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NOTES AND COMMENTS

STATUS OF TRESPASS LAWS IN OKLAHOMA
AS THEY AFFECT RANCHERS AND FARMERS

The ranchers and farmers of Oklahoma have expressed their concern as to the status of the trespass laws of this state and their effect upon the rights and liabilities of the members of the agricultural community. This paper will attempt to categorize some of the more significant statutes and court decisions in this area and point out the changes that have been made in the law. The subject matter has been divided into two main headings: the first will deal with perhaps the more important topic — that of trespass by domestic animals and its consequences to the owner while the latter part of the article will deal with personal trespass.

I. TRESPASS BY LIVESTOCK

Prior to 1965 the law with regard to trespassing domestic animals was found under various sections of the Oklahoma herd law.¹ Effective January 1, 1966, a significant portion of the herd law was repealed.² The most important feature of the new legislation is the fact that open range counties are no longer permitted³ nor does the law any longer permit the creation of stock districts wherein livestock could run at large throughout the district.⁴ The

¹Okla. Sess. Laws 1965, ch. 117, § 2.

²OKLA. STAT. tit. 4, § 98 (1965) now provides that ". . . [a]ll domestic animals shall be restrained by the owner thereof at all times and seasons of the year from running at large in the State of Oklahoma. Damages sustained by reason of such domestic animals trespassing upon the lands of another shall be recovered in a manner provided by law. For the purpose of this act, domestic animals shall include cattle, horses, swine, sheep, goats, and all other animals not considered wild but shall not include domestic house pets."

³OKLA. STAT. tit. 4, § 94 (1961), which has now been repealed, Okla. Sess. Laws 1965, ch. 117, § 2, provided that all domestic animals were to be restrained by their owner and all damages sustained by reason of their trespass upon the lands of another could be recovered in a manner provided by law. This section exempted certain counties from its operation (open range counties). The new law has invalidated these exemptions.

⁴OKLA. STAT. tit. 4 § 101 *et seq.* (1961), repealed Okla. Sess. Laws 1965, ch. 117, § 2, provided that residents of any county within the state could, by following the prescribed statutory procedure, create stock dis-

owner of domestic animals in this state is under a strict statutory duty to restrain those animals within the confines of the land which he owns or occupies.⁵ This duty is similar to that which was imposed upon the owner of domestic animals at common law. Under the common law rule, the owner of domestic animals kept them at his peril and was strictly liable for any damages resulting from his failure to keep the animals properly restrained. Liability for damages resulting from trespassing animals did not depend upon whether the owner was negligent in allowing them to escape except in cases where the animals were being driven on the highway in which case proof of negligence on the part of the owner was necessary to recover for damages the animals caused.⁶ If the animals committed a trespass upon the lands of another the fact that the land intruded upon was improperly fenced was immaterial since no one was required to fence against domestic animals in the absence of an agreement to that effect.⁷ The common law rule was eventually modified in a number of states through the enactment of fencing laws under which cultivated lands were required to be fenced before the landowner could recover damages from the owner of livestock which had broken through a fence and intruded upon the land.⁸ With the increased cultivation of lands which had formerly been used primarily for open grazing purposes, many state legislatures ultimately enacted herd laws or

districts. Once these districts were created, owners of trespassing domestic animals could not be held liable for the damages the animals caused unless they intruded upon land fenced for agricultural purposes pursuant to OKLA. STAT. tit. 4, § 115.3 (1961) repealed Okla. Sess. Laws 1965, ch. 117, §2. The land owner also could not be enjoined from allowing his livestock to run at large throughout the district. See *Inselman v. Berryman*, 180 Okla. 136, 68 P. 2d 527 (1937).

⁵ Foster and Keeton, *Liability Without Fault in Oklahoma, At Common Law and Under Statutes*, 3 OKLA. L. REV. 1, 15, 192 (1950).

⁶ *Id.* at 12.

⁷ 3 C.J.S. *Animals* § 185 (1936); *Miller v. Parvin*, 111 Kan. 444, 207 Pac. 826 (1922); *Raziano v. T. J. James and Co., Inc.*, 57 So.2d 251 (La. C.A. 1952); *Thompson v. Mattuschek*, 134 Mont. 500, 333 P.2d 1022 (1959); *Molton v. Young*, 204 S.W.2d 636 (Tex. Civ. App. 1947).

⁸ *Garcia v. Sumrall*, 58 Ariz. 526, 121 P.2d 640 (1942); *McKee v. Clark*, 115 Mont. 438, 144 P.2d 1000 (1944); *Stewart v. Oberholtzer*, 57 N.M. 253, 258 P.2d 369 (1953); *Molton v. Young*, *supra* note 7.

