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Livestock on the Highways

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LEGISLATIVE NOTES

LIVESTOCK ON THE HIGHWAYS

Florida Laws 1949, c. 25236

On July 1, 1950, an act forbidding the running of livestock at large on the public roads of the State of Florida became effective.[1]

At English common law the owner of livestock was under no duty to restrain them from going unattended on the public highways.[2] If, however, they trespassed upon another's land, their owner was liable for such trespass and any resulting damage, regardless of whether he intentionally caused or negligently allowed them to stray.[3]

In Florida the early public policy was to encourage the raising of livestock, as illustrated by the 1823 statute of the Territory of Florida permitting them to run at large on all unfenced lands without liability of their owner for resulting damage.[4] With the exception of laws of local application,[5] this policy has persisted to the present time.[6] In this field of legal control the common law no longer prevails in Florida; we have never recognized the prohibition of the straying of livestock on private property;[7] and today the common law rule permitting them to run at large on public highways is also abrogated.

As regards scope of application, the statute, although repeatedly referring to the public roads of Florida, provides:[8]

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[1]This chapter and the related chapter in regard to fencing and posting appears as FLA. STAT. *c.* 588 (1949). Chapter 25236 begins at Section 588.12. The session law itself, however, which is quoted herein, remains the official version of each 1949 statute unless and until it is adopted by the Legislature in 1951 in the form in which it is printed in the 1949 revision; for a detailed explanation see Legis., 3 U. OF FLA. L. REV. 74, 77-80 (1950).

[2]*E.g.*, Heath's Garage, Ltd. v. Hodges, 2 K.B. 370 (1916); Jones v. Lee, 106 L.T. 51 (1911); Cox v. Burbridge, 13 C.B.N.S. 430, 143 Eng. Rep. 171 (1863).

[3]*E.g.*, Cox v. Burbridge, 13 C.B.N.S. 430, 143 Eng. Rep. 171 (1863); Forsythe v. Price, 8 Watts 282, 34 Am. Dec. 465 (Pa. 1839).

[4]Fla. Terr. Act of June 11, 1823.

[5]*E.g.*, Fla. Laws 1949, c. 25591; *cf.* in this connection the broad authorization of municipal ordinances in FLA. STAT. §168.09 (1949).

[6]Thomas v. Mills, 107 Fla. 385, 144 So. 882 (1932); *see* Harris v. Baden, 154 Fla. 373, 381, 17 So.2d 608, 612 (1944).

[7]*See, e.g.*, Morgan v. Lakeland, 90 Fla. 525, 531, 107 So. 269, 271 (1925).

[8]Fla. Laws 1949, c. 25236, §2(4).

> "'Public Roads' as used herein shall mean those highways within the state which are, or may be, maintained by the state road department, including the full width of the right of way."

Apparently, therefore, the statute covers only state highways, and perhaps state aid roads,[9] although the ambiguous wording of the quoted definition leaves the matter open to debate.

The statute provides in its main operative sections for criminal punishment and civil liability of livestock owners, and for the impounding, redemption, and sale of livestock found on state highways.

Criminal Penalty

This statute obligates the owner of livestock to prevent them from running at large or straying on the public roads.[10] Section 13 provides:

> "Any owner of livestock who unlawfully, intentionally, knowingly or negligently permits the same to run at large or stray upon the public roads of this state or any person who shall release livestock, after being impounded, without authority of the impounder, shall be guilty of a misdemeanor . . . ."

Non-performance of a duty imposed by law may be punished criminally. The legislature can dispense with the necessity of proof of intent;[11] that is, negligence can itself be made the basis of a crime.[12] If, in violation of a statutory command, an owner refuses to restrain his livestock when he can reasonably foresee that they will stray on the highways, he can be punished criminally.

It is often stated that in order to be convicted of criminal negligence more flagrant negligence must be proved than in a civil proceeding.[13] The more logical view, under a statute of this type,

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[9]Fla. Stat. §341.16 (1949) so defines "state aid" roads as to bring them, perhaps, within Fla. Laws 1949, c. 25236, §2(4).

[10]Fla. Laws 1949, c. 25236, §3. The maximum penalty is six months' imprisonment and $500 fine.

[11]People v. Pociask, 14 Cal.2d 679, 91 P.2d 199 (1939); Smith v. State, 71 Fla. 639, 71 So. 915 (1916); Mills v. State, 58 Fla. 741, 51 So. 278 (1910).

