

1 **13-501. Trespassing livestock.**

2 In order to recover damages for trespassing livestock, the plaintiff must prove [that there
3 was a legal fence around ~~[[his]-[her]]~~ the plaintiff's land] [that the defendant drove ~~[[his]-[her]]~~
4 animals on ~~[plaintiff's]~~ the plaintiff's land] [that the defendant willfully turned ~~[[his]-[her]]~~ animals
5 loose knowing that they would necessarily enter onto ~~[plaintiff's]~~ the plaintiff's land and intending
6 that they should do so].

7 USE NOTES

8 Material in brackets is to be used as indicated by the evidence submitted in the trial.

9 Under New Mexico law, there are three separate and distinct liability situations as spelled
10 out in the cases referred to in the committee commentary. They are:

11 ~~[(1)]~~ 1. where a ~~[plaintiff has a legal fence enclosing his land or the damaged crops]~~
12 plaintiff's land or damaged crops are enclosed in a legal fence (NMSA 1978, § 77-16-1 [NMSA
13 1978] (1909));

14 ~~[(2)]~~ 2. where the defendant drives ~~[[his]]~~ animals onto the land of the plaintiff;

15 ~~[(3)]~~ 3. where the defendant willfully turns ~~[[his]]~~ animals loose knowing that they
16 would enter upon the land of another and intending that they do so.

17 This instruction does not apply in a herd law district.

18 Included within the term ~~[of]~~ ["livestock"] are cattle, horses, sheep, hogs, goats, and
19 even buffaloes (NMSA 1978, § 77-16-2 [NMSA 1978] (1977)).

20 [As amended, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-
21 2025-00126, effective for all cases pending or filed on or after December 31, 2025.]

1 **Committee commentary.** — The cases generally hold that unless the lands of the plaintiff are
2 within a herd law district, no recovery can be had absent proof of a willful trespass, unless properly
3 fenced.

4 *Carnes v. Withers*, 1934-NMSC-059, ¶¶ 3, 7, 38 N.M. 441, 34 P.2d 1092 [(1934)]: Lands not under
5 Herd Law [NMSA 1978, §§ 77-12-1 to [77-12-12 NMSA 1978] -12 (1923)] (C.S. 1929 § 4-401
6 et seq.) and lands of parties separated by a fence but not a lawful one per §§ 50-101 [NMSA 1978,
7 § 77-16-1 [NMSA 1978] (1909)] and 50-103 [NMSA 1978, § 77-16-4 [NMSA 1978] (1909)] C.S.
8 1929, and contiguous and [~~defendant's~~] Defendant's sheep drifted into [~~plaintiffs~~] Plaintiff's land,
9 held, in absence of legal fence, *a willful trespass* [“]“*is necessary* before a recovery of damages
10 for the injury occasioned by trespassing animals[”]” (affirming for the defendant and citing
11 *Vanderford v. Wagner*, 1918-NMSC-099, 24 N.M. 467, 174 P. 426 [(1918)]) (emphasis added).

12 *Wright v. Atkinson*, 1935-NMSC-047, ¶¶ 2, 8-9, 11, 39 N.M. 307, 46 P.2d 667 [(1935)]: Plaintiff
13 had [~~15~~] fifteen sections fenced within which were [~~2~~] two sections owned by the state and leased
14 to one of the defendants and on which was a 1,000 gallon water tank filled by hauling; [~~defendants~~]
15 Defendants turned 200 head of cattle on their unfenced land *knowing and intending* they would
16 and should graze on [~~plaintiffs~~] Plaintiff's land; held facts disclose a willful and continuing
17 trespass entitling [~~plaintiff~~] Plaintiff to a permanent injunction in that: (1) no good faith on part of
18 [~~defendant~~] Defendant; (2) relief as against willful trespass is not dependent upon the existence of
19 the statutory fence; (3) if [~~defendant~~] Defendant drove the animals upon [~~plaintiffs~~] Plaintiff's
20 land or turned them loose knowing that they would necessarily enter [~~plaintiffs~~] Plaintiff's land
21 and intended that they do so, the case is one of willful trespass.

