

AGRICULTURAL

MU Guide

PUBLISHED BY UNIVERSITY OF MISSOURI EXTENSION

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Missouri Fencing and Boundary Laws

Missouri Agricultural Law Center, Department of Agricultural Economics

Fencing duties and boundary locations have been the subject of quarrels between neighbors for centuries. This publication is intended to answer Missouri farmers' and rural landowners' questions regarding such duties and rights.

The solution to most fencing problems lies in a cooperative attitude with neighboring owners. Where an honest difference of opinion exists, this publication 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 with your attorney.

If you don't have an attorney, check with friends in the community for their recommendations on an attorney. Another aid to locate an attorney is the Missouri Bar Web site, at mobar.org. Or try the Martindale legal directory site, at martindale.com/Home.aspx.

History of Missouri fence law

Missouri's first fence law was enacted in 1808 while Missouri was still within the Louisiana Territory (Missouri became a state in 1820). It required landowners to fence out the neighbors' livestock (open range). If a landowner constructed a "lawful fence," then he had certain legal remedies against the owner of trespassing livestock: (1) Actual damages for the first trespass; (2) Double damages and court costs for subsequent trespass; and (3) On the third and later trespass, the landowner was authorized to kill and dispose of the trespassing livestock without liability. The procedure for determining the actual damages was to approach the local justice of the peace, who would appoint three householders of the neighborhood to serve as fence viewers to determine whether the fence was lawful and

the extent of the damages. To be a "lawful fence," it had to be at least 5 feet 6 inches high, and supported by strong stakes "strongly set and fastened in the earth so as to compose what is commonly called staking and riding." (Territorial Laws, page 197, Section 1, enacted October 27, 1808) This territorial law of 1808 was reaffirmed by the Missouri Legislature in 1824. (Missouri Laws of 1825, pages 428–429)

In 1877 the Missouri fence law expanded the definition of "lawful fence" and lowered the fence height minimum to 4 feet. The remedies available to the damaged landowner were altered to include "other stock" which trespassed and not just "any horse, gelding, mare, colt, mule or ass, sheep, lamb, goat, kid, or cattle...." No longer could the landowner kill and dispose of trespassing livestock on the third and subsequent trespass. Now the landowner could on the second and subsequent trespass take up the livestock (distrainment) and require payment for their upkeep.

The 1877 fence law addressed division fences for the first time. It allowed a landowner who presently had or who constructed a lawful fence "enclosing the land of another" to obtain one-half the division fence costs from the neighboring landowner. Each would then own an undivided half in the division fence. Each was required to maintain his portion of the fence, but no right-hand rule was mentioned in the statute. Disputes were to be resolved by the justice of the peace appointing three fence viewers, who each were to receive one dollar per day.

Double damages under the 1877 law were permitted if the division fence owner failed to keep his fence portion in good repair. Removal of a division fence required the consent of all the fence owners, although there was a special six-month written-notice provision, which allowed the removal (at the end of the six-month period) of all or part of a division fence owner's fence portion.

In 1889 Missouri amended its fence law (Sections 65.5032 to 65.5056) to include barbed wire and set stan-

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dards for fences made of boards and posts. Barbed wire fences were to have posts not more than 16 feet apart and to have three barbed wires tensely fastened to the posts. The upper wire had to be “substantially four feet from the ground.” A board-and-post fence had to be at least 4½ feet high with posts no more than 8 feet apart.

In 1919 the Legislature changed the procedure for removing a division fence, keeping the requirement of consent but eliminating the six-month-notice provision that would have allowed removal. Another 1919 provision said that a division fence builder did not have to give notice to the neighboring landowner before building his half but could go ahead and build it and then get reimbursement for half the construction costs.

In 1963 the Legislature enacted major changes in fence law by authorizing the “local option” fence law (Chapter 272.210 et seq., 1963). Adoption of the local option for a county required a majority vote at a county election. The issue could be put on the local ballot either by motion of the county court or upon the petition of 100 real estate owners of 10 or more acres in the county. As discussed below, the major differences between the general county fence law and the local county option changed the definition of lawful fence, allowed only actual damages rather than double damages, and limited the forced contribution from neighboring landowners to one-half the value of a fence of four barbed wires with posts 12 feet apart (no matter that a more expensive division fence is built).

