

December 2019

The Open Range: A Vanishing Concept

Frank C. Mockler

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Recommended Citation

Frank C. Mockler, *The Open Range: A Vanishing Concept*, 13 Wyo. L.J. 136 (1959)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol13/iss2/9>

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WYOMING LAW JOURNAL

VOL. 13

WINTER, 1959

NO. 2

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Published in the Fall, Winter, and Spring by the University of Wyoming School of Law
and the Wyoming State Bar.

Subscription Price \$2.50 per year.

Mailing address: College of Law; University of Wyoming,
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NOTES

THE OPEN RANGE: A VANISHING CONCEPT

One of the oldest problems known to the landowner has involved the trespass of animals upon the land, and the erection of fences to prevent the trespass. Ancient English law made the landowner strictly responsible for trespass by his livestock: "Where my beasts, of their own wrong, without my will and knowledge, break another's close, I shall be punished, for I am the trespasser with my beasts."¹ It is safe to say that, next to problems arising in connection with schools and with water, the fencing problem, and trespass related to it, remains to this day of paramount importance to rural residents of Wyoming. As grazing conditions in the state have changed, legal concepts of grazing privileges have also changed.

It was settled at common law that it was the duty of the owner of animals to fence them in, and that no duty rested upon their neighbors to fence them out; the owner of animals was liable for their trespass upon the lands of another, whether the lands trespassed upon were enclosed or not.² This common law rule has never been accepted in Wyoming. In

1. 12 Hen. VII, Keilway 36.

2. *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571 (1904).

Martin v. Platte Valley Sheep Co.,³ the Wyoming Supreme Court indicated that the common law rule requiring the owner of cattle to confine them, "never obtained" in Wyoming or in other western states. In numerous other decisions the Wyoming Supreme Court has recognized the principle that no trespass is committed when animals lawfully running at large wander upon the unenclosed lands of a private owner.⁴

The importance of standards to define whether land was enclosed or unenclosed was of such concern that the Legislature of the Wyoming Territory in 1876, in one of its few enactments, set forth the requirements for a lawful fence. Although the statute did not specifically say so, the inference was that if a fence did not conform to the specifications, the land was considered unenclosed and the owner had no remedy for trespass. The law applied only in Albany, Carbon, and Uinta Counties and provided only for fences made of poles and boards, "five to the panel, the top rail or pole to be at least five feet from the surface of the ground."⁵

With changes in fencing materials—principally the advent of barbed wire—the original requirements for a lawful fence have been, by necessity, frequently changed by our legislature. The last of these changes was in the 1953 session when a comprehensive definition of a lawful fence was enacted. In addition to exact specifications regarding materials, spacing, and height of wire or poles, the law now provides that any fence better than the one described shall be a lawful fence.⁶

Although the "fence out" rule prevails in this state, it should be noted that there are exceptions to it of great importance to Wyoming residents. The principal exception is that involving federal lands. Since these lands, comprising more than 51% of our surface area, are not subject to Wyoming law, the law regarding fencing and trespass on them should be reviewed with care.

In one of the earliest fence cases, the United States Supreme Court held that a Colorado rancher, who turned his stock loose some distance from a national forest boundary, was rightfully enjoined by local forest officials from so doing. The Court indicated that it appeared that the defendant had turned out his cattle under circumstances which showed that he expected and intended that they would go upon the reserve to graze. It also held that fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they intend to graze upon the lands of another.⁷ The Court went on to say that since it had decided that point, it was not necessary to consider how far the United States was required to go in fencing its property.

3. *Id.* at 450, 76 Pac. at 574.

4. *Garreston v. Avery*, 26 Wyo. 53, 176 Pac. 433 (1918); *Painter v. Stahley*, 15 Wyo. 510 (1907); *Hardman v. Kine*, 14 Wyo. 503 (1906); *Cosgriff v. Miller*, 10 Wyo. 190 (1901).

5. *Compiled Laws c. 51* (1876).

6. *Wyo. Comp. Stat. § 66-501* (Supp. 1957).

7. *Light v. United States*, 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911).

In a Montana case decided in 1908 a federal circuit court was more explicit in regard to fencing. It said that the United States had the unlimited right to control the occupation of the public lands, and that no obligation to fence those lands, or to join with others in fencing them for the purpose of protecting its rights, could be imposed on it by a state.⁸

In conformity with this ruling the Forest Service and the Bureau of Land Management have drawn up regulations prohibiting unlicensed livestock from grazing on lands under the control of these agencies, and have provided impoundment and damage procedures against the owners of livestock trespassing thereon.⁹

Wyoming law provides that an owner of land may require the owner of adjacent land to pay one-half the cost of construction of a partition fence.¹⁰ It also provides that joint users of a partition fence should share the cost of maintenance in proportion to their respective interests. In case either construction or maintenance costs are refused, a civil action may be maintained to recover the share of the landowner not participating.

