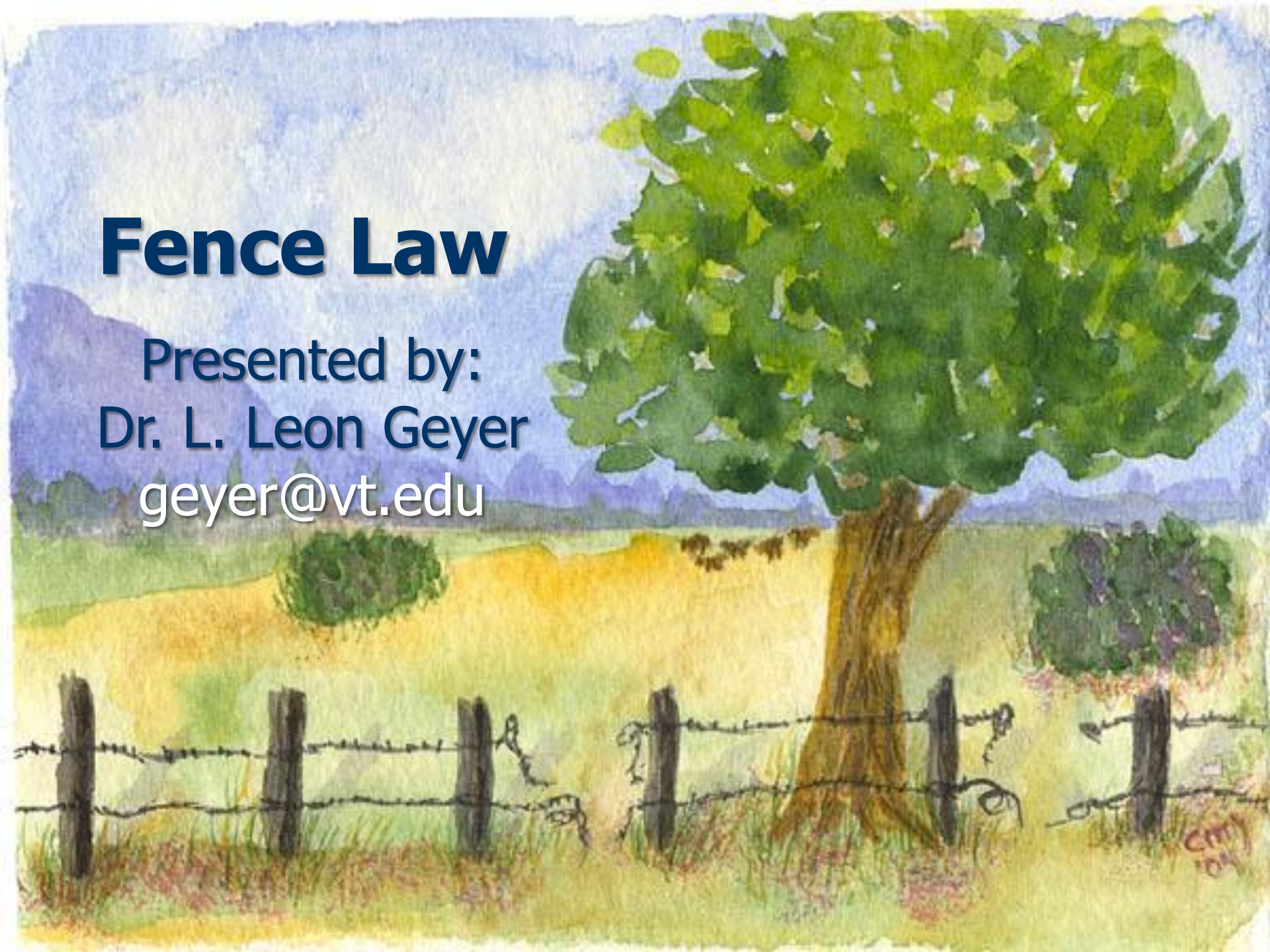


Fence Law

Presented by:
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Virginia Fence Law



2/15/2010

Fence Law CLE

Robert Frost, "Mending Wall"

There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, 'Good fences make good
Neighbors.'

