Opinion No. 13-1083

July 23, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Honorable George E. Remley, District Attorney, Cimarron, N. M.

CATTLE.

Opinion that Section 98, Compiled Laws, 1897, as to running at large of cattle, is still in force.

OPINION

*{*254}* Your letter of the 7th inst., enclosing a copy of an opinion of the District Court in the case of the State vs. Deinkin was duly received, but at a time when I was so closely occupied that it was a number of days before I could look at the opinion, and I was compelled to go to El Paso before I could find time to write to you.

It appears to me that until some new decision can be had, that opinion settles the law for your jurisdiction and that as District Attorney you cannot properly disregard it. I had not known of any such decision and I hope that some case may be brought up to the *{*255}* Supreme Court so that the matter may be definitely and finally adjudicated.

I am unable to agree with the conclusion reached in that case. It is based upon the holding that Section 98 of the Compiled Laws of 1897 is, by implication, repealed by Chapter 28 of the Laws of 1901. The court holds that the law of 1901 covers the same subject as the one treated of in said Section 98 and, in accordance with a familiar rule of statutory interpretation, the later statute covering the same subject repeals, by implication, the earlier one, and that the legislature could not intend to have two distinct enactments covering the same subject in force at the same time.

I think that, at this point, the court makes a mistake because I do not believe that the two statutes cover the same subject.

Section 98 makes it unlawful for any owner of large stock to allow the same to run at large during seven months of the year, but requires that the stock shall be under custody. You will see that the subject is the running at large of stock and having them under custody.

The act of 1901 makes it unlawful for any person or their agents, having charge, not only of "large stock" but also of other animals, to permit them to go upon the lands of others for grazing or watering purposes without the permission of the owner. This is not the same subject as that of the earlier act and the two can stand together without any necessary conflict or inconsistency.

The first act forbids stock running at large and requires that the animals should be under custody. The second act says that persons, or their agents, who have charge of stock, must not permit them to go upon the lands of others. It is plain that those persons, under whose custody the stock must be kept, under Section 98, are among the persons forbidden by the act of 1901, to permit the animals to go upon the lands of others.

I think there is more plausibility in the suggestion in the opinion that the passage of Chapter 94 of the Laws of 1909, which provides for a herd law in three counties, indicates an idea on the part of the legislature that there was not in force any law prohibiting the running at large of cattle, but I cannot believe that this is sufficient to work a repeal by implication of the statute of 1882, which appears as said Section 98. This act of 1909 is, to say the least, of doubtful validity, as being a local and special law "regulating county and township affairs;" but disregarding that question, it does not cover the same ground as the early statute which is penal in character, creating a statutory misdemeanor which is punishable under Section 1055 of the Compiled Laws, while the Act of 1909 merely provides for a civil liability on account of trespasses of animals without regard to the matter of a fence. This reference to a fence is made in that statute, because fifteen days earlier there had been passed the act defining a legal fence, Chapter 13, Laws of 1909, and one day before the act, Chapter 70 of the same laws, was passed which provided against the recovery of damages unless the land upon which trespass was made was fenced. I cannot believe that there is enough in this statute of 1909 to justify the conclusion that Section 98 was no longer in force.

Another suggestion made is that because Chapter 146 of the Laws of 1909 authorizes county commissioners to prohibit the running at *{*256}* large of cattle within the limits of any platted townsite or platted addition to any unincorporated town, with a population of not less than three hundred, it is evident that, in the absence of that statute, it would be legal for the animals to run at large and that, therefore, we must conclude that Section 98 was not in force. I think that this is a **non sequitur.** The argument would be equally applicable to many of the subdivisions of Section 2402 of the Compiled Laws of 1897, which declare the powers of cities and towns, especially the 50th one, which authorizes the prohibition of the running at large of animals. The idea would be that if there were a general statute prohibiting the running at large of animals, it would not be necessary to give cities and towns any authority on the subject, just as it is urged that it would not be necessary to give county commissioners a like power as to unincorporated towns. The intention of said Chapter 146 was to give the county commissioners, as to unincorporated places, the same authority which the city council had been given as to like matters within the corporate limits.

I return herewith the copy of the opinion as requested.