

Opinion No. 16-1757

March 13, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Mr. W. G. Pinson, Dedman, New Mexico.

Running of stock at large. Free grazing on state or federal lands. What is a lawful fence. Trespasses committed by animals on unfenced lands. Hog law.

OPINION

{*328} I have just received your letter of the 4th instant which seems to have been a long time on the road. I will answer your questions as briefly as possible consistent with clearness.

You first asked as to what is the law in New Mexico in regard to herding cattle or horses. I believe the only general statute on this subject is to be found in Section 49 of the new Codification of the statutes, which declares it to be illegal for owners of large stock to allow the same to run at large from the first of March to the end of October, unless they have them under custody. This is made a misdemeanor punishable by fine and costs, as prescribed in Section 1455 of the Codification. Section 39, however, declares it to be unlawful for any person having in charge bovine cattle, horses, sheep, goats or other animals, to permit them to go upon the lands of others for the purpose of grazing or watering without the permission of the owner, and the provisions of this section apply, not only to titled lands, but to any lands upon which any person may have a valid, existing filing under the laws of the United States, or any lands leased by any person from the State.

Your next question is as to government, state or school lands which are not leased, and you ask if such lands are free grazing lands, or any patented lands that are not protected by a lawful fence. In the strict sense of the term, there is no such thing as free grazing land. The federal government does not interfere with anyone making use of the public domain for grazing purposes, except to the extent of not permitting such land to be fenced, the fencing of the public domain being made a criminal offense. The state land is in substantially the same condition. There must be large amounts of state land which have not been sold, leased or fenced. It is quite certain that patented land cannot be considered as free grazing land, whether it is fenced or not.

You ask what is a lawful fence. In Sections 2342 to 2345 of the Codification, fences are described. You can find the Codification in the office of your justice of the peace, but for fear that may {*329} not be convenient for you, I will state the effect of those sections. If a fence is constructed of barbed wire and posts, there shall be at least four wires well stretched and firmly fastened, the top one at least four feet from the ground, and the bottom wire not more than one foot from the ground, the wires not to be over twelve

inches apart, the posts to be not more than twenty-four feet apart, and firmly set in the ground to a depth of at least two feet, and not less than three inches in diameter at the smaller end. When the posts are more than sixteen feet apart, there must be stays four feet long and at least one inch thick, fastened to the wires not more than eight feet apart.

If the fence is constructed of lumber and posts, the boards must be at least one inch thick and six inches wide, with posts as described for a wire fence, not over eight feet apart, the boards to be firmly nailed to the posts, and the space between the boards to be not more than six inches.

If the fence is constructed of poles and posts, the posts shall not be more than twelve feet apart, and of the same size and set as described for a wire fence, the poles to be at least two inches in diameter at the smaller end, and at least four in number, firmly fastened to the posts with nails or wire, the top pole at least four feet from the ground and the bottom pole not more than one foot from the ground, and the poles not to be more than one foot apart. If constructed of stone, adobe, woven wire or any other material, it shall be at least four feet in height and equal in strength to the barbed wire fence.

In connection with this statute describing a fence, your attention should be called to Sections 2340 and 2341, which, in substance, declare that owners of lands which would be injured by trespassing animals, must make a fence in accordance with the requirements of the laws of the state, and if he has his land fenced he may recover damages caused by trespassing animals, but he shall not be entitled to recover damages unless he has his lands and crops fenced. Notwithstanding this statute, I am of opinion, based upon a decision of the Supreme Court of the United States in a case that went up from Colorado, that under some circumstances the land owner can recover damages even though his land is not fenced, in cases where the animals have been turned out by their owners with the certainty that they will go upon the unfenced lands owned by another person. Colorado has a fence law similar to ours.

You then ask if a homesteader can force another to herd his cattle and horses off of grass which has never been fenced. This is, perhaps, substantially answered by what I have already said. Certainly the owner of animals ought not to drive them upon the land of another, even though that land is not fenced.

You desire, also, to know if there is any hog law in this state. Section 40 of the Codification declares that no hogs shall be permitted to run at large within the limit of any city, town or village, or to trespass upon the cultivated fields or gardens of any person, and the owner of any hogs, who does permit them so to run at large, {^{*}330} is guilty of a misdemeanor and is liable for double the damages caused by such trespassing. I think there is no other statute on the subject of hogs.