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# Animals at Large on the Highway

Helen Murphy

is not clear, and the court is split 3-2 on an important statute, may result in a contrary holding in a case similar in facts. It would seem appropriate for our legislature to remove the necessity of speculating as to its intention by amending our inheritance tax statutes. The Federal estate tax rule[16] could be used as a pattern for our inheritance tax on jointly owned property. There are obvious administrative advantages to paralleling the federal rule. We would fall heir to the federal cases interpreting that statute, and it would give us an equitable rule. With our present statutes, as applied in the Perier case, a property owner has nothing to gain and much to lose by holding property in joint tenancy.

Sidney P. Kurth.

[16]Internal Revenue Code, §811. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States. (e) Joint interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

## ANIMALS AT LARGE ON THE HIGHWAY

A dearth of Supreme Court decisions exists in Montana on the relative rights of drivers of automobiles and of owners of livestock involved in collisions on the highway, nor are there any Montana statutes directly in point. Consideration is here given to Montana statutes relating to trespassing animals and to decisions in other jurisdictions regarding animals on highways as well as to Montana decisions on related matters to in-

dicate the probable course which would be followed by the Montana Supreme Court.

The term "animals running at large" is intended to mean animals which are not under the immediate control of any person but which are not expressly prohibited to be allowed to run at large by any statute.

The owner of domestic animals is by the common law under an absolute duty to keep them restrained on his own premises and is liable for their trespasses on another's land if he does not.[1] This liability is absolute and depends in no measure on negligence. It applies, of course, only to domestic animals roaming at large and not to those being herded. Generally, this rule has been recognized or adopted in the more densely populated parts of the country where agriculture predominates and rejected in those parts of the country where population is scattered and grazing predominates.

Montana has adopted what is popularly known as "Range Law."

> "If any cattle, horse, mule, ass, hog, sheep or other domestic animal break into any inclosure, the fence being legal, the owner of such animal is liable for all damages to the owner or occupant of the enclosure which may be sustained thereby."[2]

Judicial interpretation of this statute indicates that a lawful fence entirely surrounding the premises or some obstruction equivalent thereto is a condition precedent to the right to bring an action against trespassing animals.[3]

Since it is evident that range law which prevails in Montana is the direct opposite of the common law regarding trespassing animals, the question naturally arises whether the difference is reflected in liability for highway collisions involving animals at large.

At common law an owner of a domestic animal is under no legal obligation to restrain it from being at large on the highway unattended unless he has knowledge of vicious propensities of the animal, and he is not liable for an injury resulting from its being so at large unless he should reasonably

[1]Klenberg v. Russell (1890) 125 Ind. 531, 25 N.E. 596; Stone v. Kopka (1884) 100 Ind. 458; Adams Bros. v. Clark (1920) 189 Ky. 279, 224 S.W. 1046; Fox v. Koehnig (1926) 190 Wisc. 528, 209 N.W. 708; 3 C.J.S. *Animals* 185.
[2]R.C.M. 1935, §3378.
[3]Smith v. Williams (1874) 2 Mont. 195, 201.

have anticipated that injury would result therefrom.[4] This does not contradict the previously stated common law rule regarding absolute liability for trespass of animals on another's land since the liability entailed in the latter rule is only for damage to another's land; i.e., eating, or trampling down grass; and all owners of livestock may be held to have knowledge of the natural propensity of their stock to eat or trample down grass. The duty of the livestock owner to keep his animals restrained is owed to all landowners on whose land the animals may trespass.

As has been seen above, the common law as to trespass has been changed by statute in Montana, but "a statute is not presumed to work any changes in the rule of the common law beyond what is expressed in its provisions or fairly implied in them in order to give them full operation."[5] So, regarding the legal status of animals at large on the highway in Montana where range law exists as to trespass the presumption is that the common law would apply; viz, no legal obligation on the part of the owner to keep them off the highway. Under this rule liability of the stock owner to a motorist injured in a collision with animals on the highway is predicated on the ordinary rules of negligence.

R.C.M. 1935, Sec. 3384 provides for creation of herd districts contiguous to cities having a population of 10,000 or more with a suburban population of not less than 200 people. R.C.M. 1935, Sec. 3385 provides the owner of any horses, mules, cattle, sheep or goats who wilfully permits them to run at large within a herd district shall be guilty of a misdemeanor. So, animals roaming at large on a highway within a herd district in Montana are apparently illegally there, and their owner is guilty of negligence since he owes a duty to the public to keep his animals confined. In *Strait v. Bartholomew*[6] the court held that owners of stock in a stock or herd district must exercise reasonable care in maintaining fences and must adopt such other means as are reasonably necessary to prevent their stock from straying on the highway.

