ILLINOIS FENCE LAWS

By H. W. HANNAH
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Cooperative Extension Work, University of Illinois, College of Agriculture, and the U.S. Department of Agriculture cooperating. JOHN B. CLAAR, Director.
Acts approved by Congress May 8 and June 30, 1914.
THIS CIRCULAR has been written to answer many of the questions that Illinois farmers ask about their rights and duties in regard to fences. Some of the answers are supplied by Illinois statutes (a whole chapter in the Illinois Revised Statutes is devoted to fence laws), some by court decisions, and some — unanswered by law — can only be conjectured. The desire to be cooperative with neighboring owners can solve more fence problems than the law. Yet, even when both parties are cooperative, problems arise on which owners have an honest difference of opinion.

This circular can be used to help resolve such differences; it cannot be used, however, as a substitute for the legal skill and advice one should employ when a dispute arises, or seems likely to arise.

GENERAL FENCE LAWS

The Duty to Confine Animals

The Illinois courts hold that a person has a duty to fence his animals in, that his neighbors have no duty to fence them out. An owner who fails to confine his animals properly can therefore be held liable for the damage they cause another, regardless of whether the injured party has his own property fenced. If, for example, animals driven along a road get out of control and enter adjoining fields, their owner may be held liable for the damage they cause, even though the road is not fenced.

The courts hold that the term animals includes poultry, and that a poultry owner has the duty to confine his poultry so they will not trespass. Dogs and cats are in a different category, so far as trespass laws are concerned, though by municipal, county, or township ordinance one may, under certain conditions, be required to confine them. Nevertheless, dog and cat owners may be held liable for actual damages caused by their pets, even though, according to the law, there may be technically no trespass.
Liability for Trespass by Animals

When animals trespass, their owner can be held liable for the damage they do. Injury to crops, to persons, to other livestock, and to property, the spread of disease, and the service of female animals are the most usual kinds of damages. The courts have allowed recovery for all these damages. The amount that can be recovered is based on the best evidence of actual loss. Examples of such evidence are the impairment of crop yield, the difference in value of progeny, and the value of an animal killed or injured. There is good authority for assuming, however, that an owner is not liable for damage due to disease spread by his trespassing animals unless he knew or suspected that his animals were diseased.

As in all injury cases, negligence or fault on the part of the injured party (commonly called "contributory negligence") may prevent recovery. Also, an owner completely free of negligence or fault may not be held liable. If, for example, a highway commissioner wrongfully tears out a fence or a storm blows it down, the owner of that fence cannot be held liable for the damage his animals do, unless he fails to make "immediate pursuit" upon discovering the breach in his fence.

When animals escape through a division fence, their owner may not be held liable if escape was made through the adjoining owner's portion of the fence and evidence shows that such portion of the fence was not in good repair. An Illinois Appellate Court has held, however, that if an owner turns his animals out, knowing that his neighbor's portion of the fence will not restrain them, he may be held liable for their trespass. The court reasoned that the owner of the animals has a statutory right to make the adjoining owner repair the fence or pay for having it done, and that he should have used this remedy.

A person who takes care of animals for others (an agister or a stablekeeper, for example) assumes liability for trespassing animals in his charge just as though he were the owner of them. However, if an owner fails to tell the agister about a breachy animal, he may be held liable, not only by the injured party but by the agister as well. As a general rule, a landlord is not liable for the trespass of his tenant's livestock. However, a landlord might be held liable if a livestock-share arrangement creates a legal partnership that makes the tenant an agent of the landlord. Also, under the principle that an employer is liable for the acts of his employees while they are engaged in his work, a livestock owner may be held liable for trespass resulting from the negligence of a hired man.
Animals on Highways

Farm animals, calves and hogs particularly, often get out on highways. If a user of the highway runs into a loose animal and is injured or has his vehicle damaged, he usually seeks compensation from the owner of the animal. Although no one can say exactly what damages, if any, may be recovered in particular instances, certain general rules apply:

1. If a farmer is negligent in maintaining his fences, he may be held liable for the damage his escaped animals cause to persons using the highway.

2. If a farmer maintains his fences in good repair, yet keeps animals that he knows are in the habit of breaking out, he may be held liable for damages caused by his animals when they break out.

3. If adequate fences are maintained, and animals not in the habit of breaking out get through the fence and on a highway, the owner may be held liable for the damages they cause if he knows the animals are out and makes no reasonable effort to get them back. Illinois law is not clear about a farmer’s liability when he is not negligent in any way. A good rule would be to exclude liability when there is no negligence.

