



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 28

The Honorable Joseph F. Norvell
State Senator, 37th District
State Capitol, Room 452-E
Topeka, Kansas 66612

Re: Fences -- Legal Enclosures -- Enclosure of
Domestic Animals

Fences -- Partition Fences -- Adjoining
Landowners; Duty to Erect and Maintain Partition
Fences

Synopsis: K.S.A. 29-301 requires adjacent landowners to share the costs of erecting and maintaining partition fences. Kansas' adoption of a "fence-in" policy with respect to domestic animal trespass does not negate this duty, notwithstanding the use each landowner makes of his land. Cited herein: K.S.A. 29-101; 29-102; 29-108; 29-201; 29-301; 29-304; 29-305; 29-309; 47-104; 47-120; 47-121; K.S.A. Ensley 1981 47-101 to 47-103; 47-105; 47-106; 47-107 to 47-110; 47-112 to 47-119; 47-301; G.S. 1868, ch. 40, §1.

Dear Senator Norvell:

You have requested our opinion as to whether Kansas' recent formal adoption of a "fence-in" policy with respect to domestic animal trespass alters the duty of adjoining landowners to erect and maintain partition fences.

At common law, a possessor of domestic animals was held strictly liable for damages caused by his animal's trespass. Lindsay v. Cobb, 6 Kan. App. 2d 171, 172, rev. denied 229 Kan. 670 (1981). Therefore, the duty was on the owner or possessor of animals to keep his animals off the

land of another. During the early years of statehood, Kansas lawmakers statutorily changed the common law rule to give effect to the primary use of the Kansas prairie -- grazing livestock on open range. A "fence-out" policy was adopted. Before a property owner could recover from an owner or possessor of livestock for damages caused by the animal's trespass, the property had to be enclosed by a legal fence. (G.S. 1868, ch. 40, § 1). Thus, landowners were required to fence livestock out of their property. Union Pac. Ry. Co. v. Rollins, 5 Kan. *167, *177 (1869).

As Kansas law evolved, "herd laws" were enacted which required specified animals to be restrained under certain circumstances. See K.S.A. Ensley 1981 47-101 to 47-103, inclusive (night herd laws); 47-105 (bull-boar law); 47-106 (stag law); 47-107 to 47-110, inclusive (stallion-jack law); 47-112 to 47-119, inclusive (swine law); 47-301 et seq. (county option herd law). These laws partially restored the principles of common law by limiting the privilege of allowing animals to run at large.

To end confusion as to the law of domestic animal trespass, the 1986 Legislature enacted Senate Bill No. 403 (L.1986, ch. 195). See Report on Kansas Legislative Interim Studies to the 1986 Legislature, pp. 25-47. In enacting this legislation Kansas formally adopted a "fence-in" policy by requiring "[a]ll domestic animals, other than cats and dogs, [to] be enclosed with a [legal] fence" K.S.A. 29-101. The legislative declaration of policy is stated in K.S.A. 29-108:

"It is hereby declared that the policy of this state with respect to domestic animal trespass shall be that all such animals shall be enclosed by a lawful fence. it is further declared that, unless otherwise specifically provided by law, strict or absolute liability for damages for injury to any person or property resulting from domestic animal trespass shall not arise, and, in all such cases, the principles of ordinary negligence shall apply."

In addition, the Legislature repealed the "herd laws" except for those statutes which concern driving livestock along the roadways. K.S.A. 47-104; 47-120; 47-121. It is now clear that owners and possessors of animals have the duty to keep their animals enclosed.

The question has been raised as to the effect of the 1986 legislation concerning enclosure of animals on the partition fence law. Specifically, you ask whether a landowner who raises crops must share the cost of building and maintaining a partition fence when the adjoining land is used for livestock.

The laws concerning partition fences, K.S.A. 29-301 et seq., were not altered by the 1986 Legislature. The general duty of adjoining landowners is stated in K.S.A. 29-301:

"The owners of adjoining lands shall keep up and maintain in good repair all partition fences between them in equal shares, so long as both parties continue to occupy or improve such lands, unless otherwise agreed."

