

THE KANSAS LAW OF LIVESTOCK TRESPASS: A Study in Statutory Underpainting.

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Livestock raising is an important activity in the Kansas economy. One would assume that the policies of the State of Kansas concerning livestock raising would be clearly stated in law, and that the laws could be found readily in the statute books. Unfortunately, this assumption would not be entirely correct. So far, at least, as concerns the liability of owners and keepers of livestock for trespasses to real property committed by the animals, the policy of the State of Kansas is not easy to ascertain.

It is not that we do not have statutes covering this subject. We do; several of them. In fact, we still have just about all of the statutes bearing upon this subject that have been passed by the territorial and state legislatures of Kansas since 1854. During this period, however, the policy of the state has undergone some changes. Nevertheless, as the policies have changed, the legislature has simply passed new laws, without bothering to repeal old ones. This has not been altogether unintentional, apparently, but it has made the task of the courts in interpreting these statutes more difficult than would seem to be necessary.

Our statutes contain laws enacted to effectuate a general policy of permitting livestock to run at large and to range freely over the lands of others, except where the others have taken legally sufficient steps to "fence-out" the animals.¹ The statutes also contain laws enacted in pursuance of a general policy of requiring owners of animals to keep them from "running at large," *i.e.*, requiring the animal owners to "fence-in" their stock.² There are also specific statutes dealing with the owner's duty to restrain animals of particular species, although these seem to rest upon the same fundamental "fence-in" policy.³ Two statutes apply exclusively to animals being driven along the highway.⁴

Since these statutes all have slightly different coverages, and provide somewhat different remedies, none can be said to repeal entirely any other, despite fundamentally different policy bases. Speaking figuratively, we could say that two different policy pictures have been painted at different times on the canvas that is our law of livestock trespass. The later one did not cover the earlier one completely, and so parts of both pictures are visible.

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¹ See KAN. G.S. 1949, 29-402.

² See KAN. G.S. 1949, 47-101 thru -103; 47-301 thru -308; 47-122 thru -124.

³ See KAN. G.S. 1949, 47-105 (the "Bull-Boar Law"); 47-106 (the "Stag Law"); 47-107 thru -110 (the "Stallion-Jack Law"); 47-111 (the "Ram Law"); and 47-112 thru -119 (the "Hog Law").

⁴ See KAN. G.S. 1949, 47-105 (the "Freighters and Drivers Law") and 47-120.

To carry the analogy further, the picture is complicated by a few bare places which neither painting covered. At these points in the picture the unpainted common law shows through. The overall impression conveyed by this picture undoubtedly is not what the several legislative artists intended to create. To apprehend the meaning of this legislative painting, our approach will be to examine, layer by layer, the separate strata of statutory pigments that have been laid on the underlying common-law base, noting how each successive layer combines with the earlier underpainting.

THE COMMON LAW RULE

At common law, possessors of domestic animals, other than dogs and cats, were generally held strictly liable for their animals' trespasses to realty.⁵ If the animal went upon lands without the permission of the owner or occupant, the animal's owner could be held liable for all damages to the realty caused by the animal and also for personal injuries and damages to personalty caused by the animal during the course of the trespass.⁶ This rule of strict liability in effect imposed upon the animal owner or possessor a duty to keep the animal off the lands of another at his peril. This duty was not satisfied by the exercise of reasonable care: if the animal trespassed the owner or other person charged with the animal's control was liable even though he may have been entirely without fault.

This common-law rule did not require the possessor of animals to keep them *on* his *own* land at his peril, so long as he kept them *off* the lands of others. A trespass to realty was necessary before this strict liability was imposed. The owner or possessor of a domestic animal loose on the public highway, for instance, was not liable for injuries to person or property caused by the animal in the absence of fault.⁷ Owners or keepers of domestic animals were free to drive them along the public highway or to let them graze along the public right of way, so long as reasonable care was taken to avoid damages to others. In fact, the necessity for animal owners to use the public highways to drive the herds upon was great enough that the basic common-law rule of strict liability was not imposed upon the keepers of animals being lawfully driven along the public highway even when the animals strayed onto the lands of adjoining landowners.⁸ This was a generally recognized exception to the principle of strict liability for trespass. Of course, the drover of the animals could still be liable for fault in such a case.

Although most animal trespass cases fall under one or more of several statutory rules in Kansas today, there are still some situations in which the

⁵ 2 HARPER & JAMES, LAW OF TORTS 821-25 (1956); PROSSER, TORTS 319-320 (2d ed. 1955).

