

## HERD LAWS IN KANSAS

by

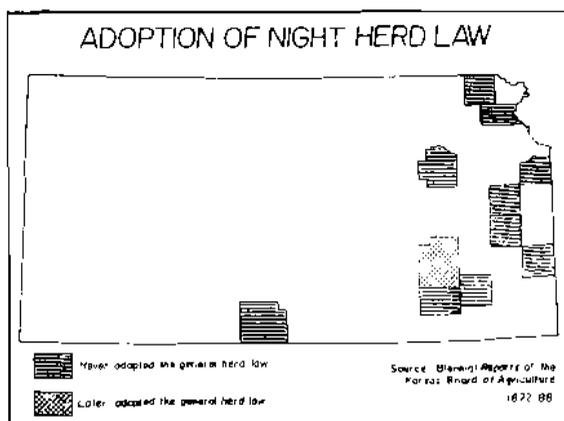
Alvin Peters

The problem of separating cattle from crops has long been an important one. In Medieval England, the solution was to graze the cattle in the town common with someone tending them. In the eastern United States, colonists and early Americans let the cattle roam throughout the woods while the settler fenced in his crops. The landscape of Kansas created a need for different solutions to this problem. In northeastern and east central Kansas, where trees were rather plentiful, the fence law of American tradition was favored, which required the farmer to fence in his fields and allowed stock to graze at large. However, the remainder of the state did not have the luxury of trees and, therefore, often favored the adoption of the herd law, which required stockmen to restrain their herds or be liable for damages to crops. Because such a law did not require the stockmen to build fences around their pastures, many of the wealthier cattlemen hired people to tend to the herds. The herd law created a problem for the less affluent, those who could afford neither to buy the materials for fencing nor to pay the needed number of cowboys.<sup>1</sup>

The first fence law was adopted by the territorial legislature in 1855. Inasmuch as most of the population of the state lay in the eastern portion and in the north, where timber was relatively plentiful, this was perfectly acceptable. The cattle roamed freely, and the fields were enclosed. If an animal did try to get into a field, the farmer was usually working nearby and would be able to drive the animal away. This worked well during the day when the farmer was in the field, but at night there was no one guarding the crops. In order to solve the problem, the legislature passed the Night Herd Law of 1864 which permitted the adoption of night herd laws by individual counties. Those counties which used the night-herd provisions of the law often did so in the 1860s, when the newspapers were busier worrying about the Civil War, Lincoln's assassination, and politics in general. Therefore, the papers of that time were silent on this subject and it was difficult to secure complete or accurate data on the extent of night-herd laws. An incomplete record of the areas where the night-herd laws were adopted is shown on the first map (Figure 1). The Biennial Reports of the Kansas State Board of Agriculture are the sources of the information on the map, and while the Board was later concerned about the general herd laws, it was not much concerned about the night-herd laws.<sup>2</sup>

Because of the night-herd law in the northeast and east central sections, the idea of a general herd law was not seriously discussed until the population began increasing greatly in the southeastern and central parts of the state. This was also about the time of the invention of barbed wire which made a lack of materials less of a problem but did not make fencing any less expensive. It was 1870 before the legislature passed the first herd law to govern the daylight

Figure 1



hours as well as the nighttime. This act applied to only one county, however, Crawford. On February 28, 1871, the law was extended to include Cowley, Butler, Marshall, Republic, Allen, Dickinson, Sedgwick, Mitchell, Neosho, Wilson, and Marion (except Doyle Township) Counties and Rock Creek Township in Coffey County. Both of these laws had one feature that gave people a voice in the decision: the laws went into effect only if they were approved by a vote of the people in the county or township affected. The law had to be approved by a majority of those voting on the question, something later laws would change. Another law allowed for the adoption of a herd law on a local basis. Enacted on February 25, 1870, it permitted a county commission to call for a vote on a herd law if a petition was submitted to the commissioners bearing the names of one-third of the voters in the county. This law applied only to Cloud, Saline, Ottawa, Washington, Cherokee, and McPherson Counties.<sup>3</sup>

