REFLECTIONS ON DOG KENNEL CORNER: FENCING AND FENCE LAW IN NEW ZEALAND

by
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Where Burke's Pass opens on the Mackenzie Basin, in the Canterbury high country, lies a pitiful monument to a pitiful class of animals- - the boundary dogs. In the days before fences, shepherds placed kennels at strategic points along the boundaries of pastoral runs and tied their most worthless dogs to them. The lonely, intermittently provisioned beasts barked at anything that came near, including the sheep, thereby keeping flocks from straying onto adjoining runs. The modest plaque at Dog Kennel Corner reads, "In early times, before these roads were fenced, a boundary dog was kenneled here to hold back station sheep."[2]

The living fence of boundary dogs was a passing phenomenon, but the question of fencing is a persistent issue. Wherever agriculturalists and pastoralists have jointly or adjacently occupied a landscape, fencing has become both a manifestation of culture and a point of contention. It is mainly in material and technique that fencing serves as a cultural document. Fences on a landscape, particularly a new-world landscape, document the interaction of immigrant culture and the environment. And it is mainly in legal matters that fencing becomes a point of contention. Laws and cases, particularly in a new-world principality, document the interaction of competing visions of the country's destiny.[3]

Unlike on the Great Plains of North America, neither the material nor the legal aspects of fencing have been the subject of significant scholarly study in New Zealand. Builders of fences and of laws there faced problems similar to those in other settler societies, and devised some of the same solutions, but in other respects were remarkable and peculiar. A survey of this experience both adds a chapter to the agriculture history of New Zealand and provides comparative context for experience in North America and other continents. [My intent in this paper is to treat mainly the legal aspects of fencing, briefly discussing the material aspects only as they enlighten the legal developments, and to flesh out the material aspects in a subsequent, longer manuscript.]

The Polynesian aboriginal farmers of New Zealand, the Maori, required no fences, for they possessed no livestock- - indeed, the islands had no large

mammals. On the arrival of Europeans the Maori quickly came to excel in the production of such European introductions as potatoes and wheat and, like Europeans, protected their fine crops with fences, until their agrarian development was stifled by their social marginalization. English planned colonization in mid-nineteenth century, by contrast, was slow to take off. Subsistence farming by smallholders was insufficiently dynamic to drive colonization and expansion. Pastoralism, spreading from the hearth of New South Wales, moved in and filled all countryside readily adaptable to it with Merino flocks. Initial opportunities for pastoralism lay in those open tussock grasslands- - those subhumid areas of New Zealand most comparable to the North American plains- - which one settlement historian has categorized as the "felden," as opposed to the "arden," the dense bush. In the most promising areas opportunistic stockmen deliberately turned the tussock, briefly practiced cereal culture, and then laid down improved pastures seeded with English grasses. More yeomanly field husbandry received new impetus from the technological advent of refrigeration, which expedited export of meat and butter, and from the political advent of the Liberals, who broke up South-Island estates for distribution to smallholders in the name of "closer settlement." They also assisted sturdy colonists clearing the Great Bush of the North Island and establishing livestock farms, particularly dairy operations.

Dynamic land development, and thus a dynamic setting for developments in fencing, continued long after the settlement era. Technological advances in the twentieth century–especially the application of phosphate fertilizers–assisted in the development of an export agriculture emphasizing lamb, wool, and butter. Government subsides for land development stoked the engines of expansion. Not until the 1980s did successive governments re-think agricultural policy in the light of changing international economics, resulting in a withdrawal of subsidies and serious questions about the sustainability of conventional agriculture and pastoral operations.