4. If a farmer drives animals along, across, or on a highway, particularly a paved highway, he may become liable on the grounds of negligence. Under such conditions, an owner is required to use whatever care is necessary to keep his animals under control. Under some circumstances (at night or when there is heavy traffic) and on some highways (limited access or other highways on which animals could be prohibited) it would be negligent and possibly even a violation of the law to drive animals at all.

If a motorist is at fault, a farmer may use the defense of contributory negligence, in which case the motorist may not be able to recover anything from the farmer. It may even be possible for the farmer, where he is not negligent, to recover the value of his animal from a negligent motorist.

Railroad Fences and Farm Crossings

By Illinois law every railroad company is required to maintain fences on both sides of its road, as well as cattle guards at all road crossings, to prevent livestock from getting on its tracks. A company failing to build such fences and cattle guards or keep them in good
repair is liable for all damages that may be done to livestock on its roads. In connection with this law, the following facts are important:

1. A person suing and recovering damages from a railroad company is by law also entitled to reasonable attorney's fees.

2. If the railroad company maintains fences and guards that are adequate and in good repair, it is not liable for injury to livestock unless "negligently or willfully done." Illinois courts have interpreted this law as imposing a duty on railroads to maintain adequate fences and guards. The policy of the law and of court decisions is expressed by this statement from an Illinois case: "The design of the statute was to require and compel railroad companies to fence their tracks so as to prevent animals from getting upon them, thus affording safety and protection to the traveling public, as well as to the owners of stock." Decisions vary a great deal, however, and some points seem to be unsettled.

3. Illinois law provides a penalty for driving livestock down a railroad right of way (within its fences) without the consent of the railroad, for damaging railroad fences or guards, for leaving gates at farm crossings open, and for leaving horses or other animals standing on farm or road crossings.

4. When a company neglects to build or repair its fence and farm crossing gates, the owner of the land adjoining the railroad may give written notice to the company to build within thirty days or repair within ten days, as the case may be. Should the company fail to comply with such notice, the owner may do the work himself and recover double the value plus interest of 1 percent a month until he is paid.

5. The courts have held that a farm owner has a right to turn his animals against a railroad fence.

6. A contract between a railroad company and an adjoining owner, under which the owner agrees to maintain the fence, is valid and transfers liability from the railroad company to the contracting party.

In Illinois a railroad company is required by law to construct farm crossings when and where they may become necessary, for the use of proprietors owning land adjoining the railroad. If a railroad fails to build or repair such farm crossings, an owner may, after giving the company written notice, do the work himself and recover double the value, as well as interest and costs. Railroad companies, however, cannot be forced to build farm crossings unless they are needed. The
proper test of need, according to the Supreme Court of Illinois, is “reasonable convenience” rather than indispensability.

Except for saying, “when the same may become necessary,” the law sets no limit on the time a request for a farm crossing may be made. Neither does the law define the kind of crossing to be built, but leaves the matter to be agreed upon by the company and the owner. In one case the Illinois Supreme Court held that an owner could not force the railroad to build an underpass.

**Electric Fences**

Whether an electric fence can be considered a “legal” fence under Illinois law depends upon the interpretation put upon the law, particularly those portions giving a certain amount of discretion to fence viewers (see page 12), town voters, and county boards in counties not under township organization. Since barb wire can be used in a legal fence (see page 11), an electric fence would seem to meet the requirements for a legal fence if it is in good repair, if the top strand is at least 4½ feet high, and if it will hold the kind of livestock turned against it. However, an electric fence should be considered a legal fence, either by interpretation or amendment, only if it is able, in a safe manner, to prevent livestock from trespassing. If adjoining owners wish to use an electric fence for the division fence, they may.

Since electric fences are used largely as temporary or movable fences within the farm itself, the question of their legality is often less important than the question of liability for death or injury to persons or the animals of other owners. In cases where injury to others is clearly caused by negligence in constructing or installing an electric fence, and where the injured parties are not at fault, the owner may be held liable for damages.

**Power of Townships**

Among the powers that the electors (legal voters) of a township may exercise at the annual town meeting are the following:

1. They may make rules regarding sufficiency of fences and determine what shall constitute a lawful fence in the township.

2. They may make rules that are not already provided by law to restrain, regulate, or prohibit the running-at-large of livestock.

