

## Opinion No. 15-1561

June 21, 1915

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Mr. Salomon Bernal, Justice of the Peace, Maxwell, N. M.

**Running of stock at large and damages committed by them on unenclosed lands. County cannot pay justice of the peace costs in misdemeanor cases.**

### OPINION

{\*141} I have received your letter of the 19th inst. asking for my opinion on the subject of the recovery of damages upon unfenced lands made by animals, and you say that you have been advised that any person who has no legal fence to protect his crops has no right to claim such damages.

In the first place, by Section 98 of the Compiled Laws of 1897, which will be Section 49 in the new codification which will soon be distributed, it is made a misdemeanor for any person or owner of large stock to allow the same to run at large from March 1 to October 31 unless they are under custody during the months specified, and any person offending may be punished with a fine and costs provided in Section 1055 of the Compiled Laws of 1897, which is Section 1455 of the new codification.

It is true that by an act of the legislature adopted in 1909 it is provided that the owner of lands which are damaged by live stock cannot recover damages unless he has his lands and crops enclosed by a legal fence. That act was Chapter 70 of the Laws of 1909 and will be found in Section 2341 of the new codification. Sections 2342 and 2345 of the new codification prescribe what shall be a legal fence, those sections being originally a part of the Chapter 13 of the Laws of 1909.

Notwithstanding these statutes, I am of opinion, based upon a decision of the Supreme Court of the United States, that under some circumstances a person so injured, might recover his damages. That decision of the supreme court was in a case from Colorado, where there was a similar fence law to ours and the court declared that fence laws do not authorize wanton and wilful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another, and that such laws are not intended to condone trespasses by straying cattle and have no {\*142} application to cases where cattle are driven upon unfenced land in order that they may feed there.

As to your costs in misdemeanor cases, I am of opinion that the district attorney is correct in holding that you cannot collect them from the county. If, in such a case, the defendant having been found guilty, should appeal, then the district court, if the judgment should be affirmed, would enter a judgment against the defendant for the

costs and he would be compelled to pay them. If he does not appeal, you can commit him to the county jail until the costs are paid, but in most cases that would not result in your actually getting the money.

If in any case, as you suppose, a poor person without means comes to you and complains of any criminal offense and he has not the means to pay the costs, you have no right to reject his complaint because he has no money, even though you may not be able to collect any fees for your services. That is one of the burdens of the office which you assumed when you qualified as justice of the peace.