Opinion No. 17-2035

July 31, 1917

BY: HARRY L. PATTON, Attorney General

TO: Mr. J. C. Logan, Secretary, Sheep Sanitary Board, Albuquerque, New Mexico.

Sheep Sanitary Board Cannot Confiscate Sheep Which Are Unlawfully Marked. Sanitary Board Cannot Divest Owner of His Right to a Brand Acquired Under Statute, Although Such Owner Fails to Notify the Board Whether Brand Is Still in Use.

OPINION

I have your letter in which you quote resolution passed by your Board, which, in substance, is that, in order to eliminate the practice of unlawful marking of sheep, it is made the duty of the Sheep Sanitary Board to seize the sheep found in the State that have more than one-half of either or both ears cut off, or more than one-half of either or both ears cut on both sides to a point. The resolution further provides that when such sheep are found thus marked in the possession of any person, the same shall be prima facie evidence that such sheep have been stolen. It is made the duty of the inspector to make complaint of such action. Upon investigation by the Board, if the ownership of the sheep cannot be proven beyond all question of doubt, the Board shall seize and advertise and sell all such sheep, the proceeds of sale being paid to your Board.

Section 185, Codification of 1915, contains a provision as follows:

"And it shall be unlawful for any persons, firm or corporation to cut off more than one-half of either or both ears, or to cut off both sides of either or both ears more than one-half of the ear to a point, as ear marks."

Section 186 provides that if any person is found having in his possession sheep marked as above set forth the same shall be prima facie evidence that such sheep were stolen.

I am referring to these sections of our statute to show the extent to which the law-makers can go in prescribing punishment for these offenses. It may be seen that such marking may be punished as larceny. Your resolution, however, goes still further and provides for the confiscation of sheep so marked. This, in my opinion, would be violative of the Constitutional provision which prohibits the taking of property without due process of law. A case, in some respects of a similar nature, is presented in the case of Lacey v. Lemmons, 159 Pac. 949, recently decided by our Supreme Court. The question arose upon a construction of Section 1632, Codification of 1915, which authorizes the seizure and sale of animals under seven months of age, if confined in any of the ways mentioned in the section and unaccompanied by their mothers. The court held that such statute authorizes the taking of property without due process of law. That the proceedings authorized are without judicial process is no objection, but in proceedings

before administrative officers or bodies, at some time before the property is finally taken, the owner ordinarily must have notice and opportunity to be heard. The court further in its opinion said:

"The trouble with this statute arises out of the fact that no notice is required to be given the alleged owner, either actual or constructive. We assume that either would be sufficient in cases of this kind. It is true that in this case the alleged owner did have knowledge of the seizure of the cattle by the cattle inspector, as is evidenced by the fact that he brought this action of replevin against the inspector, and by the allegations in the pleadings. But this was accidental, and can have no effect in determining the question. It is not what is done under a statute in a given case, but it is what may be done, that determines its constitutionality. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289. And in cases like this the circumstances might, and often would, be such that the alleged owner would have no notice whatever of the seizure and sale of the cattle until long after the same had occurred. The statute also contemplates the passing of the title and relegates the alleged owner to the recovery of the proceeds of sale, less certain deductions, from the cattle sanitary board."

The procedure provided for in your resolution is very similar to that in the statute referred to. Had your resolution been enacted into a statute, under the ruling of our Supreme Court, the same would have been held unconstitutional. If such statute would be held unconstitutional, much more so would a mere resolution by your Board be so held.

You further say that, at a regular meeting of your Board, the Secretary was directed to revise the ear mark and brand record for the purpose of cancelling all marks and brands which are not in use at this time. The secretary was directed to communicate with each owner of a recorded mark with a request that your office be advised as to whether or not such owner is still engaged in the sheep business in this State and using the same mark as shown by the record books. If such owner is still using such mark, the same shall remain unchanged, but, if he is no longer engaged in the sheep business, and said mark is not being used by him, said mark shall be cancelled and be subject to re-issue to another. All persons who fail to reply to such communication within ninety days will be considered to be no longer engaged in the sheep business and such marks and brands as to such persons will be cancelled and subject to re-issue to other persons. The resolution further provides that when the use of marks or brands shall be known to be discontinued for a period of two years, the same shall be cancelled without further notice. You ask for an opinion as to whether or not the provisions of such resolution may lawfully be enforced.

Section 185, Codification of 1915, in part, reads as follows:

"Every sheep owner, owning or having sheep in this State, shall record in the office of the secretary of the board, the marks and brands which he may use in marking sheep, and the said secretary shall enter and record said marks and brands in a book to be kept by him for that purpose: Provided, That he shall refuse to record in the name of any

person or persons, firm or corporation, any mark or brands which may have been previously recorded in the name of any other person or persons, firm or corporation."

It may be noted that the Secretary shall refuse to record for any person any mark or brand which may have been previously recorded in the name of another. The statute makes no provision for cancellation; it makes no provision for renewal; and makes no provision for a time in which the rights under a mark or brand may expire. You might take the steps provided for in the resolution and such steps would undoubtedly expedite the business of your Board and clarify the records. I am satisfied also that in a majority of instances such action would never be questioned. However, if a person were the owner of a mark or brand, I am of the opinion that his rights are not terminated by any action which your Board might take and that he would still be entitled to all rights acquired under such mark or brand, although you had cancelled his brand and had permitted another to adopt and record same. The primary fault is in the statute, which apparently gives a man a perpetual right to a mark or brand when he has recorded the same. The statute should be amended, so that steps might be taken by your Board to cancel brands under circumstances like those recited in the resolution adopted, or, better still, a law should be passed providing for the renewal of brands from time to time.