

Opinion No. 156.

Livestock—Grazing Commission—
Fences.

HELD: Various questions relating to grazing of livestock and fencing of lands are answered.

August 20, 1935.

Montana Grazing Commission
Helena, Montana

In response to your request for an opinion upon several questions involving the operation of the Montana Grazing Act, I will reply to each in succession.

I.

"In the event that the Grazing Association desiring to inclose the outside boundary of the grazing area with a fence should meet at the point where a private individual has a fence along said outer boundary, may the Grazing Association connect with the fence of the private individual running along said outer boundary and use the said fence as a portion of the outer boundary without paying to the individual

owner any compensation for the use of his fence as a part of the outer boundary of the area?"

Section 6777, R. C. M. 1921, provides: "Coterminous owners are mutually bound equally to maintain, 1. The boundaries and monuments between them; 2. the fences between them, unless one of them chooses to let his land lie without fencing, in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time of any division fence made by the latter; provided, however, that using land for grazing or pasturage of any kind whatsoever shall be deemed usage of said land, and such land shall not be considered as lying idle under the provisions of this Section."

Further Section 6778, R. C. M. 1921, provides: "The occupants of adjoining lands inclosed with fences must build and maintain partition fences between their own and the next adjoining inclosure in equal shares, so long as both continue to inclose the same; and such partition fence must be kept in good repair throughout the year, unless the occupants otherwise mutually agree."

Section 10 of Chapter 194 of the Session Laws of 1935, in defining the powers and duties of the State Grazing Commission, provides in part as follows: "In addition to the powers of the Commission hereinbefore enumerated, the Commission shall have power and authority to settle, adjust and approve mutual agreements between grazing associations and owners or users within or adjoining grazing districts, to determine and agree upon an acceptable division fence or barrier, which may be separately or jointly constructed and maintained, such fence as may be agreed upon to be as binding as any other fence prescribed by law."

None of the statutory enactments, supra, make references to "connecting line" fences but refer specifically to "division fences." The first two sections specifically mention the term "between" and likewise the latter citation refers to the term "division" fence.

Examination of the decisions of the Supreme Court of Montana discloses

no reference to any case than those in which "division" fences are involved. *Hoar v. Hennessey*, 29 Mont. 253; *Dorman v. Erie*, 63 Mont. 579; *Chilcott v. Rea*, 52 Mont. 134; *Brigge-man v. Corrigan*, 60 Mont. 205.

In the absence of statutory law on the subject the application of the rule defining the rights respecting connecting fences in other jurisdictions is stated in 25 C. J., page 1031, as follows: "The statutes providing for and relating to **partition fences** contemplate fences on the **boundary line** between the lands of adjoining owners." and cites among the authorities the cases: *Western Granite and Marble Company v. Knickerbocker*, 103 Cal. 111; *Ingwerson v. Barry*, 118 Cal. 342.

In my opinion the Commission cannot force an agreement to connect with the fence of another unless the same is strictly a "division" fence. However, the commission has the power to enter into agreements with the land owners respecting fences, and on their refusal to cooperate, the grazing district could build **partition or division fences** around the remaining three sides of the disputed tracts and compel the owners to pay for their proportional amount of the fence.

II.

"In the event that the Grazing Association uses the fence of the individual as part of the outer boundary of the area whether legally or by agreement are they obligated to maintain said fences?"

Your attention is directed to Section 6778, supra, and Section 6779, R. C. M. 1921, which reads as follows: "If any occupant of land adjoining the inclosure of another inclose the same, upon the inclosure of such other person, he must, within three months thereafter, build his proportion of such **partition fence**, or refund to the owner thereof an equal proportion of the value, at that time, of any **partition fence** of such adjoining occupant."

In the event a mutual agreement has been reached or the alternative measure of building of **partition fences**, Section 6779, is followed, then

the association and individual would each be liable equally for the cost and maintenance of the fence.

III.

"In the event the Grazing Association builds the whole of the fence surrounding the outer area of the district and a portion of the fence is used by an individual owner who is not a part of the Association, is the Association or the individual obligated to maintain that portion of the fence?"