Reform

- Right half left half
- Liable if animal passes your half
- Fence Viewers
- Tax impact of fence on Farmer and Homeowner?

- Federal Judge
- Case Law---selected
 - Ames vs. Brooks
 - Holly Hill Farm Corp. v. Rowe, 241 Va. 425, 404 S.E.2d 48 (1991)
 - Hash V. Commonwealth, 88 Va. 172 (1892)

Concepts

- Fence In v. Fence Out
 - Common Law v. Open Range
- Division Fence
 - Un subdivided land
- Trespass of Cattle v. Negligence
- Cattle Guards
- Railroad
- And More

Fence Purpose

- What is the purpose of a fence?
 - Divide Property?
 - Tool of protection?
 - Promote Good Neighbors?
 - Keep Animals Apart?
 - Social Disease?
 - Keep animals from eating neighbor's grass?
 - Unwanted pregnancy?

Questions

- What are the fence 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 of 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?

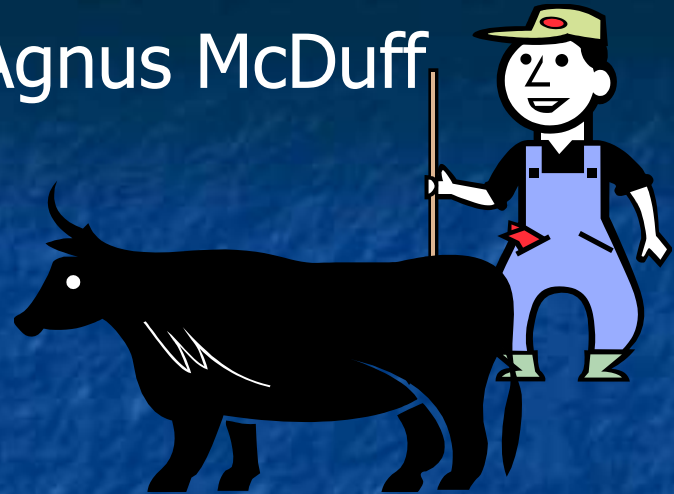
Common Law

- Duty to Fence In
 - VA – Like “Wild” West
 - - Open Range -
 - No duty to Fence In unless building supervisors declare boundary lawful fence – then duty to fence IN

