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## FENCING LAWS IN MISSOURI—RESTRAINING ANIMALS

## I. INTRODUCTION

This comment deals with the basic provisions of chapters 270 and 272 of the Missouri Revised Statutes and the disputes which they primarily contemplate. They are: (1) disputes between a landowner<sup>1</sup> and an animal owner with respect to a trespassing animal; (2) disputes between adjoining landowners with respect to their responsibility to erect and maintain a partition fence; (3) disputes between a motorist and an animal owner with respect to a collision that has been caused by an animal that has strayed upon a public highway. The comment does not consider criminal liability that may arise out of an animal trespass; liability of an animal owner for personal injury and property damage caused by a non-trespassing animal;<sup>2</sup> liability of a railroad with respect to trespassing animals;<sup>3</sup> animal trespasses within a municipality;<sup>4</sup> the requirements for adopting optional fencing laws;<sup>5</sup> and one's liability for the removal of a division fence.<sup>6</sup>

## II. DEFINITIONS

*Partition Fence:*<sup>7</sup> A fence which is erected on the boundary between two owners of land. It may or may not be a "division" fence.

*Division Fence:*<sup>8</sup> A fence that has been divided in such a way that one adjoining landowner has the legal obligation to maintain one designated portion of the fence and the other adjoining owner has the legal obligation to maintain the remaining portion of the fence.

*Common Enclosure:*<sup>9</sup> Two adjoining parcels of land which are entirely enclosed by a continuous common fence.

*Interior Fence:*<sup>10</sup> A partition fence which is wholly within a common enclosure.

*Exterior Fence:*<sup>11</sup> A fence that is not situated within a common enclosure. A fence along a public highway is an exterior fence.

1. The word "owner" is used herein to denote a lessee, agister, bailee or owner in possession.

2. See *Humes v. Salerno*, 351 S.W.2d 749 (Mo. 1961).

3. See §§ 270.060, 389.650, 537.260, RSMo 1959.

4. See *Evans v. Holman*, 202 Mo. 284, 100 S.W. 624 (1907); *Spitler v. Young*, 63 Mo. 42 (1876); *Ferry v. Sawyer*, 198 Mo. App. 30, 195 S.W. 574 (Spr. Ct. App. 1917); *Gates v. Crandall*, 123 Mo. App. 414, 100 S.W. 51 (K.C. Ct. App. 1907); § 77.510, RSMo 1959.

5. See §§ 270.080-.160, RSMo 1959; § 272.360 and .370, RSMo 1966 Supp.

6. See § 272.120, RSMo 1959; § 272.320, RSMo 1966 Supp.; § 537.350, RSMo 1959; *Jones v. Derosset*, 185 S.W. 239 (Spr. Mo. App. 1916); see Annot., 8 A.L.R. 1644 (1920); *Nixon, Fences As Monuments Under The Destruction of Landmarks Statute*, 32 Mo. L. Rev. .... (1967).

7. *Jeffries v. Burgin*, 57 Mo. 327 (1874); *Anderson v. Cox*, 54 Iowa 578 (1880).

8. *Busby v. St. Louis, K. C., & No. Ry.*, 81 Mo. 43 (1883); *McLean v. Berkable*, 123 Mo. App. 647, 100 S.W. 1109 (K.C. Ct. App. 1907).

9. *Jackson v. Fulton*, 87 Mo. App. 228 (K.C. Ct. App. 1901); *O'Riley v. Diss*, 41 Mo. App. 184 (K.C. Ct. App. 1890).

10. *Ibid.*

11. *Ibid.*

*Open Range Act of 1808*: Sections 272.010-.050, RSMo 1959. This act requires land owners to fence out freely ranging animals.

*Closed Range Act of 1883*: Ch. 270, RSMo 1959. In general this act requires animal owners to restrain certain animals from running at large, but only in those counties or townships which have elected to adopt the act.

*Senate Bill No. 129, 1967*:<sup>12</sup> This bill abrogates the Open Range Act with respect to most farm animals by making the Closed Range Act applicable to all Missouri counties effective January 1, 1969.

*The 1869 Division Fence Act*: Sections 272.060-.140, RSMo 1959. This act gives an adjoining landowner the right to compel his neighbor to contribute to the cost and maintenance of a partition fence that serves to enclose the reluctant neighbor's lands. It also establishes a remedy for animal trespasses through a division fence.

*The 1963 Fence Act*: Sections 272.210-.370, RSMo 1966 Supp. This act repeals and revises the 1869 Division Fence Act and the Open Range Act. However, it only applies in counties that have elected to adopt it.

### III. THE COMMON LAW AND THE DEVELOPMENT OF MISSOURI'S LAW

#### A. *The Common Law*

##### 1. Trespassing Animals

Because most animals are considered to have certain destructive propensities,<sup>13</sup> a possessor of such a creature has a strict duty under the common law to restrain the animal from trespassing upon the land of another.<sup>14</sup> In effect the law says to this individual: "If you desire to keep a thing which is apt to cause harm to others when not properly restrained, then you must do so at your own risk."<sup>15</sup> This rule seems fair and equitable, and it is in accord with the policy of the law that seeks to stringently protect the landowner's right to enjoy his land free from unwarranted intrusions.<sup>16</sup>

12. Mo. Laws 1967.

13. Although this appears to be the reason for retaining the rule, its roots are considered to lie in primitive laws that rendered an owner liable for injury inflicted by any of his chattles whether they were animate or inanimate. HOLMES, *THE COMMON LAW*, 22-24 (1881); PROSSER, *THE LAW OF TORTS*, 310 (3rd ed. 1964); WILLIAMS, *LIABILITY FOR ANIMALS*, 127 (1939).

14. The action was made a trespass action to which a plea of due care was not a defense in the 1353 case of 27 Lib. Assis. pl 56; *McKee v. Trisler*, 311 Ill. 536, 143 N.E. 69 (1924); see Annots., 33 A.L.R. 1305 (1924); 88 A.L.R.2d 709 (1963); *RESTATEMENT, TORTS* § 504 (1938); Comment, 34 *IOWA L. REV.* 318 (1949).

15. In *Rylands v. Fletcher*, 35 L.J. Ex. 154, 156 (1866), *aff'd* L.R. 3 H.L. 330 (1868), Blackburn, J. stated that ". . . the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and that, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God . . . ."

16. In *Haigh v. Bell*, 41 W. Va. 19, 23 S.E. 666 (1895) the court stated at pages 21-22, "In every case where one man has a right to exclude another from

When the animal of another does trespass the common law gives the landowner three remedies. First, he may always eject the animal provided that he does not unreasonably injure it or a third person's property in doing so.<sup>17</sup> Second, and in addition to the ejection, he may bring a trespass action for the damage done by the animal on the fiction that an owner trespasses with his animal and is liable as if he had personally committed the trespass.<sup>18</sup> Since the liability is strict, the animal owner's exercise of due care does not constitute a defense.<sup>19</sup> Thus whether he has adequately fenced the animal is immaterial.<sup>20</sup> In the alternative,<sup>21</sup> and as a third remedy, the landowner may distrain the animal as security<sup>22</sup> for the resulting damage and for the cost of keeping it during the detention.<sup>23</sup> These rules, however, generally do not apply to the trespasses of wild animals,<sup>24</sup> of dogs,<sup>25</sup> of cats,<sup>26</sup> nor of animals driven out of their enclosure by an act of God,<sup>27</sup> by the

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his land, the common law encircles it, if not inclosed already, with an imaginary fence . . . . In brief, the common-law doctrine is that the owner of cattle must fence them in. He is not compelled to fence the cattle of others out. His imaginary close does that."<sup>28</sup>

17. *Heald v. Grier*, 12 Mo. App. 556 (St. L. Ct. App. 1882); WILLIAMS, *op. cit. supra* note 13, at *li* and 90-91.

18. 12 Hen. VII, Keil. 3 b., 72 Eng. Rep. 156 (K. B. 1496) in which case the court declared "where my beasts of their own wrong without my will and knowledge break another's close I shall be punished for I am the trespasser with my beasts . . . for I am held by the law to keep my beasts without their doing wrong to anyone." Page v. Hollingsworth, 7 Ind. 317 (1855); Annot., 88 A.L.R.2d 709, 719 (1963).

19. Page v. Hollingsworth, *supra* note 18; *Ellis v. Loftus Iron Co.*, [1874] L.R. 10 C.P. 10.

20. "[I]f otherwise adequate fences are negligently or intentionally broken down by a third person, or destroyed by a convulsion of nature, and as a result the livestock escape and enter another's land, their possessor is liable." RESTATEMENT, TORTS, § 504, comment *d.* (1938).

21. *Vaspor v. Edwards*, 12 Mod. 658, 88 Eng. Rep. 1585, 1588 (1702/3). A distrainer sued the animal owner in trespass after its escape. In holding that a distraint bars an action for trespass, Holt, C.J. stated that the action may be revived if the distrained animal dies. WILLIAMS, *op. cit. supra* note 13, at 195 adds that the action revives where the animal is stolen or if it escapes through no fault of the distrainer.

22. *Kelley v. Easton*, 35 Idaho 340, 207 Pac. 129 (1922); see Annot., 26 A.L.R. 1042 (1923); WILLIAMS, *op. cit. supra* note 13, at 7-120; 4 AM. JUR. 2d *Animals* § 55 (1962).

