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Farmers, Ranchers, and the Railroad: The Evolution of Fence Law in the Great Plains, 1865–190

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FARMERS, RANCHERS, AND THE RAILROAD
THE EVOLUTION OF FENCE LAW IN THE GREAT PLAINS, 1865-1900

YASUHIDE KAWASHIMA

In North America, building fences was an essential part of life for the English settlers from the beginning. Departing from the English common law rule that required owners to fence in their cattle, nearly all the colonial legislatures and courts imposed upon landowners a duty to fence their property against trespassing cattle.[1] The reasons were partly to increase the meager supply of livestock by permitting cattle to wander about in order to breed faster and partly to make full use of the vast virgin forest and grassland. Gradually, however, in New England and in much of New York and New Jersey, where township settlement and mixed husbandry prevailed, this practice was replaced by the system of common pasturage. During the crop growing season, common pasture was set off and fenced, and herdsmen were employed by the towns to supervise grazing, but after harvest animals were allowed to roam at large until spring planting.[2]

In the southern colonies, where settlements were made by individuals without group cooperation, the landowners' liability was more strictly observed. Quite different from the New England practice, all the southern colonies prohibited the fencing of any land except the fields under actual cultivation. Thus nonlandholders commonly grazed their cattle and hogs on others' land. As late as the 1830s, Virginia planters were still trying to obtain legislation to permit the fencing of their whole estates or at least their pastures. The prohibition on fencing continued to prevail on each moving frontier, while in the older regions the open range gave way to the common law rule as they were more settled.[3]

Key Words: cattlemen, frontier, herd law, livestock, trans-Mississippi west, transportation, wheat

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FENCING IN THE GREAT PLAINS

The Great Plains underwent a similar experience. One after another, the Plains

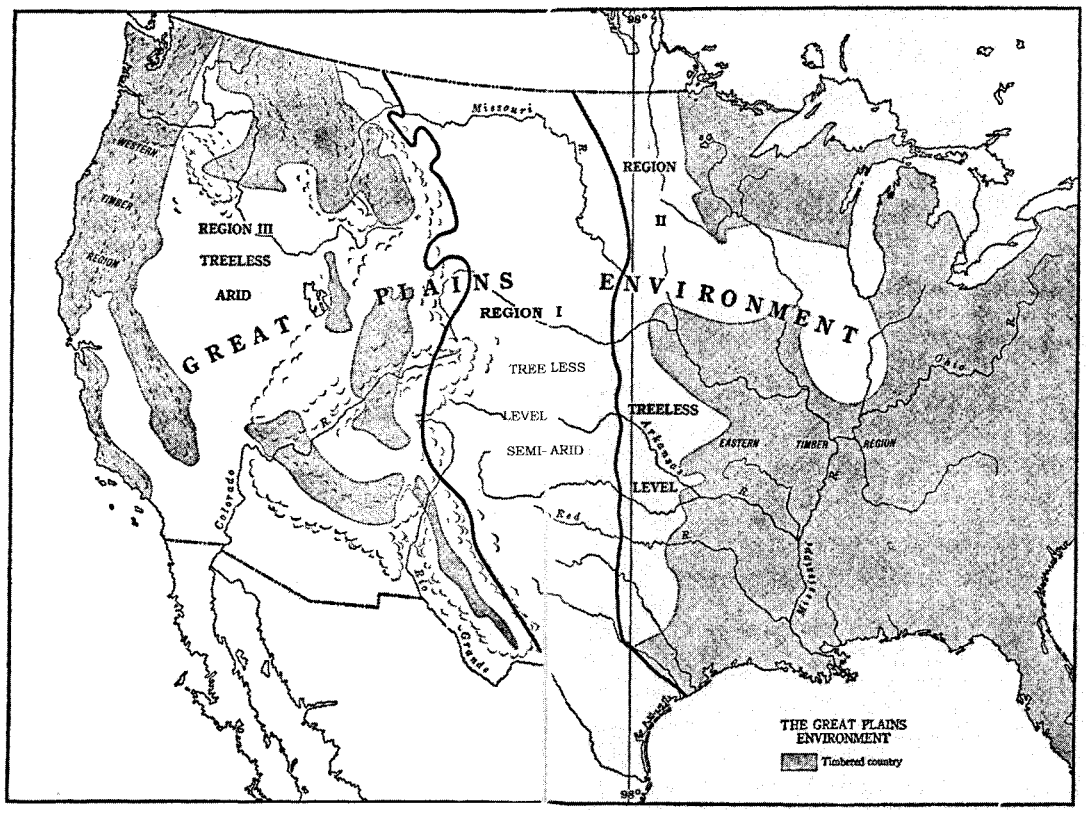

FIG. 1. *The Great Plains Environment.* Reproduced from *The Great Plains* by Walter Prescott Webb (1931; Lincoln: University of Nebraska Press, 1981).

states confirmed the rule of fencing that came to characterize all earlier American frontiers, requiring farmers to fence out domestic animals, which were allowed to run at large without liability. Yet the unique natural influence and social environment in the Great Plains did modify the traditional pattern of the open range in the East. The fencing conflicts between farmers and cattlemen in the Great Plains, as Walter Prescott Webb points out, greatly intensified and changed what had been a predominantly individual quarrel into an antagonistic confrontation.[4] Gradually, however, as farmers came to predominate, they compelled the adoption of herd laws, freeing them of the obligation to fence and imposing liability on the owners of animals. Although the pace of the process differed from place to place, the animal liability laws in the Plains reverted to the principles established in English common law.

This article is divided into three parts. The first examines specific fencing policies in Kansas, Nebraska, and other Plains states, highlighting the transformation from the "fence-out" to "fence-in" (herd laws) policies. The second part discusses the coming of the railroads to the Great Plains and the farmers and the ranchers as beneficiaries who soon became victims. And finally, the third section analyzes railroad fence laws passed in Nebraska, Kansas, and Oklahoma, the litigation over loss of livestock, and the unfavorable position the state courts generally took toward the railroads, based upon the dual nature of the railroad fence law.

