



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

June 10, 1976

ATTORNEY GENERAL OPINION NO. 76- 170

Mr. Phillip M. Fromme
Coffey County Attorney
Courthouse
Burlington, Kansas 66839

RE: Livestock - Animals Running at Large - Unlawfulness

SYNOPSIS: The violation of K.S.A. 47-122, by permitting cattle or other livestock specified therein to run at large, is not a crime or misdemeanor for which a criminal prosecution will lie.

* * *

Dear Mr. Fromme:

You inquire whether a criminal prosecution will lie under K.S.A. 47-122, which prohibits certain livestock from running at large. You further request that if this office advised against prosecutions under K.S.A. 47-122 that we furnish you with any other suggestions regarding other statutes that would be available. We have reviewed not only K.S.A. 47-122, but all statutes relating to livestock running at large and also the criminal code.

K.S.A. 47-122, -123 and -124 were enacted in 1923 (Laws of 1923, Ch. 211, Sections 1, 2 and 3), as original legislation, and were not amendments of any then existing statute or statutes. They have not been amended since their original enactment.

K.S.A. 47-122 states thus:

"That is shall be unlawful for neat cattle, horses, mules, asses, swine or sheep to run at large."

Phillip M. Fromme
Page Two
June 10, 1976

K.S.A. 47-123 and -124 state thus, respectively:

"That any person whose animals shall run at large in violation of the provisions of Section 1, (47-122) of this act, shall be liable to the person injured for all damages resulting therefrom, and the person so damaged shall have a lien on said animals for the amount of such damages.

"That any person sustaining damages as provided in Section 2 (47-123) of this act may take trespassing animals into custody, and may retain same until such damages and all reasonable charges are paid. It shall be the duty of the person taking the animals into custody to notify the owner or the keeper thereof of such taking up within twenty-four hours thereafter; and if such owner or keeper cannot be found or notified, then to proceed as provided by law in case of strays; Provided, That where notice of such taking up of such animals is given, the person so taking up said animals shall not retain the custody of the same for more than five days without commencing action against the owner thereof to recover such damages."

Thus, K.S.A. 47-122 makes it unlawful for the livestock specified therein to run at large. K.S.A. 47-123 provides that any person whose animals shall run at large in violation of K.S.A. 47-122, shall be liable to the person injured for all damages resulting therefrom and that the person so damaged shall have a lien on said animals for the amount of such damage. K.S.A. 47-124 provides that any person sustaining such damages, may take the trespassing animals into custody and may retain the same until such damages and all reasonable charges are paid and prescribes the time in which action must be taken by the person taking the animals into custody. However, none of these statutes provide that any person violating K.S.A. 47-122 shall be guilty of a crime or misdemeanor, or be subject to any criminal penalty or punishment, nor have we been able to locate any other statute that makes such violation a crime or misdemeanor or subject to any criminal penalty or punishment.

Phillip M. Fromme
Page Three
June 10, 1976

K.S.A. 21-3102(1) provides:

"No conduct constitutes a crime against the state of Kansas, unless it is made criminal in this code or in another statute of this state, but where a crime is denounced by any statute of this state, but not defined, the definition of such crime at common law shall be applied."

Under K.S.A. 21-3105, a crime is an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment, or fine or both imprisonment and fine, is authorized. Crimes are classified as felonies and misdemeanors. A felony is a crime punishable by death or by imprisonment in a state penal institution. All other crimes are misdemeanors.

In City of Coffeyville v. Vakas, 137 Kan. 797, 799, the court said:

"In this state we have no common-law crimes or offenses, but only such as are created by legislative provision--by statute or ordinance--and a court is powerless to impose a penalty unless the penalty has been denounced by statute or ordinance, and when a penalty is imposed, it must be by virtue and under authority of such statute or ordinance, and if the statute or ordinance simply specifies what shall constitute an offense without fixing a penalty for violation, it is a nullity insofar as criminal or quasi-criminal proceedings under it are concerned."

