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Article 8

Animals Owner not liable for injuries by animal in absence of neglect or previous notice of vicious propensities

J. P. T.

The court held that such resolution was not an encumbrance within the terms of the instrument.

It is a general rule that where there is a restriction imposed by law, a covenant restricting something that is already prohibited does not constitute an encumbrance between the vendor and purchaser, because it binds the owner no further than he could be bound by law in the absence of a covenant,[12] but where the restriction is greater than that imposed by law, even though it does not prejudically affect the market value of the premises, it has been held to be an encumbrance.[13]

WILLARD A. BOWMAN

Animals Owner not liable for injuries by animal in absence of neglect or previous notice of vicious propensities.—

> My Oberon! What visions have I seen!
> Methought, I was enamoured of an ass.
> (Midsummer-Night's Dream, Act 4, Sc. 1.)

Although by hide-bound tenets of philosophy man has been postulated to be "a rational animal," by a judicial construction in the state of Wisconsin and elsewhere the former opinion is being overruled by a slow but sure growth *ad majorem equi gloriam.* There is grave danger that the horse will be judically noticed as the rational animal and man as the irrational. The apotheosis of Pegasus is upon us.

In support of the premises the writer cites you *Kocha v. Union Transfer Co.*,[1] in which it was held that the defendant was not liable where the plaintiff, a bicyclist, had been thrown to the pavement by reason of his bicycle having been kicked by defendant's horse (described as of a high-strung, nervous temperament), there being no allegation that the horse had any vicious propensities or that the defendant had knowledge of them. Though ostensibly an exoneration of the Union Transfer Co., the case is a glorification of the high-bred and tactful horse—the real defendant. The learned court (which never, never sinks to levity) proceeds

> It being, therefore, a verity in this case, that the horse possessed that which, according to Iago, if in man or woman, "is the immediate jewel of their souls," "a good name," it must suffice for the horse and for us, that determining whether, in addition to good character and reputation, he also possessed a rare discriminating taste and intelligence of head or heels when, in his pick for his kick, he chose the insensate bicycle rather than the sensating rider, as it is claimed for him by appealing counsel by saying, he very carefully kicked the bicycle, not the man, and the bicycle in the very center of the handlebars, there leaving his mark, no claim being made that he could write.

Not as an alarmist but as one sincerely interested in preserving the *status quo ante* of man in the courts the writer begs to point out that unless this defection from truth and justice be curbed in limine we will have every J. P in the land holding court in a stall. The acceptable reply to counsel's leading questions will be "neigh, neigh, sir." The court bible will be hoof-marked and dog-eared instead of thumbed.

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[12] *Clement v. Burtis*, 121 N.Y. 708, 24 N.E. 1013; *Floyd v. Clark*, 7 Abb. N.C. 136, 39 Cyc. 1500.

[13] *Bull v. Burton*, 177 App. Div. 824, 164 N.Y.S. 824.

[1] 205 N. W 973 (Wis.)

Counsel will no longer be permitted to ride the witness. Instead of determining the prosecuting witness' age at the time of the alleged assault by producing the birth-record, the family bible, and the testimony of the fond mother (who, up to the present has been conclusively presumed to have been present at the birth) we will have the expert veterinarian called in to look at her teeth. Personal injuries will be described as spring-halt, charley-horse, spavin and the blind-staggers (though it is to be noted that the latter has *always* been peculiar to every two-legged High Priest of Bacchus who righteously observes the Feast of the Hangover) The salacious hee-haw of the irrepressible vulgus in the rear of the court room will be music in hizoner's gyrating ears. If counsel expects to rate high they will have to expectorate Horse-Shoe Cut Plug.

