

Opinion No. 24-3769

June 25, 1924

BY: JOHN W. ARMSTRONG, Assistant Attorney General

TO: Requested by: Grace B. Melaven, State Game and Fish Warden, Santa Fe, New Mexico.

In the Matter of Trespassing on Posted Property and Penalty, Sec. 18, Chap. 101, S. L. 1915, Sec. 2505, Code 1915, Sec. 11, Chap. 133, S. L. 1919; Fishing without license and penalty, Sec. 3, Chap. 133, S. L. 1919, Sec. 20, Chap. 101, S. L. 1915; Costs Chargeable to Prosecuting Witness, Sec. 4451, Code 1915, Sec. 2, Chap. 101, S. L. 1915, Sec. 17, Chap. 101, S. L. 1915, Sec. 4427, Code 1915; Duties of Justices of the Peace and other Officers, Sec. 15, Chap. 101, S. L. 1915, Sec. 20, Chap. 101, S. L. 1915, Sec. 3955, Code 1915, Secs. 3159, 3160 and 3161, Code 1915, Sec. 2456, Code 1915, Sec. 1, Chap. 170, S. L. 1921; Who makes complaint for Trespassing on Posted Property.

OPINION

{*145} Replying to your inquiry relating to the letter, under date of June 19, 1924, of the Adams Cattle Company and the affidavits of Alfredo Casias and George Young, sworn to June 18 and 19, respectively, 1924, we advise you as follows:

As to Trespassing on Posted Property.

Sec. 18, Chap. 101, S. L. 1915 provides that "* * * the pursuit, capture, wounding or killing of fish in any licensed preserve, park or lake, public or private, without the consent of the proprietor shall be unlawful * * * ."

Sec. 2505, Code 1915 provides that "Any violation of the provisions of Article II of this Chapter shall be punishable by a fine of not less than \$ 25.00 nor more than \$ 200.00."

{*146} Sec. 11, Chap. 133, S. L. 1919 together with Sec. 2433, Code 1915 provides another means for posting lands and streams and a stream lawfully posted and permit duly issued by the State Game Warden under these latter two sections may be protected from trespass and anyone violating the provisions thereof shall be punished by a fine of not less than \$ 50.00 nor more than \$ 100.00 or by imprisonment for not less than thirty days nor more than sixty days or by both such fine and imprisonment in the discretion of the court.

We do not know which the Adams Cattle Company maintains -- a licensed "lake" or licensed "enclosure or pasture." There are two separate laws, as we have pointed out, applicable in this connection.

As to Fishing without License.

Sec. 3, Chap. 133, S. L. 1919 provides that "no person shall at any time * * * take in any manner any * * * game fish as herein defined in this state, without first having in his or her possession a license as hereinafter provided for the year in which such * * fishing * * * is done * * *."

Sec. 20, Chap. 101, S. L. 1915 provides that "any violation of the provisions of any section of this Act, unless otherwise provided for, shall be punishable by a fine of not less than \$ 25.00 nor more than \$ 200.00." This penalty clause would be applicable to a violation of the provisions of said Sec. 3.

No Justice of the Peace is authorized to assess a fine for a lesser amount, in such cases, than is hereinbefore indicated.

As to Costs Chargeable to Prosecuting Witness.

Sec. 4451, Code 1915 provides:

Upon the trial of any criminal case, whenever the court or justice of the peace shall be satisfied that any such case has been instituted maliciously or without probable cause, the court may in its discretion tax the costs therein against the prosecuting witness, in which event such witness shall stand committed until such costs be fully paid.

Construing the foregoing section, the court in State v. Coats, 18 N.M. 314 holds:

An appeal from an order taxing the costs against the prosecuting witness should be docketed in the district court in the name of the State against him, not as originally entitled. The case is to be tried **de novo** and the burden is upon the state to show that the prosecution was malicious or without probable cause.

On an appeal the district court is required to try **de novo** the question whether the prosecution was instituted maliciously or without probable cause.

