Posts and Palings, Posts and Planks

by Alvin Peters

In May 1854 the U.S. Congress passed the Kansas-Nebraska Act which established the Kansas Territory. A territorial legislature was chosen in March 1855, and at its first session in July 1855 it enacted a fence law. As recently as November 1985, Kansas legislators were still trying to develop an all-encompassing, enforceable fence law. During the intervening one hundred thirty years, numerous modifications and three major revisions have affected the legal definitions and requirements for fences in the state of Kansas. No fewer than forty-three state court decisions have concerned themselves with defining and interpreting the law governing fences throughout Kansas. In examining fence law in Kansas, however, one must begin before territorial days with the federal and state laws that applied before 1854. Although the federal government did not enact a fence law until 1885, there were common law precedents for fencing requirements in the United States. These were carried to Kansas by emigrants from both the northern and southern states.

Unfortunately, the common law as applied to fencing practice in the United States and its territories during the 1850s was anything but consistent. In New England, common law held that the stock owner was responsible for his animals and was, therefore, responsible for the building of fences to control his herd. This interpretation came to be known as herd law. In the American South, however, common law followed the interpretation originally held in Great Britain: the farmer was responsible for protecting his crop from livestock and was, therefore, responsible for building the fences. This interpretation came to be known as fence law. While the herd law was a fence-in policy, the fence law was a fence-out policy. It was the concept of fence law, with the responsibility of fencing out the livestock resting with the farmer, that was in practice in Kansas during the 1850s and which was adopted by the territorial legislature in 1855. This fence law has retained its basic tenets for more than a century despite being modified by lawmakers over the years.

In 1870 legislators from Crawford County insisted that a herd law be passed, applying to only their county. The legislature complied, later adding the provision that other selected counties could adopt the herd law through county option. By 1871 not only Crawford, but twelve other counties, had adopted the herd law. Letters to newspapers indicate that at the time there was at least temporary support for the herd law in these areas because a fence law was not viable where hedges had yet to mature to form fencing. The following year, legislators from ten more counties insisted that their home counties be included in the herd law, and the legislature again complied. The passage of these statutes effectively muddled policy governing fences throughout the state and the responsibility of liability if fences were not constructed. Of the seventy-two counties that had been established by the end of 1872, most recognized the fence laws. With at least thirteen counties petitioning the legislature for herd law at county option, however, it cannot be conceded that fence law was the law of the land in Kansas.

The question of whether the farmer or the stockman should ultimately be responsible for building fences was widely debated in newspapers across the state, Through-

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1. Sam Brownback, Kansas Fence Laws and the Law of Trespassing Livestock, Ag Law Series (Manhattan: Kansas State University), 1-3. A review of United States Codes from 1800 to 1885 reveals the lack of federal law until 1885.
out 1871 and 1872 the Walnut Valley Times in Butler County, which had adopted the herd law in 1872, printed numerous letters from concerned readers. An article reprinted from the Atchison Weekly Champion summarized the positions quite well:

It is no doubt true that in many counties of the State, and especially in our remote frontier counties, a herd law is not only desired by the people, but imperatively demanded. It is also true that in our more thinly settled counties the farms are generally fenced, and it seems to be a hardship, oppressive and unnecessary, to compel those who have fenced their farms to either keep their cattle under the eye of the herder, or within their enclosures.

Fences, it is true, are the greatest expense of a farmer in this country. Timber is scarce and high, and fences are an enormous aggregate to our farmers, not only in their first cost, but in the sum expended annually in their necessary repair. If it was possible to dispense with them altogether, our farmers would be relieved of a burden that is heavier than any other that they have to meet.

The author of this article evidently wanted to be even-handed in his discussion of the problems confronting all types of farming operations for he pointed out the issues facing both the stockman and the farmer:

Probably four-fifths of our farmers, too, are not stock raisers except in a very small way. And the question naturally suggests itself: Is it right to compel four-fifths of the farmers and land owners, who are not stock raisers, to provide, at enormous expense, fences to keep out the cattle belonging to other people, who are stock raisers?

On the other hand it may be said, and truly, that the business of stock raising is one of the greatest and most important in our State; that the stock raisers create a demand for produce of the agriculturists; that a general herd law will entail unnecessary burdens upon stock raisers on a small scale; and that the only way to make the great bodies of unimproved land held by non-residents and speculators of any worth to the State is to allow free ranges for stock.