⁶ 2 HARPER & JAMES, *op. cit. supra* note 5, at 825, 827; PROSSER, *op. cit. supra* note 5, at 321, 322.

⁷ 2 HARPER & JAMES, *op. cit. supra* note 5, at 824.

⁸ *Ibid.*

common-law rule apparently controls.⁹ Since all of the statutes bearing on this subject refer either to animals of particular species (*e.g.*, horses, cattle, etc.) or to animals of broader but limited descriptions (*e.g.*, "stock," etc.) some domestic animals, such as fowls and perhaps bees, to which the common-law rule applied may not be within the scope of any of the existing laws, and as to them the common-law rule presumably still applies.

In other cases specific statutes impose duties upon the animal keeper or owner different from the duty imposed by the common-law strict liability rule. In most instances the statutory duty is less demanding than that of the common law. In a few cases, however, the statutory duty is just as onerous as the common-law duty.

THE "FENCE LAW" AND THE OPEN RANGE POLICY

In the case of the commonest forms of livestock the common-law rule of strict liability for trespass probably never has been the basic law in Kansas. The first edition of the Statutes of Kansas Territory contains "an act regulating inclosures"¹⁰ which rests upon a policy completely different from that of the common law. Actually, the law says nothing specifically about repealing the common-law rule of strict liability. In terms it merely imposes a duty upon someone—it does not say whom—to fence "all fields and inclosures," specifying how a lawful fence must be constructed. Sections three and five of the act prescribe a procedure for determining the lawfulness of a fence by a unique tribunal of disinterested "fenceviewers." Sections four and six are the provisions of the act that are interpreted as abolishing the common-law principle of strict liability.

Sec. 4. If any horse, cattle or other stock shall break into any inclosure, the fence being of the height and sufficiency aforesaid, or if any hog, shoat or pig shall break into the same, the owner of such animal shall, for the first trespass, make reparation to the party injured for the true value of the damages he shall sustain; and for the second offense the party so trespassed upon shall be entitled to recover from the owner of such animals double damages; and for the third or any subsequent trespass the party so injured shall be allowed treble damages for all losses sustained by such trespass, and be allowed to take into possession the animals so trespassing and be entitled to keep the same until damages with treble charges for keeping and feeding, and all costs of suit, be paid; to be recovered by action of debt before a justice of the peace.

⁹ KAN. G.S. 1949, 77-109, declares that the common law remains in force where appropriate in Kansas except as modified by constitution, statute or judicial decision. The common-law rule of strict liability for the acts of dangerous animals must be distinguished from the liability for domestic animals' trespasses. As to wild animals and domestic animals of known vicious propensities, the common-law principle of strict liability apparently still applies in Kansas for injuries attributable to the animals' vicious characteristics. This subject, however, is outside the scope of the present study. For a careful examination of the law relating to dangerous animals, see McNeely, *A Footnote on Dangerous Animals*, 37 MICH. L. REV. 1181 (1939).

¹⁰ Kan. Terr. Stat. 1855, ch. 83.

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Sec. 6. If any person, damnified for want of such sufficient fence, shall hurt, wound, kill, lame or destroy, or cause the same to be done by shooting, worrying with dogs, or otherwise, any of the animals mentioned in this act, such person shall satisfy the owner of such animal or animals in double damages with costs.

Section four here provides that if the fence is of sufficient height a person injured as a result of one of the specified animals breaking in can recover damages, or double or treble damages as the case may be. It does not say—nor necessarily imply—the converse: that if the fence is not of sufficient height, etc., the injured party can recover nothing. If nothing but the language of this section is considered, it could be argued that the legislature intended to retain the basic common-law rule of strict liability in all cases, but in cases where the landowner had a legally sufficient fence to add the additional remedies of double and treble damages and the right to hold possession of the animal to secure payment. This argument would have had little success, however, for other states had enacted “fence laws” by 1854, and these were understood as declaring a general “open range” or “fencing out” policy.¹¹ There is little doubt, then, that the legislature did intend to deny any right of recovery for trespass except where the landowner had erected a lawful fence. The act did impose a mandatory duty to fence lands, but contained no sanction to insure performance of this duty except the provision in section six which denied to the non-complying landowner the privilege to use reasonable force to resist and repel the trespassing animals. The legislature surely must have intended also to deny the power to hold the animal owner or keeper strictly liable. When the Kansas Supreme Court first had occasion to construe the act, it said, in dictum, that the act “probably so modified the common law that no action lies for injuries done to real estate by trespassing cattle unless such real estate is enclosed with a lawful fence.”¹²