Missouri’s fencing statute revised: effective August 28, 2001

Missouri finally did it! After more than 20 years of bills being introduced each legislative session, the General Assembly passed and the governor signed into law major changes to Chapter 272, Missouri’s fencing statute.

The major changes are only for “general fence law counties,” *not* those counties that have opted (or will opt) by local election into the “optional county fencing statute” (found in the same Chapter 272, but in the latter half, beginning with section 210). As of May 2008, 18 Missouri counties are thought to have adopted the Optional County Fencing Statute: Bates, Clinton, Daviess, Gentry, Grundy, Harrison, Knox, Linn, Macon, Mercer, Newton, Putnam, Schuyler, Scotland, Shelby, Sullivan, Saint Clair, and Worth.

We will return to discussing the Optional County Fencing Statute provisions after we cover the General County Fencing Statute (default provisions).

Change #1: Modified forced contribution and maintenance (general counties)

This is a major change. Only if the neighbor has livestock placed against the division fence can he be forced to pay for half the cost of construction, as well as be

required to maintain the right-hand half. If the neighbor doesn’t have livestock against the fence, you will have to put up the entire cost of the division fence and maintain the entire fence. Most other states allowed “compulsory contribution” whether or not the reluctant neighboring landowner has livestock against the division fence.

A landowner building the entire division fence must report the total cost to the associate circuit judge, who will authorize the cost to be recorded on each neighbor’s deed. If your neighbor later places livestock against the division fence, then the landowner who built the entire division fence can get reimbursed for one-half the construction costs. See Chapter 272.060.1 and Chapter 272.132 of the new Missouri statute.

Under the prior law, either neighbor could force the other neighbor to pay for half of both the construction and the maintenance of a division fence, regardless of whether the reluctant neighbor had livestock against the fence. This continues to be the fencing law in most Midwestern states.

Change #2: The right-hand rule (general counties)

Most of us assumed there was a “right-hand rule” as a custom, but there was no such language in the former statute. Now the statute clearly says neighbors who cannot agree on who is to build and maintain which portion of a fence shall apply the right-hand rule. Each neighbor stands on his land looking at the common boundary, finds the midpoint, and is responsible for the half to his right (see Chapter 272.060.1).

This assumes each neighbor has livestock against the division fence. Where your neighbor doesn’t have livestock against the fence, then you will have to build and maintain the whole fence until such time as your neighbor places livestock against it. And you can enter upon your neighbor’s land to build and to maintain your share of the division fence (see Chapter 272.110).

Under the prior law, you would have to take your neighbor to court if you and your neighbor couldn’t reach an agreement as to which fence portion was whose responsibility to build and to maintain.

Change #3: What is a “lawful fence?” (general counties)

Some may think the new statutory definition of “lawful fence” is still too cumbersome and confusing, but you should have seen it under the prior law!

Basically, revised Chapter 272.020 says that “lawful fence” is any fence consisting of posts and wire or boards *at least 4 feet high* (and mutually agreed upon by adjoining landowners or decided upon by the associate circuit court), *with posts set firmly in the ground not more than 12 feet apart*.

A question occurs when both neighbors have livestock against the division fence but one neighbor wants a more costly fence, probably because his livestock require a stronger or higher fence. The associate circuit

court for your county will be the ultimate decider on that issue. The new statute in Chapter 272.136 states that you can build the neighbor's portion in excess of the lawful fence required (but presumably at your own expense).

Change #4: Actual vs. double damages? (general counties)

What if your right-hand division fence is in need of repair and your animals trespass onto your neighbor and cause damages to crops or livestock? Under the new statute, you are liable for the *actual damages* done, but no longer for double damages (see Chapter 272.030).

There may be some confusion about the allowance for "double damages" in Chapter 272.050, which was not deleted in the revision. This particular statutory section is a "leftover" from the 1808 law (see above under "History of Missouri Fence Law"), which referred to the former duty of landowners to fence out neighbors' livestock under the open-range law. But Missouri eliminated "open range" law in favor of "closed range" law in 1969. Courts have a duty to apply statutes as written, and not to "make or remake statutes" (the separation of powers between the judiciary and legislative branches). This statute on its face says landowners who fail to maintain their section of division fences (and thereby allow a neighbor's livestock to trespass) are liable for double damages for any damage caused to the trespassing livestock by the landowners' shooting, worrying, use of dogs, or otherwise. This statute encourages landowners to maintain their portion of division fences, and also threatens to punish them if they injure trespassing livestock who enter due to the landowners' failure to properly maintain their portion of the division fence.