For the reasons above mentioned and for the further beneficial use derived by the non-member in protecting his range from trespassing stock, such non-member would be obligated to pay for one-half of the maintenance of the fence, subject to the provisions of Section 6780, R. C. M. 1921, which provides: "Whenever any land belonging to different persons in severalty have been inclosed and occupant in common, or without a **partition fence** between them, and one of such occupants desires to occupy his part in severalty, the other occupant must, within six months after being notified in writing, build and maintain his proportion of such **partition fence** as may be necessary for that purpose, and in case of neglect or refusal so to do, the person giving such notice, may build such fence at the expense of the person so neglecting or refusing, the amount expended to be recovered in an action, to the extent of damages he may sustain on account of such neglect or refusal."

IV.

"Where a public highway or a private road crosses the grazing area may the Grazing Association construct at the point of ingress or egress of the highway or road may they erect their fence to the highway or road and across the highway or road construct an auto-pass or stock guard?"

This inquiry requires distinguishing between the various forms of highways and roads. Our Supreme Court in the case of *State ex rel. McMaster v. District Court*, 80 Mont. 228, in detail defines the various forms of highways and roads. The recent trend of governmental aid to highways has

created an additional form, the forest reserve road. Therefore, the proper classification in replying to your interrogatory would be: 1. Federal aided-main state highways; 2. state highways; 3. common or public highways; 4. forest reserve roads; 5. private roads.

In the cases of federal aided-main state highways authorized in part by Section 1791, R. C. M. 1921, permits for the construction of auto-passes, stock guards and under-passes or over-passes would have to be secured from the State highway commission with the probable consent of the Federal Bureau of Public Roads.

In the case of State highways or highways designated under the provisions of Section 1788, R. C. M. 1921, which have not been aided by the Federal government consent would have to be procured from the State Highway Commission. If the highway is classified as "common or public" the procedure would be to procure a permit from the Board of County Commissioners as set forth in Chapter 153, Session laws of 1933. In the case of private roads, it would likely be necessary to have the County Commissioners dedicate the same as a public highway, as our constitution and statutes apparently both omit the right of eminent domain in the matter of crossings or the placing of cattle guards over a private road, unless amicable terms be effected with the owners of the private road.

In the case of forest reserve roads, the permission must be obtained from the Forest Reserve officials.

V.

"In the event that a highway or road crosses the grazing area and the road or highway is fenced on both sides, may the Association construct an under-pass or an over-pass over the highway and if so, what provision or method must be pursued by the Association before the construction of the under-pass or over-pass?"

This inquiry has been covered in interrogatory four.

VI.

"Do the Laws of the State of Montana provide for roads or high-

ways upon section lines whether the road is constructed or not?"

Section 1649, R. C. M. 1921, provides: "Highways must be laid out and operated when practicable upon the division or section lines; providing, however, that this section shall not be construed to prevent roads being laid out on diagonal lines when public purposes shall be best subserved thereby."

The statutes of Montana, however, do not provide for roads or highways upon section lines unless action is taken by the Board of County Commissioners dedicating said highway. In the matter of driving livestock your attention is specially called to the rule promulgated in the case of *Herrin v. Sieben*, 46 Mont. 226 at page 234: "When one person grants to another land to which there is no access except by passing other land of the grantor, a way of necessity passes by the grant. In the first instance the grantor has the right to designate the tracts or way, having due regard to the rights of both parties; but if he (grantor) fails or refuses to exercise the right, the grantee may make his own selection and will be protected in the use of it * * *."

VII.

"What, if any, is the law relative to the malicious destruction of a line or boundary fence by any person?"

Section 11482, R. C. M. 1921, provides in part: "Any person tearing down, breaking, or injuring any fence or other inclosure, for the purpose of entering upon the land or premises of another without the consent of the owner or occupant; * * * shall be guilty of a misdemeanor and shall be punishable by a fine of not less than Ten Dollars, nor more than Five Hundred Dollars, or imprisonment not exceeding six months in the county jail, or by both such fine and imprisonment; and shall also be liable to the person injured for all damages occasioned thereby."

