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Kansas Fence Law

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Overview

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. Those laws involve such issues as the construction of fences and what a fence is to be built of, what is deemed to be a “legal” fence, liability for damages caused by livestock that escape their enclosure, the maintenance of partition fences, the role of the county commissioners serving as fence viewers in settling fence disputes and rules for handling stray animals.

General Rules

Partition fences and location issues. Kansas law specifies that a partition fence is to be placed on the line between tracts of land owned by different persons, but also does allow for a partition fence to be located entirely on side of the boundary.¹ Having a fence located on one side of the actual property boundary may not raise an issue concerning ownership of the land that is fenced, but if such a fence has been in place for long-enough time *and* the adjacent landowners have, over time, come to believe that the fence marks the boundary then the fence may become the actual boundary regardless of what a deed or survey says. So, in an agricultural setting, usage of property may determine property boundaries more often than do surveys. On this point, there are two different, but related theories that may apply to determine the amount of land owned by the adjacent landowners.

Adverse possession. Under the adverse possession theory, a landowner may acquire title to property by making an open and notorious use of the property for 15 years.² This theory can be utilized

¹ Kan. Stat. Ann. §§29-316; 317.

² Kan. Stat. Ann. §60-503. *See, e.g.*, Wright v. Sourk, 45 Kan. App. 2d 860, 258 P.3d 981 (2011)(adverse possession established via placement of playground equipment and other personal property on the disputed land along with grass maintenance activity and placement of a shed, for the required 15-year statutory timeframe); Chesbro v. Douglas County Commissioners, 39 Kan. App.2d 954, 186 P.3d 829 (2008)(state successfully claimed adverse possession over disputed strip of land against private landowner; prior owner of tract entered into agreement with county more than thirty years before plaintiff purchased property that established line fence where construction was physically possible (and inside actual

if the adjacent parties know that the fence between their properties is not on the boundary but do know where the actual boundary is located (thus, the possession is knowingly adverse) and one party is benefitted by the misplaced fence, but the other party doesn't take any action to remedy the problem within the statutory timeframe.

Doctrine of practical location. Alternatively, the doctrine of practical location can be used in situations where the parties know that the fence is not on the boundary, but don't know where the actual boundary is located. Thus, one party has a good faith belief of ownership. Similarly, after 15 years of usage of a fence of the boundary in this situation the fence can become the actual boundary between the tracts.

Partition fences – building and maintenance issues. 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.³

Note: The duty to maintain a partition fence confers on the landowner the privilege to lawfully enter onto the adjoining landowner's property at reasonable times and in a reasonable manner to maintain the fence.⁴

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.⁵ Of course, adjacent landowners can execute a written fence agreement specifying the part of the fence that each party is responsible for building or maintaining. Such an agreement can be recorded and thereby become part of the land records that will bind subsequent owners of the properties.

Kansas as a fence-in jurisdiction. Kansas is a fence-in jurisdiction. That means that livestock owners are required to fence their animals in.⁶ 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.⁷ 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. But, if an adjacent non-livestock owner does not participate in the maintenance of their share of the partition fence, and injury results to them because of the defective fence that they were required to maintain, they cannot recover for damages caused by the adjacent landowner's stock.⁸ Also, a non-livestock owner will be held liable to

surveyed boundary) as intended boundary; county had operated under belief of ownership and had maintained disputed strip via weed killing and mowing).

³ K.S.A. §§29-301; 308.

⁴ *Muhl v. Bohi, et al.*, 37 Kan. App.2d 225, 152 P.3d 93 (2007)(genuine issue of material fact existed as to whether the amount of encroachment was reasonable to repair the fence); see also *Evenson v. Hind*, No. 102,995, 2011 Kan. App. Unpub. LEXIS 788 (Kan. Ct. App. Sept. 23, 2011)(substantial evidence present to support trial court's finding that the defendant acted reasonably and did not commit a trespass when entering the plaintiffs property to maintain a partition fence).