The questions of a general herd law is not, therefore, wholly one-sided. There are many arguments in favor of such a law: many against it. Widely diverse interests, each important to the welfare of the State, favor and oppose it. Possibly a law allowing each county in the State to vote upon the question, a majority of the laws for or against to decide whether it should be enforced or not, might be regarded by the Courts as a general law, and sustained. If so, a way to harmonize conflicting interests may thus be opened.\(^6\)

As early as February 1871, the Kansas Supreme Court was required to rule on Darling v. Rodgers, a case involving herd law versus fence law, but which failed to indicate the law to take precedence. Originally, Charles Rodgers of Saline County had sued Jonathan Darling of the same county because Darling’s cattle had broken through a fence and damaged Rodgers’ crops. Darling maintained that his cattle were attended and not running at large, and, therefore, since Saline County had adopted the herd law, he was not liable for damages. Darling lost the first case and appealed to the supreme court where he lost again because the high court found the Fence Law of 1868\(^7\) to be constitutional while the Herd Law of 1870 was found to be unconstitutional. Thus, the virtually identical herd law passed in 1871 was, by implication, also unconstitutional. Justice David J. Brewer wrote that Darling lost his case because the Kansas Constitution required all laws to be applied uniformly. Brewer further noted that if one county utilized herd law while a neighboring one did not, there was no way to declare the liability in any case that involved property owners residing in different counties because each landowner could comply with the law of his respective county. It was even conceivable that no fences would be built and that such action would thwart the intent of both herd law and fence law. Seemingly in response to the decision in Darling v. Rodgers, the 1872 Kansas State Legislature modified the herd law to allow all counties the option of adoption. The legislature’s action still left unresolved the problem of an inconsistent policy which had been outlined clearly in Brewer’s written decision, that of the law of the county, rather than law of the state, taking precedence. This inconsistency remained, however, until 1929 when the legislature finally adopted herd law as the statewide requirement.\(^8\)

While the responsibility for building the fence was debatable, the definition of what constituted a legal fence was not. The 1855 territorial legislature defined materials as posts and rails, posts and palings, posts and planks or palisades, turf, a hedge, or just rails. During the 1860s, legislators added stone and wire to the list of legal fencing materials; the 1883 legislature added barbed wire; and a 1985 legislative interim committee proposed the addition of electric fences. Beginning in 1855, statutes have attempted to regulate fencing. For example, a turf fence had to be at least four feet high, staked, and flanked on either side by a ditch; each ditch

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6. Walnut Valley Times, January 26, 1872.
7. The Fence Law of 1868 replaced the territorial law of 1855 but in essence it merely added to the list of materials considered to be legal fencing. Kansas Reports (Topeka: Public Printer, 1872) 7:592-600.
Since 1855, Kansas statutes have defined what constitutes a "legal" fence. Materials such as posts and planks, stone and wire, barbed wire, and posts and palings have been named as legal fencing, and statutes have stipulated such specifics as legal fence height, distance between posts, depth of post holes, and the number of planks or strands of wire that constitute a legal fence.
was to be three feet wide at the top and three feet deep, anything less did not constitute a legal turf fence. Since 1868 the law regarding fences has stipulated the height of fences, the distance between posts, the depth of the post holes, the height of the bottom plank or wire above the ground, the number of planks or strands of wire, and the weight of the wire.9

Prather v. Reeve (1880) has been the only dispute heard by the Kansas Supreme Court regarding these requirements. In Chase County, where fence law was in force, Julia A. Reeve originally sued John T. Prather because some of his cattle had gotten into her field and damaged a crop. The lower court found that Mrs. Reeve could collect damages of $67.50 because her fence, of post and plank, was substantial and averaged four feet in height. In his appeal, Prather contended that the law stipulated four feet rather than an average of four feet and pointed out that Mrs. Reeve's fence was only 3 feet 11 inches in one place. The supreme court reversed the lower court's decision and found in favor of Prather.10