[12]People v. Pociask, 14 Cal.2d 679, 91 P.2d 199 (1939).

[13]French v. State, 28 Ala. App. 147, 180 So. 592 (1938); Commonwealth v. Tackett, 299 Ky. 731, 187 S.W.2d 297 (1945); Potter v. State, 174 Tenn. 118, 124 S.W.2d 232 (1939); Copeland v. State, 154 Tenn. 7, 285 S.W. 565 (1926).

would seem to be that in a criminal action there can be a conviction only if the defendant is found negligent beyond a reasonable doubt, whereas in a civil case the verdict is based upon the preponderance of evidence.[14]

Impounding and Sale of Livestock

The sheriff, other county law enforcement officers, and the state highway patrol are under a duty to impound livestock found on the highways unless under manual control.[15]

In exercising its police power the state may prohibit livestock from running at large anywhere, and may provide for summary impounding and sale irrespective of negligence in the manner of keeping.[16] A fortiori it can confine to certain types of highways this prohibition of straying.

Statutory procedure for summary impounding must be strictly followed; any substantial deviation therefrom voids the entire transaction,[17] especially as regards the notice and the waiting period between impounding and sale.[18] A presumption of validity attaches to the acts of the sheriff, and the complainant has the burden of proving non-compliance with the prescribed procedure.[19]

In the impounding and sale of livestock, due process does not always require a court proceeding.[20] Provisions for administrative action, similar to those of the subject statute,[21] have already been

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[14]1 Wharton, Criminal Law 219 n.4 (11th ed. 1932).

[15]Fla. Laws 1949, c. 25236, §5. Section 2(3) states: "'Running at large' or 'straying' shall mean any livestock found or being on any public roads of this state and not under manual control of a person."

[16]Gill v. Wilder, 95 Fla. 901, 116 So. 870 (1928).

[17]Aguiar v. Sanders, 23 Cal. App.2d 122, 72 P.2d 196 (1937); Haden v. Fisher, 154 Okla. 228, 7 P.2d 488 (1932).

[18]Fort Smith v. Dodson, 51 Ark. 447, 11 S.W. 687 (1889); McDonald v. Lawrence, 93 Okla. 288, 220 Pac. 473 (1923); Benningfield v. Kerr, 292 S.W. 970 (Tex. App. 1927).

[19]Burton v. Johnson, 143 Fla. 245, 196 So. 489 (1940); *accord, e.g.*, Raines v. Pile, 182 Tenn. 283, 185 S.W.2d 628 (1945). *Contra:* McCrossin v. Davis, 100 Ala. 631, 13 So. 607 (1893); Johnston v. Pennington, 105 Ark. 278, 150 S.W. 863 (1912); Fort Smith v. Dodson, 51 Ark. 447, 11 S.W. 687 (1889); Jorgenson v. Story, 78 Mont. 477, 254 Pac. 427 (1927).

[20]Davidson v. New Orleans, 96 U.S. 97 (1878); Gill v. Wilder, 95 Fla. 901, 116 So. 870 (1928).

[21]These relate to various types of constructive notice, killing of animals if no bidder is found, turning of proceeds into the county fine and forfeiture fund, and

upheld by the Florida Supreme Court as a valid exercise of police power.[22] Section 7, however, is subject to possible attack in certain instances that may arise in connection with impounding costs. As regards hogs, goats and sheep, the fees can reach proportions of such size as to give rise to the contention that they are confiscatory and therefore unconstitutional.[23] If the officers impound a single hog, sheep or goat and the owner does not redeem it before the end of the redemption period that must precede sale,[24] the cost will closely approach the market value of the animal and may even exceed it.[25] In *Glisson v. Hancock*,[26] the Florida Supreme Court held that the imposition of statutory fees[27] totaling $6.50 per animal on impounded hogs, goats and sheep violated both the Federal and Florida Constitutions as a deprivation of property without due process of law[28] in view of the fact that this amount exceeded the value of the impounded animal. The opinion did admit, however, that this same sum might constitute a reasonable fee when applied to more valuable animals.[29]

The Court purported to be following *Morgan v. Lakeland*,[30] although in reality it went far beyond that decision. In the *Morgan* case the fee for impounding, quite apart from costs for care of the

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detention of animals until reasonable costs and fees have been paid.

