

## Opinion No. 16-1894

November 3, 1916

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

**TO:** Mr. Eugene F. Jones, Oscuro, New Mexico.

**Running at large of cattle, and trespassing on unfenced lands.**

### OPINION

{\*438} I have today received your letter of the first of November asking me to tell you what the law is in regard to cattle running at large, and whether a homesteader is obliged to fence them out, and how he can have recourse if they break through a fairly good three wire fence.

By Section 49 of the Codification of Statutes, a copy of which you can undoubtedly find in the office of your justice of the peace, it is made 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 penalty for this offense will be found in Section 1455. The intention of the legislature evidently was to protect crops during the season of cultivation.

The law with regard to fences will be found in Chapter XLI of the Codification, beginning with Section 2340. Section 2342 requires that a barbed wire fence should have not less than four wires, and Section 2341 provides for the recovery of damages caused by trespassing if the land is fenced as required by the statute, and not otherwise.

Notwithstanding this statutory provision, I am of opinion that under some circumstances the owner of land could recover damages even though the land should not be fenced as required by the statute. I base this opinion upon a decision of the Supreme Court of the United States in the case of Light vs. United States, 220 U.S., 523, and especially upon language to be found at page 537, from which I will quote as follows:

"Even a private owner would be entitled to protection against willful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been enclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. Lazarus v. Phelps, 152 U.S., 81; Monroe v. Cannon, 24 Montana, 315; St. Louis Cattle Co. v. Vaught, 1 Tex. App. 388; The Union Pacific v. Rollins, 5 Kansas, 165, 176."

"Fence laws do not authorize wanton and willful trespass, {\*439} nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another."

You see that no rigid general rule can be laid down but that the recovery of damages would depend upon the circumstances of each particular case.