Taken at face value, this statement of the effect of the “fence law” goes far beyond a mere abolition of the common-law rule of strict liability. It seems to say that the landowner cannot even recover for a trespass of animals negligently or even willfully caused unless his land is enclosed by a lawful fence. Broad as it is, however, this dictum probably is consistent with the intent of the legislature. In 1855 Kansas was definitely an “open range” state. Our wide prairies could be used most productively at that time for cattle grazing. It was clearly absurd to impose upon stock owners the common-law duty to keep their stock on their own land at their peril.

Moreover, it is probable that the people of Kansas at that time considered stock owners as having a general right not only to let their animals run at

¹¹ See 2 HARPER & JAMES, *op. cit. supra* note 5, at 828; and Note, 34 IOWA L. REV. 330 (1949).

¹² Union Pac. Ry. Co. v. Rollins, 5 Kan. *167 at *177 (1869).

large but also even to graze them purposely on any unfenced lands.¹³ It is therefore likely that the legislature did intend to impose upon the land owner or occupant the burden of "fencing out" unwanted stock as a condition precedent to any remedy for trespass damages. By this ambiguous statute, then, the territorial legislature abolished the common-law rule to the extent that that rule had required animal owners to "fence in" their horses, cattle, hogs, shoats, pigs and other "stock" and replaced it with a rule requiring land owners and occupants to "fence out" such animals. It is strange to us today, looking backward, that such an important reversal of fundamental policy should have been made in this casual fashion. However, since other states had adopted "fencing out" policies,¹⁴ in contravention of the common-law "fencing in" policy, the lawyers and legislators of 1855 probably did not realize the extent to which they created new remedial powers and disabilities by this act.

The territorial legislature, as has been said, may have intended to deny all recovery for livestock trespass to a land owner or occupant who had not erected a sufficient fence. However, as the court later construed the "fence law," a land owner apparently had a right to recover damages if the trespass was "willful or wanton."¹⁵ The court understood that the fence law constituted a restriction of some sort on the landowner's power to subject the animal owner to liability. But the court had difficulty analyzing the law to ascertain the extent of the restriction. As has been noted, the act did not specifically say nor necessarily imply that there could be no recovery where there was no lawful fence. The court reasoned, however, that since the act imposed a positive duty to fence upon someone—presumably the party in possession—it was negligence per se to fail to fence lawfully. Thus the owner's own negligence was assumed to be a contributing causal factor in all cases of trespass by livestock where there was no adequate fence. Under this negligence analysis the landowner could be said to be guilty of contributory negligence and therefore entitled to no recovery if he had no sufficient fence, but he could recover damages if the animal owner was guilty of some degree of fault worse than negligence, *i.e.*, for wanton or willful trespass.¹⁶

The present "fence law"¹⁷ contains several sections that were not included in the first law of 1855, but some of the original language remains intact. The first section of the 1855 law—the section imposing the general duty to fence "all fields and enclosures"—appears, with only the slightest variation, as section

¹³ In *Union Pac. Ry. Co. v. Rollins*, *id.*, at *175, it was urged that according to the customs and usages, Kansas animal owners had the right to let them run at large. The court did not deny that this was the custom, but said that in view of the specific adoption of the common law in our statutes, (see note 9 *supra*) it requires more than custom to change it.

¹⁴ See note 11, *supra*.

¹⁵ See *Larkin v. Taylor*, 5 Kan. *433 (1870); *Davis v. Wilson*, 11 Kan. *74 (1873).

¹⁶ *Larkin v. Taylor*, *ibid.*

¹⁷ KAN. G.S. 1949, ch. 29.

29-101 of the Kansas General Statutes. Other provisions have undergone more alteration, but there is still much similarity of language in some sections.¹⁸ The original vexing ambiguity has not been eliminated. It is still impossible to tell from the language of the act itself whether the owner of an inadequate fence is to be denied all recovery. Nevertheless, in cases that clearly fall within its terms, the "fence law" is still very much alive today,¹⁹ a curious holdover from the days of the open range.