It seems inconceivable that any Justice of the Peace would assess the costs against a deputy game warden or other complaining witness under the facts stated in the affidavit. Section 2, Chap. 101, S. L. 1915 provides as follows:

* * * It shall be the duty of the Game and Fish Warden and of each and every deputy, rigidly and strictly to care for and enforce the provisions of this and all {**147*} other laws of the state for the protection of game and fish of whatsoever kind or description, and to institute or cause the institution or prosecutions for any and all violations of such laws, and to that end such Game and Fish Warden and each and every one of his deputies are hereby authorized and required to arrest, or cause to be arrested, all violators of such law, and to lodge accusations against them in a court of competent jurisdiction in the premises; to gather evidence on behalf of the prosecution of such offenders, and to

do any and all things necessary to the punishment hereunder and the laws of the state of any violations of this or any other law of said state on the subject of game and fish and the protection thereof. And such Game and Fish Warden or such deputy shall be liable to a fine of not less than One Hundred Dollars, nor more than Two Hundred and Fifty Dollars, or imprisonment for not less than thirty nor more than ninety days for any failure to arrest and prosecute any person violating any of the provisions of this act; * * * ."

Sec. 17, Chap. 101, S. L. 1915 provides further that

The Warden and every deputy warden throughout the state, and every sheriff and constable in his respective county, are authorized and required to enforce this act * * * ."

If game and fish are to be protected and preserved under the laws of this state, Justices of the Peace, of course, will necessarily have to do their full duty toward assisting other officers in the enforcement of the law. Other officers are required, under penalty of fine and removal from office, to prefer the complaints in question and after any officer has so preferred a complaint, it is almost unthinkable that a Justice of the Peace would then assess the costs against the complaining officer. In all such cases, the officer should appeal his case to the District Court and, in such event, he will most likely get relief.

Wherever a Justice of the Peace may be unfriendly toward the enforcement of the game and fish laws, it might be well for the officers and other persons, desiring to see the law enforced, to file their complaints, by information, directly in the District Court under the provisions of Sec. 4427, Code 1915. If the information be made by someone not having personal knowledge of the infraction of the law, the same should be approved by the District Attorney, or his assistant, before filing in compliance with Sec. 4428, Code 1915.

As to Duties of Justices of the Peace and other Officers.

All moneys collected as fines for violation of the provisions of this act shall be immediately paid over by the justice of the peace or other officer collecting or receiving the same, to the State Treasurer to be by him credited to the current school fund of the state, and upon the conviction of any one for a violation of the provisions of this act, there shall be taxed as costs in each case the sum of Twenty-five Dollars which sum, when collected, shall be paid over to the person or persons instituting the prosecution, as witness fees. The State Treasurer shall render a monthly statement to the State Game and Fish {*148} Warden on or before the tenth day of each month, showing all moneys received and paid out by him under the provisions of this act. -- Sec. 15, Chap. 101, S. L. 1915

The penalty for violation of the foregoing statute is found at Sec. 20, Chap. 101, S. L. 1915.

Sec. 3955, Code 1915 enumerates causes for removal from office and includes "failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office."

Likewise, Justices of the Peace, under Secs. 3159, 3160 and 3161, subscribe to an oath and enter in the bond, to the effect that they will well and faithfully perform each and all the duties of their office. Justices of the Peace who fail to assess the penalties as provided by law, after conviction of any defendant, will be liable on their bonds for any failure in this connection.

Relating to the remission of fines and penalties, see Sec. 2456, Code 1915 which provides:

Whenever, upon conviction, the person convicted fails to pay the fine and costs imposed upon him, he shall be committed to the county jail and shall there be kept confined one day for each dollar fine and costs adjudged against him, and he shall not be discharged therefrom by any board of officers, except upon the payment of the portion of the fine and costs remaining unserved, or upon the order of the Governor of this State.

As to the duties of peace officers generally, see Sec. 1, Chap. 170, S. L. 1921 which reads as follows:

That it is hereby declared to be the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the State of New Mexico which are called to the attention of any such officer or of which he is aware, and it is also declared the duty of every such officer to diligently file a complaint or information, if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken, and it is also declared his duty to co-operate with and assist the attorney general, district attorney or other prosecutor, if any, in all reasonable ways. Failure to perform his duty in any material way shall subject such officer so failing, to removal from office and payment of all costs of prosecution.

As to Owners of Posted Property being

Required to make Criminal Complaint.

For trespassing on lawfully posted property, under the game and fish laws of this state, statutes declare it to be a criminal offense and the complaint may be made and filed by anyone having a knowledge of the facts. It is not necessary that the owner of property himself make the complaint.