1889

Fence Law Pertaining to the Farm

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For DEGREE OF BACHELOR OF LAW

FENCE LAW

PERTAINING TO THE

FARM

by

CARY BROWN FISH

CORNELL UNIVERSITY SCHOOL OF LAW

1889
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A fence is a building or erection between two contiguous estates, so as to divide them; or, on the same estate, so as to divide one part from another. I Bouv. Dict. 575. This definition but poorly expresses the inestimable value of fences especially to the rural community or the numerous uses to which they are put. The farmer not only depends upon his fences to prevent his stock from trespassing on the lands of his neighbors but he has also recourse to fences to divide into fields his own estate; as a means of boundary, the fence plays an important part and is very frequently referred to in deeds and other conveyances whereby the title to land is conveyed. Judge Gray in the case of the City of Boston v. Richardson 15 Allen 154 states the law in regard to boundaries as follows: “Whenever land is described as bounded by other land or by a building or structure the name of which according to its legal and ordinary meaning includes a title in the land of which it has been a part as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant: but where the boundary line is simply by an object whether natural or artificial,
the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee and which does not in its description or nature include the earth as far down as the grantor owns and yet which has width as in the case of a way, a river, a ditch, a well, a fence or a tree the center of the thing so running over or standing on the land is the line of boundary of the lot granted. From this dictum of the Court it would seem that where land was deeded the boundaries of which are defined the boundaries must govern and the vendee have no redress even though the actual amount of land fall far short of that called for by the deed. This manner of releasing the vendor of real property from further responsibility in case of shortage in the number of acres is carried in to effect to a greater extent usually by inserting in deeds or conveyances after specifying the number of acres the words "be the same more or less". In a case of this kind the boundaries mentioned must govern and the numbers of acres treated simply as a matter of description and not conclusive or binding upon the vendor.

COMMON and STATUTORY LAW RELATING TO FENCES
By the Common Law of Great Britain which was adopted verbatim by some of the United States, no man was obliged to either build or repair fences but at the same time he was under a legal necessity to prevent his cattle from running at large or trespassing in any manner upon the lands of others. From this latter fact it has become a matter of convenience to all owners of land's keeping stock of any kind to erect obstacles consisting of the ordinary fence or the hedge by which he can confine his animals and thus prevent himself from becoming liable to his neighbor in an action for damages resulting from their trespass. Every man's land in the eye of the law is enclosed and set apart from his neighbors and that either by a visible and natural fence as one field is divided from another by a hedge, or by an ideal invisible boundary existing only in contemplation of law as one man's land adjoins to another in the same field.


Therefore it is that a man for damage done by his stock on the land of another even though they enter from the land of a third party or from the highway. It was
also another settled feature of the common law that any damage which might be sustained by cattle so entering the land of another unlawfully must be borne in silence as the law precluded him from recovering anything for injuries so received even though they may have resulted from the most flagrant negligence on the part of the owner of the land? In some States this Common law rule does not seem to have prevailed to the same extent as in some cases animals are allowed to roam unrestrainedly over unfenced land as if it was a common while the owner of such land was not permitted to come into Court to recover damages because it was his own fault that the land was in condition to be subjected to a visit by the roaming heard of cattle. If however they should break through a fence which erected by the owner of the lands as a guard against invasion and which was of a sufficient nature, then in this case the owner of the land could maintain an action for damages as at common law.


In but few States does the common law rule prevail.
in entirety but in nearly all Statutes have been enacted until now nearly the whole law relating to fences vests upon Statutory regulations. Fences in the ordinary acceptation of the term where they are to separate the lands of different owners must in all cases be built on the line and usually under the Statutes the expenses are to be divided equally or each owner must erect one-half of the line fence; and erected the fence becomes part of the real estate upon which it stands and passes with the land when conveyed by deed without special reference being made to it. Murray v. VanDerlyn 24 Wis. 67, Mon v. Palmer I Comstock 564.

