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S E R I E S

Kansas Fence Law

**Kansas State University
Agricultural Experiment Station
and Cooperative Extension Service**

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Border Wars: The Building and Maintaining of Partition Fences

For rural landowners, perhaps one of the most common and contentious issues involves disputes concerning partition fences. Partition fences are those that separate adjoining lands. Kansas has numerous laws concerning partition fences, but recent court opinions have pointed out the inadequacies of some of those provisions.

General Rules

In general, the owners of adjoining lands are required to build and maintain in good repair all partition fences in equal shares, unless the parties agree otherwise.¹ In practice, however, many adjoining landowners adopt the “right-hand” or “left-hand” rule — they face each other at the mid-point of their fence and agree to build and/or maintain the portion of the fence to either their respective right or left. But in Kansas, the law states that building and maintenance is to be in equal shares rather than in halves.²

Kansas is a fence-in jurisdiction.³ That means that livestock owners are required to fence their animals in.⁴ But, as stated above, state law requires that the owners of adjoining lands build and maintain in good repair all partition fences in equal shares.⁵ That sometimes creates problems when a livestock owner shares a partition fence with a crop farmer or other landowner who does not graze livestock and, hence, has no need for a fence. In addition, if the adjacent nonlivestock owners do not participate in the maintenance of their share of the partition fence, and injury results to them because of the defec-

tive fence that they were required to maintain, they cannot recover for damages caused by the adjacent landowner's stock.⁶ Also, a nonlivestock owner will be held liable to others who are damaged by the neighbor's livestock escaping through the defective partition fence.⁷

Kansas law does indeed provide that if nonlivestock owners do not want their land enclosed, they cannot be forced to build or pay for an equal share of any partition fence.⁸

The statute states:

"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 ..."⁹

By its language, two conditions must be satisfied before the statute applies — one party must not want their land enclosed, and the adjoining tracts must be used in common. Unfenced tracts are not used in common when they are used for different purposes (i.e., crop raising and cattle grazing). Thus, when a crop farmer (or other nonlivestock owner) adjoins a livestock owner, both adjoining landowners must contribute an equal share to the building or maintaining of a partition fence because the tracts are not used in common. While K.S.A. 29-309 has never been interpreted by an appellate court in Kansas, the Kansas attorney general has twice opined that the statute applies only to relieve a landowner from responsibility for sharing equally the cost of building and maintaining partition fences when the land is used in common and the complaining party does not want the fence.¹⁰

Procedure for Handling Fence Disputes

In some instances, adjoining landowners may come to an agreement as to how to allocate the responsibility between themselves for the building and/or maintenance of a partition fence. If an agreement is reached, it may be wise to put the agreement in writing and record it in the register of deeds office in the county where the fence is located. If the adjoining landowners cannot reach an agreement concerning fence building and/or maintenance, the “fence viewers” should be called.

Under Kansas law, the county commissioners in the county where the fence in question is located are the fence viewers.¹¹ They either may act together collectively as a board, or any two of them¹² may be appointed to serve as the fence viewers. Either of the adjoining landowners may apply to the fence viewers to resolve the conflict. The fence viewers will view the fence in controversy and then assign to each party, in writing, an equal share or part of the fence to build, maintain, or repair. The decision of the fence viewers is recorded at the register of deeds office in the county where the fence is located¹³ and, while they are acting as fence viewers, their decision is final, conclusive, nonappealable, and binding upon the parties and all succeeding occupants of the land.¹⁴

However, if the commissioners do not appoint “any two of them” to serve as the fence viewers, any decision concerning fence building and/or maintenance is deemed to be an opinion of the county commissioners as a board and is appealable under K.S.A. 19-223.¹⁵ If either party decides to disregard the ruling of the fence viewers, the other party may erect, repair, or maintain the entire fence

and charge the nonperforming party for its share of the cost of the fence plus interest and attorney fees, if legal action is necessary for collection.¹⁶

However, a recent Kansas Court of Appeals opinion requires the fence viewers be called not only to make an initial view of the fence, but also to view the fence whenever there is any subsequent argument between adjacent landowners concerning the partition fence.¹⁷ Thus, if one party disregards the initial ruling of the viewers, the other party cannot build the nonperforming party's portion of the fence or make necessary repairs until the viewers have made a second view and determined that the fence in question needs to be built or repaired. After the repairs have been made, a bill cannot be sent to the nonperforming party until the viewers have made a third view to certify the work and the amount claimed due.¹⁸

What Type of Fence Can Be Required?

Generally, the fence viewers can require the parties to build only what is a legal fence in the county. They cannot require a higher-quality fence. A legal fence, by law, is a three-wire barbed wire fence,¹⁹ but other types of fences in addition to barbed wire can be legal fences under Kansas law.²⁰ However, since the county commissioners can enact more stringent legal fencing requirements on a county-wide basis, they could require these higher standards to be followed by adjoining landowners in partition fence controversies.²¹

Are Fence Maintenance Statutes Constitutional?

