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CONCLUSION

Fence line disputes are a major source of neighborhood conflict. Most are caused simply by misinformation, or by a lack of information. This brief summary of the law will, hopefully, prevent many of such misunderstandings. An attorney should, of course, be consulted concerning specific questions.

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Nebraska Fence Laws

By Professor Harvey Perlman¹

INTRODUCTION

The purpose of this circular is to inform ranchers and farmers about Nebraska fence laws, including the law of division fences and other related problems.

DIVISION FENCES

Who May Build a Division Fence?

Any person may build a fence between his property and his neighbor's, with or without his neighbor's consent.

What Kind of Fence Is Required?

If both neighbors agree on what type of fence is to be built, the law does not require a specific type. In event of disagreement, however, the law provides that only certain types of fences are lawful. Thus, if a farmer wishing to erect a fence cannot get his neighbor's approval, he must build a fence listed in the statute as lawful. Specifications for the six types of fences declared lawful in Nebraska are listed in the appendix.

Who Must Pay for the Fence?

Each neighbor must pay his share of a division fence. Even though one neighbor may not want the fence, he must still pay half its reasonable value. If one farmer builds the entire fence himself, he is entitled to be reimbursed for half the labor and materials.

One neighbor cannot, however, force the other to pay for a hog and sheep tight fence unless both are grazing hogs or sheep. For instance, if *A* wants to build a hog and sheep tight fence between his farm and *B*'s, and *B* does not raise hogs or sheep and has no need for this type fence, *B* will have to pay only half of what it would have cost to put up a lawful wire fence. If in the future *B* grazes hogs and sheep and thus uses the fence, he must pay *A* the difference.

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Who Must Repair the Fence?

Each neighbor is responsible for keeping his share of the fence in repair. His portion is determined by an agreement with his neighbor. If *B* refuses to repair his portion, *A* must send him a notice in writing to do so. If, after four weeks, *B* still refuses, *A* may repair *B*'s part of the fence and sue *B* for the costs. *A* would also be able to collect court costs.

If the fence is destroyed or damaged by fire, flood or other casualty, each neighbor is legally bound to repair his portion. If *B* refuses, *A* can give him written notice to do so. After 10 days, *A* may repair *B*'s portion and sue *B* for the costs.

Who Pays for Damage Caused by a Fence in Disrepair?

Let's assume that *B* refuses to repair the fence. If *A* has notified *B* to repair the fence, *B* is liable for any damage *A* may suffer due to the disrepair. Thus, if one of *A*'s steers escaped due to the disrepair of *B*'s portion of the fence, *B* would be liable for any resulting loss or damage to the steer.

However, in a recent case, the Nebraska Supreme Court held that in the event *A*'s cattle escape onto *B*'s land due to the disrepair of *B*'s portion of the fence and destroy *B*'s property, *B* may still sue *A* for trespass and recover the value of the property. The court said that *A*'s sole remedy against *B* for *B*'s failure to fix the fence was to notify *B* as stated in the preceding section of this pamphlet. Just because *B* failed to fix the fence did not excuse the trespass of *A*'s cattle.

Who Decides Disputes?

In any dispute that arises out of the construction or maintenance of fences, the law provides for the selection of three fence viewers. Each landowner selects one man and these two select the third. The men chosen cannot be related to either party or have a financial interest in the outcome of the dispute.

The fence viewers examine the premises and hear both parties to the dispute. They also have the power to examine other witnesses. The decision of any two of the viewers is final. These decisions are put in writing and filed with the County Clerk.

Fence viewers have authority to decide the following disputes:

1. If one neighbor builds the entire fence and then seeks one-half its value from his neighbor, fence viewers may determine that value.
2. If two neighbors cannot agree on which portion of the fence each is to build or maintain, the viewers must distinctly mark and define these portions.
3. If one neighbor is injured by the refusal of the other neighbor to build or repair his portion of the fence, the viewers may determine the amount of damages.

Who Pays the Fence Viewers?

Each fence viewer is entitled to three dollars per day for the time

spent in settling disputes. The party requiring the service of the viewers must pay them in advance, but he may demand one-half the cost from his neighbor. If one of the parties is in default, as in not building or repairing his portion of the fence, he must pay the total cost.

RAILROAD FENCES

Nebraska law requires all railroads running through farmland to be fenced within six months of the opening of the tracks. This fence is to run on both sides of the railroad right-of-way. Such a fence must:

1. Be ample enough to prevent cattle, horses, sheep and hogs from straying onto the tracks.

2. Provide openings, gates, and bars at all farm crossings for the use of landowners.

3. Provide cattle guards at all road crossings suitable and sufficient to prevent animals from straying across the tracks.

The railroad is not, however, required to build any of these structures if they will endanger the lives of trainmen.

It is the duty of the railroad to maintain the fences, even if the farmer uses them for his own purposes.

If the railroad does not build such a fence, it must pay for all animals killed or injured because of the absence of a fence. A farmer may also give written notice to the railroad to build the fence; if it does not do so within six months, the farmer may build the fence and force the railroad to pay for it. The farmer will, however, be required to pay the excess cost of building a fence more expensive than the type required by statute.

SNOW FENCES

Between October 15 and April 1 the county or state may build and maintain snow fences on any private property if necessary for highway safety. The landowner must be paid for damage caused doing this.

BOUNDARY DISPUTES

Once a fence is erected it may or may not indicate the true boundary line between adjoining landowners. Many of the fences now used to partition property in Nebraska are not on the exact boundary line. Complicated legal issues arise when an attempt is made by one of the landowners to correct the discrepancy. The following are general rules governing such disputes.