Under the old law, there was language (now deleted) referring to double damages if your livestock escaped through your defective portion of the division fence.

Existing division fences under the new Missouri statute

Under either the old (pre-August 28, 2001) or new Missouri fencing statute, neighboring landowners are free to agree on a novel arrangement for contributions, construction, or maintenance of division fences. As discussed below, such agreements should be in writing, signed, notarized, and recorded against the land title of all landowners sharing the division fence. Any validly recorded written fencing agreement in existence before August 28, 2001, will continue to be enforceable under the new fencing statute.

Division fences in existence before August 28, 2001, are *not* grandfathered under the old statute. If no valid written and recorded fencing agreement exists before that date, the fencing rights and duties will be defined under the *new* statute. For example, if your neighbor had not paid for half of an existing division fence, under the new fencing statute, he won't have to unless he has live-

stock running against it. If he had paid for half and was maintaining half, the neighbor may arguably discontinue maintenance of his half *if* he isn't running livestock against the division fence. The new statute does not go into this particular situation, so you may have to seek clarification from the associate circuit court (or perhaps in the Small Claims Court, as the same judge sits in both courts).

Under the old statute, you could have taken the neighboring landowner to the associate circuit court to obtain reimbursement for half the fence costs, as well as require that the neighbor maintain half the division fence.

Neighboring landowners still free to make special fence agreement (general counties)

In both the new and the old statutes, neighboring landowners are free to bind themselves contractually to fencing provisions different from those in the statute (see Chapter 272.090). And this includes agreeing that no division fence is needed (see Chapter 272.134).

The three-fence-viewers approach remains in the revised law as the associate circuit court's mechanism to settle disputes (see Chapter 272.040). Each fence viewer is to receive \$25 per day, and such costs are to be shared equally by the neighboring landowners. The fencing statute is simply a default provision for those situations where the neighbors cannot reach agreement.

Fencing agreements should be in writing and recorded against both titles

When you and your neighbor reach an understanding about what type of division fence to build and who is to build and maintain which portion, put it down in writing, sign it, and record it against the land title (county recorder's office) of all neighbors signing the fencing agreement.

Verbal agreements won't work, as they violate the statute of frauds, which requires that agreements dealing with land and those taking longer than one year be in writing to be enforceable in court. Furthermore, only recorded written agreements will bind successor owners (buyers, gift recipients, and heirs).

How are things different in an "optional fence law" county?

1. Forced Contribution and Maintenance: If either neighboring landowner needs a division fence, the neighbor has to pay for half the cost of the "lawful fence" (different definition in optional counties) and maintain half (see Chapter 272.235).
2. Lawful fence is defined basically as one equivalent to a fence of four barbed wires supported by posts not more than 12 feet apart, or 15 feet apart with one stay (see Chapter 272.210.1). If either neighbor wants a more costly fence, then he will have to build

it and pay for it.

3. No Right-Hand Rule: The optional county fence statutes make no mention of any right-hand rule. Each neighbor is to build and to maintain "half." Disputes are to be taken to the associate circuit court, which appoints three fence viewers to report back to the court (see Chapter 272.240).
4. Actual Damages: If your livestock trespass through your portion of the division fence and it was in need of repair, then you may be liable for the actual damages caused to your neighbor's crops or livestock (not double damages). See Chapter 272.230.
5. Neighbors are still free to make a fencing agreement that is different from these statutory provisions (see Chapter 272.235). Just be sure it is in writing, signed, and recorded properly (best to have an attorney do this).

Liability for trespass by livestock through exterior fences and division fences

The liability of the livestock owner depends on whether the animals crossed an "exterior" or a "division" fence. An *exterior fence* is one that is not within a common enclosure. A fence along a public highway is an exterior fence. *Division fences*, on the other hand, are fences that separate adjoining landowners.