Partition fences—those separating the land of one farmer or stockman from that of another farmer or stockman—added the element of cooperation or shared responsibility to the aspects of building and maintaining fences in Kansas. Common practice required each landowner to pay half of the cost of building the fence and to maintain the half of the fence which was on his right as he faced the fence from his property. In most cases this worked well, but it was not statutory law and, therefore, could not be legally enforced. In some instances the owners could not agree, and each would build a fence on his own land running parallel to the property line with the resulting space between fences being called a "devil's lane." In 1861 the legislature formalized by statute these common practices regarding partition fences providing that the cost of building and maintaining the fence be shared equally, but it did not specify how this division was to be made.11

While most landowners continued to follow the tradition that came with a partition fence, others developed agreements which would supersede statutory law, as illustrated by the Kansas Supreme Court's decision in Berry v. Carter (1877). Several farmers in Chautauqua County had agreed to submit any disputes regarding partition fences to a panel of three arbiters; each of the two landowners would select an arbiter, and those chosen would then appoint the third member of the panel. Just such a panel reviewed the dispute between Montgomery Carter and Harrison Berry and found in favor of Carter. Berry responded by filing suit in Chautauqua County District Court on the grounds that the panel's decision was not binding. He asserted that the arbiters had no basis in law and that the agreement between the farmers had only been a verbal one. The district court found for Carter because the agreement had been made and was followed. Upon Berry's further appeal, the supreme court affirmed the lower court's ruling by stating that the oral agreement was binding and that the agreement between landowners took precedence over state law.12

The informal agreement that called for a panel of three arbiters to settle the original dispute between Carter and Berry was not very different from the concept of fence viewers which had been allowed initially in the 1855 territorial law as it pertained to partition fences. The law called for a panel of three viewers who had been selected by the two parties to the dispute; however, the law was amended in 1868 to designate the township treasurer, trustee, and clerk as the official viewers. Any two viewers would be considered sufficient to resolve the conflict and their fees were to be shared equally by the two parties to the dispute. If a disagreement arose regarding the viewers' findings, the district court was empowered to act. The law gave the viewers the final decision in questions of the legality of the fence; if the viewers decided that the use of a river next to the property was a legitimate fence, it was legal. In 1894 the law was again amended to name the county commissioners as the fence viewers and to give the district court the discretion in cases of dispute.13

While the law provided for fence viewers, it did not state that their findings had to be recorded in any specific place. For that reason it is difficult to ascertain if the instances where viewers' findings were recorded are the only occasions upon which they were used. In Greenwood County only seven uses of viewers were recorded between 1885 and 1914, and only ten viewers' findings were recorded in Butler County between 1884 and 1894. While the scarcity of records indicating the

9. Statutes of the Territory of Kansas (1858), 410; Statutes of the State of Kansas, 1862 (Topeka: State Printer, 1862), Ch. 111, pp. 66-65; Statutes of the State of Kansas, 1869 (Lawrence: Public Printer, 1869), Ch. 46, pp. 486-87; Session Laws of Kansas, 1883 (Topeka: Kansas Publishing House, 1883), Ch. 113, pp. 167-68.
11. Laws of Kansas, 1861 (Lawrence: Kansas State Journal, 1861), Ch. 37, pp. 158-60; James Hoy, "Devil's Lanes" (original manuscript from newspaper column, "Plains Folk," possession Thomas Bern). 12. Laws of Kansas, 1861, Ch. 37, pp. 184-86; Kansas Reports, 10: 135-41.
13. Statutes of the State of Kansas, 1885, 416-17; Statutes of the State of Kansas, 1888, 487-88; Kansas Statutes Annotated, 1886 (Topeka: Department of Administration, 1886), Ch. 29:01, p. 337. For additional reference to fence viewers see Kansas Reports, 36:48-54.
use of fence viewers may indicate that they were rarely used, it may be that these instances were not recorded officially. Another possible reason for this anomaly could be the decision in Prather v. Reece. One of Prather's contentions had been that fence viewers had not been used to determine the legality of Mrs. Reece's fence. On this issue the court ruled that while viewers were allowed by the law, they were not mandatory. 14