Commencing agriculture in Newest England, settlers brought with them the conceptions of English common law as it pertained to fences. The basic premise was animal liability: The owner of livestock had to restrain his beasts, by herding or fencing, so as to prevent misehief by them, or be held liable for damage to crops. Where two landowners' holdings met, they were to share the cost of the partition fence, providing both had livestock to be restrained; if one had no stoek along the partition, he had no obligation to help fence the boundary. English law enforced animal liability through institutions called

pounds, attended by officials called pound keepers, who took up and impounded straying animals until damages should be paid. It enforced partition fence law by empowering local officials to arbitrate neighborly disputes over the responsibility to fence.[5]

The appointed governors of New Zealand deliberately replicated English common law, with certain notable exceptions. The first ordinance on the subject, in 1842, confirmed animal liability, but to only a limited extent. Stockmen were liable only if their beasts broke into cropland "substantially fenced." As in other new-world settings, livestock could run at large- - but only, in this case, until 1844, when the governor imposed animal liability for all lands. In 1847 the lieutenant-governor established a full-blown system of pounds and pound keepers. That same year he departed from English law in respect to partition fences. An ordinance "to encourage the fencing of land" required any landowner requested by a neighbor to share in the cost of a partition fence, whether or not he had cattle (a term which comprised all grazing animals- - mostly sheep in New Zealand) to restrain. This departure from English precedent, however, was based on an English cultural conception- - the vision of an ordered landscape, well bounded by fences and hedges.[6]

With the instigation of representative government, New Zealand's parliamentarians were educated quickly as to the volatility of the fence issue. A fencing bill in 1861 provoked debate featuring such "gross language" that the honorable members left it alone.[7] The subsequent creation of provincial governments, however, allowed the discrete provinces to deal with the fence issue as they saw fit. In those provinces where expansive grasslands encouraged extensive pastoralism but provided little wood for fences, fencing was an important issue, as authorities sought to balance agriculture and pastoral interests.

The first ordinance on the subject in Canterbury (1854), for instance, confirmed animal liability, but limited it. If cattle trespassed on land enclosed by a sufficient fence, "special damages," the full amount demonstrable, could be collected. If cattle trespassed on unfenced land, only "ordinary damages," fairly minimal fees, could be collected. Pounds were established and poundkeepers appointed, but mention in the ordinance of entire animals at large indicated an expectation that animals would not all be fenced in. Letters to the editor of the *Canterbury Standard* indicated some local controversy over the workings of the ordinance. "Arbitrator" and his allies criticized small farmers who "scratched in" a few acres of crops, turned "not one sod" for fence, and

then lay in wait to collect damages from honest stockmen. "Tu Quoque" and his friends insisted that smallholders ought not to have to fence during their first few years, and that stockmen should not keep more animals then they could feed on their own property. Although Arbitrator complained of "vulgar scurrility" heaped upon him, the exchange was genteel.[8]

Subsequently the Superintendent of Canterbury revisited the animal-liability issue, first (1862) reducing the ordinary damages that could be claimed for animal trespass during daylight hours, then decreeing that "no owner or occupier of any unfenced land shall be entitled to demand or recover any damages whatever."[9] Pastoralists were having their way, especially since Canterbury's ordinances pertaining to partition fences also exempted leaseholders of Crown "waste lands," that is, open range, from requirements to share in costs of partition fences along private-land boundaries of their leaseholds. Nevertheless, where more intensive husbandry obtained, the authorities continued to envision an ordered land. Successive Canterbury ordinances insisted that both adjoining landowners share costs for partition fences, whether or not they had animals to restrain. As recorded in the Canterbury *Government Gazette*, the superintendent routinely appointed the scores of poundkeepers required. Few partition-fence notices appeared, however, indicating that most neighbors settled such matters amicably without resort to legal notification. Two runholders in the Timaru district bought newspaper notices to inform their neighbors that they wished strays and entire horses kept off their places; they were not quick to resort to law. A petty partition fence case entered the magistrate's court and the local paper of Ashburton.[10]

Otago, too, chose to forge its own fence laws, and the same issues recurred as in Canterbury- - degree of liability for damages by animals, responsibilities of neighbors in erection of partition fences, stipulations concerning entire animals at large. The first fencing ordinance (1855) reverted to English common law in that it required an adjoining landowner to contribute to the cost of a partition fence only if he "availed himself" of the fence, but a quick revision (1856), in the interest of encouraging improvements, restored the universal obligation to contribute (except, of course, for pastoral leaseholders of Crown lands). As in Canterbury, the superintendent in Otago moved to limit animal liability. First (in 1862) he limited damages by livestock trespassing on unfenced lands to common damages. Then (in 1865) he eliminated all claims for damages on unfenced lands within "hundreds," that is, planned sections of

homesteads created by the subdivision of lands within pastoral runs.[11]

