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SECTION 951.02, R. C., VIOLATION OF—DOGS RUNNING AT  
LARGE—NOT A CRIMINAL OFFENSE.

SYLLABUS:

A violation of Section 951.02, Revised Code, is not a criminal offense, and a constable would have no authority to file a criminal affidavit in a county court against an owner or person having charge of a dog, charging a misdemeanor for violation of said Section 951.02, Revised Code.

Columbus, Ohio, July 31, 1959

Hon. Mathias H. Heck, Prosecuting Attorney  
Montgomery County, Dayton, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“The Honorable Robert J. Withrow, Jr., Judge of the Montgomery County Court, Third District, has requested me to obtain your opinion on the following question:

“In a township area, within the jurisdiction of a County Court, the residents are bothered with dogs running at large in violation of Section 951.02 of the Revised Code.

Section 951.07 provides a ‘forfeiture’ of not less than one nor more than five dollars for such violation and Section 951.08

refers to 'suits' to recover the forfeitures. The usual penalty section at the end of the Chapter, Section 951.99 mentions only one section not here involved. Section 951.01, in all respect analogous to Section 951.02, sets forth a forfeiture . . . 'to be recovered by a civil action . . . '.

QUERY: Can a Constable of the township file a criminal affidavit against the owner or person having charge of the dog in a County Court charging a misdemeanor violation of Section 951.02?"

Section 951.02, Revised Code, referred to in your communication, reads as follows:

"A person, firm, or corporation which is the owner or has charge of horses, mules, cattle, sheep, goats, swine, dogs, or geese, shall not permit them to run at large in the public road, highway, street, lane, or alley, or upon unenclosed land.

"No such person, firm, or corporation shall cause such animals to be herded, kept, or detained for the purpose of grazing on premises other than those owned or occupied by the owner or keeper thereof, except as provided in section 951.04 of the Revised Code.

"The running at large of any such animal in or upon any of the places mentioned in this section is prima-facie evidence that it is running at large in violation of this section."

Section 951.04, Revised Code, contains this provision:

"*General permission* may be granted by the board of county commissioners for any animal named in section 951.02 of the Revised Code to run at large. In counties in which such general permission has not been granted, the board of township trustees may grant *special permits for particular animals* described in such section. Such permits shall be revocable at the discretion of such board upon three days' notice in writing to the owner of such animals. Such permission, whether general or special, shall terminate on the first Monday of March in each year." (Emphasis added).

I cite this section as indicating that the legislature in enacting it in the same act as Section 951.02, *supra*, evidently did not regard the act of permitting the animals mentioned to run at large, as a very serious offense, and certainly not as a criminal offense.

Section 951.07, Revised Code, reads as follows:

"Whoever violates section 951.02 of the Revised Code shall forfeit and pay for each violation not less than one nor more than

five dollars. Continued violation, after notice of suit, shall be an additional offense for each day of such continuance.”

Section 951.08, Revised Code, provides the method of collecting such forfeiture. It reads as follows:

“Suits to recover the forfeitures provided for in section 951.07 of the Revised Code, shall be brought in the name of the state, on complaint of a person aggrieved and shall be brought before a justice of the peace or other court having jurisdiction where the offense is committed. The person offending shall pay the amount of the forfeitures adjudged, with costs. Money collected as forfeitures shall be paid into the treasury of the township where such offense was committed, for the use of schools in such townships.”

While this statute does not characterize this action as a “civil action,” it certainly is clear that it is such. Strength is added to that conclusion by consideration of Section 951.01, Revised Code, which forbids the running at large of a class of animals which are clearly more dangerous than those mentioned in your letter, reads as follows:

“The owner or keeper of a stallion, jackass, bull, boar, or buck, who permits it to go or be at large out of his own enclosure, shall forfeit ten dollars for the first offense and twenty-five dollars for each subsequent offense, to be recovered *by a civil action* in the name of the state and to be brought before a justice of the peace of the township in which such owner or keeper resides. Such forfeiture shall be for the use of the schools of the township in which the suit is brought. Such suit must be brought within sixty days after such animal is found to be at large. (Emphasis added).

Note that the only penalty provided for what could be a much more serious offense, is definitely and merely a *forfeiture to be recovered by a “civil action.”*

In the face of the clear statutory provisions above quoted, I cannot comprehend how anyone could contend that the failure to keep a dog confined as required by said Section 951.02, Revised Code, could constitute a crime, to wit: a misdemeanor, and entitle a constable or any other person to institute a criminal proceeding to collect a “forfeiture” of from one to five dollars.

I call attention to one further fact; that in Chapter 951., Revised Code, there is described one *and only one* criminal offense, punishable by a fine, to wit: that set out in Section 951.03, Revised Code, which reads:

“No township highway superintendent or township trustee acting in that capacity or marshal of a village shall *willfully neglect* on view or information to take up and confine any cattle or swine, or a horse, mule, sheep, goat, dog, or goose, running at large or in a street, lane, alley or unenclosed land. Such official shall give notice of such taking.”

(Emphasis added).

For this “willful neglect,” a penalty by way of a fine is prescribed by Section 951.99, Revised Code, which provides:

“(A) Whoever violates section 951.03 of the Revised Code shall be fined not more than twenty-five dollars or imprisoned not more than ten days, or both.”

This is the only penalty by way of a fine mentioned in the entire chapter. It hardly seems necessary, in view of the above quoted statutory provisions, to go into the general law of crimes. However, I direct attention to Volume 15, Ohio Jurisprudence, page 249, where it is said:

“The legislature, subject to constitutional limitations, has the power to declare what acts shall be criminal; to provide for and define criminal procedure. \* \* \*”

It is also said, at page 253;

“It is a well established rule, recognized by statute (Section 1.11 R.C.) that penal laws must be strictly construed.”

In *State, ex rel. Thompson, v. N. Y. C. Rd. Co.*, Ohio App., 145, the court had under consideration Section 8920, General Code, which provided that a railroad company or person having the management thereof, who failed to maintain fences and cattle guards, should “forfeit and pay” a sum not exceeding fifty dollars per day, “to be recovered in a civil action in the name of the state for the use of the county \* \* \*.” The court in the opinion said:

“\* \* \* where a statute provides for a penalty and prescribes a form of remedy for its recovery, such form is exclusive. 25 Corpus Juris, 1185, Fines, Forfeitures and Penalties, Section 90, and cases cited in note 94, supporting text. \* \* \*”

Therefore, in specific answer to your question, it is my opinion, and you are advised that a violation of Section 951.02, Revised Code, is not a criminal offense, and a constable would have no authority to file a criminal

affidavit in a county court against an owner or person having charge of a dog, charging a misdemeanor for violation of said Section 951.02, Revised Code.

Respectfully,

MARK McELROY

Attorney General