

Phoebe Kilby

Ag. Eng. 3  
Fencing

Commonwealth of Virginia



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November 2, 1981

The Honorable Kevin G. Miller  
Member, House of Delegates  
417 Mountain View Drive  
Harrisonburg, Virginia 22801

My dear Delegate Miller:

You ask three questions about division fences.

You first ask whether, under § 55-319 of the Code of Virginia (1950), as amended, a landowner may avoid liability for repairs to an existing division fence by choosing to let his land lie open, as provided in § 55-317.

Section 55-319 provides that when any division fence shall become out of repair to the extent it is no longer a lawful fence, either adjoining landowner may give written notice of his desire and intention to repair such fence, and the landowner giving such notice may then repair the entire fence so as to make it a lawful fence, and the other landowner shall be liable for one half of the expense.

Section 55-317 provides that adjoining landowners shall build and maintain, at their joint and equal expense, division fences between their lands, unless one of them shall choose to let his land lie open.

The option to let land lie open is mentioned in §§ 55-317 and 55-318, and by the terms of those sections, the option applies only when no division fence has been built. Section 55-319, by its terms, applies when a division fence has already been built. Section 55-319, unlike § 55-317, allows no option to a landowner to let his land lie open.

Accordingly, it is my opinion that, under § 55-319, a landowner may not avoid liability for repairs to an existing

MOBILE HOME

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Accordingly, it is my opinion that, under § 55-319, a landowner may not avoid liability for repairs to an existing

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division fence by choosing to let his land lie open, as provided in § 55-317.<sup>1</sup>

You next ask whether a landowner may recover damages from the owner of trespassing domesticated animals, if the landowner's property is not enclosed by a lawful fence.

At common law, the owner of domestic animals was required, at his peril, to keep them on his own land, or within enclosures, but the rule has been changed in Virginia as to domesticated animals, by legislative action, except in those areas where a "no fence" ordinance applies.<sup>2</sup>

Section 55-316 provides that it shall be unlawful for the owner of any domesticated animal to permit the animal to run at large beyond the limits of his own lands, in areas where a "no fence" ordinance applies under § 55-310.

Where such an ordinance does not apply, the owner may permit his domesticated animals to run at large beyond the limits of his own lands, and the owner of the domesticated animal is not liable for trespass by the animal, except as provided in § 55-306, which provides for liability only where domesticated animals shall enter grounds enclosed by a lawful fence.

Accordingly, it is my opinion that a landowner may not recover damages from the owner of trespassing domesticated animals if the landowner's property is not enclosed by a lawful fence, except in areas where a "no fence" ordinance applies under § 55-310.<sup>3</sup>

*Shenandoah is a "fence" county ("fence-out")*

<sup>1</sup>You also asked whether the land in question was being used for commercial purposes under § 55-317, thereby denying the landowner the option to let his land lie open. This question need not be answered, inasmuch as § 55-319 controls, and § 55-319 does not allow such an option where there is an existing division fence.

<sup>2</sup>See Poindexter v. May, 98 Va. 143, 34 S.E. 971 (1900); Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).

<sup>3</sup>See Perlin v. Chappell, 198 Va. 861, 96 S.E.2d 805 (1957) (negligence liability for escape over lawful fence of heifer known to be wild and capable of jumping barrier); Rice v. (continued on page 3)

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Your last question is whether the phrase "one half of the expense thereof," under § 55-319, means one half of the expense of repair, or the repair of one half of the fence's length.

Section 55-319 provides that the one landowner may repair the entire fence so as to make it a lawful fence, and the other landowner shall be liable for one half of the expense thereof. The item divided in two is not the length of the fence or the portion repaired, but the expense of repairing the entire fence.

Accordingly, it is my opinion that the phrase "one half of the expense thereof," under § 55-319, means one half the expense of repair, and not the repair of one half the fence's length.