⁵ Kan. Stat. Ann. §29-301. The statute also says, “...so long as the parties continue to occupy or improve such lands, unless otherwise agreed.”

⁶ Kan. Stat. Ann. §29-101. See also Kan. Stat. Ann. §47-122, stating that it is unlawful for any livestock to run at large.

⁷ See *supra* note 3 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; case involved hedge fence and its legal requirements).

⁸ K.S.A. 29-401.

others who are damaged by the neighbor's livestock escaping through the defective partition fence that the non-livestock owner is required to maintain.⁹

On the other hand, Kansas law provides that if non-livestock owners do not want their land enclosed, they cannot be forced to build or pay for an equal share of any partition fence.¹⁰ The statute states:

“No person not wishing his land enclosed, and not occupying or using it *otherwise than in common* [emphasis added], 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”¹¹

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 non-livestock 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.¹²

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 county Register of Deeds office in the county where the fence is located. However, 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 (or their designees) in the county where the fence in question is located are the fence viewers.¹³ Any action taken by the county board on the findings/recommendations of the fence viewers (or their designees) must be by a majority vote.

When acting as fence viewers, the commissioners may act together collectively as a board, or any two of them¹⁴ may be appointed to serve as the fence viewers. Either of the adjoining landowners may apply to the fence viewers to resolve the conflict.¹⁵ 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

⁹ *Id. See, e.g.,* Smith v. Ott, 100 Kan. 136, 163 Pac. 918 (1917).

¹⁰ K.S.A. 29-309.

¹¹ *Id.*

¹² See Kan. Att’y. Gen. Op. Nos. 83-43 (Mar. 25, 1983) and 87-28 (Feb. 16, 1987).

¹³ K.S.A. 29-201. For fences that are on the boundary between counties, the chairmen of the county commissioners of the respective counties are to serve as the fence viewers, and if they cannot agree on a fence dispute, they are to choose a third party from the county fence viewers in the two counties. Any fencing decision reached in such situations must be recorded in each of the counties to be binding and effective. Kan. Stat. Ann. §29-314.

¹⁴ *Id.*

¹⁵ It is important to note that the fence viewers have jurisdiction to handle disputes concerning the *building or maintenance of partition fences*. They cannot order an existing fence to be moved. Kan. Att’y. Gen. Op. No. 2002-42 (Sept. 12, 2002).

located¹⁶ and, if they are acting as the “fence viewers,” their decision is final, conclusive, non-appealable, and binding upon the parties and all succeeding occupants of the land.¹⁷ 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. 19-223.¹⁸ Under that statute, notice of appeal must be served on the board’s clerk within 30 days after the board makes its decision. Also, the party appealing the board’s decision must provide a bond and pay necessary costs.

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 (at one percent per month) and attorney fees, if legal action is necessary for collection.¹⁹

Note: A 2001 opinion of the Kansas Court of Appeals requires that 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.²⁰ 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.²¹ 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.²²

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 barbed wire fence containing at least three wires,²³ but other types of fences in addition to barbed wire can be legal fences under Kansas law.²⁴ Here are the details on the specific types of fences allowed by Kansas law:

- The following types of fences must be at least four feet high:²⁵
 - Post and rails
 - Post and palings

¹⁶ K.S.A. 29-304.

¹⁷ *Id.* Any decision of the fence viewers must be recorded in the office of the register of deeds of the appropriate county. Kan. Stat. Ann. §29-306.

¹⁸ See *Kaplan v. Johnson County Commissioners*, 269 Kan. 122, 3 P.3d 1270 (2000).

¹⁹ K.S.A. 29-305. Any amount recovered, with costs, are a lien against the land of the non-performing party. *Id.*

²⁰ *Schwartz v. Kunze*, 22 P.3d 618 (Kan. Ct. App. 2001). The court construed Kan. Stat. Ann. §§29-301 through 305 together and focused on the language of Kan. Stat. Ann. 29-§304 that states, “When any controversy shall arise about the rights of the respective owners in partition fences, or their obligations to keep up and maintain the same in good repair, and if they cannot agree among themselves, either party may apply to the fence viewers.” The court believed that the statutory language appeared to apply to both the original dispute and to any subsequent arguments over the obligation to keep up the fences.