In West Virginia, the state fencing laws are similar to those of Wyoming and provide for joint contribution of adjacent landowners.¹¹ However, in a case tried there in 1941 in federal court, the government was granted an injunction against a landowner whose livestock had grazed on the national forest adjoining his property. The defendant landowner said he was willing to build half the fence as West Virginia law provided, if the government would build the other half. The court, in ruling against the proposal, said that there was no law passed by Congress requiring the government to fence lands that it owns. It further stated that the plaintiff (the government) was a sovereign and had a right to make its own rules, and however hard and unjust it might seem to the citizens owning lands adjoining those of the government, they must comply with those rules and regulations.¹²

Another exception (in addition to the one respecting federal lands) seems to be developing in the western states as to unfenced private lands. In *Haskins v. Andrews*,¹³ decided in 1904, the Wyoming Supreme Court ruled that a defendant, who had turned out more cattle upon his own land than the land could reasonably support, could not be held liable for damage caused by his cattle wandering upon and depasturing the plaintiff's unenclosed premises. The court went on to say that it did not decide whether the fact that the defendant had overstocked his own land might or might not, in connection with other acts and circumstances, tend to show a willful trespass. Later rulings in Montana and New Mexico are more decisive. The Montana case¹⁴ held that where one stocked his own land with a greater number of horses than it could support, so that in order

8. *Shannon v. United States*, 160 Fed. 870 (9th Cir. 1908).

9. 36 C.F.R. 261.13 (1919); 43 C.F.R. 161.11(1) (Supp. 1956).

10. Wyo. Comp. Stat. §66-507 (1945).

11. West Virginia Code 2118 (1955).

12. *United States v. Johnston*, 38 F.Supp. 4 (S.D.W.Va., 1941).

13. 12 Wyo. 458, 76 Pac. 588 (1904).

14. *Hill v. Chappel Bros. of Montana*, 93 Mont. 92, 18 P.2d 1106 (1932).

to sustain life the horses were forced to pasture on the lands of others, the duty to make compensation to the persons wronged was as clear as it would be if the horses were driven thereon in the first instance. The circumstances and decision of the New Mexico case, in 1935, are interesting, as they further illustrate that overstocking may evidence willful trespass and liability. The plaintiff had a fence surrounding about fifteen sections of grazing land. Within the enclosure (and not fenced) were two sections of state land leased to the defendant for grazing purposes. Onto these two sections the defendant turned some 200 head of cattle. The New Mexico Supreme Court sustained an injunction permanently enjoining the defendant from permitting cattle to go upon lands owned by the plaintiff. The court stated that there was not sufficient grass on the defendant's lands for the number of cattle put to graze, and held that relief against willful trespass is not dependent upon the existence of a statutory fence.¹⁵

As the West has become more settled there has been a tendency to provide stricter control over livestock running at large. An example of this is the decision of the Wyoming Supreme Court in 1951, in which the court held that the owner of cattle which wandered into the City of Laramie was liable for damages to unfenced hay destroyed by them, in view of a city ordinance prohibiting cattle from wandering at large.¹⁶

Further evidence of the passing of the open range theory and toward a return to the old common law doctrine is found in the enactment in 1955 by the Wyoming State Legislature of a Livestock District law.¹⁷ This provides that landowners within an organized irrigation district may petition the county commissioners of the county wherein the proposed district would lie, and if 75% of the landowners owning 75% of the land are favorable, the commissioners can create a livestock district. Within this district, the owner of livestock is guilty of a misdemeanor if he allows livestock to run at large. The owner is also civilly liable to any person within the district "who shall suffer damage from the depredations or trespass of such animals, without regard to the condition of his fence."

The evolution of the fence law depicts the history of our state. In the early days there were areas of open range and cattle wandered miles from home, subject only to the control of the round-up wagon and a few riders. The homesteader coming later if he wanted to keep animals out, had to fence against them. Then came the creation of the National Forests and a restriction of grazing on federal lands. In 1933, with the passage of the Taylor Grazing Act, the last of the real "open range" disappeared. Later, the development of intensively farmed areas, due to irrigation, brought about further changes. Cities and towns have expanded and by ordinances have moved to protect their citizens. The legislature and the courts have kept abreast of the changing times and we now definitely tend toward the "fence in" concept of the old common law. **FRANK C. MOCKLER**

15. *Wright v. Atkinson*, 39 N.M. 307, 46 P.2d 667 (1935).

16. *Sowers v. Corthell*, 69 Wyo. 215, 240 P.2d 891 (1951).

17. Wyo. Comp. Stat. § 56-3001 (Supp. 1957).