With kindest regards, I remain

Sincerely yours,

*Marshall Coleman*  
Marshall Coleman  
Attorney General

5:41/150

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(continued from page 2)  
Turner, 191 Va. 601, 62 S.E.2d 24 (1950) (relationship between statutory duty and common-law duty of ordinary care). The law recognizes three kinds of tort liability: 1) intentional torts; 2) negligence; and 3) absolute liability (which includes casual trespass by domesticated animals). The law of "legal fences" relates only to casual trespass.

**YOUR OBLIGATIONS AND RIGHTS UNDER FENCING  
LAWS OF VIRGINIA**

L. Leon Geyer, Assistant Professor  
and  
Kevin McLaughlin, Researcher  
Department of Agricultural Economics  
Virginia Polytechnic Institute & State University

**I. INTRODUCTION**

**A. THE FENCING PROBLEM**

Two farmers named Crop and Cattle have land holdings side by side. The fence that runs between their places is old and in disrepair. Farmer Cattle has a large herd of beef cattle that graze next to Farmer Crop's land. During the past several months, Farmer Cattle's bull has found holes in the fence and entered onto the land of Farmer Crop. Farmer Crop has returned the bull to Farmer Cattle several times and complained about the fence.

No changes have been made in the fence and the bull escapes onto Farmer Crop's land again. Part in anger and part in frustration, Farmer Crop returns the bull and decides to teach the bull a lesson. He purchases electric fencing wire. Farmer Crop places the wire on the boundary between the two farms. In so doing, he inadvertently places part of the fence on Farmer Cattle's property and part on his own. He plugs the electric fence into 110 volts to "teach" the bull a lesson.

Several months go by and the bull does not trespass on Farmer Crop's land. A ten year old girl, Sally Trespass, decides to cut across Farmer Crop's and Farmer Cattle's land on the way home from her friend's house. Sally has hiked through a stream on the way and her tennis shoes are wet. As she crosses the land, she grabs the electric fence to slip underneath. The electric current is strong enough to end the life of Sally Trespass.

Was the tragedy necessary? Are Farmer Cattle and Farmer Crop, both or neither, liable for the death of Sally Trespass? Was Farmer Cattle under a duty to discover and remove the electric fence that was on his portion of the land? Would the case be different if Farmer Crop had placed a legal fence charger on the line and lightning had decommissioned the fence charge? What actions under the law could Farmer Cattle and Farmer Crop have taken that would have prevented the tragedy of Sally Trespass?

A similar case recently happened in Virginia. Both farmers face a multi-million dollar law suit and the possible loss of a portion or all of their farms. Their insurance coverage is unlikely to cover the total amount of the lawsuit.

The case of Sally Trespass raises some fundamental legal questions. What are the duties of Virginia citizens to maintain "lawful" fences? What is a lawful fence in Virginia? Who is responsible for repairing and keeping up a fence in Virginia? Can you require your neighbor to share in the upkeep or the installation cost of a fence? Is an electric fence legal in Virginia? What can you do to prevent someone's cattle from entering your land or to recover damages should this occur? These questions are addressed in the following article.

In addition to this type of case, problems regarding fencing duties have resulted in unfortunate disputes between neighbors regarding their rights and duties under Virginia law. Obviously, the solution to many of these problems lies in the willingness of neighbors to cooperate with each other to resolve conflicts. However, there are cases where honest differences of opinion result in court litigation. From this litigation and from the statutory provisions enacted by the state legislature, a body of law has developed which determines legal rights and responsibilities.

The information that follows is not intended as a substitute for the advice and counsel of an attorney. In fact, if a specific dispute arises over the law or if such a dispute seems likely, an attorney should be consulted.

#### **B. DUTY TO CONTROL ANIMALS**

Fences are often referred to as boundaries for the division of property. But, they are more properly treated in law as guards against intrusion, particularly for the purpose of preventing cattle or other domestic animals from going astray or for protecting a field or property.

