analogy to the rule in \textit{Rylands v. Fletcher}. \textsuperscript{217} The \textit{obiter dictum} of Bramwell B., in that case is, however, adverse to its inclusion. There is no direct authority on the point but two revised works on tort state that it is 'probably' a good defence. \textsuperscript{218}

(d) Especially where wild animals are concerned the question of the liability of a person who has lost his animal is a controversial issue. As early as Hale \textsuperscript{219} it was established that the mere escape of an animal, whether harmless or dangerous, did not exonerate the owner from liability for its acts. The rule was /

\begin{itemize}
\item \textsuperscript{215} Note 205 supra loc.\textit{cit}.
\item \textsuperscript{216} Williams, \textit{Animals}, p.335.
\item \textsuperscript{217} \textit{Ibid.}, p.336.
\item \textsuperscript{219} P.C.1 pp.430-1 and Williams, \textit{Animals}, p.336.
\end{itemize}
was approved in the case of May v. Burdett, which dealt with an escaping monkey. Williams refers to the 'locality' test and the 'ownership' test. In the former the question of liability would depend upon whether or not the animal had resumed its natural habitat,

"Thus, the owner of a tame fox ceases to be liable if it escapes into the country, but not if it escapes into a town; while the owner of a lion imported into England is liable for everything it does here." 

According to the 'ownership' test the owner is liable and only liable as long as he remains owner. Williams prefers the locality test. The law of negligence will, of course, in most cases be a factor in the matter.

**Negligence and Nuisance:**

It is trite that the general law of negligence and nuisance prevailing in England applies with equal force to many animate and inanimate agents. Animals are accordingly not distinguishable, however, besides the basic rule that an animal owner is subject to the ordinary duty to take care in respect of his animal, some special rules relating to animals do exist.

The basic rule of negligence has been expounded as follows:

"Quite /

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220 (1846), 115 E.R. 1213.
222 Ibid.
"Quite apart from the liability imposed upon the owner of animals or the person having control over them by reason of knowledge of their propen-
sities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour - the ordinary duty to take care in the cases put on negligence." 224

In the recent case of Carrol v. Garford 225 the plaintiff sued for damages in respect of injuries she had sustained when she tripped over a dog in the bar of a public house. She claimed damages against the owners of the dog and the licensee and his wife. The court, dismissing the claim, held (1) that there was no duty on a licensee to forbid customers to bring in dogs, or insist they be kept on a lead, although it might be different if the dog was making a nuisance of itself; and (2) that the owners of the dog were under no duty to keep a constant watch on their animal.

Nuisance may be available as a remedy in cases where there is no negligence or no escape or where the animal is not dangerous, e.g., for the stench of pigs 226 or the crowing of cockerels. 227

In certain circumstances a man may be liable in nuisance for damage done by undomesticated animals. If wild animals have been kept for sport or otherwise the owner of the land may be liable /

225 The Times, November 22, 1968.
226 Aldred’s case (1610), 77 E.R. 816.
liable for damage to neighbour's land.

Before the end of the seventeenth century it was settled in *Mitchil v. Alestree* that a party who drives a horse in a highway or other public place must do so with due care and cannot escape liability by proof that he had no knowledge of any vice on the part of the animal. In *Cox v. Burbidge* however, Earle, C.J., expressed the view that the mere fact that a horse strayed onto the highway is no evidence of the negligence of its owner. Much later in *Jones v. Lee*, Banks J., stated that there was no duty to keep animals (not known to be vicious) from straying onto the highway. Williams' comments appropriately 'caveat viator'. The horseless carriage innovation did not receive any special sympathy in *Heath's Garage v. Hodges* where the court found that there was no special duty encumbent upon cattle-owners to keep their animals from wandering onto the highway. Cozens Hardy M.R., declared that the Highway Act 1866 (in terms of which the owners of animals straying onto the Highway could be fined) did not affect civil liability. So the rule became established that the owner or occupier of land is under no *prima facie* legal duty to users of the highway to maintain fences /

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229 (1676), 86 E.R. 190.
230 (1863), 143 E.R. 171.
232 Williams, supra loc.cit.
233 (1916) 2 K.B. 370.
fences between his land and the highway to prevent his animals from straying out onto the highway, and, more important, he is not under any duty to take reasonable steps to prevent his animals, not known to be dangerous, from straying onto the highway. This rule was affirmed by the House of Lords in the case of *Searle v. Wallbank* and has come to be known as the rule in *Searle v. Wallbank*. For a criticism of this rule see *post*. It is submitted that the rule is ancillary to the law of negligence and does not affect the question of fact as to whether the owner should reasonably have foreseen the likelihood of an accident.  

In *Gomberg v. Smith* it was suggested that the rule is restricted to cattle and poultry and does not cover dogs, this case, however, is actually authority for the proposition that the rule in *Searle v. Wallbank* does not apply to animals brought onto the highway (see *post*). Regarding the scope, in respect of type of animal, the Court of Appeal held, in *Ellis v. Johnson*, that where domestic animals escape or stray (as opposed to being let out) dogs are covered together with other species of domestic animals. It does not appear to be settled whether the rule only applies to rural areas or to urban developments as well.

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235 (1947) A.C. 341.
238 Note 236 supra loc.cit.
The pronunciation of Evershed M.R., in Brock v. Richards to the effect that

"the law is founded upon our ancient social conditions and is in no way related to, or liable to be qualified by, such matters as the relative levels of fields and highways, the nature of the highway or the amount of traffic upon it."

supports the contention that place and topographical features are irrelevant. It was suggested, however, in Ellis v. Johnson that topographical features of the place where the accident occurred might limit the operation of the rule. 241

According to Winfield the rule admits three exceptions. 242

Where the animal is of known savage disposition (e.g. a fierce dog) or it can be presumed that the savage nature of the animal is known to the owner (as in the case of a lion) and the damage done on the highway is as a result of that nature, then the rule will not assist the owner.

Clearly this is merely an adaptation of scienter which is not limited in its operation to areas removed from highways. In Brock v. Richards 243 the rule was applied and it was held that the knowledge by an owner that his harmless animal had a proclivity to stray would not ipso facto fix him with liability.

The /

240 (1951) L.K.B. 529 at p.534.
241 Note 236 supra op.cit. at p.21.
243 (1951) L.K.B. 529.
The unpersuasive reasoning being that this is not knowledge of a vice but knowledge of a typical characteristic of even the most domesticated of animals.

* A more real exception is in the case of escaping animals which cause an obstruction. In the Irish case of *Cunningham v. Whelan* the defendant was held to be liable in a negligence action arising from the escape of his herd of cattle which obstructed the highway and pressed against the plaintiff's cart thereby causing same to overturn. The court distinguished this type of case from one where there is a stray animal on the road. The obvious difficulty is how to determine when 'stray animals' would be numerically sufficient to constitute an obstruction.

Finall the rule does not apply where the animal has been brought onto, let out upon or is being driven or led along the road. In these circumstances there is clearly a duty to control the animal. Before *Searle v. Wallbank* had given its name to the rule which was evolved the case of *Dean v. Davies* was decided; here, for diverse reasons, the owner of a pony who had ridden into a town and tethered his animal insecurely, with

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246 (1935) 2 K.B. 282.
the result that the pony had escaped and caused damage, was held liable. The reason of Cohen L.J., to the effect that a person who brings or drives a horse along a highway is under a duty to take all reasonable care to prevent damage to person or property is accepted as the proper basis for the decision.  

**Distress Damage Feasant:**

Williams defines this archaic remedy as:

"a process of self-help whereby chattels that are doing damage to or (perhaps) encumbering land or depasturing chattels may be taken and retained by way of security until compensation is paid."  

The historical basis and scope of this remedy in animal liability is comprehensively treated by Williams in his book. The Law Commissioners describe the rule as providing that:

"The occupier of land may under the existing law detain trespassing cattle until compensated by their owner for the damage done."  

This remedy has virtually fallen into disuse and was described by the Goddard Committee in their report as being "almost obsolete". Modern textbook writers on Tort pay scant attention to distress damage feasant. As this remedy is of negligible import in regard to animal liability in current English Law a

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249 *Supra* *op.cit.*, pp.7-123.
251 1953 Cmd. 8746.
survey of its technicalities does not appear to be warranted.

The Committee Reports:

It must be evident from the law considered above that the matter of animal liability in English law is unsatisfactory insofar as it is artificial and excessively technical. Aspects of it are also open to justifiable criticism on the basis that they are not in accord with current public policy (e.g. the rule in Searle v. Wallbank). In 1953 the Goddard Committee published its report on the Law of Civil Liability for Damage done by Animals. This report advocated the retention of the cattle trespass action but proposed that its application be restricted to damage to land and crops. As for the scienter action the Goddard Committee recommended its abolition together with the ferae naturae/mansuetae naturae dichotomy and advocated that negligence be the basis of liability for every class of animal with the onus on the defendant to show that he had acted without negligence.

None of these proposals have been implemented and the law has been subject to wide criticism. In Gomberg v. Smith Davies L.J., said,

"Nothing /

253 1953 Cmd. 8746.
254 1 Q.B. 25 at p.40.
"Nothing has been done to implement any of these proposals and the law remains as uncertain and unsatisfactory as ever."

In the recent case of Emirali v. Patrick\textsuperscript{255} the Court of Appeal reiterated that it considered the state of the law unsatisfactory but indicated that it preferred

"the view that if one kept a dog or a cat one kept it at one's own risk and if it did harm one ought to be liable for it." \textsuperscript{256}

The most important recent contribution to the growing collection of English legal literature on animal liability is the comprehensive report of the English Law Commission published in 1967. This document warrants coverage in depth.

The English Law Commission produced a report on 'Civil Liability for Animals' dated 24th October, 1967.\textsuperscript{257} Their report proposes that the English common law rule of strict liability for animal \textit{ferae naturae} and those of known fierce propensities be abolished.\textsuperscript{258} They advocate the introduction of strict liability in two instances; (1) in respect of any injury or damage done by animals belonging to a species which present a special danger to person or property and (11) in respect of an injury done by an animal, not of the species alluded to in (1) \textit{supra}, where the particular animal had dangerous characteristics known to its keeper /

\textsuperscript{255} The Times, October 11, 1968.
\textsuperscript{256} \textit{Supra loc.cit.}
\textsuperscript{257} Law Com. No.13.
\textsuperscript{258} \textit{Supra op.cit.}, paras. 14, 15, 17 and 18.
keeper which made it likely that the injury or damage would occur or where it might occur that it would be severe. The Commissioners propose that strict liability as envisaged should not depend upon escape from control. The determination of the category of animals to be included under (1) supra will be by the test of whether animals are likely to cause damage or whether any damage which they cause is likely to be severe. This matter will be determined by a test prescribed by law and the Commissioners recommend that the court should regard as a decisive consideration the risk to persons and property in the circumstances of England.

They further recommend that a species of animals generally domesticated in the British Isles should not be regarded as dangerous but with regard to other species their character abroad should only be considered to the extent that such may be relevant to the degree of risk which they present in this country. The Commissioners propose (i) negligence of the plaintiff (ii) voluntary assumption of risk and (iii) contributory negligence, insofar as it contributed to the injury or damage, as defences but specifically state that (ii) should not apply as between employer and employee.

The /

259 Ibid.
260 Ibid., para. 19.
261 Ibid., para. 15.
262 Ibid., para. 15.
The Law Commissioners state that the existing law in regard to the *ferae naturae/mansuetae naturae* distinction is unsatisfactory in that it is not entirely clear. The writer would venture that this is not an overstatement of the position. The learned Commissioners advocate the introduction of a novel dichotomy between animals belonging to a species which present a special danger to person and property and those which do not. Now, with respect, it is difficult to see how this proposed change will ensure clarity. What animals constitute a special danger to person or property? This the courts will determine and the process of establishing a comprehensive category will doubtless be slow, and is likely, it is submitted, to be beset by controversy. As a matter of policy it seems unsatisfactory to introduce legislation intended to cover a field of law fully and leave the determination of important aspects to be built up by case law. It is submitted that the burden on the courts will be greater than one of mere interpretation and will be instrumental in establishing the identity of animals to which one or other of the provisions shall be applied. Until all animals are covered by judicial decisions the position in respect of those not covered could be uncertain. The division of animals in terms of the proposed legislation is unlikely to be free from the failings which the present duality suffers from.
from. As was, with respect correctly, pointed out by the learned Members of the Law Reform Committee for Scotland (post), in their report on this matter, the feræ naturae/mansuetae naturae distinction is (a) artificial (b) excessively rigid. The distinction has proved unsatisfactory in coping with borderline cases e.g. where a fox cub is kept as a pet, and it is difficult to know beforehand into which category the animal properly falls. It is not possible that any distinction between species of animals which proceeds from the premise that domesticated animals are unlikely to cause harm is ill conceived? Zoologists will assert that the great majority of wild animals will not normally attack humans unless provoked or cornered. On the other hand, dogs, although domesticated since 8000 B.C., retain demoniacal individualism. The great majority of direct animal attacks are doubtless 'dogbites' so much so that many American states have seen fit to introduce a 'dogbite' statute - witness Californian Civil Code 3342.

In regard to the proposed division it is submitted (a) that it will not necessarily introduce certainty into the law (b) that it is likely to suffer from the same disadvantages as the present distinction does.

The /

264 1963 Cmd. 2185 para.10.
265 Ibid.
266 Post Chapter VI, p.222.
The expediency of reinvesting the law of England with the
*scienter* principle is, with respect, open to doubt. It is
clearly the intention of the learned Commissioners to retain
the *rationale* of the old law in this regard. The learned
members of the Scottish Law Revision Committee assessed the
*scienter* rule as archaic and unsuited to modern conditions. 267
With respect, this evaluation is correct. It is submitted
that the Law Commission would have done well to wash their hands
of *scienter* and propose its expurgation from the law of England.
It cannot be denied that *scienter* in its crude 'one free bite'
form is anomalous and certainly out of place in this day and
age when liability insurance has orientated the role of the law
of delict towards reparation. The *scienter* rule is historical
in origin and, it is submitted, out of touch with both logic
and modern conditions - its retention cannot be justified.

The proposal that strict liability should not be limited
as between employer and employee is commendable. The case of
268
*Hands v. McNeil* put the employee in a most unhappy position
by applying the *volenti non fit injuria* maxim. An equally
unfortunate result occurred in the Scottish case of *Fraser v.
Hood* 269 and the absurdity of the rule was laid open by Lord
Hunter in *Henderson v. John Stewart Farms (Ltd.)*. 270

In /

267 1963 Cmd., 2185 para. 10.
268 (1955) 1 C.B. 253.
269 (1887) 15 R. 176.
In terms of the Law Commission Report it is proposed that the 'general principles of the present law of negligence' in terms of which the keeper of an animal is under a duty to prevent that animal causing injury or damage should not be disturbed. The important aspect of the proposals under this head is in regard to the so called rule in Searle v. Wallbank. If enacted section eight of the Draft Bill appended to the report will in effect abolish this rule which, since its inception, seems to have been a target for judicial and academic criticism at all levels. The days of the quiet country roads through agricultural England are no more, the horseless carriage of yesteryear is the wheels of progress to-day and the learned Commissioners seem justified in appraising Searle v. Wallbank as in need of adjustment. So section eight of the Draft Bill spells the abrogation of the rule and proceeds to set out matters which should be considered:

"in determining whether any damage caused by animals straying from any land on to a highway is wholly or partially due to a breach of a duty to take care."

The nature and scope of the duty is evidently regarded by the Commissioners as being founded upon the "general principles of the present law of negligence". If the Draft Bill becomes law the /

271 (1947) A.C. 341.
the determination of claims arising from accidents caused by animals on the highway will be by reference to 'the general principles of the present law of negligence' read with the factors enunciated in section eight as relevant for consideration. Would it not, perhaps, have been more satisfactory to merely propose the abolition of the rule in Searle v. Wallbank and permit the 'general principles of the present law of negligence' to operate freely in the circumstances of each case. Alternatively, to avoid a hybridization of common law and statute the whole matter of animals on the highway could have been dealt with comprehensively in a statute.

The existing English Law rule of cattle trespass encompasses a wider field than mere depasturization and since Wormald v. Cole a cattle owner is strictly liable for injury suffered by /

274 These are as follows:
"(a) the nature of the land and its situation in relation to the highway;
(b) the use likely to be made of the highway at the time the damage was caused;
(c) the obstacles, if any, to be overcome by animals in straying from the land on to the highway;
(d) the extent to which users of the highway might be expected to be aware of and guard against the risks involved in the presence of animals on the highway;
(e) the seriousness of any such risk and the steps that would have been necessary to avoid or reduce it."

275 (1954) 1 Q.B. 614.
by a plaintiff occupier knocked down by trespassing beast. The learned Commissioners rightly point out that this is anomalous when one considers that the Common Law generally requires proof of negligence even in circumstances involving a greater risk of serious injury to persons, e.g. firing a gun. It is accordingly proposed, in terms of the report, that the present rule of strict liability for cattle trespass should be abolished and a new form of strict liability for straying live-stock should be provided whereby cattle trespass is actionable upon proof of actual damage including expenses, reasonably incurred, in detaining the livestock where there is a right to do so. Otherwise the proposals envisage that the damages be limited to loss in respect of land and chattels. The Law Commissioners propose the application of two basic defences to claims on cattle straying. Firstly, that the plaintiff by reason of his negligence was wholly responsible for the damage and insofar as it contributed to the damage the partial defence of contributory negligence should apply. In terms of the recommendations this defence should not be available merely because the plaintiff could have prevented the straying by fencing unless the straying would not have occurred but for the breach of a duty to fence by someone other than the defendant with an interest in the land upon which the livestock strayed. Secondly it is proposed that it should be a good defence to prove /
prove that the livestock had strayed from a highway where it was lawfully present. The exception to the first defence is simply that failure to fence is no defence unless a duty to do so is breached. It is submitted that the proposals in regard to cattle straying are logical and the recommended limitation of the rule to cover damage to land and chattels is commendable.

The Law Commissioners propose the abolition of the archaic rule of distress damage feasant and recommend the introduction of a rule as suggested by the Goddard Committee276 whereby a person finding livestock which have strayed onto his land can detain same as security for payment of damages and expenses. It is recommended that the rule envisaged should give a power of sale to the detainer to cover not only the cost of detaining the animal but also the damage which it has caused. These proposals seem reasonable. The provisions of the Dogs Acts 276a (1906-1928) are favoured for retention by the Law Commissioners. They propose, however, the introduction of the following defences: (1) that the negligence of the plaintiff was the sole cause of the injury or, to the extent that it contributed to the damage, the partial defence of contributory negligence, (2) that the livestock were straying on the land where they were attacked by the dog and the dog belonged to the occupier of the land or its presence there was authorised by him. The Law Commissioners approve /

276 1953 Cmd. 8746, para. 9.
276a Dogs Act 1906 (6 Edw.7,c.32,s.1.) and Dogs (Amendment) Act 1928 (18 and 19 Geo. 5,c.21) s.1; which provide for strict liability in damages against the owner of a dog for any injury caused by it to cattle (including horses, mules, asses, sheep, goats and swine) or poultry (including domestic fowls, turkeys, geese, ducks, guinea fowl and pigeons).
approve of the rationale of *Cresswell v. Sirl*\(^{277}\) in regard to the defence to an action based upon injury to a dog and propose that it should be extended to include reasonable belief in the existence or imminence of an attack on livestock by a dog.

The general problem of the definition of 'keeper' is approached by the Law Commission with the following recommendations: (i) in cases of strict liability for animals of a dangerous species or with known dangerous characteristics as well as for injury by dogs to livestock the 'keeper' is the owner or possessor of the animal or a person a member of whose household, under the age of sixteen, is the keeper. This suggestion in regard to vicarious liability in respect of minor keepers is applauded for this is an important practical aspect of animal liability law - so often a dangerous animal is owned by a child and recovery of damages for injury is problematical. The Commissioners do not propose that liability should not lie where an animal has escaped and accordingly recommend that if an animal ceases to have a keeper a person who immediately before the escape was a keeper shall continue to bear responsibility until some other person becomes keeper. But an individual who takes in an animal to prevent it causing damage or to restore it to the owner should not, for this purpose, be regarded as a

\(^{277}\) (1948) 1 K.B. 241 at p.249.
as a keeper. (ii) in strict liability for straying livestock the possessor of the livestock.

Finally the Commissioners propose that knowledge of any dangerous characteristics of an animal should be imputed in the following cases: (1) where a servant who has charge of an animal knows of its dangerous characteristics. (11) where a member of a household, who is under the age of sixteen and keeper of the animal, knows of its dangerous characteristics.
CHAPTER III

ROMAN - DUTCH LAW

Roman-Dutch Law:

The extent to which the Civil Law applied and the basis of liability:

The term 'Roman-Dutch' Law was coined by Simon van Leeuwen and is self indicative of the Civil Law ingredient in the system. In liability for animals the preponderance of Roman Law was no less evident than in other fields. Grotius, accepted by many as the most authoritative of the Dutch jurists, enunciated the Civil Law without reservation:

"Si alicuius animal, nimis incitatum, vel ad ferocitatem provocatum, aliquem laeserit, vel alterius animal invaserit, adeoque occiderit, vel vulneraverit, actio de pauperie in dominum datur. Hac actione dominus animalis tenetur damnum reparare, vel animal noxae dedere, prout maluerit." 3

Groenewegen also expressed the opinion that the Civil Law was intact in Holland. 5

Voet's /

2 1583-1645, also known as Hugo de Groot.
3 Grotius, Institutiones Juris Hollandici, III. 38.10. This translation into Latin of Grotius' famous "Inleiding tot de Hollandsche Rechtsgesleerdedheid" was prepared by van der Linden but not published until 1962.
4 1613 - 1652.
5 Groenewegen, De Legibus Abrogatis, 4, 9.
Voet's work also indicates that the principles of the Roman Law had been largely adopted in Holland and in modern times Innes C.J., stated that:

"... the law of Holland in regard to compensation for damage done by animals was in substance the law of Rome." 7

Voet after dealing with the Roman-Dutch law in detail states:

"In other respects the provisions of Roman law remain untouched among us, even as regards the very freedom of giving up as noxa and the release which follows from it, as stated above." 8

Kotze, that eminent South African Roman-Dutch lawyer, was in no doubt about the matter:

"The principles of the Roman Law in regard to damage done by animals, were in the main adopted in the law of Holland." 9

This evidence seems to demonstrate conclusively - and the writer is unaware of it ever having been challenged - that the law of animal liability in Holland was fundamentally an adoption of the Civil Law.

Regarding the basis of liability Damhouder, 10 who wrote in the mid-sixteenth century, stressed that culpa could not be imputed to an owner merely because his animal had done damage:

"If /

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6 1647 - 1713.
9 Note 7 supra op.cit., p.341.
10 1507 - 1581.
"If anyone's horse, ass, pig, cow, dog or other similar domestic animal has caused damage to, killed or hurt, a person, through its own natural viciousness (ex propria naturali malitia) and not through the provocation of anyone, the owner of the offending animal will in no way be to blame (nullo modo in culpam cadet)...." 11

Of course Damhouder does not mean that liability will not arise but merely that culpa will not be attributed to the owner. 12 Kotze, in a scholarly appendix to the edition of van Leeuwens' Commentaries which appeared with notes by C.W. Decker in 1780, writes as follows:

"According to the Roman and Roman-Dutch law the liability of a person, for damage or injury done to another by his dog or animal, rests on ownership of the animal and not on culpa or scienter (Inst. 4.9.1: Grotius 3.38.10 and 13: van Leeuwen. Com. 3.39.5; Voet 9.1.1, and 4 - 6: Fockema Andreae Oud. Ned. Burgl. Recht. II 114)" 13

A persuasive justification for ownership as a touchstone in animal cases is to be found in Decker's notes to van Leeuwen (translated by Kotze):

"... for a philosophical mind need but regard the causa moralis, or moral cause of the damage done, to satisfy itself that there is no absurdity in obliging him to make compensation whose animal has caused the damage, or who has excited or goaded it on to the damage of another, any more than allowing the owner of a house, out of which anything is thrown, to be sued specie actionis legis Aquiliae for compensation in damages." 14

Kotze /

12 O'Callaghan N.O. v. Chaplin, supra loc. cit., per Kotze J.A.
14 Ibid., p.319.
Kotze in O'Callaghan's case\textsuperscript{15} cites the little known Noodt (ad Dig. 9.1. in fin) as authority for the proposition that both in Roman and Roman-Dutch law the responsibility for damage done by one's animal is founded upon ownership and not on negligence. Where negligence is present, due to the intervention of a human, the damage will be regarded as damnum injuria datum of which an animal \textit{quod ratione caret} is incapable. Voet is conclusive as to ownership being the criteria and he says:

"They lie against him who possesses the animal in right of ownership at the time of institution of the action, though he was not the owner at the time of the causing of the damage, since harm done by animals clings to the head of the owner." \textsuperscript{17}

Van Vangerow\textsuperscript{18} in a discussion of the background to an owner's liability for damage done by his animal argues that the Civil Law texts do not support \textit{culpa} as a touchstone. For if, indeed, \textit{culpa} were the criterion, how is it that an owner can escape by surrendering his animal instead of paying damages? Further why should the claim fall away if the offending animal has died? These pertinent questions indicate that ownership was the true basis of liability in the Civil Law.\textsuperscript{19} Van Vangerow also maintains that actually liability is based upon \textit{culpa} on the part of the animal for which the

\begin{itemize}
  \item \textsuperscript{15} O'Callaghan N.O. v. Chaplin, 1927 A.D. 310 at p.344.
  \item \textsuperscript{16} 1647 - 1725.
  \item \textsuperscript{17} Cane, The Selective Voet, Vol.II, 9.1.7.
  \item \textsuperscript{18} Pand. par.689. Aum. p.596ff cited in O'Callaghan N.O. v. Chaplin, 1927 A.D. 310 at p.349.
  \item \textsuperscript{19} Ibid.
\end{itemize}
the owner, *quoad* his ownership, is liable, as a sort of representative. This is not supported by the Civil Law for Ulpian clearly states that animals can do no damage i.e. *injurie datum* - for they lack reason and are incapable of a wrongful act. Justinian concurs.

Some of the Dutch jurists, however, came close to implying that *culpa* is the basis of liability for damage by animals. Thus Huber, writes:

"Andere schade door beesten gedaan moeten de eigenaar mede boeten soo verre het beest voormaels berucht is geweest of ook dat de eigenaar het by hem heeft gehouden maar is het onberuchtet geweest zoo kan de eigenaar met het zelve te verlaten ende over te geven bestaan."  

Gane's translation of this passage reads as follows:

"The owners must also make good other damage caused by animals, if the animal had been previously notorious, or if the owner (sc. after warning) (the actual words used in the Ordinance were '*na bekendtmakinge*) kept it by him; but if it was not notorious, then the owner can satisfy the law by abandoning it and handing it over."