If a party neglects to maintain his share of the line fence and his land or crops is damaged by trespassing herds by reason of such negligence he has no standing in Court nor will he have if his cattle be injured by going upon the lands of another if they go through the fence which it is his duty to maintain. Phillips v. Cousins 29 Ohio St. 135. No person is obliged either by Statute or otherwise to erect or maintain fences between different portions of land of which he is the owner. Even where adjoining lands have once belonged
to different persons one or both of whom were obliged to keep up the line fences still where such lands came into the ownership of one person it is no longer incumbent on him to keep up the fence as before. 3 Waites Actions and Defences 340.

RAILROAD FENCES

The law upon the subject of railroad fences is usually uniform in all of the States and it is generally enacted that in all cases the railroad company shall alone maintain the fences separating their road bed from the adjoining lands and be held strictly accountable for any damages resulting from their default. Gardiner V. Smith 7 Mich. 410; McCall V. Chamberlain 13 Wis. 637; Pittsburg & R.R. Co. V. Methoven 21 Ohio St. 586; Holden V. Rutland R.R. Co. 30 Vt. 297. Where no Statute exists on the subject however the Company is no more held liable for damages resulting from not fencing their land than an individual nor are they bound to erect fences except under the same conditions as individuals "at common law owners of adjoining lands owe each other no duties and are subject to no obligation to build fences. By the Statute of New Hampshire they are bound
if the land is improved to maintain an equal share of the boundary fences. As owners of the land where they own their own track railroad companies are liable to the same liabilities as other owners. But these Statutory provisions do not apply to such corporations where they own nothing in their track but an easement, a right of way merely. In such a case neither the company nor the owner would be bound to fence. The interest of the road requires generally that it should be fenced. The question is of great importance both to the company and to the land owners since upon its decisions depend in a great degree the liability of the one or the other for injuries to the animals and crops of the land owner and to the engine and cars of the railroad, and to the persons and property borne upon the road arising from defects of the fences. Dean V. Sullivan R.R. Co. 22 N.H. 316.

HIGHWAY FENCES

In regard to highway fences the same rule is applicable as that which was applied by the common law to fences between adjoining owners: in other words as an owner was under no necessity to build any fence between
himself and the land of another neither is he compelled
to erect any barier between his estate and the public
highway. If however his stock by reason the lack of
obstacles to prevent their escaping should get into the
road and then onto the possessions of another the owner
of such stock would be held liable in an action for
damages for the trespass. But so long as cattle go
from the land of their owner into the highway, they are
trespassing on no one and none can claim damages. In
some States this rule has been modified and in fact in
some it has been entirely reversed. Generally at the
present time the whole matter is governed by Statutes
and the common law rules and precedents can no longer
be appealed to, whenever this is the case and local
Statutes have been enacted these of course must govern
and it is a matter of necessity that to find the law
on this subject one must refer to the Statutory law of
his particular locality. In the State of New York
the Statutes are silent on the subject and as a matter
of course must be had to the common law and by the latter
no man is to be forced to divide his lands from the
highway.
The Statutes of the State of New York says that the Assessors and the Commissioners of highways shall by virtue of their office be the fence viewers of their Towns. The duty of these officers when acting in the capacity of fence viewers are usually those of arbitrators and they are called in to aid in the equitable settlement of disputes between adjoining land owners usually arising from the division of line fences. The statutes reads in regard to these officers as follows:

"If disputes arise between the owners of adjoining lands concerning the proportion or particular part of fence to be maintained or made by each of them such dispute shall be settled by any two of the fence viewers of the town. Each party, in such a case where a dispute is referred to the fence viewers, shall have the right to choose one, unless one of the parties fail to make his choice after eight days notice in which event the other party may legally choose both. The fence viewers chosen by the parties to act as arbitrators must visit the premises and hear the allegations of both sides. If after such hearing the two shall not be able to
then they shall call in a third fence viewer to act with them and the decision of any two of the number so constituted shall be binding upon the disputants and also upon all persons holding under them. The decision of the fence viewers so made shall be reduced to writing giving a description of the fence and state distinctly the part to be maintained by each party and thereupon filed in the office of the town clerk. Another duty of the fence viewers of no less importance is that of determining the amount of damages done or suffered by a party not in fault. If a person whose duty it is to maintain a part of a line fence shall neglect to do so then any party suffering damage by reason of such neglect shall call in any two fence viewers who shall fix the amount of the damages so sustained, with costs of suit, can be recovered from the negligent party.