Virginia statutes have specific provisions allowing recovery for trespass by animals if they cross lawful fences within the state and cause damage by their trespass. This particular legislation is designed to apply to horses, mules, cattle, hogs, sheep, or goats. Should any of these animals enter into grounds that are enclosed by a lawful fence, the owner or manager of the animals is liable for the damages incurred by the owner of the property. The legislation further provides that for each succeeding trespass, the owner or manager of the animals shall be liable for double damages.

This particular legislation may not apply the same throughout all counties within the state. Virginia statutes specifically define lawful fences, but, in some counties or portions thereof, the boundary lines of all tracts of land may have been constituted lawful fences by act of the Board of Supervisors. If so, this means that in these areas there is an absolute duty of owners of animals to prevent their crossing onto the lands of another. Therefore, one should exercise caution in applying the general rule and should determine specifically whether in a particular county or portion of that county, all boundaries are considered to be lawful fences. Under the "Common Law", a livestock owner has the duty to keep his animals on his own land, and is responsible for any damages they may cause. However, in Virginia, the general rule of law puts no duty on the owner to restrain his stock (unless they are known to be dangerous). Consequently, in some counties, cattle may stray onto an-

other's land, and the owner is not responsible for any damages that occur. It is up to the non-livestock landowner to erect a "lawful" fence in order to keep the stock off of his land. If the animals cross this lawful fence, the landowner may recover for trespass or damages. In the general law, the cost of building and maintaining the fence can be split between landowner and livestock owner when required under the division-fence statutes. Remember, the landowner can recover only when a "lawful" fence has been crossed.

In distinguishing between "fence" and "no-fence" counties, "no fence" counties are those that have declared any boundary a legal fence and follow the Common Law referred to above. "Fence" counties follow the Virginia General Law, which puts no duty on the livestock owner to keep his animals in. As previously indicated, in "fence" counties the landowner who builds a lawful fence to protect his land may require the cost to be split with the animal's owner (as long as their lands are adjacent). Please refer to the section on Division Fences in section II B for more information on this point. Examples of fencing situations in both types of counties are shown below.

Example 1. Two farmers, Crop and Cattle, live next to each other in Fence County, Virginia. Their county is a "fence" county and, therefore, has not declared the boundary lines legal fences. Neither farmer has chosen to erect a fence. One day, a steer belonging to Farmer Cattle wanders onto Farmer Crop's land and destroys a large quantity of corn. Farmer Crop would be unable to collect for the damages because his county, being a "fence" county, follows the Virginia General Law. However, should Farmer Crop decide to build a fence in order to protect his crops, Farmer Cattle must pay half of the expense.

Example 2. Farmer Beef and Farmer Bean live next to each other in Nofence County, Virginia. This is a "no-fence" county, which means that boundary lines have been declared legal fences by the county. One day, Farmer Beef received a load of cattle and placed them in a temporary corral that his sons had built earlier that day with three old gates and a spool of rusty fence wire. That night, the twine holding the gates together broke, and the cattle escaped. They got into Farmer Bean's watermelon patch and trampled the whole crop. Farmer Beef did not want to reimburse Farmer Bean because he had just spoken to his cousin, Cattle in Fence County, and was told that in Virginia there is no duty to restrain livestock. Farmer Beef did not realize that different counties in Virginia have different fence laws. Because his county was a "no-fence" county, the Common Law rule to restrain livestock applies. Farmer Beef owed Farmer Bean the full value of the watermelons.

In situations where a lawful fence has been crossed, or in those counties where any boundary line is considered to be a lawful fence, recovery may be had for any type of entry if damages result. Naturally, recovery in the form of damages is not automatic in that if the owner of the animal refuses to pay, then a court action may be necessary.

An optional method of handling animal trespass into enclosed grounds is that the owner or the tenant of the enclosed grounds has the right to take up and impound the trespassing animal until damages have been paid.

