

## Opinion No. 15-1649

October 6, 1915

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Mrs. Alma E. Squire, Boaz, New Mexico.

**Trespassing animals and fence law.**

### OPINION

{\*221} I have just received your letter of the 4th instant asking me to send you the law on stock destroying crops in Chaves County where there is no fence law. You ask also whether damages can be collected, and whether it is not a penal offense to shoot the stock under such conditions.

Answering the last question first, I will say that it would not be a safe proceeding to kill trespassing animals, and would almost certainly subject the person doing so to a serious criminal prosecution and possible conviction.

You are mistaken in saying that there is no fence law in Chaves County, as there is a general law on the subject which is in force throughout the whole state. It is contained in Chapters 13 and 70 of the laws of 1909, and re-appears in the new codification of laws of the present year at Sections 2340 to 2345. Those statutes require every person having land or crops that might be injured by trespassing animals to make a sufficient fence about his land, in accordance with the statute, which describes just how fences of the different kinds must be constructed to comply with the law, and it is provided that he cannot recover damages unless he has his land enclosed by such a fence.

Notwithstanding this statute, I am of opinion that under some circumstances a person might recover damages even though he did not have such a fence as that required by the statute. The Supreme Court of the United States has held, in a case which was taken up from Colorado, where there is a similar fence law, that

"Fence laws do not authorize wanton and wilful trespass nor do they afford immunity to those who, in disregard of personal rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another."

There is a statute still in force, which you will find as Section 98 in the Compiled Laws of 1897 and as Section 49 in the recent Codification, which makes it unlawful and punishable by a fine for any owner of large stock to allow the same to run at large from the first of March to the end of October unless he has them under custody. The turning out of animals upon the open range, whether the owner of the stock has any title to it or not, without having the range fenced or without having herders with the cattle, would be a violation of this statute. Any person offending against this statute can be punished in a

criminal prosecution, and the punishment is prescribed in Section 1055 of the Compiled Laws of 1897, which is Section 1455 of the new Codification.