

Dear Sir:

You have submitted for approval an opinion issued to the Secretary of the Phillips County Grazing Association holding Section 27, Chapter 208, Laws of 1939, class legislation and unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States.

Chapter 208, Laws of 1939, is known as the "Grass Conservation Act" and by Section 1 is declared to have been enacted "to provide for the conservation, protection, restoration, and proper utilization of grass, forage and range resources of the State of Montana, * * * to provide a means of cooperating with the Secretary of the Interior as provided in the federal act known as the Taylor Grazing Act * * * to permit the setting up of a form of grazing administration which will aid in the unification of all grazing lands within the state where ownership is diverse and the lands intermingled and to provide for the stabilization of the livestock industry and the protection of dependent commensurate ranch properties as defined herein. This act provides a state grass conservation commission to assist in carrying out the purposes of this act, to act in an advisory capacity with the state land board and county commissioners; and to supervise and co-ordinate the formation and operation of districts which may be incorporated under this act."

By this declaration of purpose the Legislature has said that Chapter 208 was enacted under the police power of the state and intended to preserve the great grass resources of the state and by cooperation with other state and federal authorities secure to all citizens an opportunity to enjoy the benefit of these grazing resources.

Section 27 of Chapter 208 is in part as follows:

"When any land is situated within the boundaries of a state district and is not leased or controlled by said district and not surrounded by a legal fence, any person owning or controlling such lands shall have the right to obtain a grazing permit from the state district. * * * If the person owning or controlling such land declines to secure such permit, or fails to lease such land to the state district at a fair lease rental

Opinion No. 102.

Grazing Districts—Grass Conservation Act—Constitutional Law—Fencing.

HELD: 1 Section 27 of Chapter 208, Laws 1939, is not unconstitutional.

2. Chapter 208 requires a farmer within the boundaries of a grazing district to fence his land at his own expense in order to recover damages for trespass.

July 22, 1939.

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and fails to fence such land at his own expense, he shall not be entitled to recover damages, for trespass by stock grazing under permit, but the state district shall not issue a permit to use the carrying capacity of such land. Farming lands lying within the external boundaries of a state district shall be protected by the owner or lessee to the extent of a legal fence as described in Subsection (1) of Section 3374, Revised Codes of Montana, 1935. The state district or its members shall not be liable for damages unless such farming lands are protected by a sufficient fence as described in this Section."

The common law rule is that the owner of domestic animals is under an absolute duty to keep them restrained on his own premises and is liable for their trespasses if he does not. (3 C. J. S. 1291; *Herrin v. Sieben*, 46 Mont. 226, 232 and authorities cited.) But as is brought out in several Montana decisions the public land states of the west where grazing rather than agriculture is the principal industry have altered the rule. (*Herrin v. Sieben*, supra; *Monroe v. Cannon*, 24 Mont. 316; *Benton v. Griswold*, 27 Mont. 79; 3 C. J. S. 1291; See also notes to *Monroe v. Cannon*, 81 A. S. R. 439 and *Bileu v. Paisley* (Ore.) 4 L. R. A. 840.) Even before the passage of Chapter 208 the Montana rule permitted cattle to run at large and their owner was not liable for damages unless land had been enclosed with a legal fence. Our statutes on legal fence are 3374 and 3378, Revised Codes of Montana, 1935. In other words the common law rule has been modified so that trespasses by animals lawfully running at large are condoned. (*Monroe v. Cannon*, supra; *Herrin v. Sieben*, supra; *Herness v. McCann*, 90 Mont. 95.) But where animals are in charge of a herder and are knowingly and wilfully driven onto another's land damages resulting from such a trespass are recoverable even in the absence of a fence. (*Chilcott v. Rea*, 52 Mont. 134.) The same is true where land is deliberately overstocked so that domestic animals are forced to graze on adjacent land in order to sustain life. (*Hill v. Chappel Bros. of Montana, Inc.* 93 Mont. 92.) The

statute under consideration is merely another application of this Montana rule. The landowner whose lands lie within the external boundaries of a grazing district must fence his lands in order to recover damages for trespass. If he does not erect a legal fence he condones trespasses committed by animals lawfully running at large in the grazing district. But members of the grazing district are not allowed to wilfully drive their cattle upon such land nor may the carrying capacity of such land be used by the state district.

Such legislation as Chapter 208 has been uniformly sustained against constitutional objections. (See the cases collected in 3 C. J. Page 129, note 16.) These decisions declare that such laws are enacted for the mutual benefit of the state and are only valid regulations of the use of property and are not illegal appropriations for public use or unjust and arbitrary interference with its enjoyment. The reasoning of these cases is in accord with the legislative purpose as expressed in Section 1 of Chapter 208. Therefore, I hold that Chapter 208 is a valid enactment under the state and federal constitution.

You have also concluded that under Chapter 208 the grazing district must share the expense of maintaining and erecting the fence. An examination of Section 27 shows that "the person owning or controlling such land (must) fence such land at his own expense" in order to recover damages for trespass. This is plain, clear, and unambiguous and open to no other interpretation than that the legislature intended to require the landowner to bear the entire burden of erecting and maintaining the fence required. Nor do Sections 3379, 6777, 6778, 6779 and 6782 conflict. The express declaration of the Legislature in Chapter 208 indicates an intention to deal differently with grazing districts than with other types of agricultural enterprise and insofar as the enumerated sections are conflicting with the provisions of Section 27 they are by implication repealed. (Section 32, Chapter 208, Laws, 1939; *In re Wilson's Estate*, 102 Mont. 178; *Lillis v. City of Big Timber*, 103 Mont. 206; *Story Gold Dredging Co., v. Wilson*, 106 Mont. 166.)