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Recent Decisions

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RECENT DECISIONS

ANIMALS—NEGLIGENCE IN KEEPING—SCIENTER—TRESPASSING—PERSONAL INJURIES.—An action of tort was brought to recover compensation for personal injuries to the plaintiff caused by the defendant's cow. The cow had escaped from the defendant's pasture adjoining the premises of the plaintiff. The evidence showed that the pasture of the defendant, from which the cow escaped, was insecurely fenced. While attempting to drive the cow from her garden, the plaintiff was "butted" and knocked to the ground, sustaining the injuries of which she complained. The defendant contended that the trial judge was not justified in finding that the cow escaped through the defendant's negligence, and that the plaintiff could not recover in the absence of proof of *scienter*. The court held that the plaintiff, in order to recover for the personal injuries, need not prove *scienter*. *Walker v. Nickerson*, 197 N. E. 451 (Mass. 1935).

At the common law the owner of domestic animals and fowls was strictly liable for their trespasses on the land of others irrespective of the keeper's negligence. HARPER, LAW OF TORTS § 166; THROCKMORTON'S COOLEY ON TORTS § 244. Liability existed irrespective of the personal fault of the owner. Blackstone seems to have thought liability depended on negligence in keeping the animals. 3 BL. COMM. 211. This view is not supported by the English cases. In the leading case of *Cox v. Burbidge*, 13 C. B. (N. S.) 430 (1863), the court said: "If I am the owner of an animal in which by law a right of property can exist, I am bound to take care that it does not stray into the land of my neighbor; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial."

The common-law rule of strict liability is in force in many states in this country. This rule is sometimes stated to be "that one was under a duty to fence his live stock in but not to fence others' live stock out." CLARK, LAW OF TORTS § 114. In some of the western states the common-law rule is regarded as unsuitable to existing conditions, and they adopt the rule that one need not fence his own live stock in but must fence others' live stock out. CLARK, LAW OF TORTS § 114.

"As to the liability for acts of domestic animals other than trespasses to land, the English common-law rule was that the owner or keeper was liable regardless of the amount of care used where he knew of the dangerous tendency of animal." CLARK, LAW OF TORTS § 115. "The gist of the action is not negligence in the manner of keeping the animal, but the keeping him at all with knowledge of his vicious propensity. . . . Some courts, however, hold that the gist of the action is negligence in failing to exercise due care in securely restraining the animal, a rebuttable presumption of such negligence being raised whenever the animal inflicts injury." THROCKMORTON'S COOLEY ON TORTS § 250. The rule in Massachusetts is that whoever keeps a domestic animal that is accustomed to attack and injure mankind, with knowledge of this tendency in the animal, "is *prima facie* liable in an action on the case, at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing and taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities." *Popplewell v. Pierce*, 10 Cush. 509 (1852). It seems, however, that in this jurisdiction the injured person may proceed on the ground of negligence also. See *Cooper v. Cashman*, 190 Mass. 75, 76 N. E. 461, 3 L. R. A. (N. S.) 209 (1905). If he proceeds on the theory of negligence, it is said that the "negligence on which liability is founded is keeping such an animal with knowledge of its propensities." *Cooper v. Cashman*, *supra*.

