some misspent time, entailing a loss of property? It may be claimed that the Psalmist had *all* businesses in view when he spoke of the "*diligent* man's hand bearing rule," and the "diligent man's hand making rich," but he most certainly had the farmer in view when he said, "I went by the *field* of the slothful, and by the vineyard of the man void of understanding, and, lo! it was all grown over with thorns, and nettles had covered the face thereof, and the stone wall thereof was broken down." "Yet a little sleep, a little slumber, a little folding of the hands to sleep, so shall thy poverty come, as one that travaileth, and thy want as an armed man." The American farmer—especially the Pennsylvania farmer—to be successful must be diligent, not slothful, laboring with his own hands, for the promise of the Great Master is that "the husbandman who labors shall first be partaker of the fruits." A word by way of explanation and I close.

These thoughts have been arranged hurriedly, and in moments snatched from labor, but not with a view of being captious or fault-finding. "It is human to err—make mistakes." I have always disliked looking upon the dark side of any subject, but, as I grow older, I can find we can *best succeed* by making a careful note of our mistakes, and by avoiding them in the future.

THE FENCE LAWS OF PENNSYLVANIA.

By Hon. GEORGE W. HOOD, *Indiana, Pa.*

An address at the Conneautville meeting.

It was a fundamental principle of our law that every man must keep his cattle on his own land, and if they strayed away on to other people's grounds, he was liable for any damage they caused by the trespass.

At common law, it was necessary that every man should keep a constant watch over his animals; or, if he did not do this, to surround his land with a fence. The first and primary object of the fence was to keep his own animals in, and *not* to keep other people's out; and if any land-owner kept cattle, he was bound to erect a fence around his entire close, whether his neighbor kept any cattle or not; but, of course, the same rule applied to his neighbor, because, if *he* kept any, he must, also, surround his farm with a fence.

But it was discovered that two parallel fences would be useless, and would be attended with very considerable expense; and as one and the same fence would answer for adjoining proprietors, it was provided by statute, March 11, 1842, "That when any persons shall improve lands adjacent to each other, or when any person shall inclose any lands adjoining another's land already fenced in, so that any part of the first person's fence is between them; in both these cases, the charge of such division fence, as far as is inclosed on both sides, shall be equally borne and maintained by both parties."

By the same act, the auditors of the respective townships were made fence-viewers, whose duty it was, within four days after notice given, to view and examine any line fences, and to make out a certificate in writing, setting forth whether, in their opinion, the fence

of one which has already been built is sufficient; and, if not, what proportion of the expense of building a new, or repairing the old, fence should be borne by each party; and they should set forth the sum, if any, which, in their judgment, either one ought to pay to the other, in case he should neglect or refuse to repair or build his proportion of the fence—a copy of which certificate it was their duty to deliver to each of the parties; and, if any of the parties refused or failed, within ten days after a copy of the certificate of the viewers had been delivered to him, to proceed to repair or build the fence as required, the party aggrieved had the right to build the fence and bring suit against the delinquent party for value of the same, before any justice of the peace or alderman, and recover, as in action for work, labor, service rendered, and materials found.

It follows, therefore, that if any adjoining owner does not keep up his half of the partition fence, and my cattle got through and injured his crop, he has no redress against me, since his own neglect was, in part at least, the cause of his injury.

But, at common law, if my cattle escape through my neighbor's defective fence, and stray upon the lands of another, and there injure his crop, I am liable in damages to him, though my own half of the fence is good, because, so far as third persons are concerned, I am bound to keep my cattle on my own land; and, if I have any redress at all, it is against my neighbor, who failed to keep up his part of the partition fence.

At common law, also: If I turn my cattle into the road, and they wander upon the lands of another, or if some careless person, crossing my farm on a hunting or a fishing excursion, leave down my bars, and my cattle escape into the highway, and thence into my neighbor's grain-field, I am liable to him the damages they may cause. On the other hand, if you are driving your cattle along the road, and, without any fault of yours, they run upon the lands of another, and you drive them out as soon as you can, you are not responsible for the damage done, because you had a right to drive them along the highway, and if you exercised proper care and attention, you could do no more. The *law* recognizes a difference between being *lawfully* and *unlawfully* on the highway.

The common law is, as I have stated, that every man is bound to keep his cattle on his own land; and this *would* be the rule in this State, except for the acts of Assembly imposing duties upon land-owners other than those of the English common law.

Under the provisions of the act of 1700, the owner of cattle is held liable for all damages caused to the owner of inclosed land, if he fenced according to law, and it has been held by our highest court that. unless improved lands are inclosed by a fence, the owner is in default, and cannot maintain trespass for damages by roving cattle; and the owners of improved lands must fence them, both to restrain his own cattle and to shut out the roving cattle of his neighbors. (*Vide* Gregg *vs.* Gregg, 55 Penna. State Report, page 227.)

