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**FARM
FENCE
LAWS**

IN NORTH DAKOTA

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FARM FENCE LAWS IN NORTH DAKOTA

by

JEROME E. JOHNSON and RANDALL K. HANSON^a

Fences are an important part of some North Dakota farms and ranches. Fences may be used to include or exclude things, with important differences in the concepts involved.

Agriculture is a vital sector of the North Dakota economy. In 1978 there were an estimated 41,500 farms on about 41,700,000 acres. An awareness of North Dakota fencing laws can help farmers and ranchers protect themselves from legal liability and/or maintain good relations with neighbors.

Most of this publication concerns partition fences (defined below) rather than line or corral fences. Rights and duties of the landowner and others are affected in dealing with partition fences. However, for line fences the landowner is usually responsible only to himself. In addition, this publication covers fencing railroad rights-of-way, cattle guards and passes, and interstate highway fences.

SECTION I. TYPES OF FENCE LAWS

Previous to statehood, North Dakota followed the "common law" for its fencing laws. Under the law of trespass the farmer/rancher was held to be strictly accountable for any damages by his livestock whether or not he had fenced his lands.

North Dakota fence laws are basically "fencing-in" laws,^{1,2} which means that the livestock owner has to keep his livestock on his own land, and he is liable if any of his livestock negligently³ leaves his lands and damages the property or person of another. He may be strictly liable under some circumstances, but only if he was negligent under other conditions. Negligence may be proven if he did not have a legal fence or if he knew of defects which he failed to repair. Other things may be important in determining liability when a traveler on a highway is injured or when a railroad train strikes livestock.⁴

SECTION II. FENCES—TYPES AND DEFINITIONS

In general, a farm fence is a structure designed to keep livestock within, and can be made of any material that

will keep the owner's livestock from leaving or keep other livestock from entering his land, North Dakota statutes define a "legal fence" as:

1. Any fence 4½ feet high, in good repair, consisting of rails, timber, boards, stone walls, or any combination thereof;
2. All brooks, rivers, ponds, creeks, ditches, or hedges;
3. All things which, in the judgment of the fence viewers within whose jurisdiction the fence may be, are equivalent to the things specified in subsections 1 and 2 immediately above;
4. Any fence upon which the interested parties may agree;
5. A barbed wire fence consisting of at least 3 barbed wires with at least number 12½ gauge wire, the wire to be fastened firmly to posts which shall be not more than 20 feet or not more than 40 feet and 3 stays apart. The top wire shall be not less than 40 inches high, the bottom wire shall be not more than 16 inches above the ground, and no 2 adjacent wires shall be separated by more than 16 inches;
6. A wire fence consisting of 5 smooth wires with posts not more than 2 rods apart and with good stays not more than 8 feet apart, the top wire being not less than 48 nor more than 56 inches, and the bottom wire being not less than 16 nor more than 20 inches above the ground.

Courts purport to interpret such subsections as 2 and 4 above equitably for both parties. For example, if there are natural objects as in subsection 2 separating the land of two owners, those natural objects must be of such a character that they will keep one's livestock on his own land or keep other livestock from entering his land. An agreement between owners on some type of fence other than defined in the statutes should be fair to all parties concerned. In addition to the physical characteristics of the fence, surrounding circumstances⁵ are also important.

There are several types of fences:

1. **Partition fences** are fences separating the lands of two different owners. These are exterior, division fences between lands of adjoining owners.

2. **Line fences** are fences built entirely on one's land so

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that he owns land on both sides of the fence. A fence built along the borders of one's land but located a few feet within his own land is not a line fence, but is a partition fence.

3. A corral fence enclosing hay is a type of fence that would keep livestock out. It . . . "shall not be less than 16 feet distant from such stacks so enclosed, shall be substantially built with posts not more than 8 feet distant from each other, and with not less than 5 strands of barbed fence wire, and shall not be less than 5 feet high."

4. Muskrat fences are required of a landowner who owns these animals. A muskrat fence must be built using iron posts set not more than 12 feet apart, and the wire must be woven with 1½ inch mesh. The wire must be set at least 12 inches below the surface of the ground, and at the top of the fence there has to be a strip of metal 6 inches high.

SECTION III. PARTITION FENCES

A. **Defined**—A partition fence includes any part of the fence that borders land owned by any individual, including any railroad right-of-way or public highway that dissects the land as well as land owned by others. Most of these rights and obligations relate only to fences which enclose land for pasturage or grazing purposes. (Fences along private driveways to the highway are usually line fences.)

B. **Duty to build**—As a rule, a landowner need not build a partition fence nor share in the cost thereof. If he has no desire in having a fence, he cannot be forced to build one. If a landowner chooses not to have such a partition fence nor contribute to building it, he cannot complain to a court that the livestock of another damaged his property.