3. They may establish and maintain pounds, provide for the election or appointment of poundmasters, and authorize the distraining and impounding of livestock running at large.
DIVISION FENCES

The Illinois Statute

The Illinois legislature first passed an act on division fences in 1819. The law, amended several times since then, now provides that two or more persons having lands adjoining shall each build and maintain a just proportion of the division fence. The purpose of this law is to avoid friction between adjoining owners by specifying their duties, and to prevent the waste of having two fences built that leave a "devil's lane" between them. It should be noted that the statute does not state the precise proportion to be maintained by each owner. It merely says a "just proportion." Also, nothing is said about which end of the fence an owner shall maintain.

When Is There a Duty to Fence?

Many Illinois farmers keep no livestock and feel therefore that any fencing between their own and adjoining property should be maintained by the owner of the adjoining land. The Illinois law, however, does not relieve them of responsibility. It provides that "when any person wishes to inclose his land, located in any county having less than 1,000,000 population according to the last preceding federal census and not within the corporate limits of any municipality in such county, each owner of land adjoining his land shall build, or pay for the building of, a just proportion of the division fence between his land and that of the adjoining owner and each owner shall bear the same proportion of the costs of keeping that fence maintained and in good repair."

Apparently there is a conflict between the requirement as expressed in this section of the law and that contained in another section which provides that one may, after giving notice, discontinue his division fence responsibility if he thereafter "... suffers his land to be uncultivated and not used for pasture purposes. ..." The section quoted above imposes the responsibility regardless of one's use of his land. It depends instead on whether or not adjoining owners have enclosed their land.

The courts have held that an owner's obligation starts at the time the fence becomes a division fence. If, for example, an owner sells a part of his farm, he and the purchaser must share responsibility for the division fence from the date of sale. It should be understood, however, that owners whose properties adjoin are not compelled by law to build a particular kind of division fence, or any fence at all, if they can agree.
School districts in Illinois bear the full responsibility for all division fences between school grounds and adjoining lands, and are required to keep such fences and maintain them in good repair. Although the kind of fence that must be maintained is not prescribed, it can be assumed that the fence should be a legal one as described in the fence law — one capable of turning hogs, sheep, cattle, and horses.

Churches, cemeteries, park districts, and other agencies, either public or private, are apparently in the same position as other land owners with respect to division fences. However, if such an agency desired a fence that would exceed the legal requirements, it should bear the extra cost of building and maintaining such a fence. The law charges state parks with the duty to share in division fences between them and land used for farming purposes. Presumably this excuses state parks from division fence responsibility if the adjoining land is not used for farming purposes.

Highway authorities are not required to fence the road right of way.

The obligations that railroad companies have for fencing are discussed in the section on “Railroad Fences and Farm Crossings” (see page 5).

The Right to Discontinue Maintenance

The law prescribes the conditions under which an owner may legally stop maintaining his part of a division fence. Stated briefly, he must give the adjoining owner one year's written notice of his intention to remove his portion of the fence and let his adjacent lands lie uncultivated and unpastured. Even under these conditions, however, the adjoining owner may prevent the owner's removal of his portion of the fence by having the value of that portion determined by fence viewers and paying the amount to the owner.

If an owner removes a fence without giving the adjoining owner written notice, he can be held for all damages that may result. Should an unlawful removal be made, the adjoining owner may rebuild the fence at the expense of the person who made the unlawful removal. A further provision in regard to fence removal states that a landlord is bound by the acts of his tenant.

If an owner has mistakenly built a division fence on the adjoining owner's land, he may remove it to the true line, provided he pays for any fence materials that may have been taken from the adjoining land and that he does not remove the fence at a time when the crops of the adjoining owner would be exposed to livestock. The removal must be
made within six months after the true line has been run. If, within that six months' period, moving the fence would expose crops of either party to livestock, removal must be made within a reasonable time after the crops are harvested. This statute does not alter the general rule that a fence mislocated for twenty years or more cannot be moved unless both parties consent.

**Which Portion of a Fence Must One Maintain?**

Owners having adjoining lands are required to maintain a just, as well as a distinct, proportion of the division fence, but the law does not mention which portion or how much of the fence each owner must maintain. Owners ordinarily assume responsibility for a designated one-half of the fence, usually the half on their right as, standing on their own property, they face the division line. This is not a part of the law, however; it is simply a custom. Evidence can always be admitted to show that the fence should be maintained another way.