²¹ The applicable statute, Kan. Stat. Ann. §29-303, makes no mention of the fence viewers making such views.

²² *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.

²³ Kan. Stat. Ann. §29-105.

²⁴ Kan. Stat. Ann. §29-102.

²⁵ *Id.* See also *Prather v. Reeve*, 23 Kan. 627 (1880).

- Posts and planks
 - Palisades
 - Stone
 - Posts and wires
 - Turf
- Rail fence (i.e., a “worm” fence) – must be at least four and one-half feet high to the top of the rider, must be thoroughly staked and ridered (or, if not staked and ridered, have the corners locked with strong rails, stakes or posts), and the bottom rail must not be more than two feet from the ground;²⁶
 - Stone fences must be at least 18 inches wide at the bottom and 12 inches wide at the top;²⁷
 - Turf fences must be thoroughly staked and ridered, and must have a ditch on the outside that is at least two feet wide at the top and three feet deep;²⁸
 - Hedge fences must be high enough and thick enough to enclose domestic animals (other than cats and dogs);²⁹
 - Post and wire fences must be comprised of posts that are of ordinary size for fencing purposes and set in the ground at least two feet deep and not more than 12 feet apart, with holes through the posts or staples on the side not more than 15 inches apart, to admit four separate strands of fence wire not smaller than No. 9, with rollers and levers at distances which keep the wire straight and firm.³⁰
 - In the judgment of the fence viewers, a brook, river, creek, ditch and equivalent constructions may be deemed a legal fence.³¹
 - Below are the rules for barbed wire fences.³² However, it is important to note that the board of county commissioners of any county can, by resolution, establish construction requirements that are more stringent than the statutory requirements.³³ In that event, for fences that are on a county line, the least restrictive requirements for fence construction apply.³⁴
 - At least three wires;
 - Third wire from the ground not less than 44 inches nor more than 48 inches from the ground;
 - Bottom wire must be between 18 and 24 inches from the ground;
 - Center wire must be equidistant between the upper and lower wires
 - All wires must be well stretched and barbed;

²⁶ *Id.* The two-foot requirement applies to all fences composed of rails or lumber.

²⁷ *Id.* See also *Bertram v. Burton*, 129 Kan. 31 (1929)(a stone wall is a legal fence).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Kan. Stat. Ann. §29-103.

³¹ Kan. Stat. Ann. §29-104.

³² Kan. Stat. Ann. §29-105

³³ *Id.*

³⁴ *Id.*

- Barbs must average not more than nine inches apart;
 - The barbed wire must be composed of two wires not smaller than No. 13, or one wire no smaller than No. 9, or be wires having not less than 950 pounds of breaking strength;
 - All wires must be securely fastened to posts;
 - Posts must not be more than two rods apart and not less than 20 inches in the ground;
 - Posts must set in a workmanlike manner or be not more than 48 feet apart, with slats placed perpendicularly, not more than 12 feet apart, between the posts and fastened to the wires by staples, or with holes in the slats.³⁵
- Requirements for electric fences:³⁶
 - At least one 14-gauge wire (or its equivalent) not more than 48 inches from the ground that is deemed by the fence viewers to be equivalent to other legal fences.³⁷ However, the board of county commissioners could elect to declare that an electric wire fence is not a legal fence in the county.³⁸

However, since the county commissioners can enact more stringent legal fencing requirements on a countywide basis, they could require these higher standards to be followed by adjoining landowners in partition fence controversies.³⁹

Liability for Trespassing Animals

In fence-in jurisdictions such as Kansas, if livestock escape through an owner's faulty fence, the owner is liable for any resulting damages.⁴⁰ However, if the fence is in good shape, the livestock owner is generally not liable absent a showing of negligence.⁴¹ Evidence of negligence includes such things as gates having been left open, the fence being improperly constructed or maintained, knowledge that the animals were in heat requiring a stronger enclosure or a closer watch, or knowledge that the animals were outside their enclosure and the owner made no attempt to return them.⁴²

³⁵ Suspension fences are not subject to the statutory requirements for barbed-wire fences. *Id.*

³⁶ Kan. Stat. Ann. §29-109.