[22]For a comprehensive opinion on these various points see Gill v. Wilder, 95 Fla. 901, 116 So. 870 (1928); *accord*, Howell v. Daughet, 148 Ark. 450, 230 S.W. 559 (1921).

[23]U. S. CONST. Amend XIV, §1; FLA. CONST. Decl. of Rights, §12.

[24]Fla. Laws 1949, c. 25236, §6, requires that the owner shall be notified immediately after impounding. If he does not redeem the animal within three days, the notice of sale shall issue, the sale to take place not more than 10 or less than 5 days after issue of the notice (excluding Sundays and holidays).

[25]Fla. Laws 1949, c. 25236, §7, provides for the following fees: $2.50 plus mileage for impounding each animal; $1.50 plus mileage for service of notice on the owner; 50¢ per day per animal for feed and care; $2.00 for advertising sale of the animal (amount as set out in FLA. STAT. §30.23 (1949)); $1.00 for sale of the animal; and 50¢ for report of the sale. On the Chicago Livestock Market, hogs were quoted at from $9.00 to $17.35 per cwt., sheep from $8.50 to $28.00 per cwt. No prices were available on goats. Chicago Daily Tribune, April 29. 1950, §2, p. 1, col. 5.

[26]132 Fla. 321, 181 So. 379 (1938).

[27]Fla. Laws 1937, c. 18836.

[28]See note 23 *supra*.

[29]132 Fla. 321, 324, 181 So. 379, 380 (1938).

[30]90 Fla. 525, 107 So. 269 (1925).

animal, was high even by present economic standards; in the *Glisson* case this factor was largely ignored. The true test of reasonableness, as opposed to confiscation, should be based on a close relationship between the statutory amounts set and the actual cost of the care furnished and of the steps necessarily taken in order to render redemption feasible at all. The market value of the animal should, in itself, be immaterial, although it is apparent that fees for cheaper animals should be less because the cost of feeding and caring for them is less. Perhaps for this reason the fees should run to scale according to the type of animal.

The statute specifies the amount of care to be accorded impounded animals,[31] and presumably their owner may recover in damages for failure to supply it.[32] To hold that public policy can be defeated by the complaint of a person that it costs him too much to break the law, or to hold that the taxpayer alternatively must foot the bill for boarding an animal below the actual cost of the care provided, is to introduce a unique principle; and, in so far as the opinion in the *Glisson* case lends support to this extreme position, it is in need of limitation to the facts of record in that case.

A related possible objection arises from the grant of authority to impound irrespective of negligence on the part of the owner.[33] Admittedly this imposes a hardship on him in those few instances in which he is not negligent. Probably the answer is that the loss occasioned will be slight for the owner that makes any real effort to obey the law.

Civil Liability

Section 4 provides:

> "Every owner of livestock who intentionally, wilfully, carelessly or negligently suffers or permits such livestock to run at large upon or stray upon the public roads of this state shall be liable in damages for all injury and property damage sustained by any person by reason thereof."

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[31]Fla. Laws 1949, c. 25236, §11.

[32]City of Greencastle v. Martin, 74 Ind. 449, 39 Am. Rep. 93 (1881); Adams v. Adams, 13 Pick. 384 (Mass. 1830).

[33]Fla. Laws 1949, c. 25236, §§3, 5-12; see note 16 *supra*.

Although the statute does not specifically limit the liability of livestock owners to collisions between their animals and motor vehicles, the discussion in this section analyzes this type of liability as the one of the widest interest and importance.

Section 4 sets out two broad grounds of liability for damage caused by straying livestock: negligent disregard of the prohibition, and intentional violation. Although some actions will probably be predicated on the latter ground, most of them will undoubtedly be based upon the former, by virtue of the difficulty of proving the owner's intent.

Two divergent views exist as regards a presumption of negligence. In the absence of an express statutory presumption,[34] a few courts have rejected any inference of negligence from the mere presence of livestock on the highway in violation of a statute;[35] the plaintiff motorist or passenger is required to prove affirmatively all the facts that show the defendant's negligence. Since, however, these facts are within the peculiar knowledge of the defendant in most instances, recovery is in practice rendered very difficult.