23. *McPherson v. James*, 69 Ill. App. 337 (1896); Annot., 26 A.L.R. 1042, 1048 (1923).

24. *Petey Mfg. Co. v. Dryden*, 21 Del. 166, 62 Atl. 1056 (1904). Defendant's bees flew into plaintiff's close and stung his cows. The court held that the plaintiff's trespass action was inappropriate. At common law the writ of trespass only applied to *averia* which is a term that covers all domesticated creatures that are part of the productive stock of a farm, for example, oxen, cows, sheep, goats, pigs, horses, asses, and fowl such as geese, ducks, turkeys and chickens. WILLIAMS, *supra* note 13, at 136-137; TRESPASS BY CHICKENS—EFFECT OF INCLOSURE ACT, 9 U. MO. BULL. L. SER. 57 (1915).

25. *Mitten v. Faudrye*, Int. Hil. 22 Jac. Rot. 1019, 79 Eng. Rep. 1259 (K.B. 1626); see Annot., 107 A.L.R. 1323 (1937).

26. *Bischoff v. Cheney*, 89 Conn. 1, 92 Atl. 660 (1914); *Buckle v. Holmes* [1926] 2 K.B. 125; see Annot., 33 A.L.R. 796 (1924).

27. *Russell v. Fernandez*, 131 La. 76, 59 So. 20 (1912) (Enclosure destroyed by storm); *Spitler v. Young*, 63 Mo. 42 (1876) (Animal owner immediately

wrongful act of a third party,<sup>28</sup> or the plaintiff.<sup>29</sup> Nor do they apply to the trespasses of animals that are being driven along a highway,<sup>30</sup> nor to animals that have trespassed through a division fence.<sup>31</sup> In the latter case the rights of the damaged landowner are governed by the terms of the statute or fencing agreement.<sup>32</sup>

## 2. Fencing Obligations Between Adjoining Landowners

In the absence of prescription or agreement, adjoining owners of land have no obligation under the common law to erect and maintain a fence on their common boundary line.<sup>33</sup> The animal possessor's duty is to restrain his stock. Whether he does so by placing them within a fenced area or within a barn is immaterial.<sup>34</sup> It is his prerogative to choose the method and not his neighbor's. Accordingly, a farmer owning fifty head of cattle can not compel his neighbor, who only possesses ten head, or none, to contribute towards the cost and maintenance of a partition fence.

## 3. Animals Straying Upon a Public Highway

The common law imposes no duty to restrain domestic animals from straying upon a public highway.<sup>35</sup> This may be attributed to the fact that they caused

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attempted to recover stock after their enclosure was washed away by a storm—held, city ordinance was not designed to prevent an unavoidable escape); *Rylands v. Fletcher*, *supra* note 15 (dictum).

28. WILLIAMS, *op. cit. supra* note 13, at 181-184 considers that this is "probably" a defense. In support of this conclusion he cites the Irish case of *McGibbon v. McCurry*, 43 Ir.L.T. 132 (1909) in which a defendant was held not liable for an animal's escape through a gate left open by a stranger. *Contra*, RESTATEMENT, TORTS § 504, comment *d* (1939), which states that the intentional act of a third person will not relieve the defendant of liability.

29. In *Town v. Lamphire*, 36 Vt. 101, 104 (1863) the court, in construing a statute that required the restraint of rams, stated that the plaintiff's act must constitute more than mere neglect and that it must be a positive act against which the utmost care of the animal owner could not guard. With respect to a suit for personal injuries inflicted by the trespassing animal, *Hughey v. Fergus County*, 98 Mont. 98, 37 P.2d 1035 (1934) suggests that the defense is not available, while *Hickey v. Freeman*, 198 Iowa 465, 198 N.W. 769 (1924) suggests that it is; see Annot., 88 A.L.R.2d 709, 747 (1963).

30. Where a drover uses reasonable care to control his animals on a public highway a subsequent trespass onto adjoining land will not subject him to liability. *Tillett v. Ward*, [1882] 10 Q.B. 17; *Pattor Title & Trust Co. v. Oswald & Hess Co.*, 322 Pa. 81, 185 Atl. 231 (1936); RESTATEMENT, TORTS § 505 (1938).

31. *O'Riley v. Diss*, *supra* note 9; *King v. Rose*, 3 Keb. 228, 89 Eng. Rep. 258 (1673).

32. *Griffin v. Anderson*, 369 S.W.2d 889 (St. L. Mo. App. 1963); *McLean v. Berkabile*, 123 Mo. App. 647, 100 S.W. 1109 (K.C. Ct. App. 1907) (dictum); *Spaulding v. Nesbitt*, 87 Mo. App. 90 (St. L. Ct. App. 1901).

33. *Villani v. Wilmington Housing Authority*, 106 A.2d 211 (Del. 1954); *Monroe v. Cannon*, 24 Mont. 316, 61 P. 863 (1900); *Van Gorder v. Eastchester Estates*, 137 N.Y.S.2d 789, 207 Misc. 335 (1955); WILLIAMS, *op. cit. supra* note 13, at 203-231. This is because "every man's land is, in the eye of the law, inclosed and set apart from his neighbor's . . . or by an ideal invisible boundary, existing only in the contemplation of law, . . ." 3 BLACKSTONE COMMENTARIES 209.

34. 4 AM. JUR. 2d *Animals* § 49 (1962).

35. *Pennyman v. Alexander*, 229 Miss. 704, 91 So.2d 728 (1957); *Heaths Garage, Ltd. v. Hodges*, [1916] 1 K.B. 206, aff'd [1916] 2 K.B. 370; *Jones v. Lee*, 106 L.T.R. (n.s.) 123, 126 (K.B. 1911); see Annot., 59 A.L.R.2d 1328, 1333 (1958).

travelers slight inconvenience before the twentieth century. Thus an English authority observes:

The former courts leet frequently made it an offence to allow certain animals to wander in the streets of a town. These animals commonly included swine, which were noisome, and unmuzzled mastiff dogs, which were regarded as general mischief-makers. In some towns ducks were brought within the same prohibition, and it was forbidden to milk cows in the streets. But there was no universal principle that animals were not to be allowed to stray in this way; for example, the right to pasture sheep in the streets is expressly recognized in the Beverley custom, and fowls seem to have been accorded complete freedom. As for country districts, no restriction whatever is recorded; traffic moved so slowly that there was comparatively little, and travellers on foot or on horseback do not receive serious inconvenience from straying animals.<sup>36</sup>

However this rule has two qualifications. First, liability attaches if the animal directly attacks a passer-by as a result of a vicious propensity known to the owner.<sup>37</sup> Second, if the animal owner could have reasonably anticipated that injury would result from the animal's presence on the highway a motorist may succeed in a negligence action.<sup>38</sup> In such an action it seems that the motorist must at least plead and prove that the character of the highway, the volume and speed of the traffic thereon, the time of day, and other attendant circumstances were such that they should have led the animal owner to anticipate that injury would result from the animal's presence on the highway.<sup>39</sup> A few courts, recognizing that stray stock constitute an unreasonable risk of harm to passing motorists, dispense with the necessity of such proof and permit the motorist to use the doctrine of *res ipsa loquitur* to establish the animal owner's negligence.<sup>40</sup> But, in the absence of statute, most courts have refused to apply this doctrine.<sup>41</sup> In all cases, since the motorist's complaint is one of negligence, the animal owner may raise the motorist's contributory negligence as a defense.<sup>42</sup>

36. WILLIAMS, *op. cit. supra* note 13, at 378-379.

37. *Pelham v. Spears*, 222 Ala. 365, 132 So. 886 (1931); *Slessor, L. J. in Deen v. Davies*, [1935] 2 K.B. 282, 288.

38. *Lins v. Boeckeler Lumber Co.*, 221 Mo. App. 181, 299 S.W. 150 (St. L. Ct. App. 1927) (Motorist struck mule on busy street near city limits of St. Louis. Mule owner's liability for breach of common law duty was affirmed since the occurrence could have been reasonably anticipated under the circumstances); *Pennyman v. Alexander*, 229 Miss. 704, 91 So. 2d 728 (1957); *Smith v. Whitlock*, 124 W. Va. 224, 19 S.E.2d 617, 140 A.L.R. 737 (1942); *Turner v. Coates*, [1917] 1 K.B. 670; see Annot., 59 A.L.R.2d 1328 (1957).

39. *Smith v. Whitlock and Pennyman v. Alexander*, *supra* note 38.

40. *Mercer v. Byrons*, 200 F.2d 284 (1st Cir. 1952); *Bender v. Welsh*, 344 Pa. 392, 25 A.2d 182 (1942).

41. *Dungan v. Hart*, 107 Ohio App. 431, 159 N.E.2d 903 (1958) (also refusing to find a statutory presumption); *Moon v. Johnston*, 337 S.W.2d 464 (Tenn. App. 1959); see Annot., 59 A.L.R.2d 1328 (1958).

42. *Cox v. Moore*, 394 S.W.2d 65 (Spr. Mo. App. 1965).