THE HERD LAWS

The reason the fence law is called a "curious holdover" is that the statewide open range policy it was designed to effectuate was replaced successively by a township option policy, a county option policy and finally was abolished on a statewide basis in 1922. This transition may be traced through a succession of "herd laws," so-called, enacted at different times to reflect differing policy needs. These laws, like the "fence law," still may be found in our statutes. The fundamental characteristic of the "herd laws" is that they purport to require the owners or keepers of certain animals to restrain them under some circumstances and provide remedies for the breach of this duty. Commonly, in these laws the statement of the duty to restrain contains the term "running at large." Obviously to the extent that these laws imposed on stock owners a duty to restrain animals they constituted deviations from the "open range" policy as expressed in the fence law, and a step back toward the policy of the common law.

The precursor of the "herd laws" was found in the territorial statutes of 1855, just one page removed from the original "fence law." Chapter 81 of the 1855 Statutes of Kansas Territory is entitled "Horses," and contains one act: "An act respecting seed horses."

Sec. 1. If any seed horse, mule, or jackass, over the age of two years, be found running at large, the owner shall be fined for the first offence five dollars, and for every subsequent offence not exceeding ten dollars, to be recovered by action of debt before a justice of the peace, in the name of any person who will prosecute for the same, one-half for his own use, and the other half to the use of the county.

Sec. 2 If any stallion or jackass, which is kept for the purpose of breeding or training, should escape from the owner by carelessness, and the same shall be taken up, the owner thereof shall be found for all damages sustained by any person or persons, and shall be fined for the first offence three dollars, and for every subsequent offence ten dollars, to be collected as specified in section first.

Sec. 3. If any stallion, jackass, or mule, not used for breeding, over the age of two

¹⁸ Section 2 of the 1855 law is almost entirely visible in KAN. G.S. 1949, 29-102. The provisions relating to the "fence viewers" have been materially changed, see KAN. G.S. 1949, 29-201 thru -203, but the phrasing of the cause of action created by section four in the 1855 law is not far different from that of the present KAN. G.S. 1949, 29-402.

¹⁹ See *Bates v. Alliston*, 186 Kan. 548, 352 P.2d 16 (1960), in which recovery was predicated solely upon the fence law.

years, shall be found running at large, and any person shall have taken up the same, such person so doing shall notify the owner in person, or, if not to be found, by leaving written notice at his or her lodgings, and shall be entitled to receive five dollars for the first time, for the second time ten dollars, and for the third time he shall be entitled to castrate the animal, using the ordinary precautions for the preservation of the life of the animal; the animal to be retained possession of by the person taking up until all charges are paid.

Sec. 4 If any horse, mule, or jack, not used for breeding, be running at large, and cannot be taken up, the owner, upon notice being given him in person, shall, for the first offence pay the person so notifying him three dollars, and for the second notice six dollars, and the third time such horse may be killed by the person giving notice, or by any person who can kill him; such sums to be collected from the owner by action of debt before a justice of the peace.

This act apparently is intended to serve some policy different from both that of the common law and of the "fence law." It is aimed not so much at preventing trespasses to realty by horses, mules and jackasses but at protecting the purity of the female animals.²⁰ The act applies only to masculine or neuter animals, and then only when they are old enough to do some damage to a female. There would be no reason for thus limiting the act if it were aimed at protecting interests in realty, since female horses, etc., are about as likely to trespass as males, and they can cause as much damage to land and crops. Moreover, the duty imposed by the act may be violated whenever the animal is "running at large." A trespass on the lands of another does not have to occur.

It is also worth noting that the act does not contemplate an ordinary suit for damages as the remedy for violations except where it can be shown that the owner or his agent was guilty of actual carelessness in allowing a stallion or jackass kept for breeding or training purposes to escape. However, it does provide some sanctions other than the damage remedy in other cases where the animal is found "running at large." The first section provides for the recovery of a civil fine against the owner of the animal "found running at large." Any person could institute proceedings to recover the fine, and that person could share the fine equally with the county. A lesser fine was imposed for the first offense than for subsequent offenses by the same animal. Another remedy, available in some circumstances, was the power to hold the animal as a sort of lien to insure payment of the civil fine.

The "act respecting seed horses" has passed through several modifications, but it is still recognizable today in the "Stallion-Jack law."²¹ Other laws presently in force purporting to prohibit the "running at large" of specific animals are the "Bull-Boar Law,"²² the "Stag Law,"²³ and the "Ram Law."²⁴

²⁰ See Note, 34 IOWA L. REV. 318, 319 (1949) which explains the origin of the Iowa herd law as being originally designed for the protection of female animals.

²¹ KAN. G.S. 1949, 47-107 thru -110.

²² KAN. G.S. 1949, 47-105.