Derry Barnes

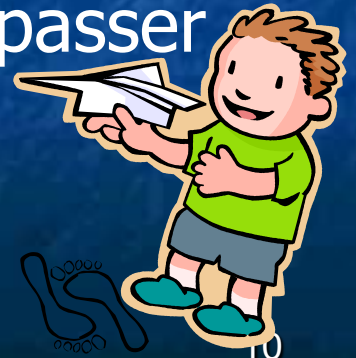


Agnus McDuff

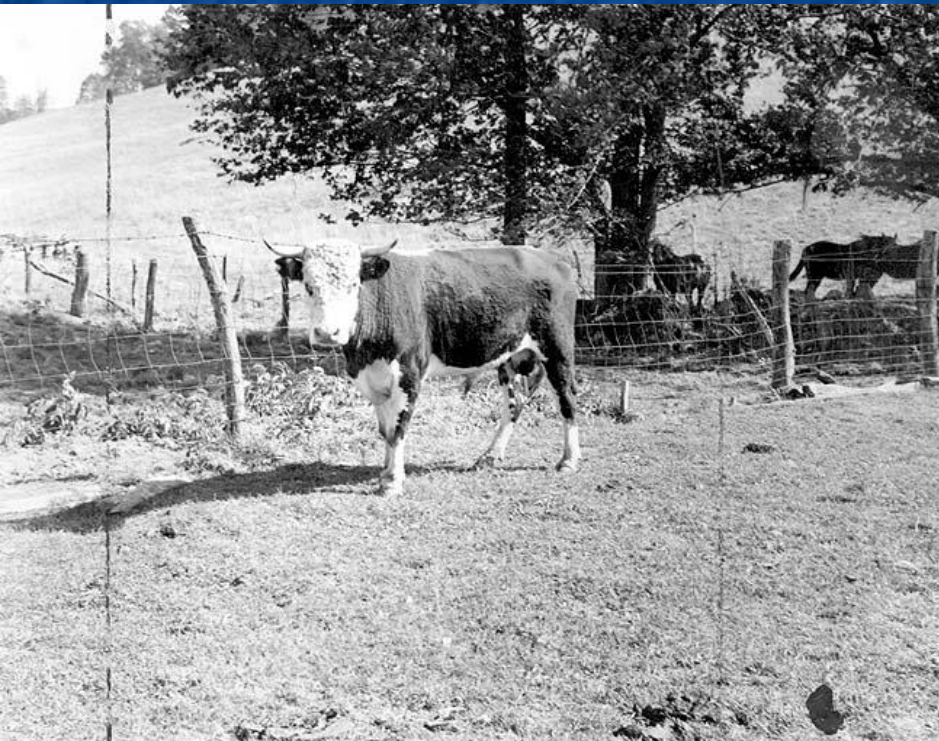


Stream

Tommy
Trespasser



Fence-In ?



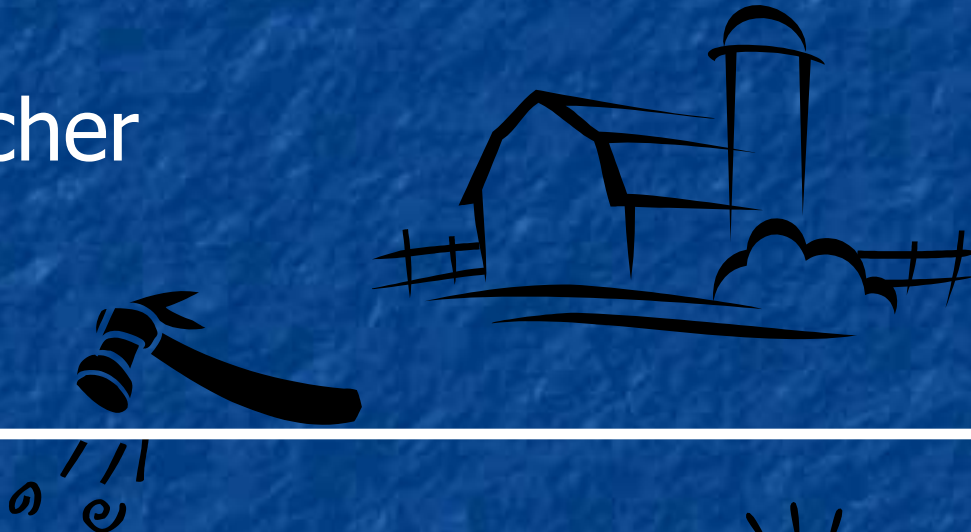
Fence-Out?

Fence Laws

- Fence In –
 - Source – English Common Law
 - Definition – Boundary lines have been declared to be lawful fences under § 55-310 of the Virginia Code. Landowners must fence their animals in.
- Fence Out –
 - Source – Virginia General Law
 - Definition – Landowner must construct lawful fences around their properties in order to keep wandering animals out.

Fence In Entitlement

Rancher



"No Fence"
Boundary
Lawful
Fence

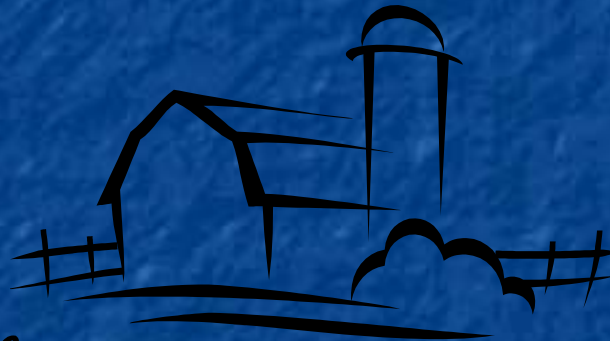
Homeowner



Common
Law
Modern

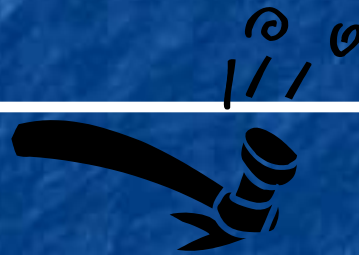
Fence Out Entitlement

Rancher



Wild
West

Division
Fence



Homeowner



Fence-Out Counties

- County has not declared boundary lines to be legal fences.
- A livestock owner has no duty to fence his animals in.
- Landowners have the duty to fence animals out. Non-livestock owner, pure bred owner has a duty to fence out others livestock.