C. **Sharing construction costs and ownership**—In building a partition fence, landowners or occupants on each side must pay one-half the cost unless one of the owners chooses to let his land lie open. If one chooses to let his land lie open, apparently the farmer needing a partition fence must bear the cost. If one of the landowners requires a partition fence which exceeds the requirements of a legal fence, then the landowner requiring this special fence must bear the entire cost of erecting and maintaining the fence unless both landowners or occupants agree otherwise.

Landowners who split the cost of building a partition fence each have a one-half interest in the fence. A landowner cannot avoid being a party to a partition fence by building a fence a few yards within his own land and calling it a line fence. If some natural object separates adjoining lands but which does not constitute a fence, the owners must share equally the expenses of building a fence either through or on one side of the object.

D. **Maintenance**—The co-owners and occupants are responsible equally for maintaining a partition fence unless one landowner chooses to let his land be open. The fence must be kept in good condition 12 months of the year unless the co-owners have agreed otherwise.

E. **Existing fences**—If a co-owner of a partition fence wants to let his land lie open, he can give the other co-owners 6 months written notice that he intends to remove his part of that fence. During that 6-month period the other co-owners can pay him a fair price for his part of the fence. If he does not get paid, he can tear down his part of the fence.

When a new owner purchases land with a partition fence on it, the new owner acquires the previous owner's interest in the partition fences too. The new owner may be bound to build additional partition fences as needed and to maintain existing fences. To assure all interested parties of their rights and duties, a written agreement should be drawn up, signed, acknowledged, and witnessed. It should be recorded with the County Register of Deeds. This document may be binding on future purchases of the affected property.

F. **Disagreements settled by "fence viewers"**—Co-owners of partition fences who disagree as to their rights and duties can ask "fence viewers" to settle their dispute. They are members of the board of township supervisors in organized townships or board of county commissioners wherein the partition fence is located. Their duties are quasi-judicial, and their decision can be appealed to the appropriate court.

The number of members to sit as fence viewers is not specified by North Dakota statute, nor is "notice" of their meeting to settle the dispute defined, although the statute does require the fence viewers to give "notice" to all interested parties to the dispute, informing them of what the dispute is about and when and where it will be settled. It is recommended that the services of an attorney be obtained on these matters.

Fence viewers may order a partition fence to be built, maintained, or repaired and can direct one owner to pay another if the other built the entire fence at his own expense. Fence viewers can be used to establish a fair price for part of an existing fence when a co-owner wants to leave his land lie open and another co-owner wants to buy it.

Each fence viewer is to be paid by the person employing him one dollar per day for the time he is employed. If the fence viewers do not do their duty adequately, they are to forfeit five dollars and become personally liable for any damages arising from the fact that they did not perform their duties adequately.

SECTION IV. RAILROAD RIGHTS-OF-WAY TO BE FENCED

North Dakota statute requires a railroad to fence each side of its right-of-way, and the fence must be erected within 6 months of the track laying.

The fences must be of good posts set in the ground firmly and not over 20 feet apart. The fence can be of woven wire at least 48 inches wide or at least four strands of barbed wire. The top wire shall be at least 54 inches

above the ground, the bottom wire about 16 inches above the ground, and the 2 center wires equally spaced between the top and bottom wires.

The statutory requirements for railroad fences are stricter than for other lands. If the owner of land bordering the railway has a "hog-tight" fence, the railroad must also build and maintain a hog-tight fence.

Railroads are required to build and maintain "cattle guards" on public highways and gates on private roads crossing the railroad right-of-way.

If a railroad company fails to do its statutory duty, it is guilty of a class A misdemeanor.⁶ Besides the criminal liability involved, a railroad company may also be civilly liable for any damages due to their failure to maintain their fences adequately. If any landowner suffers damages due to the railroad's negligence, he should notify the railway in writing, telling them the nature of the damages and the value thereof. This valuation must be equitable. If the railroad refuses to pay the landowner and he is forced to go to court, he can double the figure he originally sought.

SECTION V. CATTLE GUARDS AND PASSES

Landowners can legally build cattle passes and cattle guards under and across all highways in North Dakota except for state highways. Before a cattle guard can be built across a county road or a section line, permission must be granted by the board of county commissioners. If the cattle guard is to cross a township road, then permission must be received from the board of township supervisors. The appropriate board must approve written specifications of the cattle guard, and a copy of the specifications must be sent to the county auditor. The cattle guard must be built wide enough for two vehicles to easily pass each other over it, and there must be warning signs 300 feet from the cattle guard. Connected to it must be a gateway with a gate that easily opens and closes. The landowner must pay the cost of building and maintaining the structure. He is liable for any damages arising from the cattle guard being across the highway.

