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Animals - Stock at Large - Duty of Owner - Parish Ordinances - Article 2321 of the Civil Code

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Notes

ANIMALS—STOCK AT LARGE—DUTY OF OWNER—PARISH ORDINANCES—ARTICLE 2321 OF THE CIVIL CODE—Cattle of defendant wandered onto plaintiff's truck farm and trampled a crop of growing cabbage. Plaintiff seeks damages, citing a parish ordinance which prohibits owner from permitting cattle to run at large. *Held,* while there is no general Louisiana statute prohibiting owners from allowing their cattle to roam at large, it is well settled that a local ordinance may accomplish the same effect and render the owner of wandering cattle responsible for the damage they cause to growing crops. *Ingargiola v. Schnell,* 11 So. (2d) 281 (La. App. 1942).

At common law the owner of domestic animals was under an absolute duty to keep them restrained on his own premises and was strictly liable for their trespass on another's land if he failed to do so.[1] The duty rested on the owner to fence the stock in, and no duty rested on his neighbor to fence them out.[2] In *Fox v. Koenig,*[3] a Wisconsin court declared that such liability was absolute and depended in no degree upon the question of negligence, yet they held the injury must have been foreseeable. Today courts in the so-called grazing states hold that the owner of crops cannot recover damages from the owners of trespassing animals unless the crops are protected by a sufficient fence.[4] In the more densely populated areas, statutes[5] expressly reaffirm the common law rule which places the duty on the owner of the animal.

Louisiana has no general statute prohibiting owners from permitting their cattle to roam at large, but vests power in the

1. "Where my beasts of their own wrong without my will and knowledge break another's close I shall be punished, for I am the trespasser with my beasts." 12 Hen. VII, Keilway 3b. Accord: McKee v. Trisler, 311 Ill. 536, 143 N.E. 69, 33 A.L.R. 1298 (1924); Drew v. Gross, 112 Ohio St. 485, 147 N.E. 757 (1925); Fox v. Koenig, 190 Wis. 528, 209 N.W. 708, 49 A.L.R. 903 (1926).

2. Fox v. Koenig, 190 Wis. 528, 209 N.W. 708, 49 A.L.R. 903 (1926).

3. Ibid. But cf. Drew v. Gross, 112 Ohio St. 485, 147 N.E. 757 (1925), where two-fold test of negligence and foreseeability was applied.

4. Morris v. Fraker, 5 Colo. 425 (1880); Delaney v. Erickson, 10 Neb. 492, 6 N.W. 600, 35 Am. Rep. 487 (1880); Pace v. Potter, 85 Tex. 473, 22 S.W. 300 (1893). Cf. Joiner v. Winston, 68 Ala. 129 (1881), where court held plaintiff must have lawful fence.

5. Ill. Rev. Stat. Ann. (Smith-Hurd, 1935) c. 8, § 1; Ohio Gen. Code Ann. (Page, 1938) § 5809.

police juries of the different parishes to enact an ordinance to that effect.[6] In this connection Article 2321 of the Civil Code[7] is significant. That article provides: "The owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself of this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm done, without being allowed to make abandonment." It would seem that Article 2321 would impose a strict liability upon the owner of stray animals, regardless of any ordinance; but that article has been interpreted as being subject to the fault requirements of Articles 2315 and 2316 of the Civil Code.[8] This liberal interpretation is clearly enunciated by Chief Justice O'Niell in *Tripani v. Meraux*,[9] where he declares: "Although Article 2321 declares, unqualifiedly, that the owner of an animal is answerable for the damage he has done, the interpretation which has been put upon this Article consistently by this court is that the owner of an animal is liable for damages done by the animal only in cases where the owner was guilty of some fault or negligence in his ownership or possession of the animal." The burden is on the owner to show that he was without the slightest fault,[10] but the presumption of fault is a rebuttable one.[11]

Next let us examine the effect of various parish ordinances upon this question. There are so few cases on this question that a separate consideration of each is justifiable. First let us consider the cases where an ordinance prohibited the owner from permitting his stock to run at large. In *Williams v. Windham*,[12] the owner was held liable for the damage done by his trespassing animal. In *Cristiana v. Sievers*, [13] the court, in holding defendant liable, declared that it was negligence not to keep a fence in the

6. La. Rev. Stats. of 1870, § 2743; La. Act 115 of 1898, § 1; La. Act 202 of 1902, § 1; La. Act 132(9) of 1906; La. Act 234 of 1928, § 1 [Dart's Stats. (1939) § 6405].

7. Art. 2321, La. Civil Code of 1870.

8. Tillman v. Cook, 3 So.(2d) 230 (La. App. 1941).

9. 184 La. 66, 74, 165 So. 453, 455 (1936).

10. Damonte v. Patton, 118 La. 530, 43 So. 153, 8 L.R.A. (N.S.) 209, 118 Am. St. 384, 10 Ann. Cas. 862 (1907). Accord: Boudreau v. Louviere, 178 So. 173 (La. App. 1938).