Even when fence viewers were asked to settle disputes regarding partition fences, their presence did not preclude eventual resolution in the courts. While the 1880 Prather case was the first mentioning fence viewers to be decided by the Kansas Supreme Court, three more cases appeared on the court's docket before 1890. In considering Grey v. Edrington (1889), the court held that the Woodson County District Court was correct in ruling that the viewers had the final say in who would maintain specific portions of a partition fence. It reversed the district court, however, and agreed with the plaintiff, Lottus Grey, when it ruled that courts could overturn any monies awarded by the viewers. Further interpretation of the powers of the viewers was rendered in the decision of Snyder v. Bell (1884) when the court found that Bell was indeed due reimbursement for maintaining L. N. Snyder's part of the fence. Bell's reimbursement, however, could only accrue from the date of the viewers' findings; expenses for any work done prior to that time was not deemed collectible. In the third case dealing with viewers, Robertson v. Bell (1887), the supreme court echoed its 1877 ruling in Berry v. Carter. John H. Robertson and J. M. Bell had agreed verbally that Bell would be responsible for more than half of the fence that separated the property of the two, but Bell later called fence viewers to rule on the issue. The viewers, who were later upheld by the district court, overruled the oral agreement. In Robertson v. Bell, the supreme court stated that the verbal agreement was a contract and that Bell could not, therefore, collect the expenses for maintaining more than half of their shared fence. 15

The supreme court only heard these four cases regarding fence viewers and their roles in settling disputes over partition fences, but between 1872 and 1917, it heard six cases concerned with various aspects of the law that dealt with partition fences. In the first case, Baker v. Robbins (1872), the court implied that two or more property owners could enclose land with a single fence rather than be forced to build separate enclosures. As this issue was not the actual question in Baker v. Robbins, the ruling was not seen as definitive. In 1891, however, the court cited Baker in its ruling on Missouri Pacific Railway Co. v. Shumaker and confirmed its 1872 implication. Lavina Shumaker was one of a group of property owners who had fenced their pastures together. Two of Mrs. Shumaker's cows had gotten out of the pasture, wandered onto the railroad tracks, and had been killed. Mrs. Shumaker sued the railroad for damages in Miami County District Court which ruled that because of the state's statutes of 1889 and the fact that the pasture was fenced under the requirements of Baker v. Robbins, the plaintiff was entitled to damages. The Missouri Pacific appealed, claiming that the 1872 case did not speak directly to the question. The supreme court, however, ruled in Mrs. Schumaker's favor, thus confirming its 1872 implication regarding the legality of communally fenced pastures. 16

The provisions of the 1861 law, as it refers to the removal of partition fences, was tested in 1910 in McAfee v. Walker. The law stated that if two farmers or stockmen built a partition fence by mutual agreement, one could withdraw from the agreement only by giving notice to the other party forty days prior to removal of the fence. Although the supreme court did not specify whether the notice was to be written or verbal, it did stress the need for court evidence, implying a preference for a written statement. Both the notice and the removal could take place only between December 1 and the following March 1. O. C. Walker of Shawnee County gave McAfee proper notice of his intent to remove the shared fence, but he discontinued maintenance of the fence prior to giving formal notice. The supreme court reversed the decision of the Shawnee County District Court and noted that Walker had been responsible for maintaining his half of the fence up until the time of his giving proper notice to McAfee. 17

Two additional cases dealing with the responsibility for maintaining a partition fence were Markin v. Priddy (1889) and Smith v. Out (1917). In the first case, Robert Priddy incorporated his neighbor's standing fences as part of the fence that he built. When Daniel Markin sued to recover losses from Priddy's cattle breaking through the fence that Markin had built, he was awarded damages by the Shawnee County District Court. Reversing the lower court's ruling, the supreme court held that if a farmer built a partition fence using fences originally built by his neighbors, he was not responsible for main-

14. Kansas Reports, 23:627-31; fence viewers records, offices of the registers of deeds, Greenwood County Courthouse, Eureka, Kansas, and Butler County Courthouse, El Dorado, Kansas.
taining the previously existing fences. In *Smith v. Ott*, Fred Ott sued when Smith's cattle went through a defective section of the partition fence which was the section for which Smith was responsible. Ott was joined in the suit by several surrounding landowners from Greenwood County, and the district court found in their favor. The supreme court concurred by finding that in the question of partition fences, the party that was negligent in maintaining the fence was liable for damages. 18