When owners cannot agree on the proportion of the fence that each should maintain, the law provides that the fence viewers can specify the proportion to be maintained by each. This provision applies also to the building of division fences. In making their determination, the fence viewers may question previous owners and tenants and hired men who worked on the farm to see which end of the fence was maintained by former owners. One decision that fence viewers cannot make, however, is that each owner should maintain his own side of a hedge fence.

**What Kind of Fence Must One Construct?**

Can a neighbor make another build a hog-tight fence even if he doesn't intend to pasture hogs? Yes, he can. One adjoining owner can make the other build a fence that meets the standard defined in the law—a fence 4½ feet high that will turn hogs, as well as other stock.1 The only purpose of this definition is to avoid disputes about division fences. This definition does not apply to other fences on the farm, or even to a division fence if the adjoining owners can agree on what they want. If the parties are in agreement, a barb-wire fence or an electric fence will suffice on the division line, or, if they like, they need have no fence at all.

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1 Electors at an annual town meeting, however, may determine what shall constitute a legal fence in their town, and the county board in counties not under township organization may regulate the height of fences.
An adjoining owner cannot force the other to use certain kinds of material in the construction of a division fence. The statute states that any fence “in good repair, consisting of rails, timber boards, stone, hedges, barb wire, woven wire, or whatever the fence viewers of the town or precinct . . . shall consider equivalent thereto, suitable and sufficient to prevent cattle, horses, sheep, hogs, and other stock from getting on the adjoining lands of another, shall be deemed legal and sufficient.” An owner therefore cannot be forced to build an expensive fence, or one that will turn animals other than those specified in the law. Neither can an owner be held liable for animals injured on his fence, unless the injury results from his negligence in maintaining the fence. One owner, for example, was not permitted to recover for a barb-wire cut sustained by his horse on his neighbor’s fence.

Construction and Repair

Illinois law provides that if an owner neglects to repair or rebuild his share of a division fence, the adjoining owner may have two fence viewers of the town or precinct examine the fence. If the fence viewers find that the fence is insufficient, they are required to direct the negligent owner to repair or rebuild his share of the division fence within such time as they think is reasonable.

This procedure seems to be an alternative to a provision by which an owner may give sixty days’ written notice to an adjoining owner that he build his fence, or ten days’ written notice that he repair his fence, and by which he may build or repair the fence himself, should the adjoining owner fail to comply with such notice. Under this provision, too, the owner may hold the adjoining owner liable for any damage resulting from his neglect of the fence, and recover from him the expense of building or repairing the fence, along with costs of suit in a court of competent jurisdiction. However, use of the fence viewers is recommended, particularly if court action is likely to arise.

This part of the law also provides that when fire, flood, or other casualty damages or destroys a division fence, the person responsible for that fence has to rebuild or repair his portion of it within ten days after receiving written notice from an interested party to do so. If, however, a flood destroys a floodgate or a part of the fence that crosses a stream or natural watercourse, he has to rebuild or repair within two days after being notified by an interested person. Should an owner, under these circumstances, fail to repair or construct his share of the fence within the time specified by law, the injured party may do the
work himself and recover his expenses, as well as costs of suit if legal action is necessary.

Ordinarily a floodgate or water gap is maintained by the owner in whose end of the fence it happens to be. However, since the law states that each owner shall maintain a "just proportion" of the fence, there is no reason why an owner who maintains a floodgate or water gap should not be compensated by having a smaller proportion of the fence to take care of.

Fence Viewers

In connection with laws on division fences, the state legislature has created a local body known as "fence viewers" whose duties are:

1. To determine the value of a division fence when adjoining owners cannot agree on the amount that one owner should contribute to another for building the fence, or when the owner intends to let his land lie open and the adjoining owner wishes to buy his portion of the fence.

2. To fix, when disputes arise, the proportion of a division fence to be maintained by each owner.

3. To examine the fence on the complaint of one owner that an adjoining owner has failed to make necessary repairs, and, if they find the fence in need of such repairs, to order the delinquent party to make them within a reasonable, specified time.

In counties under township organization, town boards of auditors are ex-officio fence viewers. In counties not under township organization, the county board appoints, for a term of one year, three viewers for each precinct.

Each party may choose one of the viewers, and the viewers, if they disagree between themselves, may choose the third to act with them. Should an owner neglect to choose a viewer, the other owner may choose both, provided that he gives the other party eight days' written notice.

