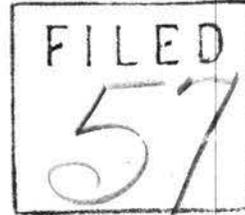


**ANIMALS:**

Charges for feeding and keeping strays are only legally assessed, pursuant to statutory authority.

May 24, 1939



Honorable E. A. Mayes  
Assistant Director  
State Park Board  
Jefferson City, Missouri

Dear Sir:

We acknowledge your letter of May 22, requesting an opinion of this department, which reads as follows:

"In past years the State Park Board has not taken any legal action against the owners of domestic animals which break over and through lawful fences and do trespass to state parks, but in recent months the State Park Board, acting through its state agents, have resolved to put a stop to these too frequent trespasses. Some farmers living near state parks feel that these parks are a free range for them to graze their domestic animals on, and the situation presents quite an administrative problem.

"At Bennett Springs State Park, we have authorized the Park Superintendent to proceed against the owners of stray animals trespassing in the Park property.

"The Superintendent of the State Park at Bennett Springs notified the justice of the peace at Lebanon, Missouri that stray sheep belonging to one Dampier were trespassing on the park premises, and he also notified Dampier verbally that his sheep were trespassing on the State Park property, and that if they continued, the Park Board had authorized an action in trespass against him.

"The justice of the peace told the Park Superintendent to impound the sheep and notify Dampier in writing about the trespass, but this the superintendent did not do, but drove the sheep to the premises of the justice of the peace and put them in his barn. There the justice of the peace kept them impounded, fed and watered them, and appointed three appraisers to assess reasonable compensation for the taking up, feeding and keeping said sheep. The Park Superintendent made no claim for damages and did not apply for any appraisers to be appointed. The justice of the peace claims \$10.00 compensation in this proceeding, and is threatening to render a judgment for such costs against the Park Superintendent. We do not believe the Park Superintendent can lawfully be taxed for these costs in this proceeding. What is your opinion? For your information, I state that the stock law has been enforced in Laclede County for many years, and the park maintains lawful fences."

35 Corpus Juris, page 694, Section 340 reads:

"The general rules relating to costs govern the right to, and liability for, costs in justices' courts. As in other courts costs can be imposed and recovered only where there is statutory authority therefor. \* \* \* \* \*

\* \* \* \* \*

From the facts stated in your letter, the complaint of the Park Superintendent being to a trespass, the justice could have proceeded upon that theory as provided in Sections 12908, 12909, 12918 and 12919 R. S. Mo. 1929. Instead, the facts show the justice proceeded under the provisions of Article 6, Chapter 88 R. S. Mo. 1929 dealing with stray animals running at large. We look to the particular statutes involved, and the cases decided thereunder, as a premise for our conclusion. Section 12797 R. S. Mo. 1929 provides that any person may restrain stray animals and reads:

"It shall be unlawful for the owner of any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat, in this state, to permit the same to run at large outside the enclosure of the owner of such stock, and if any of the species of domestic animals aforesaid be found running at large, outside the enclosure of the owner, it shall be lawful for any person, and it is hereby made the duty of the constable of the township, on his own view, or when notified by any other person that any of such stock is so running at large, to restrain the same forthwith, and such person or officer shall, within three days, give notice thereof to the owner, if known, in writing, stating therein the amount of compensation for feeding and keeping such animal or animals and damages claimed, and thereupon the owner shall pay the person, or officer, taking up such animal or animals a reasonable compensation for the taking up, keeping and feeding such animal or animals, and shall also pay all persons damaged by reason of such animals running at large, the actual damages sustained by him or them. If the owner of such stock be not known, or if notified and fails to make compensation for the taking up, feeding and keeping of animals taken up under the provisions of this article, the same shall be deemed strays, and shall be dealt with in the same manner as required by law with respect to such property as strays, under the stray law. Any failure or refusal on the part of such officer to discharge the duties required of him by this section shall render him liable on his bond to any person damaged by such failure or refusal, which damages may be sued for and recovered in any court of competent jurisdiction."

Section 12798 R. S. Mo. 1929 provides an exception to the written notice provided for in the preceding section and reads:

"If it shall appear and be proven on trial that the owner or owners of such domestic animals, as set forth in section 12797, shall have actual notice that his or their said animals or stock were restrained, and by whom, and that the parties interested could not agree on the amount of damages demanded, then the three days' notice in writing as required by section 12797 shall not be necessary to a recovery."

Section 12799 R. S. Mo. 1929 provides that the taker-up need not be the same person damaged by a trespass and provides:

"If the owner of such stock so restrained and the taker-up, or the person damaged by such stock and the owner thereof, cannot agree upon the same, either party may apply to any justice of the peace of the township where said taker-up resides for the appointment of three appraisers to assess the damages done, or reasonable compensation for the taking up, keeping and feeding such stock, and it shall be the duty of the justice of the peace to issue a notice to three disinterested householders of the township to appear at such place in said township as he may designate, and assess the damages or compensation as herein required."