According to the supreme court's 1911 ruling in *Griffith v. Carrothers*, however, some types of maintenance could be considered excessive. The case involved a hedge built by Hugh Griffith as a partition. He wanted J. T. Carrothers to pay half of the cost and to maintain half of the partition, but Carrothers objected because he claimed that the hedge was unnecessarily ornate. (The nature of this ornamental hedge was not further described.) The court ruled that Carrothers had to pay half the cost of the minimum fence, but that he was not required to pay for the ornamentation. 19

The case of *Conklin v. Dust* (1896) is unusual among those dealing with partition fence law because it is the only one ever to be decided in the Kansas Court of Appeals. J. E. Dust had built a fence on his land just inside the property line; a tenant, who rented the adjoining farm from its owner, R. R. Conklin, extended the fence. After the tenant moved, Conklin refused to maintain the fence because he had not agreed to building it. Dust sued in the district court of Elk County and won. The appeals court then reversed the decision, because Conklin, of Kansas City, was not a party to the agreement and because the fence was entirely on Dust's property. The court stated emphatically that this applied only when the owner did not give prior approval and when the fence was not built on the property line. 20

The largest number of cases involving state court rulings on some aspect of the fence laws in Kansas have dealt with the question of liability. With the exceptions of *Berry v. Carter* and *McAfee v. Walker*, all of the cases which have been discussed have revolved around determining liability. Although most supreme court rulings rather narrowly apply to the individual dispute in question, general patterns in the court's rulings can be identified. The decisions usually favored the owner of the fence. The sole exception was in *Fillmore v. Booth* (1883) where the court ruled that G. A. Fillmore, an Osage County farmer, could not collect damages because it was Fillmore's fence that was defective. Although Fillmore claimed correctly that Joseph Booth's cattle were running at large, Osage County did not have a herd law. Therefore, it was Fillmore's fence that was the problem and not Booth's cattle. At the opposite end of the spectrum is the supreme court's most overly pro-fence ruling—the case of *Hazelwood v. Mendenhall* (1916). In this decision the court stated that if cattle were enclosed by a legal fence and crops were not, the stock owner was not liable for damages to crops, regardless of the existence of a herd law in the county. 21

To determine liability, it was necessary to define precisely when stock were considered to be running at large. This issue was not specifically addressed by the courts until *Bertram v. Burton* (1929). This case not only dealt with defining when stock were running at large, but also interpreted the question of liability. On the question of whether Joe Burton's bull was running at large and, therefore, in violation of the herd law, the supreme court ruled that because Burton was driving it down the road, it was not running at large. On the question of liability, however, the court held that Burton was liable for damages because Bertram's field was enclosed by a sufficient fence. In overturning the decision of the Washington County District Court, the supreme court continued the debate as to whether herd or fence law was to have precedence in Kansas. It should be added that matters were more confused by the passage of the Herd Law of 1929. This stated that the herd law was in effect statewide and no longer by county option; the existing fence laws were not rescinded, however. A similarly convoluted question regarding herd and fence laws created a question of liability in the most recent case heard by the Kansas Supreme Court regarding fence law. In its decision in *Clark v. Carson* (1961), which turned on the fact that Clark had a fence when Carson did not, the court overturned the Labette County District Court's award of damages to Bud Carson. The court reasoned that because Johnnie J. Clark's cow had gotten out of an area that was legally fenced, it was not running at large and he was, therefore, not liable for damages. 22

To the ongoing discrepancy between herd and fence law, the 1874 legislature added a new amendment to its fence statutes that required railroads to fence off their tracks to avoid killing stock. In the broadest terms this

might be deemed an extension of fence law, but the various interpretations rendered by the Kansas Supreme Court only served to cloud the issue further because the court attempted to establish liability on a case-by-case basis rather than to interpret the law in a broader fashion. The test case for the 1874 statute came in *Aiken, Topeka, and Santa Fe v. Yates* (1879) and revolved around the incident in which two of Yates' hogs were killed by a Santa Fe locomotive. While the 1872 herd law applied to both cattle and hogs, depending upon the county and township options, Yates lived in Wakarusa Township in Douglas County where the herd law for hogs had not been adopted. Therefore, he did not have to fence his hogs with a fence, but according to the 1874 changes to the fence law, the railroad did.