11. Mercer v. Marston, 3 La. App. 97 (1925). Defendant did not have knowledge of dangerous propensity of animal. Accord: Matthews v. Gremillion, 174 So. 703 (La. App. 1937). Defendant did not know of horse's propensities.

12. 3 La. App. 127 (1925).

13. 15 La. App. 579, 132 So. 375 (1931).

proper state of repair or to carelessly permit cattle to roam. This liability was extended in *Kraak v. Gruntz*[14] to include the situation where stock break through a fence and damage another's property. It seems therefore that such an ordinance places a duty upon the owner to use due care to restrain his stock. Where, however, there is no such ordinance, it is up to the property owner to fence the livestock off his premises, and plaintiff must show that his property was inclosed with a sufficient fence before he can recover for damage done by trespassing animals.[15] Thus, under the accepted interpretation of Article 2321,[16] an owner is not negligent or at fault in permitting his stock to run at large, and he is not liable for the damage they cause.

An analogous problem is presented when animals are permitted to wander upon the highway. This problem was recognized in *Drew v. Gross*,[17] where the Ohio court declared that when that state was established it was not unsafe to permit domestic animals to run at large on the highway, but that with the development of automobile traffic the situation had been changed. Even applying this more modern approach to the problem, it is still the owner's duty to exercise care under the circumstances, and he is not liable where the animal breaks through an apparently sufficient fence and goes onto the highway, unless this propensity of the animal was foreseeable.[18] However, it has been held that the mere presence of a boar on the highway made out a prima facie case of negligence.[19]

In Louisiana this problem again depends largely upon local ordinances. In *Boudreau v. Louviere*,[20] defendant's mule was on the highway and caused plaintiff to be injured. The court declared that defendant was at fault because a local ordinance prohibited owners from permitting their stock to run at large. However, in *Abrahams v. Castille*,[21] it was held that the owner is not at fault when, due to an "Act of God" or other unforeseeable

14. 17 La. App. 179, 135 So. 122 (1931).
15. Parrott v. Babb, 15 La. App. 520 (1931).
16. Tripani v. Meraux, 184 La. 66, 165, So. 453 (1936).
17. 112 Ohio St. 485, 147 N.E. 757 (1925). Accord: Bartlett v. Galleppi Bros., 33 F. Supp. 277 (D.C. Cal. 1940); Traill v. Ostermier, 140 Neb. 432, 300 N.W. 375 (1941).
18. Fox v. Koenig, 190 Wis. 582, 209 N.W. 708, 49 A.L.R. 903 (1926).
19. Hansen v. Kemmish, 201 Iowa 1008, 208 N.W. 277 (1926). Cf. Pelham v. Spears, 222 Ala. 365, 132 So. 886 (1931), where court declared that even though defendant negligently permitted his cow to be on the highway, the negligence must have been connected with the damage and the owner must have known of the animal's propensities.
20. 178 So. 173 (La. App. 1938).
21. 158 So. 650 (La. App. 1935).

agency, his animal escapes from a fenced close and runs onto the highway where it causes damage. Where there is no ordinance prohibiting owners from permitting their stock to run at large, the owner is not negligent in permitting them to be at large. Thus it has been held that the owner of stock is not liable for damages to a passing car;[22] and that he may recover if his animal is injured.[23] Where animals are being lawfully driven along the highway and one escapes and causes damage, the owner is not liable, regardless of the fact that an ordinance exists.[24]

In earlier times many United States courts entirely rejected the rule of strict liability for animal trespasses, as contrary to local custom; but as the country has become more closely settled, the tendency has been to restore the common law rule either by statute or decision.[25] The Louisiana legislature has shown considerable foresight in making this question a matter of local option, thus leaving each parish free to adopt a rule suitable to local circumstances. As the state becomes more industrialized and the need for a uniform law outweighs the economic burden on the owners of animals, a general statute may be enacted which will obligate the owner to keep his stock from running at large on the highway, or from wandering onto the fields and gardens of his neighbor.

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CONSTITUTIONAL LAW — FULL FAITH AND CREDIT — DIVORCE— Petitioners were married to their respective spouses in North Carolina, where they continued to live for a number of years. Then they went together to Nevada, and, after remaining there for a period of approximately six weeks, filed actions for divorce against their respective North Carolina spouses. The defendants in those divorce actions did not appear, nor were they served with process in Nevada. Service was had on them through publication and substituted service. The Nevada court found petitioners to be bona fide and continuous residents of Nevada and the divorces were granted. Immediately after obtaining the divorces petitioners were married in Nevada and returned to North Carolina. The State of North Carolina indicted and convicted petitioners of the

22. Demarco v. Gober, 19 La. App. 236, 140 So. 64 (1932).
23. See Dunckelman v. Schockly, 183 So. 52, 53 (La. App. 1938). Recovery not allowed as driver did all possible to prevent hitting the animal.
24. Cook v. Tooke, 17 La. App. 307, 135 So. 917 (1931).
25. Prosser, Handbook of the Law of Torts (1941) 434.