Within three days of taking up and impounding the animal, the owner or tenant of the enclosed grounds must apply to the General District Court of the county in which the land is located for a warrant for the amount of damages claimed. Once application is made to the court, a warrant can be issued and the matter can be set for hearing. After the hearing, the judge can order whatever damages are deemed to be just and proper in the case. Normally, if the court finds that damages have been sustained, the cost of taking up and impounding the animal may be recovered in addition to reimbursement for the damages caused to the property.

This provides a specific statutory remedy for those whose property is damaged by the trespass of animals. One should keep in mind that any such action under this procedure must be started within three days of the time the animal is impounded.

It should be noted that while landowners are not under a duty to make their premises safe for trespassing animals, they may not intentionally harm them. For example, farmer Cattle's bull jumps the fence between Farmer Cattle's and Farmer Crop's land. The bull continues to do so on 3 or 4 occasions per week for 2 weeks. After repeatedly returning the steer to Farmer Cattle, Farmer Crop decides to do something about it. Farmer Crop digs a hole in the ground and places leaves and hay over it. The bull drops into the hole the next time that he jumps the fence and is injured as a result. Farmer Crop would be liable for the damages because he intentionally harmed the bull.

## II. FENCES

### A. DIVISION FENCES

Virginia statutes specifically provide when adjoining landowners shall build and maintain division fences between their lands at their joint and equal expenses. The statute outlines when the ownership of the land itself carries within a right to have a division fence built with the help of adjoining landowners on common boundaries of adjacent land or when a duty is imposed to build a fence.

When no division fence has been built, either of the adjoining owners may give notice to the other, in writing, of his desire and intention to build such a fence. By doing so, he can require the adjoining owner to come forward and build his half if required by law. The owner who has been notified of his neighbor's intention has the option to help build the fence or within ten days to notify his neighbor of his intention to allow his land to lie open. If he gives such written notice then the owner wishing to have the fence built has the responsibility of building it himself. However, should the one who has chosen to allow his land to lie open decide at some future time to enclose his own property and thus take advantage of the previously built fence, then he becomes liable to the one who built the fence originally for one-half the value of the fence. The legislation provides that if the person who has been notified of his neighbor's intention to build the fence shall fail to give any notice of his desire to leave his land open and also shall fail to come forward within 30 days and build his half, then he can be held liable to the person

who built the fence for one-half of the expense thereof. From that point forward, the fence is declared to be a division fence between the lands of the neighbors. One of the interesting exceptions included in Virginia legislation is that the owner of land not used for agricultural purposes which adjoins land used for agricultural purposes does not have the option of choosing to allow his land to lie open. Such owners have an absolute obligation to build one-half of the fence and can be held liable for expenses of building one-half if properly notified as specified above.

A slightly different situation may exist where a division fence has already been built and used by adjoining landowners. If such a fence gets out of repair to the extent that it is no longer a lawful fence, then either of the adjoining landowners may give written notice to the other of his desire and intention to repair the fence and thus require him to come forward and repair his half. Again, should he fail to come forward within 30 days after being notified, the one wishing to repair the fence can do so and hold the other owner liable for one-half of the expenses of repair.

Even though these statutory provisions are available to force owners to assume their responsibilities, the better procedure is for the two landowners to agree with respect to the construction and maintenance of the fence between their lands. Any such agreement should be in writing. An attorney can draft such an agreement, which not only will bind the present owners but also future owners of the two properties if the agreement is properly filed. The law specifically allows such agreements to be binding if they are in writing and if they are recorded in the deed book in the clerk's office in the county in which the land is located. Often, it is to the advantage of the neighbors to establish such an agreement at a time when a good relationship exists between them. This protects both in case one should sell his/her property and should the new owners not be cooperative. Some farmers agree that when they face each other at the boundary fence, each will provide and keep up the right half and the neighbor will provide and keep up the left half.

#### **B. FENCE/NO FENCE COUNTIES**

As previously indicated, certain counties may have adopted an optional fencing provision that is generally referred to as the "no fence law". In those counties, the Board of Supervisors, after proper notice, may declare the boundary line of each lot, or tract of land, or stream within the county, or district within the county, or any portion of the county to be a lawful fence. If so, it then becomes unlawful for the owner or manager of any horse, mule, cattle, hog, sheep, or goat to permit any such animal to run at large beyond the limits of his own lands. This puts an absolute duty on the owners of animals to restrain their own animals or fence them in.

