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## Railroads--Duty to Take Precautions to Avoid Injury to Domestic Animals Near Track

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by which the property was conveyed, and imposed certain restrictions upon the vendee as to the use of the land conveyed. In neither instance does it appear that the deed was signed by the vendee, but neither case attempts any explanation as to why these agreements are not within our Statute of Frauds.<sup>2</sup> Today the validity of such agreements is almost universally recognized; and in most jurisdictions independent of the mode or incidents of execution. However, practically none of these cases attempt to explain why such agreements are not within the Statute of Frauds. The courts of several states have taken the view that such agreements create interests in land within the contemplation of the Statute,<sup>3</sup> while an equally limited number expressly take the opposite view.<sup>4</sup> There are two decisions denying that such an agreement is one not to be performed within one year from the making thereof. One decision is based upon the theory that there is a possibility that the agreement may be performed within one year<sup>5</sup>; the other upon the theory that the provision does not apply to a negative contract.<sup>6</sup> The text writers upon the Statute of Frauds adopt the view that such agreements are not within the Statute, but are not accompanied by explanations.<sup>7</sup> It may be said to be a fairly well settled rule that such agreements are not within the provisions of the Statute of Frauds, but it is regrettable that the cases do not attempt any explanations as to why the Statute of Frauds does not apply. —M. T. V.

RAILROADS—DUTY TO TAKE PRECAUTION TO AVOID INJURY TO DOMESTIC ANIMALS NEAR TRACK.—A train crew discovered a cow about 125 feet ahead and 8 or 10 feet from track and between it and a slope from which she was eating grass. No effort was made to check the engine until the cow suddenly wheeled around and got upon the track 60 feet ahead. *Held*, whether employes were negligent is a question for jury determination from all the circumstances. *Testerman v. Hines, Director General*, 107 S. E. 201, (W. Va. 1921.)

<sup>2</sup> W. VA. CODE, c. 98 § 1.

<sup>3</sup> *Eprague v. Kimball*, 213 Mass. 380, 100 N. E. 622 (1913); *Clanton v. Scruggs*, 95 Ala. 279, 10 So. 757 (1892); *Rice v. Roberts*, 24 Wis. 461 (1869); *Wolfe v. Frost* 4 Sandf. Ch. 72 (N. Y. 1847).

<sup>4</sup> *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876 (1892); *Pitman v. Hodge*, 67 N. H. 101, 36 Atl. 605 (1892); *Leinaw v. Smart*, 11 Humph. 308 (Tenn. 1850); *Bostwick v. Leach*, 3 Day 476 (Conn. 1809).

<sup>5</sup> *Hall v. Solomon*, *supra*.

<sup>6</sup> *Leinaw v. Smart*, *supra*.

<sup>7</sup> See BROWNE, STATUTE OF FRAUDS, 4 ed., § 269; SMITH, LAW OF FRAUDS, § 3460.

The English common law restraining domestic animals from running at large the unenclosed range is not operative in West Virginia, being inconsistent with our legislation. Nor is there any statute in this state requiring railroads to fence their right of way. The case must, therefore, be settled on common law principles. *Blaine v. C. & O. R. Co.*, 9 W. Va. 252; *Baylor v. B. & O. R. Co.*, 9 W. Va. 270. The public interest in rapid transportation requires that no duty be imposed on a railway company to check the speed of its train, or adopt other precaution, upon discovery of domestic animals grazing quietly in vicinity of the track and manifesting no disposition to come upon it. *Wabash, etc., R. Co. v. Aarvig*, 66 Ill. App. 146; *Bunnell v. Rio Grande Western R. Co.*, 13 Utah 314, 44 Pac. 927; *Savannah, etc., Ry. Co. v. Rice*, 23 Fla. 575, 3 So. 170. An engineer is not bound to guard against every possible contingency, but only against apparent danger. *Chicago, etc., R. Co. v. Bradfield*, 63 Ill. 220. Something must be left to his discretion, and infallibility on his part is not required. *Mobile, etc., R. Co. v. Caldwell*, 83 Ala. 196, 3 So. 445; *New Orleans, etc., R. Co. v. Bourgeois*, 66 Miss. 3, 5 So. 629. However, an engineer must keep a lookout for subsequent movements of such animals, *Missouri Pacific R. Co. v. Reynolds*, 31 Kans. 132, 1 Pac. 150. A duty to adopt precaution arises where there is apparent danger of injury, as where the animal is in dangerous proximity to the track, *Snowdon v. Norfolk Southern R. Co.*, 95 N. C. 93; or is seen approaching the track apparently intending to cross it, *Chicago & Alton R. Co. v. Kellam*, 92 Ill. 245, 34 Am. Rep. 128; *Illinois Central R. Co. v. Person*, 65 Miss. 319, 3 So. 375; or where means of escape from track is made difficult by embankments or fences. *Heard v. Railway Co.*, 26 W. Va. 455; *Bostwick v. Minneapolis etc., R. Co.*, 2 N. D. 440, 5 N. W. 78. It is unfortunate that the court failed to distinguish the case of *Heard v. Railway Co.*, *supra*, where, on facts perhaps a little more evident of negligence the court held the question could be decided as matter of law. All precautions are to be exercised subject to the paramount duty of caring for the safety of passengers and property on the train. *Bunnell v. Rio Grande Western R. Co.*, 13 Utah 314, 44 Pac. 927. Some cases even hold that in case of inevitable collision the speed of the train may purposely be increased to lessen danger to the train. *Chicago R. Co. v. Jones*, 59 Miss. 465. —M. H. M.