In Pennsylvania, the law requires the fence to be "at least five feet high, of sufficient rail or logs, and close at the bottom." And to entitle a farmer to recover for the damage done by stray cattle, it is only necessary that his fence be such as men of practical knowledge and experience would consider sufficient to protect the crops from injury by orderly cattle.

If adjoining land-owners agree not to make any common division

fence, each is liable to the other for the trespass of his cattle; but where a fence has stood for twenty-one years, one of the owners cannot remove it without the consent of the other; neither has he any ownership in the materials of the part erected by himself; and where one party unlawfully removes a portion of a partition fence and sets it upon his own ground, this does not authorize the other to fence up to it on his neighbor's land. Neither can one of the owners of adjacent *unimproved* land call upon the other to contribute to the charge of a division fence. The duty to maintain partition fences exists where both parties improve their lands. It would certainly be unjust to make a man whose lands are in woods and not improved, and on which he raises no crops, to pay expenses of maintaining and building a fence which can be of no possible benefit to him. *Hence* the policy of our law to compel those *only* who are benefited by the fence to either build it or be liable for delinquency in not building it.

Aside from this, however, no man is compelled to build or keep in repair a partition fence on the line between him and his neighbor. If he prefers it, he can have his own fence, but he must put it on his own ground, and maintain and keep it in repair at his own expense, and if cattle break through his close and enter upon the lands of another, he is liable for the damage they do. So, on the other hand, his neighbor can have his own fence also, but he, too, must build on his own ground, and will alike be liable in damages if his animals break over his close.

If a division line between two farms passes through a wood-lot, neither of the owners is obliged to erect a fence; but if either owner allows his cattle to pasture in the woods, he must not let them pass the boundaries of his own land, or he will be responsible.

As to fences along the line of railroads, the law is somewhat different. A railroad company is not bound to fence its road, and it is not liable to owners of stray cattle killed thereon. *Neither* is a railroad company liable for value of cattle killed on its track, although they escape from a properly fenced inclosure, without the knowledge of the owner, and were killed at the intersection of a public highway. And when a railroad company, in purchasing the right of way, binds itself to fence the road through the other party's land, but neglects to do so, if the cattle of the latter stray upon the track and are killed, the owner cannot recover for the injury in an action for the wrong or injury done. His only remedy, if any he had, would be on his contract, to recover the loss of his cattle. Railroad companies are not bound to pay for losses, unless incurred by actual negligence, and if cattle *unlawfully* stray upon their track, and are killed, the owner must suffer the consequences, because he should have kept his cattle on his own lot, and not allowed them to stray away upon other lands.

It is, perhaps, proper for me to observe that it has been contended in some of the States of the Union, that the common-law rule does not, and never did, apply to them. That the American common law, founded upon decisions recognizing the customs, which was the result of a condition of things quite different from those which existed in the mother-country, had established the converse of the rule, that the owner of cattle must fence them in; that the common law of England was only adopted so far as it was applicable to the new State; that, as far back in the past as the rule itself can be traced, land in England was inclosed wherever cultivated; that inclosed fields and tracts of

land were the rule, and open land the exception, whilst in America the opposite condition of things existed.

But, from the beginning of the settlements in America by our forefathers, it was a well-recognized necessity that he who cultivated lands must protect his crops from trespass, whether from wild or domestic animals, by proper fences.

The common law is the basis of our jurisprudence only so far as it is applicable to the condition of society in the State by which it is adopted; and whilst it remains difficult, from the American cases, to deduce an invariable rule as to the applicability of this common-law principle that the owner of animals must keep them inclosed, and that there is not only a lack of harmony among the courts of all the States upon the proposition, but, in some instances, the decisions of the courts of last resort in the same States are at variance one with another; yet, in our own State, I think that the Supreme Court in the case of Gregg *vs.* Gregg, reported in 55 Pa. St. R., page 227, which is a ruling case on the subject, and which seems to be regarded as the law up to the present time, is sufficient warrant for us to say that, in the absence of any statutory provision, the common-law rule would be in force in Pennsylvania.

A careful examination of the fence laws of a large number of States in the Union shows that many of them are no better off than we are, many of the laws enacted being very similar to our own.

In Alabama—All fences must be five feet high, and strong enough to turn stock.

In Arkansas—The sufficiency of any fence may be determined by viewers summoned to examine it.

In California—A fence of stone, four and one half feet high, and of other material, five feet high.

In Connecticut—A rail fence four and one half, or a stone wall four, feet high.

In Delaware—Good fence four and one half feet high, of wood, stone, or well-set thorn hedges or ditch.