The inconsistency in these early herd laws was that the legislature forced a vote in some counties, permitted the submission of a petition to vote in other counties, and prohibited a vote in the remainder of the counties. This was apparently a response to local pressures. The obvious discrepancy led to the Kansas Supreme Court decision of Darling vs. Rodgers (1871). The case, which was on appeal from the Saline County District Court, noted that Saline County had a herd law under the terms of the 1870 act. Writing for the court, Justice David J. Brewer found that the herd laws of 1870 and 1871 were unconstitutional because the Kansas Constitution required equal treatment of the counties. Brewer noted that it was possible for one county to have a herd law while its neighbors did not; this would have made it possible for some people to follow the fence law and others the herd law, with the result that there would be no fences. By unanimous vote the court struck down the herd laws because they were restricted in their applications. The decision spoke specifically to the laws of 1870, since the law of 1871 had not yet been passed when the court heard the case. By the time the verdict was released, the 1871 law had passed; so it, too was struck down.<sup>4</sup>

The legislative response to the court came on February 24, 1872, with the enactment of a new herd law which needlessly repealed the previous ones. It established the county option in decisions concerning the herd law. The 1872 act gave the county commissioners the power to decide if the law would go into effect. The commission's decision was to be published in the newspapers of the county for four weeks. If there was no newspaper in the county, then the announcement was to be posted in at least two conspicuous places in each township. The people did not have to vote on the issue, nor did they need to petition the county commission.<sup>5</sup>

Although the basic concept remained, the format was changed in 1874. The new herd law provided that two-thirds of the voters could petition the county commissioners to adopt the herd law. The petitioners had to give thirty days' notice prior to presenting the petition to the commissioners. The law then had to be accepted. After its enactment, it had to be published three times in each township or posted in three places in each township. The commissioners could still, however, act without a petition.<sup>6</sup>

The Kansas Supreme Court heard four cases concerning the effective dates of various herd laws. The first two, Hoover vs. Mear (1876) and Reed vs. Sexton's Administrators (1878), came from Dickinson County and were similar. The Supreme Court ruled that a herd law went into effect on the twenty-ninth day after the first publication regardless of the stated effective date or the date the law was recorded. In the third case, Kansas vs. Hunter (1888), the Court ruled that the county commissioners, in this case Leavenworth County's, did not need a petition from the people or a vote of the people in order to affect the enactment of a herd law. In this instance the commissioners had considered a herd law without a petition being submitted or a vote held; the action was challenged even though the law failed to be passed. The final case on the question came from Labette County in 1890. The Court ruled in Pond vs. Treathart that the county commission needed to publish the notice of the law for four consecutive weeks and that a break in the publication meant the counting of weeks began anew.<sup>7</sup>

A feature in the 1874 law had been that a petition signed by a majority of the voters in a county could nullify the herd law. Prior to this time the legislature had been timid in establishing a herd law, first restricting its use, then making local enactment difficult and rescission simple. In 1879 that changed. The Kansas Legislature approved a law permitting the counties to rescind their herd laws only if a majority of the voters agreed to do so in an election. The election could only be called if a petition was presented signed by a majority of the voters in the county. This added one more step to the procedure for rescission beyond what was provided in the 1874 law.<sup>8</sup>

Only one county, if any, rescinded a herd law. The Biennial Reports of the State Board of Agriculture of the 1870s and 1880s alluded to the possibility that Jewell County adopted and then rescinded a herd law. The report of 1877-78 said that the county had had a herd law since 1872. The

reports of preceding years did not mention the existence of such a law. Finally the report of 1881-82 said, however, that Jewell County did not have a herd law. Did the law have an expiration date which caused it to lapse? Was the law rescinded? Was one of the people who reported to the state board wrong? The fifteen newspapers printed in the county at that time made no mention of discussion about the herd law. If it was a major issue, it was kept quiet. No other place had such a mix-up, nor repealed the law; however, the reports noted that Lincoln, Marion, and Labette counties discussed the idea.<sup>9</sup>

