

AGRICULTURAL GUIDE

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Fence Laws

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Missouri fencing and Boundary laws

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Trespassing livestock can cause substantial damages. A stockman's liability for such damages depends on fencing statutes, case law interpretation of statutes, and the presence of agreements for fence maintenance and repair between neighbors. Boundary fences have given rise to numerous disputes between landowners. The doctrine of adverse possession, "squatter's rights," often plays a major role in resolving boundary disputes.

Fencing duties and boundary locations have been the subject of quarrels between neighbors for centuries. This guide sheet is intended to answer many Missouri farmers' questions regarding such duties and rights. Answers are supplied mostly by Missouri statutes and court decisions, supplemented by conjecture where the statutes and cases fail to provide clear answers.

The solution to most fencing problems lies in a cooperative attitude with neighboring owners. Where an honest difference of opinion exists, this guide sheet may help to resolve it. However, this is not intended as a substitute for an attorney's skill and advice. When a dispute arises or seems likely to arise, consult an attorney.

General fence laws

The duty to confine animals

Missouri, like other states in the Great Plains and the West, once had an "open range" law requiring landowners to fence animals out if they did not want them on their land. However, this system was not favorably viewed in a state such as Missouri where much of agriculture consisted of crop production and the need for fences was not great. In 1969 the "open range" law was changed by the Missouri legislature to a "closed range" system.

Under the closed range statute, it is unlawful for the owner of swine, cattle, horses, mules, asses, sheep or goats to permit such animals to run at large outside their enclosure. The animal owner will be liable for damages caused by his unrestrained animals; however, this liability is subject to several limitations discussed in this guide sheet.

Liability for trespass by animals

As a general rule, livestock owners are liable for the trespass of stock on the premises of another, except for the special limitations for division fences. The measure of damages for the first trespass is the true value of the damages sustained, together with costs before a magistrate.

For any subsequent trespass by livestock, the injured party may put up the animals and take good care of them. The injured party must immediately notify the animal owner who shall pay the amount of damages sustained plus reasonable compensation for taking up and keeping the animals (known as "distraint") before the animal owner can remove them. If the parties cannot agree on the amount of damages and compensation, either party may make complaint to a magistrate of the county to settle the action in court.

If the animal owner recovers, he or she shall recover costs and any damages sustained, and the magistrate shall issue an order requiring the return of the animals. If the person taking up the animals is allowed recovery for actual damages, compensation for keeping the animals, and court costs, the judgment shall be a lien on the distrained animals.

The liability of the livestock owner depends on whether the animals crossed an "exterior" or a "division" fence. An exterior fence refers to a fence not within a common enclosure. A fence along a public

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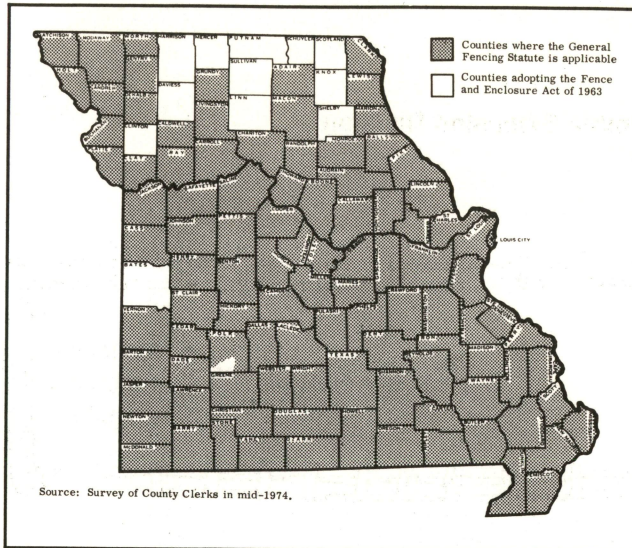


Figure 1. Fencing statutes applicable to Missouri counties.

highway is an exterior fence. Division fences, on the other hand, are fences that operate to separate adjoining landowners. Where animals cross one or more exterior fences before entering a neighbor's farm and cause damage, the animal owner is liable for all damages that may arise. This result follows from the duty placed by present Missouri law on the animal owner to fence in his animals. (See also Guide 453, "Farmers' Liability For Their Animals.")

Division fences

Where animals cross division fences, the livestock owner's liability is not automatic. Liability depends on several factors, including whose part of the division fence the animals crossed, whether the fence crossed was in need of repair, and whether the county had adopted the optional Fence and Enclosure Act. Before examining the likelihood of liability for an animal's trespass through a division fence, it is important to understand what is defined by statute to be a "lawful fence."

Lawful fence defined

Missouri has defined "lawful fence" by statute. The statute has two definitions, one for counties operating under the general law and another for those counties that have adopted the optional Fence and Enclosure Act of 1963. Refer to Figure 1 to determine which definition is applicable for your county. Although specifications for a lawful fence appear to be detailed, substantial compliance is sufficient.