A valid right of prescription may exist in regard to the maintenance of a line fence as in other cases. Where one of two adjoining owners for a term of twenty years or more has maintained the whole of the line fence between himself and the owner, a binding presumption arises that it is his duty to maintain such fence
And in this case the fence viewers have no jurisdiction. They may be called in to settle any subsequent dispute which may arise between the parties but where the right of prescription is raised or claimed by one party as against the other their decision is not binding and need not be regarded. This rule however will not hold where one party builds and keeps in repair only a part of the boundary fence as under these circumstances it is a legal presumption that the parties maintain only such part of such line fence as has previously been assigned to them by agreement. In this case the maintenance of the fence by one party is regarded as being upon consideration of the other party keeping up his part and not in exoneration of the other owner. The Statutes which gives to fence viewers the right and imposes upon them the duty of fixing the just proportion of fence to be built by adjoining owners refers only to the settling of the subject matter of the dispute between the parties calling them in at the time when they are so summoned.

The mutual division of a line fence by co-terminous owners but in case of new relations arising by subdivision or otherwise, there is a change to the extent
to which one of the adjoining owners borders upon the other,  
heif Justice  

enio says: "The Statutes implies that there are only different methods of establishing a division, for it gives the fence viewers jurisdiction only where the parties are unable to agree upon the respective proportions of the fence to be maintained by each of them. But it would lead to very absurd consequences to hold that the action of these officers proceeding as they must do in a summary manner would attach for all coming time upon the respective parcels of land which they charge or exonerate mutual servitudes or easements, whatever change of boundaries might take place. In the constant traffic in lands which is going on and the changes which are every day taking place by which large farms are converted into small ones and the contrary by divisions and subdivisions and consolidations these rights and obligations soon respecting fences would very cease to have any relation to present conterminous possessions; but a system of easements would grow up not adapted to existing circumstances, but founded upon original and distinct agreements and divisions by fence viewers which would be extremely
inconvenient in practice and quite inconsistent with the spirit and intention of the Statute. The Statute refers only to the state of affairs which suit them they are called in and not to any persons ownership of adjoining possessions." Adams v. VanAlstine 25 N.Y. 22.

STATUTES OF LINE FENCES

"Where two or more persons shall have lands adjoining, each of them shall make and maintain a just and equal proportion of the division fence between them in all cases where each of such adjoining lands shall be cleared or improved." (2 R.S. 903 Sec. 30, '8 Ed.)

Any person occupying land and interested in the making or maintaining a division fence is entitled to avail himself of the provisions of the statutes in reference to division fences without regard to what his estate or interest in the premises are for the remedy is not limited to the owner of the fee. In Bronk v. Becker (17 Wend. 320) Chief Justice Nelson says, "The right to build and maintain the fences, seems necessarily incidental to the right to enjoy the use of the land. The latter depends upon the former and if the fence may or must be built, to enjoy the
use of the premises, the adjoining occupants should each build the one-half of it. It is for the benefit of each that the law should be so; for, if the Statutes does not apply, the rights of the occupants are as at common law. The statute was enacted to relieve adjoining occupants from the inconvenience of this rule of the common law; and any person to whom it would be applicable, were it not for the statute, must be considered without the reason as they undoubtedly are within the words of the Statute.