B. *Historical Development of Missouri's Law*

## 1. 1808: The Open Range Act

When Missouri adopted the English Common Law in 1816<sup>43</sup> the common law relating to trespassing animals was preempted by existing fencing statutes that had been enacted in 1808.<sup>44</sup> This statute, commonly known as the "Open Range Act" and hereinafter referred to as such, currently comprises the first five sections of chapter 272 of the Missouri Revised Statutes. With respect to domestic animals<sup>45</sup> it completely reverses the common law rule that an animal owner has an absolute duty to restrain his animals from trespassing onto the lands of another.<sup>46</sup> The statute virtually provides the animal owner with a license to pasture his stock freely upon his neighbor's unfenced land.<sup>47</sup> Absent a lawful fence, as defined in section 272.020,<sup>48</sup> the landowner has no legal remedy which he can assert against the owner of a trespassing animal,<sup>49</sup> or stated in another way, as a condition precedent to the rightful assertion of any common law remedy the landowner must establish that the trespass occurred through or over a non-defective portion of a lawful fence that served to enclose his land.<sup>50</sup> Of course an aggrieved landowner may always eject "trespassing" stock, however, section 272.050 will hold him negligent *per se* for an ejection that causes damage to an animal that has trespassed for want of a lawful fence.<sup>51</sup> Even where the landowner can prove the lawfulness of his fence, section 272.030 does not permit him to distrain the animal unless the trespass constitutes a "subsequent" trespass.

Since the promulgation of this "free range" rule there has been a continuous series of legislative and judicial decisions that have each worked to limit its scope. The culmination of these efforts to restrict the animal owner's rights is Senate Bill No. 129, 1967, which abrogates the Open Range Rule with respect to most types of farm animals.

43. 1 Terr. Laws, p. 436 (now § 1.010, RSMo 1959).

44. 1 Terr. Laws 197, § 1-4; Crocker v. Mann, 3 Mo. 472 (1834) (dictum).

45. Section 272.030, RSMo 1959 limits the open range rule to "any horses, cattle or other stock." This has been construed to include chickens [Evans v. McLalin, 189 Mo. App. 310, 175 S.W. 294 (Spr. Ct. App. 1915)], but not animals *ferae naturae* [Canefox v. Crenshaw, 24 Mo. 199 (1857) (buffalo)].

46. Gorman v. Pacific R.R., 26 Mo. 441 (1858).

47. Fenton v. Montgomery, 19 Mo. App. 156 (St. L. Ct. App. 1885); Gillespie v. Hendren, 98 Mo. App. 622, 73 S.W. 361 (K.C. Ct. App. 1903) (dictum).

48. In a situation involving a division fence, Cook v. Cooksey, 300 S.W. 1034 (St. L. Mo. App. 1928) held that substantial compliance with the statute was sufficient.

49. Head v. Powell, 212 Mo. App. 310, 245 S.W. 618 (K.C. Ct. App. 1922); Fenton v. Montgomery, *supra* note 47. According to the dicta in Heald v. Grier, 12 Mo. App. 556, 558 (St. L. Ct. App. 1882) there is no such thing as an animal trespass on unenclosed lands under the Open Range Law.

50. Moore v. White, 45 Mo. 206 (1870).

51. Woods v. Carty, 110 Mo. App. 416, 85 S.W. 124 (St. L. Ct. App. 1905); *But see* Leach v. Lynch, 144 Mo. App. 391, 128 S.W. 795 (Spr. Ct. App. 1910) in which case the court suggests that a defendant may rebut the presumption.

## 2. 1869: The 1869 Division Fence Act

Between adjoining landowners it is likely that the open range rules caused considerable disharmony. Fencing was extremely expensive<sup>52</sup> and in many cases it served to benefit the animal owner as well as the landowner. If a hog farmer desires that his swine be restrained by an enclosure but does not want to spend money for a fence, his neighbors who need protection against the swine but do not need a fence for any purpose of their own, may as a practical matter be forced to provide the fence to protect themselves, with a resulting windfall for the swine owner. Or suppose that adjoining neighbors want to keep their stock separated by a fence, but one owns swine and the other owns cattle; would the cattle rancher agree to erect and maintain half of a more expensive hog-tight fence when a less expensive cattle-tight fence is all he needs? Recognizing the clear need<sup>53</sup> the legislature, in 1869<sup>54</sup> enacted a statute that would require adjoining neighbors to share in the cost and maintenance of a partition fence that would benefit both. Specifically the act states that where a proposed or existing fence serves or will serve to enclose an adjoining owner's land, such adjoining owner may be compelled to pay for half the cost of erecting the fence<sup>55</sup> and be required to maintain that half of the fence in good repair.<sup>56</sup> Whether the fence has been divided by an agreement or by the statutory process, a trespass resulting from the animal owner's failure to maintain his half of the fence entitles the landowner to double damages and a lien on the stock to enforce such right.<sup>57</sup> But if the trespass results from the landowner's failure he is not entitled to any compensation for his loss.<sup>58</sup> By requiring that the partition fence be a portion of a fence that entirely encloses the adjoining neighbor's land<sup>59</sup> the statute attempts to insure that some benefit will accrue to the reluctant party.<sup>60</sup> Thus when one has fenced three sides of his land it is likely that a fourth fence serving to complete the enclosure will benefit him.

A further limitation on the Open Range Act was effected by the 1882 case of *Reddick v. Newburn*.<sup>61</sup> In that case the plaintiff and defendant, an agister, had adjoining fields in a common enclosure. The cows defendant was keeping broke through a fence dividing the two pastures and destroyed the plaintiff's corn. Apparently this fence was not a division fence. The defendant argued that the plaintiff could not recover since the defendant was not an "owner" of the ani-

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52. "The United States Department of Agriculture Report of 1871 estimated that where the cost of fencing in thirty-seven states had amounted to \$1,747,549, 091, the annual cost of repairs in the same era had reached \$93,963,187, so that the expense of upkeep was in many places considered to be more than the gross intake by farmers." McCALLUM, *THE WIRE THAT FENCED THE WEST*, 19-20 (1965).

53. Cases cited note 47 *supra*.

54. Mo. Laws 1869, at 21-22, §§ 1-7 (now §§ 272.060-.110, RSMo 1959).

55. § 272.060, RSMo 1959.

56. § 272.090, RSMo 1959.

57. § 272.110, RSMo 1959, *Mackler v. Cramer*, 32 Mo. App. 542 (K.C. Ct. App. 1888), 48 Mo. App. 378 (K.C. Ct. App. 1892).

58. *Hopkins v. Ott*, 57 Mo. App. 292 (K.C. Ct. App. 1894).

59. § 272.060, RSMo 1959.

60. *Kent v. Lix*, 47 Mo. App. 567 (St. L. Ct. App. 1892).

61. 76 Mo. 423 (1882).

mals within the meaning of section 272.030 of the Open Range Act. The court rejected this argument by holding that the statute only applies to exterior fences, that the fence in question was an interior fence, and that trespasses through such fences are governed by the common law, and that under the common law an agister is strictly liable for the trespasses of animals that he has been charged to care for.<sup>62</sup> In other words, the statute applies outside a common enclosure and the common law applies inside it.

### 3. 1873: The Closed Range Act

With the Open Range Act limited to trespasses through exterior non-division fences, the legislature in 1873 attempted to further narrow its scope by enacting an optional closed range law.<sup>63</sup> This law authorized a county to abrogate the open range rule by adopting a law that would make it unlawful for an animal owner to permit his stock to run at large. Three years later the supreme court found the statute an unconstitutional delegation of legislative power.<sup>64</sup> In 1883 a corrected version of the 1873 law was enacted,<sup>65</sup> and perhaps because of the decision in *State v. Pond*,<sup>66</sup> the constitutionality of this revision has not since been challenged.

Substantively the Closed Range Act applies to most types of farm animals<sup>67</sup> and establishes a law that is nearly identical to the common law.<sup>68</sup> However, like the Open Range Law, it applies only to trespasses through exterior<sup>69</sup> non-division<sup>70</sup> fences. As of this writing most of Missouri's counties have adopted the Closed Range Act,<sup>71</sup> and except where it may be superseded by the 1963 Fence Act, the law will be uniformly applicable throughout the state by January 1, 1969.<sup>72</sup>

### 4. 1928: Protection for Motorists

As noted the common law does not favor the motorist who has been injured

62. *Id.* at 425; *O'Riley v. Diss*, 41 Mo. App. 184 (K.C. Ct. App. 1890); *Gillespie v. Hendren*, 98 Mo. App. 623, 73 S.W. 361 (K.C. Ct. App. 1903); *Barnard v. Weaver*, 224 S.W. 152 (Spr. Mo. App. 1920).

63. Mo. Laws 1873, at 70-71, §§ 1-6.

64. *Lammert v. Lidwell*, 62 Mo. 188 (1876).

65. Mo. Laws 1883, at 26-28, §§ 1-11 (now §§ 270.010 and .030-.110, RSMo 1959).

66. 93 Mo. 606, 6 S.W. 469 (1887); See also *Ex parte Handler*, 176 Mo. 383, 75 S.W. 920 (1903) which discusses the many unsuccessful subsequent attacks on the case, and *State v. Ward*, 328 Mo. 658, 668, 40 S.W.2d 1074, 1078 (1931) which recognizes the constitutionality of the Closed Range Act.

67. § 270.010, RSMo 1959 provides for "any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat." But, § 270.090 permits the voters to exclude any of the species listed.

68. *Jackson v. Fulton*, 87 Mo. App. 228 (K.C. Ct. App. 1901).

69. *Jones v. Habberman*, 94 Mo. App. 1, 67 S.W. 716 (K.C. Ct. App. 1902).

70. *Gilmore v. Harp*, 92 Mo. App. 77 (St. L. Ct. App. 1902).