General law. The fence shall be deemed to be a sufficient enclosure where:

1. Hedges are at least 4 feet high;
2. Fences are composed of posts and rails, posts

and palings, posts and wire, posts and boards, or palisades at least 4½ feet high, with posts firmly in the ground not more than 8 feet apart;

3. Fences consisting of woven wire, wire netting or wire mesh are at least 4½ feet high with posts not more than 16 feet apart;

Additional fence structures satisfying the definition of a lawful fence are detailed in the statute, including worm (rail) fences, turf fences, and stone or brick fences. The statute adds the general proviso that fences should be constructed to resist horses, cattle, swine and like stock.

Fence and Enclosure Act of 1963 (optional). If your county has adopted the optional provisions of the Fence and Enclosure Act of 1963 (see Figure 1), the applicable definition of "lawful fence" is as follows:

1. A fence with not fewer than four boards per 4 feet of height, each board to be spaced no farther apart than twice their width and to be fastened to posts not more than 12 feet apart with one stay. A "stay" is a vertical member attached to each board or wire comprising the horizontal members of the fence;
2. A fence of four barbed wires supported by posts not more than 15 feet apart with one stay or 12 feet apart with no stays;
3. Any fence which is at least equivalent to the types of fences in the immediately preceding categories.

Provisions of the Fence and Enclosure Act of 1963 are not applicable until a majority of the legal voters of any county votes approval. The county court may on its own motion and shall, upon petition of 100 real estate owners of 10 acres or more of the county, submit to the voters at a general or special election the proposition for the adoption by the county.

Adoption of the Fence and Enclosure Act operates to suspend the provisions of the general statute discussed earlier. If your county has held an election regarding fencing duties since 1962, check with the county clerk to see if these optional fencing law provisions are in effect.

Animal trespass through a division fence

Under the general fencing law, the livestock owner is liable for double the damages if his animals crossed his portion of fence and it was in need of repair. The injured landowner may detain the animal to secure payment. Where the animals cross the complaining landowner's part of the fence, he may collect the actual damages assuming the fence was in no need of repair.

The portion of the fence for which each adjoining landowner is responsible may be settled by agreement between the parties or by reviewers appointed by the circuit court under a procedure to be discussed

later in this publication. By custom, owners ordinarily assume responsibility for the half on their right as they face the division fence while standing on their property.

If the county has adopted the optional Fence and Enclosure Act of 1963, the livestock owner's liability may be considerably less. By the express language of the statute, there is no right provided to recover damages for a trespass nor a right to distrain a trespassing animal. The sole remedy provided is the right to repair a defective portion of the fence at the cost of the breaching party. That the remedy excludes recovery for the damage done is not definite, but the statute literally read would appear to restrict recovery in counties adopting the optional fencing law. To determine conclusively whether your county has adopted these optional provisions and the measure of recovery allowable, consult your attorney.

Building a division fence: When can you require contribution?

Division fences are usually built by agreement of adjoining landowners. If adjoining landowners are unable to reach agreement, the statutes offer some relief. Under the general law, if the division fence serves to enclose the land of another landowner or will become a part of the fence enclosing the lands of another, the owner of the fence can demand payment from the neighbor for one-half the value of the fence. Upon payment the adjoining landowner receives an individual ownership interest in half of the division fence.

It is unclear in a general fence law county whether contribution for a division fence may be compelled from a neighbor whose lands will not be totally enclosed by the construction of the division fence. See your attorney for more complete information should this situation arise.

Under the optional Fence and Enclosure Act, if there is a need for a fence by either of two adjoining landowners, both are obligated to build and maintain a lawful fence. Whenever one landowner desires to construct a fence bordering the land of another, he must first notify the other owner that he desires a division fence. If within 90 days after receiving the notice the other landowner has not constructed one-half of the division fence, the landowner desiring the fence may seek the assistance of the circuit court to order the other landowner to pay one-half the value of the division fence. However, no landowner can be required to pay more than one-half the value of a lawful fence of four barbed wires, regardless of the type of fence constructed.

Under either the general law or the optional statute if the parties fail to agree on the value of one-half of the fence, the circuit court shall appoint, upon request of the fence owner, three disinterested householders of the township, not of kin to either

party, to view the fence, to appraise its value and to report back to the magistrate. If the landowner thus charged with the value of one-half the division fence fails to make payment to the other landowner, the amount may be recovered before a circuit or other court of competent jurisdiction.

Maintenance responsibilities and rights

Normally landowners will readily agree which part of a division fence each is to maintain. Should the parties fail to agree as to the part each shall have and keep in repair, either may apply to a circuit court judge of the county to appoint three disinterested householders of the township to view the fence and designate the portion to be kept in repair by each of the landowners. The fence viewers receive a fee for their services. These fees, together with the fees of the court and sheriff, are to be shared in proportion to their respective interests.