Although /

20 Ibid., ("...das nach der Ansicht des Romischen Rechts, so zu sagen, eine *culpa* des Thiers seebst, das wahre Fundament der actio de pauperie ist, und der Eigenthumer nur als der Natürliche Schutzlerr und Vertreter dieses Delinquenten in Betracht kommt.")
21 D.9.1.1.3.
22 Inst. 4.9.pr.
23 1636 - 1694.
24 Huber, Hedendaagsche Rechtsgeleerdheid, Bk.6,c.6,n.27.
25 Gane, Huber's Jurisprudence, p.391.
26 References to the Ordinance are to the Provincial Ordinance of Friesland promulgated in 1723 which were included in the 3rd ed. of Huber's work edited by his son Z. Huber and translated by Gane (supra).
Although this is not explicitly stated it might be argued that the use of the phrase 'previously notorious' indicates *scienter* rather than ownership as a basis. A passage in van der Linden's supplement to Voet's commentary on the Pandects (9.1.1) can also, perhaps, be interpreted as implying *culpa* or *scienter* as the basis of liability. Van der Linden states\(^2\) that an owner is not freed of responsibility because an animal is incapable of *injuria* for he ought to take proper care of his animals and ensure that they do not cause harm to others. He adds that an owner should be presumed to have known of the vice of his animal and if notwithstanding this he retains it, he is taken to have approved what has been done by it. Kotze\(^2\) is of the opinion that van der Linden's statement means no more than an owner is presumed to know what he ought to know:

"This was a well-recognised principle of the law of presumptions as observed both in Roman and Dutch practice."

Kotze points out that whenever *culpa* can be imputed to the owner he is liable not *ex pauperies* but *ex lege Aquilia*. The same authority is critical of van der Linden's second ground (supra) where - evidently on the authority of Huber, he seeks to fix the owner with responsibility on the basis of approval of conduct:

"I /

\(^2\) O'Callaghan N.O.* v. Chaplin, 1927 A.D.310 at p.348 *et seq.*
"I speak with every respect and I fail to see how an owner can with any legal propriety be said to approve the damage done by his animal. Van der Linden himself admits that an animal, not possessed of reason, cannot, as the sources and Voet loc. cit. tells us, commit damnum injuria. As an animal cannot act wrongfully in contemplation of law, it seems to me that, in the same way, we cannot with any juristic accuracy place an animal in the same category with an agent or some other person professing to act on behalf of an owner and in his interests. The doctrine of approval or ratification has no application to damage caused by one's animals; nor do I find any mention of the doctrine of approval or ratification in the manner suggested by Huber and van der Linden, in the relevant title of the Digest." 30

Despite the element of doubt introduced by the writings of Huber and van der Linden it is submitted that the works of Grotius, Van Leeuwen, Voet and the other authorities cited conclusively establish that 'ownership' was the basis of liability in Roman-Dutch Law. South African courts have now accepted this as being the correct position and the words of Kotze are again apposite:31

"In several of the decisions, however, the responsibility for damage occasioned by animals has erroneously been based upon culpa. Hence Professor Lee rightly observes: 'This has let in by the back door the doctrine of scienter, which forms no part of the pure Roman-Dutch law' (Introd. to Roman Dutch Law 281.)32 Culpa and scienter may be factors in fixing the amount of damages to be awarded in a particular case, but in our law liability rests upon ownership of the animal."

The

32 Kotze's reference is to the first edition of Lee's book (1915). The remark does not appear in the latest edition (5th, see note 1 supra op. cit.).
The general rule

I now proceed to examine the details of the Roman-Dutch Law in regard to animal liability. The initial part of this investigation will be concerned with animals other than wild animals. Depasturisation and controversy as to whether noxal surrender prevailed in Roman-Dutch Law will also be dealt with subsequently. The basic rule is set out by Grotius (3.38.10). Lee translates this passage as follows:

"A man is liable for mischief done by his animal which has become savage or wild contrary to nature and has caused harm to someone; or which has attacked another person's animal and has killed or hurt it." 34

In a commentary to the passage Lee writes:

"Van der Keessel (Dictat) says: 'The actio de pauperie is received amongst us, so that the owner must make good the damage or surrender the animal thereby escaping further liability to the owner. Groen. ad. Inst. 4.9. pr. Voet, 9.1.8; Rechts. Obs. II. 94.'" 35

It is probable that the phrase "became savage or wild contrary to nature" simply means that the animal has acted contra naturam insofar as it has committed a savage act. The passage does not, it is submitted, infer any reversion to wildness over a period. The significant words are the verbs laeserit and invaserit which describe /

33 Supra p.34, note 3.
describe the positive act of the animal for which its owner is liable to make compensation. The text of van der Linden's translation actually mentions the *actio de pauperie*\(^{36}\) and it seems clear that this statement of the law is in fact based upon the civil law action. Grotius 'Inleiding' has also been translated by Charles Herbert; the passage under discussion reads:

"If animals, being infuriated, or let loose contrary to custom, have inflicted any injury, the owner (L.I. Sec 4.7. D. 31 quadrup. pauper facisse prim. Inst. eod.) is liable for the mischief; or if his beast has attacked the beast of another (Dict. I.1. Sec 11) and thereby occasioned death or injury. For the owner of the animal who has done this, is bound to make good the damage, or to give up the damage, or to give up the animal at his option. (Dict. Sec.11 - Groeneveld, in prin. Instit. 31 quadrup. pauper.)"

Grotius published his "Inleiding" in 1631 and it seems certain that, had his statement of the law of Holland been erroneous, some of the later commentators would have drawn attention to the error. According to Innes C.J., Scheltinga, a professor at Leyden, expressly concurred with Grotius in his statement of the law.\(^{38}\) Kotze is of the opinion that Grotius in 3.38.10 is restricting his remarks to tame animals which have done mischief *contra naturam*. This seems plausible. In this regard he states that an owner has an election to /

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36 *Supra* p. 84, note 3.
37 *Herbert, Grotius' Dutch Jurisprudence*, p. 452.
to surrender or pay damages.

Grotius also lays down the rule that a waggoner or countryman, whose horses run away, even without fault on his part, is bound to make compensation (3.38.12). Clearly strict liability is envisaged but the origin of the rule is difficult to trace. Lee noted that the texts cited by Groenewegen as the basis (D.9.2.8.1 and Inst. 4.3.8) merely state the principle 'imperitia culpae adnumeratur'. Voet apparently regards Grotius 3.38.12 as an example of a type of pauperies:

"There is no need that a fourfooted creature should have caused pauperies with its own body. It is enough for the damage to have been caused by some other thing with which such creature came into contact. Though an ox has crushed someone with a wain or something else which has been upset, or draught animals, becoming excited for no reason, back or bolt, or a driver is run away with by his horses and his car does not answer the reins, this action applies."

Lee's remark, following his explanation that the anomalous rule is probably based upon custom:

"This looks like deodand. In the modern law liability will not arise independently of culpa." cannot be reconciled with Voet's approach to the passage (supra). The probable explanation is that custom established an extension of /

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39 Ibid., p.344.
42 Ibid.
of the pauperies rule. This possibility is supported by Grotius 3.38.14 which refers to the four preceding sections of 3.38 as 'Haec obligatio' surely indicating a common basis (i.e. extensions of the actio de pauperia). Of 3.38.14 Lee cryptically states: "this relates back to secs 10 and 11" but furnished no authority for his proposition.

Grotius 3.38.13 deals with the rule that a dog owner whose animal has killed swans or other birds is bound to make compensation and surrender of the dog will not suffice. Lee ascribes this rule to various Keuren and a Placaat of Phillip II. Kotze states that Grotius, no doubt, considered a dog to be a harmful animal doing mischief secundum naturam and, according to Kotze, this view is supported by Groenewegen who in his note to 3.38.13 of the Inleiding supports that text by reference to Aedil. Edict. I.40-42, Dig 21-1 and Inst.4.9.1, where a dog is dealt with on the same footing as animals wild by nature. Kotze is resolute in his refusal to accept Lee's alleged sources as the true foundation of 3.38.13:

"...I /

46 Note 41 supra loc.cit.
48 Lee, Grotius Jurisprudence of Holland, Vol.II, p.345. Also see Regtsgeleerde Observation (Vol.2, obs.96) where reference is made to various Keuren and to a Placaat of Philip II dated 13th April 1559 (1 Groot Placaat Boek.1300). For details as to these statutes see O'Callaghan, N.Q. v. Chaplin, 1927 A.D.310 at p.344 et seq.
49 O'Callaghan's case, supra op.cit., p.344.
"...I fail to see how either the Keur of Zeeland or the Placaat of Philip II can in any way be cited in support of the statement by Grotius contained in sec 13 of his text. He was far too sound a jurist to rely on the contents of a local penal ordinance or Placaat of Philip in support of the civil liability of an owner of a dog under the common law of Holland." 50

Suffice to say that it seems to the writer an exceptional coincidence that Grotius 3.38.13 and the above mentioned statutes are so similar; if, indeed, there is no affinity between them. Kotze's statement regarding the text under discussion to the effect that:

"So far then as dogs are concerned, Grotius treats them as mischievous animals doing damage, either in public or private places, thereby rendering their owner liable to the full extent of the damage done, without his being able to escape such liability by a noxal surrender of the dog." 51

is, surely, too wide an interpretation of Grotius who gives no hint that his rule extends beyond damage to swans, and birds.

Grotius (3.38.14) 52 which has been referred to briefly above simply states that the obligation (to make compensation or hand over the offending animal) is extinguished by the death of the animal, provided that no fault can be imputed to the owner. Herbert's rendering of this latter part as "... also when there is nothing left whereby the owner can be known" 53 is misleading for /

50 Ibid., p.345.
51 Ibid., p.346.
52 Note 45 supra loc.cit.
53 Herbert, Grotius' Dutch Jurisprudence, p.452.
for van der Linden's Latin is clear, "... nisi domino culpa quaedam impartari possit."

The first part of 3.38.14 is a direct adoption from the Digest. The second part, dealing with fault attributable to the owner would have been more in place with 3.34.7 where Grotius stated that:

"If a person provokes an animal he is answerable for any damage that the animal may do to any one." 56

This aspect of the Roman-Dutch law is dealt with by Voet who states that a beneficial action under the Aquilan Law will lie "against him who stirs up or provides cause for the damage." 57 This rule logically incorporates the latter part of Grotius 3.38.14 and 3.34.7.

Of van Leeuwen's Roomsch Hollandsche Recht a learned lawyer and historian has said:

"Immediately after its publication it took a place in the legal literature of Holland second only to the Introduction of Grotius." 58

Van Leeuwen 59 was a product of Leyden University and his principle work (supra) was translated by Sir John Kotze.

Van Leeuwen (39.5) 61 sets out the rule analogous to that enunciated by Grotius at (3.38.12), 62 the translation reading as follows:

"A/"

59 1625 - 1682.
60 Kotze, van Leeuwen's Commentaries.
61 Ibid., p.319.
62 Note 40 supra loc.cit.
"A wagoner, racing and wounding any one, forfeits, besides compensation, his wagon and horses, without the officer being able to compromise it, but they of the Chamber of Accounts may do so; and if any one is killed he will obtain remission. See Papegay page 481. We are liable to make compensation through our property, whether animate or inanimate, as, for instance, through our cattle, horses, dogs, pigs, ships, wagons etc."

More important than this section is Van Leeuwen (39.6). The first part of 39.6 deals with the general rule in regard to liability for animals and the second part with depasturisation (see post). The first part is translated as follows:

"He, whose animal causes damage to another, must make compensation or deliver up the animal for the same. Sec 8.11. Institut. si quadrup. pauper fecisse dicatur, L.8. Sec E.D sod. 1.39. D ad 1.Aquil. Costal. in L.I.D. sod. But if the animal be wild by nature or otherwise of a mischievous propensity, as, for instance, a dog accustomed to bite, or a horse accustomed to kick, or the like, the owner will be liable to make full compensation for the damage done, without being able to get off by giving up the animal. 40.L.41.D. de aedilit Edict. Sec 1. Institut. si quadr. paup. fecisse dicat.)" 64

This general statement of the law is clearly of Roman lineage and at one with Grotius' basic principle. 65 Van Leeuwen is clearly dealing with both the actio de pauperie and the aedilitian remedy. Innes C.J., remarks that the mere fact that van Leeuwen omitted to notice /

63 Kotze, van Leeuwen's Commentaries, p.319.
64 Ibid.
65 Grotius, Institutiones Juris Hollandici, III.38.10.
notice the *contra naturam* principle in the pauperian action and
the public place limitation in the aedilitian action cannot be
taken to indicate that the law had altered in these two respects —
either by obsolescence or amendment. What in fact (according to
Innes C.J.) the law of Holland seems to have done is to class
vicious domesticated animals with those naturally *ferox* — as was
done by the Edict in Rome in the case of a dog. A clear de-
parture from the civil law is in regard to the exclusion of noxal
surrender in respect of animals accustomed to do harm. It would,
however, be incorrect to take this as an admission of *culpa* or
*sci:ent:er* as the basis of the pauperian action in Holland for
nothing in van Leeuwen's texts indicate that an owner is deemed to
have knowledge of the vicious propensity of a domestic animal.
The majority of Roman-Dutch writers base their statements of the
law upon the *Digest*, where no reference is made to *sci:ent:er* or
*culpa* as a touchstone in pauperian actions.

Ulrich Huber's principal work was entitled *Hedendaagsche
Rechtsgeleerdheid* and, according to Wessels, although he wrote
this as a Frisian Judge, the work was not confined to Frisian law.
The edition edited by Huber's son Zacharias was translated into
English.

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69 Kotze, *Simon van Leeuwen's Commentaries on Roman-Dutch law*,
70 1636 - 1694.
English by Gane and published in Durban in 1939. 72

Although Wessel's statement may be true of the greater part of Huber's work his sections dealing with animal liability are disappointing as they are clearly little more than a collection of Frisian Ordinances.

Huber 6.4.25 reads as follows:

"Similarly, when damage has been done by animals, the single amount is paid for the second. To secure this we must tie up the animal and inform the owner of it within two hours. He will have to make good the damage according to the taxation of the village justice, whose decision must be carried out, notwithstanding an appeal to the ordinary Judge, which may be made within eight days.  (Ord. 2,3,2 and 3)" 73

This is manifestly a reference to local Frisian law and not relevant to the common law of Holland. In terms of Huber 6.4.26 based upon Ord. 2,3,3 and 4 the restrained animal must not be ill treated and if the owner does not release it he is liable to pay sixpence a day for every horse or cow and threepence for a sheep or pig. If these food-moneys are not paid within three days of a preceding final demand the animal must be publicly sold by the executor. 74

This passage is interesting insofar as it indicates that Frisian law had transcended the vengeance idea and was orientated to reparation. Although it is not specifically stated it seems obvious that to obtain /

72 Gane, *Huber's Jurisprudence*.
obtain release of the animal the owner would be obliged to pay not only the 'food costs' but also an amount in compensation for the damage done.

Section 6.4.27 of Huber's work seems closer to a general exposition of the prevailing law of Holland than his preceding paragraphs (supra). Section 6.4.27 reads as follows:

"The owners must also make good other damage caused by animals, if the animal had been previously notorious, or if the owner [sc., after warning] (the actual words used in the ordinance were "na bekendtmaking") kept it by him; but if it was not notorious, then the owner can satisfy the law by abandoning it and handing it over. (Ord. 2, 3, 5)"

Presumably the last clause of this section would, in Frisland at least, be read with 6.4.26. It is submitted that this view is justified on the basis that both sections are founded on the Frisian Provincial Ordinance. According to section 6.4.28 the 'forfeit' paid by the owner must be half of what it would have been if a human being had been responsible for the damage (Ord. 2, 3, 5) and further that in animal cases, no payment can be demanded for time lost or craftsman's wages, as can usually be claimed in cases of injuries by human beings. Huber is critical of the last mentioned rule evidently based on the decision in the case of Jan Doekes against Jan Sjoerd in 1618 and cites the earlier case of Ede /

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75 Ibid.
76 Ibid.
77 Ibid.
Ede Walles against Korrelius Gaukes, evidently authority for the inclusion of damages arising from time lost and craftsman's wages, as preferable. In section 6.4.29 Huber reiterates a rule of the Digest to the effect that damage by dogs which are kept on a chain, or inside a house or stable, need not be met by the owner (Ord.2.3.6). All references to the Ordinance (abbreviated Ord. supra) in relation to Huber's work are to the Provincial Ordinance of Friesland promulgated in 1723, these references were included in the editions edited by Z. Huber the first of which was the third.

Jan van Sande was a member of the Council of Friesland and flourished during the first half of the seventeenth century. His Decisiones Frisicae have, according to Wessels:

"always been regarded as of extremely great authority where the law of Holland and the Frisian law are the same." 82

The case of Ede Walles against Korrelis Gaukes is reported by Sande and the jure communis (presumably common law or Roman law applicable in Holland) is enunciated. The text of the report reads as follows:

"De jure communis, domino animalis, quod damnum dedit, ante sententiam liberum eft animal aut pro noxa dare, aut estimationem damni folvere l.1.ff si quadrup. pauv. see."

Nec /

78 Ibid.
79 Ibid.
81 Wessels, History of Roman-Dutch law, pp.239 et seq.
82 Ibid., p.240.
The substance of this passage is to the effect that according to the Civil law, the owner of an animal, which had done damage, could, before sentence either give the animal up in noxal surrender or pay the price of the damage, however, according to Fresian law (Ord. 2,3,4) the owner who retains the animal for an indefinite period loses the option to surrender it, and must pay damages. In this regard the law of Saxony is similar. It cannot be doubted that Sande's statement sets out the law of Holland and contrasts the peculiarities of Frisian and Saxon law.

Simon Groenewegen is chiefly famous for his monumental *De Legibus Abrogatis* published in 1648 in Latin. This work is in fact an extensive (and valuable) commentary on the code of laws which had come to be accepted as the common law of the Netherlands. Groenewegen dealt with the matter of liability for animals at 4.9. of his work as follows:

"*Quadrupes* /

It is clear from this passage that Groenewegen held similar views to those of Grotius insofar as they both regarded the Civil law as intact in Holland. He notes that Busius and Vinnius regarded noxal surrender as obsolete but differed himself. Groenewegen states that it is in accord with equity that a man's property should not involve him in damages in an amount exceeding its value. He concludes by stating that it is his opinion that according to the prevailing law and practice of the time a man could give up the animal which had done harm as a defence to a claim against him. According to Groenewegen the liability to a double penalty under the edict of the Aediles disappeared in Dutch law.

The statement of the law by the early writer Joost van Damhouder (sixteenth century) is set out supra. The correctness of Damhouder's rule that anyone who keeps a dog or other animal of this /

89 Supra p.85.
this type at his house (domi suae) must make compensation at the
discretion of the judge for mischief done, since it is not lawful
to keep animals of this class to the detriment of other persons
(nulli enim fas est hujusmodi bestias in detrimentum alterius aut
alere, aut conservare), is open to doubt, in the light of Huber,
Voet and D9.1.2.1.

Van der Linden was the last great Dutch lawyer and his works
are the last of the publications which are affectionately referred
to by South Africans as the 'old books'. His institutes of the
law of Holland sometimes known as "Koopmans Handboek" was published
in 1806. He is also remembered for his supplement to Voet's
Commentary on the Pandects. Here (9.1.1.) he quotes with approval
the view of Puffendorf (de Jure N. et G. lib.3, cap.1.n.6) and states
that according to natural law it is right that an owner should pay
damages or give up his animal if the beast has caused damage to
another. In regard to van der Linden's statements as to the
basis of liability see supra.

Voet in 9.1. of his commentary on the Pandects deals with
the matter of 'Damage done by Fourfooted Animals' in detail. His
title on the topic actually takes the form of a definitive commentary
on the Roman Law and a statement of the relevant law of Holland. As stated /

90 Note 88 supra op. cit. p.342.
91 Gane, Huber's Jurisprudence, Vol.II, p.391 and Gane, The
92 1756 - 1835, Wessels, History of Roman-Dutch law, p.351.
93 Wessels, supra loc.cit.
95 Supra p.89.
96 Wessels, History of Roman-Dutch law, p.320 et seq.
stated above\textsuperscript{97} he concludes by intimating that civil law applies as it did in Rome in all aspects not specifically canvassed in his title. Although Voet does not actually set out the Roman law it is possible to identify the various aspects of the different actions from the treatment of these requirements. So regarding the \textit{actio de pauperie} he writes that:

"Animals are said to do harm contrary to their nature when, though tame, they take on wildness; as when a horse kicks or an ox gores, albeit that a horse is apt to kick and an ox wont to gore." \textsuperscript{98}

Voet distinguished between the possibilities of an action on \textit{pauperies}, an action \textit{in factum} ("springing from the Aquilian law on the ground of negligence")\textsuperscript{99} and an action \textit{in factum} on the edict of the Aediles. \textsuperscript{100} In the last section (9.1.8) Voet indicates that the object of these actions is compensation for the damage done or surrender of the animal, the latter alternative, however, being inapplicable in certain cases illustrated in his title on noxal surrender. \textsuperscript{101} Clearly these exceptions are the \textit{lex Aquilia} and the aedilitian action in respect of which it is trite that noxal surrender did not apply.

According to Voet the pauperian action lies where a "four-footed animal /

\textsuperscript{97} \textit{Supra} p.85 and \textit{Gane, The Selective Voet}, Vol.II, 9.1.8.
\textsuperscript{98} \textit{Ibid.}, 9.1.4.
\textsuperscript{99} \textit{Ibid.}, 9.1.6.
\textsuperscript{100} \textit{Ibid.}
\textsuperscript{101} 9.4.6, unfortunately not translated by \textit{Gane}. 
animal has become roused and done hurt without interference. Such action is either direct or beneficial being the former where damage has been caused by a fourfooted animal which grazes or is herded the latter where damage has been caused by an animal

"which is indeed a wild animal but which has been gentled or which is still wild but is such as is possessed by someone as owner." 103

On analysis it appears that the principle enunciated by Voet are at one with the rules laid down by Grotius (3.38.10), and (3.33.6) - see post re damage by wild animals. Voet's explanation of the dichotomy in regard to actions is informative - he states that on the strict law of the Twelve Tables the pauperian action was confined to such creatures as graze in a herd however "in the interpretation of wise lawyers, a beneficial action was allowed" to include cases of damage by wild beasts. 105

Voet illustrates the action on pauperies with details and exceptions. In 9.1.5 he gives the example of a groom leading a horse into a shed at an inn;

"the horse sniffed at a mule and the mule kicked back and broke the groom's leg, the opinion was given by Alfenus that this action on pauperies was to be granted against the owner of the mule." 106

According /

103 Ibid.
104 Grotius, Institutiones Juris Hollandici, III.38.10.
106 Ibid., 9.1.5.
According to Voet the authority of Ulpian allows the pauperian action where one who strokes or pats a horse is kicked - "Such patting is no exciting such as would cause this action not to apply". Where injury is caused by an animal through the fraud of another - as where a third party knowing that a particular horse is wont to kick, induces someone to go up to the animal, an action lies against the owner of the horse on pauperies (subject, of course, to the usual requirements being satisfied). The fraudulent third party can also be sued on account of his fraud, but only if the animal has not been surrendered in compensation or (presumably) the compensation has not been paid by the animal owner. Where there is a fight between rams or bulls an action only lies if it is clear that the one which was not responsible for any provocation has perished. So also if a quadruped has "sturred up" another so that it does damage then a pauperian action may be brought against the owner of the one which did the "stirring up" -

"and thus against the owner of the bull if you take the case where a horse has been gored by a bull, and by kicking back has destroyed the pig of a third party." 109

The pauperian action is, according to Voet, also competent in the case of an upset wagon or a runaway car. On the authority of

107 Ibid.
108 Ibid., 9.1.5.
109 Ibid.
110 Ibid.
van Leeuwen if human beings are injured carriage and horses are 
forfeited to the treasury. If the damage is occasioned by 
chance accident (i.e. no question of contra naturam conduct) then 
no pauperian action lies and if negligence is absent there will 
be no action at all. Voet 9.1.6 is concerned with dogs. 
Voet accepts the view expressed in the Digest to the effect 
that if a fierce dog is kept in an inn and has hurt a person 
entering by biting him the injured person will not have an action when the dog was chained up - for this should be sufficient warning to anyone that a dog is likely to bite. If a dog being led on 
a leash breaks away through the negligence of his leader and does damage no pauperian action will lie but a beneficial action under 
the lex Aquilina may be brought (presumably Voet styles it "beneficial" because causation is indirect). Similarly if a dog does damage because he is set on by another then the owner will not be liable in pauperies but the party responsible can be sued under 
Aquilian law. Noxal surrender is not apposite in these cases. 
Voet's final part of 9.1.6. is not clear. He states that if there 
is no negligence on the part of any person either "leading" or 
"setting the animal on" then:

"there is room for a beneficial action on pauperies 
against the owner, with an accompanying action in 
factum under the edict of the Aediles." 117
If the requirements of the pauperian action are present then surely it will be competent regardless of whether or not an alternative Aquilian action is available against a third party. As the two actions are clearly independent and based upon different requirements it is difficult to envisage how a pauperian action is necessarily competent if the lex Aquilia cannot be employed. The proposition purports to rest upon Inst. 4.9.1 (at end) but this merely states that where either of the actions are competent on the same state of facts they are alternative.

Parties to a pauperian action are dealt with in 9.1.7. The owner of property damaged or anyone with an interest in such property or their heirs may sue. The action lies against the possessor of the animal in right of ownership at the time of the institution of the action, even though he was not owner at the time when the damage was caused. The action lies against the owner's heirs not as his successors but as owners of the animal. The action also lies against those who have purported to be possessors or who by "ill fraud" have ceased to possess or against bona fide possessors. If the animal has joint owners they may be liable in solidum - payment by the one releasing the others.

According to Voet, in contrast to Frisian law, claims for expenses /

118 Ibid., 9.1.7.
119 Ibid.
120 Ibid.
expenses and loss of services resulting from damage by animals are competent in the law of Holland. Similarly damages for disfigurement must be paid.

Perusal of the foregoing authorities leads to the following submissions:

(i) Basically the Civil law of Rome applied in Holland. The doctrine of scianter was completely foreign to Roman-Dutch jurisprudence and culpa was only the touchstone in the ordinary general delict action and never the basis in the special animal liability actions.

(ii) The pauperian action probably gave a wider remedy than was the case in Rome.

(iii) If, indeed, noxal surrender was part of the law of Holland (see post) then it seems that it was not permitted in respect of animals accustomed to do harm.

Damage by Wild Animals.