The court, at page 799, quoted from 16 C.J. 68 as follows:

"It has been held in some cases that where an act is a crime solely by statute, and no penalty is prescribed in the statute, an indictment will be quashed, or judgment arrested; or in other words, that a description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of such an act or acts a crime unless a punishment is annexed for punishment is as necessary to constitute a crime as its exact definition."

Phillip M. Fromme
Page Four
June 10, 1976

In the case of United States v. Seibert, 2 F.2d 80, Syllabus, Par. 2, the court said:

"No legislative enactment makes an offense, crime or misdemeanor unless statute so denominates it, or unless punishment therefor is expressly prescribed."

The State Supreme Court has had before it several cases involving the collection of civil damages under the provisions of K.S.A. 47-122. See Wilson v. Rule, 169 Kan. 296, 219 P.2d 690; Abott v. Howard, 169 Kan. 305, 219 P.2d 305; Clark v. Carson, 188 Kan. 261, 219 P.2d 71. However, we have been unable to find where it has heard any cases involving a criminal prosecution for the violation of K.S.A. 47-122.

In conclusion, it is our opinion that a violation of K.S.A. 47-122 does not constitute a crime or misdemeanor, and that no criminal prosecution may be maintained for its violation.

You state that Coffey County has not adopted "The Herd Law", K.S.A. 47-301, et seq. An examination of the Herd Law reveals that except for orders of the Board of County Commissions made pursuant to K.S.A. 47-309, violations are not declared to be crimes or misdemeanors, nor is any penalty or punishment prescribed for any such violation.

K.S.A. 47-309 provides that:

"Whenever two-thirds of the legal voters of any county shall by petition ask the board of county commissioners of their county to make an order that all neat cattle, horses, mules, asses, swine or sheep, or any one or more of said classes of animals shall be prohibited from running at large in such county, said board of county commissioners shall within ten days from the presentation of such petition make such order specifying the class or classes of animals as designated in such petition . . ."

K.S.A. 47-310 provides that any person who shall, in violation of any order made pursuant to K.S.A. 47-309, permit or allow any cattle or animals designated in such order owned by him and under his control, to run at large in such county, shall be deemed guilty of a misdemeanor . . ., and upon conviction thereof, shall be punished by fine for every animal he shall permit to run at large in the sum of not less than one dollar nor more than ten dollars for each day that said animal shall be shown to have to run at large.

Phillip M. Fromme
Page Five
June 10, 1976

We take it from your letter that there is no record of Coffey County having complied with K.S.A. 47-309, and therefore, a criminal prosecution under K.S.A. 47-310 may not be maintained. You further requested that if we advised against criminal prosecution under K.S.A. 47-122, that we suggest other statutes that might be available. There are a few statutes that might be available in specific cases.

K.S.A. 21-3418 states as follows:

"Permitting a dangerous animal to be at large is the act or omission of the owner or custodian of an animal of dangerous or vicious propensities, who having shown such propensities, permits or suffers such animal to go at large or keeps such animal without taking ordinary care to restrain it. Permitting a dangerous animal to be at large is a Class B misdemeanor."

You may also wish to consider the possible applicability of K.S.A. 47-105, -107, -108, and of K.S.A. 21-4106.

If these cattle or horses that are permitted to run at large are generally owned by the same person, you might be able to obtain a judgment and decree of the District Court to the effect that their running at large constitutes a public nuisance, and have the owners enjoined from permitting said cattle or horses from running at large. The violation of such decree would constitute contempt of court. See 4 Am.Jur.2d, 291, Par. 40 and 4 Am.Jur.2d 310, Par. 61 and Olmstead v. Rich, (1889), 25 NYSR 271, 6 N.Y., Supp. 826; 39 A.L.R. 363.

Respectfully yours,



CURT T. SCHNEIDER
Attorney General

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