The district court ruling reflected this argument and found in Yates' favor. The supreme court, however, overturned the decision, ruling that because the railroad ran through Kansas, the state statutes applied and they did not require the building of hog-proof fences. The court seemed actually to nullify the 1874 railroad fence statute in its decision in *Leavensworth, Topeka, and Southwestern Railway Co. v. Forbes* (1887) when it ruled that if hogs were forbidden to run wild in the county, the Railroad did not need to fence at all. This not only modified the Yates ruling but also conflicted with the court's 1871 decision in *Darling v. Rodgers*. The Yates decision was reaffirmed in *Leavensworth v. Republican Valley and Southwestern Railroad Co.* (1889); however, its ruling ignored legal arguments related to the *Forbes* case. Finally, the court clarified its ruling regarding railroad fences in *Missouri Pacific Railway Co. v. Baxter* (1891) and, in effect, overturned its decision in *Forbes*. Baxter, a sheep owner in Dickinson County, brought suit contending that the law required railroads to fence and that *Forbes* had reaffirmed the *Yates* decision because it recognized the option of herd laws. The Missouri Pacific had not built fences in Dickinson County, arguing that the county had a herd law and fences would not have kept sheep off the tracks anyway. The supreme court supported Baxter's arguments and, thus, upheld the 1874 statute that required railroads to build fences.

While decisions prior to *Baxter* tended to favor the railroads, later cases, in which railroads were found not to have built or sufficiently maintained fences, were lost by the railway companies. Two such cases were *Missouri Pacific Railway Co. v. Olden* (1905) and *Roman v. St. Louis-San Francisco Railway Co.* (1928). The latter case also served to establish the definition of the gate as part of the fence; thus, a gate could not be legal if it contained a defective gate.

The problem for the railroads, just as for other builders of fences, had been that either they had not built or had not maintained their fences, and had, therefore, incurred liability. Generally, this liability derived from not having a fence that was strong enough to keep stock out—or in.

The beauty of the hedge fence was that it kept renewing itself, but in order to diminish his possible liability, its owner was required to keep the hedge trimmed, especially if it ran along a public road. On February 20, 1867, the legislature passed a law that provided that hedges of osage orange or hawthorne trees constituted legal fences and provided a bounty of two dollars per year per forty rods of fence for a period of eight years commencing the year that the fence reached the specifications for a legal fence. The legislature reasoned that the lack of trees in many areas hampered farmers and that the hedge bounty would encourage the planting of trees.

The bounty not only became an incentive to plant hedge fences but also became an issue in two supreme court cases. The first, *Marion County v. Hoch* (1881) was reaffirmed in *Marion County v. Winkley* (1882). In the *Hoch* decision the justices agreed that the 1867 law was constitutionally sound and that the bounty was to be paid from the county's general funds, but they did not agree upon which fences the bounty should be paid. Justices David M. Valentine and Albert H. Horton held that the bounty should be paid upon all hedge fences, but Justice Brewer wrote that the application was only proper when the hedge was along a road as that was the only situation in which a genuine public interest existed in the fence.

The public interest in roadside hedges surfaced again in the 1897 legislature, not in relation to the bounty but as a result of untrimmed hedges creating blind intersections. The legislature decided that the public interest gave the county the right to order a

23. *Kansas Reports* (Topeka: Kansas Publishing House, 1879), 21: 613-22; *Kansas Reports* (Topeka: Kansas Publishing House, 1888), 37:445-55; *Kansas Reports* (Topeka: Kansas Publishing House, 1890), 41:776-38; *Kansas Reports* (Topeka: Hamilton Printing Co., 1891), 45: 320-22. The court did allow in the *Baxter* decision that while the railroad's fences had to be animal-proof, hogs could be exempted if they were fenced in already by farmers. While the rationale is understood here, the court did not elaborate.


25. Trimming was not required until 1897.


hedge trimmed and eventually removed if the landowner did not comply with the order to trim. The landowner was allowed thirty days to comply with the trim order, after which time the county could justifiably remove the hedge.

