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December 7, 1935.

Mr. Charles P. Mullen,
State Land Commissioner,
Phoenix, Arizona.

Dear Mr. Mullen:

You have made an oral request for an opinion concerning a fence of one Levenia Peterson of St. Johns, Arizona which overlaps Section 28, Twp. 14 North, Range 28 East, G. & S.R. B. & N., which Section 28 is owned by the State of Arizona by virtue of its Enabling Act, and which, at the present time is leased to one Ferris D. Jolly of St. Johns.

You have handed me a letter from Mr. Jolly wherein Mr. Jolly states that this fence extends over Section 28 covering some 160 acres and that the said Levenia Peterson has refused to remove said fence.

Assuming the facts to be true, and that the fence is in fact located upon the State section, I quote you provisions of our statutes as follows:

Section 3006, Revised Code of Arizona, 1928:

"Whoever KNOWINGLY and WILFULLY commits a trespass upon state lands, either by cutting down or destroying any timber or wood standing or growing thereon, or by carrying away any timber or wood standing or growing thereon, or by carrying away any timber or wood therefrom, or by mowing or cutting, or removing any hay or grass thereof or therefrom, or by extracting or removing any oils, gases, coal, minerals, fertilizer or fossils of any kind or description thereon or therefrom, or who, without right, injures or removes any building, fence or improvements thereon, OR UNLAWFULLY OCCUPIES, plows or cultivates any of said lands, or negligently or wilfully exposes growing trees, shrubs, or undergrowth standing thereon to danger or destruction by fire, SHALL BE GUILTY OF A MISDEMEANOR; provided, that this section shall not prohibit the grazing of livestock upon unfenced or open lands."

You will note that before any person can be adjudged guilty of any of these offenses that said person must be

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"knowingly" and "wilfully" committing such acts of trespass.

Following this provision, the provisions of Section 3007, Revised Code of Arizona, 1928, are found:

"Whoever commits any trespass upon State lands, as DEFINED IN THE PRECEDING SECTION (Section 3006), shall also be liable in a civil action, brought in the name of the state in the county in which the trespass was committed, FOR THREE TIMES THE AMOUNT OF THE DAMAGE CAUSED BY SUCH TRESPASS, IF THE TRESPASS WAS WILFULL, but for single damages only, if CASUAL OR INVOLUNTARY."
(capitals ours)

It will be noted, that under the provisions of this section, the person trespassing may be held civilly liable for three times the amount of damages if the trespass is WILFUL, and single damages if the trespass is CASUAL or INVOLUNTARY.

I quote the provisions of Section 2977, Revised Code of Arizona, 1928, which provide as follows:

"Nothing herein shall confer any rights whatsoever upon occupants or lessees of any lands, WHO HAVE NOT TAKEN OUT A LEASE UNDER THE PROVISIONS HEREOF, and the COMMISSIONER shall examine into the rights of all persons in possession of state lands, or IMPROVEMENTS THEREON, or claiming compensation for improvements on such lands, and, IF HE FINDS THAT ANY PERSON IS UNLAWFULLY IN POSSESSION OF SUCH LANDS, or is unlawfully claiming compensation for such improvements, HE SHALL, with the approval of the department, BRING AN ACTION TO RECOVER POSSESSION OF SUCH LANDS AND IMPROVEMENTS, OR OTHERWISE ESTABLISH THE RIGHTS OF THE STATE."

Under the provisions of this section if you should find that the said Levenia Peterson is unlawfully in possession of a part of Section 28, then it is your duty to commence, with the approval of the department, such proceedings as may be necessary to recover the portion of Section 28 unlawfully held by the said Levenia Peterson.

I would therefore recommend that you conduct a thorough investigation of this matter, and if you find that the said Levenia Peterson is unlawfully in possession of a portion of Section 28, I would further recommend that you

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prevail upon her to remove the fence without the necessity of resorting to the courts.

Very truly yours,

JOHN L. SULLIVAN,
Attorney General

ELMER C. COKER,
Assistant Attorney General.