The General Statutes of 1889 were passed with a new twist in the herd law--all animals beyond a certain age were required to be enclosed. This applied to all counties of the state. The law varied with regard to the animal and its sex. Usually the males beyond the age of one year and females beyond two years were to be fenced in a pasture. This statute laid the groundwork for the Herd Law of 1929. It was this act which made the herd law applicable state-wide and to livestock of any age. But the question had, by then, ceased to be a major topic of debate.<sup>10</sup>

The biggest years for debate were those when the herd law was being considered in the various counties under the county option during the 1870s. Often the best sources of information were the newspapers. Inasmuch as it would take an enormous amount of time to review all of the newspapers of all 106 counties in existence at that time, eleven counties were selected for this paper. Anderson and Franklin were selected as representative counties in the east-central section of the state which never adopted a herd law. Doniphan was chosen because it is in the northeastern corner of the state. Clay, Butler, and Lyon were chosen because they are in the Flint Hills; the first two adopted the herd law, while Lyon County did not. Labette and Neosho Counties represented the southeastern corner of Kansas. Jewell is found in the north-central region and had a question about rescission. Finally, Hamilton and Greeley Counties are from the far western part of Kansas and among the most recently organized counties. These counties also have copies of newspapers on microfilm at the Kansas State Historical Society Library. A twelfth county, Garfield, was originally selected but was not used because there were no newspapers from it in the possession of the library.

The newspapers in Neosho, Labette, Doniphan, Butler, Anderson, and Lyon Counties carried letters and editorials debating the issue, although Anderson, Doniphan, and Labette had only one letter each on the subject. At the same time papers in Clay, Franklin, Greeley, Hamilton, and Jewell Counties carried no debate at all on herd law during the seventies. The only reference this latter group of papers made to the subject was when the Greeley County Gazette and the Greeley County Tribune each carried an article in May, 1886, telling their readers how to go about getting a herd law enacted. So there must have been popular support in that county for the idea.<sup>11</sup>

The arguments in the debate were usually the same. The lack of timber increased the cost of materials for fencing. Therefore, neither the farmers nor the stockmen wanted to fence in their land. This was the main point of contention. The cost issue was used both to support and to oppose the herd law. It was used in support when the farmers outnumbered the stockmen, and it was used in opposition when to stockmen were the majority. Other common arguments were that the herd law permitted the hiring of a herder in place of fencing and that the law would drive the stock producers out of the county. The former of these was used to support the laws; the latter was used to oppose it.<sup>12</sup>

Some of the arguments were more peculiar. For example, the editor of the Oswego Register opposed the herd law on the grounds that it was healthier for the people of the county if the cattle were allowed to roam freely. He pointed to neighboring Cherokee County in 1873 to show that the rise in the number of illnesses was attributable to the growth of "vegetation on waste lands, marshes, wet, low creek bottoms and places where vegetation grows profusely." He noted that with the herd laws, the growth was allowed to die and rot; this led to disease.<sup>13</sup> The Syracuse Journal used an interesting article to support the adoption of the herd law: it pointed out that the Frontier Stock Association passed a resolution expressing concern about splenic fever spread by the cattle from Texas which were driven into Hamilton County. If the cattle were restricted, the disease would not spread to the domestically raised cattle.<sup>14</sup>

Occasionally a writer became so involved in his argument that he forgot to tell the reader which side he supported. The editors of both the Thayer Head-Light and the New Chicago Times printed stories in 1872 decrying the use and cost of fences. It was not apparent whether they favored the fence law or the herd law, since their data could have been used against either.<sup>15</sup>