Fencing Policies

As early as 1855, Kansas's first territorial legislature enacted a law imposing a duty upon landowners to fence "all fields and inclosure," specifying how a lawful fence must be constructed. "If any horse, cattle or other stock shall break into any inclosure" protected by a legal fence, the owner of the livestock was to pay the injured party full compensation. Unless his land was enclosed by a lawful fence, the landowner could not recover. This law certainly reflected the situation in the mid-nineteenth-century Great Plains, an "open range" country; the wide prairies could be made most productive by cattle grazing, and it was absurd to impose upon stock owners the common law duty of keeping their animals confined to their own land.[5] Fencing in the Great Plains, where timber was short, was a challenge for the settlers. They started with zigzag rail fence, but as they quickly exhausted timber, they turned to hedges, especially of Osage orange, which came to be extensively used in the eastern part of Kansas and Nebraska. As the fence law came gradually to be counterbalanced by herd laws, farmers made few enclosures before barbed wire became widely used.[6]

In 1868 Kansas farmers were able to secure the "night herd law," which gave the electors of each township the power to decide whether the owners should "fence in" their stock during the night. Two years later, another law passed providing for a regular (both night and day) herd law but limiting it to only five counties. It was declared unconstitutional in the case of *Darling v. Rodgers* (1871) because it operated in only a limited area, contrary to the equal treatment of counties guaranteed by the state constitution. The legislature accordingly passed another law in 1872 authorizing the county commissioners to decide on the adoption of the herd law, and by the end of the year, twenty-six counties out of the seventy-two adopted the herd law.[7] It was not until 1889 that the general herd law passed, making it applicable to all the counties and requiring all animals to be fenced in. This statute became the basis for the Herd Law of 1929, which was applicable to all livestock throughout the state.[8]

Many other Plains states—Nebraska, Colorado, Montana, Texas, and Wyoming, as well as Idaho and Nevada—followed suit.[9] The implementation of herd laws was usually the result of a long struggle of farmers, who favored the strict liability principle of the common law, against stock raisers, who held on to the "open range" policy embodied in the fence law.[10] Only Utah, Dakota, and Oklahoma opted for the fence-in policy in their early stages of development.[11] By the time Oklahoma adopted its first fence law in 1890, the practice of allowing stock to roam freely was rapidly disappearing from the Great Plains. The Oklahoma statute provided that every owner of swine, sheep, goats, stallions, jacks, and all other stock should restrain his animals from running at large "at all seasons of the year." The county commissioners, however, on a petition signed by twenty-five resident freeholders, could divide their counties into districts and select some districts for stock to run at large, except for swine, sheep, goats, stallions, and jacks. The decision should be made based upon the condition of the land, whether watered, timbered, or prairie, its streams, and whether the land was best adapted to agriculture or stock raising.

Coming of the Railroads

The coming of the railroads to the Plains complicated the struggle between farmers and ranchers that had been taking place during the 1870s and 1880s. Now they had to take on their common enemy, the railroads, which became the center of controversy because the railroads not only killed so many animals but also caused indirectly the devastation of their fields.[12]

The first transcontinental railroad, constructed by the Union Pacific and the Central Pacific, completed in May 1869, stimulated the construction of other transcontinental lines and a network of feeder lines: the Kansas Pacific; the Atchison, Topeka and Santa Fe; the Southern Pacific; the Northern Pacific; the Great Northern; the Missouri Pacific; the

FIG. 2. *Track laying on the Union Pacific Railroad, about 1870.* Courtesy Nebraska State Historical Society.

St. Louis, Kansas City, and Northern; the Texas and Pacific; the St. Paul and Pacific; and the Atlantic and Pacific.[13] By the end of the 1880s, nearly every part of the Great Plains was accessible to the settlers.[14] Although Webb emphasizes the uniqueness of western railroads as being constructed ahead of the population and thus through unsettled areas,[15] railroads often had to be built through the lands already settled, cultivated fields and fenced pasture-land.

The problems of farmers and cattlemen involving the railroads in the Great Plains, however, were not new; a number of legal issues, such as railroad fences and injury to live-stock, had already been raised in the area east of the Mississippi in the antebellum period.[16] But the settlement of the Great Plains brought about some unique problems. The vastness of the region, and its semiarid environment and sparse population, for example, led to farming and cattle and other stock raising on a larger scale.

As the railroads moved across the Plains, farmers and cattlemen, who had been the chief beneficiaries of the railroads in various ways,[17] suddenly became aware of the heavy loss of their livestock on the unfenced rights of way. The statistics were staggering. In 1876, for example, the Missouri, Kansas, and Texas

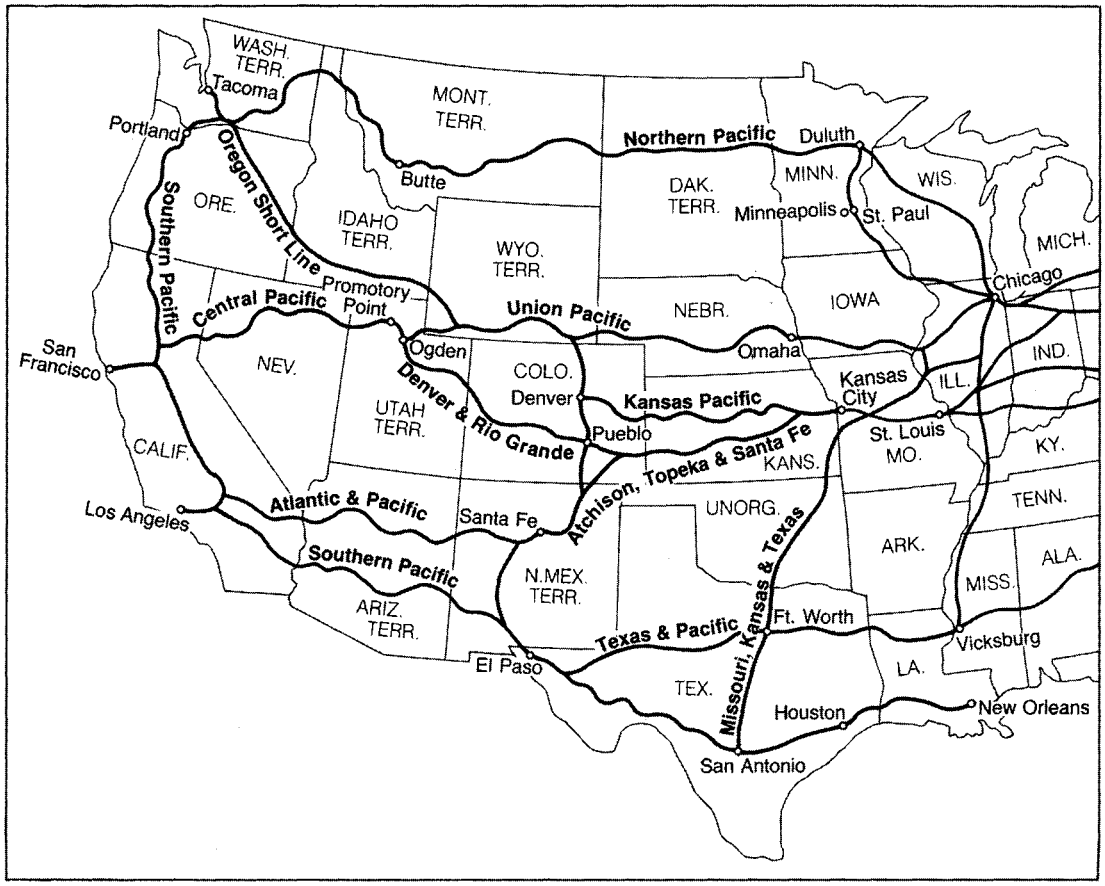

FIG. 3. *Early transcontinental railroad lines, 1887.* From *"It's Your Misfortune and None of My Own": A History of the American West* by Richard White. Copyright © 1991 by the University of Oklahoma Press, Norman. Reprinted by permission of the publisher. All Rights Reserved.