²³ KAN. G.S. 1949, 47-106.

²⁴ KAN. G.S. 1949, 47-111.

The "Hog Law"²⁵ also applies to the running of a particular species, but not solely to males. These are not, however, the laws that have been referred to as "herd laws." In addition to these specific laws, there are four laws pertaining generally to most stock animals that limit the privilege bestowed by the "fence law" of allowing such animals to run at large. Three of these laws were products of the power struggle in the Kansas legislature between the stock raisers, who favored the "open-range" policy embodied in the "fence law," and the crop farmers, who favored a return to the strict liability principle of the common law. In resolving this conflict between incompatible interests the experience of Kansas paralleled that of some other states.²⁶

In 1868 the farmers were able to secure the enactment of the "night herd law."²⁷ This act rested upon the policy of letting the electors of each township determine whether the "fence-out" principle of the "fence law" or a "fence-in" principle should be enforced in their township during the night-time. The "fence law" ruled the daylight hours, but a majority of the township electors could, by petitioning the county board under this act, require the owners of domestic animals named in the petition to confine them during the night-time during certain specified portions of the year.²⁸ A section of the "night herd" law made the owners liable to anyone injured by an animal not confined as the act required. Apparently no trespass to realty was necessary to give rise to this liability.²⁹

In 1875 the "county herd" law was adopted.³⁰ This law was based upon a county option principle. The county board of each county was empowered to determine what animals should not be "allowed to run at large" within the county.³¹ In counties where the running at large of certain animals was duly prohibited, any person "injured in property" by the forbidden activity was allowed to recover without regard to fences, all damages to property suffered as a result. The act also extended a right of lien to secure payment of damages

²⁵ KAN. G.S. 1949, 47-112 thru -119.

²⁶ See WEBB, *THE GREAT PLAINS* (1931) for a discussion of this historic conflict.

²⁷ This act now appears as KAN. G.S. 1949, 47-101 thru -103.

²⁸ The order could specify the whole year if the people so desired, according to *Lauer v. Livings*, 24 Kan. 273 (1880).

²⁹ The remedy under the act, KAN. G.S. 1949, 47-103, is not in terms limited to cases of trespass. It extends liability to "any person who shall suffer damage from the depredations of such animals . . ." However, recovery is allowed the plaintiff "without regard to his or her fence," suggesting that trespass was at least contemplated.

³⁰ This act now appears as KAN. G.S. 1949, 47-301 thru -308.

³¹ Later amendments provided that the county electors could, by petition, require the board to issue an order prohibiting the running at large of certain animals, KAN. G.S. 1949, 47-309; and could require the suspension of such an order, KAN. G.S. 1949, 47-308. For some reason the court required extremely technical compliance with the petition requirements before the night-herd law was enforceable. See *Tinkham v. Geer*, 11 Kan. 299 (1873) (holding that the statutory requirement that the county board's order issued in response to township petition be "under their hands" meant all members must personally sign the order for it to be effective). The county board's order was not presumptively valid at first. *Noffziger v. McAllister*, 12 Kan. 250 (1873). In *Kungle v. Fasnacht*, 29 Kan. 559 (1883) the court required the party asserting the night-herd law to prove that every signer of the petition was a qualified elector of the township, and that they comprised the requisite 3/5 of the qualified voters. This absurd requirement was no longer imposed after *St. Louis & San Francisco Ry. Co. v. Mossman*, 30 Kan. 336 (1883).

and the privilege of taking the animal into custody and posting it as a stray.³² Then the act provided that it should not be construed as conferring jurisdiction on the county board over animals otherwise prohibited from running at large, and that it should not be construed "to amend or affect [the fence law]."³³ This last provision is puzzling. Since bulls, boars, stags, stallions, jacks, rams and swine were otherwise prohibited from running at large,³⁴ the herd law apparently could only have been intended to apply to female animals of those species and to animals of different species, such as fowls, goats, dogs, cats, bees and perhaps wild animals. This limitation on the scope of the county herd law, which still is part of the law today, apparently has been frequently overlooked. The provision that the herd law was not to "amend or affect" the fence law is also puzzling at first glance, but, since the fence law did not expressly confer any privilege to allow animals to run at large, the fence law could remain in full force according to its terms, unaffected by the herd law. In spite of this the Kansas Supreme Court more than once declared, in dictum, that in counties where the herd law was adopted the fence law was repealed and the common-law rule restored.³⁵ This clearly was not the actual result, as will be shown.³⁶

Some important modifications were made from time to time in the county herd law, but the basic policy of county option prevailed until 1929. In that year the legislature enacted a law of statewide application declaring, simply:

Section 1. That it shall be unlawful for any neat cattle, horses, mules, asses, swine or sheep, to run at large.

