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Animal Law in California

California statutory and case law governing animal-related disputes is vast. These laws apply to the conduct of thousands of animals and their owners on a daily basis. This comment provides a summary of the California law, covering prevalent areas of concern for attorneys who are involved in cases governed by animal law. Areas which are addressed include: acquisition of title to animals; ownership rights; statutory criminal restrictions on owners; and indirect regulation by civil case law via actions in trespass, strict liability and negligence.

I. INTRODUCTION

Domestic animals have been important to man's existence and well-being for over 10,000 years.¹ Wild animals have helped to sustain man's survival for a much longer period. Because animals have been a part of man's society for so long, they are often taken for granted. But the law has not forgotten them. There are literally hundreds of cases and statutes struggling with animal issues, each of which testifies to the importance of the subject. It is fair to say that most attorneys will be involved with at least one case involving animal law during the course of their careers, though perhaps only a dog-bite case.

This comment will provide the reader with a straightforward background of California animal cases and statutes pertaining to state regulation of the conduct of animals and their owners. This regulation is both direct, by means of criminal and court sanctions, and indirect, by means of private lawsuits. The comment also summarizes the incidents of animal ownership and the acquisition of title to animals in California.

Of course this comment has some important limitations. It does not directly discuss regulation of commercial animal enterprises but instead focuses upon the individual owner or keeper.² Moreover, it is limited to society's sanctioning of the owner or keeper as opposed to sanctions against third parties. The comment does not discuss property covenants or other types of contractual regulation of animals or inheritance problems. Finally, neither California's Endangered Species Act nor its general wildlife regulations is discussed.

1. See *infra* note 10.

2. Animal law treats owners and keepers in a similar fashion.

Two points must be kept in mind when resolving any animal law problem. First, different statutes are enforceable by different groups of people. Often, the author will refer to an enforcement officer; however, who this person is may vary from statute to statute. Second, different statutory schemes cover different types of animals, and often do so without precise definition. The author has discussed each statute noted herein in terms of the animals most often associated with the individual statute, but usually there is no sharp classification. Therefore the reader/researcher must often compose his own definition for a given statute. This is true even if there is a definition given, for generally they are deceptively broad.

With these concepts in mind we will begin by briefly looking at the incidents of animal ownership (Section II). These "incidents" provide the basis upon which statutory schemes are defined and enforced. Next, we will summarize how title to animals is obtained (Sections III and IV). This background may be necessary to determine who the owner or keeper is that the state may regulate. The heart of the comment (Section V) will focus on California's statutory scheme which regulates animal owners directly by means of the state's police power. Finally, some of the more commonly used private causes of action will be considered (Section VI). By sanctioning private lawsuits the state is indirectly regulating animals and how their owners care for them.

II. ANIMALS AS PROPERTY AND THE INCIDENTS OF OWNERSHIP

Regulation of animal owners in California often operates to limit the incidents of ownership normally associated with property. This section briefly reviews the incidents typically associated with animal property.

The California Constitution guarantees its citizens certain inalienable rights, one of which is the right to acquire, possess and protect property.³ Property in California encompasses a broad class of "things" and is defined in terms of ownership.⁴ Accordingly, California's Civil Code includes "all domestic animals" as property subject to ownership.⁵

3. CAL. CONST. art. I, § 1 (1849, amend. 1974). Article one, section one provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.*

4. CAL. CIV. CODE § 654 (West 1982) ("[i]n this Code, the thing of which there may be ownership is called property").

5. CAL. CIV. CODE § 655 (West 1982). See, e.g., *Yuba River Power Co. v. Nevada Irrigation Dist.*, 207 Cal. 521, 523, 279 P. 128, 129 (1929) (property is a broad term but is specifically defined in California by sections 654 and 655 of the Civil Code), followed in *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 841 n.22, 603 P.2d 425, 443 n.22, 160 Cal. Rptr. 323, 341 n.22 (1979) (Bird, C.J., dissenting) ("the term property . . . 'extends to

In general, ownership encompasses the right to *acquire, possess, dispose of, or exclude others from property*.⁶ All property must be real or personal in nature,⁷ and clearly animals fall into the latter category.⁸ The California Civil Code provides that the right to *acquire, possess, dispose of, and exclude*, as incidents of ownership, gives rise to two other inherent rights; the right to *consume* and the right to *natural increase*.⁹

Animals are a most unique form of property. They must be fed, watered, and generally cared for to survive while held in captivity. Like water, they have the power to move freely of their own volition. Man's use and control over many species of animals for several generations has created a dependence upon animals for his individual and societal well-being.¹⁰ The fact that an animal is alive and has such great value to society has created many intriguing conflicts between the absolutist policies of private property ownership, and policies grounded in society's need for the care and well-being of animals. These conflicts have resulted in a complex amassment of laws elaborating standards by which owners of animals must care, maintain, and utilize their animal property. These tenets and the potential liability flowing therefrom can best be examined in terms of their effect on the six incidents of ownership listed above, as influenced by the deep-rooted society/property conflict.

Understanding how title to animals is acquired may be necessary in understanding who will be subject to state regulation. Before turning to the discussion of title in section 3, brief mention should be made regarding the status of pets.

At common law, most animals were divided into the categories noted below (wild and domestic). Personal pets, however, were considered a qualified classification of *ferae naturae*, falling somewhere between wild animal and domestic animal classification. Pets were

every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value").

6. Ownership is defined as "the right of one or more persons to possess and use [a thing] to the exclusion of others." CAL. CIV. CODE § 654 (West 1982). See CAL. CIV. CODE § 671 (West 1982) (people authorized to own property). See also *supra* note 3.

7. CAL. CIV. CODE § 657 (West 1982).

8. See CAL. CIV. CODE §§ 658-660, 662 (West 1982) (further defining real property); see also CAL. CIV. CODE § 663 (West 1982) (stating that all property which is not real is defined as personal).

9. The Code states "[t]he owner of a thing owns also all its products and accessories." CAL. CIV. CODE § 732 (West 1982).

10. THE NEW COLUMBIA ENCYCLOPEDIA 107 (W. Harris & J. Levey ed.; 4th ed. 1975) (regarding animal husbandry).

considered to be kept for the "pleasure, curiosity or whim" of the owner and of little or no value.¹¹ Therefore, pets were not considered "property" in the traditional sense. This peculiar status was commented upon in *People v. Spencer*,¹² where the court referred to a case in which a defendant was charged with burglary after a prosecutor accused him of entering a building with intent to steal a dog. The charge was unsuccessful. Because a dog was not considered "property" at common law, it could not be the subject of the required intent for a burglary.¹³ In California, this special dog status has been abolished by statute and dogs are valued like all other property.¹⁴ The same is true of any other pet animals in California.¹⁵ Nevertheless, it is helpful to keep this history in mind when resolving animal issues, or, in particular, when considering the changing status of pets.¹⁶

III. ACQUISITION OF TITLE TO PROPERTY: THE BASIS OF REGULATION

As noted above, ownership is a term representing the rights to which an owner is entitled because he holds title to a given piece of property. This section summarizes the common methods of acquiring title to domestic animals. A review of the cases and Attorney General opinions indicate that title is important in many animal regulation cases.

Generally, people in California obtain title to animals in one of four ways: purchase, gift, finding, or increase.¹⁷ Title to wild animals (those not previously the subject of ownership) can be obtained by means of capture provided it is carried out within the bounds of state and federal regulatory schemes. Two specialized areas of title acquisition which will not be discussed here are adoption and confusion

11. 2 W. BLACKSTONE, COMMENTARIES 446 (B. Gavit ed. 1941). Interestingly, however, the ancient Britons considered the stealing or killing of a cat to be "a grievous crime, punishable by fine." *Id.*

12. *People v. Spencer*, 54 Cal. App. 54, 201 P. 130 (1921), *rev'd on other grounds*, *People v. Odenwalds*, 104 Cal. App. 203, 285 P. 406 (1930).

13. 54 Cal. App. at 58, 201 P. at 131. By contrast, the theft of domestic animals or wild animals held in captivity was a felony at common law. Depending upon one's viewpoint, they might find it odd to know that a dog could be the subject of a criminal charge of malicious trespass. *Johnson v. McConnell*, 80 Cal. 545, 549, 22 P. 219, 220 (1889).

14. The Penal Code provides that "[d]ogs are personal property, and their value is to be ascertained in the same manner as the value of other property." CAL. PENAL CODE § 491 (West 1970) (enacted in 1872).

15. See the dicta in *People v. Fimbres*, 107 Cal. App. 778, 780, 288 P. 19, 20 (1930).

16. See CAL. HEALTH & SAFETY CODE § 19901 (West Supp. 1984) ("pet," as construed by this section, means "domesticated dog, cat, bird, or aquarium").

17. As noted earlier, issues surrounding inheritance are beyond the scope of this paper.

(accession).¹⁸ Adoption does not raise any issues not covered below, whereas concepts of title by confusion may complicate regulation in only a few specialized situations.¹⁹

It should be kept in mind that all property within the state is owned either by the state, in which case it is known as public property, or by an individual, in which case it is denoted as private property.²⁰ This distinction may be important in determining title to an animal which could be classified as either wild or domestic; many of the rules regarding title to wild animals turn on public property doctrines.²¹

A. Purchase

Purchase of animals is clearly one of the most common methods of obtaining title to animals. Animals may be acquired from private vendors or from the state when it sells impounded animals. Fortunately these transactions are governed by California's version of the Uniform Commercial Code (U.C.C.) as modified by California court decisions. Because the U.C.C. is such a specialized subject, it is pointless to become overly involved with it in this context, inasmuch as there are many good treatises on the subject.²²

B. Title to Animals by Gift

Oftentimes the title to animals is obtained as a gift.²³ California's rule regarding gifts requires that there must be: (1) intent, (2) actual or symbolic delivery, and (3) acceptance.²⁴ The intention that must be shown is that of the donor: it must be shown that the donor had the present intent to transfer title or interest to the donee.²⁵

When an inter vivos gift is evidenced by a writing signed by the do-

18. See CAL. CIV. CODE §§ 1025-1033 (West 1982).

19. For a sample adoption agreement, see D. FAVRE & M. LORING, *ANIMAL LAW* 231 (1983).

20. See CAL. CIV. CODE § 669 (West 1982).

21. See *infra* notes 62-77 and accompanying text.

22. See, e.g., J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* (1972). Nevertheless, two basic provisions should be noted. Article 2 of the Code covers transactions in goods which are defined as all things movable at the time of identification to the contract. CAL. COM. CODE §§ 2102, 2105 (West 1964). Section 2105 expressly defines goods to include "unborn young of animals" which by implication brings animals into the scope of Article 2. CAL. COM. CODE § 2105 (West 1964).

23. In California, "[a] gift is a transfer of personal property, made voluntarily, and without consideration." CAL. CIV. CODE § 1146 (West 1982).

24. See, e.g., *In re Hall's Estate*, 154 Cal. 527, 531-32, 98 P. 269, 271 (1908).

25. *Id.* at 532, 98 P. at 271. Intent must always be shown.

nor, the animal does not actually need to be transferred—only the writing need be.²⁶ But any other *inter vivos* gift of an animal generally requires that there be a delivery.²⁷ The rationale for this rule is to prevent fraud and deter impulsive giving.²⁸

California requires acceptance for a gift to be valid.²⁹ However, the law *presumes* that the beneficiary of a gift did in fact accept the gift.³⁰ Therefore, the law allocates the burden of showing a revocation of acceptance to a party seeking to invalidate the gift.

The California Civil Code provides that: “[a] gift, other than a gift in view of death, cannot be revoked by the giver.”³¹ That is to say, title passes, and vests, in the donor when the donor relinquishes dominion and control.³²

26. *Id.*

27. *Id.*

It is a uniform rule that to consummate a gift of personal property without consideration under Sections 1146-1148 of the Civil Code, it is necessary that there be an immediate surrender of the article which is the subject of the gift, together with all dominion and control over it.

Morehead v. Turner, 41 Cal. App. 2d 414, 422, 106 P.2d 969, 973 (1940), *followed in* *Rolinson v. Rolinson*, 132 Cal. App. 2d 387, 390, 282 P.2d 98, 100 (1955); CAL. CIV. CODE § 1147 (West 1982) (providing that “[a] verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolic delivery of the thing to the donee”).

Retention of any control over the gift or right to use it *may* cause the gift to be invalid. *Blonde v. Estate of Jenkins*, 131 Cal. App. 2d 682, 686, 281 P.2d 14, 17 (1955).

Where the property is already in possession of the donee, it is sufficient for purposes of delivery that the donor merely relinquish dominion and control over the property; there need not be a re-delivery. *Skellenger v. England*, 81 Cal. App. 176, 184, 253 P. 191, 194-95 (1927).

28. *See, e.g.*, *Gordon v. Barr*, 13 Cal. 2d 596, 601, 91 P.2d 101, 104 (1939).

29. *See supra* note 24.

30. *Kropp v. Sterling Savings & Loan Ass'n*, 9 Cal. App. 3d 1033, 1046, 88 Cal. Rptr. 878, 885 (1970).

31. CAL. CIV. CODE § 1148 (West 1982). A gift in view of death is known as a gift *causa mortis*. It is characterized by the fact it is revokable upon the amelioration of the donor. The Civil Code discusses the nature of the gift *causa mortis* in three sections. *See* CAL. CIV. CODE §§ 1149-1151 (West 1982).

