

DIVIDED OVER FENCES

by William Meese

In a major victory for cattlemen and other livestock owners, the Virginia Supreme Court ruled (5-2) on April 19 that a cattleman may build a fence around his land, fence out development and then bill adjoining property owners for half the cost. The division fence law and the high court's opinion may have far-reaching consequences for livestock owners throughout the United States.

In late 1985, a lawyer named John F. Ames purchased a 650-acre farm, Holly Hill Farm Corp., in Bowling Green, Va. Holly Hill had a sizable cattle herd, so they built a large tensile fence around the property and then billed the adjoining neighbors for half the cost. According to the *Richmond Times-Dispatch*, the bills ranged from between \$2,100 and \$12,500. When neighbors refused payment, Holly liened four neighbors' property and sued the others.

Fencing disputes, sometimes bitter, still occur in this country. In the South Dakota case of *K&E Land & Cattle Inc.*, a neighbor agreed to pay half the cost of fencing, but reneged when presented with an \$826 bill. He tore out 165 feet of new fence before his tractor became entangled. In 1983, the South Dakota Supreme Court upheld damages of \$199 to replace the damaged fence and \$7,000 in punitive damages to punish the wrongdoer. Others have built "spite" fences, such as the man in Florida who put up a six-foot concrete retaining wall to block his neighbor's view.

The source of our common law dates back to England in 1066. At that time, farmers were required to fence in their livestock for the simple reason that land was scarce. Every farmer's boundary line was a lawful fence; when cattle trespassed, the owner was responsible for any damages.

The American experience was somewhat different. Land was plentiful, but fencing material was scarce or

nonexistent. Depending on the strength of the cattle lobby, cattlemen were required to either fence in their herd, or the adjoining owners were lawfully told to fence out their neighbor's cattle.

In many states, such as Kansas, New Mexico and Texas, fencing did not

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become a major issue until the late 1800s. The open land was divided into numbered ranges, and the cattle—except for the mavericks—were branded and ear-marked to identify owners. Otherwise, cattle roamed freely. Roundups were, for the most part, cooperative affairs with each rancher participating by sending at least one hand. Disputes still occurred, but they involved cattle stealing, rustling and branding another rancher's stray yearlings.

As early as 1631, Virginia required adjoining landowners to fence out a neighbor's cattle for protection of crops. The actual law read, "Every man shall enclose his ground with sufficient fences upon thiere owne perill." In other words, if your neighbor's steers got into your corn, you could only blame yourself. But that 360-year old law was not the basis of the Court's decision in *Holly Hill*, as reported by one

newspaper.

In 1970, the division fence law was amended by the Virginia General Assembly to allow a livestock owner to demand that the owner of commercial, industrial or subdivided land build a fence. If the adjoining owner refused, the farmer could build the fence and demand payment from the reluctant owner.

Under current law, agricultural owners may opt out of this requirement by allowing their land to lie open, but those who use their land for commercial, industrial or subdivision purposes are not allowed that option—they must either build upon demand or share in the cost.

Although the defendants in the *Holly Hill* case argued that the law was special legislation, the Court disagreed. The majority found the purpose of the law was to protect livestock owners from increasing urbanization. More importantly, the Court found the General Assembly had determined that "agricultural owners should have primary control over the establishment of division fences." When faced with encroaching development, the cattleman has the right to decide to build the fence, and he has the power to enforce payment for half the cost. Basically, the General Assembly determined that developers should share the cost of protecting farmland and livestock.

As Holly Hill Farm Corp. owner John Ames said in a telephone interview, "the law benefits everyone." The fence protects neighboring property, the animals and the farmer. The division fence law is not a mechanism to take advantage of non-livestock raisers. The General Assembly of Virginia, as well as legislatures of other states, clearly intended to put a mechanism into play to help ensure that neighbors would come to an agreement without rancor and without resorting to the

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courts. There is no logical reason to exclude the developer of a subdivision, a commercial shopping mall or industrial encroachment from sharing in the cost of fencing.

The division fence law gives the non-cattleman a say in the type of fence placed on the boundary line and a voice in the maintenance. In other words, the non-cattleman may well be able to decide if a livestock producer can throw up two strands of hot wire and then fire it up with no regard for the neighbors' rights or whether he or she will erect a fence that is aesthetically pleasing to everyone.

Today many states, such as Illinois, Iowa and Pennsylvania still have fencing districts which mandate the way in which fences are erected, placed and paid for. Disputes are resolved by "fence viewers" who are appointed or elected and who must personally see the fence. Fence viewers make up an informal tribunal of limited jurisdiction, but their decisions are usually upheld. In most states, the losing party can appeal the decision in court.

A note of caution: Chief Justice Carrico and one associate disagreed with the majority in *Holly Hill* and found that the law violates the state

constitution as special legislation, or laws enacted to help private individuals. But the chief justice went further. Although the issue was not addressed on appeal, he stated the law may violate due process. This may mean a property owner in the future will be entitled to a prior hearing to determine the necessity of a fence and to discuss its cost. Some courts, however, have stated cost alone may not be a factor.

At least one town has had a somewhat similar law struck down as "out of date" and unconstitutional. In 1972 in the town of Fairfield, N.Y., the owners of a dairy with 110 cows demanded a share of the cost of installing a 2,200-foot fence from their neighbors, who did not farm or own livestock. The court held the town's ordinance was "not reasonably necessary to any legitimate public purpose and was oppressive and unconstitutional."

Fencing disputes will continue to arise as civilization continues to encroach upon grazing lands, farms and agriculture in general. The way in which those disputes are resolved will largely depend upon the parties involved and laws like Virginia's division fence law, a potential model for other states.

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