³⁷ An electrically charged fence cannot be erected or maintained in contact with public utility poles or lines or in any manner where there is a danger or possibility of unreasonable interference with or damage to the equipment or service of a public utility without the permission of the public utility. *Id.* Also, the public utility furnishes electricity to power the fence is not liable in the event of a power failure to anyone impacted by the loss of power to the fence. *Id.*

³⁸ *Id.*

³⁹ K.S.A. 29-105(b); K.S.A. 29-109(b)(pertaining to electric fences).

⁴⁰ Under Kan. Stat. Ann. §47-122, a domestic animal, other than a cat or dog, may not run at large – which means that the animal's owner must utilize reasonable precautions to prevent escapes. *See, e.g., Clark v. Carson*, 188 Kan. 261, 362 P.2d 71 (1961). Peacocks are normally considered domestic animals and may not run at large, but they are not "livestock" for purposes of Kan. Stat. Ann. §47-122 (which allows the county sheriff to take livestock running at large into custody and retain them in a secure holding area). As such, non-livestock domestic animals (such as Peacocks) that run at large can create liability issues for the owner. Kan. Att'y. Gen. Op. No. 93-102, 1993 Kan. AG LEXIS 87 (Jul. 26, 1993). Kan. Stat. Ann. §47-122 states that, "It shall be unlawful for any domestic animal, other than dogs and cats, to run at large." While the statute uses the word "unlawful, the statute is a civil liability statute rather than a criminal liability statute. Kan. Att'y. Gen. Op. No. 2001-54, 2001 Kan. AG LEXIS 54 (Dec. 18, 2001).

⁴¹ *See* Kan. Stat. Ann. §47-301, *et seq.* *See also Walborn v. Stockman*, 10 Kan. App. 2d 597, 706 P.2d 465 (1985).

⁴² *See, e.g., Cooper v. Eberly*, 211 Kan. 657, 508 P.2d 943 (1973)(farmer had knowledge that his horses had escaped onto the highway which created a duty on the farmer's part to take reasonable precautions to prevent future escapes).

The same rules apply when livestock wander onto a public roadway and cause injury to a motorist. In most fence-in jurisdictions, the animal's owner must be shown to have been negligent. That is the rule in Kansas.⁴³ However, some fence-in jurisdictions (but not Kansas⁴⁴) apply the doctrine of *res ipsa loquitor* in livestock/automobile collision cases. The doctrine is a procedural technique that can be used to shift the burden of proof to the livestock owner. In other words, if the doctrine were applied and its elements satisfied, the animal owner would have to prove that owner was not negligent for failing to keep the animal enclosed.

Distrain. If a neighbor's animals trespass onto an adjoining property owner's land and the adjoining property owner's land is lawfully fenced, the adjoining owner may have a right to distrain the animals. Kansas law allows a landowner that has been damaged by trespassing livestock to retain the trespassing animals until payment has been made for the damages and the reasonable cost of distraint.⁴⁵ The livestock owner must be notified within 24 hours of distraint being utilized.⁴⁶ If the owner can't be found, the sheriff is to be notified. Once notice is given, the animals can only be held for five days without bringing legal action against the livestock owner to recover the damages incurred.⁴⁷