Section 2. That any person whose animals shall run at large, in violation of the provisions of section 1 of this act, shall be liable to the person injured for all damages resulting therefrom, and the person so damaged shall have a lien on said animals for the amount of such damages.³⁷

This law abandoned, so far as the specified animals are concerned, the principles of township and county option embodied in the night herd law and the county herd law. It also seems directly contrary to the policy of the fence law, but because of the indirect wording of the fence law it was not necessarily repealed by this one.

RUNNING AT LARGE

With all of these overlapping and occasionally contradictory statutes in force, how is the owner of livestock to know whether he is performing the

³² KAN. G.S. 1949, 47-303.

³³ KAN. G.S. 1949, 47-305.

³⁴ See note 3, *supra*.

³⁵ See *Missouri Pac. Ry. Co. v. Olden*, 72 Kan. 110, 83 Pac. 25 (1905); *McAfee v. Walker*, 82 Kan. 182, 108 Pac. 79 (1910).

³⁶ In *Hazlewood v. Mendenhall*, 97 Kan. 635, 156 Pac. 696 (1916), the court explained that the herd law re-enacted the common law only so far as animals "running at large" are concerned,

³⁷ KAN. G.S. 1949, 47-122, 123.

primary duty which the society imposes upon him with respect to restraining his animals? What degree of care must he exercise?

Apparently there are four basic situations in which the animal owner is held strictly liable for any damage caused by his animal:

- A.) Situations to which the common law rule still applies.³⁸
- B.) Where the animal has trespassed upon an enclosure surrounded by a lawful fence.
- C.) Cases falling under the "freighters and drovers" law, which provides that all damages caused to crops adjacent to the road caused by stock owned by freighters or drovers shall be paid by the stock owner.³⁹
- D.) Where swine are being driven along the public highway, in which case the owner is "responsible for all damages" sustained by "any person" caused by the swine.⁴⁰

In the first three instances nothing but the absolute prevention of any damage-causing trespass will discharge the "duty" of the animal owner. In the fourth instance, no trespass to realty is required by the terms of the act.⁴¹

In the other statutes pertaining to liability for livestock, the owner's duty is performed by preventing the animal from "running at large," or from "being found running at large." No trespass upon realty of another is necessary for an animal to be "running at large." These statutes would seem to impose upon the owner a duty to keep the animals confined; if they should escape from confinement, they would be "running at large." This would be a more rigorous duty than the "fence law" and the common law rule, for the owner must not only keep the animals off a neighbor's land; he must keep them *on* his own land.⁴²

Some of the statutes prohibiting animals from running at large contained the verb "permit" or its derivatives, however.⁴³ The use of this word in connection with "running at large" suggests that the legislature did not intend the remedies provided in these laws—especially the criminal penalties—to be invoked unless the animal owner had been guilty of some fault, either wilful or negligent. And this has been the holding under these statutes: a showing at least of negligence is required before the animal owner can be subjected to liability.⁴⁴

The "night herd law" does not phrase the stock owner's duty in those

³⁸ See note 9, *supra*.

³⁹ See note 4, *supra*.

⁴⁰ *Ibid.*

⁴¹ The act probably makes the owner strictly liable for personal injuries caused by driven swine. KAN. G.S. 1949, 47-120.

⁴² *Cf.* Miller v. Parvin, 111 Kan. 444, 207 Pac. 826 (1922) (dictum): "The law seems to be settled that in a herd law county one who pastures cattle upon his own land must at his peril keep them from trespassing upon the crops of adjoining landowners. . . ."

⁴³ See KAN. G.S. 1949, 47-105 (the "Bull-Boar Law"), 47-107 (the "Stallion-Jack Law"), and 47-111 (the "Ram Law"). In the "Hog Law," KAN. G.S. 1949, 47-117, the term "suffered to run at large" is used instead of "permitted to run at large."