Whereas other provinces remained content with New Zealand law in respect to fences, Canterbury and Otago had chosen to abet the burgeoning pastoral industry by limiting the liability of livestock. At the same time, they had retained coercive partition fences laws such as would improve the landscape where more intensive settlement prevailed. Fence law had differentiated according to regional conditions. With the abolition of provincial government in 1876, however, the fencing issue again became an all-New Zealand matter.[12]

Immediately, in 1877, the House of Representatives considered both an impounding bill and a fencing bill. Some members objected that these issues were too trivial for the attention of an august legislative body; fellow members, farmers and pastoralists, quickly disabused them of such lofty attitudes. Maori members expressed suspicion, relating incidents whereby their people had been defrauded of cash and livestock through animal trespass proceedings. Most of all, members feared running afoul of local needs and desires, saying that "a system which applied to one province of New Zealand would not apply to the others." The bills died. So did in 1878 an impounding bill empowering local road boards to deal with the issue, and a fencing bill that recognized provincial definitions of a legal fence. When a Legislative Council member brought in a fencing bill in 1879, his colleagues, he said, exclaimed, "Dear me! Surely you cannot intend to do anything of the kind?" The bill, in fact, calling for a return to English common law of fences, died.[13]

Debate heated up in 1880 and crystallized along class lines. Some representatives wished to impose animal liability on all lands; they stood up for small farmers who, they said, could not afford to fence. Others depicted pastoralists as victims, harassed by bogus smallholders who took up inconvenient holdings in the middle of pastoral country and expected to profit from damages. As for the partition fence issue, some denounced a bill before the house as "pre-eminently a graziers' bill," others scored it as "pre-eminently a small settlers' bill." One member mourned that the representatives "were incapable to legislating, and were mere politicians," but others warned that a partition fence law would be used by large landholders to impose heavy obligations on smallholder neighbors and drive them from the country. Obviously, the old theme of local particularism–local authorities knew best how to deal with local conditions–was still operating, but by this time something more had been added, in fact had come to dominate consideration. The rise of

the Liberals had polarized most debate into a small-farmer versus rich-pastoralist pattern.[14]

Finally, in 1881, Parliament was able to pass a fencing bill, but not without heated and sometimes peculiar debate. By this time legislators were anticipating the subdivision of great estates which the Liberals would accomplish. Regardless of partisan differences, many considered it essential that a sound fence law be passed before this process commenced, but others remained suspicious that poor smallholders would be imposed upon when they could least afford it. Ethnic offense resulted when an English representative posited a correlation between the poverty of Scotland and that nation's lack of a fence law, to which a member named MacAndrew retorted, "Scotland is the richest country in the world." His English colleagues conceded that this was so in intellectual prowess, if not in gold, and the bill passed. The law provided for compulsory contribution for the erection of partition fences, as provincial statutes generally had before.[15]

Four years later Parliament passed an impounding bill with little fuss, probably because certain provincial regions were allowed to be exempt and follow local practice. Thus New Zealand law generally came to resemble the old Canterbury ordinance, providing that damages could be collected for animal trespass on fenced land, but not on unfenced land. In the old provinces of Nelson, Marlborough, and Westland, however, animal liability pertained on all lands, and in Otago, with certain restrictions on impounding, the same condition obtained. Within those four provinces, local county councils, by two-thirds vote, could exempt themselves from animal liability on unfenced lands. No counties in the first three provinces did so, but most of those in Otago exercised the local option. Otago, in effect, rather quietly joined the rest of the requiring parties to fence their properties to protect them from roving livestock.[16]

The legislation of the 1880s largely settled the legal questions pertaining to fencing. It remained only, in a general code reform of 1908, to eliminate regional variation, so that throughout New Zealand the owners of unfenced lands lost any right to seek damages from owners of trespassing livestock. By this time nearly all farmers kept livestock themselves; there was no longer a division between crop and animal husbandmen, merely a variation in type. Few cared about the old issues anymore, except when the resurgence of the rabbit nuisance brought adjoining landowners to quarrel over the proposition of rabbit-proof partition fences. Legislators occasionally touched up the code to rationalize it and eliminate anachronisms. No court case ever challenged basic

principles of fence law.[17]