"fencing in" statutes. Under these laws the owner of domestic animals was prohibited from allowing them to run at large outside the confines of his own land. The effect of such legislation was a reinstatement of the common law rule of strict liability with the result that owners of livestock were once again required to restrain their animals at their peril and were held strictly liable for their failure to do so.⁹

It was held in an early Kansas case¹⁰ that herd laws repeal fencing statutes to the extent that the herd laws impose liability upon the owner of livestock which trespass upon the land of another even though such land is not enclosed by a fence.¹¹ The Oklahoma law is rather confusing in this area since the statutes not only provide that the owner of domestic animals must keep them restrained at all times but also provide for a fencing law¹² under which the owner of any trespassing domestic animal "... shall be liable for all damages done by animals breaking through or over lawful fences and trespassing upon the enclosed land of another" In an early Oklahoma decision,¹³ the Supreme Court ruled that in counties wherein livestock was permitted to run at large, the owner of livestock which broke through a fence enclosing cultivated farm land couldn't be held liable for the resulting damages to crops enclosed therein unless the area was protected by a lawful fence.¹⁴ Since Oklahoma law no longer permits cattlemen to run their stock at large in any county within the

⁹ 3 C.J.S. *Animals* § 185 (1936); PROSSER, *TORTS* § 75 (3rd ed. 1964); *Miller v. Parvin*, *supra* note 7.

¹⁰ *Miller v. Parvin*, *supra* note 7.

¹¹ Casad, *The Kansas Law of Livestock Trespass*, 10 KAN. L. REV. 55, 62 (1961).

¹² OKLA. STAT. tit. 4, § 155 (1961).

¹³ *Bottems v. Clark*, 38 Okla. 243, 132 Pac. 903 (1913).

¹⁴ OKLA. STAT. tit. 4, § 154 (1961) sets out the requirements for a lawful fence in Oklahoma. The fence is lawful under this section if it is constructed of three rails or three boards not less than six inches wide and three quarters of an inch thick. Fence posts must not be more than ten feet apart where rails are used and not more than eight feet apart where boards are used. Any other fence, which, in the opinion of the fence viewers is equivalent to such a fence is lawful provided, that the lowest rail, wire or board is not more than twenty nor less than sixteen inches from the ground. The fence must be at least fifty-four inches

state, this decision no longer would appear to have any validity. It does serve, however, to show the extent of the obligation that was placed upon the farmer in open range counties or stock districts if he was to recover damages to his crops or land resulting from trespassing livestock. Obviously, the new law reverses this obligation by placing a statutory duty upon the landowner to fence his livestock in rather than upon a neighboring landowner to fence the animals out.

The only problem that might arise under the Oklahoma law in its present state with regard to lawful fences would be the construction of OKLA. STAT. tit. 4, § 155, which seems to predicate recovery of damages sustained by reason of trespassing domestic animals upon proof of a breaking ". . . through or over lawful fences. . . ." Prior to the 1965 revisions in the herd law, in counties wherein livestock was restrained by law from running at large, the owner of trespassing domestic animals was, as he is now, liable for the damages that resulted from the trespass.¹⁵ Likewise, where several owners shared a tract of land enclosed by a common fence and part of the tract was cultivated and a part used for grazing purposes, the occupant of the portion devoted to pasture was bound to prevent his livestock from trespassing upon the crops of the other occupant.¹⁶ Strict liability of the owner for damages resulting from the trespass of his livestock is not a new concept in this state. It has existed since the inception of the herd law; all that is new in the law is the extent of its application. Thus, in light of the older case law and recent legislation requiring all domestic animals to be restrained at all times in every county within the state, OKLA. STAT. tit. 4, § 155 is not to be construed to mean that liability can exist only if the injured party shows that he has constructed a lawful fence which is subsequently broken by

in height. Barb wire fences may be constructed of three barb wires or of four wires, two of which are barbed and which are fastened to posts not more than two rods apart with two stays between them or to posts not more than one rod apart where stays are not used. The top wire must be at least fifty-four inches from the ground but may not exceed fifty-eight inches in height; and, the bottom wire may not be placed more than twenty or less than sixteen inches from the ground.

¹⁵Holtz v. Connor, 129 Okla. 235, 264 Pac. 604 (1928).

¹⁶Willis v. Davis, 333 P.2d 311 (Okla. 1958).

the defendant's livestock. On the contrary, the owner of livestock is required to fence them in at all times. In the event the animals escape, the question of the owners liability might well depend upon whether the statutory requirements of a lawful fence have been met,¹⁷ assuming he is without fault in allowing the animals to escape.