K.S.A. 29-305 provides as follows:

"If a party neglect or refuse (sic) to erect or maintain the part of the fence assigned him by the fence viewers, it may be erected and maintained by the aggrieved party in the manner before provided, and he shall be entitled to recover the ascertained cost thereof, with interest at the rate of one percent per month and a reasonable attorney's fee to be fixed and allowed by the court, by action in any court of competent jurisdiction; and the amount recovered, with costs, shall be a lien against the land chargeable with the same."

By statute, the members of the board of county commissioners of each county are designated as fence viewers. The board has the duty and authority to determine whether a fence is lawful and to settle controversies. K.S.A. 29-201; 29-304. See Attorney General Opinion No. 85-54. A lawful fence is one which meets the criteria set out in K.S.A. 29-102.

The court in Griffith v. Carrothers, 86 Kan. 93, 94 (1911), determined the intent of the partition fence law to be as follows:

"The theory of the law is that owners of adjoining lands, that are occupied or

improved, are under mutual obligations to maintain partition fences in equal shares."

The only exception to the legal requirement that adjoining landowners share the cost of a partition fence is found in K.S.A. 29-309:

"No person not wishing his land enclosed, and not occupying or using it otherwise than in common, shall be compelled to contribute to erect or maintain any fence dividing between his land and that of an adjacent owner; but when he encloses or uses his land otherwise than in common, he shall contribute to the partition fence as in this act is provided."

Two conditions must be met before K.S.A. 29-309 is applicable. "First, the occupant must not wish his or her land to be enclosed. Second, the occupant may not occupy or use the subject land otherwise than in common with the adjoining landowner." Attorney General Opinion No. 83-43, pp. 2-3. In that opinion we noted that the term "in common" was defined by the court in Hewitt v. Jewell, 12 N.W. 738, 739 (Iowa 1882), as follows:

"'Land is not held "in common" when a party segregates it from the adjoining land by the erection of a fence or otherwise. A person uses his land otherwise than in common when he segregates it from the adjoining land, his occupation being such that he and his neighbor cannot or do not use their land together or in common. This may be done by the erection of a fence, but it may be done otherwise. One person may use his land for growing grain, and another for pasture.'" Attorney General Opinion No. 83-43, p. 2.

It is contended that, since animals must be fenced in, crop growers should not be required to share the expense of partition fences. The partition fence laws, however, were not altered by the legislature. It is a fundamental rule of statutory construction that effect must be given to all

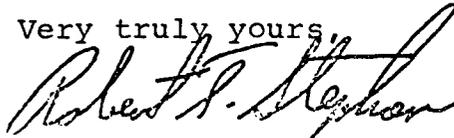
statutes when possible. See State v. Kitzman, 240 Kan. 191, 193 (1986); State v. Cole, 238 Kan. 370, 371 (1985).

The "fence-in" statutes, K.S.A. 29-101, et seq., concern the liability of an animal owner not only for the trespass of his livestock on his neighbor's property, but for an animal's trespass on any property. Adjoining landowners must share the cost of building and maintaining partition fences unless their land is held in common or the parties otherwise agree. K.S.A. 29-301. "Partition fences" have been described as follows:

"Generally, a partition or division fence is a fence erected on the dividing or boundary line between the lands of adjacent owners In reference to use, a partition fence is a common fence, that is to say, a fence which each of the adjoining landowners may make use of as part of his inclosure, and it is not erected solely to prevent animals from crossing division lines, but also to protect real property from being trespassed upon in any way or for any purpose and to mark the boundaries of the inclosed land and the possession of the person claiming title thereto." 35 Am. Jur. 2d Fences § 6 (1967).

The purpose of a partition fence is not only to keep out animals, but to delineate the boundary between adjacent parcels of land. K.S.A. 29-101 and K.S.A. 29-301, then, are not in conflict and are not mutually exclusive. Therefore, the fact that the 1986 session of the legislature amended the statutes concerning liability of owners and possessors of animals does not negate the duty of adjoining landowners to build and maintain partition fences, notwithstanding the use to which each landowner makes of his land.

Very truly yours,



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