Railway Company alone killed 1,948 animals in the three states where it operated, costing about $25,000. The Texas and Pacific for 1877-78 reported that it cost $65.84 per mile to operate the line in order to cover the loss of livestock. The Denver and Rio Grande Railroad killed at least $25,000 worth of livestock during the winter of 1884. The losses were estimated to be even larger along the Union Pacific line.[18]

The problem was that the animals became attracted to the railroad right of way, where they could find greener grass, shelter from winds, and higher, drier ground. Moreover, the railroads not only had to pass through a wider range of land in the Great Plains but also had to confront the greater herds of livestock roaming the range.[19] Although both passenger and freight trains were "in perpetual danger from cattle straying" on the tracks, the railroads were reluctant to assume the high cost of enclosing their extensive rights of way.

ENACTMENT OF RAILROAD FENCE LAWS

The Plains state legislatures heatedly debated the problem of assigning responsibility and liability for the loss of animals and injury to train passengers. Could the cattlemen along the railroads' rights of way be required to enclose their stock, should the railway compa-

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The Location is Central, along the 41st parallel, the favorite latitude of America. Equally well adapted to corn or wheat; free from the long, cold winters of the Northern, and the hot, unhealthy influences of the Southern States.

The Face of the Country is diversified with hill and dale, grain land and meadow, rich bottoms, low bluffs, and undulating tables, all covered with a thick growth of sweet nutritious grasses.

The Soil is a dark loam, slightly impregnated with lime, free from stone and gravel, and eminently adapted to grass, grain and root crops; the subsoil is usually light and porous, yet rising a, delare with wonderful tenacity.

The Climate is mild and healthful; the atmosphere dry and pure. Epidemic diseases never prevail; Fever and Ague are unknown. The greatest amount of rain falls between March and October. The Winters are dry with but little snow.

The Productions are wheat, corn, oats, barley, rye and root crops, and vegetables generally. Flax, sweet potatoes, sorghum, etc., etc., do well and yield largely.

Fruits, both Wild and Cultivated, do remarkably well. The Forests from frosts in May and September, in connection with the dry Winters and warm soil, renders this State eminently adapted to fruit culture.

Stock Raising in all its branches, is particularly profitable on the wide ranges of rich pasturage. Cattle and sheep feed with avidity and fatten upon the nutritious grasses without grain; hogs thrive well, and wool growing is exceedingly remunerative.

Timber is found on the streams and grows rapidly.

Coal of excellent quality, exists in vast quantities on the line of the road in Wyoming, and is furnished to settlers at reduced rates.

Market Facilities are the best in the West; the great mining regions of Wyoming, Colorado, Utah and Nevada, are supplied by the farmers of Platte Valley.

The Title given the purchaser is absolute, in fee simple, and free from all incumbrances, derived directly from the United States.

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Land Commissioner, U. P. R. R.
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FIG. 4. *Union Pacific Railroad poster, about 1875.* Courtesy Union Pacific Railroad.

nies be ordered to fence the track or become liable for damages for all livestock, or should the railroads and the stock owners share the construction of fences? Eventually, the state and territorial legislatures enacted laws imposing on the railroads the fencing duty either by direct command or by creating a liability for injuries due to the failure to fence.[20]

Nebraska, as early as 1867, enacted a law requiring the railroad companies to erect and maintain fences on both sides of their tracks. If they failed, they would be liable for all livestock killed or injured.[21] Another act, passed in 1883, ordered newly constructed railroads to fence the tracks within six months of their initial operation. They were also required to construct and maintain opens, gates, or bars at all the farm crossings within the limits of towns, cities, and highways and cattle guards at all existing road crossings sufficient to prevent cattle, horses, sheep, and hogs from getting onto the railroad tracks. If not, the companies would be liable for the damage.[22]

The act of 1883 further provided that if landowners adjoining the railroad rights of way outside any town, village, or city intended to enclose their land with a fence, they were to request the railroad companies in writing to build a lawful fence between the railroads and their lands. The railroads were required to erect the fence within six months, and if they failed, the landowners could build the fence at a reasonable cost to be charged to the companies.[23]

Kansas approached the problem in the opposite way. The Stock-Killing Act, passed in 1874, declared all the railway companies liable for the animals killed or injured "by the engine or cars . . . or in any other manner whatever in operating such railway." The act, however, exempted the companies that would enclose their roads with good and lawful fences.[24] Utah had passed a law already in 1869, stipulating similar provisions, and other states followed suit: Nevada in 1875, Idaho in 1878, and Texas in 1879.[25]

In Oklahoma, the statute of 1893 followed the Nebraska law of 1883, allowing the landowners adjacent to the right of way to request the railroad to construct a fence along the railroad side if they intended to enclose the other three sides of the land. If the railroad failed within sixty days, not six months as the Nebraska law mandated, the owners could build the fence at the railroad's expense at $1.25 per rod. The Territorial Law of 1903 (An Act to Compel Railroad Companies to Fence Their Roads) repealed the provision and adopted the general fence law similar to those of Kansas, Texas, and others.[26]

On the surface the railroad fence law seems an extension of the traditional American fence law, imposing on the railroads the duty of the landowners to fence their land to keep out invading animals. But it operated the same way throughout the region, in both the fence-in district and the fence-out country, and was purported to function on totally different premises from those of the regular fence law. As