Normally, violation of a statute constitutes negligence per se; that is, the plaintiff is not required to prove all the elements of common law negligence that would otherwise be required in the absence of the statutory violation.¹⁸ The concept is applicable only if the plaintiff can show that the violation was the proximate cause of the injuries complained of, and that he was a member of the class of persons sought to be protected by the particular statute.¹⁹ For the exception of several counties which were exempted from the operation of the herd law and the statutory provisions permitting the creation of stock districts, the older law was substantially similar to the revised version insofar as it prohibited domestic animals from being allowed to run at large. Where the obligations of the statute were not complied with, the stock owner was strictly liable for all damages resulting therefrom,²⁰ including injuries to other animals caused by his trespassing stock.²¹ Assuming the trespass proximately caused the injuries complained of, the party who sustained injuries of this nature could recover on the theory that violation of the statute constituted negligence per se since the person and his injuries were within the purposes for which the statute was enacted. In *Champlin Refining Co. v. Cooper*,²² the plaintiff was a motorist, and injuries were sustained to his automobile as the result of a collision with a horse that

¹⁷ OKLA. STAT. tit. 4, § 154 (1961).

¹⁸ PROSSER, TORTS § 35 (3rd ed. 1964).

¹⁹ *Champlin Refining Co. v. Cooper*, 184 Okla. 153, 86 P.2d 61 (1938).

²⁰ *Holtz v. Connor*, *supra* note 15; *Harris v. Grey*, 65 Okla. 187, 165 Pac. 1148 (1917); *Holmberg v. Will*, 52 Okla. 745, 153 Pac. 832 (1916).

²¹ In *Low v. Barnes*, 30 Okla. 15, 118 Pac. 389 (1911), the court ruled that an owner of livestock which were allowed to trespass upon the land of another was liable not only for any injury to the plaintiff's land, but liability extended to injuries to other livestock as well. Liability existed without regard to whether the defendant had knowledge of his animal's vicious propensities.

²² *Supra* note 19.

had wandered onto the highway from the defendant's premises. It was held that damages could not be recovered on the mere allegation of a statutory violation without an affirmative showing of negligence in allowing the animal to escape its confines. The court, in looking to the purpose for which OKLA. STAT. tit. 4, § 131 was enacted, stated that ". . . the statute was enacted for the purpose of protecting agricultural crops from the ravages of straying domestic animals rather than motorists upon the highway . . ." and therefore, the plaintiff's failure to offer any evidence of the defendant's negligence in allowing the horse to wander upon the highway was fatal to his cause of action.

Not until 1963 in *Merkle v. Yarbrough*²⁴ was the decision in the *Champlin* case modified. Here the court was faced with the question of whether the defendant, whose grazing lands were intruded upon by plaintiff's livestock, could lawfully take possession of the cattle and sell them pursuant to the applicable sections of the Oklahoma herd law.²⁵ The issue was whether the herd law of Oklahoma applied only to farm land or whether its provisions were applicable to the protection of grazing land as well. The court held that the statutory language in OKLA. STAT. tit. 4, §§94 and 131, did not limit their application to agricultural crops and/or land but included grazing lands as well. The court said that ". . . any language employed in *Champlin Refining Co. v. Cooper* . . . which might be construed to limit our herd laws as being applicable to only 'agricultural crops and/or land' is specifically disavowed."²⁶

After the *Merkle* decision was handed down there was no longer any question as to the extent of the application of the herd law with regard to the kinds of land protected by the herd law. It is clear that OKLA. STAT. tit. 4, §§ 94 and 131, protected the owners of grazing lands as well as the owner of cultivated lands. Although both of these sections have now been repealed, there is nothing in the new legislation that would indicate that this same

²³ *Supra* note 19, at 154, 86 P.2d at 64.

²⁴ 378 P.2d 333 (Okla. 1963).

²⁵ The parties stipulated that the cattle were taken up and sold pursuant to OKLA. STAT. tit. 4, §§ 131, 135, 136 and 184.