The first of three tests of this section of the fence law was Hartman v. Baldwin, et. al. (1918). John Baldwin, as township trustee, had joined with other township officials and the county road overseer in ordering the removal of F. M. Hartman’s hedge, but Hartman contended that he had been given only twenty-nine days to comply with the order to trim. Hartman lost his appeal before the supreme court because he could not prove that one more day would have made any difference. The case of Chaput v. Demars (1929) also involved the issue of time because Chaput claimed to have made arrangements to have his hedge improved within thirty days of the notice from Cloud County, even though the improvements were not made within the thirty-day period. In its decision the supreme court ruled that Joseph Chaput could not stop Mose Demars from removing the hedge because Chaput had been given sufficient time to carry out the county’s order.

The issue was different in Kansas v. Groenmiller (1991). Mahlon Groenmiller had been ordered by Franklin County to trim all of his hedges in Appanoose Township. When the case went to district court, the decision found in favor of Groenmiller. The supreme court also agreed with Groenmiller for it ruled that since the defendant might have several miles of hedge fences along roadways, the county had to specify which were to be trimmed. It, therefore, became necessary for the county to cite in its notice to landowners which specific portions were to be trimmed.

While several cases involving the responsibility for maintaining roadside hedge fences were heard by the high court following the passage of the 1897 statute regarding hedge fences, cases involving liability did not reach the court until 1922. In Goodale v. Cowley County the Goodale family asserted that the county was responsible for the death of Mrs. F. H. Goodale when she was thrown from a buggy after her horse was frightened by an automobile. The family reasoned that as the accident occurred at an intersection where vision was impaired by an untrimmed hedge fence, the county was liable because it had not ordered the hedge trimmed.

The court ruled that Cowley County was not liable and noted that the horse probably would have been frightened even if Mrs. Goodale had been able to see the automobile. Therefore, the hedge was not a factor in her death.

Three years later, in a case involving two automobiles, the supreme court ruled that the property owner was not liable for an accident that may have been caused by an untrimmed roadside hedge fence. In Bohm v. Racette (1925), Mary and Joseph Bohm sued both Alex Racette, because he owned the untrimmed hedge, and Cloud County, because it had not ordered the hedge trimmed. The Bohms cited Goodale to show liability and noted that their case differed in that no horse was involved. The justices, however, ruled that the cases were not different and asserted that the Bohms had misinterpreted the original case. In rendering their decision, the justices neither logically showed the similarities of the two cases nor explained how a decision based upon the nervousness of a horse could apply to an incident involving two automobiles. This is all the more disconcerting when coupled with the fact that five of the same justices heard both cases. Based on these two decisions, it would seem that neither the owner of the hedge fence nor the county was legally liable if an untrimmed hedge fence contributed to an accident.

One hundred thirty years and forty-three court decisions later, the fence law hardly seems controversial or the source of much future litigation, especially since the most recent case to reach the Kansas Supreme Court was twenty-eight years ago. That does not mean, however, that the fence law is no longer of interest. On November 13, 1985, the legislature’s Interim Committee on Agriculture and Livestock began consideration of a bill that would again change the fence law. The proposed changes, which eventually were not adopted, included adding one more strand to the current requirements for barbed wire fences, requiring fence posts to be no more than one rod apart, and adding electric fences to the types of legal fences. The modifications to barbed wire fences and to distances between fence posts would not have greatly affected litigation involving fence law since the adjustments would apply only to fences constructed after passage of the statute. The addition of electric fences to the list of legal fences, however, contained the potential for legal disputes.
since it is common in some areas to construct an electric fence with only one strand of wire on a temporary fence.  

The necessity of fences seems to be simple, and the statutes regarding fences also seem to be understandable. However, following the fence law can be complicated, and has through time resulted in a seemingly inordinate number of supreme court decisions. The law was often modified by the legislature in response to a temporary condition, such as Crawford County legislat-

ors demanding a herd law option, but these modifications often created new problems. The one instance in which legislators attempted to respond to a discrepancy by passing a herd law—that of 1872—they failed dismally. The court, on the other hand, clouded the issues regarding fence law by rendering contradictory rulings in cases with similar circumstances. Often the court seemed to make its decision first and then to develop the logic for the ruling later. Fences continue to be a necessity in Kansas, and fence law with its companion, but not necessarily compatible, herd law will continue to be the source of litigation wherever there are land, livestock, crops, fences, and liability.