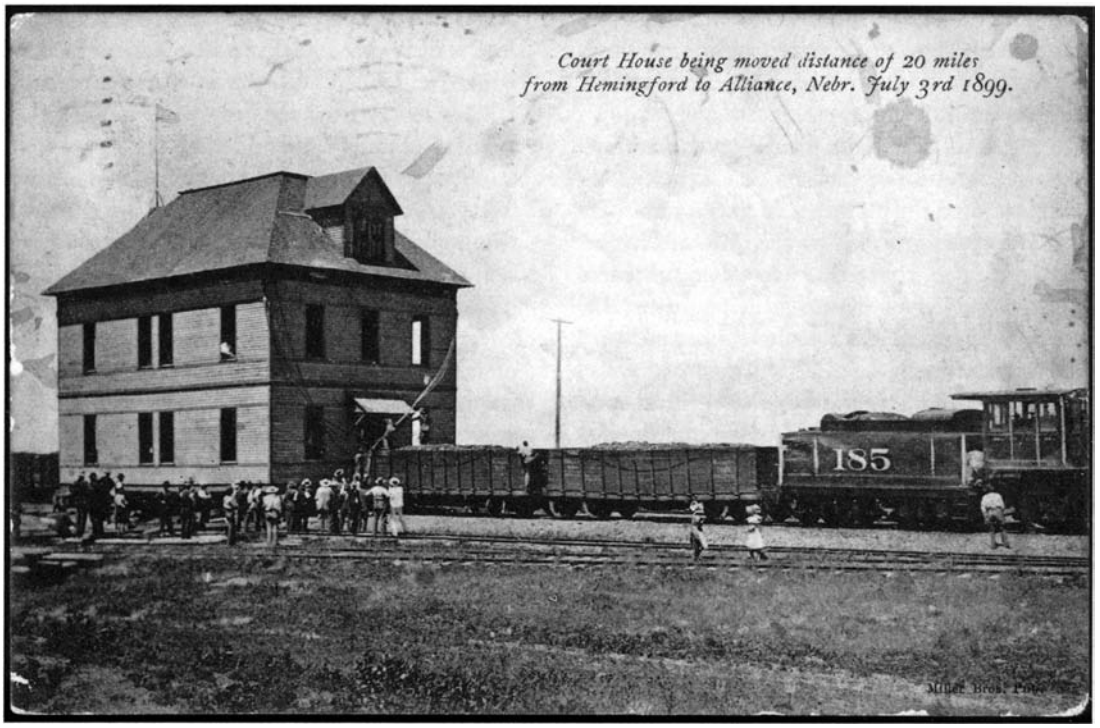

FIG. 5. *Despite the unfavorable attitude of the state court toward the railroads, the Burlington and Missouri River Railroad Company is pictured here providing a benefit by moving the courthouse from Hemingford to Alliance, Nebraska, in 1899.* Courtesy Nebraska State Historical Society.

the supreme courts of the Plains states repeatedly emphasized, the objectives of the railroad fence law were not just to protect the livestock of the owners living along the right of way, but more importantly, to safeguard the public, that is, to ensure the safety of the train passengers and their property.[27]

The railroads, however, reacted to these laws negatively. They claimed that it would be a heavy financial burden to build fences along entire lines, the livestock owners should have the responsibility to do the fencing, the states had no power to impose the fencing duty on the railroad, and the new laws should not apply retrospectively to the railroads that had long been in operation. Their challenge took two major forms.

First, the railroad companies adopted a passive, piecemeal approach by refusing to build fences unless absolutely necessary. The introduction of barbed wire in 1874, which revolutionized fencing in the Great Plains in many ways, did offer them an opportunity to enclose their rights of way more cheaply, but as Earl W. Hayter points out, they constructed fences only on the portions of the line where livestock were most numerous.[28]

LITIGATION INVOLVING LOSS OF LIVESTOCK

In their second form of challenge to the fencing laws, the railroads, instead of building fences to prevent livestock from invading, put up a vigorous fight whenever they were sued for the damages of animals killed and injured. The railroad lawyers' tenacious assertions of their rights, their persistent pursuance of appeals, and their determination to win cases at trial resulted in a number of bitterly contested lawsuits. Although the main purpose of the railroad fence law was to protect public safety as well as livestock, most of the accidents,

though numerous, involved losses of small numbers of domestic animals, without causing much damage to the trains and serious loss of property and life among the passengers.[29]

Suits were usually instituted by the animal owners at the justice of the peace, who routinely awarded the plaintiffs damages, and then the cases were appealed by the railroads to the county courts, where they were tried by jury. After favorable judgments for the plaintiffs, the railroads appealed to the state supreme court. Not only were the lawsuits a lengthy process, taking about two years, but the reversal rate was also very high. In Kansas, for example, the Supreme Court heard fifty-four appeals during the period from 1869 to 1914, all but two of which were appealed by the defendant railroad companies. In twenty out of the fifty-two cases, the highest court reversed the decisions in favor of the appellant railroads (39%).[30]

This litigation was also expensive, often costing more than the value of the property destroyed. The Kansas Act of 1874 authorized the allowance of an attorney's fee when judgment was rendered for the plaintiff,[31] and the court began awarding attorney's fees to successful plaintiffs: $15 on $35 damages, $33 on $90 damages, $30 on $30 for a heifer killed. In 1876, when the plaintiff asked for a $25 attorney's fee on the award of $39 for the value of a steer and a heifer killed, the Kansas Pacific's counsel protested. The court, however, found the plaintiff's request reasonable, because if he was compelled to pay his own attorney's fees, the amount of his claim (uniformly small) would be consumed by attorney's fees, leaving the plaintiff in no better position than before.[32] In an 1878 case, however, the Kansas Supreme Court denied a thirty-dollar attorney's fee, although the plaintiff was awarded two hundred dollars for the damage done to two mares, on the grounds that the railroad was found only partially liable. Such fees were allowed, the court reasoned, only in an action in which the company had full liability under the statute.[33]

One form of protest the railroads used against the fencing obligation was to challenge the railroad-fence legislation on constitutional grounds. Two years after its passage, the Kansas Act of 1874 was challenged by Kansas Pacific, which had been ordered to pay thirty-nine dollars for killing a steer and a heifer. The railroad's lawyers insisted that the company's liability under this act could not be derived from the common law, but the court declared the act constitutional because the power to impose such liability came from the police power of the state.[34]

In 1890, when the Missouri Pacific was sued under a new Kansas law, "An Act to Compel Railroad Companies to Fence Their Roads by and through Lands Enclosed with a Lawful Fence," for reimbursement of the expense the landowner incurred to fence the railroad side of his land, it challenged the constitutionality of the law, which was based upon the law of 1874. The Kansas Supreme Court, however, rejected the Missouri Pacific's assertion and declared the law constitutional and valid, insisting that it was in accordance with the decision of *Kansas Pacific Railway Company v. Mower* (1876), which had been upheld and approved.[35]

Although they could not successfully challenge the basic premises of the railroad fence laws, the railroad companies were able to convince the courts to declare laws unconstitutional on peripheral matters. Two cases, coming from two of the Great Basin states, which Webb included in the Great Plains environment, dealt with such issues. In 1885 Northern Pacific challenged the validity of Montana's 1881 "Act to Provide for the Payment of Stock Killed or Injured by Railroads" and argued that the clause "the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of and the injury to such stock" prevented the company from exercising its rights of appeal from the finding of the appraisers, thus depriving it of the right of trial by jury. The court ruled for the railroad, holding that such a provision was in fact in conflict with the U.S. Constitution.[36]