In Georgia—Worm fences or ditches must be five feet high, or deep, as the case may be, and other fences same height.

In Illinois—Walls, ditches, or fences five feet high, and sufficient to inclose and restrain sheep.

In Indiana—Any structure in the nature of a fence, which is such as good husbandmen generally keep, and shall, on the testimony of skillful men, appear to be sufficient.

In Iowa—A three-rail or board fence, with posts not more than ten feet apart where rails, and eight feet where boards, are used, or any other fence which, in the opinion of the fence-viewers, may be deemed equivalent thereto.

In Kansas—Post, or boards, or rails, hedge, ditch, palisades, post and wire, at least four and one half feet high, and sufficiently close, or stone walls at least four feet high.

In Kentucky—Every strong, sound fence, five feet high, and close enough to restrain stock, or a stone wall four and one half feet high.

In Maine and Massachusetts—All fences four feet high, of rails, boards, timber, or stone walls, in good repair and sufficiently close to turn stock, or such other fences as the fence-viewers deem equivalent.

In Michigan and Minnesota—The statute is the same, except that the standard of height is four and one half feet.

In Mississippi—All fences five feet high, substantially and closely built of plank, pickets, or other good material, or hedges sufficiently strong and close to exclude domestic animals of ordinary habits and disposition.

In Missouri—Fences sufficiently close to restrain domestic animals, five feet high, of posts and rails, or palisades, hedge or turf, or worm fence with corners locked by strong rails, posts, or stakes.

In Nebraska—A rail fence, six rails high, post and rails or boards; three rails or boards one inch thick and at least five inches wide, or post and four wires, (No. 9 wire,) and all at least five and one half feet high, or the fence called "Warner's Patent," four and one half feet high.

In New Hampshire—The same as in Maine and Massachusetts.

In New Jersey—All fences are lawful, which, being of post and rails, timber, boards, brick, or stone walls, are four feet two inches high; all other fences four feet six inches in height, and so close as to prevent horses and neat cattle from going through or under the same, and partition fences between improved lands must be close and low enough to turn sheep.

In Rhode Island—A hedge with a ditch three feet deep, a hedge without a ditch four feet high, a stone wall four feet high, and all other kinds of fences four and one half feet high, in good repair, and sufficiently close.

In South Carolina—All fences strongly and closely made, of rails, boards, or posts and rails, or line hedges, five feet high.

In Tennessee—A sufficient fence, five feet high, and so close from the earth as to prevent the passing through, or under, of hogs.

In Vermont—Similar to that of Maine, except the standard of height is four and one half feet.

In Virginia—Every fence five feet high, well built, and sufficiently close and near the ground to restrain horses, cattle, sheep, hogs, and goats.

In New York—The statute leaves the whole matter of the character of the fence to be determined by the electors of each town at town meetings.

In North Carolina—Similar provisions leave the matter to the determination of the voters of the several localities, in elections duly held, except that there is a general statute, by the terms of which each planter is compelled to protect his cultivated fields by a fence at least five feet high.

Thus it will be seen, by the hasty examination of the fence laws of some twenty-seven States in the Union, outside of our own, that vari-

ous kinds of fences are authorized by statutory regulation, the more liberal being in the Western or new States, and thereby making legal any kind of a fence which would serve to keep domestic animals within the inclosure.

The Pennsylvania Legislature of 1885 was doubtless in favor of repealing the act of 1700, but the bill coming before the House asking for its repeal as to but one county in the State, naturally drew forth more or less opposition from those counties opposed to its repeal, and the final result was, which was brought about by an amendment to the bill, that the provisions of the act of 1885, repealing the act of 1700, should not apply to any county in the State, unless the county commissioners request the sheriff to publish the act therein, with, and in the same manner, that notices of the next general election shall be published; and for the purpose of ascertaining whether or not the provisions of the act are deemed expedient and desired in such county, and the qualified electors shall determine by a vote thereof, whether the act shall take effect in such county.

Whilst this provision in the act puts it in the power of any or every county in the Commonwealth to repeal the act of 1700, so far as it relates to such county, yet practically the law *is* not and *will* not be repealed. The very thing intended to be accomplished by the act will not be attained. County commissioners will not take upon themselves the responsibility of requesting an election, and when an election is held, the various notions and prejudices of the people regarding the old law will enter into their actions at the polls, and, in a majority of instances, the law will not be repealed.

The act of 1700 was passed when our country was new; when it was much more difficult to fence than now, and when cattle roamed at large through every woodland and forest, wherever pasturage could be obtained. The act was only passed for the benefit of the "provinces and the counties annexed," and it has *certainly* long since outlived its usefulness.