The evolution of the fencing issue in New Zealand was in many respects tied to technologieal and material matters. Settlers in the mid-nineteenth century had only the most laborious recourse for feneing. Ditch-and-band barriers topped with carefully trimmed gorse hedges constituted the fence of choice, but these required both hard labor and several years' time to establish, as well as eontinual trimming. Where suecessful, the establishment of gorse hedges replieated, as nowhere else in the world, the English sense of a bounded landscape–perhaps even improved on it, as gorse thrived better in New Zealand than at home. In most areas of New Zealand, although not in much of the tussock country, bush, and thus wood for feneing, was near at hand, but this was an imperfect solution. During initial settlement and the early pastoral break-out, no praetieal wire was available. Fenees, therefore, had to be of the post, paling, and plank varieties, requiring far too much eutting, hauling, and erection to be praeticable on any but the smallest holdings. Even with the advent of smooth wire of suitable gauge, fences sufficient to hold sheep–seven wires, carefully secured to standards, were preferred–eonstituted a debilitating investment for a capital-poor colony. The high country proved difficult to fence with the best of materials. Most of it was enclosed with materials mule-packed in; some of the high country, because materials dropped from fixed-wing aircraft tended to smash and scatter, awaited the advent of helicopter transport.[18]

Even given these material conditions, which differed in substantial ways from those in other settlement situations, it is possible to elicit some conclusions about the New Zealand experience with fencing and to connect these conelusions with experience in the settlement experiences of North America. The first, obvious conclusion is that the authorities and settlers of New Zealand carried with them preconceptions about the fencing issue and its role in the eountry's development, and they behaved as cultural conservatives. They introduced the English common-law tenets of animal liability and partition fencing.

As in other new-world settings, however, such concepts underwent change in New Zealand. It was the nature of the settlement process that there would be unoecupied lands adjacent to settlements, and exploitation of these lands was facilitated by limiting animal liability, thereby creating an open-range situation. Where pastoralism was most expedient–as in the tussock grasslands of New Zealand–there animal liability was most severely weakened. At the

time, however, and again, as in other new-world settings, authorities considered it necessary to encourage improvements and to domesticate the settled landscape through aetivist partition fence laws. The more lenient and discretionary law of England was perhaps suitable for maintaining a landseape, but was insufficiently coereive for shaping one.

The entrenchment and continuation of the first of these adaptations, the limitation of animal liability, was peeuliar to New Zealand. In both the United States and Canada, as soon as farmers gained advantage over pastoralists in any political unit, they re-imposed unrestrieted animal liability, which they referred to as the "herd law." Eventually, over the entirety of the United States and Canada, stoekmen were subjeet to animal liability, and crop husbandmen were free of any obligation to fence–a principle opposite to that obtaining in New Zealand. It is an irony that revolutionary America restored English common law in this matter, while Newest England discarded it.

In the United States and Canada, too, wherever the herd law proved a divisive issue, high public officials were wont to divest themselves of it and remand it to loeal authorities. Local option not only allowed eounty and munieipal authorities to eonsider local conditions, but also shoved the whole issue off the desks of state and provincial officials. This strategy was at times operative in New Zealand, also. However, a peculiarity of the New Zealand experienee was that with the rise of Liberals, animal trespass and fencing were transformed into significant partisan issues. Party leaders in the United States and Canada considered these issues simply dangerous nuisances.

Finally, it seems appropriate to comment on the degree of order and civility with which New Zealanders treated these matters. On the plains of the United States the herd-law question was fought out again and again at both state and loeal levels. Public discourse was vitriolic, local violence fairly common. Canadian national mythology to the contrary, residents of the Canadian prairies were just as bitter and violent in their neighborly conflicts between pastoralists and agriculturalists. Admittedly, the differences between North Ameriea and New Zealand political systems may simply have spawned better documentation of dispute in the northern demoeracies, but the weight of evidence is that order and civility prevailed more often in New Zealand. It is a comfort to think that those miserable boundary dogs at least served the cause of keeping the Crown's good order in the Empire.