²⁶ *Merkle v. Yarbrough*, *supra* note 24, at 335.

protection has not been carried forward into the new law.²⁷ The *Champlin* decision has never been overruled by the Oklahoma court insofar as it held that highway motorists are not within the class of persons sought to be protected by the herd laws. Numerous states have similar laws,²⁸ some of which specifically provide that their purpose is the protection of highway motorists as well as landowners, while statutes in other states merely provide that it shall be unlawful to allow livestock to run at large (as is the case with the Oklahoma statute). Regardless of the wording of the statutes however, several jurisdictions have ruled that such statutes have as their purpose or as one of their purposes the protection of highway motorists.²⁹ Where such is the declared purpose of the statute, proof of its violation would constitute negligence per se. However, the great weight of authority seems to support the view that one who allows his livestock to escape from their confinement and wander upon a highway in violation of a statute, whereupon they are struck by a motorist is not liable for the resulting damages unless it can be shown that the owner was negligent in allowing the animals to escape.³⁰

The Oklahoma Supreme Court has ruled that the owner of domestic animals is liable for damages to real estate caused by reason of the animal's wrongful intrusion onto the land of another and that such liability also extends to injuries to other animals as well.³¹ Liability in such a case exists even though the owner of the animals is unaware of their vicious propensities. Where an action

²⁷ OKLA. STAT. tit. 4, § 98 (1965), which repealed the earlier sections of the herd law under which the *Champlin* and *Merkle* cases arose, provides that damages may be recovered ". . . [B]y reason of such domestic animals trespassing upon lands of another . . ." The language of the new section is substantially similar to that which was employed by the older law.

²⁸ Statutes of surrounding states which are somewhat similar to our own include: Arkansas: ARK. STAT. ANN. tit. 78, § 1140 (1947); Colorado: COL. STAT. REV. ANN. ch. 8, Art. 13-2 (1963); Kansas: K.S.A. 47-304 to 311 (1963); Texas: TEX. CIV. STAT. ANN., Art. 6938, 6939, 6943, 6965-6971 (1925).

²⁹ See Annot., 59 A.L.R.2d 1328, 1337 (1958).

³⁰ *Id.* at 1340; See also *Scanlan v. Smith*, 66 Wash.2d 601, 404 P.2d 776 (1965).

³¹ *Low v. Barnes*, *supra* note 21.

was brought to recover damages for personal injuries sustained as a result of trespassing livestock, a different result was reached by the Colorado court however.³² There it was held that a statute imposing strict liability upon the owner of livestock for damages to grass, garden and vegetable products³³ had no application to a suit for personal injuries caused by a trespassing horse since the statute applied only to damages to land and not to personal injuries. Different results have been reached in other states which have allowed recovery for personal injuries on the theory that the injuries complained of were consequences of the trespass.³⁴

Though the owner is strictly liable for the damages his animals cause while wrongfully upon the land of another, he is not absolutely liable for every harm they might cause. In other words, the owner of domestic animals is not an insurer³⁵ against all the harms his animals might cause; nor is he precluded from asserting any defenses he might otherwise avail himself of in other forms of tort litigation.³⁶ Certainly the issue of whether the livestock was restrained by a lawful fence prior to the time of their escape would have a significant bearing upon the question of the owners ability to foresee the occurrence of a trespass and the harms which would result therefrom.

We now turn to the landowners remedies that are available in the event of a trespass by livestock. Prior to 1965, Oklahoma law provided that a landowner who sustained damages to his crops and/or grazing lands had the option to recover those damages in an action at law or to distrain the trespassing animals

³²Robinson v. Kerr, 144 Colo. 48, 355 P.2d 117 (1960).

³³See Colorado statute cited *supra* note 28.

³⁴See Annot., 88 A.L.R.2d 715 (1963).

³⁵PROSSER, TORTS § 78 (3rd ed. 1964); Annot., *supra* note 34, at 720; See Harris v. Roy, 108 So.2d 7 (La. C.A. 1958) wherein the Louisiana Court of Appeals ruled that, although the owner of domestic animals is not an insurer against all those damages the animals might cause, the burden is upon the owner to show that "... he was without the slightest fault and that he did all that was possible to prevent an injury by his cattle. . . ."

³⁶FOSTER and KBETEN, *supra* note 5, at 214. It is suggested that "...[s]trict liability does not make the defendant an insurer. There are a number of recognized exceptions and limitations on the doctrine"

and hold them in some safe place until damages were paid.³⁷ The statutes of this state no longer expressly provide that the landowner shall have this right.³⁸ The question then arises as to whether OKLA. STAT. tit. 4, § 98 may still be construed as providing this right by implication. Does the language of that statute which states that ". . . [d]amages . . . shall be recovered in a manner provided by law . . ." mean that the injured party has the option to sue for damages or to distrain the trespassing animals until damages inflicted by them have been paid, or does this section only give the injured party the right to sue for damages in an action at law? The Legislature failed to make itself clear on this point when it repealed OKLA. STAT. tit. 4, § 131. The only logical conclusion that can be reached in this regard is that the Legislature intended that the injured party should retain the election of remedies available under the old law. This conclusion is based upon the fact that all statutory provisions dealing with the procedure to be followed subsequent to actual distraint of trespassing animals remain in effect.³⁹ Consequently, the right to distrain trespassing animals still exists by implication under OKLA. STAT. tit. 4, § 98 which incorporated the remedies provided by OKLA. STAT. tit. 4, § 132 et seq.