71. In 1964 an informal survey by mail obtained the following responses: Closed Range counties: 49; Closed Range counties with one or more townships with open range: 7; Closed range only to sheep and swine: 2; Open range: 13; Closed range but having no record of the adoption of the law: 10; Counties not reporting: 33.

72. Senate Bill No. 129, *supra* note 12.

or damaged in a collision with a stray animal.<sup>73</sup> Although one Missouri motorist has recovered without the aid of a statute,<sup>74</sup> it would seem that his burden of proof, the animal owner's qualified right to permit animals to stray upon a public highway,<sup>75</sup> and the Open Range Act which relieves an animal owner of his duty to fence,<sup>76</sup> would not always permit the same success. Accordingly, in 1928 the St. Louis Court of Appeals held that a motorist may base an action upon section 272.010 of the Closed Range Act, which section requires animal owners to restrain their stock from running at large. The court further stated that in such an action a "mere finding of the stock at large is *prima facie* evidence of a violation of the" law.<sup>77</sup> Since the case also contains some dictum to the effect that the animal owner's liability is absolute<sup>78</sup> the legislature added a provision<sup>79</sup> to the statute in 1939<sup>80</sup> expressly providing that an animal owner shall not be responsible for a highway accident if he can establish his freedom from fault. Thus the amendment has been construed as retaining a presumption of fault,<sup>81</sup> but as rebutting the concept of liability without fault.<sup>82</sup> Presumably this protection is only afforded where the collision has occurred in a county that has adopted the Closed Range Act. In Open Range Counties and possibly in counties adopting the 1963 Fence Act, the motorist may still have to assume the risk.

#### 5. 1963: The 1963 Fence Act

Sections 272.210-.370, RSMo 1966 Supp. constitutes the 1963 Fence Act. It revises and suspends the operation of the Open Range Act and the 1869 Division Fence Act, but only if its provisions are adopted by a county election.<sup>83</sup> Although it is not entirely clear, it appears that the 1963 Fence Act constitutes a compromise between the open range and closed range rules, a rejection of the 1869 division fence concept, and a general attempt to enhance the rights of animal owners. With respect to trespasses through exterior non-division fences the act may be construed as permitting an animal owner to defend a trespass on the ground that the enclosure from which the stock escaped was a "lawful" four strand barbed wire fence.<sup>84</sup> With respect to trespasses through division fences the statute appears to grant the landowner no remedy other than a right to repair a

73. See generally pt. III (A) (3) of this comment.

74. *Lins v. Boeckeler Lumber Co.*, *supra* note 38.

75. *Colvin v. Sutherland*, 32 Mo. App. 77 (St. L. Ct. App. 1888).

76. *Kendall v. Curl*, 353 P.2d 227 (Ore. 1960) (permitting animal to run at large in an open range county not negligence as a matter of law).

77. *Moss v. Bonne Terre Farming & Cattle Co.*, 222 Mo. App. 808, 10 S.W.2d 338 (St. L. Ct. App. 1928).

78. *Id.* at 813, 814, 10 S.W.2d at 340, 341.

79. Section 270.010 was amended to include the following: "provided, that said owner shall not be responsible for any accident on a public road or highway if he establishes the fact that the said animal or animals were outside the enclosure through no fault or negligence of the owner."

80. Mo. Laws 1939, at 360-361, §§ 1 and 12797 (now § 270.010, RSMo 1959).

81. *King v. Furry*, 317 S.W.2d 690 (St. L. Mo. App. 1958).

82. *Anderson v. Glascock*, 271 S.W.2d 243 (St. L. Mo. App. 1954).

83. § 272.370, RSMo 1966 Supp.

84. See pt. IV (A) (1) (b) of this comment.

defective fence at the cost of the breaching party.<sup>85</sup> Third, the Act establishes a right to contribution with respect to the cost and maintenance of a division fence, even though the adjoining landowner's property is otherwise unfenced.<sup>86</sup> This is contrary to the concept of the 1869 act that adjoining landowners ought not be compelled to fence unless the fence will benefit both.<sup>87</sup> If the act is construed as impliedly abrogating the Closed Range Act it may also reduce the animal owner's liability for collisions on a highway.<sup>88</sup>

#### 6. 1967: Senate Bill No. 129

The Closed Range Act states that it is unlawful to permit certain animals to run at large,<sup>89</sup> provided that the law is suspended until a county should decide to enforce it.<sup>90</sup> Senate Bill No. 129,<sup>91</sup> enacted during the summer of 1967, repeals the proviso effective January 1, 1969.<sup>92</sup> Thus it purports to make Missouri an entirely Closed Range state. But its scope does not appear quite this broad. Animals that constitute "other stock"<sup>93</sup> and that are not enumerated in the Closed Range Act<sup>94</sup> should continue to be governed by the Open Range Act. Further, as just mentioned, the Closed Range Act may have little application within a county that has elected to adopt the 1963 Fence Act.

Summarizing, Missouri's fencing laws, in counties that have not adopted the 1963 Fence Act, now essentially provide, or will provide by January 1, 1969, that: (1) with respect to animals trespassing through exterior fences other than division fences the common law, to the extent that it has been codified by the Closed Range Act, applies; (2) trespasses through non-division interior fences are governed by the common law;<sup>95</sup> (3) trespasses through division fences are governed by the agreement<sup>96</sup> or by the 1869 Division Fence Act.<sup>97</sup> In most cases the damaged landowner may only complain when the animal has trespassed through the animal owner's half of the fence;<sup>98</sup> (4) with respect to automobile accidents caused by straying livestock the negligence of the animal owner is presumed until rebutted;<sup>99</sup> (5) adjoining landowners have the right to compel

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85. See pt. IV (B)(2)(b) of this comment, and compare sections 272.110 and 272.310.

86. § 272.240, RSMo 1966 Supp. only requires that the fence "border" the reluctant neighbor's land. Under § 272.060 of the 1869 Division Fence Act, the fence must serve to enclose the reluctant neighbor's land.

87. *Kent v. Lix*, *supra* note 60.

88. See pt. IV (B) of this comment.

89. § 270.010, RSMo 1959.

90. § 270.080, RSMo 1959.

91. Mo. Laws 1967.

92. Sections 270.080-.220, RSMo 1959 are the repealed provisions.

93. See note 45 *supra*.

94. Under a similar enumeration an Illinois court found its closed range act not applicable to the trespass of turkeys. *McPherson v. Jones*, *supra* note 23.

95. Cases cited notes 61-62 *supra*.

96. *Hopkins v. Ott*, 57 Mo. App. 292, (K.C. Ct. App. 1894); cases cited note 32 *supra*.

97. *Mackler v. Cramer*, *supra* note 57.

98. *Hopkins v. Ott*, *supra* note 96.

99. *King v. Furry*, *supra* note 81; *Cox v. Moore*, *supra* note 42.

their neighbor to share in the cost and maintenance of a partition fence if it will serve to enclose the reluctant neighbor's land.<sup>100</sup> The rest of this comment will consider how the foregoing rules are or may be qualified.

#### IV. A DETAILED ANALYSIS OF MISSOURI'S FENCING LAWS

##### A. *Disputes Concerning Trespassing Animals*

##### 1. Trespasses Through Non-Division Fences

##### a. *The Closed Range Act*

Generally when an animal trespasses onto the land of another and when the trespass does not occur through or over a division fence<sup>101</sup> the animal owner's liability to the landowner is governed by section 270.010-070, RSMo 1959. This set of statutes currently applies in all of Missouri's counties except for a few remaining open range counties<sup>102</sup> and, perhaps, those counties that have adopted the 1963 Fence Act. By January 1, 1969, the open range counties will also be "closed" by virtue of the enactment of Senate Bill No. 129.

The basic provisions of the Closed Range Act are as follows: Section 270.010, RSMo 1959 provides that it is unlawful for an animal owner to permit certain animals to run at large outside of an enclosure, that if found running at large a person may take up the animal and give its owner notice within three days of the taking-up stating his damages. Thereupon the animal owner must pay all reasonable costs incurred in the keeping of the animal plus any actual damage caused. If the animal owner fails to pay the animal is deemed a stray,<sup>103</sup> and provided the proper procedure is followed, the injured party may carefully use it<sup>104</sup> and acquire title to it.<sup>105</sup> Section 270.020 provides that the three day notice is not necessary if the animal owner has actual knowledge of the restraint.<sup>106</sup> Section 270.030 provides that if the parties cannot agree as to the damages owing, a magistrate may appoint three appraisers to assess the damages. However, this is not an exclusive remedy. Damages may also be proved and recovered in an action at law.<sup>107</sup> Section 270.060 expressly rejects the open range rule by providing that a landowner need not fence against the animals enumerated in section 270.010, and that the animal owner may not assert the lack of a lawful fence as a defense in an action brought by the aggrieved landowner. Section 270.070 makes it clear that the act only applies

100. *Kent v. Lix*, *supra* note 60; *Cook v. Cooksey*, 300 S.W. 1034 (St. L. Mo. App. 1928).

101. *Gilmore v. Harp*, *supra* note 70; *Jackson v. Fulton*, 87 Mo. App. 228 (K.C. Ct. App. 1901).

102. Material cited note 71 *supra*.

103. Chapter 271, RSMo 1959 outlines the procedure for handling strays.

104. § 271.270, RSMo 1959.