Section 11485 provides for the willful and malicious tearing down of fences in the following language: "Every person who willfully and maliciously cuts, tears down, removes, or in any other manner injures or destroys any fence or other inclo-

sure of lands, other than public, belonging to another, is guilty of a misdemeanor, and upon conviction, is punishable by a fine not less than Twenty-five Dollars nor more than Two Hundred Dollars, or by imprisonment in the county jail not less than thirty days or more than six months, or by both such fine and imprisonment."

VIII.

"Is a gate which is kept closed along a boundary line fence deemed a portion of the fence and subject to the law of malicious destruction as any other portion of the fence?"

The statutes defining fences make no distinction between fences proper and the gates which unquestionably would be construed as a portion of the fence. In this particular your attention is called to Section 3, Chapter 153 of the Session Laws of 1933, which provides: "There may be maintained in a legal fence a pass so constructed that automobiles and trucks may pass over the same and which will prevent the passage of livestock across said opening without depriving such fence of the character of a legal fence under the laws of this State."

The penalty provided for willfully leaving open a gate in Section 11528, R. C. M. 1921, as amended by Chapter 50 of the Session Laws of 1923, is: "Every person who willfully leaves open a gate, when found closed, leading in or out of any inclosed premises, either inclosed by a lawful fence or not is punishable by a fine of not less than Ten Dollars, nor more than Two Hundred Fifty Dollars, or by imprisonment in the county jail not more than three months or by both such fine and imprisonment. This act will not apply to cities and towns."

IX.

"In the event that a party is the owner of a tract of land within the grazing area and fences only a portion, may he permit his livestock to be turned out on the portion of the tract owned by him not under fence which will actually place his livestock into and within the grazing area of which he is not a member of the association?"

X.

"Is the owner of a tract of land included within the grazing area of an Association required to fence his tract of land to prevent livestock from entering his tract?"

The questions raised in the two inquiries quoted are closely related and will be answered under the joint heading.

These questions present an entirely new situation in the State of Montana. There has been no legal determination of many of the issues that may eventually arise by reason of the Grazing Act. Grazing areas combine, quasi public, range rights, with the rights of strictly private undertakings, and it is impossible to give a definite opinion without knowing the concrete facts in each case. For your information and guidance, however, we briefly review the law covering public ranges.

In the case of public domain, range trespass our Supreme Court in the recent case of *Herness v. McCann*, 90 Mont. 95, reaffirmed the outstanding rule fixed in prior decisions in holding that: "In an action for damages and destruction of crops by trespassing cattle, that where animals are held in herd, their movements being directed by their owner or his employees, who know, or are chargeable with knowledge of, the boundaries of adjacent property, and they invade such property their willful acts or the negligence of either, such invasion is actionable negligence."

On the other hand our courts repeatedly have ruled in the matter of proof and the amount of damages in stock trespassing cases within enclosure, and the statutes provide methods of impounding said trespassing stock.

Undoubtedly the owner of land has a right to turn his cattle upon his own land whether fenced or not. Especially is this true when as in this state our laws provide for fencing to keep cattle out. Is not the grazing association required to fence their area so as to restrain cattle from entering thereon?

In the case of *Chilcott v. Rea*, 52 Mont. 134 at page 139, the Supreme Court said: "As regards the want of a legal fence, the rule is that when

animals which may lawfully be turned loose upon the public range or highway and follow their own inclinations, invade premises which are not inclosed by a legal fence, no cause of action arises from such invasion."

This rule necessarily may be modified by the element of negligence when the animals are held in herd, and negligence is charged to the owner of such animals. As answered by the Supreme Court in *Schreiner v. Deep Creek Stock Association*, 68 Mont. 104 "under" the "legal fence law" privately owned premises must be fenced as required by statutes in order to enable the owner to maintain an action for damages for trespass by the livestock of another. A stock grazing association doubtless is the owner or in possession under lease or other valid permits, and as such comes within the provisions of the "fencing laws" the same as a fee owner.

XI.

"Is there a Fence Law within the State of Montana and, if so, what are its provisions?"

There are several statutes in this state covering the subject of fences. The provisions of the several statutes, in some form, relate to legal fences—Section 3374, R. C. M. 1921; the Herd Law; partition and division fencing and penalties for the violation of the provisions relating to fencing. These several provisions of the law are of considerable length and it is impractical to quote them in detail in this opinion.