22 *Gallegos v. Allemand*, 1945-NMSC-012, 49 N.M. 97, 157 P.2d 493, 158 A.L.R. 373 [(1945)]:
23 Plaintiff owned 14,000 *fenced* acres; [~~defendant~~] Defendant owned 300 unfenced acres separated

1 by three miles of land owned by one Vigil; [~~defendant~~] Defendant grazed 50 head on his ["]“totally
2 insufficient[”] pasture, and without objection by Vigil, the 50 head grazed [~~Vigil's~~] Vigil's land,
3 but also [~~plaintiffs~~] Plaintiff's land. Reversed, holding for [~~defendant~~] Defendant, because no
4 evidence that [~~defendant "turned"~~] Defendant “turned” his cattle upon ([~~plaintiffs~~] Plaintiff's)
5 lands [~~“knowing”~~] “knowing” that they would *necessarily* enter the lands of ([~~plaintiff~~] Plaintiff)
6 and that [~~the (defendant)~~] (Defendant) intended that they should do so. Court noted that inference
7 of ["]“intention and knowledge[”] of grazing on [~~plaintiffs~~] Plaintiff's land not proven as record
8 failed to show that [~~defendant's~~] Defendant's and [~~Vigil's~~] Vigil's lands afforded insufficient
9 pasturage.

10 *Stewart v. Oberholtzer*, 1953-NMSC-042, ¶¶ 2, 5-7, 57 N.M. 253, 258 P.2d 369 [(1953)]:
11 ~~Plaintiffs~~ Plaintiff's riding stable of [~~35-40~~] thirty-five to forty horses on [~~40~~] forty acres of
12 unfenced land adjoining [~~defendant's~~] Defendant's forty-thousand dollar (\$40,000) residence at
13 Ruidoso; [~~defendant~~] Defendant, without making an effort to drive horses off his premises, shot
14 and wounded [~~3~~] three animals with a rifle. Affirmed for [~~plaintiff~~] Plaintiff holding that, since *not*
15 *in herd law district*[-], Judge [~~Harris'~~] Harris's instruction was correct that, where [~~defendant's~~]
16 Defendant's premises were not fenced, he could frighten horses away, but he had no right to shoot
17 them, even if horses were injuring [~~defendant's~~] Defendant's lawn, flowers, shrubs, or property,
18 as a result of what is now 47-17-1, 1953 Comp. [NMSA 1978, § 77-16-1] [~~NMSA 1978~~] (1909),
19 which makes running of livestock lawful and makes it the *duty of the landowner to effectively*
20 *enclose* [~~his~~] the land [~~if he~~] the landowner desires to keep roaming stock off of it, as one cannot
21 ["]exercise force in expelling trespassing livestock [-] ... unless the trespass is willful.["]

22 *Woolfer v. Lincoln*, 1957-NMSC-031, 62 N.M. 297, 309 P.2d 622 [(1957)]: [~~Plaintiffs~~] Plaintiff's
23 land not enclosed by lawful fences as provided by 47-17-1, 1953 Comp. [NMSA 1978, § 77-16-1]