It seems to me that if the act of 1700 was stricken from our statute books, and the common law rule in force in our State, that every farmer must fence his land to keep his cattle in, or be reponsible for the damage they may do, that it would be much better than with the act in force. The law as to partition fences remaining the same, the farmer would be at liberty to build any kind of a fence that would keep his cattle within his own close.

THE FENCE LAWS OF PENNSYLVANIA.

By Hon. HENRY M. SEELEY, *of the Twenty-second Judicial District of Pennsylvania.*

Read at the Honesdale Meeting.

I have been requested to speak, not upon the fence laws of Pennsylvania in general, but only upon a single feature of those laws.

In June, 1885, the Legislature of this Commonwealth passed an act repealing the first section of the act of 1700 relating to fences, and providing that this repealing act should not take effect in any county until it has been ascertained that the provisions thereof are deemed expedient, and desired therein, by an election to be held as therein directed.

I was invited to say something to you with reference to this act, and its effect in counties where it might become operative.

The duty to maintain line or partition fences is no part of the subject-matter of the section to be repealed, and is not presented for our present consideration.

I purpose, in a rapid review of the history of this subject, to inquire as to the common-law rule regulating fences; under what circumstances, and when first, a different rule came into effect; following the course of the legislation upon the subject in the Province and State of Pennsylvania; considering what portion of the first section of the act of 1700 is now in force, what it accomplishes, and what change would result from its repeal.

The very idea of separate ownership of land implies exclusive right of possession. No other person may enter upon it without the owner's consent; hence it is said that every man's estate is encircled by an ideal or imaginary fence, reaching from the surface upward to the heavens, and downward to the center of the earth.

Every man is bound so to conduct himself not only, but so enjoy his property, as not to injure that of another. So it was that if one permitted his cattle or his servants to trespass upon the lands of another, he must respond for all damage done. The ideal fence erected by the law was, in theory, as secure a protection as any actual fence could have been.

The first law governing this question, to which I direct your attention, is found in the Second Book of Moses, commonly called the Book of Exodus, in the twenty-second chapter and fifth verse, as rendered in the newly revised version, where we read:

"If a man shall cause a field or vineyard to be eaten, and shall let his beast loose, and it feed in another man's field, of the best of his own field, and of the best of his own vineyard, shall he make restitution."

This was the common law of England. The duty was upon the owner of cattle to restrain them from injuring his neighbor; not upon the cultivator of the soil to protect his crops against his neighbor's cattle.

In England, this general rule was subject to qualifications in its application. Sometimes, by prescription, a man became charged with the duty of maintaining a fence around his field. (See Coke upon Littleton, 283.) Sometimes Parliament, in providing for the division of common lands, directed how and by whom fences should be maintained. (See form of plea averring such an act in Wentworth's Pleadings, vol. 8, pp. 36–37, &c.) Whenever, in any way, the individual became responsible for maintaining a fence about his own field, he was not permitted to recover against another damages which could only occur by reason of his own neglect to maintain his fence.

This protection, which the common law furnished land-owners, seemed exceedingly burdensome to some of the early settlers of the American Colonies. Cattle were permitted to range at pleasure through large tracts of unimproved land, cultivated fields were com-

Pedigree of STORM KING 2161.

- Sire Happy Medium 400.
  - Hambletonian 10,
    - Abdallah 1,
      - Mambrino,
        - Imperial Messenger, . . . English Mambrino.
        - Daughter of, ... Imperial Saur Kraut.
      - Amazonia.
    - Charles Kent Mare, . . .
      - Imperial Bellfounder.
      - One Eye,
        - Bishop's Hambletonian, . Imperial Messenger.
        - Silver Tail, ... Imperial Messenger.
  - Princess 2.30, . . .
    - Andrus' Hambletonian, Judson's Hambletonian,
      - Bishop's Hambletonian, . Imperial Messenger.
      - Daughter of, ... Wells' Magnum Bonum.
    - Wilcox Mare, ... Burdick's Engineer, . . Engineer, ... Imperial Messenger.
- Dam Topsy Taylor.
  - Alex. Norman, 25,
    - Morse Horse 6, ...
      - European.
      - Beck,
        - Harris' Hambletonian, . . Bishop's Hambletonian.
        - Mozza, ... Peacock.
    - Slocum Mare, ... Magnum Bonum.
  - Daughter of, . . .
    - Howard's Sir Charles, . Clinton, ... Sir Charles.
      - Daughter of, ... Sir Alfred.
    - Daughter of, ... Smith's Messenger, . . . Dill's Messenger.

STORM KING 2161.—Bay stallion; few white hairs in forehead, little white on right hind foot; stands 16 hands. Foaled April 12, 1882. Bred by Gen. William T. Withers. Property of Daniel G. Engle, Marietta, Pa., Engletree Stock Farm.