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Animals - Actions for Damages - Recovery for Depredations of Bull Negligently Allowed to Run at Large

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RECENT CASES

ANIMALS—ACTIONS FOR DAMAGES—RECOVERY FOR DEPREDATIONS OF BULL NEGLIGENTLY ALLOWED TO RUN AT LARGE—Plaintiff owned a herd of registered Aberdeen Angus cows in a pasture directly across the road from where defendants' commercial Hereford cows and three bulls were pastured. The location was a "stock restricted area" in which an owner of livestock is prohibited from negligently allowing his stock to run at large.[1] The defendants' bull broke out of the defendants' pasture and into the plaintiff's. There he fought with the plaintiff's bull and inflicted such injuries as necessitated its subsequent destruction, a loss to plaintiff of $3,000. Plaintiff suffered a further loss of $4,500 in that seven "ill-bred calves" were born to his registered cows as a result of the trespass of the defendants' bull. Plaintiff brought action to recover those losses and the trial court entered judgment for defendants. In affirming that judgment the Supreme Court of Washington *held* that, under the applicable statute,[2] it was insufficient to prove merely that cattle were running at large in a stock restricted area, but rather, proof of negligence was a necessary element in establishing liability of defendants for trespass of their bull upon plaintiff's land. *Bly v. McAllister*, 364 P.2d 500 (Wash. 1961).

In the law of an owner's liability for trespassing animals, the instant case and the statute it construes represent another degree in an evolution which has nearly completed a circle. At common law an owner of domestic animals had an absolute duty to keep them contained within his own premises and he was strictly liable for their trespasses on another's land if he failed to do so.[3] An obligation rested on the owner to fence in his stock and no burden was imposed upon his neighbor to keep them out.[4] Also under common law every property owner's land was regarded in law as enclosed, regardless of fact,

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1. Wash. Rev. Code § 16.24.065 (1957) "No person owning or in control of any livestock shall willfully or negligently allow such livestock to run at large in any stock restricted area, nor shall any person owning or in control of any livestock allow such livestock to wander or stray upon the right-of-way of any highway lying within a stock restricted area when not in the charge of some person."
2. **Ibid.**
3. Barnes v. Pleasonton, 73 A.2d 787 (Del. 1950); McKee v. Trisler, 311 Ill. 536, 143 N.E. 69 (1924); Raziano v. T. J. James & Co., 57 So. 2d 251 (La. 1952); Pongetti v. Spraggins, 61 So. 2d 158 (Miss. 1952); Cox v. Burbidge, 13 C.B.N.S. 430, 143 Eng. Rep. 171 (1863) (dictum).
4. Raziano v. T. J. James & Co., 57 So. 2d 251 (La. 1952).

and when another's livestock broke the enclosure that other was liable.[5]

In the United States many western jurisdictions developed a rule which was the antithesis of the common law.[6] The vast areas of valuable grazing land, its greater proportion to arable soil, and the general economic importance of the cattle industry contributed to the creation of a rule that property owners must "fence out" livestock by construction of an enclosure deemed sufficient in law.[7] In holding that the owners of cattle may allow them to range at will, the Supreme Court of Colorado stated in the 1880 case of *Morris v. Fraker*:[8] ". . . (The common law rule) is wholly unsuited and inapplicable to the present condition of the State and its citizens."[9] The Supreme Court of New Mexico recently held that, where the running of livestock is lawful, it is the duty of the owner of property to enclose it should he desire to keep roaming stock off premises.[10]

As the rangeland became settled and more land was broken for crops, the reasons for rejection of the common law rule disappeared. Consequently, some states have restored the effect of the common law by prohibiting the roaming of cattle at large and making owners liable for damages resulting from their failure to restrain their animals.[11] Legislative enactments which require an owner to "fence in" his animals can be broadly categorized into two groups: (1) those which make it unlawful for an owner to "permit" or "allow" his animals to run at large[12] and (2) those which prohibit the owner from *willfully or negligently* permitting his animals to run at large.[13] A third group of judicial decisions holds that mere