Proof of a dangerous propensity in a domestic animal, such as a cow or a horse, is generally essential to recovery, at the common law, where the animal was rightfully in the place where a personal injury to the plaintiff occurs. But if the animal is trespassing on the plaintiff's premises at the time of the injury to the plaintiff, proof of *scienter*, or negligence in the manner of keeping the animal, is not generally essential to a recovery against the owner of the animal. This is the principle on which the decision in the principal case was based. This general principle has been stated by the New York Court of Appeals as follows: ". . . where the owner of such animals [horses, cattle, sheep, swine, and the like] does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the inclosure of the former under such circumstances. And in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property [such as the defendant's horse injuring the plaintiff's horse by kicking it] of the plaintiff, and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking and entering of the close in such action is the substantive allegation, and the rest is laid as matter of aggravation only." *Van Leuven v. Lyke & Dumond*, 1 N. Y. 515, 517 (1848) (the defendant's sow, while trespassing on the plaintiff's land, mutilated and mangled the plaintiff's cow and calf). A large number of cases support this general rule. *Beckwith v. Shordike & Hatch*, 4 Burr. 2092, 98 Eng. Rep. 91 (1767); *Angus v. Radin*, 2 South. 815 (N. J. Law 1820) (oxen broke the plaintiff's close and killed his cow); *Smith v. Garner*, 113 Wash. 368, 194 Pac. 375 (1920); *Morgan v. Hudnell*, 52 Ohio St. 552, 40 N. E. 716, 49 Am. St. Rep. 741, 27 L. R. A. 862 (1895); *McKee v. Trisler*, 311 Ill. 536, 143 N. E. 69, 33 A. L. R. 1298 (1924).

Thus, while the particular injury itself may not support an action for damages without an allegation and proof of *scienter*, yet if it is part of the damage suffered from the trespass, it goes to swell a recovery which the unlawful entry justifies. THROCKMORTON'S COOLEY ON TORTS § 255. This rule applies only when the injured person is one that can maintain an action for the unlawful entry. THROCKMORTON'S COOLEY ON TORTS § 255; *Peterson v. Conlan*, 18 N. D. 205, 119 N. W. 367 (1909). *Contra, Troth v. Wills*, 8 Pa. Super. Ct. 1 (1897) (with a strong dissenting opinion in support of the rule as stated herein). A stranger (one who is not the owner of the real estate on which the animal is trespassing at the time of the injury to him or his property) must prove *scienter*. *Peterson v. Conlan*, *supra*. It seems that the action of the stranger would have to be one for negligence in the manner of keeping the animal in view of its known propensities. See *Peterson v. Conlan*, *supra*. The stranger would have to show that the injury complained of was one that the animal, in view of its known propensities, might reasonably be expected to commit. See *Peterson v. Conlan*, *supra*.

In the absence of knowledge of a vicious propensity in the animal trespassing on another person's real estate, the owner is liable only, at the common law, for such damage to the person or property of the plaintiff on whose property it is trespassing when it injures him in his person or injures his personal property; for such damage as is caused by the natural propensity of the animal; and this is to be determined by its normal disposition. 2 JAGGARD, LAW OF TORTS § 855; *Lee v. Riley*, 18 C. B. (N. S.) 722, 144 Eng. Rep. 629 (1865). If the injury

complained of was due to some particular vice or propensity of the particular animal, it seems that the plaintiff would have to show *scienter* in order to establish that the damage was proximate. *Lee v. Riley, supra*. Thus, where the defendant's horse, while trespassing on the plaintiff's land, kicked the plaintiff's horse, the result was proximate. *Lee v. Riley, supra*. And where the defendant's horse injured the plaintiff's horse by biting and kicking her through the fence separating the plaintiff's land from the defendant's, the damage was held not to be too remote. *Ellis v. Loftus Iron Works, L. R. 10 C. P. 10 (1874)*. On the other hand, where the injury is not the result of the ordinary nature of the animal, such as a horse kicking a child, the owner is not liable, in the absence of a knowledge of the horse's vicious temper. *Cox v. Burbridge, 13 C. B. (N. S.) 430, 143 Eng. Rep. 171 (1863)*; 2 JAGGARD, LAW OF TORTS § 855.