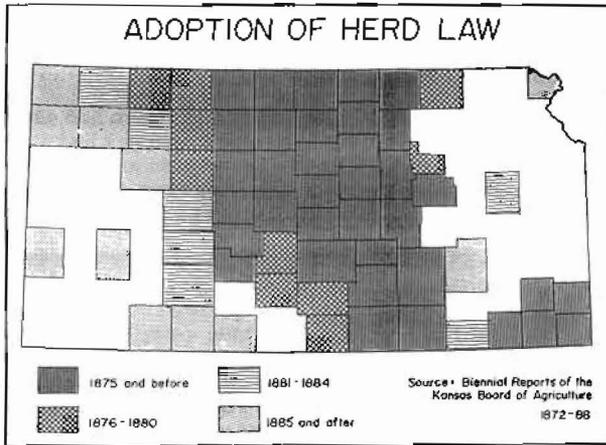
The best summation of the positions was made by the editor of the Doniphan County Republican in his edition of March 16, 1872. In it he stated

To the people of western and frontier counties a herd law was a vital necessity. They could not fence their land. They had neither the money nor the timber necessary to do so. Hence they could not raise crops if cattle were allowed to run at large. A herd law was absolutely necessary to enable them to cultivate their farms, and live.

On the other hand, the farmers of the older and more thickly populated counties were believed to be almost universally opposed to herd law. They protested against its being made applicable to their county.<sup>16</sup>

As the quoted editor noted, it was the newer counties which adopted the herd law first (Figure 2). The law was quickly adopted in the counties in the central third of the state which lies immediately west of the Flint Hills. The

Figure 2



counties to the east did not accept it as quickly, probably because they had plenty of timber for fencing and they had been under the requirements of the fence law since its inception nearly two decades before. The western third of the state did not vote in the herd law, because they were not yet organized counties. As the counties in the west were organized, though, they passed herd laws almost immediately--always the adoption was within the first two years. The information on the map, Figure 2, depicts the spread of the law, but after 1884, the Biennial Reports were no longer too concerned about the law. This made the spread in later years difficult to ascertain.

The exception to the above-noted causes was in the southeast corner of Kansas. There seemed to be no logical reason for Cherokee, Crawford, Neosho, Labette, and Montgomery Counties to adopt the herd law in the early 1870s while the rest of the counties in the eastern third of the state did not. Perhaps they adopted it because it was less expensive to leave the land with no fence than to enclose the land and, since farmers outnumbered stockmen, the larger group refused the expense. But then the question arises as to why the same did not occur in other eastern counties. The newspapers gave no reason for the difference. The arguments used in these five counties were the same as those advanced in the others. The only difference between them and the rest of the eastern third was that four of them were specifically named in the early legislation, but presumably the support was present in the counties before the legislature adopted the provisions. Another theory which has been advanced concerning this phenomenon is that it was related to immigration. It may have been a contributing factor since many of the residents moved to Kansas during the period just before the Civil War and came from New England, New York, and New Jersey. Those areas had long ago developed the concept of the herd law. If enough people who had emigrated from there were among the population in southeast Kansas that they controlled the political situation, it would have been quite natural for them to import the idea.<sup>17</sup>

The herd law was used only to regulate the movements of cattle. There were other laws regulating rams, jacks, boars, stallions, and stags. The first law of this type was enacted in 1868. This hog law was enforced state-wide, with provision for townships to exempt themselves from it. Interestingly, the petition to force a vote on the law in a township required only ten signatures. The township option made the law so conflicting that two counties voted to institute the hog law county-wide in addition to the state law. Those counties were Doniphan and Leavenworth. Generally, though, the laws dealing with animals other than cattle were much less controversial than the herd laws.<sup>18</sup>

The Kansas Supreme Court has heard twenty-one cases dealing with the herd law, the first being Darling vs. Rodgers. This decision ruled that the first three herd laws were unconstitutional. The 1872 law was passed as a response to the ruling. That law did not, however, answer the court's basic objection that it permitted two counties to have conflicting laws on neighboring homesteads. This was the basis of William K. Davis's position in a case challenging the herd law in Cowley County District Court. The court ruled that since the 1872 law allowed the county option state-wide, it was constitutional. Davis appealed. In Davis vs. Wilson (1873), the Kansas Supreme Court upheld the lower court's ruling. This was re-affirmed in 1875 in the case of Keyes vs. Snyder. Morris County had adopted the herd law on the basis of a township option; each township voted adoption or rejection of the proposal. While the court upheld the 1872 law, it struck down the township option concept of Morris County's law.<sup>19</sup>