32. Two ways around the rule of non-revocation should be noted. First, it is possible that a gift of an animal with a reserved power of revocation may be allowed. This theory is based on a long line of cases implying that gifts in *trust* are not invalid although the donor reserves a power of revocation. *See, e.g.*, *American Bible Soc'y v. Mortgage Guar. Co.*, 217 Cal. 9, 14, 17 P.2d 105, 108 (1932) (“The circumstance that the donor reserved the power to revoke the gift does not invalidate the trust.”) (citation omitted). *Cf. Gordon v. Barr*, 13 Cal. 2d 596, 602, 91 P.2d 101, 104 (1939) (court allowed donor to reserve management control and pecuniary benefits from gifted property without the establishment of a trust).

The second method of overcoming the non-revocation rule is to show the donor's intent was induced by fraud, misrepresentation, *see, e.g.*, *Murdock v. Murdock*, 49 Cal. App. 775, 781, 194 P. 762, 765 (1920) (and cases cited therein), or undue influence. *See, e.g.*, *McDonald v. Hewlett*, 102 Cal. App. 2d 680, 686, 228 P.2d 83, 87 (1951) (terminally ill patient gifts practically all his property to attorney).

C. Finders of Domestic Animals

In our society, possession/occupation conveys elements of title.³³ Moreover, title to property may become absolute if possession is held for a specified period of time. A finder of property has possession and hence is accorded many of the benefits arising out of ownership. Generally, by statute the finder may take steps to perfect ownership, but even if he does not, the law still protects his right to possession except as to the true owner. This rule is grounded in the policies of protecting title, creating societal predictability, preventing endless unlawful takings, and generally supporting man's reasonable expectations.³⁴

California resolves issues of finder's rights to "found" property by means of a complex statutory scheme.³⁵ This scheme, however, subjects the finder to several regulatory duties and constraints. Prior to August 28, 1967, the date upon which Civil Code section 2080 became effective, there was much confusion and criticism regarding California's finders rules.³⁶ Section 2080 resolved much of this confusion; the statute goes beyond the common law rule and actually vests full title in the finder once certain conditions are fulfilled.

Today in California, one who finds a lost³⁷ domestic animal is not under a duty to take it into possession. But if a finder does take possession of the animal, or "saves any domestic animal from drowning or starvation,"³⁸ he should provide it with suitable food, shelter, and

33. See *supra* notes 4-6 and accompanying text. Cf. CAL. CIV. CODE § 1000 (West 1982) (property may be acquired by occupancy, accession, transfer, will or succession).

34. One of the earliest finders cases was *Armory v. Delemire*, 93 Eng. Rep. 664, 1 Strange 504 (K.B. 1722).

35. See CAL. CIV. CODE §§ 2080-2080.9 (West Supp. 1984).

36. See Elliott, *The Work of the 1947 Legislature; Personal Property*, 21 S. CAL. L. REV. 30, 30-31 (1947) (criticizing the inconsistencies amid the finders rules which formerly were contained in the California Civil Code §§ 1865, 1871, repealed by Act of Aug. 28, 1967, ch. 1512 § 1, 1967 CAL. STAT. 3601, 3601, and in the California Political Code §§ 3146-3142, repealed by Act of May 25, 1951, ch. 656, § 1, 1951 CAL. STAT. 1866, 1866).

37. In *People v. Stay*, 19 Cal. App. 3d 166, 172, 96 Cal. Rptr. 651, 655 (1971), the court held the term "lost," as used in section 2080 of the Civil Code and section 485 of the Penal Code, was used in its ordinary sense: the same meaning given lost property in the "finders" common law.

38. CAL. CIV. CODE § 2080 (West Supp. 1984). Section 2080 is the heart of California's finders provisions:

any person who finds a thing lost is not bound to take charge of it, but if he does so he is thenceforward a depository for the owner, with the rights and obligations of a depository for hire. Any person who finds and takes possession of any money, goods, things in action, or other personal property, or saves any domestic animal from drowning or starvation, shall, within a reasonable

treat it kindly.³⁹ A finder, according to section 2080, should "within a reasonable time" inform the owner of his possession, and return the animal.⁴⁰ A finder who knows the identity of the true owner, or who reasonably has the means of locating the owner, is guilty of theft if he fails to make an honest and reasonable effort to contact the owner and return his animal.⁴¹

Under state law, if the finder is unable to locate the owner, and the animal has a value of less than ten dollars, he may appropriate the animal as his own,⁴² subject to the rights of the true owner; the finder is a "depository."⁴³ Under this section it might be possible to show the finder of a stray dog was in fact the "owner." In many situations, however, the value of an animal would exceed this amount and therefore require the finder to turn the property over to the police⁴⁴ who in turn must endeavor to locate the owner.⁴⁵

The Civil Code provides that the police, if they cannot locate the owner, must hold found property for 90 days, at which time they must publish notice. If no one claims the property within seven days, *title vests* with the finder upon payment of the publication fee.⁴⁶ No notice is necessary for property with a value of under \$50.⁴⁷

The Civil Code also provides that public agencies may promulgate

time, inform the owner, if known, and make restitution without compensation, except a reasonable charge for saving and taking care of the property.

Id. But see *infra* notes 229-247 and accompanying text describing the specialized procedure to be followed when finding livestock.

39. CAL. CIV. CODE § 1834 (West 1954). See CAL. CIV. CODE § 1815 (West 1954) (regarding involuntary deposit of personal property, e.g., an animal).

40. CAL. CIV. CODE § 2080 (West Supp. 1984). As noted above, section 2080 provides that the finder is entitled to a reasonable charge for expenses incurred while saving or possessing the animal. Expenditures on animal care can of course become quite costly.

These costs may be recovered *in addition to* any offer of reward accepted by the finder. See, e.g., *Berthiaume v. Doe*, 22 Cal. App. 78, 79, 133 P. 515, 515 (1913) (construing sections 1865 and 1867 of the Civil Code, now codified at section 2080 of the Civil Code).

41. CAL. PENAL CODE § 485 (West 1970). The section provides:

One who finds lost property under circumstances which give him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and to restore the property to him, is guilty of theft.

For a definition of lost property, see *supra* note 37.

42. CAL. CIV. CODE § 2080.1 (West Supp. 1984). This section requires that property with a value of over \$10 be turned over to the appropriate law enforcement agency with an affidavit outlining the circumstances of the finding.

43. See CAL. CIV. CODE § 2080 (West Supp. 1984) (quoted *supra* note 38).

44. See *supra* note 42.

45. CAL. CIV. CODE § 2080.2 (West Supp. 1984).

46. CAL. CIV. CODE § 2080.3(a) (West Supp. 1984). See also CAL. CIV. CODE § 2080.5 (West Supp. 1984) (providing the police with power to sell property when charges against it amount to two-thirds of its value).

47. CAL. CIV. CODE § 2080.3(b) (West Supp. 1984).

their own regulations for handling the restitution, disposal, or sale of found property.⁴⁸ In Los Angeles, for example, the Department of Animal Regulation is charged with providing a public pound and enforcing state penal and city ordinances "relating to the care, treatment or impounding of dumb animals or for the prevention of cruelty to the same."⁴⁹ Pursuant to this provision in the charter, the city has enacted ordinance section 53.09 which requires that "[a]ny person finding at any time any stray domestic animal . . . may take up such animal. . . ."⁵⁰ The ordinance goes on to provide that a finder of any domestic animal must notify a police officer or the Department of Animal Regulation within a few hours, must file a report, and must surrender the animal upon demand of the Department.⁵¹ Los Angeles has also utilized article XIII of the city charter to adopt an ordinance which provides for the notice, sale, or destruction of impounded animals (including those animals found and surrendered).⁵²

Importantly, these laws regarding city disposition of impounded animals differ markedly from the minimum requirement set forth in the California finders laws.⁵³ The procedure in Los Angeles animal control centers is that a finder of an animal who wants to retain the animal may request a first right of refusal when surrendering the animal. If after searching for the owner and publishing notice the owner has still not been found, a sale is held. If no one purchases from the sale, the finder gets the animal.

The Civil Code makes it clear that section 2080 does not apply to intentionally abandoned property.⁵⁴ When no statute or decision has been decided on a point of law, the common law of England applies.⁵⁵ Generally at common law, abandoned property is subjected to the common law finders rules or it escheats to the state. Practically speaking, however, even if an animal is thought to be abandoned it is treated as if it had been lost or had escaped by the state, thus necessitating the finder of abandoned property to follow the statutory finders provisions.

48. CAL. CIV. CODE §§ 2080.4, 2080.6 (West Supp. 1984).

49. LOS ANGELES, CAL. City Charter, art. XIII, § 155, cl. 1-2 (1973).

50. LOS ANGELES, CAL. MUNICIPAL CODE § 53.09 (1978).

51. *Id.* The Department takes possession of animals reported under the provision.

52. LOS ANGELES, CAL. MUNICIPAL CODE § 53.11 (1978).

53. *Id.*

54. CAL. CIV. CODE § 2080.7 (West Supp. 1984).

55. CAL. CIV. CODE § 22.2 (West 1982).

D. Increase

In general the owners of animals hold legal title to the offspring of their animals; title is in the owner of the mother. This concept is frequently referred to as *partus sequitur ventrem*.⁵⁶ The California Civil Code adopts this common law maxim in section 732.⁵⁷ Moreover, title to the increase of the increase is vested according to this rule.⁵⁸

Of course, owners of animals can agree to the contrary by express or implied contract,⁵⁹ for example, by a contract for future offspring. With today's high cost of caring for animals, particularly large animals, it is not uncommon for the owner of the dam to contract for her care in exchange for all her offspring. A similar type of contract may arise where an owner provides stud service to another in exchange for all offspring from a particular dam.⁶⁰ In California, the loan of an animal does not vest title in the borrower for "increase during the period of the loan."⁶¹

IV. TITLE TO WILD ANIMALS, WILD ANIMAL REVERSION, AND THE PUBLIC OWNERSHIP DOCTRINE

Many animals are or may be considered wild animals. This section briefly distinguishes the acquisition of title in wild animals from their domestic counterparts. When examining an owner's title to wild animals, two overriding hurdles must be surpassed. First, one must overcome federal, state, and possibly local regulation. Second, one must show capture.

A. Government Regulation

At common law in England, ownership of wild game belonged to the King. Hence the "right and power to protect and preserve" such property was believed to have vested in the sovereigns of the union.⁶²

56. BLACK'S LAW DICTIONARY 1010 (5th ed. 1979) ("the brood of an animal belongs to the owner of the dam"). A dam is "[a] female parent, [especially] of a quadruped." AMERICAN HERITAGE DICTIONARY 182 (P. Davis ed. 1976) (paperback ed.). The reason for the rule is that the mother is of little value while pregnant yet must still be cared for. On a more practical note, the father may be impossible to ascertain. D. FAVRE & M. LORING, ANIMAL LAW 22 (1983).

57. CAL. CIV. CODE § 732 (West 1982).

58. 3A C.J.S. *Animals* § 9 (1973).

59. *Id.*

60. Offspring have also been used as collateral for a loan. See *Calva Prods. v. Security Pac. Nat'l Bank*, 111 Cal. App. 3d 409, 412, 168 Cal. Rptr. 582, 583 (1980).

61. CAL. CIV. CODE § 1885 (West 1954). Of course the borrower must "treat it with great kindness, and provide everything necessary and suitable for it." CAL. CIV. CODE § 1887 (West 1954).

62. *People v. Stafford Packing Co.*, 193 Cal. 719, 727, 227 P. 485, 488 (1924) (citations omitted).

Since the people of the "state" collectively are entitled to the sovereign's resources, title to wild animals is held jointly by the people of the state.⁶³ Aside from the United States Constitution and the laws promulgated thereunder, the state's power is limited only by the grants of rights and power made to its citizenry. As would be expected, the state of California has been left with great power to protect wild animals by its citizens.⁶⁴ In California, therefore, wild animals are not subject to private ownership except as provided by the legislature; the legislature wields the state's police power with respect to animals.⁶⁵

Fortunately, today there are a multitude of state statutes regulating the taking of wild animals. Compliance with these statutes, in addition to actually perfecting ownership, is necessary to legally obtain title.⁶⁶ Due to the immensity of this labyrinth of statutes, they are by

63. *Id.*

64. CAL. CONST. art. IV, § 20. The provision establishes the Fish and Game Commission and Fish and Game districts. *Accord* CAL. CONST. art. IV § 25 1/2 (repealed Nov. 8, 1966).

65. *See, e.g.,* Takahashi v. Fish and Game Comm'n, 30 Cal. 2d 719, 728, 185 P.2d 805, 810-11 (1947), *rev'd on other grounds*, 334 U.S. 410 (1948). The power of the state to regulate the taking of wild animals has been litigated on many occasions. The state has extensive power subject only to constitutional limitations. *Id.* The legislature may totally prohibit the taking of wild animals and bar any commerce dealing with them. *See, e.g.,* *Ex Parte Kennke*, 136 Cal. 527, 529, 69 P. 261, 262 (1902); *Ex Parte Maier*, 103 Cal. 476, 483, 37 P. 402, 404 (1894).

66. A good place to begin searching for these statutes is the California Fish and Game Code. The Code generally covers the taking of mammals, birds and fish which usually are considered game animals.

One must understand some additional basics regarding the state ownership doctrine to be truly enlightened as to its ambiguities and constitutional dimension. The doctrine for many years, in addition to being the framework of state wildlife regulation, acted to prohibit the federal government from regulating wildlife. Perhaps the key case setting forth the doctrine is *Geer v. Connecticut*, 161 U.S. 519 (1896). *See also* *McCready v. Virginia*, 94 U.S. 391 (1876). In a series of subsequent cases, the Supreme Court eroded the doctrine, allowing some federal regulation to withstand constitutional attack. For example, in *Missouri v. Holland*, 252 U.S. 416 (1920), the Court upheld the Federal Migratory Bird Act based upon the federal treaty power. *Id.* at 435.

