

FENCES : Division fences between cemeteries and lands owned
DIVISION : by private individuals subject to statutes relating
CEMETERIES: to division fences.

May 13, 1943



Hon. J. P. Smith
Prosecuting Attorney
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Marshfield, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

"Where an acre of more of ground under deed to Church, or some organization, for Cemetery purposes, and the owner of the land around the cemetery ground pastures the land and lets the stock run on the land used as a cemetery.

"Who has to fence the cemetery ground to keep the Cemetery ground being pastured the owner of stock and land around the cemetery, or the owner of the cemetery?

"And if the ground is used as a cemetery no deed having been made to any one for the cemetery, who should fence it?"

In our research we do not find any statute applying especially to division fences bounding cemeteries.

Section 15262 makes provision for securing family burying grounds. Section 15263 gives county courts control of such grounds and makes provision against trespassing on such grounds, but nothing is stated in these statutes with reference to division fences.

The common law rule on division fences was applicable in cases such as you submit prior to the enactment of our statutes on division fences. In the case of McLean v. Berkabile, 123 Mo. App., 647, 652, the court stated the rule as follows:

"In such cases, where no division fence has been established between the farms, either under the provisions of chapter 28, Revised Statutes 1899, or by the agreement of the parties, the common law rule prevails and each proprietor is required to confine his domestic animals to his own land and is liable to his neighbor for any damages sustained from their escape to the land of the latter.
* * *"

Section 14574 R. S. Mo., 1939, provided as follows:

"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 14569 and 14570, 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 onehalf the value of so much thereof as serves to enclose his land, and upon such payment shall own an undivided half of such fence."

The court in the McLean v. Berkabile case, supra, in construing the section said at l. c. 652:

"Under the statute, chapter 28, Revised Statutes 1899, either proprietor may compel the establishment and maintenance of a lawful fence and provision is made for the division of such fence between the parties for the purpose of repairs and it has been held that a division fence may be brought under the terms of the statute by the agreement of the parties on the obviously correct principle that a proprietor may do by voluntary agreement that which his neighbor may compel him to do by law. (Mackler v. Cramer, 32 Mo. App. 542.) But to constitute a division fence within the purview of the statute, whether or not such fence be the subject of a contract between the parties, it must be located

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along the boundary line (Sims v. Field, 74 Mo. 139), and must conform to the specifications prescribed in the statute. (Secs. 3294, 3295.)"

From sources outside your request, we have ascertained that Webster County has adopted the stock law.

CONCLUSION

From the foregoing, it is the opinion of this department that if no division fence has been established between the cemetery and privately owned lands, then the common law rule applies and the proprietor owning the private lands would be required to confine his domestic animals to his own land, and a failure ~~so~~ to do would subject him to damages for their trespassing on cemetery grounds thereto adjoining.

Respectfully submitted,

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APPROVED:

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TWB/mh