⁴⁴ McAfee v. Walker, 82 Kan. 182, 108 Pac. 79 (1910). The court has tended to find more readily that hogs have been "suffered to run at large" under the "Hog Law," *id.*, than that other stock has been "permitted to run at large." Precautions that would be reasonable to prevent most stock from getting loose would not necessarily be adequate for hogs. See, e.g., Wells v. Beal, 9 Kan. 597 (1872).

terms. That act declares that in townships where an order issued under it is in force the owner of the specified animals "shall keep them confined in the night-time."⁴⁵ Confining animals would seem to be something different from just taking reasonable steps to prevent them from running at large. At one time the Kansas Supreme Court took the position that these duties were different.⁴⁶ This position, however, finally was abandoned. In *Abbey v. Missouri, Kan. & Tex. Ry. Co.*⁴⁷ the court said, "Stock is confined [within the meaning of the night herd law] when means shown by experience to be adequate for the purpose are employed, and if . . . an escape occur without the fault of the owner, the consequences of allowing stock to run at large are not visited on him."⁴⁸ The *Abbey* case was a suit for injuries inflicted upon the plaintiff's mules by the defendant's train and was brought under the "Railroad Stock Law."⁴⁹ It was not a suit to recover damages for failure to keep animals confined under the "night herd law." The defendant railroad attempted to show violation of the "night herd law" on the part of the plaintiff in order to sustain the defense of contributory negligence. The court's construction of the term "confine" in the "night herd law," then, should not necessarily be binding in an ordinary case of animal trespass.⁵⁰ Nevertheless, this decision seems to have settled the matter for all purposes. Accordingly, the term "confine" in the "night herd law" must be regarded as imposing a duty essentially identical to that imposed by the statutes containing the phrase "permit to run at large" and similar terms. In either case, the duty of the animal owner is to use reasonable care to keep the animal on his own premises when unattended.

The county herd law uses the term "run at large," but in an ambiguous manner.

The boards of county commissioners of the different counties of this state shall have power at any session after the taking effect of this act to direct by an order what animals *shall not be allowed to run at large* within the bounds of their county.⁵¹

This could mean that the county board can direct what animals the animal owner shall not "allow" to run at large. In this sense "allow" would mean the

⁴⁵ KAN. G.S. 1949, 47-101.

⁴⁶ See *Atchison T. & S.R. Ry. Co. v. Riggs*, 31 Kan. 622 (1884); *cf. Missouri Pac. Ry. Co. v. Shumaker*, 46 Kan. 769, 27 Pac. 126 (1891).

⁴⁷ 108 Kan. 88, 194 Pac. 191 (1920).

⁴⁸ *Id.* at 90, 194 Pac. at 192.

⁴⁹ KAN. G.S. 1949, 66-295 thru -299. The act imposes liability "without regard to negligence" upon railroads for wounding or killing animals. The act does not apply, however, to railroads that enclose their track with a lawful fence.

⁵⁰ Many opinions were handed down in cases decided under Railroad Stock Law which discussed the nature of the stock owner's duty under the herd laws. Although different fundamental policies were at issue in the railroad cases, these opinions were followed by the court in later herd cases without questioning their value as precedent. Their value would appear to be slight. The legislature unmistakably expressed the intention that the railroads be responsible for fencing the rights of way: to hold that an adjoining owner could not recover for damages to his stock on the track unless *he* had erected a lawful fence between his land and the right of way would almost completely emasculate the law. The indiscriminate reliance upon Railroad Stock Law decisions as authorities in herd law cases has caused additional confusion in this otherwise perplexing area.

⁵¹ KAN. G.S. 1949, 47-301.

same as "permit" in the other laws that have been mentioned. However, the phrase could mean that the county board can designate animals that it—the board—will not "allow" to run at large in the county. Under this latter interpretation the stock owner could be liable any time his animals were running at large, whether or not he "allowed" them to do so. The court apparently has never discussed this ambiguity. It seems always to have assumed that under the county herd law, as under the other laws, the owner can be liable only if his fault has contributed to the animal's being loose.

The last general law imposing a duty upon stock owners to restrain their animals was KAN. G.S. 47-122 thru -124, which simply declared it unlawful for the specified animals to run at large.⁵² Since the terms "permit" or "allow" were not used in connection with "run at large" in this law, as they had been in others, it is possible that the legislature intended to impose strict liability in cases to which it applied. This possibility was considered by the court in two leading cases.⁵³ The argument was made in those cases that this law was passed, not to provide a remedy for livestock trespass to realty, but to make stock owners strictly liable—or at least prima facie liable—for injuries caused by their stock being loose upon the highway.⁵⁴ The court rejected this interpretation. Even though such terms as "permit" or "allow" were absent, the animal owner still was not liable under this statute unless he had been guilty of negligence or wilful behavior in allowing the animal to escape confinement. The term "running at large" itself, then, means something more than just unattended: an animal is not "running at large" within the meaning of this law unless the animal has been suffered or permitted to be free of restraint.⁵⁵ The interpretation was justified by reference to some earlier cases decided under the "Railroad Stock Law," where this construction of the term "running at large" was applied to permit a livestock owner to avoid the railroad's defense of contributory negligence.