Grotius deals with wild animals and animals accustomed to do damage in 3.33.6 of his Inleiding. Van der Linden's translation of the section is as follows:

Lee translates the passage in this manner:

"If a person has in his possession a wild animal, or other animal that was in the habit of causing mischief, and fails to secure it properly and someone comes by his death in consequence, he is guilty of homicide as far as the compensation is concerned." 125

This action is manifestly based upon the Aedilitian edict but appears to have extended same to include all animals accustomed to do mischief (Justinian went as far as extending the edict to dogs) and was not limited to damage caused at or near public places. The section introduces strict liability and the phrase "in the habit of causing mischief" should not be construed as scienter. Van der Linden's Latin is clear; mansuetam sed malignum - a factual condition in no way connected to the state of mind of the owner. In this case the owner is liable without proof of culpa and cannot make noxal surrender. Van Leeuwen includes the rule in regard to wild or vicious animals in his general /

124 Grotius, Institutiones Juris Hollandici, III.33.6.
126 Herbert, Grotius Dutch Jurisprudence, p.439; where the translation is followed by a reference to L.40.1.41. D de Aedilit. act. sec 1 Inst. Si quadrupes pauper fecisse.
127 Inst.4.7.1. and O’Callaghan, N.O. V. Chaplin, 1927 A.D. 310 at pp.320 and 346.
128 O’Callaghan’s case supra loc.cit.
general treatment of animal liability. 130 Van Leeuwen's rule covers all damage by animals of the stated types, i.e. wild or by nature mischievous. Damage must be compensated in full and the option to give the animal in noxal surrender is not part of the law. Van Leeuwen's statement of the law based upon the edict of the Aediles 131 covers all animals of a vicious propensity and is not limited to damage at or near a public place. Van Leeuwen gives specific examples and includes a dog that is accustomed to bite or a horse that kicks as being harmful animals within the meaning of the words "et generaliter, aliumve, quod noceret, animal...." 132. According to Kotze the language of the edict is wide and will include any animal of a vicious propensity calculated to do harm; thus, Brunnemann (Cujac. ad. Dig. 21.1. in fine, vol.3, col.125; Brunnemann, Dig 21.1, ad. lex 40) and Vinnius (ad. Inst. 4.9.1) state, rather obviously, that a snake and a crocodile would come under this category. 133

Camhouder states the law in regard to wild animals as follows:

"If anyone should keep at his house a dog, boar, ape, bear, lion, wolf or other similar wild animal (feram bestiam) which has caused damage to, or actually bites or hurts another person, then the owner should be condemned to make reparation of the mischief done at the discretion of the Judge. For it is not lawful for anyone to keep and maintain animals of this kind to the detriment of others - caeterum Instit. co. si quadrup. paup. fec. die." 134

According /
According to Kotze this passage refers to the edict of the Aediles. Damhouder, however, extends the law to the keeping of animals in private places. According to Damhouder if anyone keeps a dog or other animal of this type at his house (domi suae) the mischief done by it must be compensated at the discretion of a Judge for it is not lawful to keep animals of this class to the detriment of others (nulli enim fas est hujusmodi bestias in detrimentum alterius aut alere, aut conservare). Damhouder's obvious inference is that in such a case noxal surrender is not competent since he leaves the matter of compensation arbitrio judiciis.

According to Voet wild animals when "gentled" or when possessed by someone as owner fall within the category of the beneficial action on pauperies. Voet argues that Justinian makes it clear in 4.9.1 Inst. that:

"one who has kept a dog, male pig, wild boar, bear or lion at a place where there is a common footpath is held liable not only under the edict of the aediles but also in an action on pauperies."

Voet also argues that a beneficial action in pauperies is logical because ownership of wild animals is lost when they escape:

"So /

135 Ibid.
136 Ibid., p.342.
138 Ibid.
"So much so that after escape he belongs to him who kills or seizes him - it follows that the person still in possession of a wild beast which causes damage is rightfully sued." 139

Whether or not Voet is correct in his assertion is of little consequence in determining the Roman-Dutch law for the rule enunciated by Grotius, van Leeuwen and Damhouder (i.e. the expansion of the action on the edict) supra covers the possible circumstances fully and a beneficial action on the actio de pauperi would be tautologous. The question of escape and cessation of ownership does not effect the action on the edict (as extended) for the cause of action rests upon a failure to secure the animal adequately. An owner will not escape liability when his wild beast breaks out, on the contrary, this will, in all probability, lay liability at his door.

According to Groenewegen the liability to pay a double penalty under the edict of the Aediles disappeared in Dutch law (Groenewegen de leg. abr. ad. Dig.9.1.1.15 et ad Inst. 4.9.1.)

Trespassing and Depasturising Animals.

Grotius and Voet deal with the matter of animal trespass and damage to herbage. The majority of Roman-Dutch writers did not concern themselves with full treatment of this matter which, although /

139 Ibid.
although of practical import, appears to be gleaned from a multitude of local statutes rather than from any fundamental source.

Grotius at 3.38.11 states the basic rule to the effect that animals found upon the land of another may be impounded and kept at the animal owner's cost until compensation is made for the damage or security given. Van der Linden's translation into latin reads:

"Animalia, quae in agro alieno depascuntur, publico stabulo includere licet, ibique retinere, donec damni depascendo dati aestimatio soluta, vel cautio interposita fuerit." 142

According to Herbert the sources of this rule are as follows:

"Charters of Duke Albert of the 30th November, 1403 - Charters of South Holland, pag. 203 - Statutes of Rineland, 11th July, 1606 - Statutes of Delftland, 25th November, 1581, and of the 3rd and 4th July, 1598, art 77, L c - Statut. of Vriesland, 2.B.tit.3 art. 3 - Groenewegen de LL.abrog. in l.39. Sec.1.D.de L. Aquil - This differs from the Roman Laws, dict Sec 1." 143

Besides Groenewegen the authority is entirely statutory. Lee in his Commentary to the text of Grotius also indicates a legislative background to the rule:

"As to impounding see Keuren v. Riinl. art.104 (van Leeuwen, pp.474-6); Hantvest v Zuydt - Hollandt. Van der Eyck, p.203; Van Leeuwen, 4.39.6; Voet 9.1.3; Rechts. Obs. IV.47." 144
Van Leeuwen simply states:

"And if an animal be found on another's land, it may be placed in a pound or enclosure appointed for the purpose, until its owner, upon payment of the damage and expenses, releases it therefrom. Grot. Introd. bk.3.ch.36 n.14. Zypal/notit.jur.Bclg.ed.leg.Aquil. vers. pecus. See Handvesten of Kemmerland, p.m. 204. Statutes of Rhineland, art.138. Statutes of Voorn, art.76. et seq." 145

Voet is the most valuable source in regard to this matter which he deals with comprehensively. In (9.1.1) he states that a beneficial action under Aquilian law is available against an individual who deliberately lets an animal into the land of another and damage is caused, regardless of whether or not the offending party is the owner. Criminal proceedings may be instituted for deliberate wrongful grazing and Voet quotes the Code (XI, 61(60),2.) as authority:

"as for instance when animals of the soldiery are let into public pastures, inasmuch as those who let them in are punished with a penalty of twelve Roman pounds of gold to be devoted to the Treasury." 147

It appears, however, that this penalty was only available against offenders in military service; others were merely required to make compensation. 148 Voet further states that, according to Dutch custom and decrees of the various provinces, if cattle stray and feed on ramparts, fortifications, strongholds or garrison towns, confiscation /

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147 Ibid.
148 Ibid., where Voet cites Code XI,67 (66),1.
confiscation is permissible and in addition damages must be repaired. For less serious offences such as grazing on roads or public places fines may be imposed but only if negligence can be attributed to the owner of the animals. In this regard Voet refers to the *Groot Placaat - Bosk*, Vol.2, pp.463 and 465, *Dutch Consultations*, Part 3, Vol.2, cons.20. and Sande, *Frisian Decisions*, 5.7.6. Voet proceeds to deal with the more important aspect of the matter i.e. damages for grazing not attributable to human agency. Here he clearly envisages the actio de pastu.

"But if one man's animal grazes on another man's ground without anyone letting him in, then there is room under the law of the Twelve Tables for a civil action on the grazing of cattle. The action is available to the owner of the land against the owner of the animal grazing." 151

Voet cites D,19.5.14.3 as authority and states that the action was available in Dutch law to make good the damage caused and to compensate the anticipated loss. The action is also evidently available when a free man has been maimed...

"When a free human being has been maimed the valuation has to be paid of the anticipated services also which the person hurt will have for the future to do without."

Voet bases this upon D9.1.3 at end and D46,8,13. 152 Voet contends that /

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150 Chapter I p. 15.
that noxal surrender is competent in the \textit{actio de pastu} on the authority of Paulus (\textit{Received Opinions} Bk.1, tit 15).\footnote{153} 

Where there is no trespass, e.g., where cattle eat acorns which have fallen from a neighbour's tree onto the cattle owner's property the \textit{actio de pastu} is not applicable but an \textit{actio in factum} (presumably based on the \textit{lex Aquilia}) will be competent if the requirements of a cause of action exist.\footnote{154} Where, however, an animal feeds from the granary or stock of another (one supposes on the land of another otherwise this case would not be distinguishable from the previous one) Voet contends that a beneficial action on pasturage (\textit{actio de pastu}) will be competent.\footnote{155} In 9.1.3. Voet deals with the civil law rights and duties of a landowner who suffers a trespass by another's cattle. He states that the owner may not impound the beasts himself but should drive them off without cruelty.\footnote{156} Voet later states the custom and practice in the Netherlands. In the second part of 9.1.3 Voet distinguishes animals from inanimate objects. This is justification for the civil law as stated.\footnote{157} Netherlands custom, however, apparently relaxed the rule set out above in terms of which the owner of land or a tenant-farmer whose fruits have been harmed is at liberty to impound another's cattle caught on his ground or in a public or imperial /
imperial stable until the value of the damage caused by the grazing has been paid or the animal surrendered. In Voet's time impounding was only permitted in a public pound. Voet concludes his consideration of this matter by stating that the provisions of the Roman Law in regard to grazing have been retained in other respects.

Was noxal surrender recognised in Roman-Dutch Law?

This next question received the attention of the South African Appellate Division in O'Callaghan, N.O. v. Chaplin. Van der Linden's translation of Grotius 3.38.10 reads vel animal noxae dedere and Innes C.J., points out that Grotius' work was published in 1631 and had his statement of the law been erroneous one would have expected some of the later commentators to have ventured criticism. On the contrary later writers have expressed approbation, so Gerloff Scheltinga, (1708-1765), twice Rector Magnificus at Leyden concurred with Grotius in his commentary.

158 Ibid., see notes (f) and (g) to 9.1.3 which indicate the long observance and universality of the impounding rule in the states of Holland. According to this source the privilege to impound was first granted by Count Jan van Henegouwen to the people of South Holland on 9th June, 1303.


159 Ibid.

160 Ibid.

161 1927 A.D. 310.

162 Grotius, Institutiones Juris Hollandici, III.38.10.


164 Wassels, History of Roman Dutch Law, p.342.
commentary to the Inleiding. Groenewegen indicates that although noxal surrender was not observed in Germany or Saxony it was recognised as competent in the law and practice of Holland for an owner to surrender his offending animal as a defence. Voet (9.1.8) states unambiguously that as an alternative to making good the damages the animal may be given up as noxa. Voet's work was published sixty-seven years after Grotius', however, Voet nowhere suggests that noxae deditio has fallen into disuetude, in fact in his title on noxal actions (9.4.10) he states that those who contend that noxal actions have fallen into obsolescence were wholly mistaken for even animals which had caused damage could be surrendered in compensation for the injury they had done. Late in the eighteenth century van der Linden edited Voet's ad Pandectas and published a supplement. At no stage in his discussion of the actio de pauperie did he suggest that in his times noxal surrender was obsolete. Voet refers to noxal surrender in connection with the actio de pastu as well and Innes C.J., quotes him as writing noxae nemque deditione etiam moribus dominum liberari posse receptum est. Decker in his note to van Leeuwen discusses the controversy /

165 Note 163 supra loc.cit.
166 Groenewegen, De Legibus Abrogatis, 4, 9.
167 This view is not shared by Strykius (Pand 9.1.sec.5) in regard to Saxon law, see O'Callaghan, M.O. v. Chaplin, 1927 A.D. 310 at p.316.
169 9.4.10. This title has not been translated by Gane but see O'Callaghan, M.O. v. Chaplin, 1927 A.D. 310 at p.318.
170 Gane, The Selective Voet, 9.1.3.
172 Kotze, van Leeuwen's Commentaries, note (c) p.319.
controversy in this way:

"But whether, by our Dutch Laws, the owner can escape further liability by giving up the animal (noxae dando animal), or is bound to make full compensation, is not without reason a matter of doubt with many. That he may escape further liability by giving up the animal is the opinion of Grotius, Introd. bk 3.ch.38 sec.10, and proved by reference to local laws by the jurists in the Observation ad Grot. vol.2.obs.94, to which we may add that the noxale judicium has nowhere been abrogated (as far as I am aware) in our laws or customs ex sequo et bono, existimaverunt putes VV. DD. Conf.P. Voet ad Inst.483 except where the animal was infuriated by the owner, or its mischievous propensity known to him, where there exists malus animus or great carelessness (on his part) and hence, according to law and equity, full compensation must take place besides judicial punishment as well."

Van Leeuwen himself recognised noxal surrender as an alternative to compensation unless the animal was wild by nature or otherwise of a mischievous propensity in which case compensation alone would suffice. 173 Paul Voet the father of Johannes Voet did not agree with those who maintained that noxal surrender was obsolete:

"Nos tres tamem et Hollandial moribus, noxale judicium servari et servandum esse ex sequo et bono existimesarem." 175

Damhouder is also of the view that the owner of an offending animal:

"should get rid of and give up the animal which has caused the harm, or otherwise bear and make good the amount of the loss sustained." 176

Damhouder /

173 Ibid.
174 1619-1677, Wessels, History of Roman Dutch Law, p.300 et seq.
176 Ibid., p.341.
Damhouder appears to be at one with van Leeuwen insofar as he considers that noxal surrender does not apply to dogs or other vicious animals. Sande favoured the view that noxal surrender was competent but mentioned a Frisian statute in terms of which an owner would be precluded from exercising the surrender option if he retained the offending animal for any period after the damage. Fockema Andreae, who was a professor at Leyden, in an annotation to Grotius' *Inleiding* recognised noxal surrender as an alternative to paying damages. He stated this both in regard to Grotius 3.38.10 and 3.37.6 in regard to the latter making the following note:

"According to several charters the owner can as soon as he becomes aware of the fact, free himself from liability by getting rid of or surrendering the animal."

Lesser writes such as Kersteman and Munniks also hold the opinion that noxal surrender had not been abrogated by disuse.

On the other hand a number of notable Roman-Dutch writers contended that noxal surrender was no longer part of the law. Vinnius who was famous for his commentary on Justinian's *Institutes* believed that the option was no longer recognised and that

178 Sande, *Dezinones Frisicae*, 5.7.5.
180 *O'Callaghan, M. O. v. Charlin*, 1927 *A.D.* 310 at pp. 343 and 345.
that the damage in pauperian suits had to be assessed by the courts:

"...Hodie noxae deditio non usurpatur, sed damnum
gatum aestimatur arbitrio judiciis." 185

Vinnius evidently supported his argument by reference to Wesembec an early writer who contended that by sec. 140 of the Criminal Ordinance of Charles V the amount payable was assessed by the judge. He added that in terms of the law of Saxony an owner who retained an animal which had done harm was always liable but if he abandoned it as derelict he escaped liability. Innes C.J., suggests that Wesembec had sec. 136 of the Ordinance in mind, this evidently imposed a penalty upon the owner of a dangerous animal, which injured anyone, and decreed that the owner should get rid of the animal. 187

Boehmer (Med. ad Const. Crim. Car.V Sec. 136 p. 639) argues that the penalty of the Ordinance was purely criminal and did not affect the law in regard to civil liability:

"Quicquid tamem sit sola poena criminibus hic
pronuntitur, non sequa de persecutione civile
agitur; adeoque actionem quadrupediam per
hunc art. haud sublatum esse, recte asserit
Hahn."

Wessenbach 189 (ad-Pand.9. disp.21.Thes.1) supported the view that noxal surrender had become obsolete:

"Moribus /

186 Ibid.
187 Ibid.
188 Ibid., p. 316.
189 1607-1665, Wessels, History of Roman-Dutch law, p. 298.
"Moribus hodiernis, noxales actiones fere exoleverunt, daturque directum judicium sine noxam deditione adversus dominum quadrupedis quae noxam nocuit, facta arbitrio judicis aestimatione." 190

As authority Wessenbach quotes the Criminal Ordinance of Charles V and 2.3.4 of the provincial ordinance of Friesland.

Antonius Matthaeus II 191 was a great authority on Roman-Dutch Law. In his work Commentarius de Crimini (147.3.3.4) he expressed the contention that noxal surrender was nearly obsolete and that damages were assessed by a judge:

"Noxales etiam actiones hodie fere exoleverunt, daturque directum judicium sine noxae deditio adversus dominum quadrupedis, quae noxam nocuit, facta arbitrio judicis aestimatione. Non nulli tamen distingueunt ut si dominus quadrupedem de seruerit etque derelicuerit, denegatur adversus eum actio, sin recerperit post pauperiem factam, pure et citra noxae deditione teneatur; quod jure Saxones cuoque uti accipimus." 192

Oosterga was of the opinion that although the Roman law was still followed in many places damages were recoverable, which in his view was commendably logical 193. According to Innes C.J., Oosterga cites a decision reported by Sande (5.7.5) as authority for his proposition. Sande (5.7.5) however, supports the opposite view 194.

Finally, de Pinto commented on Art.1404 of the Dutch Civil Code to the

191 1601-1654, Wessels, History of Roman-Dutch law, p.296.
193 Ibid., p.317.
194 Sande, Decisiones Frisicae, 5.7.5.
the effect that the practice of noxal surrender was not generally observed in the Netherlands.

Grotius, Voet, van der Linder, Decker, Paul, Voet, Damhouder, Sande, van Leeuwen and F. Andreae were the major Roman-Dutch writers who maintained that noxae dedito prevailed in Roman-Dutch law. Admittedly Decker, in his note to van Leeuwen indicates a degree of uncertainty but the remaining writers, representing the cream of Roman-Dutch jurists are unambiguous. In O'Callaghan's case Innes C.J., points out that the majority of the authorities who contend that noxal surrender has fallen into disuetude base their conclusions on the Criminal Ordinance of Charles V and upon Saxon and Frisian statutes. Learned writers such as Grotius and Groenewegen were fully aware of the implications of these statutes but did not contend that they had affected the law of Holland. Innes C.J., concludes that the authorities lead him to believe that the actio de pauperie was part of the law of Holland and that the option of noxal surrender was recognised and given effect to in connection with it.

Wissenbach, Vinnius, Wesembec, Boehmer, Matthaeus II and Oosterga are the chief protagonists of the school who hold that noxal /

196 Ibid., p. 318.
197 Ibid., p. 312.
198 Ibid.
noxal surrender had fallen into obsolescence. Kotze argues that van Leeuwen's admission that noxal surrender was inappropriate in the case of animals accustomed to do harm is a clear departure from the Roman Law by the Jurisprudence of Holland. To this it may be respectfully replied that the exception proves the existence of the rule and if the rule had been abrogated van Leeuwen would not have mentioned exceptions to it. Kotze finds it surprising that Decker who was a practising Advocate did not cite a single case in which noxal surrender was employed. Kotze further contends that F. Andreae's reference to the charters of the town of Briel indicate that noxae deditio was not generally observed for if it were it would have been superfluous for the town to enact these statutes. According to Kotze, Vinnius, Matthaeus, Wesenback and Oosterga indicate:

(i) That noxae deditio was not in general use in the Netherlands.

(ii) That notwithstanding its disappearance the liability of an owner for pauperies continued to be recognised in Roman Dutch law.

(iii) That the practice was to pay the full amount of the ascertained damages:

"The /

199 Ibid., p.346.
200 Ibid., p.354.
201 Ibid., p.356.
"The conclusion, accordingly, is that, while noxae deditio ceased to exist, the liability of an owner for pauperiss continued in Dutch jurisprudence." 202

The writer is inclined to prefer the view of Innes C.J., on the basis that according to the clear statement of the majority of the greatest writers in Roman-Dutch law (who are indeed recognised as a source of Roman-Dutch law) noxal surrender was at all times part and parcel of the law in the Netherlands.

202 Ibid., p.357.
CHAPTER IV

SCOTS LAW

The Early Law.

Although the Scottish law of delict was, from early times, firmly established on solid Roman foundations there is no evidence that the Institutional Writers specifically adopted the special actions which provided redress in the case of damage or injury by animals in Roman and Roman-Dutch Law. Stair, not illogically, dealt with the matter in his general chapter on reparation and his words have been the object of considerable judicial scrutiny - on both sides of the Tweed river. Because Stair's work is of undisputed importance a full quotation of his words is warranted:

"Accession to delinquence is either anterior, concomitant, or posterior to delinquence itself. Anterior is, either by command or counsel, instigation or provocation; or by connivance in foreknowing, and not hindering those, who they might and ought to have stopped, and that either specially in relation to oneingular delinquence, or generally in knowing and not restraining the common and known inclination of the actors towards delinquences of that kind, as when a master keeps outrageous and pernicious servants or beasts. And, therefore, in many cases, even by natural equity, the master is liable for the damage done by his beast; as is clearly resolved in the judicial law, in the case of the pushing ox, which if it was accustomed to push before time, the owner is liable for the damage thereof, as being obliged to restrain it, but if not he is free (Ex. xxii.28, et seq.) So the like may be said of mastives and

1 Smith, Short Commentary, p.653.
other dogs, if they be accustomed to assault men, their goods and cattle, and be not destroyed or restrained, their owner is liable. The remedies adhibite by the Romans, see L.40 et seq. D. de sedil. ed. et tot. tit. D.et Inst. si quad paup." 2

Doubtless unwittingly, Stair, by reference to the pushing ox of the Judicial law 3 provided a foothold for those who believed that the *sciente* action of English law was part of the law in Scotland and that to succeed in cases of injury attributable to animals the pursuer must show that the possessor of the animal was aware of a proclivity on the part of the beast to incur the sort of injury complained of. The insemination of this concept into Scottish jurisprudence has led to two unfortunate developments in the law of animal liability; (i) the erosion of the principle of *culpa* (ii) a morass of confusion. Although the reference to the pushing ox smacks of *sciente* it is difficult to see how Stair's remarks could be adjudged as anywhere near sufficiently strong to justify the importation of a technical rule from a foreign legal system. Lord Stair's remarks should rather have been read and construed in the true context of the Roman and Roman-Dutch principle of *culpa* and not by reference to a technical action in a foreign legal system in which the basis of the law of reparation is poles apart from the background to the law being enunciated by the Institutional Writer. Lord Cockburn /

2 Stair, *Institutes of the Law of Scotland*, Vol.1, l.IX.V.
3 Ex.xxi.28, et seq.
Cockburn in the ill-destined case of Fleeming v. Orr spoke in these terse terms on the matter:

"I have understood all my life that if my dog worries another man's sheep I must pay for it. But it is said that I must now review my opinion. I speak with great respect of the law of England; it is a system with which I do not profess to be acquainted, and I would recommend that Scotch law should be quoted to us here in Scotland ... It has been laid down to us, as an absolute principle that anyone keeping a wild or domestic animal is not to be liable for mischief it may have done, unless it has done the same thing before. Now this is just nonsense. The essence of the principle seems to be that every dog is to have one worry, and every bull one thrust, with absolute impunity, - that is to say without its master being liable. If this be the law of England they appear to have undue toleration for a first offence. I believe my coachman to be a sober and respectable man, and a good and steady driver; would it be any defence for me against his having ridden over an old woman, that he never had done so before? The law applies to quadrupeds as well as to bipeds."

The decision of the court of which Lord Cockburn was a member when he made this forthright denunciation of scienter, was, unfortunately, soon over-ruled by the House of Lords. The facts of this historic case are as follows: a foxhound belonging to the defender destroyed eighteen of pursuer's sheep. Scienter was not established but the Scottish courts found for the pursuer on the /

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4 (1853) 15.D. 486.
5 The unnamed author of an article in the Scots Law Times (News) 1895 p. 61 inserts a question mark after the word 'wild' in a quote from Lord Cockburn's judgement. The inference evidently being that his assessment of English law is incorrect in regard to wild animals - where liability was not dependent upon scienter.
6 Fleeming v. Orr (1855) 2 Macq. 14.
the basis of *culpa*. In effect the House of Lords, in the final appeal, found that the law of England and Scotland was the same on the matter, the Lord Chancellor specifically stating that Stair (I.IX.V) supports this approach.  

In the course of his judgement the Lord Chancellor made the following remarks:

"I have made these few remarks for the purpose of showing that the difference in the laws of Scotland and England on this subject, if differences there be, consists not in the fact that *culpa* on the part of the owner is the foundation on which redress is given in Scotland whereas something more is required in England, but that in England it is assumed that *culpa* (which is in both countries the sole ground of the action) cannot exist without knowledge on the part of the owner of the animals habits."  

This opinion of the background to the law of England is not unanimously supported by English legal historians and authorities on the *scienter* action.

Stair's passage warrants detailed analysis. Interpretation of the relevant portions are made in the light of the principles of Roman and Roman-Dutch law in the knowledge that this is the true basis of his approach to reparation. It is relevant to note at the outset that the word 'scienter' is not mentioned by Stair. This is important for the word has always been directly associated with the technical action of the English law, Lord Stair /

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9 *Supra* p.41*etseq*See authorities referred to in regard to basis of *scienter*. 

Stair was doubtless well aware of this, and if, indeed, he had wished to indicate that the \textit{scienter} action was part of Scottish jurisprudence he would have doubtless said so unequivocally. The passage from Stair quoted fully above\(^{10}\) in fact deals with the matter of the category of persons liable in reparation - the basis of reparation having already been established. If Stair had intended to create a special technical rule in regard to animals he would surely have enunciated the rule as an exception to the basic principle. It is almost unthinkable to suggest that he might have carelessly slipped such a special rule in via the head of 'who is liable in reparation'.

In the first part of the passage Stair sets out the various possible positions of the defender in relation to the delinquence. Relevant here is his final category of those who:

"... by connivance in foreknowing, and not hindering those, whom they might and ought to have stopped, and that either specially in relation to one singular delinquency, or generally in knowing and not restraining the common and known inclination of the actors towards delinquences of that kind, as when a master keeps outrageous and pernicious servants or beasts."

It seems to me clear that the positive unlawful act which Stair alludes to in this passage is in fact the failure to hinder those whom the defender might or ought to have stopped.\(^{11}\) How far is the

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\(^{10}\) Stair, Institutes of the Law of Scotland, Vol.1, l.iX.V.

\(^{11}\) See Lord Hunter's analysis of Stair in Henderson v. John Stuart (Farms) Ltd. 1963 S.C. 245 at p.248 et seq.
the duty which Stair envisages as being owed by the master who keeps outrageous beasts and pernicious servants coloured by his 'foreknowledge'. It is submitted that the use of the word 'foreknowing' is not sufficiently emphatic in the context to warrant a specific technical connotation being placed upon it - especially if that connotation introduces a rule which is difficult to reconcile with the principles already enunciated. There is no hint that prior knowledge of viciousness is an ingredient and the word 'foreknowing' seems to me to suggest no more than the existence of a duty to restrain and control introduced by presumed knowledge of the potential danger of an animal - in short an aspect of culpa. The passage is certainly not divergent from the culpa principle and the important clause alluded to above seems to be a tenet of culpa. As to Stair's reference to the Biblical law, with all deference to the ecclesiastics, this seems to be no more than illustrative of a possible fault situation. Similarly the reference to 'mastives and other dogs' seems little more than an extension of this potential fault situation. No reference is made to knowledge of vice, the fault envisaged merely being that the animals are wont to assault men - that is they are dangerous and likely to cause harm. In determining an owner's duty to restrain his animal the question of his knowledge of the potential danger of the animal is clearly relevant but this does not necessarily mean that a pursuer is bound to fail in an action unless he can prove that /
that the defender knew of the particular animal's proclivity to commit the type of harm complained of. Stair's passage concludes with a reference to the remedy applied by the Romans. There is nothing to indicate that he intends this to be contrasted with his conclusions and the logical conclusion is that he makes the reference to indicate the true basis of Scots law. Now, it is trite that *scienter* in the technical sense has never been part of the Roman and Roman-Dutch law and if the jurisprudence of these systems is the foundation of Scottish law then there is no place for *scienter* in this last mentioned system. To summarise it is submitted that the basic rule enunciated in the passage under examination is established by the words 'those, whom they might and ought to have stopped'. The matter which follows is merely illustrative. Bearing in mind that the passage falls under the general head of reparation and the basic principle enunciated throughout the chapter is *culpa* it seems logical to hold on analysis that no inference drawn from the illustrations is sufficiently strong to indicate a different approach or, indeed, to suggest that Stair may be formulating the law on the lines of a technical action adopted from another legal system.

