

Animals, Taking Up of. Range Animals, Taking Up of. Stock Trespassing.

Chapter 126, Laws of 1909, creates two offenses. The first portion of said law applies to animals on the range only, or animals upon the property of another which is not legally fenced. The second applies to animals either on the range or on private property.

Helena, Montana, April 3, 1916.

Hon. D. W. Raymond,
Secretary, Board of Stock Commissioners,
Helena, Montana.

Dear Sir:

I have your request submitted on behalf of B. E. Zachary, Stock Inspector, for the proper interpretation of Chapter 126, Session Laws of 1909, which is in part as follows:

"Any person, persons, corporation or company, who shall take up or retain in his or their possession, any mare, gelding, colt; foal, filly, mule, jack or jennet, the owner of which cannot with reasonable diligence be found, or of which he is not the owner, without the owners knowledge or consent, or who shall in any manner restrain from liberty for the purpose or purposes of using or making use of such animal without the knowledge and consent of the owner, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than Fifty (\$50.00) dollars nor more than One Hundred (\$100.00) Dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment."

The intent of the legislature in this law is not altogether clear. However, two offenses seem to be stated: The first being the taking up or retaining in the possession of, any of the animals named, by someone not the owner, where the owner cannot with reasonable diligence be found, without such owners knowledge or consent; the second, the restraining from liberty of any of the animals named for the purpose of using such animals without the knowledge and consent of the owner. This law, like all others, must be construed in connection with the rest of the law of the state. It could not, therefore, without holding it to have the effect of repealing, apply to stock trespassing upon premises surrounded by a legal fence, since Section 2090 and Section

2091, Revised Codes, provide for damage from trespassing stock, and that such stock may be taken up and held. Since the owner of premises might under certain circumstances have the legal right to take up and hold stock, this law must be given a construction which would harmonize with that; and under this construction the first part of the law must be held to apply only to animals on the range, or animals upon the property of another which is not legally fenced. The second portion of the law would apply to animals both on the open range or other places if they were taken up for the purpose of being used. This portion of the law would apply even as to animals trespassing upon legally fenced premises.

The law does not define what is meant by "for the purpose or purposes of using or making use of such animals". This would be a question of fact in each particular case, since it is largely a matter of intent, unless actual use could be proven. I think, however, that the taking up with that purpose in view, or intent, would make a complete offense.

Yours very truly,
J. B. POINDEXTER,
Attorney General.