Once steps are taken to distrain trespassing animals the party taking the action must substantially comply with the applicable statutes, or any action taken thereunder is void.⁴⁰ When a trespassing animal has been distrained, the distraining party must notify the owner of the animals, if the owner is known, within forty-eight hours after distraint. If no response is made by the owner the injured party must, within twenty-four hours thereafter,

³⁷ OKLA. STAT. tit. 4, § 131 (1961), repealed Okla. Sess. Laws 1965, ch. 117, § 2.

³⁸ OKLA. STAT. tit. 4, § 98, which repealed section 131, *supra* note 37, but left several sections following section 131 in force, now provides that ". . . [D]amages sustained by reason of such domestic animals trespassing upon lands of another shall be recovered in a manner provided by Law (Emphasis added)."

³⁹ OKLA. STAT. tit. 4, §§ 132-136 (1961).

⁴⁰ McCown v. Johnson, 387 P.2d 618 (Okla. 1964); Bodovitz v. Kinche-
loe, 178 Okla. 442, 63 P.2d 100 (1937); Keel v. Jones, 174 Okla. 363,
50 P.2d 330 (1935); Harley v. Moncrief, 171 Okla. 139, 41 P.2d 56
(1935); Hadden v. Fisher, 154 Okla. 228, 7 P.2d 488 (1932).

notify a justice of the peace to come on the premises to assess damages which will include a reasonable amount for seizing and retaining the animal. If the owner fails to pay the damages as they are assessed, notices will be posted stating that the stock will be sold at public auction to cover the damages.⁴¹ The notice required by statute to be given by the distraining party to the livestock owner need not be in writing,⁴² but other provisions of the statute, such as the forty-eight and twenty-four hour notice requirements, must be met in order to show substantial compliance with the statute.⁴³ The distraining party must exercise care in the retention of the animals. Even though the distraining party has legal possession of stock that trespass upon his land, ". . . [t]he property of the trespasser cannot be needlessly injured . . . [and] . . . when it is shown that such property has been injured through or by the wrongful or willful conduct of the custodian . . ." he will become a trespasser from the beginning.⁴⁴

Under Oklahoma law, any party who removes stock from distrant without consent of the distraining party is not only guilty of a misdemeanor but is also liable in a suit by the distraining party for the recovery of the animals or for damages and costs if the distraining party so elects.⁴⁵ However, this does not mean the owner of the animals is without a remedy to recover his stock back from the distraining party. Any person aggrieved by an assessment of damages by a justice of the peace pursuant to OKLA. STAT. tit. 4, § 135 may appeal the assessment as any other judgment of a justice of the peace may be appealed.⁴⁶ If a proper bond is filed⁴⁷ and the appellant is the owner of the distrained animals, the animals will be delivered to him upon approval of the bond

⁴¹ OKLA. STAT. tit. 4, § 135 (1961).

⁴² McDonald v. Cobb, 54 Okla. 365, 154 Pac. 345 (1916).

⁴³ McCown v. Johnson, *supra* note 40.

⁴⁴ Parker v. Luce, 97 Okla. 101, 223 Pac. 122 (1924).

⁴⁵ OKLA. STAT. tit. 4, § 132 (1961).

⁴⁶ OKLA. STAT. tit. 4, § 136 (1961).

⁴⁷ OKLA. STAT. tit. 4, § 136 (1961) provides that a bond must be filed with a justice of the peace in an amount double the value of the property distrained. If the value of the property distrained exceeds the amount of damages claimed, the bond must be in an amount of double the damages claimed.

by the justice of the peace. If the appellant is able to show that there has not been substantial compliance with the statute, the justice of the peace will never have taken proper jurisdiction over the matter and the court to which the appeal is taken must dismiss the case.⁴⁸