Fence-In Counties

- County has declared boundary lines of every tract of land to be legal fences.
- Livestock owners have absolute duty to fence their animals in.
- Livestock Owner Can Be Criminally Prosecuted for Livestock Escape

Negligence

- Grandma Petunia choose to let her land lay open.
- Farmer Wealthy chooses not to fence in his cattle in fence out county.
- Wealthies' cattle destroy Petunias flowers and travel onto State Highway. Would Wealthy be liable for injured and killed motorist?

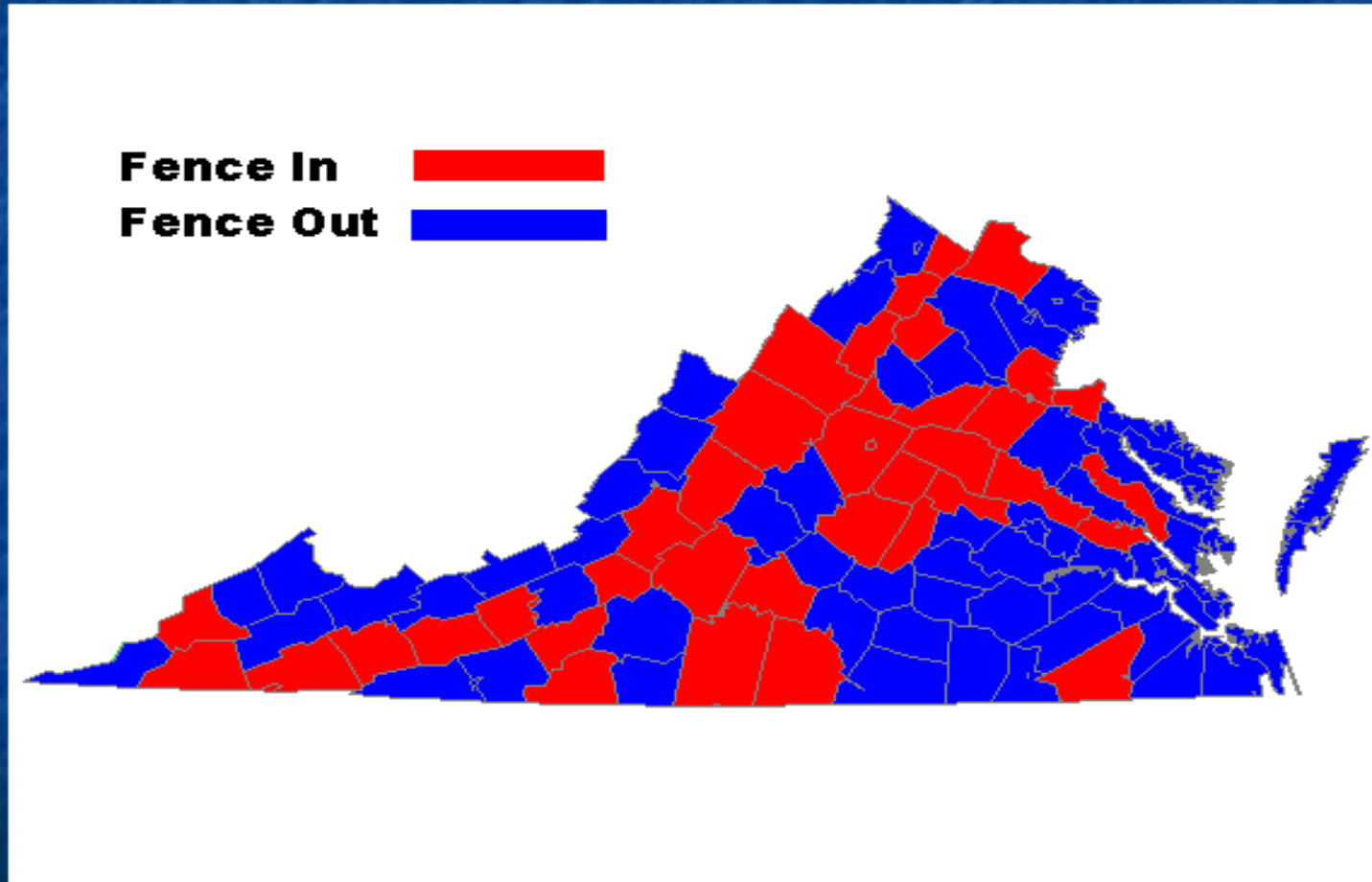
Fence-Out Counties

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

Fence-In Counties

Albemarle, Augusta, Bedford, Botetourt,
Buckingham, Campbell, Clarke, Cumberland, Floyd,
Fluvanna, Gloucester, Goochland, Greene, Halifax,
Hanover, King George, King and Queen, Loudon,
Louisa, New Kent, Orange, Page, Patrick,
Pittsylvania, Pulaski, Rappahannock, Rockingham,
Roanoke, Southampton, Spotsylvania, Smyth,
Warren, Washington, Wise

Virginia Fence Law: Fence In and Fence Out Counties



Fence Definition

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.

What is a Legal Fence?



Lawful Fences Defined

Although the law specifies certain types of fencing that qualify as lawful, the intent is to provide for fences that livestock are not able to creep through.

Lawful Fence

1. Statutory Description
2. Standard for Construction of Fence Out “Enclosure” for Trespass to Apply
3. Standard of Construction and Repair of Division Line Fence

Division Fence Law

1. Applies to Both Fence In and Fence Out Jurisdictions – Joint Sharing of Cost to Build & Maintain Division Line Fence
2. Enacted 1887 to More Equally Share Burden of Fencing Cost Between Livestock Owner & Non-Owner
3. Of Critical Importance to Non-Livestock Land Owner in Fence Out Jurisdiction
4. Of Critical Importance to Livestock Land Owner in Fence in Jurisdiction

Lawful Fences Defined

- Five feet high. If the fence crosses a ditch, the fence must reach to the bottom of the ditch.