Four years later, the Union Pacific was also successful in challenging the validity of the Idaho railroad fence law of 1878. The company

protested that the law was unconstitutional because it made the killing of an animal by legitimate railroad companies, which were running trains legally and for great public benefit, the only test of its liability, nor did any general Idaho statute require railroad companies to fence their tracks. The court agreed and ruled that the law, by making the killing of an animal by the railroad the sole liability test, deprived it of the "due process of law" guaranteed by the U.S. Constitution.[37]

The railroads not only challenged the validity of the laws but also tried to interpret them strictly, especially the extent of injury, in order to evade their liability. In 1878 the Atchison, Topeka, and Santa Fe railroad was sued for fatally injuring a mare that got onto the track at a site where it was not fenced. Frightened by an approaching train, she fled and reached a tie bridge, where her leg fell between the ties, causing injury. The railroad insisted that the injury had not been caused "by the engine or cars . . . in operating such railway," as required by the act of 1874. The Kansas Supreme Court ruled, however, that the liability was not limited to cases of "actual collision" but extended to those cases where the animal was injured "in any other manner."[38] The same court subsequently decided several cases similarly.

Damage to livestock after it escaped from the right of way was not usually a natural consequence of the railroad's failure to construct and maintain proper fences. The railroad appellants won several cases in which the railroads had originally been held liable for such damages,[39] but they were nevertheless usually unsuccessful in preventing the Kansas Supreme Court from broadening the scope of their liability for the injury of stock. They were even held liable for "the stock that wandered away from the right of way and became lost" and for "a horse which, while on its right of way became frightened, and was killed by running into a fence not on the right of way."[40]

In Texas, the railroads were more successful in convincing the court to strictly limit the scope of the injury defined by the railroad fence law. In 1887 the International and Great Northern Railroad Company, when sued for an injury an animal incurred upon the trestle, onto which the animal had run frightened by the train, argued that there was no contact between the animal and the train. The Texas Supreme Court, to which the case was appealed, agreed and reversed the judgment below in favor of the railroad, stating that in no case could a recovery be had for an injury to animals where there was no collision with a moving engine or car. In some cases, the court did recognize that the injury, without collision, might be the proximate result of the railroad's negligence, but the recovery in such cases would not be based upon the railroad fence law of 1879.[41]

The railroads also tried to disclaim their liability to their own employees in accidents resulting from their failure to fence the rights of way. In 1896, for example, James Quill, a locomotive engineer of the Houston and Texas Central Railway Company, was killed by the derailment of his engine as the result of a collision with cattle that had entered upon the track through the company's negligence to keep its fence in repair. In a suit instituted by his wife and daughter, the railroad company not only insisted that Quill knew that the fence was defective and cattle were getting within the enclosure but presented evidence that Quill had previously struck cattle and horses with his locomotive at eight different times during a fifteen-month period and was reprimanded for killing so many stock. The Texas Supreme Court ruled that Quill had assumed the risk, but the plaintiffs could recover if the deceased did not know of the defective fence.[42]

Railroads could also disclaim their liability when accidents occurred in public places, where the railroads were not required to fence their rights of way. Although the railroad fence statutes seldom specified liability in such areas,[43] the courts in construing the statutes interpolated certain exceptions and held that the statute was inapplicable whenever superior obligation forbade a fence.

Where a railroad was laid along a public street in a city, town, or village, the company

was not required or permitted to fence its track, nor was it required to fence its track at its switch limits within a municipality or to fence across legally laid out highways crossing its tracks. Thus a railroad was not liable for injuring cattle at night in the switch area.[44]

The railroads tried to disclaim their liability by broadly defining the areas in which they were immune from building fences. The courts in Kansas and many other Plains states, however, continually ruled that the railroad could not evade its liability for not fencing even within the limits of a municipality, if such fences would not obstruct the streets, highways, or public guards.[45]

The Texas Supreme Court, in the case of *International and Great Northern Railway Company v. Cocke* (1885), clarified the company's liability at public crossings for damage to stock, stating that the situation was the same as if the road were fenced. If, therefore, stock were lawfully running at large, the company was liable for injury to stock only when it failed to exercise ordinary care. If, on the other hand, animals were running at large illegally, the company would not be responsible for injury, unless the company was grossly negligent.[46] The same court two years later specifically enumerated the places that public necessity or convenience required should be left unfenced, such as the streets of a city or town, the depot, and station.[47]

Perhaps the most important weapon the railroads used to defend their cases was the herd law. They constantly cited it in their attempts to prove contributory negligence on the part of the plaintiffs, which in turn could release the companies from their liability. Especially in Kansas, the issue was a hard-fought battle for the railroads. In one of the earliest cases, *Central Branch Railroad Company v. Lea* (1878), in which the plaintiff sued the railroad for killing one of her cows by its moving train, the Supreme Court accepted the railroad's assertion of contributory negligence of the plaintiff and found fault on both sides. The railroad, in violation of the law of 1874, failed to fence its track where the cow was killed, but the owner did permit her cow to run at large at night in a county where both the night herd law of 1868 and the general herd law of 1872 were in force. The court held that the owner, in disregarding the statute, was equally at fault with the railroad company, and therefore could not recover.[48]

On the other hand, the court maintained that the stock owner could collect damages if the owner obeyed the herd law but the railroad did not obey the fence law. Thus the owner of hogs that he kept and pastured on his land in a herd-law county could recover for a hog killed upon the railroad track, where it had strayed. Similarly, a farmer living in a county where the herd law was in force could recover for the loss of his hogs, which escaped, through no fault of his own, by breaking through his enclosure, regardless of whether or not the railroad had fenced the track, although a legal fence would not have prevented hogs from getting into the right of way.[49]

By 1891 the emphasis had shifted. In the previously cited lawsuit brought by a sheep owner against Missouri Pacific for killing twelve sheep and injuring seventeen more, the railroad fence law became the key issue. The pasture was enclosed with a sheep-tight barbed-wire fence, but the railroad track that ran through the enclosure was not fenced. The railroad in its defense concentrated on the question of why the sheep strayed onto its right of way. The Supreme Court, however, maintained that if the railroad had enclosed its track with a lawful fence, it would not have been liable, even though the fence would not have kept the sheep off the track. Since it did not, the company was declared liable.[50]

The pendulum shifted again by 1905, when the Missouri Pacific was once more sued, for killing three mules and a colt. The defendant tried to find fault with the owner of the animals, but the court found that the stock killed were the ordinary farm stock kept in the owner's pasture enclosed with an ordinary fence in a county where the herd law was in force. Since the stock escaped without the owner's being at fault, the court held that the

owner of the stock could recover, regardless of the position of the railroad in the fence law of 1874.[51] Throughout the period the problem for the Kansas Supreme Court was a balancing act, deciding which law, the railroad fence law or the herd law, should be used to ascertain the extent of negligence for the injury or killing of stock on railroad tracks.