In *Cox v. Burbridge* a child, lawfully on a highway, was kicked by the defendant's horse, grazing there. The action was for negligence in keeping the horse. No *scienter* was alleged or proved. On the contrary, there was evidence showing that the horse was a quiet animal. There was no evidence showing that the horse was in the highway through the defendant's negligence. The court held that the action would not lie without an allegation, supported by proof, that the defendant knew that his horse was liable to kick persons. The defendant did not know that his horse, *contrary to its ordinary nature*, would probably kick a child on a highway. A contrary result was reached in *Goodman v. Gay, 15 Pa. St. 188, 53 Am. Dec. 589 (1850)*. The action was in case for injuries received by the plaintiff's son, resulting from a kick of the defendant's horse while the horse was at large within the limits of a city. The court, in holding that it was actionable negligence to permit a horse to run at large and unattended on the streets of a city regardless of their vicious character or of *scienter*, and that the result was expectable, said: "The owner has no right, either by law or custom, to turn a horse loose in the streets of a city. All men know that a horse which has been stabled and well fed will, when turned out, run and plunge, and become dangerous in the midst of people. . . . I might say that all horses are, when turned loose, more or less dangerous in confined streets; and all men know this."

While *Cox v. Burbridge* and *Goodman v. Gay* were cases wherein the action was for negligence and was brought directly for the personal injury in each instance, in the latter the defendant voluntarily turned his horse out in the city streets, while in the former there was no evidence as to how the horse happened to be in the highway. This distinguishes the two cases on the facts and as to the nature of the defendant's act in each instance. But as far as foreseeability of the consequences is concerned contrary results are reached in them.

"It seems well-settled that at common law it was not unlawful for horses and other domestic animals to run at large upon public highways." *Fox v. Koehnig, 209 N. W. 708, 710 (Wis. 1926)*. On the other hand, it is generally considered actionable negligence to leave "a horse or team untethered and unguarded on a public street." *Roberts v. Griffith Co., 280 Pac. 199, 200 (Cal. 1929)*, and authorities cited. But it is not unlawful *per se* at common law for one to depasture one's horses, or other live stock, on a country road adjoining one's premises; this principle is based on the rule that a property owner, through whose land a highway is established, owns the fee in the highway subject to the public easement. *Holden v. Shattuck, 34 Vt. 336 (1861)*. Accordingly, it has been held that where the defendant's horse, while at large on a country highway adjoining the defendant's premises, excited the plaintiff's horse to run and injure itself, the plaintiff could not recover without showing that the circumstances and occasion, or that the habits and character of the animal were

such as to indicate carelessness on the part of the defendant, with reference to the safety and convenience of travelers on the highway. *Holden v. Shattuck*, *supra*. In Massachusetts it has been considered unlawful for one to permit domestic animals to go at large on the highways without a keeper; and it has been held that in such cases the owner is liable for all damages caused directly, either to persons or property, by domestic animals running at large on the highways. *Leonard v. Doherty*, 174 Mass. 565, 55 N. E. 461 (1899) (swine scaring horses traveling on the highway); *Barnes v. Chapin*, 4 Allen 444 (1862) (a colt, while following its dam, which was led by its owner, was attacked and killed by a stray mare of the defendant). In England, at the time of the decision in *Cox v. Burbridge*, it seems that no one could have complained of the presence of domestic animals on a highway, as a wrong *per se*, except the owner of the fee in the highway, or the public. In some cases in this country, dealing with the question of liability for the acts of animals while they are running at large on highways, there is either a state statute or a city ordinance making it unlawful to permit live stock to run at large on the highways.

Where it is unlawful for one's domestic animals to go upon a public highway or the streets of a city unattended some courts have adopted practically the doctrine of absolute liability, while, at the same time, purporting to hold the owner liable only for those consequences that he could reasonably have foreseen. *Goodman v. Gay*, *supra*; *Roberts v. Griffith Co.*, 280 Pac. 199 (Cal. App. 1929). In Massachusetts the doctrine that the owner of domestic animals is liable for all damages committed by them while they are unlawfully on the highways of the State or are in the streets of a city unattended is applied. *Hardiman v. Holley*, 172 Mass. 411, 52 N. E. 518, 70 Am. St. Rep. 292 (1899).

James W. Myers.