As in all legal questions, liability cases filled a large part of the history of herd law. The group most often involved in the cases, other than stockmen, was the railroads. The first liability case was Central Branch Railroad Co. vs. Lea (1878). The Supreme Court held that if the herd law or the night herd law was in effect, as it was in Marshall County, and neither the railroad nor the stockmen followed the laws, the stockman could not collect damages when an animal was killed. The court cautioned that this only applied if the stockman did not obey the herd law and if the railroad failed to obey the fence law. The fence law still required the railroads to fence their land when passing through or next to a pasture. In hearing two cases from Marion County in 1884, the court refined the previous ruling. In Atchison, Topeka, and Santa Fe vs. Riggs and again in A., T., & S.F. vs. Howard, the Supreme Court held that when the stockman did obey the herd law, he could collect damages from the railroad if it did not obey the fence law. The original ruling was also reinforced in 1879 when the justices said in A., T., & S.F. vs. Hegwir that the railroad was not responsible if the animals killed were in violation of Reno County's herd law. A restatement was made the following year when Cloud County gave the court the case of Central Branch-Union Pacific vs. Walters.<sup>20</sup>

The final case dealing with the railroads broke new ground. The decision reached in Martin vs. A., T., & S.F. (1914) was that a cattle guard used in place of a gate by a

railroad was legal but had to be maintained so that snow and ice did not build up to the point that the cattle could walk over it as if the guard was not there.<sup>21</sup>

One case between a stockman and a farmer allowed the Supreme Court to apply its rulings in the cases of Riggs and Howard to a different area of concern. Hazelwood vs. Mendenhall (1916) came out of Gove County, which had a herd law. The court ruled that the condition of Hazelwood's fence made no difference in the case, because Mendenhall had not fenced in his crops. Since Mendenhall had not followed the requirements of the fence law and Hazelwood had followed the herd law, the former could collect no damages for his ruined fields. The importance of this decision was that it stated that the fence law was still enforceable regardless of the existence of a herd law in the area. The ruling also pointed out one of the more confusing aspects of the law: since the legislature never repealed the fence law, it must still be obeyed. Many counties still struggle today with the question of which law takes precedence. The ruling in Hazelwood also meant that the argument of whether to pass the herd laws in the 1870s and 1880s should have been useless since the farmers would still have to fence in the crops, but the case came up thirty years too late to be of importance in that argument.<sup>22</sup>

In Bertram vs. Burton (1929), the justices upheld Burton's contention that since his cattle were being driven, they were not running at large. Thus the Washington County District Court was correct in stating that the herd law had been obeyed. But the Supreme Court further ruled that this technicality did not absolve Burton of the liability if his cattle wandered into someone else's field.<sup>23</sup>

The herd law was considered by most people to be a restatement of common law. Therefore, it was used to prove the case for common law in a lawsuit in Jackson County. Orlo E. Olden sued the Missouri Pacific Railway Company. He contended that common law held that his cow, which had wandered onto the railroad tracks and been killed, was not unattended simply because it was not fenced in. The railway company believed that common law had no effect because it had been superceded by the Fence Law of 1868 and the subsequent herd laws. Olden won and Missouri Pacific appealed. In Missouri Pacific vs. Olden (1905), the Supreme Court stated that the Herd Law of 1872 was indeed a re-adoption of the common law prior to 1868. This was stated again by the Kansas Court of Appeals in Lindsay vs. Cobb (1981). These were interesting rulings since the fence laws were the same as common law in the southern states, and the laws in the northeastern states as well as England began as fence laws and moved toward the herd laws. Thus, the herd law was not the traditional common law in either the United States or England.<sup>24</sup>

The common law concept was used in a blanket ruling on liability in 1922. In Miller vs. Parvin, the Supreme Court held that wherever the herd law was in effect, common law liability was in effect. Thus, if the stockman's cattle did any damage which the stockman could have prevented, he was

liable. While Olden referred only to cases involving railroads, Miller applied to all cases.<sup>25</sup>