105. § 271.160, RSMo 1959. With respect to swine and sheep see § 270.170-.180 and the case of *McCrorry v. Fisher*, 108 S.W.2d 413 (Spr. Mo. App. 1937).

106. *Warren v. Cowden*, 167 Mo. App. 485, 151 S.W. 501 (Spr. Ct. App. 1912).

107. *Bowles v. Abrahams*, 65 Mo. App. 10 (St. L. Ct. App. 1896).

to unattended animals. Section 270.080 suspends the provisions of the act until a majority of the legal voters of a county have elected to enforce it.<sup>108</sup>

The Closed Range Act only applies to the trespasses of an animal that may be classified within the species of horse, mule, ass, cattle,<sup>109</sup> swine, sheep or goat. With respect to all other domestic animals<sup>110</sup> the Open Range Act applies. This will be true even after Senate Bill No. 129 becomes effective since that bill does not repeal the Open Range Act. Accordingly, should turkeys,<sup>111</sup> chickens or other such animals<sup>112</sup> trespass, the landowner, as a condition precedent to his right to impound or sue for damages, must establish that the trespass occurred through or over a "lawful fence" as such fence is defined in section 272.020, RSMo 1959.<sup>113</sup>

It may be generally stated that whenever adjoining owners have agreed to maintain a division fence or have been compelled to do so by operation of the Division Fence Act their rights and obligations with respect to an animal trespass through the fence are measured by the terms of the agreement or the statute and not by the provisions of the Closed Range Act.<sup>114</sup> However, this rule may not apply if the trespass occurs in spite of or because of mutual compliance or non-compliance with the agreement. Such situations are discussed *infra* at pt. IV (A) (2) (a) of this comment.

The Closed Range Act is not applicable to interior fences. The case of *Jackson v. Fulton*,<sup>115</sup> holds that trespasses through such fences are governed by common law rules and not by the provisions of the Closed or Open Range Acts. Substantively the distinction will normally be of no major importance since the closed range and common law rules are nearly identical. However, procedurally, the distinction can be of crucial importance. For instance, in *Jackson v. Fulton*<sup>116</sup> and *Jones v. Habberman*<sup>117</sup> the losing parties tried their cases under the Closed Range Act when the trespass had occurred through an interior fence. Recognizing there could be a valid complaint on a common law theory, nevertheless, the

108. This and subsequent sections governing election procedures are repealed by Senate Bill No. 129, effective January 1, 1969.

109. In other statutes the word "cattle" has been defined as designating all domestic quadrupeds. *Ash Sheep Co. v. United States*, 252 U.S. 159, 167-169 (1920); *State v. Pruett*, 61 Mo. App. 156 (St. L. Ct. App. 1895); *State v. Lawn*, 80 Mo. 241 (1883).

110. § 272.030, RSMo 1959 of the Open Range Act applies to any "horses, cattle or other stock" and has been held to govern the trespass of chickens, *Evans v. McLalin*, 189 Mo. App. 310, 175 S.W. 294 (Spr. Ct. App. 1915), but not the trespass of animals *ferrae naturae*. *Canefox v. Crenshaw*, 24 Mo. 199 (1857) (buffalo).

111. See note 94 *supra*.

112. Domestic geese are required to be restrained under § 270.190, RSMo 1959.

113. An exception to this exception is § 272.230, RSMo 1966 Supp. which imposes liability for the trespass of domestic livestock. But this statute is only effective in counties that have adopted the 1963 Division Fence Act.

114. *Griffin v. Anderson*, 369 S.W.2d 889 (St. L. Mo. App. 1963); *Hopkins v. Ott*, *supra* note 58; *Gilmore v. Harp*, *supra* note 70; *Field v. Bogie*, 72 Mo. App. 185 (K.C. Ct. App. 1897).

115. 87 Mo. App. 228 (K.C. Ct. App. 1901).

116. *Ibid.*

117. 94 Mo. App. 1, 67 S.W. 716 (K.C. Ct. App. 1902).

courts refused to grant relief since such theory was either abandoned or not asserted on trial.

Although the animal owner's liability under the Closed Range Act is strict,<sup>118</sup> exceptions which prevail under the common law,<sup>119</sup> such as a trespass that results from an act of God, may also prevail under the statute.<sup>120</sup> And since the statute only applies to animals running at large,<sup>121</sup> animals that trespass while being driven along the highway under the care of an attendant will not likely render the drover strictly liable. In such case the common law rule will probably apply so as to limit his responsibility to an exercise of ordinary care in keeping them off abutting property.<sup>122</sup> This includes a duty to make a reasonable pursuit after animals that have wandered onto the adjacent land.<sup>123</sup> But if the animal manages to venture past the buffer of abutting land and onto property not adjacent to the highway the drover's liability again becomes strict.<sup>124</sup>

#### b. *Trespasses Through Non-Division Fences—The 1963 Fence Act*

What effect does a county's adoption of the 1963 Fence Act have on the Closed Range Act? Since the 1963 act expressly suspends the operation of the Open Range Act<sup>125</sup> and since it further states that the 1963 Act has no application "to counties which have all or partial open range,"<sup>126</sup> one should properly surmise that the 1963 Act was not intended to abrogate the Closed Range Act. *Expressio unius est exclusio alterius*. However, after first defining a lawful fence as one consisting of at least four strands of barbed wire,<sup>127</sup> the act then states the broad general rule that "all fields and enclosures in which livestock are kept or placed shall be enclosed by a lawful fence."<sup>128</sup> In other words, section 272.220 of

118. *Bowles v. Prentice*, 186 Mo. App. 560, 172 S.W. 429 (St. L. Ct. App. 1915); *Moss v. Bonne Terre Farming and Cattle Co.*, *supra* note 77, at 814, 10 S.W.2d at 341 (dictum); *Jackson v. Fulton*, *supra* note 101 (recognizing the common law and the closed range law as being identical); *Ferry v. Sawyer*, 198 Mo. App. 30, 195 S.W. 574 (Spr. Ct. App. 1917) and *McVey v. Barker*, 92 Mo. App. 498 (St. L. Ct. App. 1902) (as construing city ordinance prohibiting animals from running at large).

119. See pt. III (A)(1) of this comment.

120. *Spitler v. Young*, 63 Mo. 42 (1876). In a replevin action plaintiff's fences were washed away by a storm. He gave immediate chase but was unable to capture the animals. The city impounder defended his possession on a city ordinance similar to the closed range act. The court held that the ordinance did not apply to unavoidable escapes. *But cf. McVey v. Barker*, 92 Mo. App. 498 (St. L. Ct. App. 1902) which distinguishes *Spitler v. Young*, *supra*.

121. § 270.070, RSMo 1959 states that "Nothing contained in this law shall be construed as to prevent owners or other persons from driving any of the species of animals enumerated in this chapter from one place to another or along any public highway."

122. See note 30 *supra*.

123. *Wood v. Snider*, 187 N.Y. 28, 29, 79 N.E. 858, 859 (1907), *reversing* 108 App. Div. 168, 95 N.Y. Supp. 508 (1905).

124. *Id.* at 36, 79 N.E. at 861.

125. § 272.370, RSMo 1966 Supp. contains the suspending provisions.

126. § 272.320, RSMo 1966 Supp.

127. § 272.210, RSMo 1966 Supp.

128. § 272.220, RSMo 1966 Supp.

the 1963 Fence Act states that animal owners are required to restrain their stock from running at large, but only with a four strand barbed wire fence. Of course section 270.010 of the Closed Range Act does not so qualify the animal owner's duty. Under that statute the duty is strict and the lawfulness of the animal's enclosure may not be raised as a defense.<sup>129</sup> Should a pig squirm under the bottom strand of a lawful fence, may the owner be successfully sued under the Closed Range Act or does his compliance with section 272.220 constitute a complete defense? If section 272.220 does not impliedly abrogate section 270.010, then the former serves no purpose. If it does, the qualification which it appears to impose on the animal owner's duty may be negated by the next section of this peculiar enactment.

Section 272.230, RSMo 1966 Supp. states that the trespass of stock is actionable and that an injured party may recover his damages or claim a lien on the animal if the trespass is a "subsequent" trespass. The section does not specifically state that recovery is limited to trespasses caused by animals that have escaped from an unlawful enclosure. Accordingly, it may be argued that section 272.220 does not qualify section 272.230 and that section 272.230 enacts a law similar to the common law or the Closed Range law. However, this interpretation would also render section 272.220 useless. To make that section functional one must conclude that it establishes a standard of care on the animal owner that is less than that required by either the common law or the Closed Range Act, and that it thereby provides him with a defense to a trespass action, the defense being: "I am not liable since my pig crawled through a lawful fence."

If the Closed Range Act is not impliedly repealed by an election to adopt the 1963 Fence Act then section 272.230 will also have no apparent use. Trespasses through external non-division fences would be governed by section 270.010 and trespasses through division fences would appear to then be governed by section 272.310<sup>130</sup> or the contract, and not by section 272.230. Section 272.230 speaks only of "trespasses" and makes no mention of division fences. Also it was taken almost verbatim from section 272.030 of the Open Range Act, a statute which has never been applied to division fences and which has been construed as only applicable to exterior fences.<sup>131</sup> Consequently, to give either section 272.220 or section 272.230 a function, a court may have to conclude that the Closed Range Act has no application in a county electing to adopt the 1963 Fence Act, and that in such case the animal owner's liability for a trespass is not strict. As discussed *infra*<sup>132</sup> this result may also have a significant effect on the animal owner's liability to a motorist for a collision on a highway.