Finally, in 1979, the Court *totally abrogated* the doctrine in *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979). Nevertheless, state wildlife regulatory schemes still hang onto the skeleton of the doctrine. More importantly, any research regarding the regulation of the taking of wild animals must include a thorough search of federal law. For a good overview of the rise and fall of state wildlife regulation with future predictions, see Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295 (1980). In any event, although the federal legislature appears to respect state regulation of wildlife, it clearly can and will regulate any area it so desires.

On an aside, one must distinguish the public ownership doctrine and the public trust doctrine which require a state to care for the animals for which it holds title for the benefit of its citizens. *See Qualified Ownership of Falcons*, 56 Op. Cal. Att'y Gen. 190, 192 n.2 (1973).

necessity beyond the scope of this article.

B. Capture

The remaining requirement in securing title to wild animals at common law is "capture" of the animal. In 1872, the legislature expanded the common law rule and decided to "prescribe the limit where public proprietorship ends and that of the individual" begins.⁶⁷ Section 656 of the Civil Code, which is consistent with the common law capture rule, allows wild animals to be the subject of ownership. The Civil Code provides: "[a]nimals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or when taken and held in possession, or disabled and immediately pursued."⁶⁸ Thus, the right of ownership when based on capture is qualified and title to a wild animal is conditional.⁶⁹ As at common law, title is vested in the owner only as to those animals actually reduced to possession.⁷⁰

The qualification in the title of this type of property does not refer to the incidents of ownership.⁷¹ Rather, it refers to the fact that if the animal *escapes* from its owner and reverts to a state of nature, ownership can be lost.⁷² However, the escape doctrine only applies if the animal escapes to its "native habitat."⁷³ Moreover, as noted in section 656, where a wild animal has been "so tamed and domesticated that it has lost its disposition to return to a primitive state," the owner's qualified title remains intact even though the animal escapes.⁷⁴ This rule helps to resolve the classic conflict between the

67. *Kellogg v. King*, 114 Cal. 378, 388, 46 P. 166, 169 (1896). The court went on to say: "when within the provisions of such statute, an individual is as much to be protected in the enjoyment of his rights in this species of the property as in any other under the law." *Id.*

68. CAL. CIV. CODE § 656 (West 1982). Compare *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

69. See CAL. CIV. CODE § 656 (West 1982).

70. *People v. Truckee Lumber Co.*, 116 Cal. 397, 401, 48 P. 374, 375 (1897).

71. See *supra* notes 3-10 and accompanying text.

72. *Qualified Ownership of Falcons*, 56 Op. Cal. Att'y Gen. at 192. Under the Civil Code there are two types of property, absolute and qualified. CAL. CIV. CODE § 678 (West 1982). One form of qualified property is property with its use restricted. CAL. CIV. CODE § 680 (West 1982). When the legislature passes laws which restrict wild life appropriation, they fall under the control rubric of section 680, thus qualifying the common law right to qualified ownership. Therefore, all statutes which limit appropriation limit ownership as well.

73. Elliott, *The Work of the 1941 Legislature; Personal Property*, 15 S. CAL. L. REV. 218 (1942). The "natural habitat" doctrine has been abrogated as to fur bearing animals raised on a farm or ranch for commercial pelting purposes. CAL. CIV. CODE § 996 (West 1982).

74. *Qualified Ownership of Falcons*, 56 Op. Cal. Att'y Gen. at 198 (see also cases cited therein). The opinion goes on to point out that someone who finds such an animal must return the property pursuant to Civil Code section 2080, or be guilty of theft under Penal Code section 485. *Id.* See *supra* notes 38, 41 and accompanying text.

need to protect an owner's reasonable expectations, and protecting subsequent finders who have no knowledge of an animal's prior ownership.⁷⁵

The language in section 656, which provides: "when on land of the person claiming title to them," has been construed to mean that "although title to wild animals is in the state in trust . . . , [the landowner] has a sufficient qualified property interest to protect such game as against trespassers."⁷⁶ This principle is termed a prior right of appropriation.⁷⁷

Finally, if title to a wild animal can be placed in a particular person, that person and the animal's keeper will be personally liable for any damages incurred by the animal.

V. LIMITATIONS ON ANIMAL OWNERSHIP

Direct government regulation of animals and the ways in which their owners treat them can issue from three sources: federal, state, and local law. Since the thrust of this comment is on state law, only the minimum emphasis absolutely necessary is spent upon federal or local regulation.

A. Federal Limitations

As was noted above, the federal government has been involving itself on an increasing basis with regulation of wildlife.⁷⁸ In contradistinction to this position, the federal government for many years has had a notable history in regulating domestic animals. The legislature has traditionally drawn the required power from the commerce clause.⁷⁹ Of course, any exercise of federal power is limited by the due process clause of the fifth amendment,⁸⁰ which also includes the equal protection component.⁸¹ Additionally, the "no taking" clause

75. Cf. *Pierson*, 3 Cal. R. at 175.

76. *Qualified Ownership of Falcons*, 56 Op. Cal. Att'y. Gen. at 192 n.2. This is a departure from the common law rule which requires possession. See RESTATEMENT OF PROPERTY § 450, comment g (1944) ("Subject to such paramount authority as may be asserted by the state, he not only has this power to prevent appropriation by others" but he may also invalidate any attempt to take possession).

77. RESTATEMENT OF PROPERTY § 450, comment g (1944).

78. See *supra* note 66.

79. U.S. CONST. art. I, § 8, cl. 3.

80. The fifth amendment provides in pertinent part that: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

81. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

of the fifth amendment provides further protection.⁸² Needless to say, the statutes are pervasive, spanning portions of no less than fourteen titles of the United States Code.

Agencies are often utilized by the legislature to carry out its statutory mandate. These agencies often promulgate hundreds of regulations under a given statutory scheme. However, they must operate in compliance with the Administrative Procedures Act.⁸³

It is therefore clear that in today's regulatory environment, resolution of issues involving limitation on ownership or handling of animals must include assiduous research of the federal statutes and regulations.

B. State Limitations

The tenth amendment to the United States Constitution reserves certain rights and powers for the states.⁸⁴ This power is in part manifested by the states' ability to pass laws which preserve and protect health, safety, morals and the common good. Often the power is used to regulate the incidents derived from the ownership of property by citizen-owners within a state.⁸⁵

California animal owners are regulated by a profusion of laws which limit the ways in which their animals may be exploited. In reading these statutes it is important to identify the struggle between the policies of absolute property ownership which allow an owner to utilize his property as he so chooses and the state's interest in protecting animal welfare.

1. Cruelty

One of the earliest statutes limiting an owner's conduct with respect to the treatment of his animals was the original Penal Code section 597.⁸⁶ Today, subsection (b) proscribes a wide order of acts, the performance of which subjects the owner, or any other person, to criminal liability. Essentially the statute provides sanctions for overworking animals, failing to feed or water animals, and cruelly killing,

82. See *supra* note 80.

83. 5 U.S.C. §§ 551-559, 701-706 (1982).

84. The tenth amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

85. BLACK'S LAW DICTIONARY 1041 (5th ed. 1979) (definition of "police power").

86. The original provision enacted in 1872 provided: "Every person who maliciously kills, maims, or wounds an animal, *the property of another*, or who maliciously and cruelly beats, tortures or injures any animal, *whether belonging to himself or another*, is guilty of a misdemeanor." See CAL. PENAL CODE § 597 (West 1970) (historical notes) (emphasis added). Under title 14 of the Penal Code "animal" means "every dumb creature." CAL. PENAL CODE § 599b (West 1970).

beating, or injuring animals.⁸⁷

A recent evolution seems to have occurred in the courts' interpretation of section 597(b). In *People v. Farley*,⁸⁸ the defendant failed to water his horses which in turn caused their death. On appeal of his conviction, a felony at the time, the defendant contended that no criminal culpability was shown at trial. After a rather roundabout discussion of the various cases pertaining to the issue, the court analogized the case to one of child neglect.⁸⁹ The court held that cruelty laws, like child protection laws, were public welfare offenses which required no criminal intent or criminal negligence to be shown for a conviction.⁹⁰ Instead, the court said, the defendant need only be found to have committed the act, or negative act, voluntarily and in a negligent fashion (ordinary negligence).⁹¹

Seven years later, in *People v. Brian*,⁹² an animal owner was found guilty of not caring for his animals as required by section 597(b). The judge disagreed with the *Farley* analogy,⁹³ holding that conviction of

87. CAL. PENAL CODE § 597(b) (West Supp. 1984). See *id.* § 597(c). The Code contains some limitations on this provision. Section 599c acknowledges that none of the statutes in title 14 of the Penal Code (sections 594-625c) are to be construed to invalidate any "game laws" or laws involving destruction of certain birds. CAL. PENAL CODE § 599c (West 1970).

The provision also makes a common exception to cruelty laws by excluding from the protected classification of animals: "venomous reptile[s]," "animal[s] known as dangerous to life, limb or property," and animals used in "properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university. . . ." *Id.*

Another clause in section 599c has stirred recent controversy. It exempts from the title 14 killing proscriptions, the "right to kill all animals used for food." *Id.* In 1980, a Samoan family living in Sacramento, "killed, skinned, and presumably ate their pet dog." The SPCA commented that there was no state or federal law which prevented the act provided it was carried out for personal use. See *Animals as Property: Eating Your Pet*, ANIMAL RTS. L. REP., Jan. 1981, at 5. Attempts to prohibit such acts have not been successful. See *Animals as Property: Pet Killing*, ANIMAL RTS. L. REP., July 1981, at 7.

88. 33 Cal. App. 3d Supp. 1, 109 Cal. Rptr. 59 (1973).

89. *Id.* at 7, 109 Cal. Rptr. at 62.

90. *Id.* at 10, 109 Cal. Rptr. at 64.

91. *Id.*

92. 110 Cal. App. 3d Supp. 1, 168 Cal. Rptr. 105 (1980). The *Farley* case was decided in the Appellate Department of San Joaquin County Superior Court. *Brian* is a Los Angeles County case.

In *Brian*, the defendant had left her horses, dogs, cats, goats, and birds in the custody of her stepfather while she was away. The stepfather, after some time, left the area and refused to pay the feeding bills. The defendant, stranded with car problems, attempted to have the animals cared for until she returned but was unsuccessful. She was charged with neglect the day of her eventual return. *Id.* at 3, 168 Cal. Rptr. at 106.

93. *Id.* at 3, 168 Cal. Rptr. at 106. The court noted that the child neglect cases upon which *Farley* was decided had been undermined by *People v. Peabody*, 46 Cal.

section 597(b):

requires proof of criminal negligence which means that the defendant's conduct must amount to a reckless, gross or culpable departure from the ordinary standard of due care; it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for [animal] life.⁹⁴

It is unclear which degree of culpability future cases will find necessary to support a conviction under section 597(b). While it is socially desirable to protect people from criminal sanctions when they lack criminal intent, or were not grossly negligent, the position is hard to reconcile with the policy of protecting animals in captivity who, like children, cannot support themselves.

Section 597f of the Penal Code is similar to 597(b) but it is much broader (as to an owner). The statute makes any "owner, driver, or possessor of any animal" who fails to provide "proper care and attention" for the animal guilty of a misdemeanor.⁹⁵ Convictions under the statute have withstood the constitutional attack of vagueness; one court defined the phrase, "without proper care and attention," as meaning abandoned or neglected.⁹⁶ Oddly enough, it may be possible for ordinary negligence to sustain a conviction under this section.⁹⁷

Nevertheless, in many areas violations go on without prosecution. This may be in part due to frustration on the part of enforcement personnel who find violators, when prosecuted, are neither fined nor jailed.⁹⁸

If an enforcement officer finds that an animal is being abused he has several alternatives. Section 597f provides a detailed summary of situations in which an enforcement officer can take possession of an animal which is injured, abandoned or neglected and destroy the animal if necessary.⁹⁹ An interesting twist to section 597f power oc-

App. 3d 43, 119 Cal. Rptr. 780 (1975). 110 Cal. App. 3d Supp. at 4, 168 Cal. Rptr. at 107. Moreover, the judge noted the California Supreme Court's policy of requiring proof of criminal intent or criminal negligence before one is convicted of a crime. *Id.*

94. 110 Cal. App. 3d Supp. at 4, 168 Cal. Rptr. at 107 (quoting *Peabody*, 46 Cal. App. 3d at 48-49, 119 Cal. Rptr. at 783) (insertion added to reflect holding's applicability to animal life).

95. CAL. PENAL CODE § 597f (West Supp. 1984).

96. *People v. Untiedt*, 42 Cal. App. 3d 550, 554, 116 Cal. Rptr. 899, 901 (1974).

97. In dicta, the court stated that simple negligence would support a conviction thus perpetuating the confusion surrounding the required culpability. *Id.* at 555, 116 Cal. Rptr. at 901. See also *People v. Reed*, 121 Cal. App. 3d Supp. 26, 33, 176 Cal. Rptr. 98, 101 (1981).

98. See, e.g., *Cruelty: Criminal Prosecutions/Convictions*, ANIMAL RTS. L. REP., July 1982, at 1, 2. The segment comments on the first animal neglect case ever filed in Solano County, California. The case involved a Great Dane which was 50 pounds underweight.