In Texas, the railroads concentrated their efforts on proving contributory negligence in the plaintiff's conduct. They based their arguments on the 1876 act "Preventing Certain Animals from Running at Large in Counties and Subdivisions," which authorized the county to restrict certain animals from running at large.[52] The Texas courts had taken a position favorable to the railroads, fully considering the stock (herd) law to determine the liability of the railroad. Thus, where the stock law was in force, prohibiting stock from running at large, the degree of care that a railroad company was required to exercise in preventing injuries was much less than where there was no such law.[53]

In *Missouri, Kansas, and Texas Railway Company of Texas v. Tolbert* (1907), an action to recover the value of a mule killed by the defendant's locomotives, a judgment was rendered in favor of the plaintiff in the amount of $175. The Texas Supreme Court, to which the railroad appealed, rejected the appellant's contention that the stock law was legally in force in the county, because the court found the stock law petition defective. The court ruled, accordingly, that the railroad fence law (article 5428) alone would control the case; without a stock law or with a defective stock law, there was nothing to modify the plaintiff's right of recovery.[54]

The railroads suffered a major defeat in Nebraska, where the Supreme Court took a more clear-cut, hostile position. The court construed the statute of 1867, which made a railroad company liable for stock killed upon its track, in such a way that a railroad company was not relieved of liability even though the stock killed was running at large in violation of law.

Dual Objectives of the Railroad Fence Law

In *Burlington and Missouri River Railway Company v. Brinckman* (1883), the Nebraska Supreme Court held that the railroad was liable for stock killed upon its track while running at large at night, although the 1877 statute prohibited stock from running at large at night. The duty of the railroad to erect and maintain fences, the court explained, was for the public benefit and security as well as for the benefit of the cattle owners, and therefore the court considered the matter too important to leave to the thousand proprietors along the road. Nor were damages done to the cattle limited to those of the adjoining owners. The court further pointed out that the statute required all railroad companies to fence their tracks and to put in cattle guards at road crossings. If the railroad failed to do so, they should absolutely be liable to the owners of the stock killed or injured, and the question of negligence of the owner would not enter into the case.[55]

Two years later, in *Chicago Burlington and Quincy Railway Company v. Sims* (1885), the Nebraska Supreme Court rejected the contention of the defendant railroad that the owner willfully and purposely had turned his animal loose to run at large and that evidence was not sufficient to prove that the accident had occurred because of the lack of fencing. Strictly following its *Brinckman* decision, the court made the railroad liable for the stock killed upon its track.[56]

In Oklahoma, a fence-in country, no stock was allowed to run at large. Where a railroad was not required to fence its right of way but did so voluntarily, the railroad was not liable unless it was negligent by failing to keep the fence in good condition and as a result, trespassing cattle were killed.[57] The railroad lost an important battle in 1912, however, when the Oklahoma Supreme Court upheld Nebraska's *Brinckman* ruling, stating that the herd law did not alter the railroad's obligation to fence the rights of way.[58] The railroad's

refusal to construct a hog-proof fence bordering its right of way, despite the hog owner's request, was sufficient to make the company liable.

CONCLUSION

By the end of the nineteenth century, the herd law had become a standard rule, marking the end of the frontier in the Great Plains. By then not only were many western railroads forced to fence their rights of way, at least partially, but also more stock owners voluntarily enclosed their lands as the cost of barbed-wire fencing became affordable.

Consequently, lawsuits involving railroad fences dwindled to an insignificant number. It is difficult to speculate which was more economical for the railroads, to avoid their liability by fencing both sides of entire lines or by fighting lawsuits in court and successfully defending their cases. The railroads considered the fencing requirement a costly and unfair burden arbitrarily imposed on them. The legal forum the railroads chose to use, as defendants seeking solutions, was largely a disappointment. The law of railroad fencing, as the courts interpreted it, was never intended as, nor ever became, a vehicle to promote the interest of the railroad enterprise but came to serve mainly the interest of the stock owners along the track as well as to protect the passengers and their property. The vigorous defense the railroads put up, trying to safeguard their economic interest, however, did lead to an unexpected, important transformation of railroad fence law into a mature body of law.

Nevertheless, by the beginning of the twentieth century the railroad fence law had fully developed into the railroad stock law, which came to impose liability on railroads "without regard to negligence" for the wounding or killing of animals by a train. The requirement that railroads fence their rights of way in order to avoid civil liability for the destruction of livestock by passing trains did drastically broaden railroad liability. This enlarged burden certainly might have been one of the state regulations imposed on the railroads, such as freight rates during the Gilded Age, that some historians have claimed were major factors in the eventual decline of American railroads.

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NOTES

1. Nathaniel Shurtleff, ed., *Records of the Governor and Company of the Massachusetts Bay in New England, 1628-1686* (Boston: William White, 1853-54), 1:15, 39; 2:106, 215, 332; 3:241; William Whitmore, ed., *The Colonial Laws of Massachusetts, 1660-1672* (Boston: Rockwell and Churchill, 1889), 132; Richard B. Morris, *Studies in the History of American Law with Special Reference to the Seventeenth and Eighteenth Centuries*, 2nd ed. (New York: Octagon Books, 1964), 209-10.

2. The New England fencing practice has been discussed in such general works as William Weeden, *Economic and Social History of New England, 1620-1789* (Boston: Houghton, Mifflin and Co., 1890), 1:58-67, 275-78, 404-5; Percy Bidwell and John Falconer, *History of Agriculture in the Northern United States, 1620-1860* (Washington, DC: Carnegie Institution of Washington, 1925), 21-25, 55-58; Sumner Powell, *Puritan Village: The Formation of a New England Town* (Middletown, CT: Wesleyan University Press, 1963), 14, 19, 122, 141-42, 184-85; Howard Russell, *A Long, Deep Furrow: Three Centuries of Farming in New England* (Hanover: University Press of New England, 1976), 35-37, 40-63, 73-74, 79, 126-27, 155; and David Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 1982), 46-47, 49-50.