## 2. Trespasses Through Division Fences

A division fence is a fence that has been divided in such a way that one

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129. Cases cited note 118 *supra*.

130. See pt. IV (A) (2) (b) of this comment.

131. *Reddick v. Newburn*, 76 Mo. 423 (1882); *Gillespie v. Hendren*, 98 Mo. App. 622, 73 S.W. 361 (K.C. Ct. App. 1903); *Matthews v. McVay*, 241 Mo. App. 998, 234 S.W.2d 983, 987 (Spr. Ct. App. 1950) (dictum).

132. See pt. IV (B) of this comment.

1967]

adjoining landowner has the legal obligation to maintain one designated portion of the fence and the other adjoining owner has the legal obligation to maintain the remaining portion of the fence.<sup>133</sup> The division of responsibility may be created by prescription,<sup>134</sup> agreement or statute. In the latter case the designation of responsibility is done by fence viewers and a magistrate when properly petitioned by one of the adjoining owners pursuant to statute.<sup>135</sup> Assuming that a fence has been divided in one of these ways, what are the rights of the landowner should his neighbor's stock trespass through the fence?

a. *Trespass Through Division Fence Divided by Agreement*

If the responsibility for the maintenance of a fence has been allocated in accordance with an agreement, the rights of the parties are governed by the contract.<sup>136</sup> If *A's* cow trespasses onto *B's* adjoining corn field through *A's* defective half of an agreed division fence, the breach will give *B* an action for his damages<sup>137</sup> and a common law right to distrain the cow to secure their payment.<sup>138</sup> However, should the trespass occur through *B's* defective fence then *B* has no ground for complaint even though the animal owner was otherwise under a duty to restrain his stock from running at large.<sup>139</sup>

A first exception to this general rule results in the case of a trespass through a *non-defective* portion of a division fence. The liability of the animal owner may then be determined as if there had been no agreement. In the case of *Morris v. Gutshall*,<sup>140</sup> the plaintiff and defendant were adjoining owners of a division fence that was located within a closed range county. Defendant's hogs crawled through the plaintiff's half of the division fence, which the court found to be "hog tight" and non-defective. The plaintiff alleged that the defendant permitted the hogs to run at large in violation of the Closed Range Act and the defendant successfully demurred to the evidence. On appeal the Kansas City Court of Appeals reversed the trial court. It held that the defendant was under duty to restrain his animals and that a breach of that duty entitled the plaintiff to a recovery unless it could have been shown that the trespass resulted from the plaintiff's breach of duty to fence. Since the plaintiff's proof of a good fence indicated that he did not breach such a duty, the defendant's demurrer was erroneously sustained.<sup>141</sup>

Logically this result should also follow in the case of a trespass through the animal owner's non-defective half of the fence, whether the fence be an

133. Cases cited note 8 *supra*.

134. *Matthews v. McVay*, *supra* note 131.

135. § 272.090, RSMo 1959 of the 1869 Division Fence Act and §§ 272.270 and 280, RSMo 1966 Supp. of the 1963 Fence Act.

136. Cases cited note 114 *supra*.

137. *Griffin v. Anderson*, *supra* note 114; *McLean v. Berkabile*, *supra* note 8.

138. *Walker v. Robertson*, 107 Mo. App. 571, 81 S.W. 1183 (K.C. Ct. App. 1904).

139. *Field v. Bogie*, *supra* note 114; *Hopkins v. Ott*, *supra* note 96.

140. 206 S.W. 385 (K.C. Mo. App. 1918), *appeal dismissed* 226 S.W. 589 (K.C. Mo. App. 1920).

141. *Id.* at 386. Cf. *Goslar v. Reed*, 189 Iowa 1198, 179 N.W. 621 (1920); *Haack v. Rodenbaur*, 234 Iowa 368, 12 N.W.2d 861 (1944).

exterior or interior division fence. The case would then stand for the proposition that an animal owner is strictly liable for a trespass through either side of a division fence provided that the landowner can establish that the trespass was not caused by his breach of a fencing duty. Although the rule appears contrary to the often expressed statements that the closed range act does not apply to division fences and that the rights of the owners are to be governed by their agreement or by the terms of the statute which created the division,<sup>142</sup> one may be able to reconcile the conflict by arguing that the rule only applies to those situations not contemplated by the agreement and therefore to cases in which a division of this *type of responsibility* has never been determined. In such case the rule would not be applied to a division fence and it would not be applied contrary to the agreement. For example, suppose *A* and *B* agree to maintain a fence that will be sufficient to restrain cattle. They then erect and maintain a three strand barbed wire fence, thereby impliedly agreeing that a fence of this nature will be sufficient to turn ordinary cows. A week later *B*'s cow jumps over *A*'s non-defective half and thereafter tramples his corn. Since *A* has agreed that the fence would be sufficient it would seem that he ought to be estopped from asserting a claim for a trespass that he had decided would not occur.<sup>143</sup> But suppose *B* then purchases pigs which later crawl under *A*'s non-defective half of the fence. Or suppose *B*'s extremely breachy bull jumps *A*'s good fence. Because the agreement did not contemplate swine or extremely breachy bulls the rule of the *Morris* case would seem applicable so as to render *B* strictly liable for the damage.<sup>144</sup> In other words it is suggested that to the extent that the agreed fence was not designed to resist stock of the type that have trespassed or to the extent that the trespass occurs as a result of the fault of neither party, the *Morris* rule ought to apply so as to place the un contemplated risk upon the one in control and possession of the animal.

If both parties have failed to maintain their respective portions of a division fence, their rights and obligations with respect to an animal trespass may be determined as if there had been no agreement. The dicta in *O'Reily v. Disr*<sup>145</sup> supports this proposition. In that case the plaintiff sued the defendant for the breach of a division fence agreement, alleging that, as a result of the defendant's failure to maintain his part of a division fence, the defendant's stock trespassed onto the plaintiff's land and thereafter caused certain damage. The defendant argued that covenants to maintain a division fence are dependent. Therefore, as a condition precedent to the plaintiff's recovery, it must be established that he had performed his part of the contract by properly maintaining his half of the fence. Further, since the plaintiff failed to do so the judgment should be reversed. The Kansas City Court of Appeals agreed with the defendant but stated

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142. Cases cited note 114 *supra*.

143. *Spaulding v. Nesbitt*, 87 Mo. App. 90 (St. L. Ct. App. 1901).

144. In *Haack v. Rodenbaur*, *supra* note 141, a land owner successfully defended an action to replevy a "breachy" bull even though it was found that the division fence was in good condition and repair as required by the law of Iowa.

145. 41 Mo. App. 184, 193 (K.C. Ct. App. 1890), citing *Mulligan v. Wehinger*, 68 Pa. 235 (1871); *But cf.* *Saxton v. Bacon*, 31 Vt. 540 (1859).

that even if the plaintiff is precluded from recovering on the contract, he may still recover on a common law theory. When both parties fail to maintain a fence then this amounts to a mutual waiver of their contractual duties. Because the fence was an interior fence, such a waiver then revives the parties' common law duties so as to render the animal owner strictly liable for the trespass notwithstanding the agreement. Presumably the same reasoning would apply to an exterior division fence agreement and thereby place a similar liability on the animal owner under the Closed Range Act.

Although an earlier case contains dicta to the contrary,<sup>146</sup> it was held in *Mackler v. Cramer*,<sup>147</sup> that a party to a division fence agreement, in lieu of his contractual rights, may assert the rights granted by the 1869 Division Fence Act. Section 272.110 of that act states that if an owner of a division fence fails to maintain his portion of it, the aggrieved landowner, owning the other half, may (1) repair the defective portion at the other party's cost, (2) may recover double the actual damage caused by such failure, and (3) may distrain as security, and treat as if they were strays, animals that have trespassed through the other's defective half of the fence. The main advantage of an action on the statute is the right to double damages. But this relief is only accorded to those who have established that the division fence existed on the boundary line<sup>148</sup> and that it was "lawful"<sup>149</sup> at the time of the agreement.<sup>150</sup>

As discussed *infra*,<sup>151</sup> the 1963 Fence Act may provide no statutory remedy for a trespass through a division fence other than the right to mend the defective fence at the cost of the breaching party. Accordingly, the victim of such a trespass may encounter less risk by basing his action on the contract. That would entitle him to the recovery of his actual damages and a common law lien on the animal.<sup>152</sup>

Oral division fence agreements are enforceable between the parties but do not bind successors in title who have no notice of the agreement and who have not acquiesced thereto.<sup>153</sup> In a county that has adopted the 1963 Fence Act such persons can be bound if the agreement is written, executed, and recorded in accordance with the provisions of section 272.270. With respect to other third persons, the cases suggest that duties created by a division fence agreement do not inure

146. *Kneale v. Price*, 29 Mo. App. 227 (K.C. Ct. App. 1888).

147. *Supra* note 57.

148. *Sims v. Field*, 74 Mo. 139 (1881); *Mc Lean v. Berkabile*, 123 Mo. App. 647, 653, 100 S.W. 1109, 1110 (K.C. Ct. App. 1907) (dictum); *Jones v. Derosset*, 185 S.W. 239 (Spr. Mo. App. 1916).