5. Van Gorder v. Eastchester Estates, 137 N.Y.S.2d 789 (1955) (dictum).
6. See, **e. g.,** Morris v. Fraker, 5 Colo. 425 (1880); Beinhorn v. Griswold, 27 Mont. 79, 69 Pac. 557 (1902); Delaney v. Errickson, 10 Neb. 492, 6 N.W. 600 (1880) **Rev'd on rehearing on other grounds in** 10 N.W. 451 (1881).
7. See, **e. g.,** Morris v. Fraker, 5 Colo. 425 (1880); Beinhorn v. Griswold, 27 Mont. 79, 69 Pac. 557 (1902); Delaney v. Errickson, 10 Neb. 492, 6 N.W. 600 (1880); Kerwhacker v. C. C. & C. Ry. Co., 3 Ohio St. 172 (1854) "If an action for damages be maintainable for every instance in which the cattle and other livestock of a person go upon the uninclosed lands of another, without express license, more than nine-tenths of the business men of the State become for this cause, **tort feasors** every day of the year, and liable to suit for damages."
8. 5 Colo. 425 (1880).
9. **Id.** at 428.
10. Stewart v. Oberholtzer, 57 N.M. 253, 258 P.2d 369 (1953).
11. See, **e. g.,** Phillips v. Bvnum, 145 Ala. 549, 39 So. 911 (1906); Puckett v. Young, 112 Ga. 578, 37 S.E. 880 (1901); Gumm v. Jones, 115 Mo. App. 597. 92 S.W. 169 (1906). See PROSSER, TORTS § 57 (2d ed. 1955).
12. See, **e. g.,** Va. Code § 8-886 (1950) "It shall be unlawful for the owner . . . of any horse, mule, cattle, hog, sheep, or goat, to permit any such animal . . . to run at large. . . ."
13. See, **e. g.,** Wash. Rev. Code § 16.24.065 (1957 "No person owning or in control of any livestock shall willfully or negligently allow such livestock to run at large. . . .".

proof of the running at large raises a presumption of negligence on the part of the owner.[14]

It has been early established that a plaintiff may recover damages for such harms as were alleged in the instant case i e., (1) injuries inflicted in a fight with plaintiff's animal[15] and (2) the "misalliance"[16] of an inferior bull with a pedigreed cow.[17] In the latter case the usual measure of damages is the difference in value of the cow before and after the impregnation.[18]

The law in North Dakota on the liability of an owner for the trespass of his livestock is presently governed by statute: "No cattle, horses, mules, swine, goats, or sheep shall be permitted to run at large."[19] At one time it was lawful for livestock to run at large during a season of the year when they would be unlikely to damage growing crops.[20] However, as early as 1892 the North Dakota Supreme Court declared the common law rule to be in effect in the State.[21]

The development of the law relating to an owner's liability for the trespass of his animals is strongly indicative of the fact that the law is not static, but rather, is readily adaptable to the conditions and circumstances of the time.

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CONSTITUTIONAL LAW — DUE PROCESS — HEARING BEFORE EXPULSION FROM STATE SUPPORTED COLLEGE — Plaintiffs, while attending a state supported college, were expelled for reason of misconduct by the President of the institution on the recommendation of the State Board of Education. Plaintiffs

14. Brotemarke v. Snyder, 99 Cal. App. 2d 388, 221 P.2d 992 (1950); Fallon v. O'Brien, 12 R.I. 518, 34 Am. Rep. 713 (1880).
15. Houska v. Hrabe, 35 S.D. 269, 151 N.W. 1021 (1915).
16. Kopplin v. Quade, 145 Wis. 454, 130 N.W. 511, 512 (1911) (The opinion is a classic example of legal humor on the subject).
17. Crawford v. Williams, 48 Iowa 247 (1878) (dictum); Kopplin v. Quade, 145 Wis. 454, 130 N.W. 511 (1911).
18. Madison v. Hood, 207 Iowa 495, 223 N.W. 178 (1929); Crawford v. Williams, 48 Iowa 247 (1878). In 34 Iowa L. Rev. the general rule as to the measure of damages is criticized as being inadequate in that it may not permit recovery of the difference in value of the resulting inferior calf and a purebred eligible for registry.
19. N.D. Cent. Code § 36-11-01 (1961).
20. N.D. Rev. Code § 1549 (1899) "It shall be lawful for cattle, horses, mules, ponies and sheep to run at large from the first day of November until the first day of April of each year. . . ."
21. Bostwick v. Railway Co., 2 N.D. 440, 51 N.W. 781, 783 (1892) "In this state . . . The common law rule is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damage done by such stock upon the lands of another, whether fenced or unfenced." See also, Schneider v. Marquart, 45 N.D. 390, 178 N.W. 195 (1920) for a discussion of the Bostwick case and a general historical summary of the law on the point up to 1920.