In addition to their other powers and duties, fence viewers may determine what the equivalent of a legal fence is for their town or precinct. They may also compel testimony when considering a fence dispute. Their decisions must be recorded and filed with the town clerk or, in counties not under township organization, with the county clerk. A viewer is entitled to $1.50 a day for the time he spends in performing his duties. He is paid by the party requesting his services, but that
owner is entitled to demand that the expense be shared by the adjoining owner. If, in the judgment of the viewers, one party is at fault, that person must bear the entire cost himself.

Fence viewers must conform strictly to the law, and act only on the specific questions stated in the law. Even so, their decisions are not final and may be appealed to the courts.

**HEDGE FENCES**

**Trimming Division Fences**

By Illinois law an owner of a hedge division fence is required to trim his fence to a height of four feet or less the year after the hedge becomes seven years old, and to five feet every two years after that time. This law further specifies that trimming is to be done on or before June 15. If an owner fails to cut his hedge as required by law, an adjoining owner who is injured may give ten days’ written notice and, after that time, cut the hedge himself and recover the cost from the owner of the hedge.

However, 60 rods of hedge may be left untrimmed in a division fence to protect wildlife, orchards, buildings, or windbreaks, or to protect against soil erosion. The hedge must actually be serving as protection if this exception is to be made. The mere prospect of such use is not considered a sufficient reason for failure to trim the hedge.

In trimming a hedge fence, even one neglected by an adjoining owner, a person is entitled only to his share of the posts that might be taken out of the trimmings.

**Trimming Hedges Along Highways**

An Illinois law gives highway authorities the right to protect roads from adjoining and overhanging hedge trees. This law provides that the owner of a hedge fence lining a public highway must trim his fence to a height of five feet or less the year after the hedge becomes seven years old, and to five feet at least once every year after that time, so that it will not obstruct the public highway, impair its usefulness, or endanger the public. Osage-orange hedge is subject to the same regulations, except that annual trimming need not start until the second year after it is first trimmed and trimming must be to a height of four feet. However, as much as one-fourth of the length of a hedge fence along a highway may, with the consent of the highway commissioner,
be left untrimmed for windbreak purposes. Owners failing to trim their hedges by October 1 are liable annually to a fine of $10 to $50, which the highway commissioner may recover by a suit brought before a court of competent jurisdiction.

Planting willow hedge fences on the margin of highways has been made illegal in Illinois. Where such hedge fences already exist, the appropriate highway authority may contract with the owner for their destruction prior to tiling.

**Liability for Damages**

Where a landowner maintains a hedge according to the law in his portion of the division fence, he is not liable for crop damages caused adjoining property. While the law is not clear as to liability where hedges are maintained contrary to the trimming statute, it seems reasonable that there should be liability for resulting damage. This would also hold for trees or hedges not part of a division fence, but which nevertheless overhang and damage adjoining property.

There are no Illinois cases on damages for loss of yield caused by overhanging branches and trespassing roots of individual trees. One remedy allowed is to trim the overhanging limbs and dig up the trespassing roots back to the division line.

**Removing Hedges**

One landowner cannot force another to remove a hedge, since Illinois law does not require the removal of hedges but only the trimming of them. However, if the hedge as trimmed is not animal-tight, the owner may be forced to make his end a "legal" fence. This he may do by reinforcing his hedge with other material, or by removing the hedge and replacing it with another kind of fence.

**Multiflora Rose**

Do multiflora rose fences come within these trimming laws? Apparently so. There is nothing in the law defining *hedge*, but the highway law implies that hedges other than Osage-orange are included in the term. If multiflora rose is used for a division or highway fence, the owner can probably be forced to trim it as required by statute.
FOR INFORMATION concerning any problem on farm fences that is not discussed in this circular, Illinois residents may write the Department of Agricultural Economics, College of Agriculture, University of Illinois, Urbana.
Some of the many questions farmers have asked about fences that are answered in this circular:

Am I supposed to fence my animals in, or are my neighbors required to fence them out?

If my animals escape and injure crops or property, am I liable for damages?

Is a railroad company liable for damages if one of my animals is killed on its tracks?

Can I require a railroad company to construct a farm crossing?

Is an electric fence legal?

Who is responsible for building and maintaining a division fence?

Do I have to share responsibility for a division fence even though I don’t keep livestock?

What kind of materials must be used in building a division fence?

If I get into a dispute with my neighbor about a division fence, what can I do?

Can highway authorities require me to trim my hedge trees that adjoin or overhang roads?