149. Section 272.020, RSMo 1959 defines lawful fences. By January 1, 1969, when the Closed Range Act becomes effective throughout the state to restrain swine from running at large, a fence need only consist of three strands of tensely stretched barbed wire, between posts set not more than sixteen feet apart, with the top wire four feet off the ground and with "the two remaining wires placed at proper distances below to resist horses, cattle and like stock." Substantial compliance with the statute is sufficient, *Cook v. Cooksey*, *supra* note 100.

150. *Mackler v. Cramer*, 48 Mo. App. 378 (K.C. Ct. App. 1892).

151. See pt. IV (A)(2)(b) of this comment.

152. Statutes cited notes 125 and 126 *supra*.

153. *McNaughton v. Schaffer*, 314 S.W.2d 245 (K.C. Mo. App. 1958).

to their benefit.<sup>154</sup> Stated another way, a person has no duty to fence against stock not rightfully upon the adjoining land<sup>155</sup> or to restrain stock not lawfully upon his land.<sup>156</sup> Thus if *C*'s cow should enter *B*'s enclosure and thereafter trespass through *A*'s defective half of a fence divided pursuant to an agreement with *B*, *C* can not raise as a defense *A*'s breach of the fencing duty owed to *B*.<sup>157</sup>

b. *Trespass Through a Division Fence Divided by Statute*

Generally, if adjoining landowners are unable to agree to the division of a partition fence either may petition a magistrate to appoint fence viewers for the purpose of designating which portions of the fence each shall be required to maintain.<sup>158</sup> Being so divided, what rights accrue to a landowner who has been damaged by the trespass of his adjoining neighbor's animal?

If the fencing responsibility has been determined pursuant to section 272.090 of the 1869 Division Fence Act, the adjoining landowner should have the same rights he would have had, had the fence been divided by agreement. Thus, if the trespass results from the landowner's failure to maintain his half of the fence, the trespass is not actionable.<sup>159</sup> However, should it result from a defect in the animal owner's half, the landowner may sue the animal owner for double his actual damages, or he may distrain the animal to secure payment.<sup>160</sup> As a preventive measure either party may repair a defective portion of the fence at the cost of the defaulting party.<sup>161</sup>

If the fence has been divided according to the procedure announced in section 272.280 of the 1963 Fence Act the landowner may not be assured of the same remedies. Section 272.310 of that act is titled: "*Owners to repair division fence—remedy for failure.*" The single remedy provided is the right to repair a defective portion of the fence at the cost of the breaching party. On its face the statute provides no right to recover damages for a trespass nor a right to distrain a trespassing animal. That the legislature intended to withhold these remedies is further evidenced by the fact that this section is patterned after the corresponding section of the 1869 Division Fence Act that specifically grants them.<sup>162</sup> One may argue that these remedies are provided by section 272.230.<sup>163</sup> But this section does not ex-

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154. *Smith v. Chicago & A. Ry. Co.*, 127 Mo. App. 160, 105 S.W. 10 (St. L. Ct. App. 1907); *Novak v. Shoup*, 209 Ill. App. 97 (1918).

155. *Rust v. Low & Al.*, 6 Mass. 90 (1809); *Wood v. Snider*, *supra* note 123.

156. *Pool v. Alger*, 11 Gray 489, 71 Am. Dec. 726 (Mass. 1858); *Lawrence v. Combs*, 37 N.H. 331 (1858).

157. *Novak v. Shoup*, *supra* note 154.

158. Statutes cited note 135 *supra*.

159. *Cf.* cases cited note 139 *supra*.

160. § 272.110, RSMo 1959.

161. *Ibid.*

162. *Ibid.*

163. RSMo 1966 Supp. "If any horses, cattle or other stock trespass upon the premises of another, the owner of the animal shall for the first trespass make reparation to the party injured for the true value of the damages sustained, to be recovered with costs before a magistrate, or in any court of competent jurisdiction, and for any subsequent trespass the party injured may put up the animal or animals and take good care of them and immediately notify the owner, who shall pay

pressly cover division fences and a nearly identical section on which it was patterned has always been construed as only applicable to exterior non-division fences.<sup>164</sup>

If fence mending is the landowner's only remedy under the statute an adjoining animal owner will be in a very favorable position in a county that has adopted the 1963 Fence Act. For instance, assume a landowner, *L*, has an entirely unfenced corn field adjoining *A*'s cattle ranch. *L* has no need or desire for a fence since he has no stock and since *A* has a duty to restrain his from running at large.<sup>165</sup> *A* demands that *L* agree to maintain one half the fence between their property so that it will be sufficient to restrain *A*'s cows from trespassing onto *L*'s land. Since the fence borders *L*'s corn field, *L* must agree or have *A* divide the fence in accordance with the statute.<sup>166</sup> If *L* succumbs to the demand and agrees to *A*'s terms and if *A*'s stock trespass through *A*'s defective half of the fence, *L* may detain the animal or sue on the contract.<sup>167</sup> However, if *L* persists in his refusal and if *A*'s stock trespass through *A*'s half of a defective fence that *A* has divided by statute *L* has no remedy at all. Section 272.310 will only permit him to recover the cost of repairing *A*'s part of the fence. Consequently, in a county adopting the 1963 Fence Act, to divide a fence by the statutory process is to create an "open range" between the parties.

#### *B. Disputes Arising out of Automobile Collisions with Stray Stock*

In terms of recent litigation generated and amounts involved it is probable that the most significant feature of the Closed Range Act is a short clause in section 270.010. It states that an animal owner "shall not be responsible for any accident on a public road or highway if he establishes the fact that the said animal or animals were outside the enclosure through no fault or negligence" of his own. As construed by Missouri Courts this provision has the following legal effects: (1) A presumption is created that stray stock on a public highway constitutes an unreasonable risk of harm to passing motorists.<sup>168</sup> At common law the motorist must prove that the road character, volume of traffic, weather and lighting conditions, etc. were such that the animal's occupancy of the highway created a foreseeable traffic hazard.<sup>169</sup> (2) Once the motorist has established (a) adoption of the Closed Range Act by the county in which the accident occurred,<sup>170</sup> (b) that

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to the taker-up the amount of the damages sustained, and such compensation as shall be reasonable for the taking up and keeping of the animals, before he shall be allowed to remove them . . . ."

164. See cases cited note 131 *supra*, construing earlier enactments of § 272.030, RSMo and similar statutes.

165. Either § 270.010, RSMo 1959, or § 272.230, RSMo 1966 Supp. will impose such a duty.

166. Contrary to the 1869 Division Fence Act, § 272.240, RSMo 1966 Supp. does not require that the fence "serve to enclose" the reluctant neighbor's land.

167. Cases cited notes 137 and 138 *supra*.

168. This follows from the fact that none of the cases construing § 270.010 have required the motorist to offer proof as to the character of the highway. In particular see *Keefer v. Hartzler*, 351 S.W.2d 479, 480 (K.C. Mo. App. 1961).

169. Cases cited note 38 *supra*.

170. Senate Bill No. 129 removes the necessity for such proof for accidents occurring after January 1, 1969.

the animal was on the highway unattended,<sup>171</sup> and (c) that the animal was possessed by the defendant,<sup>172</sup> a presumption arises that the animal owner failed to exercise ordinary care in keeping the animal off the highway. If the animal owner can not then present evidence showing that the animal strayed through no fault of his own the motorist is entitled to a verdict provided that he also proves the elements of causation and damage.<sup>173</sup> (3) If the animal owner does offer rebutting evidence, the facts mentioned in (a) through (c) above establish a *prima facie* case of the animal owner's negligence and therefore permit the motorist to take his case to the jury without further showing the animal owner's specific acts of negligence.<sup>174</sup> (4) The statute does not render the animal owner strictly liable.<sup>175</sup> Accordingly, he may assert the motorist's contributory negligence as a defense.<sup>176</sup> It should also be noted that section 270.010 of the Closed Range Act only applies to animals of the species of horse, ass, mule, swine, cattle, sheep or goat. Presumably, the common law will apply if a buffalo, turkey, chicken or other excluded animal strays upon the highway to cause a collision.

As previously mentioned, a county's adoption of the 1963 Fence Act may have the effect of impliedly suspending the operation of the Closed Range Act within the county. If it does, section 272.220 appears to say that the animal owner's only duty under the statute is to enclose his stock with a lawful four strand barbed wire fence. Accordingly, if his pig escapes from an enclosure that conforms with the statutory description the animal owner may be permitted to raise his compliance with the statute as a defense, and the motorist may be refused the presumptions which he is entitled to under the Closed Range Act.

What is the liability of a landowner who has permitted his neighbor's animal to stray through his half of a defective division fence to cause a collision? Suppose an animal owner, *A*, and a landowner, *L*, own adjoining parcels of land with a division fence on their common boundary. If *A*'s cow should trespass through *L*'s defective half of the fence and then enter an adjacent highway to cause a collision with *M*, a non-negligent motorist, is *M* entitled to relief from *L*? The lack of any cases that consider the question suggest that *M*'s cause, at its best, is doubtful. This is further indicated by the fact that most animal trespass cases that have involved a third party situation suggest that the obligation to maintain a portion of a fence does not run to a third party.<sup>177</sup> In other words there is no privity be-

171. *Brixey v. Luna*, 254 S.W.2d 23 (Spr. Mo. App. 1953); *Keefer v. Hartzler*, *supra* note 168 (dictum).