EXECUTORS AND ADMINISTRATORS—EVIDENCE—APPEAL AND ERROR.—A recent Iowa case, *Johnston v. Johnston*, 261 N. W. 908 (1935), while reiterating and applying a familiar principle of law, nevertheless applies it to a set of facts that evokes a discussion of an interesting legal problem. Section 12032 of the IOWA CODE OF 1931 provides as follows: "No person who *feloniously* takes or causes or procures another so to take the life of another shall inherit from such person, or receive any interest in the estate of the decedent as surviving spouse, or take by devise, or legacy from him, any portion of his estate." An application was made for a widow's allowance, and after overruling the objections of the administrator, Raymond Johnston, the court entered an order allowing the widow \$1,000 for a year's support. In the resistance filed by the administrator to the above application it appears that the widow was tried for the murder of the decedent and was convicted of manslaughter, and this is set up as bringing the case under the statute above quoted denying any right to the decedent's estate under the conditions therein set forth. The decision of the lower court was affirmed on the main ground that there was not in the resistance any allegation of a felonious killing, and that the plea that the widow was convicted in the district court availed the administrator nothing, as the fact of her conviction was not even admissible to the district court, except possibly to prove there had been a judgment, but to prove none of the facts back of it.

The plea of the administrator technically did not come within the requirements of the statute. True it says in the resistance that "his death was caused by gun-

shot wounds inflicted on the said Herbert T. Johnston by the applicant herein, his surviving spouse." The statute requires that the act be done feloniously. The court contended that the act relied upon might have been done inadvertently or in self-defense, or accidentally. Various courts hold that statutes of this nature should be strictly construed and pleadings under it must bring the case within the letter of the statute. In *In Re Tarbo's Estate*, 172 Atl. 139 (Pa. 1934), the court, after construing the statute similar to the Iowa statute, held that the estate of the father who fatally shot his daughter and then committed suicide was not precluded from taking the daughter's estate by inheritance since the father had not been "adjudged" guilty of murder within the statute precluding inheritance. Three of the seven judges dissented vigorously to this decision of the majority. It would appear that the dissenting opinions in this case are sounder in theory and in policy. The intention of the legislature in enacting the statute was to outlaw definitely such an unconscionable mode of acquiring property. The reason for the statute was found in the fundamental concepts of equity and public policy. The intention of the legislature was not to declare, consciously, that murderers who were not "adjudged guilty" should profit by their crime. But the decision of the majority of the court inferentially established that to be their intention.

It is the opinion of the writer that the Iowa court, in the instant case, likewise contributed to an inequitable result and established a precedent contrary to the spirit of and reason for the statute in question when it ruled that the omission of the word "feloniously" in the administrator's resistance negated the possibility of the statute applying. The resistance alleged that "the death of Herbert T. Johnston was caused by gunshot wounds inflicted on the said Herbert T. Johnston by Pearl Johnston, his surviving spouse." The omission of the word "feloniously" in the above allegation was controlling in the decision even though this allegation followed: "That Pearl Johnston was tried for the murder of Herbert T. Johnston in the District Court in and for Ringgold County, Iowa, and was on November 2, 1934, convicted of manslaughter, and, that said Pearl Johnston was on December 17, 1934, duly sentenced and judgment entered under said conviction of manslaughter." Under modern civil practice, courts are less wont to be hypercritical than formerly, and the language of the pleader is construed so as to save him harmless from many technicalities of the common law system of pleading. *Foster v. Elliott*, 33 Iowa 216 (1871); *Gray v. Coan*, 23 Iowa 344 (1867); *Brown v. Tregoe*, 236 N. Y. 497, 142 N. E. 159 (1926); *Kansas Wheatgrowers' Association v. Bridges*, 124 Kan. 601, 261 Pac. 570 (1927); *State v. Ford Motor Co.*, 114 Ohio St. 221, 151 N. E. 171 (1926); *United States Nat. Bank v. Town of Swiss*, 196 Wis. 176, 218 N. W. 845 (1928). The acknowledged policy of Civil Practice Acts to construe pleadings so as to arrive at their common intent would indicate that it would not have been necessary for the Iowa court to lean over backward in order to hold the administrator's resistance sufficient in the instant case.

