

Lost or Strayed Animal, Right to Advertise for Sale. Estrays, How to Proceed to Recover Cost for Care Of. Herd Law, to What Animals it Applies. Fence Law, to What Animals it Applies.

A person finding a lost or strayed animal or saving it from starvation should proceed under the provisions of Secs. 1996 to 2002, Revised Codes.

The herd law makes it a penal offense for any person to drive or cause to be driven his live stock upon the land of another, but the live stock must be in charge of a herder and the land must be so marked as to give notice that it is not public domain.

Under the fence law a person's premises must be fenced as required by statute to enable him to maintain an action for damages for trespass by live stock of another, unless, (1) the trespassing animal is prohibited by statute from running at large, or (2) the trespassing animal has been placed or caused to be placed thereon by the owner of the animal with knowledge that the land is not public domain,—in any of which events the animal may be retained as security for the damage done.

January 20, 1912.

Mr. James A. Metcalf,
Editor, Dawson County Review,
Glendive, Montana.

Dear Sir:

I am in receipt of your letters of January 11th and 15th inclosing certain clippings from your paper with reference to the "fence law" and "herd law" of this state, and also inclosing a copy of the decision of the federal court in the case of *Light vs. United States* from Colorado with reference to cattle trespassing upon the lands of the United States, and requesting me to write you a letter explaining the laws of this state with reference to lost or strayed cattle and the right of persons finding the same to advertise them for sale for the cost of their keep, and also the "fence law" and "herd law" of this state.

I will endeavor to explain our statutes upon these subjects taking them up in the following order:

Lost or Strayed Animals—In an opinion addressed to Hon. Justin M. Smith, county attorney, Bozeman, Montana, Dec. 4th, 1911, a copy of which opinion I herewith inclose you, I held that a person finding a lost or strayed horse, cow, or other domestic animal, has no legal right to advertise it for sale or dispose of it to defray the cost of keeping or caring for it, but he may by proceeding under the provisions of Secs. 1996 to 2002, Revised Codes, recover a reasonable charge for his trouble or acquire title to the property. The copy of the opinion

which I enclose I think fully explains this phase of your inquiry.

Herd Law.—Under the provisions of Secs. 8474, 8475, 8476 and 8477 of the Revised Codes of 1907, it is made unlawful for any person or persons to wilfully drive, or cause to be driven, any live stock held in herd, on or over any field, ranch property or valid claim in process of title under any of the land laws of the United States, or under lease from the State of Montana, whether the same be fenced or not; provided, that any lands so owned, or under process of title, or under lease, and not fenced, shall be clearly defined by suitable monuments or stakes, and plough furrows, with printed or written notices indicating the lands so held. A violation of the provisions of these sections renders the guilty party liable to the payment of a fine of not less than \$25, nor more than \$500 and costs, which fines are to be paid into the school funds of the county in which the action is brought. The provisions of these sections do not apply to stock on range not held in herd, or not in charge of a herder.

It is apparent then that under the "herd law" a person's lands must be so marked as to give notice to the herder that he has no right to trespass thereon.

Fence Law.—At common law every man was bound, at his peril, to keep his cattle within his own close, and, if he failed to do so, was liable for their trespass upon the lands of another, whether the lands trespassed upon were inclosed or not (Vol. 2 Cyc 392); but in many states of the Union, and especially in the western country, this doctrine is not deemed applicable to the conditions, and this common law rule has been changed by statute. The sections of the Montana Code changing the common law are Secs. 2082 to 2091 inclusive, Rev. Codes of 1907. Sec. 2082 defines legal fences, and Sec. 2090 provides as follows:

"If any cattle, horse, mule, ass, hog, sheep, or other domestic animal break into any enclosure the fence being legal, as hereinbefore provided, the owner of such animal is liable for all damages to the owner or occupant of the enclosure which may be sustained thereby. This section must not be construed so as to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law."

