

Spring 1998

Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change

Craig R. Heidemann

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Craig R. Heidemann, *Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change*, 63 Mo. L. REV. (1998)

Available at: <https://scholarship.law.missouri.edu/mlr/vol63/iss2/12>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Agricultural Law

Fencing Laws in Missouri: Confusion, Conflict, Ambiguity and a Need for Change

*Craig R. Heidemann**

I. INTRODUCTION

Missouri's fence laws are significant for several reasons. First, the State of Missouri is second among all states in beef cattle production and in total number of working farms.¹ Of Missouri's 5.3 million citizens,² a full ten percent are engaged in agriculture or agriculture-related occupations³ and generate \$5.1 billion dollars in agricultural income and \$1.38 billion dollars in export revenues.⁴ Second, of Missouri's total area, thirty million acres are being used as farm land.⁵ Surrounding most of these thirty million acres of farm land are fences, most in need of repair or maintenance. These fences stand as sentinels, guarding and restraining hundreds of thousands of head of livestock from running free on what used to be Missouri's open range and thereby causing unimaginable damage and inconvenience to our modern way of life.

The importance of quality fences to Missouri's farmers, ranchers and those who drive upon the public roads often goes unnoticed until the occasional stray wanders in front of a speeding vehicle or destroys a neighbor's crops or pasture. When these events occur, it is up to the legal practitioner to weave through Missouri's complex, antiquated series of fence laws and case decisions to pave the way towards an acceptable resolution of the client's problems. However, in the law's current state, practitioners need more than a road map to find their way through the maze of fence laws. They need the earliest volumes of the *Missouri Appeal Reports* and the ability to predict how the courts ultimately will decide upon the interaction of Missouri's four separate fence laws and upon issues that generally have not been presented to Missouri courts in this century.

* B.A., University of Tulsa, 1991; J.D., University of Missouri-Columbia School of Law 1994; Co-Chairman, Missouri Bar Agricultural Law Committee, 1995-1997.

1. MISSOURI DEPARTMENT OF AGRICULTURE, 1997 MISSOURI FARM FACTS 1 (Vicky Pauley et al., eds.). Furthermore, four percent of the U.S. hog operations are in Missouri, five percent of the U.S. farms are in Missouri, six percent of the U.S. cattle operations are in Missouri, and seven percent of the U.S. turkeys are raised in Missouri. *Id.*

2. OFFICIAL MANUAL, STATE OF MISSOURI 894 (Jim Grebing, ed., 1997-1998) [hereinafter MISSOURI OFFICIAL MANUAL].

3. See MISSOURI OFFICIAL MANUAL, *supra* note 2, at 896.

4. See MISSOURI OFFICIAL MANUAL, *supra* note 2, at 895.

5. See MISSOURI OFFICIAL MANUAL, *supra* note 2, at 895.

This Article will address landowners' responsibilities arising from the fencing requirements found in Chapters 272 and 270 of the Missouri Revised Statutes and the historical context of those requirements. This Article also will address the statutory and tort liability of landowners whose livestock trespasses or runs at large and will summarize the legislative attempts to change the fencing laws throughout the past several years. Much of the groundwork for this Article has been laid by two preceding authors, John H. Calvert⁶ and Robert V. Krueger,⁷ and it is with thanks to them that Missouri's otherwise unintelligible fencing laws can be deciphered at all.

II. DEFINITIONS

Before one can embark on an analysis of Missouri's fence law, the basic fence terminology must be set forth and defined:

1. *Exterior Fence*: A fence that is not situated within a common enclosure. A fence along a public highway is an exterior fence. Also, any fence which is not a partition fence, interior fence or a division fence.
2. *Partition Fence*: A fence which is erected on the boundary between two owners of land. It may or may not be a "division" fence.
3. *Division Fence*: A fence that has been divided in such a way that one adjoining landowner has the legal obligation to maintain one "divided," designated portion of the fence and the other adjoining owner has the legal obligation to maintain the remaining portion of the fence.
4. *Interior Fence*: A partition fence which is wholly within a common enclosure and does not border any public road right of way.
5. *Common Enclosure*: Two adjoining parcels of land which are entirely enclosed by a continuous, common fence.⁸

III. COMMON LAW RELATING TO RESTRAINING DOMESTIC ANIMALS

Depending on which county a livestock owner lives in, and depending on the type of fence at issue, the common law relating to restraining domestic animals has limited application. Thus, an analysis of Missouri's fence laws must begin with the common law. At common law, possessors of animals are under a strict and absolute duty to restrain their animals from trespassing or wandering onto the land of another, due to the inherent destructive qualities of most

6. John H. Calvert, Comment, *Fencing Laws in Missouri—Restraining Animals*, 32 MO. L. REV. 519 (1967).

7. Robert V. Krueger, *Fencing Laws in Missouri and Livestock Running at Large on Public Roads*, MO. FARM LAW, Ch. 6 (2d ed. 1993).