NOTES

1. It was my good fortune in 1991 to hold a Fulbright fellowship for residence at the Alexander Turnbull Library of New Zealand. My research at the Turnbull and other repositories dealt with the agricultural and pastoral history of the tussock grasslands–the subhumid to semiarid portion of the South Island lying to the east of the New Zealand Alps. The several topics on which I worked all had to do with the relationships among culture, technology, and environment. The topics generally were subjects that I had investigated on the plains of the United States and Canada; New Zealand promised intriguing comparative studies. My proposal, "Tussock Grasslands of the South Island: A Comparative Study in Agricultural History," outlining my rationale and topics, is on file both in my office and in the Manuscripts Department, Alexander Turnbull Library, Wellington, New Zealand. North American studies providing comparative basis for the present paper included my own paper, "The Herd Law in the Prairie Provinces," presented to the Western Social Science Association, 1989, and those of my students–Alvin Peters, "Herd Laws in Kansas," *Heritage of the Great Plains* 20 (Summer 1987): 29-38; Alvin Peters, "Posts and Paling, Post and Planks," *Kansas History* 12 (Winter 1989-1990): 222-31; Jan Orton Farrar, "Herd Laws and Hedge Posts: Fencing in a Kansas County," *Heritage of the Great Plains* 21 (Summer 1988): 3-10.

2. Alister Mackintosh, "Dog Kennel Corner," *Tussock Grassland and Mountain Lands Institute Review* No 17 (Sept. 1969): 20-22; personal reconnaissance.

3. Contributory to these comparative remarks are my works, cited above, and the following North American Studies: Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985); Rodney O. Davis, "Before Barbed Wire: Herd Law Agitations in Early Kansas and Nebraska," in Burton J. Williams, Ed., *Essays in American History in Honor of James C. Malin* (Lawrence: Coronado Press, 1973); Charles L. Wood, "Fencing in Five Kansas Counties Between 1875 and 1895," M.A. thesis, University of Kansas, 1959; Robert R. Dykstra, *The Cattle Towns* (New York: Alfred A. Knopf, 1968); and Paul Voisey, *Vulcan: The Making of a Prairie Community* (Toronto: University of Toronto Press, 1988).

4. Standard sources supporting this contextual sketch of New Zealand agriculture include G.T. Alley and D.O.W. Hall, *The Farmer in New Zealand* (Wellington: Department of Internal Affairs, 1941); P.W. Smallfield et al, "Farming in New Zealand," a serial history of agriculture in New Zealand published in the *New Zealand Journal of Agriculture* 74-75 (1946-48); Eldson Best, *Maori Agriculture* (Reprint, Wellington: Dominion Museum Bulletin No. 9, 1976); L.G.D. Acland, *The Early Canterbury Runs* (4th Ed., Christchurch: Whitcoulls Ltd., 1975); R. Ogilvie Buchanan, *The Pastoral Industries of New Zealand: A Study in Economic Geography* (London,

Institute of British Geographers, Pub. No. 2, 1935); Andrew Hill Clark, *The Invasion of New Zealand by People, Plants, and Animals: The South Island* (Reprint, Westport: Greenwood Press, 1970); P.W. Smallfield, *The Grasslands Revolution in New Zealand* (Auckland: Hodder & Stoughton, 1970); Eric Warr, *From Bush-Burn to Butter: A Journey in Words and Pictures* (Wellington: Butterworth of New Zealand Ltd., 1988) and Stephen Eldred-Grigg, *A Southern Gentry: New Zealanders Who Inherited the Earth* (Wellington: A.H. & A.W. Reed, 1980). The source for the arden-felden dichotomy is Rollo Arnold, *The Farthest Promised Land: English Villagers, New Zealand Immigrants of the 1870s* (Wellington: Victoria University Press, 1981). The literature on New Zealand agriculture is more comprehensively discussed in my paper, "A & P: The Agricultural Historiography of New Zealand," presented to the Northern Great Plains History Conference, 1992; in Tom Brooking, "Can't See the People for All the Sheep: The Strange Case of New Zealand's Neglected Rural History," presented at the same conference; and in James Watson, "Rural Life," in Colin Davis and Peter Lineham, Eds., *The Future of the Past: Themes in New Zealand History* (Palmerston North: Massey University, Department of History, 1991).