In case one landowner neglects or refuses to maintain his part of a division fence, the other landowner may have the fence repaired at that party's expense. Under the general fencing statute, if a landowner's property is damaged by animals coming on his land by reason of failure of the livestock owner to keep his portion of the division fence in repair, he may recover double damages. The collection of these damages may be enforced by distraining trespassing livestock.

Boundary line disputes and adverse possession

Fence boundaries

Boundary location disputes usually arise in connection with rebuilding or relocating old fences. The principle referred to as "squatter's rights," properly called the doctrine of adverse possession, then becomes important. This legal doctrine provides that if one is in possession of land continuously for a period of 10 years, he will receive absolute title to the land if his possession was *adverse* to the interests of the true owner.

The usual case of adverse possession is one in which the adverse possessor does not have guilty knowledge that he is on another man's land. Typical cases involve innocent construction of fences beyond the boundary line. If the possession is (1) actual, (2) hostile, (under claim or right) (3) open and notorious (so long as he acts as though the land is his), (4) exclusive, and (5) continuous for the 10-year period, title can be established in the adverse possessor.

Keep in mind that if a title is acquired by adverse possession it can be made "marketable of record" only after a court has rendered judgment that all the requirements of the doctrine of adverse possession

have been met. This is done by what is called a "quiet title" suit, which can be brought by either of the parties claiming title to the disputed land.

Boundaries along streams

The question of where the boundary runs when land borders a stream may arise when water, gravel, mineral or recreational rights are disputed or when a stream changes course.

The location of the boundary and the adjoining landowner's rights normally depend on the legal classification of the stream at the point in question.

In Missouri, riparian water (natural water-courses or lakes) may be classified as (1) public navigable, (2) public non-navigable, or (3) private non-navigable.

A stream is basically classified as *public navigable* if it is capable of floating commercial watercraft. In Missouri, the landowner adjoining the stream is considered to own land down to the water's edge (low-water mark) while the public retains ownership of the stream bed. Any land that is slowly and imperceptibly built up along the shore line is considered to belong to the adjoining owner by the doctrine of "accretion."

A stream that is too small to float commercial watercraft but is sufficiently large to float canoes, small fishing boats or logs is legally classified as *public non-navigable* in Missouri. Here the boundary is said to run with the center thread of the stream. Thus, the boundary would change with a gradual change in the center thread of the stream. If the stream suddenly changes course the boundary does not change but remains at the original place.

A landowner adjoining a public non-navigable stream has the right to remove sand and gravel from it. However, his ownership rights are subject to the public's right to use the stream itself for recreational purposes.

If a stream is too small to float canoes, small fishing boats or logs it falls into the classification of *private non-navigable*. Here, adjoining landowners not only own the bed to the middle thread, but also have the right to control the use of such streams.

Examples of application of the law

Example 1. A's cow gets into B's cornfield and causes substantial damage.

1. If there is no division or fence between A and B, then A will be liable for any damage to B's cornfield.
2. If there is a division fence between A and B, the extent of A's liability will depend upon several factors.

- (a) Under the general fencing statute, A will be liable for the damages only if the fence was a lawful one. If all portions of the fence are in good repair and A's cow still sneaks through, A may be liable for actual damages. A will be liable for double damages if the cow sneaks through a portion of the fence A was obligated to repair but didn't. If, however, the cow sneaks through a portion of the fence B was obligated to repair but didn't, A will not be liable for any damages to B's land caused by the cow.
- (b) Under the optional fencing statute, A may not be liable for the damages for his cow's trespass depending upon the interpretation given the statute by the courts. Double damages are not available. However, B can have A's defective portion of the division fence repaired at A's expense if A neglects or refuses to repair his fence.

Example 2. A owns 40 acres of land adjoining that of B. The division fence is in poor condition so A builds a new one but mistakenly builds it 10 feet beyond the true boundary. B objects but A does not move the fence. Twelve years later B's successor in title sues A.

Now A has title by adverse possession because his possession was open and continuous for over 10 years and was adverse to the interests of the true owner—B and his successors in title.

Example 3. A and B own farms separated by a small creek. The creek is often used for float trips by people in the area. A decides to remove gravel from the creek bed. B complains saying that A has no right to remove the gravel and asks for an injunction to stop A from removing the gravel.

Since this stream can be used for boats and canoes, it would be classified as a public non-navigable stream. Each adjoining landowner would own to the middle of the center thread of the stream. Therefore, A could remove his share of the gravel. *Note:* The ownership interests of both A and B are subject to the public's right to use the public non-navigable stream for recreational purposes.

More information

The material contained in this guide sheet is a general statement of the law. Specific questions should be directed to an attorney. Your attorney can get relevant facts and act on them in your best interest.