- Of barbed wire, forty-two inches high consisting of eight strands of barbed wire, firmly fixed to posts substantially set in the ground at intervals of sixteen feet, with a substantial stay or brace half way between such posts, to which such wire shall be also fixed, when such wires are placed as follows. The first wire, two and one-half inches above the ground; the second, five and one-half inches above the ground; the third, nine inches; the fourth thirteen and one-half inches; the fifth, nineteen inches; the sixth, twenty-six and one-half inches; the seventh, thirty-four and one-half inches; and the eighth, forty two inches.

Lawful Fences Defined

- Of boards, four feet high, consisting of five boards not less than five inches wide, and firmly attached to posts placed at intervals of eight feet, or
- Three feet high within the limits of the incorporated town whose charter does not prescribe nor give to the council thereof power of prescribing, what shall constitute a lawful fence within such corporation sufficient to turn all kinds of livestock shall also be deemed a lawful fence as to the livestock mentioned.

VDACS Authority to modernize fence law?

- The Board of Agriculture and Consumer Services may adopt rules and regulations regarding lawful fencing consistent with this section to provide greater specificity as to the requirements of lawful fencing.
- The absence of any such rule or regulation shall not affect the validity or applicability of this section as it relates to what constitutes lawful fencing.

Penalty for non lawful fence

- "...since there was no 'lawful' **division fence** on the line between the adjoining landowners, neither the plaintiff nor the defendant could recover for any damages done by livestock which came through, over or under the existing fence" Hale v. Fawcett
214 VA 583 (1974)



Are Any of These Legal?



2/15/2010

Fence Law CLE

30

Who Pays for the Fence?



