Opinion No. 16-1769

March 31, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Mr. Irvin Ogden, Sr., Roy, New Mexico.

As to whether Sections 2340 and 2342 of the Codification of 1915 repeals Section 39, and definition of word "drove."

OPINION

*{*340}* I have just received your letter of yesterday in which you ask me to advise you regarding the relative merits of Section 39 of the Codification of 1915 and Sections 2340 and 2342, in regard to fencing of lands. You desire to know whether the latter enactment annuls or repeals the former, or whether Section 39 is still in force as to trespass, and if so, under what conditions.

This subject presents peculiar difficulties as to the condition of the law. The legislature, having re-enacted both statutes in the Codification, it would seem to be the legislative intent that both should be considered in force, and certainly if we can in any way reconcile and harmonize them they must be considered as of equal validity. It appears to me that Section 39 can be made to harmonize with Sections 2340 and 2342 by limiting it to "any drove of bovine cattle, horses, sheep, goats or other animals." You will notice that it is declared to be unlawful for any person having charge of such a drove to permit the herd of animals to go upon the lands of others for the purpose of grazing or watering without the permission of the owner of the land. The Standard Dictionary defines the word "drove" as meaning "A number of animals, as cattle, sheep or swine, driven in a body, or collected for driving." Under this definition this section would seem to apply to stock grazing on the open range and not collected for the purpose of driving.

The other sections require a fence of the kind described in Sections 2342 to 2345 about any land under cultivation, or other land which might be injured by trespassing animals as a prerequisite to the recovery of any damage sustained by reason of trespassing animals, without regard to the condition of the trespassing animals. I am of opinion, however, based upon a decision of the Supreme Court of the United States, that notwithstanding this statutory provision, *{*341}* under some circumstances the owner of unfenced land might still recover damages, or by injunction prevent such trespass. In that case the court declared that such statutes do not give permission to the owner of cattle to use his neighbor's land as a pasture, but are intended to condone trespasses by stray cattle, and have no application to cases where the cattle are driven upon unfenced land in order that they may feed there. The court goes on to say that fence laws do not authorize wanton and wilful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they are intended to graze upon the lands of another.

As to your question about there being an action for trespass under Section 39 where no claim is made for damage, I assume that you must mean a criminal action, and I am not prepared to say that that statute creates a criminal offense for which punishment could be had by prosecution as in the case of other crimes. The general rule is that statutes as to criminal offenses are to be strictly interpreted, and in no way expanded beyond their obvious meaning, and this statute does not say that the act declared to be unlawful shall constitute a crime.

In this connection, however, I invite your attention to Section 49 of the Codification, which distinctly makes it an offense punishable by fine and costs for any owner of large stock to allow the same to run at large from the first of March to the end of October. The punishment is specified in Section 1455 of the Codification, which provides for the punishment of misdemeanors for which no punishment has been prescribed by law. Criminal prosecution under this section might be more effective than the bringing of civil suits for damages.