In the sections of Montana where herd districts have not been created it cannot be held that the owner of animals is negligent merely because his animals are at large on the highway regardless of whether he knew of their presence there. The

[4] *Animals at Large in Highway*, 140 A.L.R. 742 (1942).
[5] Forrester v. B. & M. Mining Co., (1898) 21 Mont. 544, 55 P. 229, 353.
[6] (1923) 195 Iowa 377, 191 N.W. 811.

negligence of a driver colliding with an animal loose on a public highway should be tested by the rule of due care under the circumstances.[7] The fact that a motorist ran into an animal which was in plain view on a public highway where there was ample room for safe passing has been held to be a lack of due care on the part of the operator of the motor vehicle.[8] But where the animal dashed in front of the car without warning, the motorist was held not liable.[9]

Although under range law a stock owner is not negligent by virtue of violating a law prohibiting animals at large on the highway, there is evidence that his negligence may be predicated on his failure to keep his animals off the highway when he could foresee an accident as a result of their presence thereon. The court in *Yazoo & M. Valley R. Co.* v. *Gordon*[10] said that one in possession of an animal is without the right to permit it to be on a public highway unattended if he should have reasonably anticipated that injury would be there inflicted by the animal.[11] Since the collisions involved in all these cases occurred at night, it is questionable whether the stock owner would be held to the same degree of foreseeability had they occurred in the day time.

In Louisiana there is no general statute prohibiting owners from allowing their cattle to roam at large, but parishes may at their discretion adopt local ordinances prohibiting this practice. In *Boudreau* v. *Louviere*[12] defendant's mule was on the highway and caused plaintiff to be injured. The court held defendant liable because a local ordinance prohibited owners from permitting their stock to run at large. However, in *Abrahams* v. *Castille*[13] where a similar ordinance has been enacted it was held the owner was not at fault when, due to an "Act of God" or other unforeseeable agency, his animal escapes from a fenced close and runs onto the highway where it causes damage. In *Demarco* v. *Gober*[14] the court in a decision reversing a lower court's decision against the owner of a mule killed on a highway

[7]Rivers v. Pierce (1940) 106 Colo. 236, 103 P.(2d) 690; Texeira v. Sundquist (1934) 288 Mass. 93, 192 N.E. 611.
[8]Pullam v. Moore (1920) 204 Mo. App. 697, 218 S.W. 938.
[9]Demarco v. Gober (1932) 19 La. App. 236, 140 So. 64.
[10](1939) 184 Miss. 885, 186 So. 631.
[11]Lins v. Boeckeler Lumber Co. (1927) 221 Mo. App. 181, 299 S.W. 150; Schindler v. Mulhair (1937) 132 Neb. 809, 273 N.W. 217; Trail v. Ostermeier (1941) 140 Neb. 432, 300 N.W. 375; Drew v. Gross (1925) 112 Ohio St. 485, 147 N.E. 767; Smith v. Whitlock (1942) .....W. Va....., 19 S.E. (2d) 617.
[12](1938) .....La....., 178 So. 173.
[13](1935) .....La....., 158 So. 650.
[14]Note 9, *supra*.

and granting recovery to the owner of the car involved in the accident said:

> "There is no evidence whatsoever showing that mules, horses or cattle are prohibited by ordinance of the police jury or other authority from roaming at large on the highways of the parish in which the accident occurred. Plaintiff cannot, therefore, be held to have been at fault because his mule on that occasion had gone on that highway."

In *Dunckelman* v. *Schockly*[15] an action was brought for the value of two horses killed in a collision with defendant's truck. The accident took place in a parish where it is lawful for stock to run at large, but nevertheless, recovery was denied the plaintiff because he failed to prove negligence on the part of the defendant.

Within a herd district the owner of livestock would be negligent in allowing his livestock to wander on the highway. The question may be raised as to the applicability of the Last Clear Chance Doctrine. As to whether this can be pleaded in cases involving property damage alone, the following is quoted from a note on the Last Clear Chance Doctrine in 92 A.L.R. 55 (1935):

> "Although the doctrine is most frequently invoked in cases involving personal injury and its applicability to property damage has sometimes been questioned, its applicability to support recovery for damage to property in a proper case has been expressly affirmed in some cases and assumed in many others.[16] After all, the donkey whose demise was the occasion of the decision in Davies v. Mann[17] and a contributing cause at least of the perplexities incident to the doctrine sponsored by that case was a chattel and not a person."

The English court in *Davies v. Mann*[18] held that since the defendant did not deny that the donkey was lawfully in the highway, the court must assume that it was lawfully there, but "even were it otherwise, it would have made no difference for as the defendant might by proper care have avoided injuring the animal and did not he is liable for the consequences of

[15](1938) .....La....., 183 So. 52.
[16]West Construction Co. v. Atlantic Coast Line R. Co. (1923) 185 N.C. 43, 116 S.E. 3; Morgan v. Missouri K. & T. R. Co. (1917) 108 Tex. 331, 193 S.W. 134.
[17](1842) 10 M. & W. 546.
[18]*Id.*

his negligence, though the animal may have been improperly there."