99. CAL. PENAL CODE § 597f (West Supp. 1984). A 1970 amendment created a distinction for dogs and cats as well as providing for their conveyance to a veterinarian when injured. Act of August 4, 1970, ch. 580 § 1, 1970 Cal. Stat. 1155. See CAL. PENAL CODE § 599e (West 1970) (giving power to police to destroy animals if owner refuses).

curred in 1976 when a King County Animal Control Officer took possession of various farm animals which were in poor condition and found wandering at large.¹⁰⁰ The confiscation was challenged on procedural due process grounds pursuant to the fourteenth amendment's due process clause. The court found that although the "state" had an important interest which justified a "taking" of the property without a pre-deprivation hearing,¹⁰¹ the confiscation was illegal because, regardless of a defense, the county failed to provide a speedy post-deprivation hearing.¹⁰² The significance of this case may be tempered somewhat by the fact that many *farm animals* were involved in the confiscation, which, after five weeks, culminated in a feeding bill of over \$2,000.¹⁰³ Clearly, however, section 597f is a legislative statement that the people of the state will not tolerate abuse and neglect by owners of their animals.

A notable provision governing keepers, owners, or possessors of animals is Penal Code section 597t.¹⁰⁴ Enacted in 1970, the statute makes it a misdemeanor for an owner to fail in providing any animal with an adequate exercise area.¹⁰⁵ Also, if the animal is restricted by a tether it must be attached so as to allow the animal to reach adequate food, shelter and water, without becoming entangled in the tether.¹⁰⁶

2. Transportation by Owner¹⁰⁷

An area which has received recent attention is the state's regulation of the transportation of animals in an owner's vehicle. The original section setting forth limitations was enacted in 1905.¹⁰⁸ The section makes it a misdemeanor for anyone to cause an animal to be carried on a vehicle in a "cruel or inhumane manner" or to authorize or permit it to suffer, be treated cruelly or be tortured.¹⁰⁹

No reported cases have been prosecuted under the statute due in

100. *Carrera v. Bertaini*, 63 Cal. App. 3d 721, 725, 134 Cal. Rptr. 14, 16 (1976).

101. *Id.* at 728, 134 Cal. Rptr. at 18.

102. *Id.* at 729, 134 Cal. Rptr. at 19. The court held that a hearing on the merits of the seizure six weeks subsequent to the confiscation did not satisfy due process.

103. *Id.* at 725, 134 Cal. Rptr. at 16.

104. CAL. PENAL CODE § 597t (West Supp. 1984).

105. *Id.*

106. *Id.* See section 597l for a multitude of care and facility requirements for pet shops. CAL. PENAL CODE § 597l (West Supp. 1984).

107. For other provisions dealing with transportation of animals, see generally CAL. AGRIC. CODE §§ 21051-21591 (West 1968 & Supp. 1984).

108. CAL. PENAL CODE § 597a (West 1970).

109. *Id.*

part, no doubt, to the difficult burden of showing cruel or inhumane treatment. This burden is particularly difficult when an animal carried in a vehicle, for example, the back of a pick-up truck, is thrown to its death during an automobile collision.

In 1979, Assemblyman Mike Roose introduced bill number 214 which would have amended Vehicle Code section 21712 to provide:

(g) No person shall transport on a freeway any cat or dog in the *unenclosed* portion of a vehicle designed or intended for the transportation of property unless the cat or dog is caged or tethered with a harness or leash or is otherwise secured to the area designed to carry property, or unless the vehicle is enclosed in such a manner as to prevent the animal from falling out of or off the vehicle.

This subdivision shall apply only to the Counties of San Francisco, San Mateo, Santa Clara, Alameda, Contra Costa, Los Angeles, Orange, and San Diego. This provision applying only to these counties is necessary due to the volume of traffic in such areas and the subsequent increased need for *protecting the traveling public*.¹¹⁰

While the bill was before the legislature, Roose requested then-Attorney General George Deukmejian, to determine if section 597a could be used to carry out a policy of protecting unsecured animals in vehicles.¹¹¹ The ensuing opinion defined "cruel," "inhumane," "torture" and "suffering" in the transportation mode as meaning "transporting of animals in such a manner that causes or permits, without necessity or justification, 'physical pain or suffering' or at least in such a manner as to indicate that one is 'willing or pleased' to have pain or injury or anguish inflicted upon the animal."¹¹²

While the report concluded that an animal could be transported in a vehicle unrestrained without violating section 597a,¹¹³ it did recognize that it would be possible to violate the section under circumstances of, for example, extreme heat or cold.¹¹⁴ This opinion underscored the need for some type of legislation in this area. However, the Assembly bill died pursuant to article IV, section 10(a) of the California Constitution.¹¹⁵ However, some residual support for the bill appears to linger on. On March 8, 1982, Assemblyman

110. Cal. A.B. 214, 1979-80 Reg. Sess. (1979) (emphasis added). See section 597t, *supra* note 104, which provides in part: "This section shall not apply to an animal which is in transit, in a vehicle, or in the immediate control of a person." CAL. PENAL CODE § 597t (West Supp. 1984).

111. *Transporting A Dog or Cat*, 62 Op. Cal. Att'y Gen. 708, 708-09 (1979).

112. *Id.* at 710 (referring to section 599b).

113. *Id.*

114. *Id.* The opinion closed by emphasizing that "risk of injury is not sufficient within itself to render such transporting" a misdemeanor under section 597a. *Id.* (emphasis in original).

115. Cal. Assembly Final Hist., 1979-80 Reg. Sess. vol. 1 at 202. The bill failed for lack of support. It was opposed by humane societies and other animal rights groups which felt more suffering would result in requiring animal restraints than would occur without them. They felt the animals may become entangled in restraints while trying to escape after an accident.

Kapiloff introduced bill number 3048 which would have amended section 23116 of the Vehicle Code to specifically prohibit carrying any animals or children in the back of open-bed trucks while traveling on freeways.¹¹⁶ However, prior to its enactment into law, the "any animals" portion of the bill was withdrawn; the section, now part of the Vehicle Code, only protects small children on *highways*.¹¹⁷ As amended, however, the bill did requisition a study to determine the "*number of traffic accidents caused by an animal being discharged by jumping or falling from a vehicle onto a freeway.*"¹¹⁸ Why the amendment requested a study only for animal accidents on "freeways" while amending the bill, as to children, to include "highways" is unknown to the author.

3. Fighting

One of California's strongest policy statements regarding animals is set forth in several penal statutes dealing with fighting animals; or more particularly, animal owners fighting their animals against one another. The state has drawn the line in this area, limiting the purpose for which an owner can use his property.

Section 597b covers fighting animals generally except for dogs.¹¹⁹ The statute covers any person who causes an animal to fight with another animal (except as between two dogs), any person in control of a premises who acquiesces in such fighting, and any aiders or abettors. The crime is a misdemeanor. The rule is even broader with respect to cocks. It is extended to those who *possess* a bird with *intent* that the bird be used for fighting by him or his *vendee*.¹²⁰

Enforcement officers have broad power under two statutes which help them enforce these statutes. The first is section 599a. The law expressly sets forth the procedure for obtaining a search and arrest warrant based upon a complainant's belief that "any provision of law relating to, or in any way affecting, dumb animals or birds, is being,

116. Cal. Assembly Weekly Hist., 1981-82 Reg. Sess., Aug. 31, 1982, Pt. 3 at 1047.

117. CAL. VEH. CODE § 23116 (West Supp. 1985).

118. Cal. Assembly Daily J., 1981-82 Reg. Sess., Aug. 26, 1982 at 17937 (emphasis added). See the vote on page 17808, and the amendment on page 17937. The study will be conducted monthly through 1985.

119. CAL. PENAL CODE § 597b (West Supp. 1984).

120. CAL. PENAL CODE § 597j (West Supp. 1984) ("Any person who owns, possesses or keeps any cock with the intent that such cock shall be used or engaged by himself or by his vendee or by any other person in any exhibition of fighting is guilty of a misdemeanor.").

or is about to be violated.”¹²¹ Thus a report by a neighbor, control officer or anyone else can be the basis for a search and arrest.¹²²

Section 599aa allows an enforcement officer making an arrest under 597b, 597.5 or 599a to seize all animals and paraphernalia used, or about to be used, in violation of these animal fighting statutes.¹²³ Moreover, the statute provides that anyone convicted of the crime for which the animal or instrumentalities were seized will forfeit the property upon judicial determination of guilt; this includes judicially ordered destruction of the animals or instrumentalities.¹²⁴ The scope of section 599aa has been judicially broadened.

In *People v. Treadway*,¹²⁵ the defendant was charged with violating sections 597b and 597c¹²⁶ of the Penal Code and his fighting dogs were impounded pursuant to section 599aa. The defendant pled guilty to only the 597c charge on the condition that the other charges be dropped. The defendant demanded return of his dogs which he received after the trial court determined that section 599aa applied only to the dropped 597b charges.¹²⁷ On appeal the decision was reversed. The court found that section 599aa applied to section 597c as well as 597b.¹²⁸

In the same year that *Treadway* was decided, the legislature severed the crime of dog fighting from other animal fighting statutes. By enacting section 597.5,¹²⁹ the fine for dog fighting was extended to a maximum of \$50,000 and/or a jail term not to exceed one year.¹³⁰ These stiff fines and possible prison sentences extend to people in

121. CAL. PENAL CODE § 599a (West 1970). The section applies to other statutes within title 14. Section 597d sets forth the situations in which an officer may arrest without warrant violators of sections 597b, or presumably 597.5. CAL. PENAL CODE § 597d (West 1970). The provision, as usual, sets forth clear cut categories of who can exercise the power. *Id.*

122. The officer may also confiscate the animals in certain conditions. *See supra* note 99 and accompanying text.

123. CAL. PENAL CODE § 599aa (West Supp. 1984).

124. *Id.* The statutory scheme goes even further. Section 597c makes the training with intent that the animal will be fought a crime, and even covers persons present at preparations for fights, with the intent to be present at the fight. CAL. PENAL CODE § 597c (West Supp. 1984). Section 597i makes the manufacture, possession, or movement of gashes or slashes (sharp metal spurs attached to legs of game cocks) a misdemeanor. CAL. PENAL CODE § 597i (West Supp. 1970).

125. 55 Cal. App. 3d Supp. 15, 127 Cal. Rptr. 306 (1975).

126. *See supra* notes 119 and 124 and accompanying text for these provisions. The case occurred before section 597.5 was enacted.

127. 55 Cal. App. at 17, 127 Cal. Rptr. at 308.

128. *Id.* at 17-18, 127 Cal. Rptr. at 308-09. In noteworthy dicta, the court inferred that 599aa might apply to other Penal Code sections as well. *Id.*

129. CAL. PENAL CODE § 597.5(a) (West Supp. 1985).

130. *Id.* Section 4830.5 of the Business and Professions Code requires licensed veterinarians (*see* CAL. BUS. & PROF. CODE § 4828 (West Supp. 1984)) which treat animals they believe were killed or injured in fight to “promptly report the same to law enforcement authorities.” CAL. BUS. & PROF. CODE § 4830.5 (West Supp. 1985).

charge of premises upon which a dogfight occurs. The statute also covers trainers who train dogs with the intent they will be fought.

The impact upon established jurisprudence in this area is not yet fully known. But in 1980, a 32-year-old Long Beach resident was fined \$625 and sentenced to six months in jail with "three years strict probation" for dog fighting and cruelty violations.¹³¹

Subsection (b) of section 597.5 makes it a misdemeanor to be present as a spectator at a dog fight or even present at preparation for a fight with intent to remain.¹³² Finally, subsection (c) makes express exceptions for hunting dogs, dogs used to manage livestock and training dogs for purposes not prohibited by law.¹³³

4. Miscellaneous

California has several other miscellaneous laws which restrict private ownership of animals without delving too far into restriction on commercial animal operations. For example, it is a misdemeanor to cut the solid portion of any horse's tail. This is commonly termed as docking and became a misdemeanor in 1905.¹³⁴

Another limitation upon animal ownership, or horse ownership in particular, is Penal Code section 597g. This might commonly be referred to as the polling provision. In short, it outlaws a number of methods a horse trainer might use in training a horse to jump higher. In order to commit the crime, the method must consist of:

(1) forcing, persuading, or enticing a horse to jump in such manner that one or more of its legs will come in contact with an obstruction consisting of any kind of wire, or a pole, stick, rope or other object with brads, nails, tacks or other sharp points imbedded therein attached thereto or (2) raising, throwing or moving a pole, stick, wire, rope or other object, against one or more of the legs of a horse while it is jumping an obstruction so that the horse, in either case, is induced to raise such leg or legs higher in order to clear the obstruction.¹³⁵

131. *Cruelty: Convictions*, ANIMAL RTS. L. RPTR., Jan. 1981, at 5, 6.

132. CAL. PENAL CODE § 597.5(b) (West Supp. 1984).

133. *Id.* at (c). On a final note, California provides bulls with their own statutory protection. Section 597m of the Penal Code makes any kind of bullfighting illegal. CAL. PENAL CODE § 597m (West 1970). Of course the section would not be complete without an exception for "religious celebrations" or "religious festivals". *Id.* In fact the only reported opinion touching on the section is a case in which a promoter sought to stage a bloodless bullfight by allowing a priest to bless the bulls with a catholic mass. Then-Attorney General George Deukmejian found that such an event would violate the law. *See Bloodless Bullfights*, 64 Op. Cal. Att'y Gen. 151 (1981).

134. CAL. PENAL CODE § 599d (West 1970). *See generally* CAL. PENAL CODE § 597q (West 1970) (regarding proof). *But see* CAL. PENAL CODE § 597r (West 1970) (dealing with exceptions to the rule).

135. CAL. PENAL CODE § 597g (West Supp. 1984). Another statute limiting an

On a more practical note is California's law which outlaws the giving away or sale of "live chicks, rabbits, ducklings or other fowl as a prize."¹³⁶ The purpose behind this law is to protect the animals from the inevitable inhumane treatment they would receive in light of the special care they require. In 1965, the statute was greatly broadened. Today the statute outlaws the non-commercial sale or gift of any such animal by a roadside vendor,¹³⁷ and no such person, no matter where located, may lawfully engage in the practice of selling or giving these animals when artificially colored or dyed.¹³⁸

The purpose for the 1965 amendment to the provision displays the same policy contours as the original act: an endeavor to protect these animals from unnecessary cruelty, the present danger of which is continuously present both in the hands of the inexperienced vendor and short-sighted recipient.

