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NOTES

CARE OF ANOTHER'S LIVESTOCK

When parties enter into a contract whereby one is to care for the other's livestock in exchange for compensation, the question arises as to the legal relationship of the parties and the consequences thereof. The problem has been litigated many times, and there has been a variety of holdings as to this relationship.

This arrangement has been held to be a type of bailee-bailor relationship¹ called an agistment. An agistment is defined as the taking of another's cattle into one's own ground for a consideration to be paid by the owner;²

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1. *Wilinsky v. Martin*, 4 Ga. App. 187, 60 S.E. 1074 (1908); *Andrews v. Hurst*, 163 S.C. 86, 161 S.E. 331 (1931).
 2. *Webster's Dict.*; *Bouv. L. D.*; *Am. and Eng. Encyc. Law*.

this seems to be the basic holding as to contracts for the care of another's livestock. In a bailment the title to the property does not pass to the bailee; he has merely possession. However, the bailee has a right of recovery against a third person in trespass or trover for full recovery if the bailor has taken no action, or, for his interest in case the bailor has taken action, and the bailor cannot recover if there had been recovery by the bailee to the full measure allowable.³ The bailee is under a duty to exercise reasonable care of the animals under his charge; he is not the insurer thereof.⁴ Therefore, the agistor is not liable for any destruction unless it could have been avoided by him through the use of reasonable care. The degree of care required can be specified in the original contract;⁵ however, in the light of the general rule of law that a party can't contract away his liability for negligence,⁶ this provision in the contract has a lesser importance than originally might be thought. In the case of bailments, the acts of either party inconsistent with the terms of the agreement will amount to a breach of the contract of bailment and will give the one party a right to a suit for breach of contract for damages,⁷ or an action in trover for conversion by the bailee. The courts in the West have been uniform in recognizing this type of arrangement as creating a bailor-bailee relationship; nonetheless, they have not been uniform in the name that has been given to the relationship.

Civil law has crept into the holdings of some of the courts who call these "partido" contracts;⁸ these states are: Arizona,⁹ Colorado,¹⁰ and New Mexico.¹¹ There seems to be no common law counterpart for the "partido" contract, other than agistment. The bulk of the western states that hold these to be bailee-bailor relationships do not call them by any special name; these states are: Montana,¹² South Dakota,¹³ Idaho,¹⁴ California¹⁵ Utah,¹⁶ and Oregon.¹⁷ The normal form for the agreement is that the owner of the stock will put the stock in the possession of the other party to keep for a certain length of time, the compensation for which will be

3. *Rogers v. Atlantic G. & P. Co.*, 213 N.Y. 246, 107 N.E. 661, L.R.A. 1916A 787, Ann. Cas. 1916C 877 (1915); *Illinois C. R. Co. v. Sims*, 77 Miss. 325, 27 So. 527, 49 L.R.A. 322 (1900).
4. *Edgar v. Parsell*, 184 Mich. 522, 151 N.W. 714, Ann. Cas. 1917A 1160 (1931); *Waldo v. Beckwith*, 1 N.M. 97 (1854).
5. *Salazar v. Garde*, 35 N.M. 353, 298 Pac. 661 (1931).
6. *Pilson v. Tip Top Auto Co.*, 67 Ore. 528, 136 Pac. 642 (1913); *Dennis v. Colemans Parking & Greasing Station*, 211 Minn. 597, 2 N.W.2d 33 (1942).
7. *Lujan v. McCuiston*, 232 P.2d 478 (N.M. 1951); *Vaughn v. Bixley*, 24 Cal. App. 641, 142 Pac. 100 (1914).
8. A contract which is a form of agistment commonly used in Mexico which creates a bailor-bailee relationship; *Martinez v. Garcia*, 43 Ariz. 243, 30 P.2d 501 (1934).
9. *Ibid.*
10. *First Nat'l Bank of Limon v. Matteson*, 106 Colo. 233, 103 P.2d 487 (1940); *Clay, Robinson & Co. v. Martinez*. *Same v. Bards*. *Same v. Moeller*, 74 Colo. 10, 218 Pac. 903 (1923).
11. *Page v. Jones*, 26 N.M. 195, 190 Pac. 541, 10 A.L.R. 761 (1920).
12. *Noel v. Cowan*, 80 Mont. 258, 260 Pac 116 (1927).
13. *Duetscher v. Broadhurst*, 69 S.D. 554, 12 N.W.2d 807 (1944).
14. *Mahoney v. Citizens' Nat'l Bank of Salmon*, 47 Idaho 24, 271 Pac. 935 (1938).
15. *Pacific States Corp. v. Gill*, 57 Cal. App. 90, 206 Pac. 489 (1922).
16. *Wetzel v. Deseret Nat'l Bank*, 30 Utah 62, 83 Pac. 570 (1905).
17. *Beezley v. Crossen*, 16 Ore. 72, 17 Pac. 577 (1888).