*Dahmer* v. *N. P. R. R. Co.*,[19] a leading case on the Montana doctrine, holds that allegation and proof of three propositions are essential to recovery under the Last Clear Chance; i.e., (1) the exposed condition brought about by negligence of the person injured, (2) actual discovery by defendant of perilous situation of the person, and (3) defendant's failure to thereafter use ordinary care to avert the injury. In *Pollard* v. *Oregon Short Line*[20] plaintiff sued for personal injuries received when defendant's train struck plaintiff's car stalled on defendant's track. Plaintiff at the time was attempting to repair the truck so that he could move it from the tracks. The appellate court in their decision said that while many courts require allegation and proof of "actual discovery" in crossing cases, the better view with reference to crossings—as distinguished from injuries to trespassers and bare licensees upon railroad tracks at places where they have no right to be —is that the servants of the railroad are bound to keep a lookout at crossings; and the railroad company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it oculd avoid injuring them. Although this case shows a disposition on the part of the Montana courts to depart from the earlier doctrine of actual discovery, the case is not conclusive since the court found that actual discovery could be proved in this case by circumstantial evidence. However, even though the doctrine of undiscovered peril should become law in Montana, it is questionable whether stock owners who allow their animals to run at large within a herd district could recover under the Last Clear Chance since the animals are wrongfully on the highway. Is the motorist obliged to keep a lookout for animals wrongfully on the highway? In *Frowd* v. *Marchbank*[21] the driver of a car who kept on driving though vision of the highway was obscured by lights from a passing car and who thereafter collided with cattle which had been permitted to run loose on the highway at dusk unaccompanied by any person was held not properly chargeable with negligence under the Last Clear Chance Doctrine in an action by a farmer as owner of the cattle for damages, inasmuch as

[19](1913) 48 Mont. 152, 136 P. 1059, 142 P. 209.
[20](1932) 92 Mont. 119, 11 P. (2d) 271.
[21](1929) Wash. 283 P. 467.

the driver had no reason to suspect the presence of cows on the highway uncontrolled by any person, in violation of a statute. A Wisconsin court[22] in 1941 in deciding a case with substantially the same facts held there was no duty on the part of the motorist to keep a lookout since he had no reason to suspect a horse on the highway at night. From the doctrine laid down in these two cases it would seem the motorist owes a duty to keep a lookout for only such objects as he may suspect would be in the highway and that he cannot be held to suspect animals in the highway in violation of a statute. Where range law prevails, the animals are rightfully on the highway, and consequently under the rule indicated in the Pollard case, the motorist would be liable if he "should have discovered" the animals. In *Armstrong* v. *Butte, Anaconda & Pacific Ry. Co.*[23] the doctrine of undiscovered peril as expressed in the *Restatement of the Law of Torts*[24] is quoted verbatim in dictum. However, there has never been a Montana case decided in plaintiff's favor on appeal on the doctrine of undiscovered peril. So, on the decisions thus far, it might, therefore, be argued that actual discovery of the animals on the highway would be necessary before the negligent motorist could be held liable against the negligent stock owner in Montana.

A California court in 1941 indicates what seems to be the trend of the law regarding animals on the highway.[25] Plaintiff's automobile, which was proceeding at night at the rate of 45 miles per hour with headlights on over a highway running through hilly, open range country belonging to the United States, collided with a cow belonging to defendant, which apparently was crossing the road after leaving a creek to get to the other side of the road to feeding grounds. The highway was unfenced and well-traveled. It was the custom of cattle owners to allow their stock to range at will unattended, and plaintiff was familiar with the country and had seen cattle alongside the road but had never seen them at night. The court found no contributory negligence on the part of the plaintiff. In rendering a decision for the plaintiff, the court said:

> "We may assume at common law appellants were under no duty to keep their cattle off the highway. However, there are common sense limitations on the application

[22]Ott v. Tschantz (1941) 239 Wis. 47, 300 N.W. 766.
[23](1940) 110 Mont. 133, 99 P.(2d) 223.
[24]RESTATEMENT, TORTS, §479.
[25]Galeppi Bros. v. Bartlett CCA 9th, 1941) 120 F. (2d) 208 affirming (DC, 1940) 33 F. Supp. 277.

> of such a rule. The common law rule was adopted when there was no elaborate system of highways and no motor vehicles. There was then no such reason for imposing on cattle owners a duty of using ordinary care in the care and control of cattle. Now the changed conditions compel adoption of a different rule. 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."

It is questionable whether Montana would accept this California doctrine, as yet, since highways in Montana, except for those embraced in the herd districts, are not so heavily traveled as those in California, and furthermore, the courts would probably consider the necessity for encouraging stock raising in the state, this being one of our principal industries.

Helen Murphy.

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