Lord Kames also deals with the problem of liability for animals.

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12 *Supra* p. 110.
13 1696 - 1782.
animals. He covers the matter in the following manner:

"But for the security of individuals in society, it is not sufficient that a man himself be prohibited from doing mischief; he ought over and above to be careful and vigilant, that persons, animals, and things, under his power, do no mischief; and if he neglect this branch of his duty, he is liable to repair the mischief that ensues, equally as if it had proceeded from his own act." ...

"With respect to animals, it is the proprietor's duty to keep them from doing harm; and if harm ensue that might have been foreseen, he is bound to repair it; as, for example, when he suffers his cattle to pasture in his neighbour's field; or where the mischief is done by a beast of a vicious kind; or even by an ox or a horse, which, contrary to its nature, he knows to be mischievous (Exodus, chap.xxi.29,36) 14

It is difficult to see how this passage could be held to represent anything but a reassertion of the culpa principle in respect of "... persons, animals, and things, under ... power". Kames' straightforward statement to the effect that an individual is liable to repair damage ensuing as a result of his neglect to be careful and vigilant of his animals could not by any construction be associated with any special technical rule. Examining Kames' statement of the law specifically applied to animal cases it appears that the three ingredient elements of Aquilian liability emerge:

(1) Damnum - "... and if harm ensue"

(ii) Fault - "... that might have been foreseen"

(iii) Causative link - "... proprietors duty to keep them from doing harm".

14 Kames, Principles of Equity, p.63.
It seems surprising that Scottish (and English) courts have not more regularly referred to Kames' clear enunciation of the law on the matter of animal liability.

The examples which Kames gives in the final part of his passage are no more than illustrative of possible culpa situations - as surely the words 'for example' indicate. Kames, as with Stair, includes the Biblical reference as illustrative material.

Kames states the general defences to actions of this kind:

"...But as to cases of this kind, it is a good defence against a claim of reparation, that the claimant suffered by his own fault: "Si quis aliquem evitans magistratum forte, in taberna proxima fe immifiiffet, ibique a cane feroce laefus effet non poffe agi canis nomine quidam putant: at fii folitus fuiifet contra." (1.2. sec l. si quadrupes pauperiemosciffe dicatur). If a fierce bull of mine get loofe, and wound a person, I am liable; but if a man break down my fence, and is hurt by the bull in my inflofure, I am not liable; for by an unlawful act he himself was the occasion of the hurt he suffered."

Kames is clearly referring to the defence of negligence of the pursuer - this goes to show that the action which he is dealing with is the ordinary negligence action rather than a special technical action which would be likely to have concomitant special defences.

Bankton in his work on the law of Scotland deals with liability:

15 Ibid., p.65.
16 1685 - 1760.
17 Bankton, An Institute of the Laws of Scotland, Vol.1, Book 1, Tit.10, sec.48 et seq.
liability for animals in his book on Civil Rights under the general title of Reparation arising from Crimes or Delinquences. This topic falls into the above general title together with other sections on 'damage'. Bankton's work is described (presumably by the author), on the titlepage, as being "After the General Method of the Viscount of Stairs Institutions". In this particular field there is little justification for claiming any relationship with Stair for Bankton commences by laying down the principle of the Roman Actio de Pauperie as the law of Scotland:

"In case of damage done by beasts, contrary to the natural custom of their kind, without provocation, as a horse kicking, or an ox goring, termed by the Romans, Pauperies, the master must either answer the damage, or deliver up the beast to the person that receives the prejudice."

The summary encompasses the basic concepts of Pauperian liability as is evident if it is compared to one of the Roman-Dutch writers who did the same.20 It is notable that Bankton does not quote any authority in support of his first proposition (supra) as he does with his second set out below. He is the only institutional writer who actually regarded pauperies as a part of Scots law and as this inclination was never followed up by the courts one is perhaps justified in assessing his statement as of historical interest alone.

18 Ibid.
19 A literal translation of contra naturam sui generis.
20 Supra p. 92; Grotius.
alone. Considering, of course, the general legacy of Scots law to Roman delict it is somewhat surprising that the Civil treatment of animal liability did not also find a niche. Bankton proceeds to set out the rule commonly ascribed to the Judaical law:

"He may be more severely punished, in case he did not refrain the beast, after due intimation, according to the judicial law of the Jews, and natural reason."

As to how a "master" would be more severely punished Bankton says nothing and this unlikely element probably constitutes the reason why his passage is so seldom alluded to. Bankton's motivation was probably a desire to reconcile the Civil law and the Judaical law and allow them to stand together in harmony or perhaps he merely wished to set out the civil law but in deference to Stair did not feel he could omit the principle which he considered to be the basis of his famous predecessor's work. Whatever the position was it is submitted that the last quote is unacceptable as the true Scots law for these is no evidence to indicate that there was ever a more severe 'penalty' for cases where foreknowledge of propensity featured.

Bankton proceeds to lay down the rule of the Digest regarding an animal fight:

"If /

21 The writer is not aware of any Scots Court ever having relied upon it.
22 Bankton himself intimates as much when he says at the end of sec.48 "It would seem, that these principles of reason, being authorized by the Mosaic and Civil law, our law agrees, for the most part with them; and we have an old statute to that purpose." (1 Stat. Rob.1.C.31).
23 D.9.2.45.3.
"If two beasts, belonging to different owners, fight, and one kills the other, if the aggressor is killed, the owner of the other is free, flush regard is had to self-defence even among brute animals; but if the other is killed, the aggressor must be given up for satisfaction, or the owner shall repair the damage." 24

This rule is supportable only as an adjunct to the Pauperian law where it is logical because the ratio of the action is the animals fault attributable to the owner. Clearly an animal defending itself cannot be regarded as being 'in fault'. It is submitted that this cannot be accepted as a specific rule of Scots law unless the Civilian action is regarded as the solution - which, as is stated above, does not appear to be the case.

Bankton deals with depasturization in his final section 25 on damage by animals first setting out the Civil law and then stating the Scots law:

"By our law, the person injured may detain them for the damage and trespafs-money which is half a merk for each beast, toties quoties, till the same is valued by the sentence of a judge, and thereafter point or distrain them thereby, in case the owner do not relieve them by payment." (P.1686 C11). 26

The author continued to set out some of the rules connected with this matter:

"In the meantime he may impound them, and must forthwith give notice to the owner, that he may furnish them provision; and, in such case, if they die for want, the owner must suffer the loss.

24 Bankton, An Institute of the Laws of Scotland, Vol.1, Book 1, Tit.10, Sec.48.
25 Bankton, An Institute of the Laws of Scotland, Vol.1, Book 1, Tit.10, Sec.49.
26 This is the Winter Herding Act, Post pp.154 et seq.
lofs since he does not relieve them, or take care of them while in the pound; but whether an owner can free himself of the damage, occasioned without his assent, by delivering up the beasts, is not so certain with us, tho' it is the law at present elsewhere (Voet sec.3 si quadprud. paup. sec)\(^27\) and the liberty allowed by our law to the person aggrieved, to impound or detain the beasts till he is satisfied for his damage, seems to impart, that the owner may abandon the beasts to him for his satisfaction." \(^28\)

Bankton's reasoning herein is not altogether logical - the right to impound is not a step towards noxal surrender but merely introduced to give notice to an animal owner that his beasts have done damage and that he must repair same or suffer the loss of his animals by public sale.

Erskine in his work on the law of Scotland,\(^30\) does not canvass the matter of animal liability and Bell\(^31\) merely refers to carelessness in the keeping of a dangerous dog under Quasi Delicts as being "subjects to damages in reparation".\(^32\) Guthrie, however, deals with the problem comprehensively in his edition of Bell's book on Scots law,\(^33\) however this treatment must be viewed with caution on account of the nineteenth century tendency to assimilate English and Scots Law.\(^34\) His treatment falls under /

\(^{27}\) Supra pp. 118-119.
\(^{28}\) Bankton, An Institute of the Laws of Scotland, Vol.1, Book 1, Tit.10, sec.49.
\(^{29}\) 1695-1768. Professor of Scots Law in the University of Edinburgh 1737-1765.
\(^{30}\) Erskine, An Institute of the Law of Scotland.
\(^{31}\) 1770-1843. Professor of Scots Law in the University of Edinburgh 1822-1843.
\(^{32}\) Bell, Principles of the Law of Scotland, para 553(2).
\(^{33}\) Guthrie, Bell's Principles of the Law of Scotland, para.553(3).
\(^{34}\) Smith, British Justice: The Scottish Contribution, p.19.
under the general head of reparation and reads as follows:

"Keeping dangerous Dogs, etc. - Carelessness in the keeping of a dangerous dog 'or other animal', or in the management of firearms, subject to damages in reparation. It was formerly held that the owner's knowledge of the dangerous or mischievous character of a domesticated animal must in all cases be proved in order to render him liable; but now, in any injury to sheep or cattle, and the occupier of the place where the dog is kept or allowed to stay is liable, unless he proves that he is not the owner, and that it was kept or allowed to remain on the premises without his sanction or knowledge. Cattle include horses. There is little doubt that carelessness, as above stated is a ground of liability and will readily be inferred if a dog is allowed to stray from home and worries sheep or cattle. The 'scienter' i.e. the owner's or the custodian's knowledge of the animals vicious propensity, must still be proved in the case of other domesticated animals, and in the case of injuries done by dogs to persons or other animals than sheep or cattle. And one who keeps a dog or bull, or the like, which he knows to be of a ferocious disposition, or a wild beast, is not merely bound to take all proper precautions for its control, but, at all events in a question which one who is lawfully on the ground and is not himself in fault, is absolutely bound to prevent mischief, and must at his peril keep the animal from doing hurt. In other words in such a case it is unnecessary for the injured person to adduce evidence of preventative negligence. A distinction has been taken between the effect of scientia in a question between the owner and one of the public, and in one between the owner and a servant employed in attending to the animal alleged to be vicious, the latter having possibly equal knowledge of its propensity with the master. Apart from the vice or ferocity of the animal, its owner is liable according to the ordinary rules of law, for negligence in using or guarding it, as for careless or reckless driving of horses or cattle in public places or failure in maintaining fences. Indeed the scientia, so much discussed in the cases cited, is just an element in the proof of negligence, having the effect when established, of shifting the onus probandi."
The criticism of Bell in his treatment of Scottish Mercantile Law:

"... Bell prepared the way for subsequent confusion by quarrying too much material from a system whose technicalities he had not mastered completely." 35

seems equally justified in regard to Guthrie's notes. One should, however, remember that all the propositions made in the above passage can be supported by Scottish court decision and thus perhaps criticism of the then state of Scottish law is more appropriate.

The final proposition is Guthrie's own opinion, here he states without reservation that *scienter* is no more than an element in the proof of negligence, having the effect when established of shifting the onus of proof. By this Guthrie presumably means that upon proof of an owner's knowledge of the offending animal's dangerous propensity it will be up to the owner to establish that he took all reasonable steps in the circumstances of the case. Guthrie is surely not stating that *scienter* is a necessary element in the proof of negligence in animal cases. It cannot be doubted that if he intended to convey this idea he would be bound to state so explicitly for 'negligence' in this parlance connotes the Aquilian action which does not provide special requirements to cover certain types of cases. What Guthrie is doubtless saying is that an owner's proven knowledge of the dangerous propensity of his offending animal is likely to go towards proof of his negligence.

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35 Ibid.
negligence. Guthrie's final statement clearly excludes the possibility in his view of a separate technical *scienter* action existing in Scots law. According to his judgment the part *scienter* plays in Scots law is only in relation to the negligence action.

Baron Hume's lectures\(^\text{36}\) indicate that this learned author did not suggest any novel solution to the problem of liability for animals. In short his statement of the law seems little more than a condensation of the principles operative in England. So he makes the following assessment:

"I may now close this discussion with a few words concerning damage done by vicious animals in one's keeping (such as bulls or dogs). For this I take it, the master or owner is liable, only if the animal be of a known vicious kind, or if the particular animal is known to be so, and has been complained of to the master, and the master has failed to part with or sufficiently confine it."\(^\text{37}\)

So we see *ferae naturae* and knowledge by the master of a particular animal's vicious characteristics imparting a form of strict liability. As authority for his statement Hume quotes early cases in which these principles were applied.\(^\text{38}\) Unfortunately this cursory investigation of the law does not assist in determining its foundation.

Glegg /

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36 The Stair Society No.15, *Baron David Hume's Lectures 1786-1822* vol.III.

37 Ibid., p.198.

38 E.G. Arthur Robertson v. Wm. Gourdieclock, 18 May 1802, (Not reported Hume, sess. Pap. vol.lxi, No.11.) "... the dog was known to be vicious and ill-tempered - and had been complained of to the master - and being still not sufficiently confined, he had sallied out from his master's premises, and bitten a boy who was passing. The master was found liable to make him amends."
Glegg, a more recent Scottish writer on reparation deals with
the matter under the head of "Duty of Owners of Dangerous Animals" but his assessment of the law is of little value for his argument and authority is either directly English or heavily biased that way. He does not canvass the question of a justifiable basis for scienter in Scotland.

Decisions of the Scottish courts in the last century do not establish clearly the elements necessary for success in a case of injury or damage by an animal. The decision in the case of Fleeming v. Orr, although, with respect, arrived at per incuriam, bound Scottish courts to the scienter principle. What did not emerge clearly in the cases that followed was whether scienter was relevant in all animal cases (as some of the judicial generalizations suggest), whether it was merely an ancillary action which could be employed instead of or in the alternative to negligence or, finally, whether scienter (as Guthrie would have it) was nothing more than an element in the proof of negligence.

In Clark v. Armstrong a dairymaid was trampled by her master's bull while removing cows from a field. Held by Lord Justice Clerk:

"There /

40 (1853) 15 Sc. 486.
41 Guthrie, Bell's Principles of the Law of Scotland, para.553(3).
42 (1862) 24 L, p.1315.
"There is no proof of knowledge by the owner of this bull that it was an animal of its class of unusually vicious habits and propensities, and these could not have been, because there is no proof that such habits and propensities existed." 43

In *Renwick v. von Rothenz*, a dog was put up for auction but not sold, the owner was requested to remove the dog and the animal was tied up at the mart where it bit a passing boy. Damages were awarded and it was held that there was sufficient evidence to indicate that the owner knew the dog to be of a ferocious nature for him to be liable. Although this was clearly a case which could have been decided in the same way on *culpa* the court regarded knowledge of propensity as fundamental. A similar approach was adopted in *Cowan v. Dalziel and Dalziel* 45 where a dog in the custody of two individuals, not its owners, attacked a man on a public road and bit him severely. Held per Lord Ormidale:

"The law goes far enough when it says that until a dog has shewn that he is vicious neither the owner nor custodier shall be liable. But there is a very serious responsibility laid upon the keepers of such a dog as that in question, known to them to be dangerous." 46

The first part of the learned judge's statement would appear to indicate that proof of *scienter* was a necessary ingredient in any action based upon dogbite in the Scots law. This is, of course, demonstratably false for a pursuer in Scots law could and can base a

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43 Ibid., p.1320.
44 (1875) 2R.855.
45 (1877) 5R.241.
46 Ibid.
a claim for reparation of patrimonial loss on the *lex Aquilia* regardless of the nature of the fact situation giving rise to the injury. In *Burton v. Moorhead* the *scienter* rule as employed in England was applied and it was held that where the owner knows of the ferocity of his animal he is bound to take not only reasonable but effectual, precautions against it attacking the public, and that, in the event of the precautions taken proving insufficient he will be liable in damages to the injured party. So strict liability was envisaged where the ferocity of the animal is well known. In *Hennigen v. McVey* absolute liability was imposed where the pursuer was attacked and severely wounded by a boar. Herein it was held that a boar is not *mansuetæ naturæ*, the court relying on the English *faæ naturæ mansuetæ naturæ* dichotomy, and the owner is accordingly bound to secure it failing which he is strictly liable for damages resulting from his precautions proving inadequate. In *Smillie v. Boyd* it was held that an Invitee can recover and the *scienter* rule was again enunciated so it was held that if a dog is known to be vicious then there is an obligation upon the owner to keep it in proper restraint. In *McDonald v. Smellie* where a child died of meningitis resulting from a dogbite the *scienter* action was applied and the defender was held liable because /

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47 (1881) 8 R. 892.
48 (1882) 9 R. 411.
49 (1886) 14 R. 150.
50 (1903) 5 R. 955.
because it was established that it was within his knowledge that the dog had previously acted in a manner dangerous to children.

In other Scottish cases culpa has been recognised as a competent cause of action. So in Brown and Company v. J. Stewart where the pursuer had been bitten by a watchdog which was normally chained up but allowed free during meal times, the majority of the court were of the opinion that as a watch dog is necessarily rendered fierce and vicious by his confinement, it is the duty of the owners either to keep the dog chained up, or, when loose, to take effective precautions to prevent it from having access to any public place. The decision was founded firmly on the culpa principle and there was no evidence to establish that the dog was known to be vicious. Brown v. Fulton also proceeded upon the basis of negligence, this, however, was not a case of injury caused by animal attack but injury suffered by a pedestrian when a horse, ridden by defendant's son, ran into him. In Shaw v. J. Croall and Sons the court found that a cab driver had not been negligent when his horse bolted after he had turned away briefly. In Phillips v. Nicoll a butcher's servant was leading a cow on a rope and halter in a public street. The animal became infuriated and knocked down and injured the pursuer. It was held that the butcher /

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51 (1824) 38. 187.
52 (1881) 9R. 36.
53 (1885) 12R. 1186.
54 (1884) 11R. 592.
butcher was responsible for the damage done by the cow belonging to him. The Lord President based his decision on this consideration:

"The whole question then turns on this - whether the person in charge knew or should have known that she was, not necessarily infuriated or excited when she left the byre, but in such a condition that she was disposed to become infuriated on the slightest cause." 55

MacDonald v. Lye, 56 although a dogbite case, turned on the negligence and imprudence of a gamekeeper who set his dog upon trespassing youths and urged the animal "to catch the young buggers". In Reid v. Cartwell 57 the pursuer succeeded in a small debt court action for damage which the defender's fox-terrier had caused to her dress while both were passengers in a tram car. The case was decided without reference to scienter and it was held that a party who takes a dog into a tram-car accepts an additional liability for any damage the dog may occasion while in the car, and that it is not necessary to prove propensity on the part of the dog to commit the damage. In McIntosh v. Waddell 58 it was held that the pursuer's action was relevant where he averred that defender's servant had left an animal unattended in a Glasgow street although the animal was known to be spirited.

Two cases decided on the basis of negligence in Scotland seem to /

55 Ibid.
56 (1888) 4 S.L.R. 376.
57 (1893) 10 S.L.R. 179.
58 (1896) 24R. 80.
to have produced somewhat severe results. The first is Harper v. G.N. of S.Ry.Co. Here while two servants of a steamship company were leading a bull through the streets of a town the animal became excited by a noise in the street and broke loose in consequence of a latent defect in the nose-ring. Pursuer was injured by the rampaging bull and sued the company. Held that because the defender had used precautions which were usual and reasonably safe in the circumstances it was not responsible for the injuries to pursuer. Lord Young's dictum is worthy of full quotation:

"... and I do not think that our law of responsibility on the grounds of mere culpa has gone further than to require that the usual and generally understood reasonably safe course should be followed."

Although at the time when this case was decided there may have been a more ready motivation to let loss lie where it falls it seems a perversion of natural justice that an individual who owns an animal and is sending it about the country for his own profit should not be civilly responsible for the harm which it does. Of course the owner was not sued in Harper's case but pursuer would not have succeeded even if he had sued the animal's owner for it is unlikely that he could have established scienter or culpa. A similar case is that of Gray v. N.B. Ry. Co., which related to a /

59 (1886) 13R. 1139.
60 (1890) 18R. 76.
a claim by a gardener who had been bitten by a dog that had escaped from the custody of a railway company. The case was decided solely upon negligence and it was held that the defendant company had not been negligent in the circumstances and that plaintiff's claim must fail. The above comments apply equally to this case.

In Fraser v. Bell a porter alleged injuries caused as a result of defender's dog which jumped up at another porter and caused him to drop coal on pursuer's foot. The Court of Session reversed a decision of the Sheriff Substitute who had dismissed the action on the ground that pursuer's averments were not relevant or sufficient. On the question of remoteness Lord Craighill's remarks are interesting:

"If the defender was in fault in not restraining the dog, it seems to me plain, and I did not understand it to be disputed, that, though the sufferer was not the person on whom the dog leaped, still the pursuer may recover, because the dog was the cause of the piece of coal being dropped or thrown from the man's back." 62

The learned judge went on to state (obiter) that when it came to proof the pursuer would not succeed in the action unless he proved knowledge of the dog's vicious or mischievous character imputable to the defender.

Robertson v. Connolly related to the communication of disease /

61 (1887) 14 R. 811.
62 Ibid.
63 (1851) 13 D. 779.
disease by animals. Pursuer sued defender, a grazier, for the value of three horses alleging that one of the horses had been infected with glanders by a pony which defender knowing to be diseased had put into a field with the pursuer's horse and the latter animal, when it returned to pursuer's stable, had communicated the disease to two other horses. In an application to dismiss the summons as irrelevant it was held that the averments were relevant, if proved, to infer liability against the defender for the loss not only of the horse which had caught the infection but also for the animals to which the disease had subsequently been communicated.

The early Scots law on this matter is generally uncertain. But this criticism cannot, with justification, be laid at the door of the Civilian jurisprudence as applied in Scotland but is undoubtedly attributable to the indiscriminate adoption of English law and the powerful corruption influenced by Fleeming v. Orr. If lawyers in both countries had taken heed of the proverb:

"what is true on one side of the Cheviots is false on the other"

the law in Scotland might have been in a far happier state at the close of the nineteenth century. The defences applied in animal cases in Scotland seem generally to have been the usual defences employed in negligence actions but, of course, where the courts have/

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64 Law Reform Committee for Scotland (12th report) Cmd. 2185, p.4.
65 (1853) 2 Macq. 14.
66 Kames, Principles of Equity, p.65.
have deemed *scienter* a necessary ingredient for success, proof by the defender that this ingredient was not present has been employed as a good defence. In *Fraser v. Hood* knowledge of propensity operated against an employee stable hand who was bitten when he entered a box to tie up a horse. The court refused to entertain his claim because he had voluntarily assumed a risk which he was well aware of. In *Daly v. Arrol* the decision was based upon a similar principle. Pursuer employed by defender went too close to a dog chained in the workyard and was bitten. It was held that his claim must fail because his injury was due solely to his own negligence.

Joint wrongdoers were dealt with in *Murray v. Brown and Porteous* where it was held that the owners of two dogs which had worried sheep were jointly liable for the whole damage on the ordinary rule applicable to joint delinquents. In the similar case of *Smith v. Hurll* where two dogs belonging to one owner and other dogs belonging to different owners were found to have worried sheep it was held that the liability was joint and several between all the owners of all the dogs which had participated in the sheep worrying.

In the case of *Robertson v. Wright* pursuer requested an interdict /

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67 (1887) 15R. 178.
68 (1886) 14R. 154.
69 (1881) 119 S.L.R. 253.
70 (1885) 1 S.L.R. 246.
71 (1885) 13R. 174.
interdict to restrain the defender from permitting his cattle to trespass on pursuer's fields. The court refused to grant an interdict because it had not been established that defender had failed to take reasonable precautions to prevent his cattle trespassing onto pursuer's property.

Two statutes are relevant to the early Scottish law of animal liability. The Sheep Worrying Act\textsuperscript{72} was passed in Scotland in 1863 to protect farmers from the operation of the decision in \textit{Fleming v. Orr}\textsuperscript{73}. The object of the act was to render certain classes of people liable for injuries done by dogs to sheep and cattle.\textsuperscript{74} In terms of the statute in any action brought against the owner of a dog for injury to sheep or cattle it would not be necessary for the pursuer to prove a previous propensity on the part of the animal to injure sheep or cattle. Unlike its English and Irish counterparts, however, the Scottish Act did not deal with the question of whether the pursuer must prove \textit{culpa} on the part of the dog owner. In the two cases decided under the Act the pursuer was able to prove \textit{culpa} but it is thought that the legislature inadvertently failed to specifically exclude the necessity of proof of \textit{culpa}.\textsuperscript{75} The cases decided under the statute are \textit{McIntyre v. Carmichael}\textsuperscript{76} where it was held that the owner

\textsuperscript{72} 26 and 27 Vict. c100.
\textsuperscript{73} (1855) 2 Macq. 14.
\textsuperscript{74} Glegg, \textit{A Practical Treatise on the Law of Reparation}, p.323.
\textsuperscript{75} Ibid.
\textsuperscript{76} (1870) 8 M.
owner of a dog which was proved to have worried sheep was liable on the ground of culpa as he had previously received an intimation that the dog had worried sheep on a prior occasion and Murray v. Brown where the dog owner was also found to be in culpa. Clearly the statute did not assist the matter to any great extent. The act was not restricted to dog owners but covered other parties harbouring a dog. So the occupier of premises in which the dog is usually kept is also liable.

The second early statute relates to depasturization and provided for a penalty and payment of damages by the owner of stock which destroyed a neighbour's grass or planting. This statute, known as the Winter Herding Act, improved the land owner's position vis-a-vis his stockrunning neighbours for under the old common law an owner of cattle was not obliged to prevent his animals straying except at haining time. In interpreting the provisions of the act the words imposing the obligation to herd, have been construed to impose an absolute duty on their owner to keep his cattle from trespassing on another's land. It has been held to be no defence to prove that a herd was kept by the defender, or that in addition to keeping two herds, a march fence had been erected at the joint expense of the pursuer and /

77 (1881) 19 S.L.R. 253.
78 James VII, 1686, C11.
81 Turnbull v. Coutts, F.C., 23 February, 1809.
The Winter Herding Act is applicable to trespass on all cultivated lands, corns as well as grass, gardens, and highland sheep-farms, and it is not necessary to prove that real damages have been suffered. The act provides that it shall be lawful for the injured party to detain the animals until the penalty has been paid for each beast and also the expense of keeping them. This lien created by the act does not cover the damage caused by straying cattle. To lawfully exercise the right to detain the cattle in security they must be pointed while actually on the ground of the injured party. So where a herd boy had followed cattle which had escaped from his master’s land and apprehended them two hundred yards down the public road it was held that there was no right to detain them. The court observed obiter that if the beasts had been lawfully taken possession of and had then escaped the landowner might lawfully follow up and recapture them. Once taken for security the stock cannot be demanded by the owner without the penalty being paid.

