



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

March 25, 1983

MAIN PHONE (913) 296-2215  
CONSUMER PROTECTION 296-3751  
ANTITRUST 296-5299

ATTORNEY GENERAL OPINION NO. 83- 43

Thomas H. Sullivan  
Phillips County Attorney  
P. O. Box 571  
Phillipsburg, Kansas 67661

Re: Fences -- Partition Fences -- What Occupants Not  
Required To Contribute Towards Partition Fence

Synopsis: The responsibility to comply with K.S.A. 29-101  
and 29-301 is relieved by K.S.A. 29-309 only if  
a landowner or occupier does not want his/her  
land enclosed and the land is used or occupied  
in common with the adjoining landowner or occu-  
pier. County commissioners, acting in their  
capacity as fence viewers, may order adjoining  
landowners to contribute to the cost of erection  
and maintenance of a partition fence unless both  
requirements of K.S.A. 29-309 are satisfied.  
Cited herein: K.S.A. 29-101, 29-301, 29-309.

\* \* \*

Dear Mr. Sullivan:

You have requested an opinion from this office regarding the  
responsibilities of the board of county commissioners in their  
capacity as fence viewers pursuant to K.S.A. 29-201 et seq.  
Specifically, you inquire as follows:

"When may the County Commissioners, in their  
capacity as fence viewers, order that a parti-  
tion fence be built and maintained and a por-  
tion of the expense thereof assessed against  
one of the adjoining land owners who does not  
wish his land to be fenced?"

You state further that this issue arises as a result of a  
dispute between adjoining farmers, one of which uses his

land for pasture while the other cultivates his land for crops. The farmer who cultivates his land for crops contends that K.S.A. 29-309 relieves him of a duty to contribute to the cost of a partition fence.

K.S.A. 29-101 states as follows:

"All fields and enclosures shall be enclosed with a fence sufficiently close, composed of posts and rails, posts and palings, posts and planks or palisades, posts and wire, rails alone, laid up in the manner commonly called a worm fence, or turf, with ditches on each side, of stone, or a hedge, composed either of thorn or Osage orange."

K.S.A. 29-301 provides as follows:

"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. 29-309 states as follows:

"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."  
(Emphasis added.)

In Griffith v. Carruthers, 86 Kan. 93 (1911) the Court determined the intent of the fence laws to be, inter alia, 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." 86 Kan. at 94.

The legislature has apparently recognized in K.S.A. 29-309, that factual situations may arise where application of the statutory requirement to build and maintain a partition fence is not necessary. Two conditions precedent must be satisfied in order for K.S.A. 29-309 to be 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. The final clause of K.S.A. 29-309 is helpful in clarifying the legislative intent in this regard. That clause specifies that if an occupant "encloses or uses his land otherwise than in common, he shall contribute to the partition fence as in this act provided."

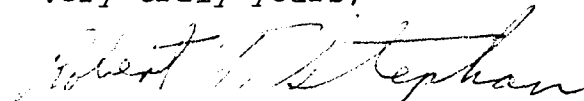
In the factual situation presented herein the adjoining landowners apparently are not using their respective parcels in common, where one farmer cultivates his land for crops while the other utilizes his land for pasture. See, Hewitt v. Jewell, 12 N.W. 738, 39 Iowa 37 (1882) wherein the court discusses the term "in common" 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." Id. at 739. (Emphasis added.)

Therefore, K.S.A. 29-309 appears to be inapplicable and both adjoining landowners should be required to contribute in equal shares to the erection and maintenance of a partition fence pursuant to K.S.A. 29-101 and 29-301.

In conclusion, the responsibility to comply with K.S.A. 29-101 and 29-301 is relieved by K.S.A. 29-309 only if a landowner or occupier of land does not want his or her land enclosed and the land is used or occupied in common with the adjoining landowner or occupier. County commissioners, acting in their capacity as fence viewers may order adjoining landowners to contribute to the cost of erection and maintenance of a partition fence, unless both requirements of K.S.A. 29-309 are satisfied.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Robert Vinson Eye  
Assistant Attorney General