5. Open Grazing Law

Division 9 of the Agricultural Code contains several sections covering animals generally.¹³⁹ Within the division is the California Open Range Grazing law which places some restrictions upon all animal owners falling within the statute.

The Open Grazing Law prohibits any person from turning out cer-

owner or keeper's actions in respect to his animal is Penal Code section 597k prohibiting the use of a bristle bur or tack bur. CAL. PENAL CODE § 597k (West Supp. 1984). After much searching, this author still has not been able to find anyone who knows what these devices are or what they do. Therefore, in his opinion, the statute, upon which no reported cases have been decided, may possibly fail for vagueness.

136. CAL. PENAL CODE § 599(a) (West 1970). Another statute that can be classified as a curiosity is Penal Code section 598. The statute set forth below has never been cited in a reported case, yet stands on the books today as it has for over 110 years. It provides "[e]very person who, within any public cemetery or burying-ground, kills, wounds, or traps any bird, or destroys any bird's nest other than swallows' nests, or removes any eggs or young birds from any nest, is guilty of a misdemeanor." CAL. PENAL CODE § 598 (West 1970).

137. *But see* CAL. PENAL CODE § 599(d) (West 1970) (does not affect "dealers, hatcheries, poultrymen or stores regularly engaged in the business of selling the same").

138. CAL. PENAL CODE § 599(b), (c) (West 1970). The statute goes even further in that it requires dealers of these animals to provide for "adequate food, water and temperature control." *Id.* § 599(c).

For general provisions dealing with poultry and rabbits, see generally CAL. AGRIC. CODE §§ 24501-27673 (West 1968 & Supp. 1984).

139. The Agricultural Code's Division 9 deals with animal law generally. The statutory scheme is quite extensive.

Part 1 of Division 9 deals with animals at large and provides both civil and criminal sanctions for violators of its many statutes. The criminal sanctions of part 1 include \$100 to \$1,000 fines, jail sentences of 10 days to six months, or both. CAL. AGRIC. CODE § 16421 (West Supp. 1984). While this penalty may not appear very stiff it should be noted that each day of sustained violation constitutes a separate offense. *Id.*

The Code further provides that the Attorney General may upon his own initiative institute civil proceedings against a violator for damages, not to exceed \$500 for each violation, and injunctive relief. CAL. AGRIC. CODE §§ 16441-16443 (West 1968).

tain bulls onto unenclosed lands located outside the city limits where cattle are permitted to roam.¹⁴⁰ To fall within the section, the bull must be over eight months in age and *not* a purebred.¹⁴¹ The law goes on to require that at least one bull be allowed to roam with each thirty cows while pastured on open range.¹⁴² The violators of the law are liable not only for civil and criminal penalties,¹⁴³ but also subject to a private right of action for any actual damages arising from a violation.¹⁴⁴

6. Special Statutes Pertaining to Dogs

Division 14 of the Agriculture Code contains provisions relating to the regulations and licensing of dogs.¹⁴⁵ The division can be broken into two types of statutes. The first are recommended statutes which a county may adopt. These statutes are designed to provide a framework for county dog control ordinances.¹⁴⁶ Therefore, if one has a problem dealing with dog licensing or regulation, he must research local ordinances to determine what sections have been adopted.

The second type of regulation found in Division 14 are mandatory

140. CAL. AGRIC. CODE §§ 16801(b)-16802 (West 1968).

141. CAL. AGRIC. CODE §§ 16801(a), 16802 (West 1968).

142. CAL. AGRIC. CODE § 16803 (West 1968).

143. See *supra* note 139.

144. CAL. AGRIC. CODE § 16804 (West 1968). Part one, chapter four of Division 9 does contain two additional statutes designed to protect society from any "indecent exposure" of certain animals. Essentially the owner is prohibited from commingling "stallion[s] or jack[s]" with "jennies or mares" within 400 yards of a populated area unless the horses are kept within an enclosure which prevents inhabitants from viewing the animals. See CAL. AGRIC. CODE § 16701 (West 1968). An accompanying section prohibits owners of a "stallion, bull, boar, ram or male goat" from allowing the animal to run at large. CAL. AGRIC. CODE § 16702 (West 1968). The sanctions provided by these laws differ from other penalties found in provision 9. See *supra* note 139. Violation of either statute is a misdemeanor and prior to 1983 was punishable by a \$5-\$20 fine, imprisonment in the county jail for not less than 30 days or both. See CAL. AGRIC. CODE § 16703 (West 1968) (fine increased to \$10-\$40 effective January 1, 1984).

Additionally, one must not forget the infamous crime against nature. CAL. PENAL CODE § 286.5 (West Supp. 1984). Originally the crime, placed on the books in 1872, was a felony punishable by no less than 5 years in prison: "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years." California Code Commissioners, THE PENAL CODE OF CALIFORNIA 65 (1872).

When certain acts of sodomy were decriminalized, the legislature relegated this crime to its own isolated section which provides: "Any person who sexually assaults any animal protected by Section 597f for the purpose of arousing or gratifying the sexual desire of the person is guilty of a misdemeanor." CAL. PENAL CODE § 286.5 (West Supp. 1984).

145. See generally CAL. AGRIC. CODE §§ 30501-31508 (West 1968 & Supp. 1984).

146. See CAL. AGRIC. CODE § 30501 (West 1968).

regulations. Most of these are found in Chapters 4 and 5. Chapter 4's section 30951 makes it unlawful for any person to have a dog over four months old unless the dog has a dog tag or license tag fastened to a collar worn on its neck or leg.¹⁴⁷

Provided an owner complies with the tagging rule, and other statutes and ordinances promulgated thereunder, a dog cannot be impounded, injured or killed.¹⁴⁸ There are, however, many statutes and ordinances subject to violation. Note that many of these and other dog statutes were promulgated in response to the old common law notion that dogs were not property and thus placed within a special classification. Today, remnants of this classification system have led to these special dog laws.

Thus, the state prohibits the owner of a female dog, which is in heat, from permitting the dog to run at large.¹⁴⁹ The state further prohibits an owner from permitting *any* dog to run at large on a farm where "livestock or domestic fowls" are kept, absent special circumstances.¹⁵⁰

Two statutes are worthy of particular attention. Section 31102 allows any person to kill any dog if:

(a) [t]he dog is found in the act of killing, wounding, or persistently pursuing or worrying livestock or poultry on land or premises which are not owned or possessed by the owner of the dog [or]

(b) [t]he person has such proof as conclusively shows that the dog has been recently engaged in killing or wounding livestock or poultry on land or premises which are not owned or possessed by the dog's owner.¹⁵¹

Section 31103 is more limited in its provision which states that "any dog entering any enclosed or unenclosed property upon which livestock or poultry are confined may be seized or killed by the owner or tenant of the property or by any employee of the owner or tenant."¹⁵² No criminal or civil liability will lie for a killing under either section 31102 or 31103.¹⁵³

As noted, violation of these laws may lead to impounding, injuring

147. CAL. AGRIC. CODE § 30951 (West 1968). See CAL. AGRIC. CODE § 31101 (West 1968) (dogs at large). For the sections on dog tags, see CAL. AGRIC. CODE §§ 30801-30807 (West 1968 & Supp. 1984). Incorrectly applying a *license tag* is unlawful. CAL. AGRIC. CODE § 30952 (West 1968).

148. See CAL. AGRIC. CODE § 30953 (West 1968).

149. See CAL. AGRIC. CODE § 30954 (West 1968).

150. See CAL. AGRIC. CODE § 30955 (West 1968). The circumstances are (1) owner consent, (2) livestock control, (3) "hunting and sporting purposes" or (4) contests. *Id.* See *infra* note 156 regarding a special provision for violators of this section. See also CAL. AGRIC. CODE § 31109 (West 1968) (holding tagged dogs on farms).

151. CAL. AGRIC. CODE § 31102 (West 1968).

152. CAL. AGRIC. CODE § 31103 (West 1968).

153. CAL. AGRIC. CODE §§ 31102-31103 (West 1968). The provisions do not apply within the city limits or when the animal is under owner control, unless actually caught in a prohibited act. See CAL. AGRIC. CODE § 31104 (West 1968).

or killing of the dog.¹⁵⁴ These violations may also lead to criminal and civil charges against the animal owner. Any violation of the division's laws is an infraction punishable by a \$50 fine for the first offense.¹⁵⁵ If the violation results in the death or serious injury of poultry or livestock, it is a misdemeanor and can bring a \$500 fine, six months in jail, or both.¹⁵⁶

The dog owner is also liable in a private cause of action for damages covered by the section in double the amount of actual damages.¹⁵⁷ Additionally, if the incident happened while the dog was in the charge of the owner, he must show cause why the animal should not be destroyed.¹⁵⁸ Finally, if a livestock owner suffers injuries from livestock killed by dogs and the owner cannot be identified, he may recover from the county in which the damages occurred.¹⁵⁹

7. Quarantine

It appears that two separate state political bodies have the power to quarantine an owner's animals. They are the California Department of Agriculture and the Department of Health Services.

Pursuant to Health and Safety Code section 3051,¹⁶⁰ the State Department of Health Services¹⁶¹ has the power to quarantine animals "whenever in its judgment such action is necessary to protect or preserve the public health." This power includes the power to destroy an animal when it becomes "an imminent menace to the public

154. Owners are responsible for impound fees; failure to pay the fee constitutes an abandonment. See CAL. AGRIC. CODE §§ 31253-31254 (West 1968).

155. CAL. AGRIC. CODE § 31401 (West Supp. 1984). Prior to 1971, a violation of this division was a misdemeanor. Today a second violation costs \$100.00. *Id.*

156. CAL. AGRIC. CODE § 31402 (West Supp. 1984). Serious injury occurs when an animal "must be destroyed" or "may not be profitably sold". *Id.* Violators of section 30955 may, in the court's discretion, have their sentence stayed if they pay actual damages to the land owner for his injuries; this precludes any other action for damages. See CAL. AGRIC. CODE § 30956 (West Supp. 1984). See also CAL. GOV'T CODE § 25803 (West Supp. 1984); CAL. HEALTH & SAFETY CODE § 18601 (West 1984).

157. See CAL. AGRIC. CODE § 31501 (West 1968). See *infra* notes 206-09, 281-83 and accompanying text.

158. See CAL. AGRIC. CODE § 31505 (West 1968). See generally CAL. AGRIC. CODE §§ 31501-31508 (West 1968).

159. See generally CAL. AGRIC. CODE §§ 30651-30656 (West 1968 & Supp. 1985).

160. CAL. HEALTH & SAFETY CODE § 3051 (West 1979). "Statutes which are enacted for the purpose of eradicating animal diseases detrimental to health and public welfare come within the police power and 'every reasonable intendment is in favor of their validity, on the theory that such diseased animals constitute public nuisances.'" *Dairy Cattle*, 27 Ops. Cal. Att'y Gen. 384, 385 (1956) (quoting *Affonso Bros. v. Brock*, 29 Cal. App. 2d 26, 32, 84 P.2d 515, 518 (1938)).

161. CAL. HEALTH & SAFETY CODE § 100 (West 1979).

health.”¹⁶² This power is delegated to county, city or district health officers,¹⁶³ and gives the locality the power to compensate injured parties for destroyed animals.¹⁶⁴

The other body which has the power of quarantine over animals is the Department of Agriculture. The Director of Agriculture¹⁶⁵ has the power to¹⁶⁶ inspect any domestic animals¹⁶⁷ upon receiving information of the existence of *any* “contagious, infectious or transmissible disease[s] which [affect] . . . domestic animals.”¹⁶⁸ If the Director’s suspicions are confirmed, he *must* create a quarantine area in which the infected animal must remain; other animals which have been, or might have been, in contact with the diseased animal may also be so detained.¹⁶⁹ Movement of quarantined animals without a written permit is unlawful.¹⁷⁰ Violators of the quarantine provisions¹⁷¹ are subject to the criminal sanctions of fine, imprisonment or both.¹⁷²

Once a quarantine is established, the Director has broad power which includes the power to destroy animals that are “dangerous to themselves or other animals.”¹⁷³ Importantly, animals destroyed pursuant to section 9569¹⁷⁴ entitle the owner to compensation¹⁷⁵ un-

162. CAL. HEALTH & SAFETY CODE § 3052 (West 1979). This section covers general diseases that affect all animals. See CAL. HEALTH & SAFETY CODE §§ 1900-2000 (West 1979 & Supp. 1984) for a separate and distinct quarantine scheme for control of rabies; the extensive provision provides for the destruction of animals and \$1,000.00 fines for violators of its provisions.

163. CAL. HEALTH & SAFETY CODE §§ 3000-3110 (West 1979).

164. CAL. HEALTH & SAFETY CODE § 3114 (West 1979).

165. See CAL. AGRIC. CODE § 102 (West Supp. 1984).

166. See CAL. AGRIC. CODE § 9561 (West 1968). The provision allows the director to “establish such quarantine, sanitary, and police regulations as may be necessary to circumscribe and exterminate any contagious, infectious, or transmissible disease which affects domesticated animals within the state.” *Id.*

167. The definition of animal is very broad. CAL. AGRIC. CODE § 9502 (West 1968) (“‘Animal,’ ‘livestock,’ or ‘domestic animal,’ includes poultry”). Compare section 16302’s definition which provides that the term “‘animal’ includes any domestic bovine animal, horse, mule, burro, sheep, goat, or swine, or the hide, carcass, or portion of a carcass of any such animal.” CAL. AGRIC. CODE § 16302 (West 1968).