A slight majority of the courts confronted with this issue regard the presence of livestock at large on the highway as prima facie evidence of negligence; the owner is accordingly required to go forward and rebut this presumption.[36] The California Supreme Court, in expressly applying to this type of situation the doctrine of res ipsa loquitur, characterized its basis as the fact that the defendant either knows or has the best opportunity of ascertaining the cause of the accident.[37] Other jurisdictions have reached the same result

[34]ILL. ANN. STAT. c. 8, §1 (Smith-Hurd 1941); MO. REV. STAT. ANN. §14463 (1939). Conversely, CAL. AGRIC. CODE §423 (1943) eliminates any presumption of negligence.

[35]Favre v. Medlock, 212 Ark. 911, 208 S.W.2d 439 (1948); Gardner v. Black, 217 N.C. 573, 9 S.E.2d 10 (1940); *accord,* Granger v. Tremblay, 113 Vt. 32, 28 A.2d 696 (1942); *cf.* Champlin Ref. Co. v. Cooper, 184 Okla. 153, 86 P.2d 61 (1938) (motorists not in the class protected by statute).

[36]Hansen v. Kemmish, 201 Iowa 1008, 208 N.W. 277 (1926); Bender v. Welsh, 344 Pa. 392, 25 A.2d 182 (1942); Adamcik v. Knight, 170 S.W.2d 521 (Tex. Civ. App. 1943); *accord,* Doherty v. Sweetser, 82 Hun 556, 31 N.Y. Supp. 649 (1894); *see* Wigginton & Sweeney v. Bruce's Guardian, 174 Ky. 691, 192 S.W. 850 (1917).

[37]Kenney v. Antoretti, 211 Cal. 336, 295 Pac. 341, 342 (1931). The law has now been changed by statute, CAL. AGRIC. CODE §423 (1943); there is now no presumption of a livestock owner's negligence in a collision between auto and domestic animal.

without relying on res ipsa loquitur expressly.[38]

In Florida res ipsa loquitur is not a rule of substantive law; it is rather a rule of evidence permitting the jury to infer negligence when the injuring instrumentality is under the exclusive management and control of the defendant and the plaintiff without contributory negligence is injured in an accident not ordinarily occurring without negligence.[39] No undue stretch of the imagination is required to apply this doctrine to automobile accidents caused by the straying of livestock on the highways; under this statute such accidents will seldom be possible without negligence on the part of the livestock owner in keeping his animals. In most instances the other two prerequisites of res ipsa loquitur can also be met: absence of contributory negligence on the part of the motorist, and exclusive management and control of the livestock by their owner if he makes any serious effort to obey the law. The degree of control actually exercised in this situation does not properly enter into the determination of the existence of exclusive control; the degree will necessarily vary with the amount of care that each individual owner may desire to exercise.

The application of the doctrine of res ipsa loquitur does not in Florida shift the burden of proof to the defendant; neither does it alone constitute an adequate basis for a directed verdict.[40] It merely provides a strengthening inference to be considered by the jury along with any other evidence.[41] If the jury arbitrarily ignores this inference, the trial judge may grant a new trial.[42]

Even if the technical prerequisites of res ipsa loquitur are not satisfied in an accident of this type, negligence on the part of the owner might still be inferred as a matter of law. In view of the specific statutory imposition of a duty on the owner,[43] the mere fact

[38]See note 36 *supra.*

[39]Orme v. Burr, 157 Fla. 378, 25 So.2d 870 (1946); American Dist. Elec. Protective Co. v. Seaboard A.L. Ry., 129 Fla. 518, 177 So. 294 (1937); Bujol v. Gulf State Utilities Co., 147 So. 545 (La. App. 1933); 1 U. OF FLA. L. REV. 470 (1948).

[40]American Dist. Elec. Protective Co. v. Seaboard A.L. Ry., 129 Fla. 518, 177 So. 294 (1937).

[41]Skinner v. Ochiltree, 148 Fla. 705, 5 So.2d 605 (1941); Coaster Amusement Co. v. Smith, 141 Fla. 845, 194 So. 336 (1940); 1 U. OF FLA. L. REV. 470 (1948).

[42]American Dist. Elec. Protective Co. v. Seaboard A.L. Ry., 129 Fla. 518, 177 So. 294 (1937). This case went to the jury without submission of evidence by defendant; award of new trial after verdict for defendant was affirmed on appeal.