5. Glenville L. Williams, *Liability for Animals* (Cambridge University Press, 1939); New Zealand, Parliament, *Parliamentary Debates*, 25 Nov. 1879.

6. New Zealand, Legislative Council, *Ordinances of the Legislative Council of New Zealand, 1841 to 1853*, pp. 116, 155-56, 263-72, 283.

7. *Parliamentary Debates*, 23 July 1861.

8. Canterbury, Provincial Council, *Trespass of Cattle Ordinance*, 1854 (loose copy in Albert Turnbull Library); *Canterbury Standard*, 1 Mar. 1855, 22 Mar. 1855, 29 Mar. 1855.

9. Canterbury, Provincial Council, *Ordinances*, 1869, p.11.

10. *Ibid.*, 1860 pp. 315-28, 1863, pp. 547-52, 1866, pp. 7-11, 1869, pp. 9-26, 1872, pp. 71-75, 89-100; Canterbury, *Government Gazette*, 1854-76 (the rosters of poundkeepers appointed, and the occasional notices of intent to erect partition fences, are scattered through these volumes); *Timaru Herald*, 31 Dec. 1864, 16 July 1864; *Ashburton Guardian*, 11 Sept. 1880.

11. Otago, Provincial Council, *Acts and Ordinances*, 1855, pp. 47A-49A, 1856, pp. 3B-4B, 1862, pp. 537-50, 1865, pp. 1175-76, 1867, pp. 1357-61, 1868, pp. 1437-41, 1872, pp. 1937-47, 1949-53.

12. A search of all provincial ordinance books held in the Turnbull Library revealed no other provinces fashioning significant legislation on the questions here treated.

13. *Parliamentary Debates*, 3 Aug. 1877, 6 Aug. 1878, 8 Aug. 1878, 5 Nov. 1879.

14. *Ibid.*, 23 June 1880, 11 Aug. 1880, 13 Aug. 1880.

15. *Ibid.*, 23 June 1881, 11 Aug. 1881, 25 Aug. 1881; *Statutes of New Zealand*, 1881, pp. 207-17.

16. *Statues of New Zealand*, 1884, pp. 190-206; *Parliamentary Debates*, 8 July 1885, 7 Aug. 1885; New Zealand, National Archives, Records of the Department of

Agriculture, File 21102: Impounding Act, 1895-1909 (file contains correspondence in 1905 indicating developments in Otago and indicating that the local option had been exercised routinely; *New Zealand Gazette*, 1885-96 (scattered notices record every instance of an Otago county invoking the local option).

17. New Zealand, Governor, *The Consolidated Statutes of New Zealand*, 1908, vol. 2, pp. 391-403, 722-36; New Zealand, Attorney General, Reprint of the Statutes of New Zealand, 1908-1957, Vol. 4, pp. 869-92, Vol 6, pp. 309-37; New Zealand, National Archives, Records of the Department of Agriculture, File 1625: Fencing Act and General Inquiries, 1924-76 (contains correspondence on the rabbit-proof partition fence issue); *New Zealand Legal Reports* 10 (1892): 562-69, 15 (1897): 436-43, 21 (1902): 213-14; New Zealand, Property Law and Equity Reform Committee, *The Fencing Act 1908: Report of the Property Law and Equity Reform Committee*, 1972; N.J. Jamieson, "Fencing Law Is Complex," *New Zealand Journal of Agriculture* 111 (June 1965): 57-59; J.F. Corkery, "The Fencing Act 1978 and Other Matters," *Otago Law Review* 4 (1978): 269-76.

18. The sources for the technology and material culture of fencing in New Zealand are substantial, and lie mainly in the periodical press, such as the *New Zealand Farmer*. Detailed diaries of sheep station owners and managers document the heavy labor and cost of fencing, which can be totaled and tabulated. The discussion of material culture awaits expansion in a future manuscript.