82 Loch v. Tweedie (1799) M.10.501 and supra loc.cit.
84 McArthur v. Miller, (1873) 1R. 248.
85 Ibid.
The Law Reform Committee Report and Aspects of Modern Scots Law.

The Law Reform Committee for Scotland, in its Twelfth Report dealt with "the law relating to civil liability for loss, injury and damage caused by animals." This document forms an appropriate basis for a consideration of the solutions in modern Scots law and the possible lines of development. The learned Committee members report is embodied in a Command Paper 1 published in October 1963.

Initially the report deals with the existing law in Scotland on this matter. After a cursory consideration of Stair 1.9.5 2 the Committee makes the cautionary remark that Stair was not:

"attempting to formulate a comprehensive statement of the law on this subject, but was engaged in expounding the principle of anterior accession to delinquency, of which one example is the failure of a master who has foreknowledge of his animal's dangerous propensities to restrain or confine it effectually."

After this inference to the danger of reading too much into Stair 1.9.5., the report proceeds to indicate that the members accept it to be settled law in Scotland that an animal owner is absolutely liable for damage occasioned by some dangerous propensity, exhibited by his animal, in respect of which he has foreknowledge, regardless of evidence of failure to exercise reasonable care to restrain or confine the animal. 3

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1 Law Reform Committee, Liability for Animals, Cmd.2185.
2 Supra p. 128.
3 Law Reform Committee, Liability for Animals, Cmd.2185, p.2.
The report continues and illustrates the *ferae naturae/mansuetae naturae* dichotomy with the conclusion that:

"the law outlined ... is similar in its general effect to the law of England, where the rule that liability for damage caused by a domestic animal depends on foreknowledge of its dangerous propensities is known as the *scienter* rule." 4

Lord Cockburn, whose clearly conceived feelings on this point are illustrated earlier in this paper, 5 warrants further quotation:

"... It has been laid down to us, as an absolute principle that anyone keeping a wild or domestic animal is not to be liable for mischief it may have done, unless it has done the same thing before. Now this is just nonsense. The essence of the principle seems to be that every dog is to have one worry, and every bull one thrust, with absolute impunity, - that is to say without its master being liable. If this be the law of England they appear to have undue toleration for a first offence."

Lord Cockburn would clearly not have acquiesced but the Law Reform Committee's next paragraph, (see post), to a certain extent, mitigates their position for they proceed to recognise the possible operation of the law of negligence in animal cases.

Modern Scots law textbook writers also indicate the existence of an absolute duty but emphasis varies. Smith introduces the topic by intimating that the law is in a state of flux but acknowledges, at the time of writing, that reliance is placed on something akin to the *ferae naturae/mansuetae naturae* dichotomy of 6

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4 Ibid.
5 Supra p.130 and Fleeming v. Orr (1853) 15.D.486.
of English law with the imposition of a very high duty ("amounting almost to insurance") in respect of animals known to be dangerous to mankind and with liability limited by proof of demonstrated vicious propensity in respect of domestic animals. Walker states that strict liability is part of Scots law where the owner:

"had, or is deemed by law to have had, knowledge of the dangerous propensities of the animal; because in such circumstances he should have taken greater care than merely that reasonable care, failure to take which is held to be legal negligence."

Walker proceeds to deal with details of the strict liability law and quotes numerous cases, including many English ones, in support of what is in substance a summary of the English scienter action. The same author refers to the judgement of Lord Hunter in the case of Henderson v. John Stuart (Farms) Ltd and states that here strict liability was apparently treated (obiter) as a species of culpa on the basis of liability for fault arising from reasonably foreseeable harm - proof of knowledge of an animal's vicious propensity being instrumental in establishing that harm was reasonably foreseeable. Henderson's case was decided in the Outer House and is thus not strictly binding on subsequent courts. The crucial undecided question is whether modern Scots courts will find for a pursuer on proof of knowledge of propensity (even if /

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7 Ibid.
8 Walker, Delict in Scots Law, p.642.
9 Ibid. pp.644 at seq.
10 1963 S.C., p.245.
11 Ibid.
12 Smith, Judicial Precedent in Scots Law, pp.18-19.
if styled proof of actual foreknowledge in regard to the anterior accession to delinquence aspect of culpa) and whether they will continue to distinguish the two categories of animals referred to earlier. Strict liability operating from the animal dichotomy and proof of foreknowledge has an impressive record of Scots authority to support it. On the other hand this writer would tentatively venture that dicta in Henderson v. John Stuart Farms Ltd. and the recent case of MacLean v. Forestry Commission demonstrate a tendency to regard culpa as the sole vehicle available to a pursuer in a Scots animal liability case. The obiter dictum of Henderson's case to the effect that strict liability is competent where culpability is present on account of foreknowledge and failure to confine is a rationalisation for scienter as /

15 1963 S.C. 255.
as a ground of liability in Scots jurisprudence but is not sufficiently developed to be seriously promoted as a form of liability distinct from that associated with culpa in its general delictual context. The matter is clearly open for legislation or comprehensive judicial scrutiny and pronouncement. The authors of Gloag and Henderson regard strict liability for animals as part of Scots law and state that it is founded upon the owner or custodier's knowledge of the animal's dangerous propensity. The authors proceed:

"In that event the duty is to confine or control the animal so as to prevent it from doing damage and liability stems from breach of that duty. While this is culpa and may be called negligence in the broad sense of neglect of a duty, it is not negligence in the narrow sense, in which that word is now commonly understood as connoting neglect or failure to exercise such care as is reasonable in all the circumstances of the situation." 18

The authors proceed to draw the distinction between the two classes of animals and imputed and proven knowledge of dangerous nature. English and Scots cases are cited as authority for various propositions. If liability is strict and synonymous with knowledge of propensity then it arises when a previously vicious animal causes one subsequent infringement. To refer to liability as arising from a breach of control seems superfluous in circumstances where liability could be found although control was never relinquished /

17 Gloag and Henderson, Introduction to the law of Scotland, pp. 452-453.
18 Ibid.
The Law Reform Committee do not deal with defences to liability arising from failure to restrain or confine an animal with known dangerous propensities. Contributory negligence or volenti non fit injuria is a good defence in Scots law and either could be applied where the pursuer teased or provoked the animal or was imprudent or negligent in approaching or handling it. It is no defence to prove that the intervening wrongful act of a third person was the immediate cause of the damage. It may, however be a defence that the animal was properly secured and improperly let loose by a third party who also urged it to mischief. The owner or custodier cannot escape liability by proving that he took reasonably sufficient precautions. As Lord Young said:

"I think the precautions must be effectual, and not only reasonably sufficient, in the sense that though they were not effectual the owner was morally excusable. The reason of our judgment is that ineffectual precautions are no defence to an action for injuries done to a person, where he lawfully was, by a ferocious animal."  

The Law Reform Committee having dealt with the law purporting to prescribe absolute duties (supra) embrace the question of whether the:

"principles /

19 Daly v. Arrol Bros. (1896) 14R. 154, but Cf Henderson v. John  
20 McEwan v. Cuthill (1897) 25R. 57. Stuart (Farms) Ltd.  
22 Walker, Delict in Scots law, p.651.  
23 Burton v. Moorhead (1881) 6R. 892 at p.896.
"principles of the modern law of negligence can be applied to questions of liability for damage caused by animals."

The learned members conclude that in spite of certain dicta, prima facie indicating a negative conclusion on this question, there is sufficient support for it in other authorities to justify their forming the opinion that the ordinary law of negligence is a good cause of action in cases of this type. Here they rely on the recent case of Henderson v. John Stuart Farms Ltd. It cannot, with respect, be doubted that the Committee's conclusion is correct, and it would, indeed, be almost unthinkable to suggest that the wide remedy, founded on the lex Aquilia, which is recognised as prevailing in Scots Law, be precluded from playing its proper part in animal cases.

Regarding animals on the road the Committee recognise the magnitude of this problem - and its lamented magnification in recent years. The Committee refer to the English rule of Searle v. Wallbank and state that the Scottish law is not altogether clear concluding with an intimation that the pronouncement of a higher court would be welcome. It seems that this prayer has not gone altogether unanswered and the first step towards logical clarification has been achieved by the Outer House in Gardiner v. Miller.

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26 T.B. Smith, A Short Commentary on the Law of Scotland, pp.648 et seq.
27 (1947) A.C.341 and see Chapter II p. 79.
Miller. The pursuer herein was injured when his car collided with a horse which had escaped onto a public highway from an adjoining field. He sued the owner of the animal who also owned the field. Held that according to Scots law there is no absolute duty to fence or keep gates shut so as to prevent domestic animals straying onto a public highway, however, the owner or occupier of land adjoining a highway is bound to exercise reasonable care to prevent his animals from straying where there is a foreseeable risk of such straying causing injury to people using the highway. It is respectfully submitted that this approach is to be commended, and clearly envisages the possibility of the land/animal owner's duty being more or less weighty depending upon the area in which the accident occurred. Any absolute rule in this matter is unacceptable, for clearly foreseeable risk in respect of a farmer whose land adjoins a main road between Edinburgh and Glasgow is now the same as foreseeable risk in respect of land contiguous to some little used road in Ross and Cromarty. 29

The Committee find two basic causes for complaint in regard to existing Scots law. Firstly they criticise its uncertainty and state that there is evidence of a "remarkable amount of judicial disagreement."

29 The English Law Commission have recognised this and advocate the abolition of the 'rule' in Searle v. Wallbank and the introduction of a number of factors to be considered in determining liability. See *supra* Chapter II, p.79.
disagreement". The comment that *Henderson v. John Stuart (Farms) Ltd.* has probably settled the question of the application of the law of negligence to animal cases is justified but, as the Committee points out, other aspects of the law, are uncertain. The second criticism set out in the report is concerned with the existing state of the law. In the Committee's view the law:

"insofar as it imposes absolute liability on the owner of an animal who has foreknowledge of the animal's dangerous propensities, is archaic and unsuited to present day conditions." 31

This viewpoint is justified insofar as the criterion of foreknowledge of dangerous propensities and the artificial dichotomy (which the Committee apparently accepts as part of existing Scots law) is concerned. The Committee, however, appears (this is inferred as much from their proposed remedy as from anything stated under the head of 'Criticism of the Existing law') to consider the imposition of an absolute duty too onerous in modern law:

"From the modern point of view, the absolute duty is too high in this context."

This sentiment motivates the remedy proposed by the Law Reform Committee for Scotland. The Committee advocates the abolition of the *ferae naturae/mansuetae naturae* distinction and the abrogation of absolute liability based on foreknowledge. It recommends that /

30 1963 S.C. p.245.
31 Law Reform Committee, Liability for Animals, Cmnd. 2185, p.5.
that the determination of liability should in each case depend upon whether there has been a failure to exercise reasonable care to prevent the animal causing the injury or damage. The proposal is worded as follows:

"We recommend that liability for injury caused by animals should, in every case, depend upon whether there has been a failure to exercise reasonable care to prevent the animal causing the injury. We believe that this single principle could be effectively applied in all cases and that it is flexible enough to allow the court to have regard to all the circumstances of a particular case." 32

Henderson reviewing this report, states that the Committee might have profitably considered a further discussion of law on comparative lines. It seems, with respect, doubtful whether the same conclusion in regard to the determination of liability in animal cases would have been reached if the general trend of modern jurisdictions had been followed. By far the outstanding majority of jurisdictions in the western world employ special rules in regard to damage by animals and more often than not the rule is strict and a form of absolute liability is imposed. It is respectfully submitted that on this account the learned members of the Committee have erred in assessing a form of absolute liability as too onerous in the context of modern law (supra).

According to Walker the owner of an animal is subject to the /

32 Ibid.
33 1964 Juridical Review Vol.9, p.244.
the absolute liability aspect of Scots law unless;

"he has committed the care of the animal to another for a substantial time and for the latter's own behoof and the custodier is trustworthy and fully aware of the precautions necessary." 34

The actual custodier, according to the same authority, is liable if he had full knowledge of the animal's nature.35

The Law Reform Committee Report envisages that the proposed form of liability should extend to anyone, regardless of the existence or not of any particular relationship with the animal, who might be held to have been subject to a duty to take care. This is logically concomitant with the proposed basis for liability.

The strict liability rule of Scots law probably covers all cases of harm to persons such as is caused by kicking biting, or knocking people over and also probably indirect personal damage as could be caused from a fall when attempting to escape from a dangerous animal.37 Liability has frequently been imposed in cases of dogs worrying sheep, or chasing horses, or cats killing poultry.38 39

Although most cases of damage to property are covered by the statutory provisions (post) some cases indicate that absolute liability for failure to confine an animal with known dangerous to propensities may extend to damage/or on heritable property.40

Cameron /

34 Walker, Delict in Scots law, p.644.
36 Law Reform Committee, Liability for Animals, Cand.2185, p.5.
37 Walker, Delict in Scots law, p.649.
Cameron v. Hamilton's Auction Marts, Ltd., an excited cow, anxious to escape the hammer, rushed up a flight of stairs crashed through a roof, caused a tap to turn on and flood a shop with consequent damage to the goods therein. The owner was held liable on the basis of his knowledge of the cow's vicious propensity. Walker is critical of this case which he feels should have been dealt with under the law of negligence. This, of course, would be the result if the Law Reform Committee's recommendations were implemented.

The Committee hold no fear that their proposals will not adequately cover cases of damage caused as a result of animals on a public road:

"In our view the principle of liability based on failure to take reasonable care would be flexible enough to meet any difficulty. Thus, there would not necessarily be a duty in every case to prevent animals from straying on to the highway or a duty to fence land adjoining the highway: whether such duties existed in any particular case would depend upon the whole circumstances, including the general nature of the terrain, whether or not such land was habitually enclosed, the existence or otherwise of warning notices etc."

It cannot be denied that the flexible principle of culpa lends itself admirably to the type of variable interest situation which is associated with animals on the road and the Committee is to be commended on advocating its application in this field.

In /

43 Walker, Delict in Scots law, p.650.
44 Law Reform Committee, Liability for Animals, Cmd.2185, p.6.
In respect of the two statutes prevailing in Scots Law with regard to animal liability the Committee proposes their retention but suggests that the Winter Herding Act be re-enacted in modern form and that the lien which it embraces should be extended to cover damage to land, graining crops and gathered crops and that a procedure should be formulated enabling an animal which is subject to the lien to be sold. As to the Dogs Act the Committee recommends that its provisions should be extended to include the liability of the keeper of a dog as well as to its owner and so as to furnish a defence to anyone shooting a dog in defence of livestock or poultry.

From a general point of view the report is commendable in that its recommendations are clear and if implemented would at least ensure a workable and straightforward basis for the operation of the law. It is felt however that the Committee has not been correct in advocating the ordinary law of negligence as a foundation for liability by animals which, this writer believes, warrants, in the majority of cases, a form of strict liability.

45 The Winter Herding Act 1686, c21 and The Dogs Act 1906 as amended by the Dogs (Amendment) Act, 1928.
CHAPTER V

SOUTH AFRICAN LAW

The Actio de Pauperie

As indicated in the chapter on Roman-Dutch Law the actio de pauperie was adopted into that system from the Roman Law and it can now be confidently stated that the action was part and parcel of the Roman-Dutch Law which first prevailed in South Africa with the coming of van Riebeeck in 1652. Until 1927, however, the position of the actio de pauperie in South African Law was a matter of controversy. In Serfontein v. Peterson plaintiff alleged damage to his ostriches by dogs and based his claim foursquare on defendant's ownership of the offending animals making no allegation of culpa. Herein the Supreme Court upheld a magistrate's decision in favour of the plaintiff. Another instance of damages awarded in the absence of culpa in an early animal case is le Roux v. Fick which was for many years the locus classicus on the subject Smith J., having performed a comprehensive review of the authorities. This decision received the approbation of the full court in Drummond v. Searle where De Villiers C.J., stated /

1 Chapter III pp. 92 et seq.
3 1876 Buck. 103.
4 Ownership being the basis of liability in the actio de pauperie. See Chapter III pp. 85 et seq.
5 1879 Buck. 29.
6 Ibid., p. 8.
stated the law as follows:

"I do not wish to say anything that would interfere with the established doctrines of this court in regard to injuries done to (by?)' animals. There can be no doubt that the ordinary rule is that where a person's dog injured another person's animal the owner of the dog is liable; but all the authorities which laid this down must be taken with this limitation - that the animal injured was lawfully at the place where it was injured."

The early case of *Nel v. Halse* also found ownership of the offending animal the appropriate touchstone for liability and no "exception was taken or criticism offered". In 1882 the High Court of Griqualand West decided the case of *Storey v. Stanner*. The headnote reads as follows:

"A person lawfully on the premises of the owner of a dangerous animal, who without any substantial negligence or imprudence on his part is injured by the animal is entitled to recover damages for the injury sustained."

In this case Buchanan J.P., reiterated the law as laid down in *Drummond v. Searle* and his brother Laurence J., said that by the law of the colonies *pauperies* was actionable regardless of *sciente* provided that there is no negligence or imprudence or other impropriety of conduct on the part of the plaintiff. Laurence J., again examined the law a few years later in a case in /

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8 6 S.C. 275.
10 1 H.C.G. 40.
11 Surely 'imprudence' contrast *O'Callaghan's case*, 1927 A.D. 310 at pp. 326 and 329.
12 1879 Buck. 6.
13 *Cowell v. Friedman & Co.*, 5 H.C.G. 22.
in which the plaintiff had been knocked down by a runaway horse which he alleged the defendant had negligently permitted to escape from control. As an alternative to proof of negligence the court held that there must be:

"some vicious, perverse, or unwarrantable behaviour on the part of the beast constituting pauperies, and for which the owner is therefore liable." 14

Despite these precedents the Cape Court took the view in Parker v. Reed 15 that the actio de pauperie was obsolete in South African law because noxal surrender was obsolete. Herein the owner of a horse which had kicked and injured another was sued for damages. Negligence was alleged but not proved and it was held that in view of the general practice in South Africa and on account of the fact that no attempt had even been made by a defendant to avail himself of noxae deditio, the actio de pauperie had become obsolete and the defendant could not be held liable in the absence of culpa.

The confusion introduced by the last mentioned case is reflected in the judgment of the Appellate Division in Robertson v. Boyce 16 where although the majority of judges rejected scienter and, in obiter dicta, referred to a rule of strict liability in Roman-Dutch law, the courts findings are based entirely upon negligence (post). In 1927 the Appellate Division were given an

14 Ibid.
15 (1904) 21 S.C. 496.
16 1912 A.D. 369.
an opportunity to settle the matter when they were confronted with an appeal in a case wherein plaintiff's nursemaid had gone to defendant's home to visit a maid employed there and taken plaintiff's two year old son. In defendant's maid's quarters the child was placed on a bed already occupied by three Highland terriers, the property of the defendant. The terriers became excited when defendant's maid produced a leash and one of them bit the plaintiff's child on his leg. The Appellate Division upheld the lower court's finding that despite the absence of negligence on defendant's (or his servant's) part, he, as owner of the dogs, would be liable in a pauperian action were it not for the fact that plaintiff's nurse had not taken proper care of the child and thus negligently contributed to the injury. So the decision in Parker v. Reed\(^{17}\), insofar as it tended to establish that the owner of an animal is not liable for contra naturam damage by his animal, was rejected but the Appellate Division did confirm that noxal surrender had fallen into obsolescence.\(^{18}\) So, following O'Callaghan v. Chaplin, the position of modern South African law is that the actio de pauperie prevails, shorn of noxal surrender and the effect is to place animal owners in a far less enviable position than they were in Roman Law - strict liability /

\(^{17}\) (1904) 21 S.C. 496.  
\(^{18}\) 1927 A.D. 310.
liability being a far more serious matter than it was in early times.

Before proceeding to examine the various requirements of the actio de pauperie in South African law there is justification for referring to the summary of the action by De Villiers C.J., in a case decided by the Appellate Division shortly after O'Callaghan N.O. v. Chaplin. The following points appear from the summary made by that learned Judge:

1. The actio de pauperie is in full force in South Africa. But noxal surrender is obsolete.
2. The action is based upon ownership. Scienter is not part of South African law.
3. The action lies against the owner in respect of harm done by domesticated animals, e.g. horses, mules, cattle, dogs etc., acting from inward excitement (sponte feritate commota). Such damage is said to be caused contra naturam sui genereis.
4. The idea behind the action was to render the owner liable where there was fault attributable to the animal.
5. If the animal was provoked and so its act was not due to vice the action does not lie.
6. If the fault lies with the injured party himself he cannot recover, e.g. provocation or unlawful entry onto another's property.

20 1927 A.D. 310.
property despite notice in regard to a fierce animal.

7. Stroking or petting a horse is not considered provocation (conictatio).

8. The action does not lie if the animal was provoked by a third party.

9. The action does not lie if the injury was due to casus where nobody can be considered to blame.

The action will now be considered under the following three heads Elements, Defences and Miscellaneous provisions.

Elements

(I) The modern actio de pauperie applies only to domestic or domesticated animals such as horses, mules, pigs, dogs, cats etc.

(II) The animal must have acted contra naturam sui generis. The historical evolution of this requirement has already been traced in the chapter on Roman Law but the problem is to determine the legal connotation of the phrase in modern South African law. De Villiers C.J., in his above mentioned dicta states that the animal must act from inward excitement or vice to constitute conduct 'contra naturam sui generis' which will be present when the animal's behaviour "is not considered such as is usual with a well behaved animal of the kind". The facts and findings of the case /

22 Chapter I pp.7 et seq.
case De Villiers C.J., pronounced upon warrant consideration. The plaintiff, passing a stationary wagon to which four mules were harnessed was kicked by one and fell under a moving tram thereby sustaining severe injuries. It was held that a person passing a draught animal in a city street is entitled to assume that the animal is accustomed to the ordinary noises of the city and if the animal is upset by such noises and injures a pedestrian it must be held to have acted from inward excitement; the cause of injury not being the noise but the innate wildness of the animal, so the action de pauperis will lie for recovery of damages.

In his judgment De Villiers C.J., speaks of behaviour 'not considered such as is usual with a well behaved animal of the kind' (supra) which clearly imports an objective criterion going beyond 'natural behaviour'. Laurence J., makes the same implication in Cowell v. Friedman:

"but when an ox goes, the act may be regarded as a breach of the good behaviour that is its second nature", and later in the same case:

"some vicious, perverse, or unwarrantable behaviour." 27

In a recent case the Appellate Division approached the definition of 'contra naturam sui generis' in a more literal way, so where the

26 5 H.C.G. 22 at p.44.
27 Ibid., p.53.
28 Coetzee and Sons v. Smit and Another, 1955(2) S.A. 553 (A.D.)
the plaintiff, owner of certain ewes, sued a neighbouring farmer whose rams had broken through the common fence and served his ewes. The court held the *actio de pauperie* inapplicable for to mate at the right time is, where animals are concerned, *secundam naturam*. It could surely be contended that the rams were motivated by inward excitement and on an extreme objective good behaviour standard could have involved their owner in pauperian liability. Although the philandering rams' conduct could not be regarded as perverse it might, perhaps, have been unwarrantable promiscuity and thus, from a highly artificial standpoint, it could be adjudged as contrary to the conduct norm of a well behaved animal of the kind. In this case van der Heever J.A., stated that he did not consider it to be against the nature of a domestic trek-beast to eat a farmer's green forage:

"Die makheid van die trekdie het nie betrekking op sy eetgewoontes nie: die van die hond wel." 29

In clear conflict with this *dictum* is that of Jansen J., in the case of *Maree v. Diedereeks* 30, to the effect that it is *contra naturam* for a hungry dog to kill chickens. In this case it was held that an allegation of 'contra naturam sui generis' is a necessary inference to draw from the statement that a dog has entered upon plaintiff's premises and attacked and injured certain eleven hens and one rooster. If the dog in the case had stopped at /

30 1962(1) S.A. 231(T) at p.237.
at one chicken and made a meal of this it would certainly have been difficult to adjudge the animal's conduct any more contra naturam sui generis that the behaviour of the philandering rams in the earlier case. From the decided cases it appears that there are at least three possible meanings to the phrase:

(i) simply against the nature of their kind. This cannot, however, be squared with *Maree v. Diedericks* for it would be fallacious to say that it is contrary to the nature of dogs to kill poultry.

(ii) that the animal acted from inward excitement or vice.

This is difficult to reconcile with *Coetzee and Sons v. Smit and Another* and is unworkable insofar as it raises impossible questions of animal psychology. McKerron seems to regard this possible interpretation of contra naturam as a sine qua non of the action.

(iii) that the animal merely indulged in ferocious conduct contrary to the controlled behaviour normally expected of domesticated animals. This is, it is submitted, the only interpretation on which it is possible to reconcile *Coetzee and Sons v. Smit and Another* and *Maree v. Diedericks*. Hunt describes this interpretation as follows:

"The /

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31 *Coetzee and Sons v. Smit and Another*, 1955(2) S.A. 533 (A.D.)
32 Note 30 supra loc. cit.
33 Note 32 supra loc. cit.
"The contra naturam concept seems, in fact, to have come to connote ferocious conduct contrary to the gentle behaviour normally expected of domestic animals. This imports an objective standard suited to humans. It is far more refined than behaviour literally natural to that species of animal. It is what Voet 9.1.4 means when he speaks of *animalia mansueta feritatem assumunt.* 36

The latest edition of Maasdorp 37 does not mention the two most recent cases on this matter but suggest that 'contra naturam sui generis' should be treated from two standpoints ...

"... in relation to man, every unprovoked act of a domesticated animal which causes a personal injury to a human being must be regarded as being an injury done by the animal contra naturam sui generis; but in relation to an injury to property which is the result of some act on the part of a domestic animal, irrational though it may be, the question whether the harm done was contrary to the nature of animals of that class must be determined by at least some considerations of imputability, or something equivalent to culpa in the conduct of the animal." 38

The writer has been unable to find any judicial support for this dichotomy.

In the light of the recent decisions only the approach of P.M.A. Hunt 39 is tenable and should, with respect be preferred to the alternative definitions of contra naturam sui generis. Hunt's definition covers, as he explains, the majority of cases the only real difficulty being encountered when some external force (not amounting to contributory negligence or the fault of a /

a third party) caused the animal to act ferociously, as in the case of the horse which sniffed the mule and kicked its groom or the broken shaft which caused the horse to bolt. According to Hunt's view the test in these cases should simply be "would a normal domestic animal have abandoned its tameness in the circumstances?"