Another important question was raised in the case, namely whether or not a conviction in a criminal prosecution is a bar to a subsequent civil proceeding, for any reason other than to prove the fact of its rendition. The court quotes from 34 CORPUS JURIS, page 970, Section 1387, to the effect that, "By the great weight of authority and in the absence of any statute to the contrary, a judgment or sentence in a criminal prosecution is neither a bar to a subsequent proceedings founded on the same facts nor is it proof of anything in such civil proceeding, except the mere fact of its rendition. So where the same acts or transactions constitute a crime and also give a right of action for damages or for a penalty, the acquittal of defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him, nor is it evidence of his innocence in such action."

In a note appendant to *Micks v. Mason*, 145 Mich. 212, 108 N. W. 207, 11 L. R. A. (N. S.) 653 (1906), it is said: "It has been laid down by the courts as a general rule, and repeated by the text writers, that a judgment in a criminal prosecution cannot be given in evidence in the civil action to establish the truth of the facts on which it is rendered." This rule has practically universal application. In *Johnson v. Girdwood*, 7 Misc. 651, 28 N. Y. S. 151 (1894), it was held in an action to recover damages for an arrest, conviction, and imprisonment procured by fraud, duress, and conspiracy, the plaintiff alleging that he was innocent, the judgment of conviction is not conclusive on the question of the plaintiff's guilt, but is open to impeachment. In an interesting Texas case, *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297 (1890), it was decided that in an action to recover money alleged to have been extorted under duress in consequence of a threatened prosecution for embezzlement, the fact that the plaintiff was subsequently tried and acquitted of the crime of embezzlement is not admissible to establish his innocence. See: *Stone v. United States*, 167 U. S. 178 (1897); *Carlisle v. Killebrew*, 89 Ala. 329, 6 So. 756, 6 L. R. A. 617 (1889); *Small v. Harrington*, 10 Idaho 499, 79 Pac. 461 (1904); *In re Mason*, 147 Minn. 383, 181 N. W. 570 (1921); *Towle v. Slake*, 48 N. H. 92 (1868); *Chermes v. Rosenwasser*, 184 App. Div. 337, 169 N. Y. S. 38 (1918); *Shock v. Peters*, 59 Tex. 393 (1883).

It has been held in a number of cases that a judgment in a criminal proceedings may be admissible in a civil suit involving the same facts and particularly when entered on a plea of guilty, although there is strong authority to the effect that such judgment is not conclusive evidence, and may be contradicted. *Woodruff v. Woodruff*, 11 Me. 475 (1834); *Markett v. Gemke*, 154 N. Y. S. 780 (1915); *State v. Weil*, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461 (1909); *Crawford v. Bergen*, 91 Iowa 675, 60 N. W. 205 (1894). The grounds for the admissibility of evidence under such facts is that such evidence is a species of admission. It is obvious that the admission of such evidence is not a relaxation of the general rule in specific cases, but constitutes an exception to or limitation of that rule.

The application of the rule by the Iowa Supreme Court in the instant case illustrates strikingly the rigorous inflexibility of the general doctrine that the judgment of a criminal court cannot be received in evidence, in the vast majority of cases, in a civil suit involving the same set of facts, except for the purpose of proving the mere fact of its rendition. It is presumptuous perhaps to attempt to indict the operation and consequences of a rule of evidence that has been time-tested and seemingly found necessary since the very early days. In manifold cases the rule obviously is equitable, just and necessary. The want of mutuality, the dissimilarity in object, issues, procedure, and parties in the criminal and civil suits are the traditional and proper grounds justifying the application of the rule in the majority of the cases. But practically speaking, the application of the rule in a proceedings involving the facts presented in the instant case is rather difficult to defend. The plaintiff, convicted of having murdered her husband, has had all the extra safeguards of a criminal trial and has been found guilty by evidence sufficient to warrant that judgment "beyond a reasonable doubt" and not by a "mere preponderance of the evidence." The same facts are involved, the same object is sought. It would be infinitely more difficult for her to prove that she is innocent of the crime of manslaughter in a civil suit. In the matter of proof alone she could not hope to better her position. The same situation is presented in cases where after being adjudged guilty of arson in a criminal court, the person is allowed to collect from an insurance company as a direct result of the application of the rule being discussed. "It has been held that a criminal sentence or acquittal will be admissible in evidence in a subsequent suit, civil in form but penal in character, to enforce a penalty or for-