Aside from civil liability for allowing domestic animals to trespass upon the lands of others, the owner of such animals could also be criminally prosecuted for violation of OKLA. STAT. tit. 4, § 94. Although this section has now been repealed, criminal responsibility imposed by the earlier statute remains unaffected by the new legislation.⁴⁹ In a case brought under the old statute, the Oklahoma Court of Criminal Appeals stated that ". . . [t]he purpose of this statute is to penalize the owners of livestock for permitting them to run at large . . ."⁵⁰ The court went on to say that before a person may be criminally prosecuted under the statute there must be such a purpose on the part of the owner as would indicate an indifference as to whether they were restrained or not (citations omitted) . . ."⁵¹

II. PERSONAL TRESPASS

In the area of personal trespass the statutes define the offense and provide the liability for violation of the law whether it be criminal or civil or both. Normally, a simple trespass by an individual onto the land of another will involve nothing more than nominal damages in the absence of any other injury to the land. The Oklahoma statutes define a number of offenses based on the theory of trespass and most of these offenses involve minor criminal liability. Besides the statutes dealing specifically with criminal offenses against property, several other related matters will be discussed in this portion of the paper.

Under the provisions of the Oklahoma forcible entry and detainer statute⁵² anyone who uses, procures, encourages, or assists

⁴⁸ *Newland v. Hatten*, 92 Okla. 207, 218 Pac. 822 (1923); *McCown v. Johnson*, *supra* note 40.

⁴⁹ OKLA. STAT. tit. 4, § 98 (1965).

⁵⁰ *Hall v. State*, 95 Okla. Crim. 284, 285, 245 P.2d 132, 133 (1952).

⁵¹ *Id.* at 286, 245 P.2d at 133.

⁵² OKLA. STAT. tit. 21, § 1351 (1961).

another in using ". . . any force, or violence in entering upon or detaining any lands or other possessions of another except in the cases and manner allowed by law, is guilty of a misdemeanor." In the old case of *Foust v. Territory*⁵³ the court, in discussing the Oklahoma forcible entry and detainer statute, pointed out that it created two separate offenses: one offense was the forcible entry upon and the detention of the lands of another; while the other was the forcible entering upon and detention of the possessions of another.

One of the purposes of the statute is the protection of tenants from forcible eviction from their leased premises without judicial process. In addition to criminal sanctions, the Oklahoma statute imposes stringent civil penalties for the forcible ejection or exclusion of a person from real property.⁵⁴ The Oklahoma Supreme Court has ruled that the law is penal in effect and therefore, it may not be enlarged through construction by judicial interpretation.⁵⁵ The reason for this strict construction being placed upon the statute lies in the fact that a showing of forcible ejection or exclusion from real property will entitle the injured party to recover treble damages. The term forcible entry or exclusion means ". . . force of an unusual kind which tends to bring about a breach of the peace, such as an injury with a strongarm, or a multitude of people, or in a riotous manner . . . or with a threat or menace to life or limb, or under circumstances which would naturally inspire fear."⁵⁶ A finding that the ejection was merely wrongful without this additional element of force will preclude a recovery of treble damages and the plaintiff will be limited to the actual damages he has sustained by reason of his ejection from the land.

As a substitute for forceful or violent means of ejecting persons from unauthorized possession of real estate, Oklahoma law provides peaceable methods whereby removal from the land may be accomplished according to law.⁵⁷ Once a person has been re-

⁵³ 8 Okla. 541, 58 Pac. 728 (1899).

⁵⁴ OKLA. STAT. tit. 23, § 71 (1961), allows treble damages for the forceable ejection from real property.

⁵⁵ *Crow v. Davidson*, 186 Okla. 84, 96 P.2d 70 (1939).

⁵⁶ *Id.* at 87, 96 P.2d at 72.

⁵⁷ OKLA. STAT. tit. 39, § 391 *et seq.* (1961).

moved from possession of real property by process of law, such person will be guilty of a misdemeanor if he returns to possession of the property without authority.⁵⁸ Thus, a landowner is limited to peaceable methods of excluding persons wrongfully in possession of real property; but this does not mean that the landowner is under any legal obligation to make his land safe for trespassers. The only duty the landowner owes to the trespasser is to refrain from wantonly or wilfully injuring him.⁵⁹

Under Oklahoma law every person who commits a trespass through acts such as cutting down timber upon the lands of another; driving or riding through a cultivated hedge row, tree row, grove of ornamental trees or orchard of fruit trees growing upon the land of another; carrying away wood or timber which has been previously cut down; or maliciously severing anything produced from or attached to the land is guilty of a misdemeanor.⁶⁰ This is a trespass statute under which a conviction may be obtained if it is shown that the defendant has committed a willful trespass by engaging in one of the acts enumerated by the statute. Malice toward the owner of the property affected is not an element of the offense defined by the statute.⁶¹

A statutory section⁶² provides that it shall be a felony for any person to wantonly or wilfully remove, for commercial purposes, without the consent of the owner, any stone from the land; to injure cultivated timber growing on the land; or to wantonly or wilfully let down any fence which encloses such cultivated timber upon the land of another. Conviction for violation of the provisions of this statute carries with it not only criminal penalties⁶³

⁵⁸ OKLA. STAT. tit. 21, § 1352 (1961).