Highway officials can order the cattle guard removed if they decide it is a hazard or that the landowner is not maintaining it, or they can maintain it and sue the owner for that cost.

SECTION VI. INTERSTATE HIGHWAY FENCES

The State Highway Department has fences built on each side of interstate highways in the state with gates that are always kept locked. Motorists have a right to expect that there will be no livestock upon interstate highways, so livestock owners must do everything they can to keep their livestock fenced in, and even then they may be liable for any damages that occur if their livestock enter upon the

interstate highways. On other North Dakota highways, livestock owners must also keep their livestock fenced in.

SECTION VII. CRIMINAL AND TORT LIABILITIES

A. Criminal liabilities⁷—Hunters, as well as others, are under a duty to close all fence gates they open. If they fail to do so, they can be found guilty of a class B misdemeanor⁸ and can also be held liable for any damages that may result directly or indirectly from lowering the gate open.

Other criminal penalties exist if owners willfully permit certain animals to run at large.

B. Tort liabilities⁹—In general, before a motorist can recover for personal injury or automobile damages he must show that the livestock owner was negligent in allowing the livestock to be on the highway. The mere fact that the livestock were on the highway is not enough, nor is the fact that the fence was not adequately repaired. It must be shown that the farmer/rancher knew that his livestock were out because the fence was not properly maintained or repaired. The motorist must also show that he did not have a last clear chance to avoid the accident. The burdens of proof are substantially changed and much easier for the motorist when traveling on interstate highways.

No recovery is allowed the motorist if a grazing district has been created by the board of commissioners, and the accident occurs within the grazing district which has been properly posted to indicate it is a grazing area.

However, when crops or property of another are damaged, liability would appear to be strict and not dependent on negligence.

If personal or property damage is suffered in fence accidents, such as a snowmobile hitting a fence, recovery depends on whether or not the fence was in a legal place or, if across a trail or highway, whether it was built in such a way as to be dangerous and hazardous. If the fence was there to enclose livestock and that is the only purpose, there can be no recovery. The injured person must show that the farmer intended and knew that the fence, being where it was, was dangerous to the public. Fences along highways are there legally and serve a legal purpose and, therefore, are not of themselves dangerous or hazardous. The main consideration is the farmer/rancher's intention in having the fence where it is. The farmer can fence off trails used by the public if after building a legal fence he warns the public by posting that the trail has been fenced. In order to recover, the one injured would have to show that a fence was placed where it was in negligent disregard of the safety of the public.

Farmers/ranchers want to avoid being held liable for damages if at all possible. Prudent livestock operators must seek to prevent the problem from arising if possible, or if arisen, to improve their position to make it more likely that the scales of justice will tip in their favor.

An alertness for potential trouble-spots in and proper maintenance of fences is a part of good farm management. Examining property from the view of a visitor may help

avoid potentially hazardous situations and accidents, law-suits, injunctions, and loss or property. Knowing the law is a good start to an awareness of potential problems.

FOOTNOTES

¹There are two general types of fencing laws in the USA. The "open range" or "fencing-out" law is common to many western states. Under the open range system, livestock are free to roam at will. If a landowner wants to grow crops or have some other use of his land, it is his legal obligation to fence out animals belonging to others. Generally, under this concept, owners of livestock are not liable for damages which their livestock cause others. However, most states have "fencing-in" laws.

²One deviation from the basic "fencing-in" law came in 1899 when the North Dakota legislators passed the "herd law" which allowed farmer/ranchers to let their livestock graze wherever they wandered, even off their own land, during the winter months. All livestock were then permitted to graze in this "open" except male animals which always had to be fenced in. The herd law was repealed, so today livestock cannot graze in the open upon the lands of another in North Dakota.

³Negligence means doing something or failing to do something that a reasonable and prudent man would or would not do. For example, a farmer who knows that average spring thaws and run-offs have washed out his fence in the same place for the last five years, and who puts his angus bulls in this pasture after an average winter without checking the fence would be negligent. He would be liable when the bulls enter the neighbor's land and cause damage.

⁴A major exception to the fencing-in law affects railroads. Railroads are not required to fence their right-of-way, but may be liable to the owner for any damage to livestock.

⁵For example, is the fence too close to some object, so that the cattle can injure that object merely by putting their heads between the wires?

⁶A class A misdemeanor is punishable by a maximum penalty of one year's imprisonment, a fine of \$1,000, or both.

⁷Criminal liabilities arise from an act or the commission of an act that is forbidden or the omission of a duty required by law and that makes the offender liable to punishment by that law.

⁸A class B misdemeanor is punishable by a maximum penalty of 30 days' imprisonment, a fine of \$500, or both.

⁹Tort liabilities arise due to some fault leading to injuries and/or losses for which relief is sought by a civil action. A tort arises when one fails to do his legal duty and thereby intrudes into someone else's legal rights.