168. CAL. AGRIC. CODE § 9531 (West 1968). See CAL. AGRIC. CODE § 9532 (West 1968) (chapter does not preempt local city and county inspection ordinances).

169. See CAL. AGRIC. CODE §§ 9562, 9564-9565 (West 1968). Depending upon the situation, the animal may be detained at the place where it is found.

170. See CAL. AGRIC. CODE §§ 9563, 9566 (West 1968).

171. See CAL. AGRIC. CODE §§ 9691-9693, 9696-9700 (West 1968) (specifying violations of quarantine provisions).

172. CAL. AGRIC. CODE § 9701 (West Supp. 1985) (the fine was raised in 1983 and 1984).

173. CAL. AGRIC. CODE § 9569 (West 1968). Hiding the animal or resisting its destruction is unlawful. CAL. AGRIC. CODE §§ 9694-9695 (West 1968).

174. See CAL. AGRIC. CODE § 9569(d), (e) (West 1968) (power of Director of Agriculture to destroy animal property in quarantined area).

175. CAL. AGRIC. CODE § 9591 (West Supp. 1984).

less he violates a quarantine order.¹⁷⁶

Although contribution for this reimbursement by the state to the Department is conditional upon matching federal funds, or the director finds that the failure to dispose of the animal would be detrimental to the welfare of the animal industry,¹⁷⁷ the Department is authorized to allow compensation to owners of destroyed animals to be paid from their general funds¹⁷⁸ in an amount determined by an appraisal committee.¹⁷⁹

8. Death Chambers and Their Inspection (A Brief Word)

In recent years the California legislature has decided that when animals are destroyed, they must be destroyed in a humane manner. To attain this goal the state has enacted a host of laws regulating euthanasic devices.¹⁸⁰ The state has outlawed the use of decompression chambers¹⁸¹ and placed strict limitations on the use of nitrogen gas¹⁸² and carbon monoxide gas chambers.¹⁸³ Special methods are required when killing newborn dogs and cats.¹⁸⁴ Violation of any of these laws is a misdemeanor.¹⁸⁵

C. Local Limitations

Cities and townships generally derive their power from charters which are similar to a state's constitution. The charter and all ordinances promulgated thereunder must not contravene the restrictions of the United States Constitution or certain provisions in the state

176. CAL. AGRIC. CODE § 9595 (West Supp. 1985).

177. CAL. AGRIC. CODE § 9592 (West Supp. 1985).

178. CAL. AGRIC. CODE § 9594 (West Supp. 1984).

179. CAL. AGRIC. CODE § 9593 (West Supp. 1985). However, if an animal is affected with dourine or is classified as a public nuisance, no indemnity will be provided for state imposed destruction. See CAL. AGRIC. CODE § 9621 (West 1968).

180. A euthanasic device is an instrument used to kill animals. See CAL. BUS. & PROF. CODE § 13200 (West Supp. 1984).

181. CAL. PENAL CODE § 597w (West Supp. 1985).

182. *Id.* See CAL. PENAL CODE § 597x (*repealed by* Act of July 5, 1984, ch. 281, § 2, 1984 Cal. Stat.—).

183. CAL. PENAL CODE § 597u (West Supp. 1984).

184. CAL. PENAL CODE § 597v (West Supp. 1984).

185. CAL. PENAL CODE § 597y (West Supp. 1984). Recently California enacted a vigorous enforcement program to verify that euthanasic devices were being properly maintained. The general provision may be found in the Business and Professions Code. See CAL. BUS. & PROF. CODE §§ 13200-13206 (West Supp. 1984) (general provisions); CAL. PENAL CODE § 597z (West Supp. 1985) (power to enter facility). See also CAL. BUS. & PROF. CODE §§ 12012.1, 12013, 12016 (West Supp. 1984) (injunctive relief, power to arrest and interference with the sealer).

constitution. Moreover, ordinances may not exceed the scope of powers enumerated in the charter under which the ordinance has been enacted. As this paper is generally limited to state law, the author does not endeavor to set forth local ordinances. Needless to say, when any regulation problem arises, the researcher must thoroughly check the city and county ordinances within his jurisdiction.

VI. CIVIL LIABILITY IMPOSED ON ANIMAL OWNERS; INDIRECT REGULATION

Potential civil liability of animal owners canvasses several areas of the law. The three major areas are: absolute liability, trespass actions, and negligence actions. All three may be discussed in terms of three generic classes of animals: wild animals, domestic animals, and dogs.

The three actions can be broken down into two types: strict liability and negligence. Strict liability is the basis of the absolute liability actions and trespass actions. Three elements must be proved: (1) causation in fact, (2) proximate cause, and (3) damages.

The materials on title noted above will help in determining the causation in fact issue when it must be shown that it was a particular defendant's animal which caused the harm. The rationale for imposing strict liability is not based so much on the notion of a duty owed to someone but rather as a means of balancing the legally protected right of owning certain animals with the great harm which these animals can cause.¹⁸⁶

Negligence by comparison requires, in addition to the three factors above, that the plaintiff prove: (1) a duty, and (2) a breach of that duty. Thus, the rationale for negligence is based on the defendant's activities; liability is imposed when his activities go beyond the required standard of care.

Two additional possible causes of action will not be discussed due to their complexity and the limitations of this article. They are nuisance and product liability theories.

A. *Strict Liability/Absolute Liability*¹⁸⁷

1. Wild Animals

Perhaps the seminal case which introduced absolute liability in

186. W. PROSSER, LAW OF TORTS 536-38 (5th ed. 1984) (footnotes omitted).

187. Primitive law tended to hold the owner of property strictly liable for the harm it did. The owner of a slave, an animal, or even an inanimate thing, was so far identified with his chattel that he was liable, without any fault of his own, for the damage it might inflict on his neighbors. It is characteristic of certain stages of development in all legal systems of which we have knowledge, that he might escape liability by surrendering the harmful agent

California as to *wild* animals is *Laverone v. Mangianti*.¹⁸⁸ The case itself dealt with a ferocious dog. The court first held "that a person may lawfully keep a ferocious dog . . . [and] he has the same right to keep a tiger."¹⁸⁹ The court went on to analogize a domesticated dog, with known vicious propensities, to wild animals, finally holding that the doctrine of absolute liability applicable to wild animals was applicable to such dogs.¹⁹⁰ The judge stated:

[T]he only difference I can see between the two cases is, that in case of an injury caused by a dog, the knowledge of the keeper that the dog was ferocious, must be alleged and proven, for all dogs are not ferocious; *while in the case of a tiger, such knowledge will be presumed from the nature of the animal.*¹⁹¹

This bit of tiger dicta, and the dicta noted earlier above, have been cited time and time again as authority for three propositions: first, that people have the right to keep animals with a vicious propensity; second, that owners of wild animals are presumed to have knowledge of their pets' vicious propensities; and finally, and most importantly, injuries caused by wild animals subject the owner to absolute liability.¹⁹² Therefore, if a traveler returning to California imports a cobra and keeps it as a pet, he will be held absolutely liable if it bites anyone.

This is not true of all wild animals, however; a distinction must be drawn between wild animals and wild animals subject to domestication. *Opelt v. Al G. Barnes Co.*¹⁹³ dealt with the liability of a leopard owner. Clearly a leopard falls within the first group. Animals such as leopards are never truly domesticated. Therefore, the owner is conclusively imputed with knowledge of the animal's vicious propensities,¹⁹⁴ and the animal is presumed to possess this propensity.

itself, either to the injured party or to the crown. The present state of the common law may be said to begin with the disappearance of this "noxal surrender" and the rule of strict liability for harm done by harmless things. So far as the responsibility of keepers of animals is concerned, the survival of the primitive notion of strict liability has been due in part to modern views of policy. Certain kinds of animals involve an obvious danger to the community, even if they are carefully kept; . . . [They] can never be regarded as safe. Those who keep such animals for their own purposes are required to protect the community, at their peril, against the risk involved. The strict liability is, in general, co-extensive with the obvious risk.

Id. at 538-39 (footnotes omitted).

188. 41 Cal. 138 (1871).

189. *Id.* at 139.

190. *Id.* at 139-40.

191. *Id.* at 139 (emphasis added).

192. *E.g.*, *Opelt v. Al G. Barnes Co.*, 41 Cal. App. 776, 779, 183 P. 241, 242 (1919).

193. *Id.* at 776, 183 P. at 241.

194. The owner is imputed with the natural propensities of that particular animal. Whether an animal is deemed "wild" at all varies from location to location.

The second group is composed of wild animals as well. However, this group of animals is generally thought to be subject to domestication. When dealing with this class of animals, the propensity presumption is no longer conclusive. If the parties establish that the animal belongs to this second group,¹⁹⁵ the owner/keeper must show the animal was tamed. If he fails to do so then the case is disposed of in the same fashion as a case involving wild animals not subject to domestication (like a leopard).

But if the defendant owner can show that the animal was tamed, the burden of proof is shifted to the plaintiff who must make the same showing as that required for domestic animals noted below.¹⁹⁶ In *Gooding v. Chutes Co.*,¹⁹⁷ the plaintiff was a non-keeper employee who was bitten by a camel. The report states that the camel took him up by the leg, "lifted him from the ground and swung him about in the air, biting his leg so severely that the bones were crushed, rendering amputation necessary."¹⁹⁸ The court viewed the camel as a domesticated animal and thereby affirmed the defendant's liability on the grounds that the animal had a vicious propensity and that the defendant possessed knowledge of the propensity.¹⁹⁹ This is the same general rule the courts use in determining the liability of owners of any domesticated animal.

2. Domestic Animals

California law generally makes distinctions between liability for domestic animals generally and that concerning dogs. As to domestic animals generally, "[t]he rule is well settled that the owner of an animal, not naturally vicious, is not [absolutely] liable for an injury done by such animal, unless it is affirmatively shown, not only that it was vicious,²⁰⁰ but that such owner had knowledge of the fact."²⁰¹ Accordingly, in *Heath v. Fruzia*,²⁰² the owner of a horse with a propensity to kick people was held liable because the plaintiff, who had suffered a broken leg when kicked, proved the owner had knowledge

195. Again, which animals fall in this group depends upon the community.

196. See *infra* notes 200-03 and accompanying text.

197. *Gooding v. Chutes Co.*, 155 Cal. 620, 102 P. 819 (1909).

198. *Id.* at 622, 102 P. at 820.

199. *Id.* at 624-25, 102 P. at 821. See also *Clowdis v. Fresno Flume & Irrig. Co.*, 118 Cal. 315, 50 P. 373 (1897) (injuries caused by wild bull; same test used as in *Gooding*).

200. But see *Talizin v. Oak Creek Riding Club*, 176 Cal. App. 2d 429, 1 Cal. Rptr. 514 (1959) (propensity to hurt human beings is enough).

201. *Finney v. Curtis*, 78 Cal. 498, 501, 21 P. 120, 120 (1889). See *Mann v. Stanley*, 141 Cal. App. 2d 438, 296 P.2d 921 (1956) (judgment for the defendant upheld based upon the finding that defendant had no knowledge of the animal's dangerous propensities). Some courts use the test: whether the defendant knew of the propensity or should have known of it.

202. 50 Cal. App. 2d 598, 123 P.2d 560 (1942).

that the horse had a propensity to kick people.²⁰³

3. Dogs

The rules pertaining to dogs and absolute liability are slightly different than those dealing with wild or domestic animals generally. Therefore, they must be examined separately. At common law, there was no duty, and thus no liability, for injuries inflicted by a dog, provided that the dog had not previously displayed a vicious propensity.²⁰⁴ This rule led to a flood of litigation brought to determine whether the dog had a vicious propensity which was known, or should be known, to the owner. The rule also may lead to unjust results in cases where the plaintiffs cannot show this propensity.²⁰⁵

Thus, in 1931, the legislature enacted what is now California Civil Code section 3342, a strict liability dog statute.²⁰⁶ The law states:

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.²⁰⁷

The California law has further provided that once a dog has bitten a person the owner must take steps to prevent the incident from happening again.²⁰⁸ When a dog has bitten a person on more than one occasion, an action may be brought by anyone in municipal court to determine if court-ordered sanctions will be imposed. The court may even order the dog destroyed.²⁰⁹

203. *Id.* at 600-01, 123 P.2d at 562.

204. *See* *Chandler v. Vaccaro*, 167 Cal. App. 2d 786, 789, 334 P.2d 998, 1000 (1959).

205. *See, e.g., id.* (no liability when plaintiff failed to prove owner's prior knowledge of the dog's vicious nature). As will be seen, a plaintiff who could not show such a propensity could not recover under any theory.

206. This statute was originally enacted as Act of May 29, 1931 ch. 503, 1931 Cal. Stat. 1095-96. Dog statutes of this nature are employed in many jurisdictions to resolve this conflict.

207. CAL. CIV. CODE § 3342 (West 1970). It is important to note that the statute creates a strict liability cause of action; no propensity or knowledge need be shown.

208. CAL. CIV. CODE § 3342.5(a) (West 1970 & Supp. 1985).

209. CAL. CIV. CODE § 3342.5(b) (West 1970 & Supp. 1985). *See also* CAL. CIV. CODE § 3341 (West 1970) (strict liability for injuries by any animal to certain stock animals; permissive killing of such animals).