The final legal aspect of the herd law came with the widespread use of the automobile. The question was raised about damage caused to a car when it had an accident with a vehicle pulled by an animal. Two cases dealt with this subject. Wilson vs. Rule came from Sedgwick County and dealt with a mule; Abbott vs. Howard was from Johnson County and dealt with a horse. Both were heard by the Supreme Court in 1950, and the rulings were identical: if the animal was not running at large (these were not), the car owner could not collect under the terms of the herd law.<sup>26</sup>

With the exception of the two cases in 1950 and the one in 1981, debate over herd law versus fence law has been quiet since 1929. When the legislature finally made the decision to make the herd law applicable state-wide, the problem was solved definitively. Occasionally a county commission decides that the fence law has precedence over the herd law, but that argument must always fail in court unless the legislature decides to change the law again. For the most part, the question was settled as Kansas was settled. As the farmers moved to the western part of the state, they took the herd law with them. When the total number of farmers outnumbered the stockmen and the cities no longer cared about the issue, the herd law replaced the fence law in the eastern part as well.<sup>27</sup>

#### NOTES

1. Rodney O. Davis, "Before Barbed Wire," in Burton J. Williams, ed., Essays in American History in Honor of James C. Malin, 124-126.
2. Kansas Territorial Statutes, 1855, 416-417; Session Laws of 1864, 64-65.
3. Session Laws of 1870, 9-10; Session Laws of 1871, 206-211; Charles L. Wood, "Fencing in Five Kansas Counties Between 1875 and 1895," Master's Thesis at the University of Kansas, 7-8.
4. Kansas Reports, Vol. 7, 364-369.
5. Session Laws of 1872, 384-385.
6. Session Laws of 1874, 203-204.
7. Kansas Reports, Vol. 16, 11-13; Kansas Reports, Vol. 20, 195-201; Kansas Reports, Vol. 38, 587.
8. Sessions Laws of 1874, 203-204; Sessions Laws of 1879, 343-345.
9. All of this information came from viewing the Biennial Reports of the Kansas State Board of Agriculture from 1872 to 1888. Emphasis is placed on the editions cited in the text.
10. General Statutes of 1889, Chapter 6725; General Statutes of 1929, 47-301 to 47-313.

11. Greeley County Tribune, 1 May 1886, 2; Greeley County Gazette, 6 May 1886, 2.
12. New Chicago Transcript, 1 April 1871, 2; Walnut Valley Times, 19 August 1870, 2; Garnett Plaindealer, 5 October 1875, 1; Erie Ishmaelite, 31 March 1871, 2; Garnett Plaindealer, 10 December 1875, 2.
13. Oswego Register, 7 February 1873, 3.
14. Syracuse Journal, 17 July 1885, 1.
15. Thayer Head-Light, 6 July 1872, 2; New Chicago Times, 9 November 1872, 4.
16. Ooniphan County Republican, 16 March 1872, 1.
17. Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution, 29-30.
18. General Statutes of 1868, 1008-1012.
19. Kansas Reports, Vol. 7, 364-369; Session Laws of 1872, 384-385; Kansas Reports, Vol. 11, 65-72; Kansas Reports, Vol. 15, 116-118.
20. Kansas Reports, Vol. 31, 622-634; Kansas Reports, Vol. 21, 449-452; Kansas Reports, Vol. 24, 361-365.
21. Kansas Reports, Vol. 92, 595-605.
22. Kansas Reports, Vol. 97, 635-638.
23. Kansas Reports, Vol. 129, 31-35.
24. Kansas Reports, Vol. 72, 110-115; Kansas Appeals Court Reports, Vol. 6 (2nd series), 171-173; McDonald, *ibid.*, 30.
25. Kansas Reports, Vol. 181, 444-448.
26. Kansas Reports, Vol. 169, 296-305; Kansas Reports, Vol. 169, 305-319.
27. Emporia Gazette, 19-20 April 1886, 1 & 3.