part of the increase of the herd. It has been held under these conditions that until the actual division of the increase the title to it remains in the bailor and that the bailee has no right to his share until given it by the bailor.¹⁸ At the same time, it has been held that in the case of a lease of livestock in return for part of the increase, the lessee and lessor were also baillee-bailor and became tenants in common in the increase immediately.¹⁹ It has also been held that in the case of a bailment the option to buy does not change the nature of the relation.²⁰ (Despite the general rule that if bailor surrenders to bailee the right to retain the property in kind and accepts in return the value thereof, it ceases to be a bailment and becomes a sale.)²¹

Under a similar, but not identical facts, it has been held that a lease of a farm with the cows and sheep thereon for a term of years, at a certain rate, constituted a transfer of title to the lessee to such an extent as to allow a creditor of the lessee to levy on the stock.²² The holding was based on the fact that the lease contained the provision that at the end of the term cows and sheep of equal age and quality should be returned to the lessor—not the same sheep and cattle. Therefore, the legal title passed to the tenant so as to give him the right to dispose of the stock and subject the stock to seizure and sale for his debts. Here the lessor could merely insist on the terms of the lease at its expiration; he had no right to interfere with levies on the lessee's property; conversely, any loss or destruction of the stock would fall entirely upon the lessee. For protection against such a holding, the contract should specifically provide that the lessee is to receive only a share of the increase, or a monetary compensation, and that the stock is to be returned to the lessee in kind. Wyoming has little case law on the subject of agistment, but agistment liens are recognized in Wyoming as provided for in the statutes.²³

The contract may be formulated so as to constitute a partnership or a joint adventure. A joint adventure is best defined as a special combination of two or more persons wherein some specific venture or profit is sought without any corporate or partnership designation.²⁴ It ordinarily

18. *Enrico State Bank v. Tenorio*, 28 N.M. 65, 206 Pac. 698 (1922); *Milliken v. Martinez*, 22 N.M. 61, 159 Pac. 952 (1916); *Allen v. Whiting*, 58 Ariz. 273, 119 P.2d 240 (1941); see note 8 supra.

19. See notes 13 and 14 supra. In *Deutscher v. Broadhurst*, it was held, where the lessee attempted to sell his portion of the increase, that he didn't hold exclusive title to half the increase, but rather an undivided half in all, and therefore, he had no authority to sell until there was a partition.

20. *Clay, Robinson & Co. v. Martinez*, see note 10 supra; in this case X held sheep on a "partido" contract from Y. X mortgaged the sheep to Z who required the sheep to be turned over to him, and Y sought not his same sheep, but an equal number.

21. *Lyon v. Lemon et. al.*, 106 Ind. 567, 7 N.E. 311 (1886); *State v. Bickford*, 28 N.D. 36, 147 N.W. 407 (1914); *Savage v. Salem Mills*, 48 Ore. 1, 85 Pac. 69 (1906).