When a dog runs into the street, barks at or 'attacks' a vehicle, and thereby causes an accident and ensuing damage, is the dog owner liable under the pauperian law? Although the majority of cases on this type of situation have been presented and decided on Aquilian principles there does not seem to be any reason why a pauperian action would not be competent if the canine conduct constituted 'contra naturam sui generis'. In *Double v. Delport* the court intimated that a pauperian action would have been an appropriate means of obtaining relief in a case where a fierce fox-terrier actually chased the unfortunate plaintiff cyclist and caused him to come to grief by charging at and attempting to bite the bicycle. As the episode took place in a quiet Pietermaritzburg street the plaintiff failed in his Aquilian action. Hunt is also of the opinion that the plaintiff would probably have succeeded if his action had been founded on ownership /

41 D9.1.5 and Voet 9.1.5.
42 Cowell v. Friedman and Co., 5 H.C.G. 22.
44 Ibid.
ownership rather than negligence.

On the question of onus relative to 'contra naturam sui generis' it seems that the correct approach is for the plaintiff to prove that the animal attacked him in circumstances which infer ferocity and that the onus is then on the defendant to establish some defence - e.g. that the plaintiff was a trespasser or that he provoked the animal. In a pauperian action it is not necessary for the plaintiff specifically to plead contra naturam sui generis as it suffices if the allegation is implicit as a necessary inference from the facts alleged. So in Maree v. Diedericks the court found that an allegation of contra naturam was a necessary inference to draw from the statement that the dogs 'had entered upon the plaintiff's premises and attacked and injured certain eleven hens and one rooster'. In this case it was also held that although the plaintiff had specifically pleaded negligence this had not misled or prejudiced the defendant and a finding of contra naturam sui generis was thus permissible.

(III) The attack must result in harm to the plaintiff's person or property. In Paul N.O. v. Rapaport the question of whether the actio de pauperie was open to defendants as a counterclaim arose but the matter was not decided because the court was able to /

\[\text{Hunt, More Bad Dogs, 1962 S.A.L.J. (73) 458.}\]
\[\text{1962(1) S.A. 231(T).}\]
\[\text{1930 W.L.D. 1.}\]
to hold that the animal had not acted contra naturam.

(IV) The defendant must have been owner of the offending animal at the time of the damage the authority for this being Butchon v. Crick which seems to have been overlooked by the author of Maasdorp when he intimates that the effect of transfer of ownership of the animal before summons has not yet been decided upon. In Butchon v. Crick the respondent had been gored by a bull which had acted contra naturam sui generis. Appellant contended that he was not liable for the damage done by the animal because although he was owner of the animal at the date of the occurrence complained of he was not the owner at litis contestatio. Held, dismissing the appeal, that as noxal surrender and the accompanying doctrine of noxa sequitur caput had disappeared from South African law, liability does not attach to the owner at the date of litis contestatio but to the person who owned the animal at the date when the damage was done.

Defences

(I) That plaintiff was at fault in relation to the incident insofar as he provoked the animal or in some way acted imprudently or

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49 In Roman and Roman-Dutch law it was a defence for the owner to establish that he had ceased to be owner before the action was instituted Chapter I p.10.
50 1941 N.P.D. 19.
51 Hall, Maasdorp's institutes of South African law, p.49.
or negligently. Although this defence is actually a species of contributory negligence the Apportionment of Damages Act does not apply. The reason for this is that liability for 
apnuries
is based not upon fault but on ownership and the damage cannot therefore be construed as having been caused by the fault of the defendant. O'Callaghan N.O. v. Chaplin, the facts of which are set out above is an example of fault attributable to the plaintiff as is the case of Harmse v. Hoffman wherein plaintiff, lawfully in a public place, inadvertently trod on defendant's dog. When the animal yelped plaintiff stooped down to administer a placatory pat and the dog bit him. Held that plaintiff's conduct was imprudent in the circumstances and he only had himself to blame for the injury. De Waal J.P., said:

"for it is natural that a dog, already excited by an injury, would snap at a person, a stranger, who immediately after having caused it pain, stooped down to stroke it." 57

According to the obiter dictum of De Villiers C.J., in S.A.R. and H. v. Edwards stroking or petting a strange horse does not necessarily amount to imprudence sufficient to preclude the plaintiff from succeeding. This limitation also applies to injury caused by one animal to another. So, if two animals engage in a /

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52 No. 34 of 1956.
54 1927 A.D. 310.
55 Supra p. 172.
56 1928 T.P.D. 572.
57 Ibid., p.575.
58 1930 A.D. 3.
59 McKerron, The Law of Delict, p.239.
a fight and the one that started the fight is killed, no action will lie against the owner of the defending animal. In the same way where an animal is injured or killed at a place where it had no right to be the owner is precluded from obtaining damages this case being included under 'plaintiff's fault' rather than 'trespass' because the fault of the owner is relevant in allowing his animal to stray.

(II) That the fault lies with a third person or third animal. The action is not available if the fault is attributable to someone other than the defendant or to an animal which does not belong to the defendant. In this sort of case the injured party's remedy is an action against the third person or owner of the third animal under the *lex Aquilia*.

(III) That the damage caused was attributable to an accident due to *casus fortuitous* or *vis major*, as for instance a horse which bolts when frightened by lightning.

(IV) That the plaintiff or his animal had no lawful right to be at the place where he was injured. The ingredients and extent of this defence have received the attention of the courts in a line of cases commencing nearly a century ago. In *Drummond v. Searle*.  

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60 *D.9.1.1.11.*  
64 *Gane, supra loc.cit.*  
65 *Cowell v. Friedman & Co.*, 5 H.C.G. 22.  
66 1879 Buck. 8.
Searle the court recognised a limitation to an animal owner's liability which it held to be subject to the proviso that:

"the animal injured was lawfully at the place where it was injured." 67

In Watson v. Absche the Transvaal Provincial Division attempted a more exact formulation of the defence. Held herein that an individual who goes upon the land of another to ask the way is not lawfully on that land for the purposes of being entitled to maintain an action based on pauperies; he is a trespasser in the wide sense. In this case the word 'trespasser' does not refer to a person against whom damages for trespass could be recovered by the owner, but an individual who had no legal right to be there, the test of such legal right, in the absence of an express invitation is not whether the plaintiff entered for a lawful purpose, e.g. to enquire directions, but whether there was a tacit invitation from the owner to him to come upon the premises for that purpose at the time when he did.

The question of whether a person, in the position of the defendant in Watson's case might be regarded as having been tacitly invited if he went to plaintiff's property for the same purpose in the day time was left open. In Nicholson v. Morrow, 69 however, decided ten years later by the same court, the small child of plaintiff /

67 Ibid.
68 1931 T.P.D. 499.
69 1942 T.P.D. 315.
plaintiff, a trespasser in the wide sense, (supra) was bitten during the day by defendant's dog. Held that plaintiff was not entitled to recover under the pauperian action. In Veiera v. van Rensburg, defendant kept a fierce dog to protect his wife and children. Plaintiff entered to ask for directions and while speaking to defendant's wife the dog rushed up and bit him. Held that plaintiff was not entitled to succeed under the actio de pauperie because he was not lawfully on appellant's land at the time when he was injured. Plaintiff's alternative claim based upon negligence succeeded (see post). McKerron is not satisfied that these decisions are correct:

"The idea originally underlying the pauperian action seems to have been to impose liability on the owner only in cases where no one was to blame for the injury, and the fault so to speak lay with the animal. This idea will be found to be at the root of all the limitations on the owner's liability. It is submitted, therefore, that the owner should not escape liability unless the plaintiff entered upon his premises for an unlawful purpose; for a person who enters for a lawful purpose cannot be held to blame for the injury, unless of course, it is shown that by his negligence or imprudence he directly contributed thereto." 71

This limitation of an animal owners strict liability in cases where the plaintiff is injured on the property of the defendant exceeds the limit of liability in the general South African law /

70 1942 T.P.D. 315.
law of occupiers liability for dangerous property. In the latter branch of the law if the presence of trespassers could reasonably be foreseen, then a duty to take reasonable care to prevent injury to persons trespassing on the property is imposed. The limitation of the *actio de pauperie* is difficult to justify especially considering that a claim based on the *lex aquilia* (on the same facts) is not limited by the wide definition of trespass. It is submitted that McKerron's criticism is valid.

**Miscellaneous Provisions**

In the early case of *Grier v. Miller* the plaintiff was awarded damages under the pauperian law in respect of the indirect consequences of an attack by defendant's dog which had caused plaintiff's horse to bolt with a result that the plaintiff was injured.

It is not necessary to specifically plead *contra naturam sui generis* in a suit under the *actio de pauperie* it suffices if the allegation is implicit as a necessary inference from the facts alleged. In *Maree v. Diedericks* although the plaintiff had actually pleaded negligence this had (according to the court) not misled or prejudiced the defendant so the court found that an allegation /

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73 Post pp. 196 et seq.
74 22nd August, 1887, Cape Supreme Court. Not reported but see Cape Times, 23rd August, 1887. Cited in Robertson v. Bovce, 1912 A.D. 339 at p. 364.
75 Maree v. Diedericks, 1962(1) S.A. 231(T).
76 Ibid.
allegation of contra naturam was a necessary inference from the statement that the dogs 'had entered upon the plaintiff's premises and attacked and injured certain eleven hens and one rooster'. The matter of prejudice to the defendant is obviously important and it is submitted that there would be no justification for a finding on the pauperian law for the plaintiff in a case where the claim was demonstrably based on the lex Aquilia and the defendant had pleaded accordingly - thus neglecting the possibility of a special plea applicable to the actio de pauperie.

The actio de pauperie lies against the state, this was decided in the case of South African Railways and Harbours v. Edwards.

The Actio de Pastu

The background to this action is illustrated in the earlier chapters on Roman and Roman-Dutch law.

Until recently no case was reported in which this action had received the recognition of the South African courts and McKerron in the 1959 edition of his book intimates that the action has fallen into obsolescence by reason of being superseded by modern pound laws. In 1955, however, the Appellate Division in

77 Geldenhuis v. Wilson, 1949(4) S.A. 534(T).
78 1930 A.D.3.
79 Supra Chapter I, pp. 15 et seq., and Chapter III, pp. 114 et seq.
In dealing with the 'philandering rams' case intimated (obiter) that the *actio de pastu* had no application to the facts before it and thus indicated that high judicial opinion were willing to consider the action as viable in modern South African law and not merely as an antique solely of historical interest to posterity. The court in *van Zyl v. Kotze* unhesitatingly found that the *actio de pastu* was still part and parcel of South African law and rejected the argument that same had fallen into disuetude.

McKerron rectifies the earlier statement in the latest edition of his book. In this case the plaintiff claimed damages for loss sustained when four calves belonging to the defendant strayed into her garden and ate off certain rose bushes. The calves were sent to the pound and defendant paid for their release and undertook to pay for such damages as he was liable for. After the calves were released defendant denied liability. Plaintiff did not rely upon negligence in her action. De Wet J.P., quotes Smith J., in the early case of *le Roux v. Fick* where the latter states that the *actio de pastu pecoris* was available in Roman law, under the Twelve Tables, for damage caused by ordinary animals *mansuetae naturae*, which according to their natural disposition, depasturize another.

82 Coetzee and Sons v. Smith and Another, 1955(2) S.A. 533 A.D.
83 1961(4) S.A. 214(T) and 1962 S.A.L.J. and (73) 5.
85 1879 Buck. 29.
another man's herbage. Smith J., stated that the Roman-Dutch law was the same on this point and thus de Wet J.P., adopts it as implicit that this was the law when Smith J., wrote his judgment. De Wet J.P., accordingly held that he could find no justification for holding that the action had fallen into disuse especially as the analogous action on pauperies was still part of the law.

This action entails strict liability cuonad the owner of a domestic animal which causes damage by depasturization. It is submitted that in modern South African law it should be read in conjunction with the pound laws which provide for statutory relief and it is probable that the plaintiff will only have an action if the offending animal has not been impounded. The details of the action have not been fully developed in modern South African law but it is reasonable to assume that until there is competent judicial authority to the contrary the principles as enunciated by the Roman-Dutch authorities can be taken to apply. From the early law it appears that the actio de pastu covers the epicurean rovings of almost all domesticated animals, but, paradoxically excludes poultry which are probably the least gastronomically refined and accordingly the most common offenders.

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86 Supra Chapter III, p.114 et seq.
The Aedilitian Action

A Roman Law edict prohibited the keeping of wild animals at or near a public place and imposed strict liability for damage done by them. The edict was adopted into the law of Holland but its position in modern South African law is a source of some controversy. So Innes C.J., in O'Callaghan N.O. v. Chaplin, said:

"It is not necessary for the purposes of this case to decide whether the Aedilitian principle is still in force with us; but I desire to guard myself against being taken to imply that it is not. I have refrained from discussing it because the incident with which we are concerned did not occur in a public place ..."

and later in the same case Wessels J.A., expressed a more positive view:

"I have very grave doubts whether the police regulations of the Romans can be said to be in force under our present conditions. The whole liability is based on the transgression of a public measure. If there is no such police measure at present the liability of a person who brings a vicious dog that does damage on the market place or street will depend entirely on whether there was or was not culpa on his part. I do not think anyone can be prosecuted now-a-days for bringing his dog on the street or on a railway station with the intention of sending it elsewhere by train. However, this enquiry is not necessary for our decision for even if the Aedilitian action were in force it does not apply in the present case."

Evidently /

87 Supra Chapter I, pp. 11 et seq.
88 Supra Chapter III, pp. 110 et seq.
89 1927 A.D. 310 at p.330.
90 Ibid., p.330.
Evidently the early case of *Roux v. Fick* was decided on the principle of the edict and this case is probably the basis for Innes C.J.'s, cautious statement. Innes C.J., describes the judgment of Smith J. in *Roux v. Fick* in the following manner:

"He decided the dispute by applying the principle of the Aedilitian Edict - for the dog had been brought onto a public road, and had there killed an ostrich in a public place."

McKerron cites Innes C.J.'s first quoted statement as authority for the proposition that the Aedilitian law is still in force in South Africa to-day. With respect this seems to attribute too great a degree of weight to the *obiter dictum* of the Chief Justice. Despite *Roux v. Fick* it is impossible to assert with confidence that the ancient remedy still applies especially considering that the remedy was last employed, in South Africa, nearly ninety years ago and then only by a single judge court.

McKerron proceeds to state that he does not consider the Aedilitian action to be of any practical import, for if the edict is restricted to vicious or ferocious dogs (he does not mention wild animals which were also included) and not to dogs in general, almost every case will be covered by the *lex Aquilia* or *actio de pauperie*. Considering the high duty (almost equal to insurance) which the courts are likely to place upon the keepers of ferocious animals /

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91 1879 Buck. 29.
93 Ibid., p. 330.
95 1879 Buck. 29.
animals - especially if kept near public places, McKerron is probably correct in assessing the Aedilitian action as a potential fifth wheel to the wagon.

**The Lex Aquilia**

The *lex Aquilia* which is the cornerstone of the general principles of Delict in South African law is clearly a competent basis for an action in cases involving damage or injury by animals. A similar position prevailed in Roman and Roman-Dutch law. Liability rests upon the ordinary principles of the Aquilian law and therefore to succeed the plaintiff must prove *dolus* or *culpa* on the part of the defendant (who obviously need not be the owner of the animal). It is common to plead the *lex Aquilia* as an alternative to an action based on the *actio de pauperie* or *pastu* and in this way it can provide a residual remedy. There are circumstances when the *lex Aquilia* is the sole remedy applicable to particular cases and McKerron, with respect correctly, refers to these as:

"(1) harm done by a domesticated animal falling outside the scope of the pauperian action and the *actio de pastu*, and (2) harm done by a wild animal falling outside the scope of the aedilitian action."

Although the basic principles of Aquilian liability do not differ

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97 *Supra* Chapter I, pp. 19 *et seq.*
98 *Supra* Chapter III, pp. 105 *et seq.*
with the circumstances of the cases it is convenient to consider accidents on the road separately, for here, it is submitted, certain policy considerations are relevant. All cases, besides those arising from accidents on the road, will accordingly be dealt with initially.

To succeed in a suit under the lex Aquilia, culpa on the part of the owner or person in charge of the animal, must be proved affirmatively. According to McKerron, however, in the case of harm done by an animal of a kind which is by nature vicious, there is a presumption of culpa. McKerron refutes the possibility of any analogy to the English law in this respect.

"The distinction here is not between animals ferae naturae and animals mansuetae naturae but between animals normally dangerous, and therefore likely to cause harm, and animals normally innocuous, and therefore not likely to cause harm."

Only scant judicial authority exists in regard to the presumption of culpa and this writer is inclined to challenge the view that such a rebuttable presumption exists as a substantive rule in Aquilian suits arising from damage by animals which are normally dangerous. It seems more likely that questions of habitual viciousness or typical viciousness are merely possible aspects /

100 Wasserman v. Union Government, 1934 A.D. 228.
102 Ibid., p. 242.
103 Supra Chapter II pp. 44 et seq.
aspects of the proof of negligence which could obviously, depending upon the circumstances, be of considerable importance in a particular case.

According to McKerron, the operation of the presumption can be illustrated by cases. In *Wassermann v. Union Government* a widow sued following the death of her husband as a result of a bee sting from one of a swarm which had hived in a police station roof. The Appellate Division refused leave to appeal *in forma pauperis* from the Orange Free State Provincial Division on the grounds that the occupier of a building is in general under no duty to take steps to eradicate a swarm of bees which have hived in the roof of a building. The basis of the ruling being, in McKerron's view, that bees, although *ferae naturae*, are normally harmless, and thus no presumption of *culpa* arises against the keeper of them if they do injury to another. The court, in fact, at no stage referred to a presumption of *culpa* but merely held that in the circumstances there was no *culpa*. The case of *Klein v. Boshoff* involved a claim by plaintiff after she and her young child had been bitten by a meercat while at defendant's premises on his invitation. Defendant was held liable for both bites on the basis that a person who keeps a vicious animal such as a meercat on his premises is under a duty to ensure that it is /

105 1934 A.D. 228.
107 1931 C.P.D. 188.
is not a danger to persons lawfully there. The case of *Moubray v. Svfret* \(^{108}\) is also referred to by McKerron as illustrative of the *culpa* presumption. Herein the plaintiff, while relieving himself alongside a Rhodesian farm road, was gored by a bull; it was held that:

"The owner of a cattle farm in Southern Rhodesia, a cattle country with large open spaces, is not negligent if he allows his cattle to roam over his farm though such cattle may stray on a public road running across the farm and if a bull in his possession and accompanying such cattle injures a person lawfully using the road, the owner of the farm is not liable unless he knew or ought to have known that the bull was vicious."

This dicta comes perilously close to an assertion of *scienter* which can only be relevant as a factor to be considered in regard to the determination of *culpa* in South African law. Counsel in this case erroneously submitted that proof of *scienter* is a necessary ingredient of success under the *lex Aquilia* where damage is done by an animal, not *ferae naturae*. \(^{109}\) This is patently incorrect for the plaintiff is subject to no fetters in regard to proof of *culpa*. In this case the plaintiff would doubtless have succeeded in an *actio de pauperie* claim had he sued the owner of the bull and not the defendant who was merely a hire-purchase possessor and thus only potentiallyliable under the *lex Aquilia*. At no stage did the court in *Moubray v. Svfret* \(^{110}\) refer to a positive /

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108 1935 S. D. 199.
109 Ibid., p. 201.
110 Ibid., pp. 199 et seq.
positive presumption of culpa in regard to certain classes of animals. As is stated above this writer is not satisfied that sufficient judicial authority exists to add undeniable support to McKerron's thesis of a culpa presumption. It is perhaps surprising that the matter has not long since been settled for the lex Aquilia is the only appropriate basis in cases of damage by wild animals, the pauperian law being restricted to domesticated animals, and it is common place for wild or semi-wild animals to be kept as pets in South Africa.

In Veiera v. van Rensberg the plaintiff was precluded from succeeding under the actio de pauperie by reason of the fact that he was not lawfully on the appellant's land at the time he received the injury. His alternative claim, however, based on the lex Aquilia was successful and it was held that defendant owed a duty to care to an uninvited visitor and that a reasonable man would have foreseen the possibility of injury to a person in the position of the plaintiff. Defendant had failed to observe this duty of care.

This result thus contrasts sharply with the probable one in an action on the actio de pauperie where the plaintiff would be denied the right to recover damages by reason of his unlawful presence on defendant's property. It is rather paradoxical that /

111 1953(3) S.A. 647(T).
112 Supra p. 185 et seq.
that plaintiff's success in the Aquilian suit arises from defendant's duty in respect of the former's 'unlawful presence'. This case therefore presents the rather absurd position of plaintiff's success in the alternative claim being founded upon the very factors which precluded relief under the first alternative claim. In Coetzee and Sons v. Sait and Another it was held that relief in an action where defendant's rams broke through a boundary fence and served plaintiff's ewes depended on the lex Aquilia and to succeed it would be necessary for the plaintiff to prove that the trespassing of the rams was attributable to negligence on the part of their owner. Fourie v. de Preez also turned on the question of trespass. Herein plaintiff took a short cut through a fenced piece of ground belonging to defendant where he was set upon and injured by defendant's dogs; the ground in question was a considerable distance from defendant's dwelling house and used by him for grazing cattle. In evidence defendant stated that he kept the dogs as a precaution against trespassers who were wont to cross his land. The evidence indicated that on previous occasions people had been attacked by dogs. The plaintiff, who as a trespasser was precluded from obtaining relief under the actio de pauperie, succeeded in his Aquilian suit. McKerron is critical of the decision and states that although, in /

113 1955(2) S.A. 533(A.D.)
114 1943 T.P.B. 50.
in contrast to English law, South African law recognises that the occupier of property may owe a duty even to a trespasser he is still entitled to take reasonable precautions to protect his property against trespassers. In the circumstances McKerron submits that it is difficult to see what other measures the defendant could reasonably have taken to guard against the trespassers.

**Animals on the Road**

Regarding questions of liability arising from accidents occurring as a result of animals on the road the South African case law is not altogether satisfactory. In *Robertson v. Boyce* plaintiff travelling at twenty miles per hour on a motorcycle collided with defendant's English sheep-dog, which, according to the evidence, had run down from a bank barking and proceeded to cross the path of the cycle. Although evidence indicated that the dog was in the habit of indulging in this type of behaviour there was no suggestion that claimant was aware of this. Held, in a judgment from which two judges dissented, that plaintiff was not entitled to recover damages from the owner for loss to his motor cycle. Lord de Villiers C.J., saw the broad implications of the matter in this light:

"A /

116 1912 A.D. 367."
"A motorist or cyclist who chooses to travel at the rate of twenty miles per hour in a public thoroughfare where dogs are likely to be about does so at his own risk." 117

The Chief Justice stated that this operated against the negligence of the defendant who had allowed his dog to run into the public road despite the finding that he should have known of the propensity of dogs generally "to run after and in front of rapidly moving objects". 118 The members of the court in this case differed among themselves in applying the lex Amilia to the facts and it is accordingly impossible to extract any positive ratio from the decision. In O'Callaghan, N.O. v. Chaplin, Kotze J.A., indicated, obiter, that in certain circumstances the owner of an animal will be liable for damages arising from an accident caused by the presence of his animal on the road regardless of whether the accident was occasioned by an attack attributable to the animal or by its mere presence on the road. He furnished the following example:

"The case of a dog straying at night into the street, and going to sleep in the road; a motorist on his cycle, without any fault on his part, runs over the dog with the consequences that he loses his balance and is injured. Here there can be no doubt whatever that the owner of the dog will be liable, for it is his plain duty to keep his dog from being at large in the public street." 119

So /

117 Ibid., p.372
118 Ibid.
119 1927 A.D. 310 at p.368.
So to be found negligent, on this contention, the owner does not need to have actual knowledge of his particular dog's propensities. In *Double v. Delport* a fox-terrier chased a cyclist in a residential area of Pietermaritzburg and caused him to fall and sustain injuries. Held that the mere allowing of a dog on a public street does not amount to negligence on the part of its owner. According to De Wet J., herein the statement of Kotze J.A., in *O'Callaghan's case* was too widely stated.

In *Double v. Delport* the plaintiff would probably have succeeded if he had based his claim on the *actio de pauperie* instead of the general delict action. If Kotze J.A.'s *obiter dictum* in *O'Callaghan's case* is orientated too far in favour of roadusers that of De Wet J., in *Double's case* seems unduly indulgent of dog owners. De Wet J., apparently adopted the approach that in determining whether the defendant had been negligent the court should consider:

"the particular facts: notably the dog's past behaviour and the location of the street". 122

Hunt approves of this approach and writes:

"It is submitted that within the premises of the Aquilian action this approach is clearly correct. It would be hardly fair a priori to tar with the same brush of negligence the city and suburban possessors of *dolce* fox-terriers, tempestuous collies, elephantine St. Bernards and trap-jawed bulldogs /

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120 1949(2) S.A. 621(N).
bulldogs. If, as Kotze J.A., held, the mere
fact that an owner has permitted his dogs to
stray into a public road amounts to negligence
we should, in effect, have a curious new category
of strict liability." 123

With respect there is surely a case for strict liability relating
to dogs on the road in urban areas as a desire to prevent accidents
must outweigh the public policy background to a dog owner's un-
fettered right in respect of his animal and its access to the
road. The balance here turns full circle from the case of farm
animals on the road in remote agricultural areas where clearly
strict liability would the farmer's necessary animals would often
be repugnant to reasonable judgment. The writer is of the opinion
that it is not unreasonable to require a dog owner to ensure that
an animal which he brings onto, or permits access to a public
road, in an urban area does not behave in a manner dangerous to
lawful road users. If, as Hunt would have it, 124 the dogs past
behaviour is to be considered the absurd position would develop
where dogs might have one free chase - which could well be one too
many for the unfortunate motorist.

