

FENCE LAW: A School district cannot be required to pay its proportionate share for the erection and repair of a division fence under the provisions of Section 272.060, et seq., RSMo 1949.

SCHOOL DISTRICT:

September 3, 1953



Honorable Gene Thompson
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Mr. Thompson:

You request an official opinion of this department as follows:

"Some time ago, a controversy came to my office between a common school district in this county and an adjoining land owner, over a partition fence.

"The school district took the position that a landowner had to fence his land if he so desired, if it was along the public road, and in the same manner, a land owner should fence his land if he wanted to use it for pasture if it was adjacent to public school grounds.

"In other words, that the partition fence law did not apply as against a right-of-way owned by a township road district and in the same manner would not apply as to public land of a common school district.

"The Superintendent of School of this County has requested me to write you for an opinion on this question so this is an official request from the Prosecutor and the Superintendent.

"The question is:

Is a common school district subject to the partition fence law, and can an adjoining landowner require the school

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district to maintain one-half of a fence around the public school grounds?"

The "partition fence law" which you mentioned in your letter is assumed to be the following statutes providing for the erection of fences between adjoining lands belonging to two or more different persons. The following sections, all RSMo 1949, deal with the erection and repair of what are referred to in the statutes as division fences:

"272.060. Division fences--rights of parties in, how determined.--Whenever the fence of any owner of real estate, now erected or constructed, or which shall hereafter be erected or constructed, the same being a lawful fence, as defined by sections 272.010 and 272.020, serves to enclose the land of another, or which shall become a part of the fence enclosing the lands of another, on demand made by the person owning such fence, such other person shall pay the owner one-half the value of so much thereof as serves to enclose his land, and upon such payment shall own an undivided half of such fence."

"272.080. Value of fence may be recovered, when.--If the person thus assessed or charged with the value of one-half of any fence, under the provisions of this chapter, shall neglect or refuse to pay over to the owner of such fence the amount so awarded, the same may be recovered before a magistrate, or other court of competent jurisdiction."

"272.090. Fence to be divided for purpose of repair.--If the parties cannot agree to the part each shall have and keep in repair, either of them may apply to a magistrate of the county who shall forthwith summon three disinterested householders of the township to appear on the premises, giving three days' notice to each of the parties of the time and place where said viewers shall meet, and said viewers shall, under oath, designate the portion to be kept in repair by each of the parties interested, and notify them in writing of the same."

"272.110. Division fences to be kept in repair.--Every person owning a part of a division

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fence shall keep the same in good repair according to the requirements of this chapter, and when said division fence is a hedge, shall properly trim the same at least once a year, to a height not greater than four and one-half feet, and to a breadth not greater than three feet, and for the purpose of trimming said hedge as aforesaid, he shall have the right to enter upon any land lying adjacent thereto. Either party owning land adjoining a division fence or hedge may, upon the failure of any of the other parties, have all that part of such division fence belonging to such other parties repaired, upon the failure of such other party to do so, such repairing or trimming to be at the cost of the party so failing to repair or trim his part of such fence; and the party so repairing or trimming such hedge shall always throw the brush trimmed off on his own side of such hedge; and upon neglect or refusal to keep said fence in repair, or to keep said hedge trimmed as provided in this section, such owner shall be liable in double damages to the party injured thereby, and such injured party may enforce the collection of such damages by restraining any cattle or other stock that may break in or come upon his enclosure by reason of the failure of such other party to keep his portion of such division fence in repair and proceeding therewith under the provisions of chapter 270, RS Mo 1949."

For the purpose of this opinion it is assumed that the private landowner has erected a fence between his land and the land of an adjoining public school in full compliance with the requirements of the above statutes, and that if the school grounds were owned by a private person, such person would be liable for payment of his share of the cost of erection and repair of said fence. The question is then resolved whether a school district can be assessed for its proportionate share of said division fence.

There appear to be no cases on this specific point. However, it is a fundamental rule of statutory construction that unless it is clearly indicated that the intent of the Legislature is to include the State and its subdivisions, they will not be considered within the purview of any particular

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statute. This rule of statutory construction is stated by Corpus Juris, Volume 59, Statutes, Section 653, Page 1103, as follows:

"(§ 653) 11. Construction as Including or Binding Government. The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong."

The State and its subdivisions are not mentioned in the statutes providing for division fences. That school districts are agencies of the State within the purview of the above is made clear by School District of Oakland vs. School District of Joplin, 102 S.W. (2d) 909, 1.c. 910:

"* * * The school districts are organized as separate legal entities. School Dist. No. 7 v. School Dist. of St. Joseph, 184 Mo. 140, 156, 82 S.W. 1082, 1086. They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved. * * *"

It further appears unlikely that the Legislature intended to make it possible for a private individual to usurp the discretion of the School Board in determining whether school grounds should be enclosed, and create an involuntary liability for something which the school board in the exercise of its governmental function may have decided was undesirable.

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CONCLUSION

It is, therefore, the opinion of this office that a school district cannot be required to pay a proportionate share for the erection and repair of a division fence under the provisions of Section 272.060, et seq., RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

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