8. See Krueger, *supra* note 7, § 6.1.

animals.⁹ The common law doctrine requires that the owner of livestock fence in the livestock or otherwise restrain them from running at large; adjoining landowners are not compelled to fence out the livestock of others.¹⁰ At common law, absent any prescription or agreement, adjoining owners of land have absolutely no obligation to build or maintain a partition fence on their common boundary line with an adjoining landowner.¹¹ Rather, at common law, a stock owner is bound to keep his cattle on his own premises, whether by placing the livestock within a fenced area or within a barn, or by tethering them to posts.¹² At common law, a rancher running five hundred head of horses cannot force his neighbor, who only raises a few animals, to contribute towards the cost of building and maintaining a partition fence.

At common law, land owners damaged by a trespassing animal can: (1) eject the animal using reasonable care;¹³ (2) maintain a trespass action for the damage done by the animal;¹⁴ or (3) "distrain the animal as security for the resulting damage and for the cost of keeping it during the distraintment."¹⁵ However, if the animal trespassed through a common law division fence under circumstances in which an agreement existed between the owners as to which section of the fence each was to maintain, these three remedies are inapplicable.¹⁶

"The common law imposes no duty to restrain domestic animals from straying upon a public highway."¹⁷ This issue is of particular importance, as discussed more fully *infra*.¹⁸ Prior to the twentieth century, animals caused

9. "[T]he true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and that, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God . . ." *Rylands v. Fletcher*, 35 L.J.-Ex. 154, 156 (1866) (emphasis added).

10. *Haigh v. Bell*, 23 S.E. 666, 667 (W. Va. 1895); See *Calvert supra* note 6, at 520.

11. *Calvert, supra* note 6, at 522.

12. See 4 AM. JUR. 2D *Animals* § 59 (1995).

13. *Heald v. Grier*, 12 Mo. App. 556, 559 (1882); GLANVILLE WILLIAMS, *LIABILITY FOR ANIMALS* 90-91 (1939).

14. *Calvert, supra* note 6, at 521 ("Since the liability is strict, the animal owner's exercise of due care does not constitute a defense. Thus, whether he has adequately fenced the animal is immaterial.")

15. *Calvert, supra* note 6, at 521.

16. See *O'Riley v. Diss*, 41 Mo. App. 184, 193 (1907). In these cases, the rights of the damaged landowner are governed by the terms of the fencing agreement. *Griffin v. Anderson*, 369 S.W.2d 889, 891-92 (Mo. Ct. App. 1963).

17. *Calvert, supra* note 6, at 522 (extensive discussion of common law regarding animals straying upon public roadways).

18. As discussed *infra* notes 60-82 regarding counties adopting the 1963 Fence Act

travelers slight inconvenience considering the mode of conveyance and speed of pre-twentieth century transportation. Cows, sheep, or swine on the road posed little threat to an oncoming surrey or buckboard.¹⁹ Accordingly, none of the previously discussed common law options relating to trespassing animals relates to trespasses of animals upon a public way or to animals being driven along a highway²⁰

Not surprisingly, the common law has never favored motorists or parties injured or damaged in colliding with roving animals along a public highway. Liability attaches only where the roving animal has vicious propensities²¹ or where the animal's owner knew or should have known that the animal's presence on the highway would cause injury.²² Contributory negligence is a recognized defense in all motorist-animal collisions.²³ As noted by Calvert, only one Missouri motorist has successfully recovered under a common law theory after colliding with an animal on a roadway.²⁴ In light of animal owners' qualified right to permit animals to stray upon a public highway,²⁵ it would seem that a purely common law action for damages resulting from strays on the roadway is likely to fail more often than not.²⁶

IV. THE BIRTH OF FENCING LAW IN MISSOURI: THE OPEN RANGE ACT

The 1808 Enclosure Act, known as the "Open Range Act," was Missouri's first fence law and was enacted twelve years before statehood, while Missouri

as a local option, the presumption of negligence created by the Stock Law may be abrogated by the 1963 Fence Act in counties adopting it. Accordingly, the common law regarding domestic animals straying into roadways should apply in those counties.

19. See Calvert, *supra* note 6, at 522-23; see also WILLIAMS, *supra* note 13, at 378-79.

20. RESTATEMENT (SECOND) OF TORTS § 505 (1976) ("A possession of livestock that is being driven upon an unrestricted highway is subject to liability for their intrusion upon land abutting on the highway if, but only if, he has failed to exercise reasonable care to prevent them from straying or to remove them from the abutting lands upon which they have strayed.")