Alternatively, the sheriff can be summoned to retrieve the livestock and hold them in custody.⁴⁸ The sheriff is to give notice to the livestock owner within 24 hours after receiving the livestock, and the owner then has 10 days to claim the livestock and pay actual costs of keeping and maintaining the livestock.⁴⁹ If the livestock are not claimed and paid for within the 10-day period, the livestock will be sold at public auction.⁵⁰ Kansas law details how the proceeds of sale are to be applied, but there is no provision for the payment of damages to the individual damaged by the trespassing livestock.⁵¹

If the trespassing livestock are strays (i.e, the owner is not known or cannot be found), the sheriff must be notified within 24 hours.⁵² The party feeding and caring for the strays is entitled to an agister's lien for the cost of the feed and care,⁵³ but the statutory requirements for dealing with strays must be strictly followed to obtain the lien and avoid being in unlawful possession of livestock.⁵⁴

Other Issues

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 non-livestock owners to build and maintain an equal share of a partition fence, challenges have been made in

⁴³ See, e.g., *Walborn v. Stockman*, 10 Kan. App. 2d 597, 706 P.2d 465 (1985); *Abbott v. Howard*, 169 Kan. 305, 219 P.2d 696 (1950); *Wilson v. Rule*, 169 Kan. 296, 219 P.2d 690 (1950).

⁴⁴ *Harmon v. Koch*, 24 Kan. App.2d 149, 942 P.2d 669 (1997).

⁴⁵ Kan. Stat. Ann. §29-408; Kan. Stat. Ann. §47-123.

⁴⁶ Kan. Stat. Ann. §47-124.

⁴⁷ *Id.*

⁴⁸ Kan. Stat. Ann. §47-122a(a).

⁴⁹ Kan. Stat. Ann. §47-122a(b).

⁵⁰ Kan. Stat. Ann. §47-122a(c).

⁵¹ Kan. Stat. Ann. §47-122(d).

⁵² Kan. Stat. Ann. §47-230.

⁵³ Kan. Stat. Ann. §58-207.

⁵⁴ *Chasteen v. Childers*, 218 Kan. 519, 546 P.2d 935 (1976).

other states with similar statutes.⁵⁵ For example, in a 1989 Vermont case,⁵⁶ a non-livestock 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 non-livestock owner to recover for payment of the non-livestock owner's share of the cost of building the fence. The non-livestock owner asserted that the fence law was unconstitutional, and the Supreme Court of Vermont agreed. The Iowa Supreme Court was also faced with a similar factual setting and held that the existing fence statute requiring non-livestock owners to build and maintain partition fences in equal shares to be constitutional.⁵⁷

In a 1997 Pennsylvania case,⁵⁸ 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 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.

Railroad fences. Typically, landowners do not have any responsibility to build or maintain railroad fences. Instead, railroads are responsible for damages caused to animals that are hit by a train regardless of whether they were negligent or not.⁵⁹ Livestock owners do not have to establish that the railroad was negligent.⁶⁰ However, the liability of a railroad can be waived by the adjacent owner by contract.⁶¹ But, railroads can avoid liability if they enclose their tracks with a lawful fence. Adjacent landowners can require the railroad to enclose its right-of-way with either a lawful fence or a hog-tight fence,⁶² but

⁵⁵ The argument is that fence statutes requiring a non-livestock owner to contribute toward the building and/or maintenance of a partition fence that the non-livestock owner does not need or want constitutes a taking of the non-livestock owner's private property without just compensation, in violation of the Fifth Amendment. *See, e.g.*, *In re Fence Viewing Petition of Bailey*, 626 N.W.2d 190 (Minn. Ct. App. 2001)(state fence law requiring contribution by a non-livestock owner for installation of a partition fence not unconstitutional because non-livestock owner not deprived of all reasonable uses of their land and their property would benefit from the fence by providing freedom from intrusion by neighboring livestock and increased privacy).

⁵⁶ *Choquette v. Perrault*, 153 Vt. 45, 569 A.2d 455 (1989).

⁵⁷ *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995).

⁵⁸ *Fogle v. Malvern Courts*, 701 A.2d 265 (Pa. Supr. Ct. 1997).