172. *King v. Furry*, 317 S.W.2d 690, 696 (St. L. Mo. App. 1958); *Keefer v. Hartzler*, *supra* note 168 (dictum).

173. In *Keefer v. Hartzler*, *supra* note 168 at 480-481, the court stated that proof and a finding of the stock law, the accident, the defendant's possession, and damage "entitles plaintiff to a verdict unless there is a further finding that the animal was outside the enclosure through no fault or negligence of the owner."

174. *Cox v. Moore*, 394 S.W.2d 65 (Spr. Mo. App. 1965) (dictum); *Keefer v. Hartzler*, *supra* note 168, at 481.

175. *Anderson v. Glascock*, *supra* note 82.

176. *Cox v. Moore*, *supra* note 174, at 70.

177. Cases cited notes 154-156 *supra*.

tween *M* and *L*. Still one might overcome this obstacle on a tort theory which Prosser considers to be applicable to any "contract made with one person, when the interests of another may be expected to be affected."<sup>178</sup> He states the basis for the negligence action as follows:

By entering into a contract with *A*, the defendant may place himself in such a relation toward *B* that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that *B* will not be injured. The incidental fact of the existence of the contract with *A* does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.<sup>179</sup>

### C. Disputes Concerning Fence Building and Mending

Division fence laws seem to be based on the proposition that partition fences benefit both adjoining landowners. Accordingly, these laws basically provide that each adjoining owner has the right to compel the other to share in the erection and maintenance of such a fence. This rule may be inequitable between parties without an actual mutual need for the fence, as in the case of two adjoining farmers, one of which raises cattle and the other corn. However, where the need is fairly equal, as in the case of adjoining owners that both possess some livestock, the rule would not seem to be so unjust.

#### 1. Fencing Responsibility Under the 1869 Division Fence Act

The rule of the 1869 Division Fence Act that an adjoining landowner has the right to compel his neighbor to share half the fencing responsibility has certain qualifications. If the fence will not "serve to enclose" the reluctant neighbor's parcel of land there is no right to contribution.<sup>180</sup> In *Kent v. Liv*<sup>181</sup> the court said of this limitation:

It was not the aim or object of the statute [section 272.060, RSMo 1959] that any owner may erect an enclosure in the midst of a forest or prairie, and thereby compel all abutting owners to pay for one-half of his fences, although they may prefer to leave their lands unfenced.

By imposing this limiting requirement, the legislature reduced the chances of an inequitable division, such as that mentioned above between a crop farmer and a cattle rancher who have no mutual need for a fence. If the crop farmer wants to avoid the obligation he need only keep a portion of his land unfenced.

If the fence does not rest on the boundary<sup>182</sup> and if it does not substantially comply with the specifications set forth in section 272.020,<sup>183</sup> an adjoining neighbor

178. PROSSER, TORTS, 693 (3rd ed. 1964).

179. *Id.* at 658.

180. § 272.060, RSMo 1959.

181. 47 Mo. App. 567, 568 (St. L. Ct. App. 1892).

182. See cases cited note 148 *supra*.

183. See note 48 *supra*.

can not be compelled to contribute. If it does satisfy these two requirements the statute does not limit the amount of such contribution.<sup>184</sup> Thus one might be permitted to recover half the value of a cyclone fence ten feet high, although the legislature probably only intended half the value of one of the types of fences mentioned in section 272.010-.020. The right to contribution may also be asserted by a grantee with respect to an existing division fence.<sup>185</sup> For instance, suppose *A* builds a lawful partition fence between his and *B*'s adjoining land. Since *B*'s land is otherwise unfenced *B* has no obligation to contribute. But if *A* then conveys to *C* and if *B* then fences the rest of his adjoining land and thereby completes an enclosure, *C* will become entitled to one half the value of the partition fence<sup>186</sup> plus a division of the maintenance responsibility.<sup>187</sup>

## 2. Fencing Responsibility Under the 1963 Fence Act

As mentioned previously, the 1963 Fence Act suspends the operation of the 1869 Division Fence Act but only after a county has elected to adopt it.<sup>188</sup> Substantively the two acts are quite dissimilar. Their major differences are discussed below.

An adjoining owner has no right to contribution from his neighbor unless one of the two has a "need" for the fence.<sup>189</sup> If both raise corn, but not stock, the right may not exist. Under the 1869 act the need is conclusively presumed if the fence will serve to enclose the adjoining neighbor's land.

Unlike the 1869 Division Fence Act, the 1963 act expressly provides that the right to contribution may be enforced even though the fence stands wholly upon one side of the boundary line.<sup>190</sup>

The right to contribution exists even though the reluctant neighbor's land is otherwise unfenced. As previously mentioned section 272.060 of the 1869 statute requires that the division fence must "serve to enclose" the neighbor's land. Section 272.240 of the 1963 Fence Act states that the fence need only "border" the abutting land. Should a commuter develop a rural plot for residential purposes only, he may be compelled to pay for one half of an adjoining fence to be erected by a neighboring dairy farmer, and of course, he will also have to maintain a half of it. This reverses the idea expressed in *Kent v. Liv*,<sup>191</sup> that in the absence of mutual benefit the right to contribution does not exist.

Under the 1963 act one may not be compelled to contribute more than half the cost of a four strand barbed wire fence.<sup>192</sup> Also the demand for contri-

184. § 272.060, RSMo 1959 states that "such other person shall pay the owner one half the value of so much thereof as serves to enclose his land. . . ."

185. *Brawnner v. Langton*, 57 Mo. 516 (1874).

186. *Ibid.*

187. § 272.090, RSMo 1959.

188. § 272.370, RSMo 1966 Supp.

189. § 272.235, RSMo 1966 Supp. Note that the statute does not contemplate a mutual need.

190. § 272.330, RSMo 1966 Supp.

191. *Supra* note 181.

192. § 272.240, RSMo 1966 Supp.

tribution must be made before the fence has been erected.<sup>193</sup> Under the 1869 act the amount is apparently unlimited and the demand may be made at any time.<sup>194</sup>

## V. CONCLUSION

### A. Summary

In Missouri a trespass through a non-division fence may be governed by the Closed Range Act, the Open Range Act, the 1963 Fence Act, or the common law. The Closed Range Act generally applies to domestic animals and by January 1, 1969, will have effect in all of Missouri to the extent that it is not abrogated by the 1963 Fence Act. The Open Range Act has application to most domestic fowl and "other stock" not enumerated by the Closed Range Act, but only in counties that have not suspended its operation by adopting the 1963 Fence Act. In those counties trespasses of "horses, cattle or other stock"<sup>195</sup> through non-division exterior fences will probably be governed by section 270.220 and .230 and not by the Closed Range Act. The common law governs trespasses through non-division interior fences and the trespass of animals not covered by any of the above mentioned enactments.

Generally, trespasses through division fences are governed by the terms of the agreement or statute. If the fence meets the statutory requirements at the time of the agreement the parties may sue on the contract or rely on the applicable statute, asserting the remedies provided therein. Because of the decision in *Morris v. Gutshall*,<sup>196</sup> it seems that a landowner is entitled to relief as long as he can establish that the animal escaped through the defendant's half of the fence, or if it escaped through his half, that such trespass did not result from his breach of a duty to fence.

Accidents between a motorist and a stray animal are governed by section 270.010 of the Closed Range Act to the extent that it has not been superseded by an election under the 1963 Fence Act. The animal owner is not held to a strict standard of care but must utilize ordinary care to prevent the animal's escape. Proof of its presence on the highway raises a presumption of the animal owner's negligence that will entitle the motorist to a verdict unless rebuttal evidence is offered by the animal owner.

The duty to contribute to the cost and maintenance of a partition fence does not arise until it has been created by agreement or a determination by fence viewers. In counties adopting the 1963 Fence Act the duty may be imposed on an adjoining landowner even though his land is otherwise unfenced. The statute expressly states that the right accrues when only one party needs the fence. In all other counties the 1869 Fence Act applies so as to permit contribution only in the event that the fence will serve to enclose the reluctant neighbor's land.

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193. *Ibid.*

194. *Brawner v. Langton*, *supra* note 185.

195. § 272.230, RSMo 1966 Supp.

196. *Supra* note 140.

*B. Recommendation*

Missouri's fence law is conflicting, overlapping, ambiguous and obsolete in parts. Section 272.030 and .050 of the Open Range Act purport to govern the trespass of horses, cattle and other stock, but these statutes probably only have application to the trespass of fowl. Section 270.010 and 272.230 both purport to govern the trespass of stock through external fences in counties that have adopted the 1963 Fence Act, but neither statute indicates which is the primary authority. Section 272.220 appears to conflict with section 272.230. On their face, all the applicable trespass statutes purport to govern trespasses through non-division interior fences, however, the case law states a contrary rule. These and other shortcomings appear to have resulted from a natural legislative tendency to add changes to a body of law without integrating it with, and making any necessary revisions in, the existing law. This has been called statutory underpainting by a writer describing a similar set of confusing Kansas Statutes.<sup>197</sup> Therefore, before the next addition to chapters 270 and 272 it is suggested that consideration be given to their complete revision and updating. Admittedly most fence disputes do not usually involve great sums of money; their occurrence, however, will continue as long as animals are pastured in this state. Accordingly, the rules governing such disputes ought to be made less confusing and more certain.

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197. Casad, *The Kansas Law of Livestock Trespass: A Study in Statutory Underpainting*, 10 KAN. L. REV. 55 (1961).