Lawful Fence

1. Statutory Description
2. Standard for Construction of Fence Out "Enclosure" for Trespass to Apply
3. Standard of Construction and Repair of Division Line Fence

Division Fences

- The obligation to provide a division fence typically occurs when:
 - The adjoining landowners do not have either a division fence built or an agreement on how to share the costs of a fence if it should be constructed.
 - A fence has already been built on the division line, and a question arises when the fence needs repair or replacement. Again, this scenario includes landowners that do not have a formal agreement.
 - The landowners have already come to an agreement, or the obligation has been transferred via title, on how the division fence between properties will be cared for and maintained.

Virginia Fence Statute Past Law

Virginia's division fence statute was so unique because few were allowed the option of letting one's land lie open.

Only farmers with un-subdivided land could let land lie open.

Division Fence Building

- In the case where no division fence has been built:
 - Either of the adjoining landowners may notify the other of his intent to build a fence.
 - The adjoining landowner must help build the fence or notify his neighbor within ten days of *his intent to let his land lie open.*
 - *If the adjoining landowner chooses to let his land lie open, then the builder of the fence must do so at his own expense.*

- A Landowner must pay half of the fence cost if an adjacent landowner notifies him of his intent to construct the fence **AND THEY USE THE FENCE.**
- ***Non user can opt out.***

Division Fence Law

1. Applies to Both Fence In and Fence Out Jurisdictions – Joint Sharing of Cost to Build & Maintain Division Line Fence
2. Enacted 1887 to More Equally Share Burden of Fencing Cost Between Livestock Owner & Non-Owner
3. Of Critical Importance to Non-Livestock Land Owner in Fence Out Jurisdiction
4. Of Critical Importance to Livestock Land Owner in Fence in Jurisdiction

No Previous Division Fence

1. Either Land Owner May Give Notice to the Other of Intention to Build Lawful Division Fence

3 Possible Replies:

1. Come Forward and Build One-Half Lawful Division Fence
2. Do Nothing and Pay for One-Half of Cost and Lawful Division Fence
3. Elect to Allow Land to Lie Open

1. Lie Open Land Owner Cannot Recover Damages for Trespassing Livestock in Either Fence In or Fence out Jurisdiction
2. Lie Open Land Owner Who Revokes Election and Encloses Land Liable for One-Half Cost of Division Fence

Division Fence Building

- If the adjoining land owner intends to let his land lie open he must notify his neighbor within thirty days. Otherwise, he will become liable for one-half of the cost of that division fence.
- If the adjoining landowner chooses to let his land lie open, taking advantage of his neighbor's fence, will she become liable for one-half of the cost if they add livestock 5 years latter. No case or statutory guidance.

Division Fence Building

- If you receive notification from your neighbor of their intent to build a division fence, you have these options:
 - Come forward and pay for half of the fence
 - Notify builder, in writing, within 10 days of intent to let your land lie open
 - After 30 days of non-response, you will become liable for half of all cost

Division Fence Building

- In the case where no division fence has been built:
 - Either of the adjoining landowners may notify the other of his intent to build a fence.
 - The adjoining landowner must help build the fence or notify his neighbor within ten days of his intent to let his land lie open.
 - If the adjoining landowner chooses to let his land lie open, then the builder of the fence must do so at his own expense.

New Fence Law I

House Bill NO. 1648

- Be it enacted by the General Assembly of Virginia:
- That § 55-317 of the Code of Virginia is amended and reenacted as follows:
- § 55-317. Obligation to provide division fences.
- 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 as hereinafter provided for, or unless they shall otherwise agree between themselves.

Division Fence Repair

- Either Land Owner May Give Notice of Intent to Repair Fence and Restore it to “Lawful Fence” Status
- 2 possible replies
 1. Come Forward and Repair One-Half Lawful Division Fence
 2. Be Liable for One-Half of Cost of Repair of Lawful Division Fence

Division Fence Disrepair

- If a division fence falls into disrepair, and a neighbor notifies you of their intention to repair it:
 - You must come forward within 30 days and repair your section of the fence
 - If not, you will be liable for half the cost of repairs, regardless if you are a livestock owner or a Grandma Petunia

55-321. Requirements for agreement to bind successors in title; subsequent owners

- No agreement made between adjoining landowners, with respect to the construction or maintenance of the division fence between their lands, shall be binding on their successors in title, **unless** it be in writing and specifically so state, and be recorded in the deed book in the clerk's office of the county in which the land is located, and properly indexed as deeds are required by law to be indexed.