The term owners as used in the Statutes in many places to designate the parties; it is not to be found on any of the Acts preceding those of 1803. which provided",that where the lands or meadows of any two or more persons shall join each other each of them shall make and maintain a just proportion of the division or partition fence between them, except such persons shall choose to let their lands or meadows to lay vacant &c. (2 L.R. 133, Sec. 17) it is apparent however, that it was used simply to describe the occupants interested in making and maintaining the division fences, without regard to the particular estate owned
by them, and was intended to convey the idea without the circumlocution, belonging to the words in the first three lines of Sec. (31 2 R.S., 8 Ed.) Besides the term owner does not necessarily mean the person owning the fee or any particular estate in the land; nor is it the appropriate language to convey such meaning; but, from the generality of the expression, may properly include any person having any interest of any description in the adjoining lot. He may be considered owner to the extent of such interest.

It seems to be the rule that where one person is in possession of property belonging to another, if by reason of the division fence not being properly maintained his cattle should trespass on the contuminsous land of his neighbor, the owner of the land is liable for such damages. Justice Follet in Roney v. Aldrich (44 Hun. 320) says, Aldrich owned the farm and as such owner was required by Statute to build and maintain a just and equal proportion of the division fences (2 R.S. Sec. 30 (8 Ed.)) Ditchett v. S.B. and P.M.R.R. Co. (67 N.Y. 425) does not hold that the occupant, and not the owner, is charged by the above Statute
with the duty of building and maintaining division fences as between adjoining owners. That case did not arise under this Stature, or between adjoining owners, or between the occupants of adjoining properties but it was an action by the administratrix of a traveler on a public street, who was killed by falling from the street into an excavation which had been previously guarded by a fence, but then out of repair.

So similar are many of the boarder duties of specific agents and servants that it has been found impossible to draw a line clearly separating one from the other, and though this is a border case, we are of the opinion that Baldwin must be held to have been the representative and agent of Aldrich in building the fence. Baldwin was not directed to use posts of any particular size, kind or strength; nor how far apart the posts should be set, nor how far apart nor how high above the ground the wires should be strung, nor how they were to be secured to the posts. In the se respects, which together make up all there has been done, he might, and did exercise his own judgment; and in these very respects the fence was negligently constructed.
Aldrich is liable for this negligence of his agent (Story's Agency, Sec. 452). But if it be held that Baldwin was the servant of Aldrich, in building the fence, the rule of respondeat superior, fixes the liability of Aldrich for the negligent construction of the fence. That Baldwin represented Aldrich in the capacity of agent, cannot be doubted. Aldrich owned the farm; it was his duty to build the fence; he furnished the wire, for it and authorized Baldwin to build it.

RIGHT TO LET LAND LIE OPEN

If any person who shall have made his proportion of a division fence shall be disposed to remove his fence and suffer his lands to lie open, he may do so provided such lands are not cleared or improved, at any time between the first day of November in any one year and the first day of April following, but at no other time, giving ten days notice to the owner or occupant of the adjoining land of his intention to apply to the fence viewers of the town for permission to remove his fence; and if, at the time specified in such notice, any two of such fence viewers to be
selected as aforesaid, shall determine that such fence may, with propriety, be removed, he may remove the same.

If any such fence shall be removed without such notice and permission, the party removing the same shall pay to the party injured all such damages as he may sustain thereby, to be recovered, with costs of suit. (2 R.S. sec. 39 & 40)(SEd.)

A person is not obliged to give written notice of his intention to throw open his lands for common feeding; but it is sufficient if he give oral notice of such intention. It is held in Holladay v. Marsh (3Wend. 142) "If any person shall neglect to make or keep in repair his portion of a line fence, he shall be liable to such damages as shall accrue by reason of his negligence; and if he omit to make or repair his portion of the line fence for one month after notice and request, then the party injured may make or repair the fence at the expense of the party so neglecting to do it. And in case any person who shall have made his proportion of the fence, shall be disposed to throw up his lands for common feeding, or to let the same lay open, he shall give three months notice to the person or persons in possession of the lands adjoining
and if the fence shall be removed before the expiration of the three months, the person removing it shall pay all damages sustained by such removal.