As for animals on the road in rural areas the dicta of the
A.D. in Houbray v. Syfret, 125 to the effect that the owner of a
Southern Rhodesian cattle farm was not negligent in allowing his
cattle /

123 Hunt, supra loc. cit.
125 1935 A.D. 199.
cattle to roam over the farm though they were likely to stray onto a public road traversing the farm, was probably the earliest important judicial pronouncement on the matter. In *Shapiro v. Castle Wine and Brandy Company Limited*, the plaintiff driving his car on a main road in the country collided with certain of defendant's sheep which suddenly rushed onto the road in an unusual manner. It was held that as it could not be said that a reasonable man in the position of the defendant should have foreseen that his sheep would behave in this manner the defendant had not been guilty of *culpa* in failing to take special pre-cautions against such behaviour and was thus not liable to the plaintiff for damage done to his car. The court in this case seems to have been painfully out of touch with the infinite possibilities of the behaviour of sheep and the correct approach would surely have been to ascertain whether defendant was negligent in the circumstances in permitting his sheep to graze on or near an unfenced main road. The tendencies of the South African Courts are demonstrably orientated towards the interest of the agricultur-;alists, although in *Nebel v. Eloff*, a case which is not strictly relevant because the animal owner was plaintiff, the duty of a motorist in cattle country was held not to extend to regulating his /

126 1939 C.P.D. 215.
127 1963(3) S.A. 674(T).
his conduct so that he would be able to avoid an accident if an animal or a number of animals suddenly emerged onto the carriage-way ahead of him from a place where they were previously not visible at a stage when he was very close to them. In van der Merwe v. Austin plaintiff was travelling on the national road shortly before sunrise when he collided with a horse belonging to the defendant. The accident occurred in an area where no statutory duty to fence prevailed and the horse with which plaintiff collided was one of four which had been roaming on and around the road in an unusual manner. Held herein that where a National Road traverses a farm in a 'cattle area' where cattle can be expected about the road the farmer owes no obligation towards traffic on the road in respect of any of his horses which may run across the road in an unusual manner. If the court had restricted itself to proclaiming the farmer's immunity in respect of his cattle which might chance upon the road the judgment might be defensible, but, with respect, to exonerate the farmer in relation to horses which may run across the road in an unusual manner seems an exemption of unwarranted latitude. After all the only justification for this type of immunity is the public interest in farming operations and a desire to permit these to be proceeded with, but if the rationale of van der Merwe's case were stretched it might excuse /

128 1965(1) S.A. 43(T).
excuse a farmer who had nurtured two young elephants and allowed them unfettered access to the National Road where they had caused an accident.\(^{130}\) The approach in the last-mentioned case received the stamp of approval of the Appellate Division in *Botes v. van Deventer*\(^{131}\) which, although concerned largely with the admissibility of evidence, also canvassed the alleged negligence of a farmer (the plaintiff) whose stud horses had been injured by defendant's lorry in an accident which occurred at night on an unfenced public road traversing plaintiff's fenced paddock, in which there was an opening (apparently for a gate), through which the horses had come onto the road. On the question of plaintiff's negligence the Appellate Division held that:

"it was unrealistic to expect the plaintiff in the circumstances to see that the horses were kept away from the unfenced portion of the paddock." \(^{132}\)

Rumpff J.A. clearly confirms the basic principle of van der Merwe's case:

"Nog is daar groot dele van die land, oorwegend landbougebied, waar met vee geboer word en waar publieke paailie wat nie afkamp is nie oor pleas gaan, en waar die gewone motoris sien en weet dat hy op n boer se plaas ry waar boerderybedrywighede pleeg, en waar van daardie bedrywighede is dat vee in die nag (net soos in die dag) toegelaat word, en dikwels toegelaat moet word, om vry rond te loop en te weel. Nog het die tyd nie aangebreek nie en suike bedrywighede te beperk, vir anti-deliktuele doeleindes /

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\(^{130}\) Carey Miller, *Animals on the Road*, (1969) 66 S.A.L.J.
\(^{131}\) 1966(3) S.A. 162 (A.D.)
\(^{132}\) Ibid., p. 163.
The danger of these two decisions is that they may go towards establishing an inflexible immunity in favour of farmers as Searle v. Wallbank did in England. 134

The courts approach Aquilian suits of this type from a different standpoint when the road is fenced. Statutory duties aside it was held in Careejees v. Carnarvon Municipaliteit en 'n ander that once a fence has been erected alongside a public road it is the duty of the owner to see that the fence is effective in so far as this can be reasonably achieved. In this case the plaintiff claimed damages after his car had collided with a calf, belonging to the defendant farmer, which had jumped through a hole in the fence alongside a public road. Bayer J.P. stated the law as follows:

"waar eenmaal 'n heining ..., ongerig is lanks 'n openbare pad, die die plig is van die eienaar van daardie heining om te sorg dat die heining doeltreffend is in soverre dit redelikerwyse gedoen kan word en om die strappe te seem, wat 'n versigtige redelike man onder die omstandighede so geseem het om te sorg dat hy heining aan die doel beantwoord waarvoor hy daar is." 136

In Kruger v. Coetzee the case turned on the question of whether
the defendant had failed in his duty to keep a gate closed when a horse had jumped through into the public road and caused an accident, it being common cause that:

"a *diligens paterfamilias* in the position of the defendant would have foreseen the possibility of his horses straying through the open gate on to the main road and causing damage to motor cars which might collide with them."

The Appellate Division reversed the decision of the Eastern Cape Division in *Coetzee v. Kruger* and found for the defendant.
CHAPTER VI

SOME OTHER SOLUTIONS CONSIDERED BRIEFLY

In Germany the matter of liability for animals is dealt with by two sections of the German Civil Code dated 1900. Sec. 833 imposes strict liability upon the keeper of an animal which kills or injures a person or damages property. If, however, the damage is caused by a domestic animal "which is to serve the calling, occupation or support of the keeper" the keeper is immune from liability unless he failed to observe "the standard of care required in everyday interactions". Subject to the proviso that even if the keeper did fail to observe that standard of care liability will not arise if the damage would have been caused regardless of the observance of the requisite standard of care. In short the section introduces strict liability for the keepers of all types of animals subject to two exceptions applicable to the keepers of domestic animals who use these animals for purposes connected with their occupation; viz: (i) immunity if the keeper observed the requisite standard of care; (ii) immunity if the injury or damage would have occurred in any event regardless of the exercise of the reasonable standard of care. Cohn refers to

1 Secs. 833 and 834.
2 Acknowledgements to Herr Erich Schanze of Frankfurt and Harvard for this and subsequent translations.
the rule enunciated in sec. 833 as "A genuine case of responsibility for risks". According to the same author the proviso which limits:

"culpability in the case of domestic animals, intended to serve the keeper in his profession or business or otherwise for his maintenance" is the result of an amendment effected by a law passed on 30th May, 1908.

Cohn's assessment of this rule as "responsibility for risk" is justified for the strict duty to compensate is strongly worded and von Mehren translates it as:

"is bound to compensate the injured party from any damage arising therefrom".

Sec. 834 of the B.G.B. provides for the liability of a party who, under a contract, "receives the exercise of control over an animal on behalf of the keeper". Liability is strict in the same field of injury or damage enunciated in sec. 833.

Two exceptions apply in favour of the contractor; rather surprisingly regardless of the type of animal - so the contractor of a wild animal benefits from these exceptions. The exceptions are: (i) immunity if the contractor, while exercising control, observed the standard of care prescribed in sec. 833 in regard to domestic animals which serve the occupation of their keeper (supra)/

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3 Cohn, Manual of German Law, p.164, para. 328.
4 Ibid.
(supra) and (ii) immunity if the injury or damage would have occurred in any event regardless of the exercise of the requisite standard of care.

Although the standard of care required for a contractor to escape the basic strict liability is the same as that employed in sec. 833 in respect of domestic animals which serve the occupation of their keeper it should be noted that in the contractors case the immunity applies to all types of animals including wild ones. This, it is submitted, is not as significant an inroad into the strict liability rule as might first be judged. Clearly contractors of wild animals will not be numerous and in any case 'the standard of care required in everyday interactions' will obviously be more onerous in respect of a wild animal as opposed to a domesticated one.

Who is the keeper of an animal for the purposes of the German Civil Code? Probably the individual who keeps a domestic or wild animal in his house or on his property, or keeps and/or uses one in connection with his occupation. The identity of the keeper is to be ascertained by considering the existence of some nexus associating the harmful animal with some person. The link may exist as a domestic connection or take the form of economic enterprise. According to one German legal authority three factors operate:

6 Enneccenius-Lehmann, Recht Der Schuldverhältnisse, sec. 253, IV,3, p.1017.
operate to constitute the identity of the "keeper". These are as follows: (i) his own material interest (either domestic or economic) in the animal. Ownership or physical custody is not essential; (ii) the fact that he has kept the animal or intended to keep it for a reasonable time; (iii) the fact that he has control over the animal. This does not connote direct physical control or custody but merely control at the relevant material time.

Third party intervention is a good defence to the strict liability imposed by the sections of the German Code.

In certain circumstances the holders of hunting rights are held strictly liable for all damage to landed property by animals or birds in respect of which the rights exist. So in terms of sec. 29 of the Bundesjagdgesetz hunters (or the corporate entity of their association) are absolutely liable for all damage to landed property caused by certain species of game which stray or fly from the particular assigned area and cause damage.

Broadly speaking German Law imposes strict liability upon the keeper for harm done by his animal. To safeguard the individual whose livelihood may depend upon the keeper/animal relationship liability is precluded in certain cases (supra). The German Law /

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8 Cohn, Manual of German Law, p. 164, para. 328.
9 Ibid.
Law has gone far to justify the imposition of strict liability by ensuring that final responsibility rests with the individual who has the greatest interest (and accordingly owes the greatest reciprocal responsibility) in the animal. This is logical and, perhaps more satisfactory than systems which assign responsibility to the owner - who may well be a mere figurehead. On the other hand if insurance is considered a relevant factor weight is added to the argument that the owner should be liable for he is clearly best able to insure. So American strict liability 'dog bite' statutes lay responsibility at the door of the owner.

In the Netherlands the matter is currently covered in the Burgelijkwetboek which imposes strict liability upon the owner of an animal if he 'uses' it himself whether it is under his supervision and custody or otherwise and even if it has lost its way or escaped. According to judicial interpretation, however, the onus is on the animal owner to prove that he was not at fault. This article in the Netherlands Code is apparently based upon the Code Napoleon and the shift of onus aspect was adopted from early French interpretations where the device was also employed as ancillary to the counterpart French article. Thus the Authors of /

10 E.g. California Civil Code, sec.33+2. Post p. 222.
11 1404.
13 Article 1385 of the French Code.
of Amos and Walton say of the French Law:

"For long this article was interpreted as establishing a rebuttable presumption of fault. In the latter part of the nineteenth century, however, the Court of Cassation held that proof of absence of fault was not enough to rebut the presumption; the defendant had to show that there had been force majeure or that the victim himself had been at fault." 14

In the Netherlands article 14:04 is still interpreted as establishing a rebuttable presumption of fault (in the same way as the counterpart French article was treated in early interpretations) and the animal owner is absolved of liability if he proves that he observed the reasonable standard of care required by everyday interactions.

The authors of the Draft for a new Netherlands Civil Code 15 advocate changes to the law on this matter. So the appropriate sections in the translation of draft code read as follows:

"1. A person who keeps an animal is liable for the damage caused by the animal in so far as by virtue of the foregoing articles he would have been liable if he had been able to control the behaviour of the animal. 2. Without prejudice to the provisions of article 4, he has recourse against the person who by virtue of the foregoing articles is liable to the injured party. 3. The owner of an animal is presumed to be the person who keeps it."

In terms of the final section under the new draft the owner of /

15 Unofficial translation of the Draft of a New Netherlands Civil Code 6.3.11.
of an animal is presumed to be the person who keeps it. This obviously does not go as far as stating that the 'keeper' is the owner but would probably operate to establish a presumption to that effect. Again, the full implications of the proposed law will only become evident after comprehensive judicial interpretation.

As stated earlier the currently operative Netherlands law (Art. 1404 Burgelijkwetbook) was modelled on the French law where in terms of Article 1385 of the Code:

"the owner of an animal, or the person making use of it, while it is at his service, is responsible for the damage which the animal has caused, whether it was under his care or had strayed or escaped from it." 16

It is also indicated above that the rebuttable presumption of fault interpretation only prevailed until the latter part of the nineteenth century when the Court of Cassation held that mere proof of absence of fault was unsufficient to rebut the presumption 17 and that it was necessary for the defendant to establish force majeure or the plaintiff's fault. 18 So in terms of current interpretation the rule in France represents a very real form of strict liability. Ownership of the offending animal is not the criterion of liability in French Law for the person /

17 Civ. 16.6.1896, S. 1879.1.17, D. 1897.1.433; all cited in Amos and Walton, supra loc. cit.
18 Civ. 27.10.1885, D.P. 1886.1.207, S. 1886.1.33, Les grands arrets, no. 112; Civ. 8.1.1894, D.P. 1894.1.403; all cited in Amos and Walton, supra loc. cit.
person liable is the one who is 'making use of the animal'. While it is presumed that the owner is in this position of responsibility the presumption can be discharged by an owner who proves that another party was in fact 'making use of' the animal. Whoever, in fact, enjoys the rights of control, command and utilization of services is deemed to be making use of the animal. So a hire-purchase possessor would be liable under French law in contrast to his equivalent in South Africa who would not be subject to the strict Pauperian action. Logically enough the rule cannot apply to wild animals until they are appropriated into ownership but then it operates without reference to any special conditions relating to wild animals. Belgian and Italian legislators have followed the Code Napoleon closely and have also imposed a rule amounting to a form of strict liability. Henderson, writing in a Scottish law journal, indicates that although the doctrine of presumption of fault is dominant in Belgium this approach has been criticised by Dekkers, a Belgian commentator, who holds it to be 'foreign to any idea of fault' and 'immoral'. The same Scottish writer states that in terms of the Italian view:

"responsibility /
"responsibility is based on the utility derived from the animal - the enjoyment need not be strictly economic, of course. The principle of objective responsibility is adopted - ubi commoda, ibi et incommoda." 25

The 1942 Italian Code evidently expressly exonerates the defendant on proof of *casus fortuitus*, which means, not that the damages were not attributable to his negligence but that he must establish a breach of causal connection, in short, that the loss could not have been avoided by him. 26

Although there is at present no common Nordic legislation on this matter in terms of the recommendations of the Draft Northern Code (ss.20(1) and 21) any person holding wild animals or dogs should be responsible for damage caused by them subject to proof by defendant that plaintiff caused the damage himself intentionally or through gross fault. 27 Presumably the standard delict provision would be applicable to damage caused by domesticated animals other than dogs.

Early law in regard to liability for animals in America can be identified with English law where it was adopted. Prosser recognises the background to the concept that "strict liability is, in general, co-extensive with the obvious risk" as largely synonymous /

26 Ibid.
27 Ibid., pp.248 and 249.
synonymous with the evolution of the Anglo American law on this matter. Statutory considerations apart American law can be considered from the same standpoints as English law i.e., cattle trespass and scienter, although American authors apparently prefer terminology such as "Trespassing Animals" and "Damage by Dangerous Animals". The basic principles and some of the distinctive features of American law can thus be considered under these heads.

(1) Trespassing Animals

Harper and James illustrate the background to the common law rule of the owner's strict liability in respect of damage occasioned by the trespass of domestic animals, which has been covered in the earlier chapter on English law, and proceed to state that:

"The common law rule of strict liability is the law in many states of this country in so far as it has not been altered or modified by statute."

Prosser supports this contention:

"While this primitive idea of the identity of the owner with the animal has vanished, it remains the common law in most jurisdictions that the keeper of animals of a kind likely to roam and do damage is strictly liable for their trespass."

Prosser proceeds to indicate that in the early days in the United States /

29 Ibid., and Harper and James, The Law of Torts, pp. 821 et seq.
30 Ibid., p. 822.
31 Supra Chapter II, pp. 21 - 40.
32 Prosser, Law of Torts, p. 512.
States many courts rejected the rule of strict liability for animal trespass as being incompatible with established custom which prevailed, particularly in the west, and permitted cattle to be grazed free over large ranges. In some states local conditions and custom has prevailed and the common law rule has never been followed:

"In the Western states particularly, where cattle are raised on a large scale, it is regarded as more consistent with common sense and the welfare of the general community that they be permitted to graze and roam over large areas of land without involving their owners in the endless and continuous actions for trespass which must necessarily attend the English rule." 34

The anomalous extension of cattle trespass to encompass claims for bodily injury has been adopted by the American states recognizing the action but is limited to cases where no superseding cause intervenes to cause the damage or where the loss sustained is entirely beyond the general type to be anticipated as a result of the trespass of an animal. So in Hollenbeck v. Johnson where defendant's cow trespassed into plaintiff's barn and crushed the cover of an old cistern through which the plaintiff subsequently fell, it was held that the defendant although liable for the property damage was not liable in respect of plaintiff's injuries which occurred as a result of causes entirely outside the

33 Ibid.
35 3 Restatement of Torts, sec. 504, comment (e).
the general sort of hazard to be anticipated from a trespassing cow.

In modern American law the matter of Animal Trespass is largely governed by statutory provisions which the textbook writers consider as falling into two categories, 'fencing out' and 'fencing in' statutes. 'Fencing out' statutes provide that where plaintiff has fenced his land in the proper manner (usually stipulated) he will be entitled to relief on a strict liability basis where animals break through, otherwise he will be compensated only when the animal owner was at fault. On the other hand the 'fencing in' statutes require the owner of animals to fence or otherwise restrain them subject to strict liability for compensation if he does not do so. Further, in some states the common law rule has been restored by legislation and in many states individual countries are at liberty to choose the rule they wish.

39 E.g. Ark. Stat. Ann. § 76,1207(1947): "If any horse, cattle or other stock, shall break into any enclosure, the fence being of the height and sufficiency required by this Act, or if any hog, pig or shoat shall break into same, the owner of such creature shall, for the first trespass, make reparation to the party injured, for the true value of the damages he may have sustained; and for every trespass thereafter, double damages, to be recovered with costs ... and for the third offence ... the party injured may kill and destroy the beasts so trespassing, without being answerable for the same." See generally Harper and James, supra op.cit., p.629.
wish to apply accordingly the law may vary in different parts of the state and from state to state. The diversity does not end here for some states have introduced absolute provisions against livestock running at large although in some the test is negligence or wilfulness. Some statutes are interesting examples of civil law coloured with penal characteristics as, for instance, one operating in Minnesota whereby cattle and other livestock are prohibited from being permitted to run at large but the owner is only liable when he "knowingly permits" them to escape, a successful suit resulting in an award of treble damages for the plaintiff. So although the common law rule of cattle trespass applies in states which adopted it, it is clear that its operation is largely overshadowed by local enactments comprehensively covering the matter of trespassing animals.

(ii) /

40 E.g. Ark. Stat. Ann. § 79-1140: "In all countries in this state, wherein there has been, or may be, submitted to the people by Initiative Petition a prepared act prohibiting horses, mules, cattle, hogs, sheep and goats, or any of them, from running at large in said county or counties and at an election held pursuant thereto the electors voting thereon have enacted, or shall enact such act, it shall be unlawful from the effective date of such act for any such animals, at any time during the year to run at large and enter upon the fields and lands of such counties either enclosed or unenclosed ... the owner of such animal or animals shall be liable in damages for all damage they may do ..." Harper and James, The Law of Torts, p. 829.

41 Harper and James, The Law of Torts, pp. 830 et seq.

(11) **Keeping dangerous animals**

Prosser describes the law in this regard in general terms and it is clear that little difference exists between the American and English law on the matter although the American text book writers are inclined to shy clear of the *ferae naturae/mansuetae naturae* terminology. The above author refers to a distinction made between animals which, by reason of their species, are by nature 'ferocious, mischievous or untractable' and those 'of a species normally harmless'. Of the first class he states that regardless of domestication they can never be regarded as safe and thus liability does not rest upon any experience with the particular animal. As in England knowledge of propensity in respect of the particular animal must be proved in a claim for damages arising out of harm done by an animal of the 'species normally regarded as harmless'. Prosser sums up the application of *scienter* (wherein the American courts appear to have largely followed the policy of English decisions) by stating that:

"The strict liability is limited to the particular risk known to the defendant." 45

The Restatement of Torts has attempted to overcome the common law casuistry of case law allocation to the dual category by proposing a positive criteria to enable a particular animal to be designated /

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44 Ibid., p.514.
designated 'wild' or 'domestic'. This commendable step introduces these definitions of the classes as follows:

"(1) A wild animal — is an animal not by custom devoted to the service of mankind at the time and in the place where it is kept.

(2) A domestic animal — is by custom devoted to the service of mankind at the time and in the place where it is kept." 46

In terms of this formulation an Egyptian camel, installed as a curiosity to wander about the grounds of a Californian motel would doubtless be considered 'wild' regardless of its domestic heritage of centuries of service to mankind in its native Egypt. The definitions proposed in the Restatement of Torts do not represent any innovation from the line of thinking which can be traced in the case law — on both sides of the Atlantic, 47 but it is certainly a satisfactory step towards generalization.

In terms of the test a person keeping a dog is not subject to strict liability unless there is scienter, except evidently, in some states, where the scienter ingredient has been abolished by statute. 48 An example of this type of statute is one in effect in Wisconsin:

"making /

46 3 Restatement of Torts, § 506.
47 Supra Chapter II, pp. 144 - 48.
48 For a full discussion of this type of statute see annotations on the validity, construction and effect of statute eliminating scienter as condition of liability for injury by dog or other animal, 1 A.L.R. 1114(1919) and 142 A.L.R. 136(1943).
"making the owner or keeper of any dog which
shall have injured or caused the injury of any
person or property, or killed, wounded, or worried
any horses, cattle, sheep or lambs, liable to the
person so injured and the owner of the animals
for all damage so done, without proving notice
to the owner or keeper of the dog or knowledge
by him that his dog was mischievous or disposed
to kill, wound or worry horses, cattle, sheep
or lambs." 49

This type of statute, referred to colloquially in America as a
'dog bite' statute has a counterpart in many states including
California where section 3342 of the Civil Code reads as follows:

"The owner of any dog is liable for the damages
suffered by any person who is bitten by the dog
while in a public place or lawfully in a private
place, including the property of the owner of
the dog, regardless of the former viciousness
of the dog or the owner's knowledge of such
viciousness. A person is lawfully upon the
private property of such owner within the meaning
of this section when he is on such property in
the performance of any duty imposed upon him by
the laws of this state or by the laws or postal
regulations of the United States, or when he is
on such property upon the invitation, express or
implied, of the owner." 50

The comment in the Restatement of Torts to the effect that:

"A dog is no longer regarded as entitled to one
bite. It is enough that the possessor of the
animal knows that it has on other occasions
exhibited such a tendency to attack human beings
or other animals or otherwise to do harm as
should apprise him of its dangerous character." 51

is not an innovation as far as Anglo American law is concerned

for /

49 142 A.L.R. 436(1943) at p. 444
50 Burden v. Globerson, 60 Cal. Reptr. 632
51 3 Restatement of Torts, §s 509, comment (g).
for the principle was recognised in the early English case of Worth v. Gilling⁵² where scienter was held to be present in respect of the owner of a dog which had never succeeded in a previous bite but which had exhibited a vicious propensity by repeatedly growling at passers by.

In America the scienter action does not effect or exclude the possibility of an action on negligence so while a horse may not be dangerous and, indeed, even while a particular horse may be docile and tractable it may nevertheless be negligence to permit it to run at large in the streets, especially in certain circumstances.⁵³

Under the head of limitations to liability Harper and James consider the tendency to apply the law of negligence in determining the liability of the keeper of a dangerous animal, confined to his own premises, in respect of persons injured while on such premises.⁵⁴ This, it is submitted, is a sensible approach recognising that an individual who keeps a dangerous animal secure on his own premises should, subject to infringements attributable to his negligence, be under a less onerous duty than one who merely permits his animal access to public places. The whole concept could clearly be employed in respect of any damage alleged to be caused by any animal on the property of its keeper (in America the exception is apparently restricted to dangerous animals). If South African law made use of /

⁵² (1866) L.R. 2 C.P.L. See supra, Chapter II, p.50.
⁵³ Harper and James, The Law of Torts, pp.821 et seq.
⁵⁴ Ibid., p.639.
of this device the unsatisfactory position prevailing, where a 'trespasser' is defined differently in the lex Aquilia and the actio de pauperie, would obviously be eliminated.

A fundamental limit on common law liability under this head is that an action will not succeed in respect of damage outside the risk area. So where the appearance of defendant's elephant on the highway frightened plaintiff's horse which ran away it was held that there was no liability because:

"In this case the injury resulted not from any act of the elephant but from the fact that his appearance, as he was passing along the highway, caused the horse of the plaintiff to become frightened and unruly ..." 55

Strict liability will not avail against the owner of an animal which injures someone who deliberately throws himself within the zone of danger. Thus, while contributory negligence is no defence and will not bar recovery where liability is strict risks which a person:

"deliberately and recklessly brings upon himself are not within the range of perils which the owner assumes by keeping the animal." 56

Circus cases represent the common application of this principle in America.

55 Scribner v. Kelly, 38 Barb.14, 16 (N.Y. 1862); Liability for attack by mad dog known to be vicious, 34 Harvard Law Review, 770(1921) and supra Chapter II, p.54.
CHAPTER VII

COMPARATIVE SURVEY AND CONCLUSIONS

Comparative Survey

Considerable diversity of approach exists in modern legal systems with regard to liability for animals. English, Scots, South African and American legal systems employ a number of actions, both statutory and common law, to provide for relief in cases of damage or injury by animals. European Civilian jurisdictions, however, rely in general on an all embracing article or group of articles to cover animal liability comprehensively. Having considered the principles involved in English, Scots and South African law and briefly surveyed the solutions employed in some continental jurisdictions and the United States of America a concluding comparative survey would seem justified. This will be conducted under the following heads:

(i) special strict liability actions; (ii) general delict/tort actions, and (iii) actions relevant to depasturization.

(i) All the jurisdictions surveyed above, with the possible exception of Scotland, employ an action introducing strict liability in one or other form. Two special strict liability actions exist in English law to provide relief in cases of injury or damage by animals. These are referred to as the scienter and cattle trespass actions. The latter will be considered under (iii) supra for, although /
although it, somewhat anomalously, extends beyond mere depastur-\textemdash;ization, its prime function warrants its inclusion under that head. In Scots law where \textit{scienter} is not an indigenous concept it is probably fair to say that, up until recently at least, roughly parallel redress was frequently granted by the courts. So the learned members of the Law Reform Committee for Scotland outlined the application of \textit{scienter} and indicated that the rules enun-
\textemdash;iated were similar, in general effect, to the law in England.\textsuperscript{1} Similarly the author of a modern textbook on the law of delict in Scotland treats the \textit{scienter} action fully and supplements deficiencies in Scots case law with English decisions.\textsuperscript{2} Although similar principles have been applied in England and Scotland for well over a century in cases of liability for animals Lord Hunter in \textit{Henderson v. John Stuart (Farms) Limited}\textsuperscript{3} recently intimated, obiter, that the correctness of this approach is open to doubt. Strict liability for animals, based on foreknowledge, in Scots law has often been regarded as synonomyous with English \textit{scienter}. According to Lord Hunter, however, proof of actual foreknowledge should, in Scots law, be confined to the realm of anterior accession to delinquence\textemdash;a species of \textit{culpa}. Although at present specul-
\textemdash;ative it may well be that the Inner House will in due course settle the matter as to the existence of a strict liability action for damage by animals. If a prognostication may be ventured it is the writer's view that the trend of Scottish jurisprudence is likely to

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\textsuperscript{1} Law Reform Committee, Liability for Animals, Cmnd.2185, \textit{supra}.
\textsuperscript{2} Walker, \textit{Delict in Scots Law}, p.641 \textit{et seq.}\textsuperscript{3}
\textsuperscript{3} 1963 S.C. 245 at pp.247-248.
\end{flushleft}
to follow the approach of employing *culpa* as the sole vehicle for redress - this solution already bears the stamp of approval of the Law Reform Committee for Scotland.