⁵⁹ *Concho Construction Co. v. Oklahoma Natural Gas Co.*, 201 F.2d 673 (10th Cir. 1953); *Ford v. U.S.*, 200 F.2d 272 (10th Cir. 1952); *Keck v. Woodring*, 201 Okla. 665, 208 P.2d 1133 (1961); *Ramage Mining Co. v. Thomas*, 172 Okla. 24, 44 P.2d 19 (1935); *Kroger Grocery & Baking Co. v. Roark*, 171 Okla. 595, 43 P.2d 710 (1935).

⁶⁰ OKLA. STAT. tit. 21, § 1768 (1961).

⁶¹ *Smith v. State*, 71 Okla. Crim. 297, 111 P.2d 198 (1941).

⁶² OKLA. STAT. tit. 21 § 1769 (1961).

⁶³ The statute provides that every person convicted of a violation thereof ". . . shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state penitentiary for not more than five (5) years, or by fine of not more than One Thousand

but the offender may be civilly liable as well. Prior to the revisions that were made to this section in 1955, malice toward the owner of the property affected was an essential element of the offense.⁶⁴ The purpose of the revision is not clear; however, the statute is probably aimed at preventing the trespass upon the land of another for the purpose of removing stone or timber for commercial use rather than malicious injury to the property owner.

For the malicious injury or destruction of the real or personal property of another, Oklahoma law provides for criminal liability as well as the recovery of treble damages in a civil action.⁶⁵ This is the general malicious mischief statute, and malice toward the owner of the property affected is obviously an element of the offense defined by this section.⁶⁶ The Oklahoma statutes define the term "malice" as importing ". . . a wish to vex, annoy or injure another person, established either by proof or presumption of law."⁶⁷ Such malice must be directed toward the property owner and an act done in good faith under claim of right will not support a conviction under the statute.⁶⁸ Thus, where an unregistered bull was allowed to run at large, in violation of law, among a herd of registered cows, the owners of the cows were not guilty of malicious mischief when they "abated" the nuisance the bull had

Dollars (\$1,000) or by both such fine and imprisonment, and shall be liable in damages to the party injured."

⁶⁴ Prior to the 1955 amendments to this section it provided as follows: "Every person who shall wantonly or maliciously cut, dig up, or injure any timber set out . . ." The amended version of the statute deletes the word "maliciously" and adds the words "for commercial purposes without the consent of the owner." Note that under the old version of the statute a person convicted of "maliciously" committing one of the enumerated acts was guilty of a misdemeanor and was punishable in the county jail for a period not to exceed thirty days or by fine not to exceed One Hundred Dollars, or both. Compare this with the criminal responsibility provided under the amended version of the statute, OKLA. STAT. tit. 21, § 1769 (1961).

⁶⁵ OKLA. STAT. tit. 21, § 1760 (1961).

⁶⁶ *Moran v. State*, 316 P.2d 876 (Okla. 1957); *Hummel v. State*, 69 Okla. Crim. 38, 99 P.2d 913 (1940); *Lewis v. State*, 55 Okla. Crim. 182, 27 P.2d 363 (1933). *Thissen v. State*, 21 Okla. Crim. 437, 209 Pac. 224 (1922); *Colbert v. State*, 7 Okla. Crim. 401, 124 Pac. 78 (1912).

⁶⁷ OKLA. STAT. tit. 21, § 95 (1961).

⁶⁸ *Moran v. State*, *supra* note 66.

created in the most efficient way they knew how.⁶⁹

Ranchers and farmers face constant problems resulting from unauthorized hunting and fishing upon their lands. This of course is unlawful in the absence of consent from the owner or the occupier of the land.⁷⁰ However, the law provides that no consent is required where the land is unoccupied unless a conspicuous notice is posted upon the land by the owner or his agent. Prosecutions for alleged violation of the statute can be commenced only by written complaint filed in the proper court by the owner or occupier of the land or upon written complaint to an authorized game ranger. Upon conviction for violation of the statute the offender will be guilty of a misdemeanor and punished accordingly.⁷¹

Another area of frequent concern to the rancher and farmer is the pollution of his stock water or other streams due to the placing of harmful substances therein. The problem of oil or saltwater pollution is particularly predominant in Oklahoma as a result of the substantial oil field operations that are carried on here. Since this is an extensive topic in itself, the problems in this area will not be comprehensively discussed, but, due to the importance of the subject, some mention of it should be made at this point.