3. Scholars have paid more attention to the open range that prevailed in the colonial South, or more broadly, the antebellum South. Lewis Gray, *History of Agriculture in the Southern United States to 1860* (Washington, DC: Carnegie Institution of Washington, 1933), 1:138-51, 2:843, argues that the open range was a homegrown necessity in the South because of the vast expanse of land, as landowners preferred to fence in the small cultivated areas rather than closing the range. This view has been confirmed by a number of scholars, including

Terry Jordan, whose *Trails to Texas: Southern Roots of Western Cattle Ranching* (Lincoln: University of Nebraska Press, 1981) provides an excellent account of how open-range cattle raising moved steadily from seventeenth-century Carolina to the Texas of the 1870s. On the other hand, Forrest McDonald and Grady McWhiney maintain that the open range was not a mere creation of the southern physical environment but was itself a tradition for the people of Celtic heritage who settled in the South. See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 30-31; Forrest McDonald and Grady McWhiney, "The Antebellum Southern Herdsmen: A Reinterpretation," *Journal of Southern History* 41 (1975): 147-66; Forrest McDonald and Grady McWhiney, "The South from Self-Sufficiency to Peonage: An Interpretation," *American Historical Review* 85 (1980): 1095-1118; and Forrest McDonald and Grady McWhiney, "Celtic Origins of Southern Herding Practices," *Journal of Southern History* 51 (1985): 165-82. One of the significant works on the southern open range is J. Crawford King Jr., "The Closing of the Southern Range: An Exploratory Study," *Journal of Southern History* 48 (1982): 53-70. It explains why the policy of fencing crops in and animals out persisted, despite the constant protests of planters, until long after the Civil War, and argues that the end of the open range was a part of a profound set of changes that reshaped the social, economic, and political life of the region. This very suggestive interpretation could be useful for understanding the transformation of the fencing policies in the Great Plains, which took place in a shorter duration of time, from 1850 to 1900.

4. The story of fencing in the Great Plains after the Civil War has been well told as the most dramatic phase of the history of fencing in the United States in Walter Prescott Webb, *The Great Plains* (Boston: Ginn, 1931), 238-39, 280-318. Although some of his views have come to be challenged by recent historians, Webb has provided a sound basic framework in which the fencing problem should be properly comprehended.

5. Sam Brownback, "Kansas Fence Laws and the Laws of Trespassing Livestock" (Manhattan: Kansas State University Cooperative Extension Service, 1984); Robert C. Casad, "The Kansas Law of Livestock Trespass: A Study in Statutory Underpainting," 10 *Kansas Law Review* 57-60 (1961). Casad's article is an excellent analysis of the Kansas law and court cases dealing with livestock trespass covering the period 1854-1960, but it touches only briefly on the period before 1900.

6. Leslie Hewes, "Early Fencing on the Western Margin of the Prairie," *Annals of the Association of American Geographers* 17 (1981): 499-526.

7. Alvin Peters, "Herd Law in Kansas," *Heritage of the Great Plains* 20 (1987): 29-38; *Kansas Territorial Statutes* (1855), chap. 83; Casad, "Kansas Law," 58; *Union Pacific Ry. C. v. Rollins*, 5 Kansas 177, 260 (1869). Kirk Hutson argues, in his "Texas Fever in Kansas, 1866-1930," *Agricultural History* 68 (1994): 74-104, that the Kansas herd law resulted from problems with Texas fever.

8. *Kansas General Statutes of 1889*, chap. 6725; *Kansas General Statutes of 1929*, 47/301-47/313; Alvin Peters, "Posts and Palings, Posts and Planks," *Kansas History* 12 (1989-90): 32.

9. *Revised Statutes of Nebraska, 1867*, 82; *General Laws of Colorado, 1877*, 461; *Codified Statutes of Montana, 1872*, 476; *Revised Statutes of Texas, 1879*, 358; *Fence Laws of Wyoming Territory, 1869 and 1871*; *Revised Laws of Idaho, 1878*; and *Statutes of Nevada, 1875*.

10. Rodney O. Davis, "Before Barbed Wire: Herd Law Agitation in Early Kansas and Nebraska," *Journal of the West* 6 (1967): 41-62.

11. *Laws of Territory of Utah, 1869*, 3; *Revised Codes of Dakota, 1877*, 271; *Statutes of Oklahoma of 1893*, 86-91.

12. The railroad in the Great Plains, as well as the unique topography, agriculture, ranching, and fencing in the Plains, have long attracted the attention of many scholars. What still needs to be examined is the interplay between farmers, ranchers, and the railroads, especially its legal aspects. In order to fully appreciate the role the railroads played, it is necessary to analyze the statutes and court cases of the Plains states and territories.

13. The literature of the construction, influence, and achievements of railroads in the Great Plains is vast. See, for example, John C. Hudson, "Towns of the Western Railroads," *Great Plains Quarterly* 2 (1982): 41-54; Russell S. Kirby, "Nineteenth-Century Patterns of Railroad Development on the Great Plains," *Great Plains Quarterly* 3 (1983): 157-70; William L. Lang, "Corporate Point Men and the Creation of the Montana Central Railroad, 1882-87," *Great Plains Quarterly* 10 (1990): 152-66; Albro Martin, *Railroads Triumphant: The Growth, Rejection, and Rebirth of a Vital American Force* (New York: Oxford University Press, 1992).

14. Webb, *The Great Plains*, 273-80; Robert E. Riegel, *The Story of the Western Railroads* (New York: Macmillan, 1926); Ray A. Billington, *Westward Expansion: A History of the American Frontier*, 2nd ed. (New York: Macmillan, 1960), 635-52; Richard White, *"It's Your Misfortune and None of My Own": A History of the American West* (Norman: University of Oklahoma Press, 1991), 125-47, 195-97, 246-58.

15. Webb, *The Great Plains*, 274.

16. James W. Ely Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001),

117-23; Sarah H. Gordon, *Passage to Union: How the Railroads Transformed American Life, 1829-1929* (Chicago: Ivan R. Dee, 1996), 56-69.

17. Sig Mickelson, *The Northern Pacific Railroad and the Selling of the West: A Nineteenth-century Public Relations Venture* (Sioux Falls, SD: Center for Western Studies, 1993), 4, 25, 51, 53-55, 61, 70, 104, 105, 146, 150; Karen De Bres, "Come to the 'Champagne Air': Changing Promotional Images of the Kansas Climate, 1854-1900," *Great Plains Quarterly* 23 (2003): 111-26; Hudson, "Towns of the Western Railroads," 41-54. The western railroads, however, soon became a bitter enemy of the farmers and cattlemen, who thought the railroads were charging them excessively high freight rates. For a fascinating, fresh analysis of state regulations of railroad rates that, through a landmark case, were beneficial for the farmers and stock raisers, see James W. Ely Jr., "The Railroad Question Revisited: *Chicago, Milwaukee & St. Paul Railway v. Minnesota* and Constitutional Limits on State Regulations," *Great Plains Quarterly* 12 (1992): 121-34.

18. Earl W. Hayter, *The Troubled Farmer, 1850-1900* (DeKalb, IL: Northern Illinois University Press, 1968), 116-17.

19. Ibid., 116; Earl W. Hayter, "The Fencing of Western Railways," *Agricultural History* 19 (1945): 163.

20. 16 *American Law Reports* 933; *Kansas Laws of 1874, Revised Statutes, 1876*, art. 4605.

