

Opinion No. 17-2068

November 10, 1917

BY: HARRY L. PATTON, Attorney General

TO: Volney T. Hoggatt, Esq., Editor The Great Divide, Denver, Colo.

Review of Herd and Legal Fence Laws of State.

OPINION

We have your favor of the 12th instant requesting of this office an opinion as to the real status of herd laws in the State of New Mexico. You state that you have many inquiries from your readers respecting this subject, and that you would like to publish a resume of the laws now in effect. We are pleased to accede to your request and we will be glad to have you publish this letter, as we, too, are constantly receiving inquiries concerning the herd laws of New Mexico.

There seems to be no clear, positive, or satisfactory law in this State of general application with regard to herds of animals, and about the only light we can throw upon the matter is to cite and quote the various sections of our statutes where the subject is touched upon. In the very beginning it should be noted that the Territorial Legislature of 1909, by Chapters 94 and 382 of the Session Laws of that year, enacted a herd law which was applicable only to the Counties of Curry, Quay, Roosevelt, and that portion of Guadalupe laying east of the Pecos and Gallinas Rivers. These chapters were omitted from the Codification of the statutes adopted by the State Legislature of 1915 and now known as the "Code of 1915." The question then arises as to whether this herd law was repealed by not being embraced in such general code. The Code of 1915 was enacted by the Legislature as an entirety and contains a repealing clause as follows:

"All acts and parts of acts of a general and permanent nature not contained in this Codification, are hereby repealed."

This office has heretofore held that the said herd law was not of a general nature, but was special or local legislation, since it pertained only to the counties named, and was, therefore, not repealed by omission from the Codification.

This special herd law provides that the inhabitants of any precinct in the counties named, may prohibit the running at large of all domestic animals, by following the procedure set out in the chapter. A majority of the legal voters of any precinct may present a petition to the County Commissioners, asking the Board to call an election in such precinct for the purpose of submitting the question of the establishment of a herd law. If the proposition is carried, the Board is to make an appropriate order and publish the same. The law provides for damages against the owners of trespassing animals, without regard to whether or not the injured person has a fence. It may be questioned,

of course, whether or not this local herd law is in effect, but, as we have pointed out above, it is the opinion of this office that such herd law for the counties named still exists.

The law regarding the running at large of animals as found in the general statutes of the State, is somewhat chaotic. A most careful search of the Codification of 1915 reveals a number of varying provisions, which I shall herein note.

Section 39 seems to apply to the trespassing of animals upon the grazing lands of others, and provides that a person who desires to exclude trespassing animals shall mark the lines of his lands and post notices, warning against trespassing. The section in full is as follows:

"It shall be unlawful for any person, persons, company or corporation, or their or either of their agents or employes having charge of any drove of bovine cattle, horses, sheep, goats or other animals to permit or allow such herd of animals to go upon the lands of others in this State for the purpose of grazing or watering upon any waters upon such lands, without the permission of the owner or legal claimant, or his or their agent. The provisions of this section shall apply not only to titled lands in this State, but to any lands upon which any person may have a valid existing filing under the laws of the United States, or any lands which may be leased by any person from the State of New Mexico.

"Any person, persons, company or corporation who may claim the benefits of the protection of this section, shall carefully and conspicuously mark the line or lines of his or its lands, so that such mark may be easily seen by persons handling such droves, flocks or herds of animals, and shall post a notice upon such land conspicuously, warning against trespassing thereon; or shall serve personal written notice giving description of such land by government surveys or by metes and bounds."

The running at large of animals during certain months, without being herded, is prohibited by Section 40, which is as follows:

"It shall not be legal for any person or persons in this State, or for any owner or owners of large stock, to allow the same to run at large during the months of March, April, May, June, July, August, September and October, nor under any pretext whatever to have them at large on their ranches or herd ranges, unless they shall have them under custody during the months above specified. And every person or persons who shall violate the provisions of this section shall suffer a fine and costs as provided in the laws in force in this State."

A legal fence law, applicable to farmers, gardeners, and planters, is found in Chapter XLI. of the Codification of 1915, being Sections 2340 to 2356, inclusive. Section 2340 is as follows:

"Every gardener, farmer, planter or other person having lands or crops that would be injured by trespassing animals, shall make a sufficient fence about his land in

cultivation, or other lands that may be so injured, the same to correspond with the requirements of the laws of this State prescribing and defining a legal fence."

Section 2341 relates to the recovery of damages from the owners of trespassing animals upon fenced lands; and Sections 2342 to 2345, inclusive, prescribe the requirements of a legal fence within the meaning of the law. When the fence is constructed of barbed wire and posts, there should not be less than four wires well stretched and firmly fastened to the posts, the top one at least four feet from the ground, and the bottom wire not more than one foot from the ground. The wires must not be over twelve inches apart, and the posts must not be more than twenty-four feet apart. The posts are to be firmly set in the ground to the depth of at least two feet, and must not be less than three inches in diameter at the smaller end. When the posts are set more than sixteen feet apart, there shall be stays four feet long and at least one inch thick, firmly fastened to the wires and not more than eight feet apart.

In case the fence is constructed of lumber and posts, the boards shall be at least one inch thick and six inches wide, with posts as described above. Such posts must not be over eight feet apart and firmly set in the ground as described above. The boards must be firmly nailed to the posts and the space between the boards must not be more than six inches.

If the fence is constructed of poles and posts, the posts must not be more than twelve feet apart, and must be the same size, and set in the ground in the same manner, as described above. The poles are to be at least two inches in diameter at the smaller end, and to be 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 such poles not to be more than one foot apart.

When the fence is 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 barged wire fence, first described above.

The provisions for damages occasioned by trespassing animals on such fenced ground are contained in Section 2341, which section is as follows:

"When any trespassing shall have been done by any cattle, horses, sheep, goats, hogs or other livestock upon the cultivated or enclosed ground of any other person, when the same is fenced as provided by section 2340, but not otherwise, such person may recover any damage that he may sustain by reason thereof by suit in any court having jurisdiction and a person so damaged is hereby given a lien on all livestock of the same kind and brand, belonging to the owner of such trespassing animal or animals for security of his damages and costs; but in no case shall he have such lien nor shall he be entitled to recover any damages, under any circumstances, for such trespass, unless he has such lands and crops enclosed by a legal fence as provided by the preceding section."

Damages are also provided for injuries to such fences, occasioned either by people or animals.

Sections 35 to 38, inclusive, provide for the establishment of a sort of a local herd regulation in the limits of any platted townsite, or platted addition of any unincorporated town, having a population of not less than three hundred people, on the order of the Board of County Commissioners, when such board is duly petitioned to make such order by twenty-five residents of the town. These sections provide what the petition shall contain and what shall be the effect of the establishment of such herd regulation.

Section 1136 forbids the running at large of animals in all unincorporated county seats. Section 3515 limits the liability of the owner of livestock which may trespass on mines and mineral claims.

Such sections as I have quoted constitute, I believe, all of the general law in this State on the subject you ask about.

You will note that there seems to be a distinction made between cultivated and uncultivated lands, with regard to the necessity of a legal fence, and, under certain circumstances, in my opinion, damages might be recovered from the owners of trespassing animals, notwithstanding the fact that the premises upon which the trespass was committed were not enclosed with a lawful fence, or criminal prosecutions might properly be instituted.