While there is no recorded appellate court opinion in Kansas construing the constitutionality of the portion of the Kansas fence statutes requiring nonlivestock owners to build and maintain an equal share of a partition fence, challenges have been made in other states with similar statutes.²²

For example, in a 1989 Vermont case,²³ a nonlivestock owner refused to contribute toward the maintenance of a partition fence with his livestock-owning neighbor. The livestock owner built the fence and then brought an action against the nonlivestock owner to recover for payment of the nonlivestock owner's share of the cost of building the fence. The nonlivestock owner asserted that the fence law was unconstitutional, and the Supreme Court of Vermont agreed. The Iowa Supreme Court was also recently faced with a similar factual setting and held that the existing fence statute requiring nonlivestock owners to build and maintain partition fences in equal shares to be constitutional.²⁴

In a 1997 Pennsylvania case,²⁵ the plaintiff owned property in a town bordered on three sides by the defendant's property. During the time of the parties' ownership of the properties, no fence had ever existed on or near the boundary between the parties' properties. The plaintiff, in accordance with Pennsylvania law, requested that the court order the defendant to pay an equal share of the cost of erecting a division fence between the properties. The defendant refused. The court, in construing the fence law, did not strike the fence law down on constitutional grounds, but noted that while the statute required adjoining landowners to erect division fences, the statute

also focused on whether the fence was a “sufficient” fence as required by law. To be a “sufficient” fence, the court reasoned, a fence must keep livestock fenced in to protect other persons and property from trespassing livestock. As such, the court held that the fence law did not apply to persons not owning livestock and that such persons are not required to share the cost of a partition fence with a livestock-owning neighbor. The court thus reasoned that this meant a fence must be construed as having been built for a particular purpose for the statute to apply (i.e., to protect property from trespassing livestock). As such, the court held that the fence law did not require an adjoining landowner who does not keep livestock to share the cost of a fence with a livestock-owning neighbor.

Responsibility for Highway Fences

In some states, it is conventional to expect landowners to build highway fences. Other states, such as Kansas, have resolved the issue by delegating to the state highway commission or department of transportation the responsibility to build and maintain highway fences.

In a recent Kansas case, the scope of the duty of the Kansas Department of Transportation (KDOT) with respect to the maintenance of highway fences was at issue. The Kansas Supreme Court, in reversing the judgment of the Kansas Court of Appeals and reinstating a jury verdict against KDOT of \$1.2 million, held that KDOT has a duty to maintain a highway in a reasonably safe condition.²⁶ The duty, the court reasoned, included a duty to maintain highway fences, and that KDOT’s breach of that duty contributed to the injuries and damages that the plaintiff sustained. The court reasoned that the evidence supported

a finding that livestock entered the highway by crossing a downed highway fence, rather than through a nearby double-box culvert that KDOT was not responsible for fencing. The court rejected KDOT's argument that it had a duty to maintain only highway fences behind which livestock grazed.²⁷

Concluding Thought

The best way to avoid fence disputes with adjoining landowners is to maintain communication and have at least a general understanding of the Kansas rules involving partition fence building and maintenance. Many conflicts may be able to be resolved by mutual agreement of the parties. If an irreconcilable dispute does arise, it may be best to involve the fence viewers as soon as possible. In any event, it remains clear that good fences make good neighbors.

Endnotes

- 1 K.S.A. 29-301.
- 2 Id.
- 3 K.S.A. 29-101.
- 4 Id. See also K.S.A. 47-122.
- 5 See supra note 1 and accompanying text. See also *Griffith v. Carrothers*, 86 Kan. 93 (1911) (intent of partition fence law is that adjoining landowners are under obligation to maintain partition fences in equal shares).
- 6 K.S.A. 29-401.
- 7 Id. See, e.g., *Smith v. Ott*, 100 Kan. 136, 163 Pac. 918 (1917).
- 8 K.S.A. 29-309.
- 9 Id.
- 10 See Kan. Att'y. Gen. Op. No. 83-43 (Mar. 25, 1983) and 87-28 (Feb. 16, 1987).
- 11 K.S.A. 29-201.
- 12 Id.
- 13 K.S.A. 29-304.

- 14 K.S.A. 29-304.
- 15 See *Kaplan v. Johnson County Commissioners*, 269 Kan. 122, 3 P.3d 1270 (2000).
- 16 K.S.A. 29-305.
- 17 *Schwartz v. Kunze*, 22 P.3d 618 (Kan. Ct. App. 2001).
- 18 *Id.* The court seemed persuaded by the supposed need of having the fence viewers see the situation before action is taken and direct what is to be done.
- 19 K.S.A. 29-105.
- 20 See K.S.A. 29-102.
- 21 K.S.A. 29-105(b); K.S.A. 29-109(b).
- 22 The argument is that fence statutes requiring a nonlivestock owner to contribute toward the building and/or maintenance of a partition fence that the nonlivestock owner does not need or want constitutes a taking of the nonlivestock owner's private property without just compensation, in violation of the Fifth Amendment.
- 23 *Choquette v. Perrault*, 153 Vt. 45, 569 A.2d 455 (1989).
- 24 *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995).
- 25 *Fogle v. Malvern Courts*, 701 A.2d 265 (Pa. Supr. Ct. 1997).
- 26 *Reynolds v. Kansas Dept. of Transportation*, 43 P.3d 799 (Kan. 2002), rev'g, 30 P.3d 1041 (Kan. Ct. App. 2001).
- 27 Before reversal by the Kansas Supreme Court, the Kansas Court of Appeals had held that KDOT need not build and maintain livestock-tight fences, reasoning that the purpose of a highway fence is to restrict vehicular access to a roadway, rather than keep livestock fenced in. *Reynolds v. Kansas Dept. of Transportation*, 30 P.3d 1041 (Kan. Ct. App. 2001), rev'd, 43 P.3d 799 (Kan. 2002).

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