Negligence, or some more serious degree of fault, then, must be proved in

⁵² See text at note 37, *supra*.

⁵³ *Wilson v. Rule*, 169 Kan. 296, 219 P.2d 690 (1950), and *Abbott v. Howard*, 169 Kan. 305, 219 P.2d 696 (1950). The majority opinions in these two cases are almost identical in wording. In both cases the majority opinion represented the view of only three justices. Two dissented, including Justice Smith, who wrote the majority opinion, one concurred in the result, and one did not participate in the decision.

⁵⁴ See Annot., "Liability for damage to motor vehicle or injury to person riding therein by animal at large in street or highway," 59 A.L.R.2d 1328 (1958).

⁵⁵ In the most recent case involving this statute, the court approved the following instruction to the jury concerning the meaning of "running at large": "21. As used in the Statute, 'running at large' is the strolling, without restraint or confinement, as wandering, roving and rambling at will without restraint. *Suffering or permitting* an animal to go at large implies knowledge, consent, or willingness on the part of the owner, or such negligent conduct as is equivalent thereto; but does not comprehend a case where animals escape from their owner, after due precaution to secure them has been taken, and without fault or negligence on his part, and he makes immediate and suitable efforts to recover them." (Emphasis supplied.) *Clark v. Carson*, 188 Kan. 261, at 265, 362 P.2d 71, at 75 (1961). This interpretation is consistent with that of most other states in similar legislation. See Annot., "Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence," 34 A.L.R.2d 1285 (1954).

order to hold the animal owner liable under all of the laws which purport to prohibit "running at large." These are the laws which were said to "restore the common law" by superseding the "fence law." Instead of having this effect, however, they have substituted negligence in place of the common law's strict liability as the criterion of the animal owner's responsibility. The "fence law," on the other hand, which was enacted originally in pursuance of an "open range" policy now provides one of the few situations in which strict liability may be imposed today.

CONCLUSIONS

From this examination of the laws and decisions touching upon livestock trespass, the following conclusions relative to the stock owner's duty can be drawn. If he is to avoid liability the owner:

- (a) Must exercise reasonable care to keep the animals upon his own land.
- (b) Must keep them out of a lawfully fenced enclosure belonging to someone else at his peril.
- (c) If he is a "freighter or drover," he must prevent the stock from damaging crops on lands adjacent to the road at his peril.
- (d) If he is the owner of swine being driven along the highway, he must see to it that the driving of such swine causes no damage to any person at his peril.
- (e) If he owns or keeps domestic animals not covered by statute, he must keep them off the lands of others at his peril.

If these duties are complied with, the owner or keeper of livestock cannot be subjected either to civil liability or the criminal penalties provided in some statutes for livestock trespass. Is there, then, any purpose in retaining all of the several statutes that treat essentially this same duty? Now that we have a general statewide herd law in 47-122 thru -124, the necessity for the night herd law and the county herd law is not obvious. Nor can it be said that the special remedies provided in those special laws dealing with Rams, Stags, etc., are important enough to warrant such special treatment.

If the policy of the state of Kansas is to be to hold the animal owner liable only where negligent, except in a few cases of strict liability, the legislature should simply enact a statute to that effect, repealing all of the "underpainting," and re-enacting those portions of the prior laws it is desired to preserve—such as the standards for lawful fences. Doing this would not only make the law bearing upon the important activity of livestock raising more comprehensible; it would also rid the statute books of some obsolete and unnecessary laws. A simple statute declaring that animal owners will be liable for injuries caused by their failure to exercise reasonable care to keep the animals restrained, with provisions for certain exceptional cases of strict liability should be sufficient for this purpose. Perhaps the reason this was not done each time the change of

basic policy produced a new law was that the legislators were uncertain of what the result of repealing the old laws would be. Granted that this is a problem that must be dealt with, a better solution than simply leaving the old laws intact would be to conduct careful research into the effect of repealing the old law and replacing it with the new one. The cost of a thorough study of the laws treated in this article should not be very great. A thorough study of the actual effects of these laws would probably reveal that some of them serve only to take up space in the statute book.