1 ~~[NMSA 1978] (1909)~~, but ~~[plaintiffs]~~ Plaintiff's fence was of barbed wire, and, when irrigation
2 water turned off, ~~[defendant's]~~ Defendant's 800 ewes and lambs crossed ditch into ~~[plaintiffs]~~
3 Plaintiff's irrigated alfalfa field for about twenty-five (25) minutes. Reversed, for ~~[defendant]~~
4 Defendant, because, notwithstanding ~~[plaintiffs]~~ Plaintiff's lack of legal fence, ~~[he]~~ Plaintiff can
5 recover only if ~~[defendant]~~ Defendant drove ~~[his animals]~~ and willfully turned ~~[them]~~ animals
6 loose knowing they would necessarily enter ~~[plaintiffs]~~ Plaintiff's lands and intended that they
7 should do so. *Johnson v. Hickel*, 1923-NMSC-002, 28 N.M. 349, 212 P. 338 [~~(1923)~~].
8 The special cases occurring within herd law districts, provided for by 47-13-1 et seq., 1953 Comp.
9 ~~[NMSA 1978, §§ 77-12-1 to -12 [NMSA 1978 et seq.] (1923)]~~, give an opposite result in that
10 ~~[“when any trespassing shall have been done by any cattle, horses, sheep, goats, hogs or other~~
11 ~~livestock, upon the land or property within said (herd law) [herd law] district, whether such land~~
12 ~~or property is enclosed with a legal fence or not, the [-] ... owner [-] ... may recover any damages~~
13 ~~[he may sustain] ... sustain[ed] by reason thereof[-].” NMSA 1978, § 77-12-5 [NMSA 1978]~~
14 ~~(1923). [Owner or holder of livestock in herd law district “who shall permit such . to run at large~~
15 ~~on any public road within any such . shall be guilty of a misdemeanor . . .] “An owner or holder of~~
16 ~~livestock who permits livestock to run at large on a public road in a herd law district is guilty of a~~
17 ~~misdemeanor.” NMSA 1978, § 77-12-11 [NMSA 1978] (1923). Trespass by herds, 47-15-2, 1953~~
18 ~~Comp. [NMSA 1978, § 77-14-3 [NMSA 1978] (1901)]~~, and running at large in unincorporated
19 towns or conservancy districts, being rare, do not merit elaboration in these instructions. Similarly,
20 47-15-35, 1953 Comp. [~~formerly NMSA 1978, § 77-14-35 [NMSA 1978] (1901), now repealed]~~,
21 making it a misdemeanor for hogs or swine to run at large within city, town or village limits or to
22 trespass upon cultivated fields or gardens and 47-15-36, 1953 Comp. [~~formerly NMSA 1978, §~~
23 ~~77-14-37 [NMSA 1978] (1921), now repealed]~~, prohibiting ~~[“]“mustang[s] or other inferior~~

1 stallion[s][~~"~~]" (one-fourth mustang or bronco blood) over eighteen (18) months of age from
2 running at large within [~~3~~] three miles of any city, town, or village.

3 The Herd Law, 47-13-11, 1953 Comp. [~~NMSA 1978, § 77-12-11 [NMSA-1978] (1923)~~], provides:
4 [~~"Any~~] "An owner or holder of livestock [~~in~~] [in a herd law district] *who* [~~shall permit such~~]
5 permits livestock to run at large on [~~any~~] a public road within [~~any such~~] a herd law district [~~shall~~
6 ~~be~~] is guilty of a misdemeanor[~~---"~~]." This statute is applicable in an automobile collision with
7 an animal in a herd law district. No New Mexico cases. [~~See~~] See 59 A.L.R.2d 1330; *Scarborough*
8 *v. Wooten*, 1918-NMSC-019, ¶ 11, 23 N.M. 616, 170 P. 743 [~~(1918)~~] where the [~~court~~] Court
9 stated that "[t]he act prohibits the running at large of livestock in those precincts which have
10 adopted a herd law, and whether or not the trespass was willful is not material, except as affecting
11 the amount of damages. Chapter 94, Laws 1909, prohibits trespass by livestock, and subjects
12 owners to liability for damages without regard to whether the trespass was willful[~~---~~]."

13 *Kinsolving v. Reed*, 1964-NMSC-131, 74 N.M. 284, 393 P.2d 20 [~~(1964)~~]: Plaintiff owned 320
14 acres of unfenced land surrounded by lands owned by [~~defendant,~~] Defendant Reed. Not a herd
15 law district. No finding of fact or request for finding to effect that trespass was willful.
16 [~~Defendant's~~] Defendant's cattle had grazed on [~~plaintiffs~~] Plaintiff's land for five (5) or six (6)
17 years. A finding that [~~defendant's~~] Defendant's own grass was insufficient and that one could infer
18 from such insufficiency that [~~defendant's~~] Defendant's cattle would graze [~~plaintiffs~~] Plaintiff's
19 land [~~is~~] was not enough upon which to base a finding that [~~defendant "intended"~~] Defendant
20 "intended" that his cattle should trespass. The facts have to show a willful trespass and anything
21 less is insufficient to avoid the prohibition of 47-17-1 and 47-17-2, 1953 Comp. [~~NMSA 1978, §§~~
22 77-16-1 and 77-16-3 [NMSA-1978] (1909)]. (The emphasis in committee commentary is of the
23 committee.)

1 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]