feiture of property against the same defendant, on the same state of facts, but this exception does not apply where the parties are not the same." JUDGMENTS, 34 C. J. 971; *Coffey v. United States*, 116 U. S. 436 (1886); *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86 (1896); *In Re Food Conservation Act*, 254 Fed. 893 (D. C., S. D. N. Y. 1918). The principle of law relative to penalties and forfeitures which provides the basis for the exception just noted might possibly be applied so as to extend the operation of this important exception to cases involving factual set-ups as found in the instant case. The analogy between the two types of cases is not wanting.

John J. Locher, Jr.

FRAUDULENT CONVEYANCES—CONDITIONS PRECEDENT TO SETTING ASIDE—RESORT TO OTHER PROPERTY.—In the recent Indiana case of *Kennedy v. Lubre Co.*, 196 N. E. 366 (Ind. App. 1935), the court held that a creditor must show that his debtor did not leave sufficient assets with which to pay his debts in order for the creditor to succeed in an action to set aside a voluntary conveyance of the debtor as fraudulent. That is to say, a man who is indebted may make a voluntary conveyance that will be valid and cannot be successfully attacked by creditors without a showing that his other property has been exhausted or is insufficient to pay his debts.

The general rule, which Indiana adheres to, is that a person indebted in large amounts, whether as principal or surety, is not entitled to make a voluntary conveyance of his property and thus defeat a collection of the debts. The reason for this general rule is tersely put by the Supreme Court of Indiana as follows: "The claims of justice are paramount to those of affection and charity." *Law v. Smith*, 4 Ind. 56, 61 (1853). While this general rule is recognized in Indiana, this State recognizes, along with several other states, that the mere fact that a person is indebted, even in large amounts, does not prevent him from making a voluntary conveyance that will be valid as against any particular creditor. Before any particular creditor can attack such a conveyance on the ground that it is fraudulent, he must show that the debtor who made the conveyance does not have sufficient other property with which to satisfy the particular claim. This principle seems to have been established for the first time in Indiana in 1853 in the case of *Law v. Smith, supra*; and it has been adhered to consistently in a large number of decisions in this State ever since. *Baugh v. Boles*, 35 Ind. 524 (1871); *Morgan v. Olvaney*, 53 Ind. 6 (1876); *Sell v. Bailey*, 119 Ind. 51, 21 N. E. 338 (1889); *Brumbaugh v. Richcreek*, 127 Ind. 240, 26 N. E. 881 (1902). The complaint of a creditor, in an action to set aside a conveyance on the ground that it was made to defraud creditors, in order to be sustained on demurrer, must allege that at the time the suit was brought the debtor had no other property out of which the debt of the creditor might be collected, or had no other property subject to execution. An omission of such an averment is fatal on demurrer to the complaint. *Brumbaugh v. Richcreek, supra*; *Jackson v. Saylor*, 30 Ind. App. 72, 63 N. E. 881 (1902).

In other jurisdictions while a voluntary conveyance is not necessarily fraudulent as to creditors, yet a creditor, in order to reach such property to satisfy his claim, need not show that the debtor who made the conveyance did not have any other property out of which the claim might be satisfied. *Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351 (1866); *Dalton v. Barron*, 293 Mo. 36, 239 S. W. 97, 22 A. L. R. 187 (1922).