It will be noticed that by the above section the owner of any domestic animal which breaks into an inclosure surrounded by a legal fence is liable for all damages to the owner or occupant of the inclosure which may be sustained thereby. The section then provides that it must not be so construed as to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law. This portion of the section has reference to animals mentioned in Sec. 8836 of the Rev. Codes, which section prohibits any person owning a stud horse, ridgeling, or unaltered male mule or jack over the age of eighteen months to allow them to run at large. If one of these animals should break into any inclosure, the fact that the inclosure did not constitute a legal fence would be no bar to an action for damages sustained.

Sec. 2091 provides that if any domestic animal break into an inclosure surrounded by a legal fence, or is wrongfully on the premises of another, the owner or occupant of the inclosure or premises may take into his possession the animal trespassing and keep the same until all damages together with reasonable charges for keep and feed are paid. But within twenty-four hours after taking such animal into his possession, the owner or occupant must give notice to the claimant of the animal that he has taken up the animal, if known, and if unknown, he must post a like notice at some public place near the premises.

This section simply gives the owner of the premises the right to retain the animal, upon giving notice, to secure him for the damage done by such animal. It will be noticed also that this section includes any animal "wrongfully upon the premises of another." Under the laws of this state, the owner of a domestic animal has a right to permit it to run at large and is not required to "fence in" his animal, but the owner of the land in order to prevent a trespass by such animal is required to "fence out" such animal, and fences must be in accordance with the statute. But the owner of an animal would have no right to deliberately drive his stock upon the premises of another or to turn domestic animals into the inclosure of another, and if he did so, under the provisions of this section, the animal would be wrongfully upon the premises of another and might be retained as security for the damage sustained.

Monroe vs. Cannon, 24 Mont. 316.

The supreme court of the State of Montana in the case of Beinhorn vs. Griswold, reported in 27 Mont. at page 79, in passing upon the question of domestic animals trespassing upon the premises of another used the following language:

"If the land owner fails to "fence out" cattle lawfully at large, he may not successfully complain of loss caused by such live stock straying upon the uninclosed land. For under these circumstances the trespass is condoned or excused—the law refuses to award damages. While the land owner, by omitting to fence, disables himself from invoking the remedy which is given to those who inclose their property with a legal fence, and while the cattle owner is thereby relieved from liability for casual trespasses, it is nevertheless true that the cattle owner has no right to pasture his cattle on the land of another, and that cattle thus wandering over such lands are not rightfully there. They are there merely by the forbearance, sufferance, or tolerance of the nonfencing landowner; there they may remain only by his tolerance.

The cattle-owning plaintiff did not owe to the land-owning defendant the duty to fence his cattle in; the latter did not owe to the former the duty to fence them out; neither of them was under obligation to the other in that regard. The defendant is not liable in this action unless he was negligent. There cannot be negligence without breach of duty. Hence, manifestly, the defendant was not guilty of negligence in omitting to pre-

vent the plaintiff's cattle from going upon his unfenced land."

In short the foregoing opinion may be epitomized as follows: a person finding a lost or strayed animal, or saving it from starvation, should proceed under the provisions of Secs. 1996 to 2002, Rev. Codes, which sections specifically point out the method to be pursued to recover the cost of keeping or caring for it.

The herd law of this state makes it a penal offense for any person to drive, or cause to be driven, his live stock upon the land of another—but the live stock, under this law, must be in charge of a herder, and the land must be so marked as to give the herder notice that the land is not public domain.

Under the "fence law" a person's premises must be fenced as required by statute to enable him to maintain an action for damages for trespass by live stock of another, unless (1) the trespassing animal is prohibited by statute from running at large, or (2) the trespassing animal has been placed, or caused to be placed thereon by the owner of the animal with knowledge that the land is not public domain—in any of which events the animal may be retained as security for the damage done as hereinabove explained.

The opinion in the case of *Light vs. United States*, under date of May 1, 1911, has no reference to the statutes of the State of Montana, upon the subject, but would apply in case cattle were trespassing upon the public domain of the United States. I herewith return the opinion.

With kind regards I remain,

Yours very truly,

ALBERT J. GALEN,

Attorney General.