Adverse Possession

If a person has actual, continuous, exclusive, notorious, and adverse possession of property under claim of ownership for ten years, he is deemed the sole and true owner whether or not he in fact has a valid deed to the property. Ownership arises by virtue of the doctrine of adverse possession.

1. "Actual, Continuous, and Exclusive" Possession

To gain title by adverse possession an actual entry onto the land

followed by acts of ownership is necessary. Simply having a deed is not enough. The uses for which the land is adapted determine what are sufficient acts of ownership. Thus, grazing cattle on pasture land or mining sand from a sandpit would be sufficient.

These acts of ownership must also be continuous and uninterrupted for ten years. On arable land, however, it is not necessary to have a crop in the ground continuously. It is enough that land be used for crops during the growing season. Between harvest and planting time no acts of ownership need be exercised to maintain continuity of possession.

Possession must also be exclusive. For example, if one party grazes the land, and another hunts and traps on it, neither can obtain title by adverse possession.

2. "Notorious and Adverse" Possession

The acts of ownership required of a person seeking to gain title by adverse possession must be notorious; that is, visible so as to give the true owner ample notice that someone is claiming his land. A secret or hidden claim to the land is not enough. Actual knowledge of such claim is not, however, necessary if the owner could have learned of it by going onto the land and making inquiry. Once ample notice is given, it is up to the true owner to bring suit within ten years or lose his land.

Possession must also be hostile and adverse. There must be an intent on the part of the possessor to claim the land as his own contrary to the claim of the true owner. Thus, a tenant cannot wrest title from his landlord by adverse possession. In fact, any possession by permission of the true owner can never ripen into title by adverse possession unless the owner is informed by the possessor that the latter is now holding the land under his own claim of right.

3. Evidence of Adverse Possession

The issue of adverse possession usually is determined by a jury. Factors considered as evidence of such possession include:

- a. Building a fence around the land.
- b. Entering upon the land and making improvements.
- c. Growing crops and felling trees.
- d. Grazing cattle. (The Nebraska court has held, however, that grazing cattle on the unenclosed, uncultivated land of another does not constitute evidence of adverse possession.)
- e. Receiving rents and profits from the land or buildings.
- f. Paying taxes. (Although it is doubtful whether just the act of paying taxes is sufficient, it is strong evidence of a claim of ownership.)

4. Boundary Conflicts

When a fence is built on what is presumed to be a boundary line, and when a party (1) claims ownership of the land up to the fence for ten years, and (2) fulfills the requirements for adverse possession on

land improperly enclosed, the fence becomes the true boundary. The gaining landowner need not necessarily have been in possession for the full ten years. To reach the ten year requirement he is permitted to "tack" onto his own years of adverse possession the time during which prior owners also held adversely.

A party may offer to pay for land along a disputed boundary without losing his claim of adverse possession. Such an offer is held to be merely an attempt to avoid a threatened law suit to clear up the title.

Acquiescence

A Nebraska statute provides that when corners and boundaries are lost, destroyed or in dispute, a showing that the boundary then in existence has been recognized and consented to by both parties for ten years will make such boundary the true one. This is the doctrine of acquiescence. It differs from adverse possession in that no hostility is involved. Neither landowner is attempting to claim any more than that which has been historically his share of the property. The doctrine involves the establishment of a boundary line by one or both parties and the assent thereto of both. Assent may be shown by conduct, words, or even silence.

Where a boundary line is known or certain, or where it can be determined without considerable difficulty and expense, the doctrine of acquiescence is inapplicable. Ownership rights may, however, be obtained in such a situation through adverse possession.

APPENDIX

Lawful Division Fences

Neb. Rev. Stat. §34-115 (Reissue 1960)

Rail fence:

1. Six rails or more.
2. Rails secured by stakes at the end of each panel.
3. Stakes must be well set into the ground.
4. Rider on the stakes.
5. Four and one-half feet or more in height.
6. Not more than one foot between rails.

Board fence:

1. Three or more boards.
2. Boards five or more inches wide and one or more inches thick.
3. Boards well secured to posts.
4. Posts not more than eight feet apart.
5. Four and one-half feet or more in height.
6. Not more than one foot between boards.

Rail and post fence:

1. Three or more rails.
2. Well secured at each end to posts.
3. Posts not more than ten feet apart.
4. Four and one-half feet or more in height.
5. Not more than one foot between rails.

Pole and post fence:

1. Four or more poles.
2. Well secured to posts.
3. Posts not more than seven feet apart.
4. Four and one-half feet or more in height.
5. Not more than one foot between poles.

Wire fence:

1. Four or more wires.
2. Wires to be not less than number nine fencing wire.
3. Well secured to posts.
4. Posts no more than one rod apart.
5. A stake or post between each post to which wire is attached.
6. Four and one-half feet or more in height.
7. Not more than one foot between wires.

Any of these wires may be barbed within the following requirements: Two or more single wire strands twisted into cable wire; metal barbs averaging not more than five inches apart; wire strands to be not less than number twelve and one-half gauge fencing wire.

Hog and sheep tight fence:

1. One barb wire at ground.
2. Next above; one section of woven wire twenty-six inches high consisting of:
 - a. Not less than seven strands.
 - b. Upper and lower strands number nine wire.
 - c. Intermediate strands number eleven wire.
 - d. Stays not more than twelve inches apart.
3. Next above; three barb wires at intervals of six, nine and nine inches.
4. Wires securely fastened to posts.
5. Posts no greater distance than one rod apart.
6. One stake or post between every two posts to which wire shall be attached.
7. Four and one-half feet or more in height.
8. Not more than one foot between wires.

Warner's Patent:

1. Five or more boards.
2. Boards at least five inches wide.
3. Boards at least one inch thick.
4. Four and one-half feet or more in height.