Under this statute it has been decided, that where hogs entered a cornfield through the plaintiffs own fence, the same being insufficient, the plaintiff could not recover; but had they entered through the defendants fence, the plaintiff would have recovered. And the case of Wells v. Howell (19 Johns. 385) decides that as against a highway, where cattle have no right to run, no fence at all is necessary, to enable the plaintiff to maintain trespass. In the application of these principles to this case, how are the parties affected? Had the statute never been passed, the defendant must have kept his cattle in his own premises in the absence of all agreement or prescription about fences. The plaintiff, without any fence, could bring trespass for any injury that he sustained. Had the fence remained under the statute regulation, it being the fence of the defendant, and had the same injury been inflicted, the plaintiff would have sustained trespass. Is the defendant by throwing up his land to common feeding, or to lay open, in a better or the
plaintiff in a worse situation, than at common law?
Into what is the defendants field converted by removing the partition fence? Is it a common highway? Or does it become the common lands of the town? or does it remain the property of the defendant, for any trespass upon which he may maintain an action? if it became common lands, the defendants cattle were wrongfully there without a bye-law of the town permitting cattle to run at large. So, to, if it became a highway: and if the character of the field was not altered, the utmost effect of the defendants withdrawing his fence under the statute would be to remit the parties to their common law rights and duties. The statute was intended for the convenience and accommodation of all concerned; not to enable one man to destroy his neighbors crops under cover of the law.

Suppose a case where a town has no common land, and they pass a bye-law permitting cattle to run at large, where they to run? Surely not on individual property. Where then in the highway? The public have simply a right of passage over the highway; they have no right to depasture the highway. The owner of lands through which the highway runs is the owner of
the soil, and of the timber, except what is necessary to make bridges, or otherwise and in making the highway passable; and if the owner of the soil owns the timber why not the grass? This question has never been distinctly raised in this Court, and some intimations have been given from which it might be inferred that towns have a right to permit cattle to run at large in the highways; but in Stackpoole v. Healy (16 Mass. 33) the question has undergone a very full consideration and discussion, and the Supreme Court of Massachusetts have decided that the public have no such right in highways. The statute in that state is in stronger terms than ours; but it was holden to relate to common lands only, and not to highways. If the defendants cattle were in the highway or a common, they were there unlawfully, without authority from the town: and it is certainly well settled, that a man is not obliged to fence against any cattle but such as may be rightfully on the adjoining close. Citing (Richardson v. M'Dougall II Wend. 46; VanSlyck v. Snell 6 Lan. 299; Shepard v. Hees 12 John. 433; Wells v. Howell 19 John. 385; Rust v. Lowe 6 Mass. 94.)

Whenever the electors of any town shall have made
any rule or regulation, prescribing what shall be
demed a sufficient fence in such town, any person who
shall thereafter neglect to keep a fence according to
such rule or regulation, shall be precluded from re-
covering compensation in any manner, for damages done
by any beast lawfully going at large on the highways
that may enter on anym lands of such person, not fenced
in conformity with the said rule or regulation, or for
entering through any defective fence.

Where the sufficiency of a fence shall come into
question in any suit, it shall be presumed to have
been sufficient, until the contrary be established.
(2 R.S. 905 Sec. 44 & 45/)(8 Ed.)

The foregoing pages may be properly summed up in
the following rules:1st. Individuals whose land join
must make and maintain a just proportion of the division
fences; 2nd. If disputes about the proportions to be
made by each arise, they must be settled by the fence
viewers of the place in which the lands are situate;
3rd. If a party omits to make and maintain his proportion
of the fence he is made liable to damages, to be appraised
by the fence viewers; 4th. If he continues such
neglect one month after notice, the party injured
thereby may make the fence at the expense of the party neglecting, to be recovered with costs in any court having cognizance thereof; 3th. If a party who has made his proportion of such division fence wishes to let his lands lay open, he may do so by giving three months notice; and 6th. If he removes his fence without such notice, he is made liable for all damages sustained to be recovered as aforesaid with costs.

Gary Brown [Signature]