Where animals cross one or more *exterior fences* (or *unfenced exterior boundaries*) before entering a neighbor's farm, the animal owner is probably liable for all damages that may arise on that farm, and the livestock can be distrained. This results from the Missouri statute that places the duty to fence in animals on the animal owner (closed range, as opposed to the former "open range"). The livestock owner's potential defense to avoid liability includes arguing that the livestock escaped through no negligence on his part, as he kept a good fence and regularly fed and checked on his livestock. Another defense argument might be that "acts of God" (*force majeure*) were intervening and unforeseeable forces causing the livestock to escape, such as a storm knocking trees down onto fences, or dogs chasing the livestock through the fence. For more information on Missouri's statute requiring livestock owners to restrain their livestock from running at large, see Chapter 270. See also MU publication G453, *Farmers' Liability for Their Animals*.

When livestock cross a *division fence*, the measure of damages for the *first trespass* is the true value of the damages sustained, together with costs before a magistrate (see Chapter 272.030). For any *subsequent trespass* by livestock through a division fence, the injured party may distrain 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. If the parties cannot

agree on the amount of damages and compensation, either party may complain to the circuit court of the county to settle the action in court. If the animal owner wins, he or she shall recover costs and any damages sustained, and the judge shall issue an order for the return of the animals. If the person who distrained 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 livestock.

Boundary line disputes and the doctrine of adverse possession (squatter's rights)

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 someone in possession of land continuously for a period of 10 years may receive absolute title to the land if his or her possession was *adverse* to the interests of the true owner. The court and jury will decide.

It may require a "quiet title" lawsuit to decide whether all five elements of adverse possession are present in any given factual situation. If the possession is

1. *actual* (land used in the same way that nearby landowners use their land),
2. *hostile* (under claim or right),
3. *open and notorious* (so long as the adverse possessor acts as though the land is his),
4. *exclusive*, and
5. *continuous* for the 10-year period,

then title can be established for the adverse possessor. Tenants cannot assert adverse possession even after leasing the property from more than 10 years because they are there with the consent of the landowner (not "hostile use").

The usual case of adverse possession is one in which the adverse possessor does not have guilty knowledge that he is on another person's land. Typical adverse possession lawsuits involve innocent construction of fences off the true boundary line. It doesn't make any difference (under Missouri law) whether the adverse possessor (really just a "trespasser") paid or did not pay the real estate taxes on the land being claimed under adverse possession.

Keep in mind that if a title is acquired by adverse possession, it can be made "marketable of record" only after either a court has rendered judgment that all the requirements of the doctrine of adverse possession have been met, or the neighboring landowners have given each other signed, notarized, and recorded quitclaim

deeds. The “quitclaim approach” is basically a settlement out-of-court and should be done with legal advice.

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 watercourses or lakes) may be classified as (1) public navigable, (2) public nonnavigable or (3) private nonnavigable.

A stream is basically classified as *public navigable* if it is large enough for commercial watercraft to float on it. 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 streambed. Any land that is slowly and imperceptibly built up along the shoreline 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 nonnavigable* 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 nonnavigable stream has the right to remove sand and gravel from it. However, his or her 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 nonnavigable*. 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.

- If there is no division fence between **A** and **B**, then **A** will be liable for the actual damages to **B**’s cornfield.
- If there is a division fence between **A** and **B**, the extent of **A**’s liability will depend on several factors:
 1. Under the general county fencing statute as revised in 2001, **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 or over, **A** is liable for actual damages. If the cow sneaks over or through a portion of the fence **B** was obligated to repair but did not, **A** will not be liable for any damages caused by the cow to **B**’s land.
 2. Under the optional county fencing statute, **A**’s liability will be determined basically as under the newly revised general county fence law. However, in a local option fence county, the statute specifically authorizes **B** to have **A**’s defective portion of the division fence repaired at **A**’s expense if **A** neglects or refuses to repair his fence (see Chapter 272.310).

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 a good argument to obtain title by adverse possession because his possession was open and continuous for more than 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. People in the area often use the creek for float trips. **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 nonnavigable stream. Each adjoining landowner would own the streambed to the center thread of the stream. Therefore, **A** could remove his share of the gravel. The ownership interests of both **A** and **B** are subject to the public’s right to use the public nonnavigable stream for recreational purposes like canoeing, fishing and wading.

Disclaimer

Do not rely on this publication for legal advice. The material contained in this guide is a general statement of the law. Direct your questions to an attorney. Your attorney can get relevant facts and act on them in your best interest.