The adoption of the fence/no-fence provisions of the law by Virginia counties is shown in tables 1 and 2. The information that follows was obtained from the counties in response to a survey conducted by the authors during the summer of 1986. The response was from the county administrator or other appropriate person. If you have any question concerning your county, contact your county administrators.



**TABLE 1. NO-FENCE COUNTIES**

Counties/Cities that have "declared the boundary line of each lot or tract of land, or any stream in such county...or any selected portion of such county to be a lawful fence":

Albemarle	Floyd	Lee	Rockingham
Arlington	Fluvanna	Louisa	Scott
Augusta	Frederick	New Kent	Smyth
Bedford	Greene	Orange	Stafford
Botetourt	Halifax	Page	Warren
Buckingham	Hanover	Patrick	Washington
Campbell	King & Queen	Pittsylvania	Wise
Clarke	King George	Pulaski	Wythe
Cumberland	Loudoun	Roanoke	York

**TABLE 2. FENCE COUNTIES**

Counties/Cities that have not "declared the boundary line of each lot or tract of land, or any stream in such county/city...or any selected portion of such county/city to be a lawful fence":

Accomack	Culpeper	Isle of Wight	Prince Edward
Alleghany	Dickenson	James City	Prince George
Amelia	Dinwiddie	King William	Prince William
Amherst	Essex	Lancaster	Rappahannock
Appomattox	Fairfax	Lunenburg	Richmond
Bath	Fauquier	Madison	Rockbridge
Bland	Franklin	Mathews	Russell
Brunswick	Giles	Mecklenburg	Shenandoah
Buchanan	Gloucester	Middlesex	Southampton
Caroline	Goochland	Montgomery	Spotsylvania
Carroll	Grayson	Nelson	Suffolk
Charles City	Greensville	Newport News	Surry
Charlotte	Hampton	Northumberland	Sussex
Chesapeake	Henrico	Northampton	Tazewell
Chesterfield	Henry	Nottoway	Virginia Beach
Craig	Highland	Powhatan	Westmoreland

The circuit court of any county, upon petition by a landowner, may declare any stream of water or boundary land a lawful fence.

The owners and occupants of low grounds on either side of the James River in the counties of Buckingham, Albermarle, and Goochland need not keep up any fence on the boundary lines running across the low grounds to the river. These boundary lines are deemed legal fences except where public roads cross the river or run parallel with its banks. Lawful fences must, however, be constructed on the back and hill lands.

The boundary lines of any land in any county in Virginia that is under animal quarantine constitutes a legal fence.

The type and color of the paint to be used for posting is prescribed by the Department of Game and Inland Fisheries by law. Aluminum paint is the designated color.

**Question 16.** How does an individual determine when the fence needs repair, or should be replaced?

**Answer:** I know of no cases or law on point. Common sense would argue replacement when it must be fixed or repaired constantly. Secondly, if the fence does not comply as "a lawful fence" as defined in the statute, then I would argue that it should be replaced. One solution to this problem would be for each landowner to agree to maintain his one-half. Then each owner could make his own determination. Another alternative would be to have a third party determine whether the fence should be repaired or replaced. Some states require one of these two solutions by law. Virginia law is moot on this point. As a practice pointer, have each owner agree in writing, filed with the land records to keep their half in repair.

**Question 17.** Farmer Right and Farmer Left have each agreed to keep their own half of the fence repaired. Farmer Right's cow gets out through Farmer Left's unrepaired fence. Who is liable for damage from the trespassing animal of Farmer Right?

**Answer:** I would argue that Farmer Left is liable, because he was negligent in maintaining a legal fence. Courtesy on the part of Farmer Right would dictate that he notify Farmer Left of any known state of disrepair.

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