Deposuit lex de sedes et exultavit equum

Of course the eulogy of the horse in the Kocha case, *supra,* is rationalized by the court. The law is in his favor. The common law rule regarding scienter has been changed only as against the runt tribe of gutter-pups. Whereas, in the good old days before Section 1620, Stat. of 1911, "every dog was entitled to one bite," the said section wiped out with one fell swoop of the legislative pen the freedom and liberty of dogdom—it was a veritable canine Eighteenth Amendment, carrying with it no prospect of "light bites and growls." "But," says the court, "there has been no modification as to the horse or a taking from him of his free first kick." Here we have the sad spectacle of the court's smiling benignly on the horse's kicking when it is matter of common knowledge that his master's kicking in the same court would be *lése majesté.*

But if this were not sufficient to show to what heights the ambitious horse is climbing in our courts witness *Lyman v Dale,*[2] in which case Mr. Justice Lamm sings a pæn to the Missouri mule. It is true that the mule is the baser brother of the horse but the Fourteenth Amendment to the Federal Constitution should guarantee to him the equal protection of the laws. What's good for the horse should be good for the mule. Although the Federal Supreme Court has not as yet construed the Amendment to go farther than wiping out the old civil distinction between white man and black it is not unreasonable to suppose that the late progress of the horse will soon force a test case upon the court to determine the respective civil rights of the mule and the horse. It is to be hoped that the dubious generation of the mule will not blind the court to the *parus delictus* of many fewer legged asses that enjoy the franchise. Be that as it may, Justice Lamm was overindulgent to the led mule in *Lyman v Dale, supra,* that kicked five dollars worth of spokes out of Mr. Lyman's buggy wheel. The learned Justice says, "It must be allowed as a sound psychological proposition that haltering his head or neck can in no wise control the mule's thoughts or control his hinder parts affected by those thoughts. So much is due to be said of the Missouri mule whose bones, in attestation of his activity and worth, lie bleaching from Shiloh to Spion Kop, from San Juan to Przemysl. But the faithfulness, the endurance, the strength,

[2] 156 Mo. App. 427, 136 S.W 760.

and the good sense of the mule (all matters of common knowledge) may be allowed to stand over against his faults and create either an equilibrium or a preponderance in the scales in his favor." Leading the "defendant" mule by a five-foot halter was held not to be negligence *per se,* even though experts testified that such animals (this mule's little girl friend was also among those present at the time of the alleged tort but was not joined as a party defendant) should have been "necking." Although the learned Justice understood "necking" to mean halter-yoked he left nothing to the wagging of idle tongues and denounced this practice of "necking" as shameful in law and morals. What mule would not feel a glow of pardonable pride on hearing this? —a vain mule would forever after part his hair in the middle. Stronger language could not have been used against his human brother upon a charge of "Driving While Infatuated."

But enough has been said to show that the ass is not without some rights in the courts even on sentimental grounds.

In *Baumgartner v. Hodgdon,*[3] which was an assault and battery action, the provocatory remark was directed at the defendant's horse. The words of the plaintiff were either that the defendant had "a thing of a horse," or that the defendant's horse was the "damndest-looking horse he ever saw" The court said

> Both may be conceded to have been slanderous and defamatory of the horse but the most that can be said is that it was disgraceful to the horse, but the horse was not present. Moreover, we have the right to assume that the animal was endowed by nature with the usual amount of "horse-sense," and that, had the remark been overheard by him, ne would have dismissed it without reply as the opinion of one not competent to speak on the subject.

Q.E.D. The horse stands *rectus in curia.*

But lest our more cautious brethren at the bar still doubt we append the final panegyric in *Kocha v. Union Transfer Co., supra.*

> What was said, sung, and held in that decision concerning the Missouri mule, with all the storied, latent possibilities lurking in his heels, will surely support and warrant the conclusion here reached as to this Wisconsin horse. It is true that neither his pedigree, place or date of birth appear of record here, but it is disclosed that he had lived with us and worn out his shoes upon our pavements these many years; this, in view of the verity of his unimpeached character, supra, warrants, if not requires, the presumption in a Wisconsin court that he was Wisconsin bred as well as led. Then, of course, being a Wisconsin horse, he, like Webster's Massachusetts, "needs no encomium."

J. P T.

Equity · Zoning ordinance as implied covenant in deeds.—Where, at the time of a sale, there exists a restrictive zoning ordinance affecting the property, which subsequent to the sale of the land, is repealed, does such restriction become impliedly a part of the covenant and binding between both the parties and stangers? The main question hinges upon whether or not it can be enforced as an implied covenant. As an example, suppose that A sells to B. At the time of the sale there is a zoning ordinance, the effect of which is to create a thirty foot building line. After the land has gone through several hands, and the ordinance having been repealed, the last purchaser proceeds to build in a

[3] 105 Minn. 22, 116 N.W 103.