Section 12800 R. S. Mo. 1929 provides:

"The persons so notified, or any two of them attending, shall take an oath that they will fairly and impartially assess the damages or compensation in controversy, and they shall make out, sign and deliver to each party a written statement of their assessment of damages or compensation, and upon the payment of the same and the expenses of said controversy, the owner of such stock shall be entitled to take the same away, and if refused, he may maintain an action therefor, as in case of wrongful taking or detention of property."

In *Worthington vs. Brent*, 69 Mo. 205, l.c. 207, the Supreme Court said:

"The stray law has been on our statute book from the organization of the State, and is not materially different now from what it was in 1825. No definition of a stray is given in any of the statutes; indeed, none was necessary. The object of the law was to encourage farmers to take up such cattle and other animals as were found on their plantations at a season of the year when feeding was usually required, and the main purpose was, by small premiums offered to the taker up, to benefit the owner who might in this way be enabled to trace his lost stock.  
\* \* \* \* \*

The above case specifically holds that there was no prohibition against taking up strays on a plantation occupied by the taker up, simply because the taker up knew the owner. It is only a step further to say that strays found on a farm of the taker up, in his barn, are no less strays because they were driven there from the premises of a state park by the Park Superintendent.

It is true that where a person takes up strays as the justice did in this case, he should do so in strict compliance with the statutes, if he expects to claim the compensation allowed by the estray statute, and in *Harryman vs. Titus*, 3 Missouri 302, the Supreme Court said:

"Having said this much, we proceed to lay down the rule to be, that the party who seeks to detain property as an estray, must show that he did all on his part, exactly as the law requires it should be done; and secondly that he must show that all the law required of the justice was done by him. \* \* \* \* \* This view of the matter establishes the point, that there was no legal taking up of an estray in the case. It, therefore, is unnecessary to take any particular notice of the instructions refused by the court to be given, as required

by the plaintiff in error. \* \* \* \* \*

The law gives 37 cents to the taker up for that act. Now if the owner applies for the property within the ten days, he is to have his beast if he will pay the 37 cents; if not, the law authorizes the taker up to detain the beast for that reason. But if the owner does not apply for the beast within the ten days, then the taker up is bound to proceed to post the estray; and if he does not do so in good faith, or should proceed to do it in such manner as not to comply with the requisitions of the law, he is from the end of the ten days a transgressor, and in such case the rule is, that if a thing be begun lawfully, but be carried on and ended unlawfully, the transaction is void from the beginning. If it were not so in this case, the taker up would, if dishonest, only arrest or take up the beast, claim his 37 cents, if any one ever demanded the stray, would claim to them on the ground of a taker up, when, at the same time, he would conceal the means of knowledge from the owner. To allow this fee in this case, would be contrary to the spirit of the stray law, which is so anxious to have all things done right, and in due time, that it imposes a penalty of \$20 on a person who shall begin the process of taking up, and not go through with it. \* \* \* \* \*

Where one follows the statute in taking up strays, he has a lien on the property for his lawful charges and cannot be forcibly divested of his possession of the strays until such charges are paid by the owner. The cases in construing the above statutes all say that liability for such charges is on the owner and in Rice vs. Underwood, 27 Mo. 551, l.c. 552, the Supreme Court said:

"If the plaintiff had complied with the stray law (R. C. 1845, p. 1038), the title to the mules would have been vested in him after the expiration of one year; and, if within one

year the defendant had claimed them, and proved his right, he would only have been entitled to take them upon payment of 'all costs, the reward, and a reasonable allowance for keeping them.' The plaintiff had a lien on the mules for whatever was due to him, and though he had no right to reclamation against the defendant, if he chose to abandon his property, he had the right of possession until he was paid. By taking the property the defendant admitted that it was worth more than the plaintiff's legal charges on it, and he could not, by committing a trespass, avoid the liability to pay the just demands against it. The law implied an obligation on the defendant, if he took the mules within one year from the time they were taken up, to pay 'all costs, the reward, and a reasonable allowance for taking (keeping) the same', and the plaintiff was entitled to recover his legal charges."

#### CONCLUSION

The statutes allow any person to be the taker up of stray animals, hence the complainant need not be the taker up. Written notice to the owner is not necessary when the owner has actual knowledge that his sheep are restrained as strays. Where there is no claim for damages by reason of the trespass of the sheep, the statute does not provide for any costs being taxed against the complainant, and to do so by the justice or appraisers is illegal, void and of no effect.

The statute dealing with stray animals running at large, supra, provides contingencies where either the taker up or the owner may be liable for feeding and keeping stray sheep: the taker up, when his charge according to appraisers is exorbitant, otherwise, all feeding and keeping charges fall on the owner. The taker up has a statutory lien for such reasonable charges on the strays in his possession, and he must look to the owner or to his lien for satisfaction of a claim for feeding and keeping stray sheep. This is the legislative scheme and the purport of the statutes, supra.

Honorable E. A. Mayes

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May 24, 1939

The justice or the appraisers cannot ignore the statutory scheme by placing costs against persons other than the persons the legislature has provided. The Park Superintendent, not being the taker up or the owner of the sheep could not be legally looked to for the costs in this proceeding, and such is our opinion.

Respectfully submitted,

WM. ORR SAWYERS  
Assistant Attorney-General

APPROVED:

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W. J. BURKE  
(Acting) Attorney-General

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