4. Affirmative Defenses to Strict Liability

In *Opelt v. Al G. Barnes Co.*,²¹⁰ the court held a leopard owner not liable for injuries sustained by a 10-year-old when the child stuck his hand in the cat's cage. The court held "if the injured party imprudently, or negligently, places himself in a position to be attacked, or by his own negligence contributes to his injury, the owners of the wild beast may be exonerated."²¹¹

Next, the doctrine was extended to domestic animals with a known vicious propensity.²¹² And finally, in *Gomes v. Byrne*,²¹³ it was held that the rule was also a defense to the 1942 dog bite statute.²¹⁴ A good statement of the general rule was set forth:

In adopting Section 3342 of the Civil Code, the Legislature did not intend to render inapplicable such defense as *assumption of the risk or willfully invited injury*. . . . The "elements of the defense of assumption of the risk are a person's knowledge and appreciation of the *danger* involved and his voluntary acceptance of the risk."²¹⁵

Early on it was held that the attractive nuisance doctrine (no longer valid in California), would not supplant assumption of the risk as to children.²¹⁶ Finally, it should be noted that, should assumption of the risk successfully block a cause of action based upon absolute liability, a cause of action may still be pled in negligence (except for the actions of dogs).²¹⁷

B. Trespass

In order to bring a cause of action for trespass, two hurdles must be cleared. First, at common law, the courts felt that an owner of dogs and cats, as opposed to horses or cattle, should not be liable for their animals' trespasses.²¹⁸ The stated reasons for the rule are many, but the underlying rationale seems to be that dogs and cats tend to stray by nature and do not generally cause harm when they

210. 41 Cal. App. 776, 780, 183 P. 241, 242 (1919).

211. *Id.*

212. See, e.g., *Heath v. Fruzia*, 50 Cal. App. 2d 598, 602, 123 P.2d 560, 563 (1942) (owner held liable when shown he knew of his horse's vicious propensity). The same rule was applied when a four-year-old stuck his hand through the bars of an ape's cage at a circus and was injured. See *Baugh v. Beatty*, 91 Cal. App. 2d 786, 205 P.2d 671 (1949).

213. 51 Cal. 2d 418, 333 P.2d 754 (1959).

214. *Id.* at 420, 333 P.2d at 755.

215. *Id.* (emphasis added) (citation omitted). Assumption of the risk depends upon the "actual or assumed mental capacity of the actor." *Greene v. Watts*, 210 Cal. App. 2d 103, 105, 26 Cal. Rptr. 334, 336 (1962).

216. Cf. *Baugh v. Beatty*, 91 Cal. App. 2d 786, 791, 205 P.2d 671, 674 (1949).

217. *Id.* at 790-91, 205 P.2d at 674.

218. See *Buckle v. Holmes*, 2 K.B. 125 (1926), 54 ALR 89 (suit against neighbor whose cat admittedly killed thirteen pigeons and two bantams). Moreover, an owner/occupier cannot recover for trespassing wild animals.

do so.²¹⁹ This rule has been noted by California courts.²²⁰ However, at least as to dogs, the rule has been abrogated to some degree,²²¹ suggesting a retreat from the common law rule.

Assuming one is involved with a trespass of other domestic animals, the second hurdle must be cleared. In order to successfully assert a cause of action based upon strict liability for trespassing animals, the owner/occupier must show that he has conformed with all applicable fencing laws. At common law, owners of stray cattle were strictly liable for damages done while the animals were trespassing on the lands of another.²²² California abandoned this rule in the first session of the California legislature, preferring instead the fence-out approach.²²³ The rule was subsequently amended and interpreted to restore the common law approach in all but certain listed counties.²²⁴

The residual effects of California's brief departure from the common law rule are found today in the Agricultural Code sections 17001-17128.²²⁵ The statutory scheme continues the common law approach except as in listed counties. Thus, in all parts of Siskiyou, Lassen and Modoc Counties, and in parts of Trinity and Shasta counties, a fencing law is in effect.²²⁶ In these counties, in order to bring a cause of action for trespass, or to take-up an estray under section 17041, the owner/occupier's property must be "entirely enclosed with a good and substantial fence."²²⁷

In summary, in order to bring a trespass action in specified coun-

219. *Id.* at 128, 54 ALR at 91.

220. *See, e.g.,* Hagen v. Laursen, 121 Cal. App. 2d 379, 381, 263 P.2d 489, 491-92 (1953) (dicta) (dogs are a class of animals which were traditionally permitted to stray).

221. *See supra* note 209 and accompanying text.

222. Hahn v. Garratt, 69 Cal. 146, 146, 10 P. 329, 330 (1886).

223. Act of Mar. 30, 1850 ch. 49, 1850 Cal. Stat. 131.

224. *See* Act of May 20, 1915 ch. 397, 1915 Cal. Stat. 636 (repeal of fencing law in all but six counties). For an explanation of this history, *see, e.g.,* Montezuma Improvement Co. v. Simmerly, 181 Cal. 722, 186 P. 100 (1919).

225. CAL. AGRIC. CODE §§ 17001-17128 (West 1968 & Supp. 1984).

226. CAL. AGRIC. CODE § 17123 (West 1968). For those sections of Shasta and Trinity Counties which are excluded from the fencing law, *see* CAL. AGRIC. CODE §§ 17125-17126 (West 1968). Importantly, a county board of supervisors for Trinity and Shasta counties may expand the area exempted by ordinance. *See* CAL. AGRIC. CODE § 17127 (West Supp. 1984).

Furthermore, any county by ordinance can include their county, or any part thereof, within the fencing laws requirements. *See* CAL. AGRIC. CODE § 17124 (West 1968).

227. CAL. AGRIC. CODE § 17122 (West 1968). For a definition of what is considered a lawful fence under the statutes, *see* CAL. AGRIC. CODE § 17121 (West 1968). This issue can provide a defendant in a fencing zone with a good affirmative defense and has in fact been the subject of much litigation.

ties, the landowner must establish there was a good and substantial fence surrounding his property. This need not be proven under the common law rule.

VII. DIGRESSION: ESTRAY ACT

The Estray Act goes further than just to partially repeal the fencing statutes. Section 17041 provides that any person that finds any estray or domestic animal upon his property or upon the roadway adjacent to his property may take the animal into possession²²⁸ and have a statutory lien²²⁹ on the animal for all the expenses incurred for its care.²³⁰

The statute used to appear quite broad regarding what animals are to be included in the scope of the statute, but in 1982, the legislature defined an "estrays" animal within the statute as potentially any horse, mule, bovine animal, burro, sheep or swine whose owner is unknown.²³¹ Any person who holds an estray as provided in section 17042 must, within five days, file a notice with the Department of Agriculture.²³²

An authorized inspector can take possession of the animal from the "taken-up" on demand and if so taken, he must attempt to locate the owner.²³³ If the owner is found, the animal is returned provided that the owner pay all expenses incurred for its handling.²³⁴ If the owner is not located and if no one comes forward for the animal within 14 days²³⁵ from the posting of the first notice,²³⁶ the animal may be sold

228. The possessor must use reasonable care in tending to the animal to avoid liability for injury or escape, CAL. AGRIC. CODE § 17043 (West 1968), and it is unlawful for anyone but an authorized inspector to remove the animal from the "taker-up" once the animal is reduced to possession. CAL. AGRIC. CODE § 17045 (West 1968).

229. Section 17044 prescribes the compensation to be awarded; it should be in accordance with "the prevailing rates charged by commercial enterprises which feed livestock." CAL. AGRIC. CODE § 17044 (West 1968) (citing CAL. AGRIC. CODE § 10795 (West Supp. 1984)). The funds come from public or private sale of the animal or from the owner. See CAL. AGRIC. CODE §§ 17069, 17092-17093 (West 1968 & Supp. 1984).

230. CAL. AGRIC. CODE § 17041 (West 1968).

231. CAL. AGRIC. CODE § 17001.5 (West Supp. 1984). Regarding the scope of authority, section 17003 specifically states that the section's provisions do not preempt local promulgation of regulations or ordinances related to the Estray Act area. See CAL. AGRIC. CODE § 17003 (West Supp. 1984).

232. CAL. AGRIC. CODE § 17042 (West 1968) provides that this notice must contain: (a) A description of the animal seized; (b) The marks or brands, if any; (c) The probable value of the animal; (d) A statement of the date and place where it was taken up and confined. See also CAL. AGRIC. CODE §§ 17062-17068 (West 1968 & Supp. 1984) (regarding removal and notice requirements).

233. See CAL. AGRIC. CODE § 17061-17065 (West 1968).

234. CAL. AGRIC. CODE § 17069 (West 1968).

235. CAL. AGRIC. CODE § 17092 (West Supp. 1984). However, it should be noted that the holding period for animals seized with a value under \$225.00 is only 5 days. CAL. AGRIC. CODE § 17066 (West Supp. 1984).

236. CAL. AGRIC. CODE § 17092.

by public or private sale.²³⁷

Proceeds from the sale go into the Department of Agriculture Fund, and from this the "take-up" and the Department are reimbursed for any costs of keeping and caring for the animal.²³⁸ The owner has no right to obtain sold animals from the buyer at the sale,²³⁹ but if the owner can prove ownership within one year from the date of the sale he may recover the net proceeds.²⁴⁰

Once a plaintiff is over the two preliminary requirements for a trespass action, California follows the common law rule which allows the owner to file suit for any property damages caused by the animal; the liability is imposed irrespective of fault.²⁴¹ Because an animal has no legal rights and thus no duty, at common law a rationale was adopted which in essence treated a trespass by an animal as if the owner had done the act.²⁴² Today liability is imposed because of the owner's possession and control of the animal.²⁴³ In essence, the elements which must be proved by the owner/occupier are:

1. That the plaintiff is an owner or occupier of the injured property
2. That the defendant is an owner or keeper of the animal
3. Causation
4. Damages

At common law, damages were only allowed for injury to crops and land. This rule was recognized in many cases.²⁴⁴ In *Williams v. River Lakes Ranch Development Corp.*, the court extended the rule to cover personal injuries regardless of other injury.²⁴⁵

Ownership would generally not be difficult to prove, but causation has a caveat which should be considered: the owner will only be held responsible for those damages that are reasonably foreseeable—that is, the kind of damages the animal could be expected to cause if tres-

237. CAL. AGRIC. CODE §§ 17092-17093 (West 1968 & Supp. 1984). Strict compliance may be required by the inspector/director with these statutory provisions so as not to violate due process. Cf. *Aguilar v. Souders*, 23 Cal. App. 2d 122, 127, 72 P.2d 196, 199 (1937).

238. CAL. AGRIC. CODE § 17095 (West Supp. 1984).

239. CAL. AGRIC. CODE § 17092 (West Supp. 1984).

240. CAL. AGRIC. CODE § 17096 (West 1968).

241. See, e.g., *William v. River Lakes Ranch Dev. Corp.*, 41 Cal. App. 3d 496, 502, 116 Cal. Rptr. 200, 204-05 (1974) (plaintiff was attacked by a trespassing bull).

242. *Id.*

243. *Id.*

244. For a list of cases, see *id.* at 504-05, 116 Cal. Rptr. at 206.

245. *Id.* at 506-07, 116 Cal. Rptr. at 207-08.

passing.²⁴⁶ *Williams* also made it clear that one need not be an owner of the land upon which the trespass occurs. Instead, possession is sufficient.²⁴⁷ If one cannot bring a cause of action for trespass, a negligence action may be pursued.

C. Negligence

Negligence acts as a catch-all for cases in which either propensity cannot be shown or when there has been no trespass. Moreover, the negligence concept pulls together many of the liability concepts raised above.

It was well settled at common law that owners were not liable for injuries caused by their animals while on a public road or highway.²⁴⁸ California, however, adopted a different rule. In *Ficken v. Jones*,²⁴⁹ a defendant keeper was driving his herd down a street when a steer became wild, "ran against the plaintiff, knocking him down and goring him in a terrible manner."²⁵⁰ Although propensity could not be shown, the court upheld a cause of action in negligence holding that an owner or keeper has a duty to exercise reasonable care while herding his cattle on the street.²⁵¹

With the growth of the state's highway system, the California legislature realized there was a need to change the common law rule by statute; the potential for accidents involving vehicles and animals on the roadway was just too great, so statutory law was enacted. The statute is now located in section 16902 of the Agricultural Code.²⁵²

The rule makes it unlawful for any owner or person controlling the possession of livestock to "negligently" or "willfully" allow the livestock to remain upon the highway unaccompanied by someone if the highway is bordered on both sides by a "fence, wall, hedge, sidewalk, curb, lawn, or building."²⁵³ It should be noted that the statute requires at a minimum that the plaintiff prove negligence.

246. *Id.* at 504, 116 Cal. Rptr. at 206.

247. *Id.* at 508, 116 Cal. Rptr. at 209.

248. *Fox v. Koehnig*, 190 Wis. 528, 534-35, 209 N.W. 708, 710 (1926) (and citations therein), *overruled*, *Templeton v. Crull*, 16 Wis. 2d 416, 114 N.W.2d 843 (1962). See *Galeppi Bros. v. Bartlett*, 120 F.2d 208, 210 (9th Cir. 1941).

249. 28 Cal. 618 (1865).

250. *Id.* at 622-23.

251. *Id.* at 626. See *Clowdis v. Fresno Flume & Irrig. Co.*, 118 Cal. 315, 50 P. 373 (1897) (upholding *Ficken*). Compare *Roberts v. Griffith Co.*, 100 Cal. App. 456, 280 P. 199 (1929). The court stated:

While there is a conflict of authority on the subject in the various jurisdictions, we are satisfied that the better rule is that it may be actionable negligence to permit horses or mules to run at large and untended on the streets of a municipality regardless of their vicious character or of scienter.

Id. at 457, 280 P. at 200.

252. CAL. AGRIC. CODE § 16902 (West 1968).

253. *Id.* See *Summers v. Parker*, 119 Cal. App. 2d 214, 217, 259 P.2d 59, 61 (1953) (suggesting plaintiff need not show exact point where animal escaped).