⁵⁹ Kan. Stat. Ann. §§66-295 through 66-299.

⁶⁰ *Roman v. St. Louis-San Francisco Railway Company*, 120 Kan. 585, 245 P. 115 (1926)(gate on a railroad right-of way must conform to the legal fence requirements; defendant liable for injuries to animals on the tracks because of a defective gate and farmer entitled to attorney's fees). It is also not a condition precedent to recovering damages from a railroad for an owner's livestock that are struck by a train that the livestock owner own the land through which the railroad's right-of-way passed or that adjoined the right-of-way. *Kirby v. Missouri-Kansas-Texas Railroad Company*, 123 Kan. 353, 254 P.2d 1036 (1927).

⁶¹ *Atkinson v. Thompson*, 182 Kan. 389, 320 P.2d 850 (1958).

⁶² Kan. Stat. Ann. §66-308.

cannot require the railroad to maintain an electric fence.⁶³ If the railroad fails to fence-off its right-of-way, Kansas law provides a procedure for landowners to follow in getting such a fence built.⁶⁴ Issues can also arise, however, when railroads abandon lines.

Public roads through private pastures. In Kansas, it is possible that a public road may exist through a privately-owned pasture by authorization of the county commissioners.⁶⁵ In other words, the county commissioners can permit a gate and fence to be placed over and across certain public roads, but they cannot authorize the locking of a gate that would prohibit general public access to the road.⁶⁶ In these situations, the road can be either auto-gated or cattle-guarded. If a gate is used and is left open when it is to remain closed, it is a misdemeanor subject to a \$100 fine.⁶⁷

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 placing a common law duty on the state highway commission or department of transportation the non-delegable responsibility to keep the highways in a reasonably safe condition.⁶⁸ 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 Court of Appeals and reinstating a jury verdict against KDOT of \$1.2 million, held that KDOT has a duty (non-delegable) to maintain a highway in a reasonably safe condition.⁶⁹ 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 which KDOT was not responsible for fencing off. The court rejected KDOT's argument that it only had a duty to maintain highway fences behind that enclosed livestock grazed.⁷⁰

Note: The Court's opinion involves KDOT's responsibility with respect to the maintenance of *highway* fences – fences along state highways. In some counties, so-called fence relocation agreements have been entered into with private landowners who own land along county roads such that the fence is located entirely on the landowner's property and is the landowner's fence with the landowner having the duty to maintain the fence.⁷¹

Criminal Penalties. It is a crime to willfully leave a gate open or willfully cut wires, mutilate or tear down a fence.⁷²

⁶³ Kan. Stat. Ann. §66-308(b).

⁶⁴ Kan. Stat. Ann. §§66-309; 66-310.

⁶⁵ See Kan. Stat. Ann. §§68-126 through 68-128a.

⁶⁶ Kan. Att'y. Gen. Op. No. 78-316, 1978 Kan. AG LEXIS 90 (Sept. 28, 1978).

⁶⁷ Kan. Stat. Ann. §68-127.

⁶⁸ *Trout v. Koss Construction Company*, 240 Kan. 86, 727 P.2d 450 (1986).

⁶⁹ *Reynolds v. Kansas Dept. of Transportation*, 273 Kan. 261, 43 P.3d 799 (2002), *rev'g*, 30 P.3d 1041 (Kan. Ct. App. 2001).

⁷⁰ Before reversal by the Kansas Supreme Court, the 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*, 273 Kan. 261, 43 P.3d 799 (2002).

⁷¹ In such situations, if the landowner wishes to retain ownership of the strip of land between the fence and the road, it is important that the landowner continue to assert acts of ownership over the strip, and perhaps record an agreement with the county detailing such an understanding so that a claim of adverse possession cannot be successfully asserted against the landowner.

⁷² Kan. Stat. Ann. §29-107. The crime is a misdemeanor subject to a fine of up to \$50.

Conclusion

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.