[43]Fla. Laws 1949, c. 24236, §3: "No owner shall permit livestock to run at

that livestock are straying on the public roads logically calls for an explanation from him as to his apparent violation of this duty.[44]

Contributory negligence of the plaintiff, which must be proved by the defendant,[45] bars recovery if it is a substantial factor in causing the injury.[46] Like alleged negligence of the defendant, contributory negligence of the plaintiff is a question for the jury.[47] It must be borne in mind that the mere presence of livestock on the highway, even though in violation of the law, does not give the motorist a license to kill or injure them. Once their presence is discovered, he must use reasonable care to avoid a collision.[48]

With the exception of those areas in which laws of local application prohibit livestock from running at large,[49] the mere failure of the owner to fence, stake, or otherwise restrain his livestock will not, in and of itself, constitute negligence. The first question is whether in a particular case the owner could reasonably have anticipated that his livestock would stray onto a state highway. If his range lies many miles from the nearest highway or is separated from it by a river, he might within reason permit his cattle to stray without anticipating that they would roam for miles or swim the river. These are perhaps extreme illustrations, but it indicates one type of problem that may well arise. The same test should be applied to those instances in which, although the owner fences his cattle and makes adequate inspections of the fence, a break in it nevertheless occurs and his livestock pass through this onto the highway.

Conclusion

The new liability imposed upon livestock owners is designed primarily to reduce collisions between motor vehicles and animals on

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large on or stray upon the public roads of this state."

[44]See note 36 *supra.*

[45]White v. Hughes, 139 Fla. 54, 190 So. 446 (1939); Shayne v. Saunders, 129 Fla. 355, 176 So. 495 (1937).

[46]Stanford v. Atlantic Life Ins. Co., 109 F.2d 428 (5th Cir. 1940); Shayne v. Saunders, 129 Fla. 355, 176 So. 495 (1937); Boudreau v. Louviere, 178 So. 173 (La. App. 1938).

[47]Myler v. Bently, 226 Mich. 384, 197 N.W. 521 (1924); Traill v. Ostenan, 140 Neb. 342, 300 N.W. 375 (1941).

[48]Miller v. Dobbs, 180 Okla. 576, 71 P.2d 737 (1939); Missouri K. & T. Ry. v. Savage, 32 Okla. 376, 122 Pac. 656 (1912).

[49]Fla. Stat. §168.09 (1949); *cf. also, e.g.,* Fla. Laws 1947, cc. 24496, 24532.

the public roads of Florida. The efficiency of this statute remains questionable, however. Passed as a compromise measure, with no public contribution to the heavy expense of fencing, it leaves numerous loopholes in enforcement.

As regards impounding, the provisions relating to fees are subject to attack on constitutional grounds. From an administrative standpoint, it is difficult to envisage a Florida highway patrolman, whose numerous regular duties continue undiminished, in hot pursuit of a fleeing razor-back hog. The sheriff and other local law enforcement officers, precisely because they are local, may quite possibly lack the zeal required for an efficient impounding campaign in a "cattle" county. Nor can one expect that in such an area a local jury will readily find criminal negligence on the part of the owners of the predominant industry. Upon conviction, the penalty imposed by the county judge may well be insignificant; the statute fixes merely the maximum.

In civil actions, in at least some instances, the owner of the animal, after its mutilation by collision, will be difficult to trace. In all instances, the jury problem arises here too, not only as to negligence of the defendant but also as to contributory negligence on the part of the plaintiff motorist. Finally, the Supreme Court of Florida may not apply the doctrine of res ipsa loquitur, although without this or some inference of negligence the statute becomes virtually useless as a practical matter. The situation would have been greatly clarified if the Legislature had at least created a presumption of negligence to be inferred from the mere straying of livestock onto the public roads.[50]

It is quite possible that the entire benefit ultimately resulting from this high-sounding enactment will in reality consist of no more than relief of the deceased or injured motorist from the liability of paying for the animal causing the accident.

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[50]An apt illustration of such a presumption, created for railroad collisions, is analyzed in Legis., 2 U. OF FLA. L. REV. 124 (1949); *cf.* Seaboard A.L. Ry. v. Watson, 103 Fla. 447, 137 So. 719, *aff'd*, 287 U.S. 86 (1931); ILL. ANN. STAT. c. 8, §1 (Smith-Hurd 1941), Fugett v. Murray, 31 Ill. App. 323, 35 N.E.2d 946 (1941); Mo. REV. STAT. ANN. §14463 (1939).