The history of the law is quite informative. Prior to 1935, a plaintiff could invoke the doctrine of *res ipsa loquitur* to raise an inference of defendant's negligence under the statute whenever someone hit a farm animal in the road. A 1935 amendment abolished use of the inference under section 16902;²⁵⁴ the section specifically dealing with the amendment is found in the Agricultural Code, section 16904.²⁵⁵ Prior to the 1935 amendment, a plaintiff's chances of recovery were good.²⁵⁶ Suits brought subsequent to the enactment of section 16904 have had less success.²⁵⁷

Where the plaintiff cannot show the required fencing/border at or near the scene of the accident, no recovery is permitted under section 16902. However, the courts have recently allowed recovery under Civil Code section 1714(a) which provides:

(a) every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.²⁵⁸

Recovery for injuries sustained when a driver hits an animal in the

254. The first portion was enacted in substantially its present form in 1923 (Stats. 1923, chap. 266, pp. 517, 565) as section 151 of the Motor Vehicle Act. In 1931, the statute was in part relied upon for a holding that the doctrine of *res ipsa loquitur* should be invoked in favor of an automobile occupant injured in a collision with an animal on a highway (*Kenney v. Antonetti*, 211 Cal. 336 [295 P. 341]). In 1933 the statute was incorporated in the Agricultural Code as Section 423, and a provision was added that in a collision with a domestic animal on a highway, there should be no "presumption" of negligence (Stats. 1933, chap. 25, pp. 60, 129, § 423). The Supreme Court, in 1936, pointed out that the doctrine of *res ipsa loquitur* raises only an inference and not a presumption of negligence. Thus, it was held, the 1933 amendment did not bar application of *res ipsa loquitur* (*Anderson v. I.M. Jameson Corp.*, 7 Cal. 2d 60 [59 P.2d 962]). That case dealt with a collision which had occurred in 1933. In 1935, the statute was amended to provide, as it now does, that there should be no presumption or inference of negligence of the livestock owner from the fact of collision of a vehicle and an animal (Stats. 1935, chap. 265, p. 951). *Anderson*, decided after the 1935 amendment, indicated that it was designed to eliminate the doctrine of *res ipsa loquitur* in this type of case. The same view has since been expressed (*Jackson v. Hardy*, 70 Cal. App. 2d 6, 15 [160 P.2d 161]; *Galeppi Bros. v. Bartlett*, 120 F.2d 208, 210; and see *Summers v. Parker*, 119 Cal. App. 2d 214, 216 [259 P.2d 59]). The conclusion that the statute as amended is designed to bar application of the doctrine of *res ipsa loquitur* seems inescapable.

Pepper v. Bishop, 194 Cal. App. 2d 731, 733-34, 15 Cal. Rptr. 346, 348 (1961).

255. CAL. AGRIC. CODE § 16904 (West 1968).

256. See *Anderson v. I.M. Jameson Corp.*, 7 Cal. 2d 60, 59 P.2d 962 (1936).

257. See, e.g., *Pepper v. Bishop*, 194 Cal. App. 2d 731, 15 Cal. Rptr. 346 (1961).

258. CAL. CIV. CODE § 1714(a) (West Supp. 1984).

road have often been awarded under this law.²⁵⁹

It has been settled since *Finney v. Curtis*²⁶⁰ that if a plaintiff can show both a vicious propensity and the owner/keeper's knowledge of that propensity, a cause of action in negligence may be pleaded.²⁶¹ The action may lie, for example, for negligently handling a vicious animal,²⁶² or one not known to be vicious.²⁶³ Moreover, it is clear that a cause of action might lie for negligently handling a wild animal²⁶⁴ found or presumed to be dangerous.²⁶⁵ However, some courts have noted they may treat the negligence cause of action as surplusage where the animal is shown to be vicious and the knowledge imputed to the owner.²⁶⁶

Finally, a word should be said about negligence and dog cases. Common law liability did not extend to injuries inflicted by dogs that had previously been gentle and friendly.²⁶⁷ Thus, complaints based upon the general negligence of the dog owner for injuries sustained have not stated a valid cause of action.²⁶⁸ The reason for this rule is that a dog is presumed to be good-natured "until the contrary appears."²⁶⁹ Therefore, any action in negligence for injuries caused by a dog must be based on specific acts of negligence on the part of the owner or keeper or upon a negligence per se theory grounded upon a state statute.

An ambiguous area of liability, which pertains to animals generally

259. See, e.g., *Jackson v. Hardy*, 70 Cal. App. 2d 6, 14, 160 P.2d 161, 165 (1945) ("There is no reason for exempting cattle owners from the same duty applicable to other people to use 'ordinary care or skill in the management of [their] property.'").

Several other sections of the Code deal with animals and roadways. See CAL. AGRIC. CODE § 16903 (West 1968) (driving cattle at night); CAL. AGRIC. CODE § 16901 (West 1968) (driving cattle on railroad right of ways); CAL. STS. & HY. CODE § 105 (West 1968) (allowable locations of stock trails parallel or upon highways). An odd statute allowing a felony conviction of an owner if his animal kills another person due to the owner's negligence is CAL. PENAL CODE § 399 (West 1970).

260. 78 Cal. 498, 21 P. 120 (1889).

261. See *id.* at 502, 21 P. at 120.

262. *Id.* See *Clowdis v. Fresno Flume & Irrig. Co.*, 118 Cal. 315, 50 P. 373 (1897). *Porter v. Thompson*, 74 Cal. App. 2d 474, 477-78, 169 P.2d 40, 42-43 (1946) (liability to an invitee).

263. See, e.g., *Barnett v. La Mesa Post No. 282, American Legion Dept. of Cal.*, 15 Cal. 2d 191, 99 P.2d 650 (1940).

264. See *Lindley v. Knowlton*, 179 Cal. 298, 176 P. 440 (1918), where a cause of action for negligent infliction of emotional distress stood on its own and without a showing of impact. The court found for the plaintiff when it was shown a 165-pound chimpanzee attacked her children necessitating her immediate response; she successfully contended with the beast. Later she developed nervousness, etc. The court relied upon common carrier cases to allow the recovery absent contemporaneous physical injury. *Id.* at 299, 176 P. at 441.

265. See, e.g., *Baugh v. Beatty*, 91 Cal. App. 2d 786, 791, 205 P.2d 671, 674 (1949) (wild animals presumed to be vicious).

266. *Id.*

267. *Chandler v. Vaccaro*, 167 Cal. App. 2d 786, 789, 334 P.2d 998, 1000 (1959).

268. See *Hagen v. Laursen*, 121 Cal. App. 2d 379, 382, 263 P.2d 489, 491 (1953).

269. *Id.*

and to dogs in particular, arises from the duty that a landowner or occupant owes a trespasser. The old rule of liability as to a trespasser, to which the strict liability dog bite statutes appear not to apply,²⁷⁰ has an interesting history. In 1872, the legislature adopted Civil Code section 1714,²⁷¹ which created a duty on the part of a property owner to exercise reasonable care in the management of his person or property.²⁷² Many California courts, however, disregarded the statute and followed the common law rule which made trespassers a separate classification subject to special rules.²⁷³ Thus, as to a trespasser, the owner or occupier of land had only a duty to refrain from willful and wanton conduct. The rule was subsequently eroded, however.²⁷⁴

In *Radoff v. Hunter*,²⁷⁵ a dog bite case, the court stated that the California rule as to a known trespasser is that the owner or occupier has a duty to exercise reasonable care "so far as active [as opposed to passive] operations are concerned."²⁷⁶ While the court did not find that having a vicious animal (a dog) was an active operation which breached this duty, it found liability by determining the dog was a trap; the dog was concealed from view immediately preceding the incident which led to the suit.²⁷⁷ In 1968, the California Supreme Court decided *Rowland v. Christian*,²⁷⁸ which led to the abolition of the distinctions between persons present on a premises. When the

270. Civil Code section 3342 states that it is only applicable when the victim is on property because of duty or invitation, express or implied. CAL. CIV. CODE § 3342 (West 1970). See *supra* note 207 and accompanying text.

Moreover, section 3342.5(d), (g) of the Civil Code states:

(d) Nothing in this section shall authorize the bringing of an action pursuant to subdivision (b) *which is based on a bite or bites inflicted upon a trespasser*

(g) Nothing in this section shall be construed to affect the liability of the owner of a dog under Section 3342 or any other provision of the law.

CAL. CIV. CODE § 3342.5(d), (g) (West Supp. 1985) (emphasis added). Taken together these two statutes (sections 3342 and 3342.5) appear not to allow a trespasser to recover damages based on the strict liability statutes; they do demonstrate the legislature's perpetuation of the trespasser classification. In any event one might still try a cause of action under common law strict liability theory if they feel the dog had vicious propensities.

271. See CAL. CIV. CODE § 1714 (West Supp. 1984).

272. *Id.*

273. *Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal. App. 2d 91, 96, 219 P.2d 73, 76 (1950).

274. *Id.* at 97, 219 P.2d at 77.

275. 158 Cal. App. 2d 770, 323 P.2d 202 (1958).

276. *Id.* at 774, 323 P.2d at 205.

277. *Id.* at 775, 323 P.2d at 205.

278. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

active/passive concept was abolished, *Radoff* was overruled.²⁷⁹ In *Mark v. Pacific Gas & Electric Co.*, the court stated:

[I]n *Rowland* we declined to follow and perpetuate the foregoing rigid classifications, immunities and exceptions, adopting in their place the basic test "whether in the management of his property he [the possessor of land] has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative. . . . Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it . . . the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence."²⁸⁰

The impact from *Rowland* upon this area of the law is unclear. Specifically as to dogs, both before and after *Rowland* it appears a trespasser cannot recover under Civil Code section 3342. However, it now appears, based upon *Rowland*, that a trespasser has more flexibility in successfully bringing a cause of action based upon a negligence theory and a common law absolute liability theory. The state of the law in this area is unclear and only additional cases will help to clarify it.

In 1975, a new cause of action was approved in the case of *Uccello v. Laudenslayer*.²⁸¹ In that case, the defendant landlord had leased a dog-owning tenant a house on a month-to-month tenancy. The landlord gave specific permission to the tenants to keep a dog, and knew "beware of dog" signs had been posted on the property.²⁸² Plaintiff, a child, was bitten by the dog after being invited to the tenant's house to play with the tenant's children; the child had visited many times in the past.²⁸³

In deciding the case the court noted that the difficulties some animal owners have in objectively evaluating their dog's propensities was important in determining whether or not public policy required placing the burden of attacks on the owner of the premises where the animal is kept.²⁸⁴ The court held that a duty of care arises when the landlord has actual knowledge of the presence of the dangerous animal and when he has the right to have it removed from the leased property.²⁸⁵ However, actual knowledge of the dog's propensities is

279. *Mark v. Pacific Gas & Elec. Co.*, 7 Cal. 3d 170, 176, 496 P.2d 1276, 1279, 101 Cal. Rptr. 908, 911 (1972).

280. *Id.* at 177, 496 P.2d at 1280, 101 Cal. Rptr. at 912 (citation omitted).

281. 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975).

282. *Id.* at 508, 118 Cal. Rptr. at 744.

283. Subsequent to the attack on plaintiff, the tenant ignored neighbor warnings to get rid of the dog. Four months later the dog attacked the tenant's daughter and was euthanized. *Id.* at 509, 118 Cal. Rptr. at 744.

284. *Id.* at 509 n.2, 118 Cal. Rptr. at 744 n.2.

285. *Id.* at 514, 118 Cal. Rptr. at 748. Specifically the court held: "we believe public policy requires that a landlord who has knowledge of a dangerous animal should be held to owe a duty of care only when he has the right to prevent the presence of the

required, as distinguished from constructive knowledge, thereby relieving any duty to inspect.²⁸⁶ This case should be conceptually distinguished from *Nava v. McMillan*,²⁸⁷ where a teenage minor was so frightened by barking dogs located in a fenced yard owned by the defendant that she stepped into the street, only to be struck by a car.²⁸⁸ The court, focusing on the policies surrounding real property and ownership doctrines, found that there was no legal duty owed to the plaintiff by the defendant,²⁸⁹ and so there could be no liability.

VIII. CONCLUSION

This article has canvassed laws pertaining to the ownership of animals, title to animals and regulation of animals in California. While laws concerning title and ownership are remaining fixed with time, it is clear that laws concerning animal regulation are in a state of flux. Clearly, this is more pronounced in the area of direct state regulation. Recently pressure has been brought to bear on the California Legislature concerning such issues as fighting animals, euthanasic devices, and cruelty. There is no reason to believe this trend will not continue. Comparatively, indirect regulation through the sanctioning of private law suits remains more stable. However, recent changes in California's view of owners and occupiers of land has introduced new areas in which negligence actions will withstand judicial scrutiny.

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animal on the premises." *Id.* at 512, 119 Cal. Rptr. at 746. This rule appears to be based upon a few New York decisions, *Rowland v. Christian's* interpretation of California Civil Code section 1714, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968), and cases which hold (inter alia) a lessor liable to third parties if at the time the lease was made or renewed it was known the tenant would use the premises to start a public nuisance. *Id.* at 511, 118 Cal. Rptr. at 746.

286. *Id.* at 514, 118 Cal. Rptr. at 748.

287. 123 Cal. App. 3d 262, 176 Cal. Rptr. 473 (1981).

288. *Id.* at 263-64, 176 Cal. Rptr. at 474-75.

289. *Id.* at 266-67, 176 Cal. Rptr. at 476. The court said:

Needless to say, the consequences upon the community of imposing a duty as suggested by plaintiff would be totally unreasonable: the owner of a dog would in effect be required to keep "man's best friend!" in a place where it could neither be seen nor heard by members of the public passing by.

Id. at 266, 176 Cal. Rptr. at 476.