In South African law the *actio de pauperie* falls for consideration under this head. It can be compared, in outline, with the *scienter* action of English law a form of which has also been employed in Scotland (*supra*). Both the *scienter* and the pauperian actions are instances of strict liability. Liability in the *scienter* action depends upon possession in contrast to the pauperian action where the touchstone is ownership. The whole question of who should be liable in strict liability animal actions is relevant and is argued fully below. The background to the above distinction lies in the fact that the rationale for the *scienter* action is the possessor's fault in failing to observe his duty to restrain the animal in his possession when he knew of its dangerous propensity or when this can be imputed. In contrast the touchstone of liability in the pauperian action is the fault of the animal for which the person who enjoys the benefit of ownership is deemed responsible. The *scienter* action applies to all types of animals but different rules apply as between animals *ferae naturae* and *mansuetae naturae*; the *actio de pauperie* only applies to domesticated animals which, historically, were evidently considered capable of fault. The English dichotomy and the South African limitation /
limitation to a particular class of animals can be contrasted with the solutions of continental jurisdictions which generally embrace all animals within a single rule. Proof of knowledge of the animal's propensity to commit the act complained of is a prerequisite to success in the *scienter* action although this is imputable in the case of damage by animals 'ferae naturae'. No such concept exists in pauperian law where it is necessary to prove that the animal acted *contra naturam sui generis*. There is no similarity whatsoever in these ingredients. The *ferae naturae/mansuetae naturae* dichotomy, fundamental to the *scienter* action, has no relevance in the *actio de pauperie* which, as was stated earlier, is only concerned with domesticated animals. Although the defences are not the same, certain points of similarity exist. Contributory negligence is a good defence to the *scienter* action, and liability may be partially reduced by the operation of the Law Reform (Contributory Negligence) Act 1945, s.1(1). The defence of plaintiff's fault in South African law does not, however, admit the Apportionment of Damages Act, 1956 for the reasons set out above. The English action is, perhaps surprisingly, not subject to a special defence of trespass but in South Africa 'trespass' is a defence insofar as the pauperian action does not avail a plaintiff /

4 Supra Chapter V, p.182.
plaintiff who had no lawful right to be at the place where he was injured. The whole question of whether strict liability should be limited where the damage or injury occurs on the property of the animal owner is a significant one. Finally *volenti non fit injuria* is recognised as an independent defence to the *scienter* action in English law, and has had unfortunate consequences in limiting strict liability as between employer and employee. This defence is not applicable to the *actio de pauperie* and, although in Scotland in the past servants injured by animals have been subjected to the same severe exclusionary rules as they have in England, the *dictum* of Lord Hunter in *Henderson v. John Stuart (Farms) Limited* would indicate that proof of actual foreknowledge should be confined to the realm of anterior accession to delinquency and in this context can have no possible effect on the well recognised duty of care owed by employer to employee.

The modern civilian systems impose a very strict duty on the owners or keepers of animals. The provisions of the Code Napoleon have been followed closely in Belgium and Italy. In France responsibility is based on a presumption of fault, reasoning from the basis that the individual who had legal control of the animal failed to observe the requisite duty of care. As indicated above the

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6 Supra Chapter V, p.183 et seq.
7 Supra Chapter II, p.63.
8 1963 S.C.204 at p.251 et seq.
9 Belgium, C.C. art. 1365; Italy C.C. of 1942, art. 2052.
10 France, C.C. art. 1385.
11 Supra Chapter VI, p.211-212.
the presumption of French law is no longer rebuttable by mere proof of absence of fault but can only be displaced on proof of force majeure, fault on the part of the injured party or third party fault equivalent to casus. Thus in contrast to the pauperian action of South African law liability is not limited to the owner and there is no limit on the class of animals covered by the article. Moreover the law prescribes no special rules as to the nature of the animal's conduct (cf. contra naturam sui generis in South African law), and the scope of the competent defences appear to be more limited than in South Africa. The counterpart strict liability article in the Netherlands code is less onerous with regard to the owner. In terms of judicial interpretations fault can be rebutted by the defendant in anyway. In Germany two articles in the B.G.B. impose strict liability upon the owner of an animal which kills or injures a person or damages property. If however the damage is caused by a domestic animal which is kept to serve the calling, occupation or support of the owner, the owner escapes liability unless he failed to observe the standard of care required by everyday interactions. This provision is, however, subject to the further exception that, even if the owner did fail to observe that standard of care, liability will not arise if the damage would have been caused regardless of the exercise of the standard of care.

Contractors

12 Ibid.
Contractors of animals are also covered by these strict provisions. The details in regard to ascertaining who is an owner are set out above, and it should be noted that the group of persons affected is wider than 'owners' for pauperian purposes. Third party intervention is a good defence to liability under the German articles, but the defences are more limited than the English and South African strict liability actions. Statutory changes aside the scienter action is employed in all the American states which adopted English law. In a number of states, however, the requirement of proof of scienter has been abolished by statute in certain cases of damage by dogs. Examples are Wisconsin and California. The Wisconsin statute is wider than the Dogs Act (1906 - 1928) applying to England and Scotland. The former enactment covers all damage by dogs and the latter is restricted to damage to livestock including poultry. The Californian statute only covers injury to persons.

(ii) The general delict/tort action is available for animals claims in the three jurisdictions considered in detail above. The appropriate action is the tort of negligence in English law, and the lex Aquilia in South Africa and Scotland. There can be no doubt that it is most important in Scotland where it is possibly the sole remedy - statutory considerations aside. The lex Aquilia is /

13 Ibid., p.209 et seq.
14 Ibid., pp. 221-222.
15 Supra Chapter II, p.81.
is also of special importance in South Africa for it is the only appropriate means of redress in cases of damage or injury by wild animals. It has been maintained that a presumption of culpa operates in favour of the plaintiff who sues for damages resulting from injury attributable to a habitually vicious animal, but the author has reservations as to whether this can be regarded as settled South African law. Although it is submitted that this aspect of South African law is not finally established there is no doubt that proof of the owner's knowledge of an animal's vicious proclivity will often be relevant in an Aquilian action as an element of the proof of culpa. As proof of this ingredient in England would entitle the plaintiff to strict liability relief under the scienter action it is of no great significance in relation to the tort of negligence. Foreknowledge of vicious propensity is clearly equally relevant to proof of culpa in Scots law, and this may be a factor which has contributed to the confusion in that system for, as Lee has pointed out, culpa can let in scienter by the backdoor. In England and South Africa the general action is apposite in cases where the defendant is not one of the limited class ('possessors' and 'owners' respectively) liable under the strict actions. In all three jurisdictions the general action provides for relief against anyone who can be proved to have owed a /

16 Supra Chapter V, p.192.
17 Supra Chapter III, p.90.
a duty or be 'in culpa' with regard to injury or damage by an animal.

In modern times one of the most important aspects of animal liability relates to claims arising from accidents on the road involving animals and motor vehicles. The strict scienter action of English law would only be relevant to these cases if the animals involved were known to be dangerous. As the possibility of this is clearly remote, claims devolve upon the tort of negligence, and its operation is restricted by the rule that the owner or occupier of land adjoining the highway is under no duty to prevent his domestic animals, not known to be dangerous, from straying onto the highway. This is known as the rule in Searle v. Wallbank. Similarly in South Africa the actio de pauperie is unlikely to be relevant for the circumstances of an animal's passive involvement are likely to exclude the requisite 'contra naturam sui generis'. In South Africa, however, no rule analogous to Searle v. Wallbank operates although it appears from recent cases that the approach of the Supreme Court is to limit the right of the motorist to claim damages from an animal owner when the accident occurs in a rural area. The so-called rule in Searle v. Wallbank does not apply in Scotland where, although there is no absolute duty to fence or prevent animals having access to the public highway, the occupier of

18 Supra Chapter II, p.78 et seq.
19 Supra Chapter V, p.202 et seq.
of fields adjoining a highway is bound to take reasonable care to prevent his domestic animals from straying onto the highway where there is a foreseeable risk of such straying causing injury to persons using the highway. The Outer House decision in *Gardner v. Miller* should probably be read in the light of the fact that the accident occurred on a busy road in a densely populated area. It is probable that the Inner House would not be readily inclined to find against an animal owner in an action arising from an accident in a remote country area. In American states recognising *scienter* this action does not exclude the possibility of an action based upon negligence. Regarding liability for animals on the highways in America as in England there may be strict liability on the basis of *scienter* as to dangerous traits but, doubtless more common in practice, liability founded on negligence in looking after the animal. The rule in *Searle v. Wallbank* apparently does not apply in America for it is not mentioned by the textbook writers. Continental jurisdictions do not employ special rules to deal with animals on the road and the various articles in the relevant codes are intended to be all embracing.

(iii) Regarding special actions to redress depasturization the English *Cattle-Trespass* action, the South African *actio de pastu* and /

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and the Scottish Winter Herding Act can be the subject of comparative consideration. In terms of the English cattle trespass action the owner of certain types of domestic animals is liable for the damage caused by their trespass; and similarly under the actio de pastu strict liability is imposed on the owner of an animal which trespasses on another's property and damages crops or plants. The South African action is also limited insofar as the class of animal is defined by the courts and excludes poultry, whereas poultry is covered by the English action. The Scots statute governing this matter also covers a limited class of animals - oxen, cows, horses, sheep, swine and goats. A further distinction is that in South African and Scots law respectively liability under the actio de pastu and the Winter Herding Act is limited to damages resulting from depasturization, whereas the English cattle trespass action covers any damage, subject to the limits imposed by the rule as to remoteness, which occurs on the plaintiff's property. A lien created by the Scots act covers the expenses of keeping the animal until the penalty is paid, but does not cover damages resulting from the straying. No lien operates automatically in connection with the English cattle trespass or South African de pastu action but the right to empound is covered by independent legislation in these jurisdictions. Although some American states adopted the cattle /

22 Supra Chapter II, p.29 et seq.
cattle trespass actions, others, particularly those in the west, found it incompatible with prevailing custom which permitted cattle to graze freely over large areas. In modern American law the majority of states control the matter by statutes which often provide for strict liability and some of which provide for penal damages. Where the cattle trespass action is recognised, it is extended, as it is in England, to claims for bodily injury, but is limited to cases where no superseding cause intervenes and where the loss sustained is not entirely beyond the general type to be anticipated as a result of the trespass of an animal. The European jurisdictions do not employ special rules in regard to depasturization.

**Conclusions**

Certain fundamental questions emerge from the material surveyed above and the comparisons drawn earlier in this thesis. In the writer's view these are as follows: (1) The determination of a basis for liability and its limitations, if any. (2) The determination of the parties who should be liable.

A host of subsidiary questions arise under these two heads, and the writer will attempt to deal with some of them in the following pages.

**Proposals regarding the determination of a basis for liability and its limitations.**

The /

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23 Supra Chapter VI, pp. 218 - 219.
The preponderance of modern legal systems demonstrably favour the imposition of some form of strict liability in cases of damage or injury by animals. The writer believes that this tendency is logically justifiable. Animals are by definition animate and potentially agents of independent dangerous action. Historically legal systems have long recognised this and have created special categories of strict liability. Ownership or possession of an animal clearly imports a risk to third parties which does not necessarily have any bearing upon the positive conduct of the owner or possessor. In contradistinction mere ownership or possession of a motor vehicle creates no risk in respect of third parties, and risk only arises when the owner or possessor commences positive conduct - begins to drive the car. The distinction is between an animal which is a risk in itself and most of man's other possessions which being inanimate are only a potential risk but become a risk when man assumes positive control. An individual in a locked room bound hand and foot and incapable of motion is subject to no risk arising from a bottle of lethal poison in the same room, however, if the room is also occupied by a snake or vicious dog the risk position is obviously very different. Thus although culpa may be an appropriate touchstone in respect of man's inanimate possessions there seems justification for imposing a more strict rule where man, for his own profit or pleasure, assumes control of animate and potentially dangerous creatures. The writer is of the opinion that /
that the age-old recognition of liability for animate possessions is valid and, subject to certain limits, worthy of retention. If the risk arising from animal ownership was the only factor to be considered the solution would be simple - namely to introduce legislation to provide for the destruction of all animals and to prohibit ownership and breeding. But animals have a very real social utility and a compromise solution is thus desirable. So as Fleming says:

"There is enough social usefulness in most dangerous animals, whether wild beasts in the zoo or circus or ferocious stud bulls on the farm, to preclude them from being outlawed, but the special risk they present entails a corresponding obligation on the keeper to keep them at his peril." 24

Having decided that some form of strict liability is appropriate the next step is to consider an appropriate criterion. The tendency to impose strict liability in respect of animals of a particular species (as in the scienter action and English Law Commission re-commendations) has clear failings and has not proved successful in England. Although the idea of a variable rule depending upon whether the particular animal falls into a 'dangerous' or 'non dangerous' class is superficially attractive, experience in England has shown that difficulties of proof do not assist the plaintiff in obtaining redress. It is submitted that the test for strict liability /

24 Fleming, Torts, p.169.
25 Supra Chapter II, p.73 et seq.
liability should not be by reference to the question of (i) into what category the offending animal falls or (ii) the degree of knowledge of propensity attributable to the owner, as these criteria have been proved to be completely unworkable. In the writer's view it is valid to draw a distinction between cases in which damage results from direct physical causation attributable to an animal and those wherein damage results from a situation in which an animal is merely involved in a passive capacity. It is therefore proposed that strict liability should be imposed, subject to the limits set out hereunder, in all cases where damage is directly attributable to an animal either on account of an intact *nexus* of physical causation or on account of some attack, but that where damage results indirectly from a situation in which an animal is merely involved in a passive capacity the touchstone should be the owner's negligence. The advantage of this type of dichotomy is that the ingredients of proof necessary for success in each case will be limited to facts pertaining to the actual incident and will not involve the proof of such difficult matters as (i) the particular animal's place in a general class of animals or (ii) knowledge of an animal's previous vicious conduct attributable to the owner. The solution proposed, in outline, above is basically at one with the rationale of the civil law which provided special strict liability actions for direct injury to persons or other animals caused *contra naturam* /
naturem (in classical Roman law any undomesticated conduct, e.g. kicking, goring, biting) and for direct damage to pastures. In other cases where animals were merely involved the lex Aquilia was apposite.

A significant special aspect of the whole question of liability for animals arises in regard to accidents involving animals on the highway. In modern times, with fast moving traffic, the incidence of this type of accident has multiplied alarmingly. During 1958 in England and Wales about one per cent. of road accidents causing personal injury were considered by the police to have been contributed to by animals. South African statistics indicate that in 1964 about 2.7 per cent. of motor accidents were attributable to animals. There is a conflict of interest between the motorist and his right to use the highway and expect reasonable conduct from other road users and the animal owner who may, in certain parts of a given country at least, be unduly burdened by a rule that he should effectively restrain his animals from straying onto the road. The English rule in Searle v. Wallbank leans over too far in favour of the agriculturalist. In accidents involving animals in a passive role (on the road) and in accidents arising therefrom the touchstone for liability should be culpa or negligence. This would certainly be appropriate for England, Scotland and South Africa for in all these jurisdictions /

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juries run across the nature of the area in which the accident occurs. Clearly a different standard should be applied depending upon factors such as the nature of the area in which the accident occurs. The broad principle of *culpa* (or negligence) is sufficiently wide to permit the standard to vary depending upon particular circumstances. It is submitted, therefore, that the principle of strict liability should give way to *culpa* in ascertaining liability arising from accidents involving animals on the road.

A further limit should be placed upon strict liability where the injury or damage does not result from direct physical causation attributable to the animal. The proposed rule of strict liability is introduced because ownership or control of an animal entails assumption of a certain risk of damage or injury. The risk is distinguishable from the risk potentially applicable to man's inanimate possessions because an animal is animate and thus capable of independent physical harm. The writer believes that an owner's strict liability should not extend beyond the reasonably likely limits of damage attributable to an animal's animate characteristics and in this connection it seems reasonable to draw a line at physical causation. Thus if the terrifying roar of an African lion being transported by mobile cage through the streets of a staid northern capital

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capital causes a blind man so much fear that he panics and runs into the road under the wheels of a car, then the action which he (or his dependants) bring should, it is felt, be based upon the general principles of the law of negligence. It is thought that one exception should be permitted to the limitation applicable to cases of non physical causation, viz.; where the damage or injury results from an attack by an animal. Here, subject to the ordinary rules of remoteness, strict liability should apply. Therefore where a child is charged by a bull, and, in attempting to escape over a fence, sustains injury it is considered that although the injury is not attributable to direct physical causation on the part of the animal strict liability should be imposed because the injury resulted from an attack by the animal. To succeed under this head the plaintiff will have to establish (i) that the animal attacked him and (ii) that injury resulted from the attack.

The rule of strict liability envisaged should be subject to certain set defences available to the owner. The writer believes that justification exists for permitting the defence of fault of the plaintiff which should be permitted to operate as a total defence or, in conjunction with the appropriate Apportionment Legislation, as a partial defence to liability. The writer does not consider that justification exists for permitting the inclusion of the defence known as act or fault of a third party. As will be seen /
seen below the question of who should be liable is largely considered in the light of 'who is best able to insure?' In keeping with the tendency of strict liability directed against the animal owner it seems logical to limit the defences available, for the owner should cover himself against claims for damages which may arise as a result of the risk which he has introduced into society. As is stated above, in the writer's view, the defence of plaintiff's fault is relevant but an extension to fault of a third party does not seem justified. *Volenti non fit injuria* is inclined to overlap with the defence of plaintiff's fault and it does not warrant independent recognition. Indeed there is a positive argument against such recognition for in England the doctrine of *volenti* has limited strict liability between employer and employee with consequences that have been widely criticised.  

One of the principle difficulties which arise in deciding upon a limit to strict liability is in regard to incidents which occur on defendant's property where the damage is attributable to his animal. In South African law a plaintiff's right to damages has been severely limited in these circumstances. The result is somewhat anomalous for plaintiff is in a stronger position if he employs the *lex Aquilia* than if he relies upon the strict *actio de pauperie* in this type of case.  

29 Supra Chapter II, p.77.  
30 Supra Chapter V, pp.185-186, 196-198.
A possible solution is to preclude the operation of strict liability entirely where the damage results from defendant's animal and occurs on his property. The determination of liability would then devolve entirely upon the general delict/tort action under the head of occupier's liability. This, however, probably goes too far in favour of the animal owner and a provision which operates to limit strict liability in certain circumstances would be more satisfactory. The Californian 'Dog Bite' statute has this effect, and imposes liability upon the owner of a dog where the plaintiff is bitten while "... lawfully in a private place, including the property of the owner of the dog ...". For the purposes of the statute a person is lawfully upon the private property of such owner:

"... when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws of postal regulations of the United States, or when he is on such property upon the invitation express or implied, of the owner."

The writer is of the opinion that there are no valid grounds for limiting the right of a claimant to strict relief when his presence on the owner's property was sanctioned by statute as in the case of policemen, postmen, meter readers, etc. Parties whose presence is based on contract with the owner or express invitation should also enjoy /

31 Supra Chapter VI, p.223.
32 Californian C.C. sec.3342 supra Chapter VI, p.222.
enjoy an unfettered right to redress. The crucial question is whether any limit should be placed on the right of individuals whose presence does not result from legal right or duty, contract or express invitation. Under this head comes the large category of travelling salesmen, purveyors of religious dogma, all other uninvited visitors and those whose presence he has positively prohibited. An 'unlawful presence' criterion might tend to import the special 'trespass' of English law which would not be compatible with Scottish or South African legal principles. In respect of this category of potential claimants the writer believes that an animal owner should be permitted to refute liability by recourse to either of two defences; viz. either (i) that the plaintiff had no right to be on the property of the owner or (ii) that the owner took reasonable steps to communicate the knowledge of his animal or animals presence to the public. These defences would only operate in respect of persons other than those who entered the owner's property under legal right or duty, in terms of a contract or an express invitation. The second defence proposed is particularly apposite and warranted in the case of farmers who often keep dangerous animals but do so partly in the public interest. In their case it seems that liability to the uninvited visitor class should be precluded if they have erected signs indicating the presence of and /
and, if appropriate, potential danger of animals on their land. The writer feels justified in proposing that this defence should not be extended to encompass all cases occurring on private property but should be limited to the scope of incidents involving the animal belonging to the lawful occupier of the property. To extend the defence would tend to punish the fault of the plaintiff in entering the property without right which could be unrelated to any fault vis a vis the injury sustained. Further when the animal owner is not the occupier of the land where the accident occurred he must be permitting his animal to move about, often for pleasure or profit, thereby introducing a greater risk to society and therefore should not benefit from a limitation of liability merely on account of the injured parties fault quoad the place at which he sustained the injury. The incidence of the defences of casus and vis major is very limited and the writer does not consider that they should be included. Their exclusion will have a negligible effect in increasing the scope of an animal owner's strict liability and in remote cases where they might be apposite they would strike a somewhat anomalous chord amongst the other defences proposed - all of which are based upon some element of fault attributable to the plaintiff. Glamour from the farming lobby has long demanded special treatment for farm animals and it cannot be denied that the /

33 As with the Californian C.C. sec. 3342 supra loc. cit.
the social utility of these warrants consideration. Germany deals with the problem directly and provides for a less onerous standard in the case of domestic animals kept to serve the calling, occupation or support of the keeper. The writer has not made any direct proposals on these lines but two aspects of the above general proposals would tend to mitigate the position for the farm animal owner. The first is the proposed limitation of strict liability from accidents occurring on the highway - obviously these often involve farm animals. The second is in regard to the special defences suggested to deal with injury or damage occurring on the land of the animal owner.

The determination of parties who should be liable.

The problem of assigning liability is fundamentally a choice between two theories: first that the owner quoad his acceptance of ownership and the ensuing risk should be responsible for strict liability damages, secondly that a party in immediate control or custody of an animal should be responsible for ensuring that it does not do damage to person or property. The strict liability actio de pauperie of Roman lineage, still employed in modern South African law, assigned liability to the owner. The English scienter action is available against the possessor which widens the group restricted /

34 Supra Chapter VI, p.207.
restricted to owners. As stated above the rationale here is the possessor's fault in failing to observe his duty to restrain the animal when he knew of its dangerous propensity. Most continental systems have a special class of 'keeper' normally wider than mere owners. The proposed basis for liability is a strict rule emanating from the risk voluntarily assumed by one acquiring ownership of an animal. The writer believes that strict liability in this context should be basically limited to animal owners, subject to certain extensions set out hereunder, and that 'keepers' in the wide sense of those having some duty ad quod the animal should be distinguished and any failure by this group effectively to restrain an animal should be treated under the head of fault. Theory of responsibility aside liability of the owner is defensible on pragmatic grounds. The availability and low cost of insurance provides clear justification for recognising a duty to insure encumbent upon animal owners. The insurance factor is relevant for strict liability is only valuable to injured persons if it assists in assuring reparation for loss. If the legislation sets out from the standpoint of attempting to ensure that loss is repaired in a certain field then the question of who is best able to insure is clearly relevant in modern delict. In regard to damage or injury by animals the owner is clearly best able to arrange cover and

35 Cf. Supra Chapter VI, p.211.
and should, indeed, be regarded as responsible for arranging cover. American states recognise this in their 'Dog-Bite statutes.' Witness California Civil Code 3342. The following are some up to date figures regarding the cost of insurance against claims arising from damage or injury by animals. These figures were furnished by the Royal Insurance Group.

<table>
<thead>
<tr>
<th>Animal</th>
<th>Risk</th>
<th>Amount of cover</th>
<th>Premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dog</td>
<td>legal liability for bite by or for attack to livestock</td>
<td>up to £100,000</td>
<td>£1-10 p.a.</td>
</tr>
</tbody>
</table>
| All or any livestock kept on a farm | legal liability arising out of claims in respect of accidents caused by animals on the highway. (This is included in a general farm third party policy.) | up to £100,000  | Premium depends upon size of farm:  
50 acres £1-10 p.a.  
100 acres £2,2,6 p.a.  
200 acres £2,15,- p.a.  
1,000 acres £8,7,6 p.a.  
+ 7/6 per unit of 100 for every 100 acres over 1,000. |

If legislation on the lines of the foregoing proposals are implemented in England, Scotland and South Africa the cost of insurance would be likely to increase.

It /

36 Supra Chapter VI, p.222.
It is proposed that 'owner' for the purposes of legislation should include the owner, the legal guardian of any minor who owns an animal and any person who was responsible under the above two heads where the owner had ceased to own the animal until some other person becomes owner thereof. The first extension, particularly necessary in respect of English law, is adopted from the recommendations of the English Law Commission but modified to the extent that a legal guardian is placed in the position of responsibility rather than a person of whose household the minor is a member. Again the duty to insure is relevant. It seems perfectly justifiable that a guardian should be responsible for the potentially dangerous animals which a young person for whom he is responsible chooses to keep. Secondly it is proposed that the owner of an animal shall, from the point of view of potential responsibility, remain owner, regardless of escape or dispossession of the animal, until some other person becomes owner. This rule should assist in obviating the difficulty of finding a proper defendant in cases of damage by wild animals which have escaped and may be legally regarded as res nullius. Obviously enough the practical success of this device depends upon establishing the correct identity of the earlier owner, but this difficulty exists in any case of damage by animals apparently 'ownerless'.

By /
By way of summary it can be stated that the writer concludes that strict liability should be imposed where animals cause direct injury to persons or damage to property, movable or immovable. Direct injury or damage is intended to cover all harm with the exception of the two limits set out below. For claimants to succeed under a strict liability provision it should merely be necessary for them to establish, on a balance of probabilities that the animal caused the damage and that the defendant was the owner. Thus an action will lie against the 'owner' of a dog which bites, a steer which tramples or eats pastures or a horse which knocks someone over. The defendant will only be able to escape liability by establishing one of the defences or by proving that he is not the 'owner' as defined. The two limitations to the operation of the strict rule are (i) where the injury or damage occurs as a result of an accident on the highway involving one or more animals and one or more motor vehicles and (ii) where the injury or damage occurs as a result of an act or occurrence which is not directly attributable to physical causation on the part of the animal unless the damage occurred as a result of an attack by the animal in which event, subject to the ordinary rule as to remoteness, the strict rule shall apply. The strict rule envisaged will in no way affect the right of an individual to relief, on the basis of fault, under the general delict/tort action.

The /
The proposed defences are based on the principle that liability should only be limited in circumstances amounting to fault on the part of the plaintiff. Thus proof of fault attributable to the plaintiff may absolve the defendant of liability in whole or in part. Defendant will also be able to avoid liability in certain cases when the incident occurred on his property and involved his animal. In these circumstances, unless the plaintiff had a legal duty to attend on the property of the defendant or was present as a result of a contract with the defendant or an express invitation from him, the defendant will be freed from responsibility if he can show that (i) the plaintiff had no right to be on his property or (ii) that he took reasonable steps to communicate knowledge of the animal's presence to the public. By analogy this defence will apply to plaintiff's property damaged on the defendant's land.

'Owner' as defined will include the owner of the animal or the legal guardian of any minor who owns an animal or any individual who was keeper in terms of the Bill when the owner ceased to be owner of the animal until some other person becomes owner thereof.

Finally to those who might venture that this esoteric subject is without practical significance the writer would refer to the frightening possibilities envisaged by Orwell:

"As /
"As soon as they were well inside the yard, the three horses, the three cows, and the rest of the pigs, who had been lying in ambush in the cowshed, suddenly emerged in their rear, cutting them off ....... At the sight, several men dropped their sticks and tried to run. Panic overtook them, and the next moment all the animals together were chasing them round and round the yard. They were gored, kicked, bitten, trampled on. There was not an animal on the farm that did not take vengeance on them after his own fashion. Even the cat suddenly leapt off a roof on to a cowman's shoulders and sank her claws in his neck, at which he yelled horribly. At a moment when the opening was clear, the men were glad enough to rush out of the yard and make a bolt for the main road. And so within five minutes of their invasion they were in ignominious retreat by the same way as they had come, with a flock of geese hissing after them and pecking at their calves all the way."