21. *Revised Statutes of Nebraska*, Act of June 22, 1867.

22. *Laws of Nebraska, 1883*, 262-64.

23. Ibid., 263-64.

24. *Kansas Railroad Fence Law of 1874* (art. 4605-4609). For later Kansas laws, see Sam Brownback and James B. Wadley, *Kansas Agricultural Law* (Topeka, KS: Lone Tree Publishing Co., 1989), 258-59, 268-69.

25. *General Railroad Act, Laws of Territory of Utah, 1869*, 15; *Statutes of Nevada, 1875*, 442; *Revised Statutes of Idaho, 1878* (sec. 2680); *Revised Statutes of Texas, 1879*, 610.

26. *Statutes of Oklahoma, 1890*, 261; *Territory of Oklahoma, Session Laws of 1903 (An Act to Compel Railroad Companies to Fence Their Roads)*, 139-40.

27. *Kansas Pacific Ry. Co. v. Mower*, 16 Kansas 573 (1876); *Burlington & M.R.R. Co. v. Childress*, 64 Texas 346 (1885); *Missouri Pacific Ry. Co. v. Harrelson*, 24 Pacific 465 (1890).

28. Hayter, "Western *Railways*," 163-64; Hayter, *The Troubled Farmer*, 116-17.

29. Cases usually involved a small amount of damage: "$30 for a loss of a cow," "$39 for killing a steer and a heifer," "$30 for the value of a heifer," "$90 for killing 12 sheep and injuring another 17 sheep," "$35 for killing a cow and injuring another." See the cases discussed below.

30. These cases are reported in the *Kansas Reports*.

31. *Kansas Laws of 1874*, chap. 94, sec. 4.

32. *Kansas Pacific Ry. Co. v. Mower*, 16 Kansas 573 (1876).

33. *Atchison, Topeka & Santa Fe Ry. Co. v. Edwards*, 31 Kansas 531 (1878).

34. *Kansas Pacific Ry. Co. v. Mower*, 16 Kansas 573 (1876). See also *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 515, 522 (1885); Ely, *Railroads and American Law*, 119-20.

35. *Missouri Pacific Ry. Co. v. Harrelson et al.*, 24 Pacific 465 (1890).

36. *Graves v. Northern Pacific Ry. Co.*, 6 Pacific 16 (1885).

37. *Cottrel v. Union Pacific Ry. Co.*, 21 Pacific 416 (1889).

38. *Atchison, T. & S. F. Ry. Co. v. Jones*, 20 Kansas 529 (1878).

39. See, for example, *Chicago, K. N. Ry. Co. v. Hotz*, 28 Pacific 695 (1892).

40. *Stanley v. Atchison, T. & S. F. Ry. Co.*, 127 Pacific 620 (1912); *Missouri Pacific Ry. Co. v. Eckel*, 31 Pacific 693 (1892).

41. *International & Great Northern Ry. Co. v. Hughes*, 4 SW 492 (1887).

42. *Houston & Texas Central Ry. Co. v. Quill*, 92 Texas 335 (1898).

43. The Nebraska Act of 1883 (*Laws of Nebraska 1883*) and the Oklahoma Act of Railroad Fence of 1903 (*Territory of Oklahoma, Session Laws of 1903*) seem to be the only two clearly stated exceptions.

44. *Union Pacific Ry. Co. v. Dyche*, 28 Kansas 200 (1882); *Fort Worth & D. C. Ry. Co. v. Hodge & Speer*, 58 Texas Civ. App. 540 (1883); 125 SW 350 (1910); *International & G. N. Ry. Co. v. Leuders*, 1 Texas App. Civ. Cases (White & W) 133 (1883).

45. *Union Pacific Ry. Co. v. Dyche*, 28 Kansas 200 (1882); *Atchison, T. & S. F. Ry. Co. v. Shaft*, 33 Kansas 521 (1887), 6 Pacific 908 (1885); *International & G. N. Ry. Co. v. Dunham*, 68 Texas 231 (1887), 4 SW 472 (1887); *Edmund v. Salt Lake & L. A. Ry. Co.*, 196 Pacific 1019 (1921). According to an Idaho law (Rev. Codes no. 2815), a railroad company was not required to fence its road where it ran through narrow canyons, with a public-traveled road occupying almost the entire space, regardless of whether it was located in the municipalities or county districts. Thus the court held that the Northern Pacific was not liable for killing a cow "in a narrow canyon running through a town," because the area was not required to be fenced. See *Bernadi v. Northern Pacific Ry. Co.*, 108 Pacific 542 (1910).

46. *International & G. N. Ry. Co. v. Cocke*, 64 Texas 151 (1885).

47. *International & G. N. Ry. Co. v. Dunham*, 68 Texas 231 (1887); 4 SW 472 (1887).

48. *Central Branch Ry. Co. v. Lea*, 20 Kansas 353 (1878). For the next few years, similar decisions were rendered by the same court. See, for example, *Atchison, T. & S. F. v. Hegwin*, 21 Kansas 449 (1879), *Central Branch U. P. Ry. Co. v. Walers*, 24 Kansas 361 (1880), and *Kansas Pacific Ry. Co. v. Landis*, 24 Kansas 406 (1880). Many cases heard by the Kansas Supreme Court are briefly discussed in Peters, "Herd Laws in Kansas," 30-32.

49. *Atchison, T. & S. F. Ry. Co. v. Riggs*, 3 Pacific 305 (1884); *Missouri Pacific Ry. Co. v. Bradshaw*, 6 Pacific 917 (1885); *Leavenworth, T. & S. W. Ry. Co. v. Forbes*, 15 Pacific 595 (1887).

50. *Missouri Pacific Ry. Co. v. Baxter*, 26 Pacific 49 (1891).

51. *Missouri Pacific Ry. Co. v. Olden*, 83 Pacific 25 (1905).

52. *Revised Statutes of Texas, 1879*, articles 4592-4610 (Act of August 15, 1876), 150.

53. *International & G. N. Ry. Co. v. Dunham*, 68 Texas 231, 4 SW 472 (1887).

54. *Missouri, Kansas, & Texas Ry. Co. of Texas v. Tolbert*, 100 Texas 483 (1907).

55. *Burlington & M. R. Ry. Co. v. Brinckman*, 15 NW 197 (1883).

56. *Chicago B. & Q. Ry. Co. v. Sims*, 24 NW 888 (1885).

57. *Davis Bros. & Burke v. LeFlore*, 26 Oklahoma 729 (1910).

58. *St. Louis & S. F. Ry. Co. v. Steele*, 37 Oklahoma 536 (1912).