Two statutes deal with the problem of water pollution. One provides that it shall be unlawful to place any deleterious substance including things such as dynamite and other explosives into any stream, lake or pond within the state.⁷² The statute further

⁶⁹In *Hummel v. State*, *supra* note 66, the owner of an unregistered bull permitted the animal to run at large in violation of state law. When the owners of certain thoroughbred cattle sought to "abate the nuisance" created by the unregistered bull mingling with registered cows by castrating the bull, a prosecution was instituted under the malicious mischief statute. The Oklahoma Court of Criminal Appeals reversed the conviction on the ground that no malice was shown toward the owner of the bull. The bull constituted a "private nuisance" and could therefore be summarily abated by the aggrieved parties.

⁷⁰OKLA. STAT. tit. 29, § 513 (1961).

⁷¹The Statute provides that any person convicted of violating its provisions ". . . shall be punished by a fine of not less than Ten Dollars . . . nor more than One Hundred Dollars . . . or, by imprisonment in the county jail for thirty days, or by both imprisonment and fine."

⁷²OKLA. STAT. tit. 29 § 409 (1961).

provides that the Oklahoma Corporation Commission may be called in to take corrective action to abate the pollution, or violators may be criminally prosecuted.⁷³ The second statute specifically makes it unlawful to permit any inflammable product from an oil or gas well to drain into any tank, pool or stream which is used for watering stock.⁷⁴ It has been suggested that violation of this statute is negligence per se,⁷⁵ but it has been held that there is no statutory

duty imposed upon the lessee to erect fences around a slush pit; thus, evidence of failure to fence is not sufficient to permit recovery or injuries to livestock which drink from the pit.⁷⁶ This section was not applicable in an action against an oil refinery for injuries to cattle which drank from a pool of crude oil caused by a drip in the refinery's pipe line.⁷⁷ This does not mean that an oil and gas lessee will not be liable for damages sustained by the surface owner whose cattle drink salt water which the lessee has permitted to flow over the leased land.⁷⁸ Furthermore, it has been held that the fact that the landowner executes an oil and gas lease does not in itself constitute consent for the lessee to pollute a stream running through other parts of the lessor's land.⁷⁹ Nor will the fact that the plaintiff-lessor fails to separate the damages inflicted by his own lessee from those caused by other leaseholders in the area defeat his recovery for injuries to his livestock caused by the leaseholders pollution of his water supply.⁸⁰

In conclusion, the protection that the trespass laws afford the ranchers and farmers of Oklahoma takes several different forms.

⁷³The penalty for violation of the statute is a fine not to exceed five hundred dollars. The statute also provides that ". . . each day or part of day during which such action is continued or repeated shall be a separate offense"

⁷⁴OKLA. STAT. tit. 52 § 295 (1961).

⁷⁵Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373, 382 (1958).

⁷⁶*Id.* at 383.

⁷⁷Warren Petroleum Corp. v. Helms, 207 Okla. 699, 252 P. 2d 447 (1953).

⁷⁸Phillips Petroleum Co. v. Sheel, 208 Okla. 416, 256 P. 2d 815 (1953).

⁷⁹H. F. Wilcox Oil and Gas Co. v. Johnson, 184 Okla. 198, 86 P. 2d 51 (1937).

⁸⁰Commercial Drilling Co. v. McKee, 162 Okla. 204, 19 P. 2d 338 (1933).

The protection may be against the unlawful intrusion by livestock upon the lands of another. In this area we saw that the law imposed strict liability upon the owner of domestic animals for harms resulting from his failure to keep the animals restrained within the confines of his own land. Suits to recover damages resulting from livestock trespass do not depend upon a showing of the owner's negligence in allowing his livestock to escape unless the injured person is outside the class of persons sought to be protected by the enactment of the herd law. In the area of personal trespass the landowner is protected not only from general trespass to his land but is also protected from malicious injury to his real or personal property. Other statutes provide protection in areas of indirect trespass such as water pollution by oil field operations or other activities which result in the contamination of state streams, lakes and ponds.

The preceding does not represent an exhaustive list of every form of trespass that might, in one way or another, affect the interests of the ranchers and farmers of this state. However, it is hoped that this article will help in the understanding of what the rights and liabilities in this area are and the extent to which the law has sought to protect the interests of the owner or occupier of land.

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