22. *Carpenter v. Griffin & Spencer*, 9 Paige 310, 37 Am. Dec. 396 (1841).

23. *Wyo. Comp. Stat. 1945*, secs. 55-111, 55-114 to 55-123, 56-526.

24. *Ruby v. United Sugar Cos. S.A.*, 56 Ariz. 535, 109 P.2d 845 (1941); *Hansen v. Burford*, 212 Cal. 100, 297 Pac. 908 (1931).

contemplates an enterprise for commercial profit.²⁵ There are no formalities required in Wyoming for the formation of a partnership, but there are still statutes to be complied with.²⁶ Since the law of partnership controls in the case of a joint adventure,²⁷ the two can be considered together in discussing the rights and liabilities of the party. The parties may regulate their own rights and duties by contract;²⁸ each may dispose of his interest in the enterprise;²⁹ each owes a duty of good faith to the others and is held strictly accountable,³⁰ and may sue his associates for breach of contract,³¹ conversion,³² or accounting.³³ Losses through negligence are solely chargeable to the negligent partner (or adventurer, as the case may be).³⁴ As to third persons, the relationship is principal-agent, and the act of one binds his associates within the scope of the enterprise.³⁵

The agreement may be a contract of employment, in which case, the person caring for the animals would have mere custody;³⁶ and it follows that the master would retain all rights of action against third persons for interference with the animals. It would be a master-servant relationship whereby the master would be liable to third persons for the actions of the employee within the scope of his employment,³⁷ but the servant would have no property right subject to levy. As between the employee and employer, the relative rights, duties and liabilities can be defined in the contract.

The difference between the various arrangements is not due to any conflict among the courts; it is due to the way the contracts were originally drawn. Extreme care should be exercised in preparing this type of contract so that the exact relationship intended is clear. The consequences flowing from each type of relationship as herein described should be considered in reaching the conclusion as to which type of relationship is desired.

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25. *Binning v. Miller*, 55 Wyo. 478, 102 P.2d 64, rehearing denied 56 Wyo. 129, 105 P.2d 278 (1940).
 26. Uniform Partnership Act; Wyo. Comp. Stat. 1945, secs. 61-101 to 61-615.
 27. *Fried v. Guiberson*, 30 Wyo. 150, 217 Pac. 1087 (1923); *Goldberg v. Miller*, 54 Wyo. 485, 93 P.2d 947, rehearing denied 54 Wyo. 485, 96 P.2d 570 (1939).
 28. *Hagermann v. Schulte*, 349 Ill. 11, 181 N.E. 677 (1932); *In re Week's Estate*, 204 Wis. 178, 235 N.W. 448 (1931).
 29. *Fried v. Guiberson*, see note 27 supra.
 30. *Walls v. Gribble*, 168 Ore. 542, 124 P.2d 713 (1942); *Weigardt v. Becken*, 21 Wash.2d 59, 149 P.2d 929 (1944).
 31. *Snider v. Carmichael*, 102 Mont. 387, 58 P.2d 1004 (1936).
 32. *Mitchell v. Reolds Farm Co.*, 268 Mich. 301, 256 N.W. 445 (1934); *Alexander v. Turner*, 139 Neb. 387, 297 N.W. 589 (1941).
 33. *Alexander v. Turner*, see note 32 supra.
 34. *United Brokers v. Dose*, 143 Ore. 283, 22 P.2d 204 (1933).
 35. See note 27 supra; *Claughton v. Johnson*, 47 Wyo. 447, 38 P.2d 612, rehearing denied 47 Wyo. 536, 41 P.2d 527 (1935).
 36. *Commonwealth v. Ryan*, 155 Mass. 523, 30 N.E. 364, 15 L.R.A. 317, 31 Am. St. Rep. 560 (1892).
 37. *Ploof v. Putnam*, 83 Vt. 252, 75 Atl. 277 (1910).