New Fence Law II Removed

~~No owner of land used for industrial or commercial purposes, or subdivided into lots or parcels, adjoining lands used for agricultural purposes, when given notice by the owner of such adjoining lands under § 55-318 shall have the option of choosing to let his land lie open, but shall build one half of such fence or be liable therefor.~~

New Fence Law III Possible Removed

No adjoining landowner who owns or otherwise controls livestock as defined in § 55-306 may choose to let his land lie open unless he can show by a preponderance of the evidence that those livestock are restrained from trespass or otherwise running at large by means other than a division fence established pursuant to this article.

~~Proceedings for the erection and repair fences shall be as set forth in the following sections.~~

E. Fences in Town Page 6

It should be noted, however, that these provisions are applicable only in counties and not in cities and towns. It makes no difference if a defendant's fence meets the requirements set out above if the action takes place in a city or town. This section is considered to be inapplicable outside of a county, and bears no weight on liability or degree of care. (*See Perlin v. Chappell, 198 Va. 861,96 S.E. 2d805 (1957).*)

Local districts may also impose certain fence requirements under their zoning laws. This generally applies to town, city, or suburban landholdings.

Electric Fence Checklist Page 7

- Fence charge regulated by controlling device approved by U.L., I.C.C.C., or § 55-298.2 of the Code of Virginia
- Controlling device does not permit uninterrupted current flow for longer than one second with value over 5 milliamperes device, is between 450 and 550 ohms
- Fence supplied by only one controlling device
- The controlling device is properly grounded.

Horse and cow on the road

- Negligence
 - How long has the cow been out
 - Windstorm & tree
 - Gate open

Building the fence on the line

Page 3

When I decide to build my division fence, should I build it on the boundary line? This question is one that is asked many times to agricultural lawyers throughout the country. Indeed, this issue is an interesting point to ponder

Willing V. Booker, 160 Va. 461 (1933)

- Ownership of land carries with it right to division fence on common boundaries of adjoining lands.
- A fence is not a two dimension concept. It must have width. One may occupy the necessary land on each side of the true line for such a fence, though it encloses part of the adjoining tracts. One proprietor may place half of a fence of reasonable dimensions on the land of the adjoining owner.

Damage Recovery



Now that liability for damages has been determined, it is important to ask how those damages can be recovered.

If, however, an ox was previously in the habit of goring, and its owner has been warned, yet he does not confine it, and kills a man or woman, the ox shall be stoned and its owner also shall be put to death. *Exodus 21:29 (New American Standard Translation)*

Act of God

Where fence began to fall almost immediately after it was constructed by defendants and it was doomed to failure even in absence of high wind on day of final collapse, defendants could not avoid liability for breach of contract on basis that collapse of fence had been caused by an Act of God.

Trespassing

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.

Hash v. Commonwealth, 88 Va. 172 (1892)

- Where accused had built a fence upon the line between his land and that of deceased, and it had been so used for a number of years, and deceased had notified accused not to remove it, the removal thereof would be nothing more than a trespass.
- But if the fence had been built by the accused on his own land, such removal would not be a tortious act at all. And in either event, if, to prevent such removal, deceased had made an attack upon accused with a deadly weapon, under circumstances calculated to excite in the latter's mind a reasonable apprehension of death or great bodily injury to himself, under which he kills his assailant, he would be entitled to avail himself of the plea of self-defence

Hale v. Fawcett 214 VA 583 (1974)

- the court below ruled (1) that since there was no 'lawful' **division fence** on the line between the adjoining landowners, neither the plaintiff nor the defendant could recover for any damages done by livestock which came through, over or under the existing fence

Tate v. Ogg 170 Va. 95, 195 S.E. 496 (1938)

- The rule allowing person redress if exclusive and peaceful enjoyment of his own land shall be wrongfully interrupted applies to acts of trespass by domestic animals, unless some provision of law requires landowner to actually fence out such animals.

