

Opinion No. 13-1049

May 23, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Mr. August Veith, Rosebud, New Mexico.

DAMAGES BY CATTLE.

Section 98, Compiled Laws 1897, in regard to cattle running at large still in force.

OPINION

{*218} I have just received your letter of the 20th inst. Under Section 98 of the Compiled Laws of 1897, owners of stock are compelled to have them in charge of someone from the first of March to the end of October, and it is made a misdemeanor to disregard this requirement. The punishment for the misdemeanor will be found in Section 1055 of the same Compiled Laws. Such a misdemeanor can be prosecuted either in the court of a justice of the peace or in the district court. Any person can go to a justice of the peace and make a complaint under oath and it will then be the duty of the justice to issue a warrant for the arrest of the person accused, who should be brought before the court and tried. In such a case if the defendant is not convicted and the justice of the peace is satisfied that the case was instituted maliciously, or without probable cause, the court may, in its discretion, compel the prosecuting witness to pay the costs. This is provided for in Section 3 of Chapter 61 of the Laws of 1907. If you should make such a complaint you would not be liable for the costs except as provided in the section last referred to, but you would probably feel compelled to employ some person as an attorney to prosecute the case. If there are many persons suffering as you say that you are, you might combine so as to divide expenses.

If you decide that it is not advisable to proceed before a justice of the peace, you should then communicate with the District Attorney, whose duty it is to attend to all criminal business in the district courts.

{*219} You will probably be told that under two laws of 1909, you have no remedy, but those laws do not repeal Section 98 of the Compiled Laws of 1897. One of them, which is Chapter 13 of the laws of that year, declares what is a lawful fence in the territory of New Mexico, while the other, which is Chapter 70 of the same laws, declares that damages shall not be recovered on account of trespasses of livestock, unless the land is fenced with a lawful fence. This refers only to the recovery of damages in a civil action and has no reference to criminal prosecutions. Even in the face of this statute, however, under some circumstances, it might still be possible for the owner of land to recover damages if the owner of the cattle turned them out under circumstances which showed that he expected and intended that they would go upon his neighbor's land to graze.

This opinion is founded upon the decision in the Supreme Court of the United States in the case of Light vs. United States, which was decided about two years ago.