Tate v. Ogg 170 Va. 95, 195 S.E. 496 (1938)

- The common-law rule requiring owner of domestic "animals" at his own peril to keep them on his own land or within enclosures includes domestic turkeys and poultry, since word "animals" viewed in broad sense is used in contradistinction to a human being, and signifies an inferior living creature generally having the power of self-motion.

Under statute allowing recovery for trespass of any horse, mule, cattle, hog, sheep, or goat upon land of another enclosed by lawful fence, Legislature has not attempted to prevent domestic fowls from running at large, nor to require landowner to fence against fowls of another.

Tate v. Ogg 170 Va. 95, 195 S.E. 496 (1938)

- The Supreme Court of Appeals will take judicial cognizance of the fact that it is the nature of a turkey to chase a grasshopper or other bugs or insects without paying much attention to fences or boundary lines.
- The livestock ... are quadrupeds and animals, whose self-motion is confined to the ground. The word 'cattle' in common acceptation is a collective name for domestic quadrupeds, such as horses, mules and those which serve as food for man.

Tate v. Ogg 170 Va. 95, 195 S.E. 496 (1938)---Free range chicken

- The common law rule requiring the owner of domestic animals to keep them on his own land, with respect to fowl, is in force in Virginia
- One may not in Virginia raise a flock of turkeys for his own use, or for commercial purposes, and either wilfully drive them, or carelessly permit them to go upon the lands of another, and there destroy the property of the other. But where the fowls on adjacent farms merely make infrequent visits to the property of the adjoining landowner, and the damages thereby are inconsequential, and the circumstances indicate that the fowls have escaped for only a few minutes from their pens or from the vigilance of their landowner, and there is no good reason to believe that the trespasses will continue in the future, relief by injunction will be denied.

Frequently Asked Questions

Question:

Farmer Jones's cow gets into Farmer Smith's corn field and causes substantial damage. Can Farmer Smith recover for the damage to his corn?

Answer:

The answer depends on the county in which the lands are located. (a) If the farms are located in counties that have the optional “no fence law” then the owner (Farmer Jones) is responsible for the damage since his cows crossed a boundary designated as a lawful fence. (b) In other counties, if the cow crosses “a lawful fence” to enter the corn field, Farmer Jones is responsible for the damages caused.

Question:

Farmer Jones would like to construct a fence between his property and that of Farmer Smith. Can he require Farmer Smith to help him pay for this fence?

Answer:

The answer depends on whether or not farmer Smith wishes to allow his land to lie open. Farmer Jones may notify Farmer Smith of his intention to construct a new fence. Farmer Smith may then notify Farmer Jones within ten days that he intends to let his own land lie open. If he chooses to do so, Farmer Jones must build the fence at his own expense. However, if Farmer Smith ever uses the fence in the future to help enclose livestock, then he would be liable for one-half the value of the fence at that time. If Farmer Smith makes no reply whatsoever, Farmer Jones may construct the fence after thirty days and hold Farmer Smith responsible for one-half the cost of construction.

- Question: If a fence was constructed 20 or more years ago, are any of these laws applicable?
- Answer: Yes...replacement / repair

- Question: Does the division fence legally place the property line at the fence line?
- Answer: It depends. The fence should be built on the property line or a letter stating that it is not on the property line filed. If the fence is built three feet away from the property line, the then other party would not have to share the cost.

- Question: Suppose the fence was built years ago and nothing was said to the adjacent landowner, does this change anything?
- Answer: No

- Question: What if a tree falls on a fence from a golf club? Is the golf club responsible for the damage and removal of the trees?
- Answer: Yes, if they are negligent (i.e. they don't remove a dead tree).

- Question: Suppose a fence is adjacent to a golf club. Is this different from a farm?
- Answer: Prior Law A farmer without cattle can choose to let his land lay open, but no other person is allowed to let their land lay open (i.e. An apple orchard does not have to pay, but mother tulip or joe commercial have to pay). Holly Hill Farms case states this.
- New Law – Yes golf course nee not pay

- Question: If a tree from a farmer's property falls across the fence and does damage to another's property, am I responsible?
- Answer: Once again, it is a matter of negligence.

The End

Presentation Designed by:
Emily Blevins & Cathy Sponaugle