21. Pelham v. Spears, 132 So. 886, 887 (Ala. 1931); Calvert, *supra* note 6, at 523.

22. Lins v. Boeckeler Lumber Co., 299 S.W. 150, 151-52 (Mo. Ct. App. 1927) (motorist struck mule on busy street; mule owner held liable for common law negligence because occurrence could have been reasonably anticipated under the circumstances). Calvert, *supra* note 6, at 523.

23. Cox v. Moore, 394 S.W.2d 65, 68 (Mo. Ct. App. 1965).

24. Calvert, *supra* note 6, at 527 (citing Lins, 299 S.W. at 151-52).

25. Colvin v. Sutherland, 32 Mo. App. 77, 83 (1888).

26. This is a critical point for counties adopting the 1963 Fence Act by local option.

was merely a U.S. territory.²⁷ This first fence law was passed even before the Missouri Territory adopted the English common law in 1816.²⁸ Remnants of the Open Range Act, though having little perceivable effect, still exist today and can be found in Missouri Revised Statutes §§ 272.010 through 272.050. Under the Open Range Act, landowners were required to “fence out” freely pasturing livestock. The Act required a landowner, as an injured party, to prove that he had maintained a “lawful fence”²⁹ under the Act as a condition precedent to maintaining an action for damages caused by trespassing livestock.³⁰ Thus, the Open Range Act impliedly vested livestock owners with the absolute right to pasture livestock upon a neighboring landowner’s land if the adjoining land was not enclosed by a lawful, non-defective fence.³¹ While the Open Range Act is not well suited to our level of modernization and land use today, the Act must have made infinite sense to the inhabitants of the Missouri Territory in 1808, considering the vast expanses of unoccupied, unclaimed land.

Under the Open Range Act, adjoining landowners had few remedies when menaced by trespassing animals. They could eject the trespassing animals, but were negligent *per se* for an ejection that damaged an animal that trespassed through a damaged fence or through any fence not meeting the requirements of Section 272.020.³² If the adjoining landowner maintained a lawful fence under Section 272.020, he could take up the trespassing stock and hold it for payment of damages and cost of care, but only after the same animal trespassed through the same fence twice.³³ The only remedy the adjoining landowner had upon the animal’s first trespass was either to allow it to remain, or return it to the owner’s property.

The Open Range Act always had one significant limitation in its application: it applied only to animals trespassing through exterior fences; it did not apply to animals trespassing through division fences.³⁴ Animals trespassing

27. Act Oct. 27, 1808, 1 TERR. L., 197 (currently codified at MO. REV. STAT. §§ 272.010-272.050 (1994)).

28. Act Jan. 19, 1816, 1 TERR. L., 436 (currently codified at MO. REV. STAT. § 1.010 (1994)).

29. The “lawful fence” definition from the Open Range Act survives today as an example of the antiquity of the Act. Today, in 1998, a “lawful fence” may consist of hedges, palisades, turf, worm fence, stone, brick, posts, railings, wire, or mesh. MO. REV. STAT. § 272.020 (1994).

30. *State v. Prater*, 109 S.W. 1047, 1048 (Mo. Ct. App. 1908); *Heald v. Grier*, 12 Mo. Ct. App. 556 (1882) (there is no such thing as an animal trespass on unenclosed lands under the Open Range Act).

31. *Gillespie v. Hendren*, 73 S.W. 361, 362 (Mo. Ct. App. 1903) (dictum); *See Krueger, supra* note 7, § 6.3.

32. MO. REV. STAT. § 272.050 (1994). *See also Woods v. Carty*, 85 S.W. 124, 125-26 (Mo. Ct. App. 1905).

33. MO. REV. STAT. § 272.030 (1994).

34. *Reddick v. Newburn*, 76 Mo. 423 (1882) (defendant’s cows broke through an

through division fences were covered by the common law proscription against trespassing animals, which imposed strict liability on the animals' owner.³⁵ Thus, the Open Range Act applied to animals trespassing *outside* of a common enclosure and the common law applied inside a common enclosure.³⁶ Since the promulgation of the Open Range Act, a steady series of enactments and judicial decisions have substantially limited the Act's scope so that, today, it effectively applies only to nonstandard farm animals such as ratites, buffalo, ducks, chickens, turkeys, or other undesignated domestic farm animals or fowl.³⁷

V. THE 1869 DIVISION FENCE ACT

Generally, "[i]n the absence of prescription or agreement, adjoining owners of land have no obligation under the common law to erect and maintain a fence on their common boundary line."³⁸ The General Assembly enacted the Division Fence Act in 1869 shortly after the end of the Civil War as a response to the inherent inequities of the Open Range Act's requirement that parties desiring to prevent animal trespass bear the burden of constructing a "lawful fence." The Division Fence Act also was a response to the fact that the Open Range Act applied only to exterior fences.³⁹ Under the Division Fence Act, adjoining landowners are required to share in the cost of constructing and maintaining a partition fence serving to benefit both landowners.⁴⁰

The Act states that when a proposed or existing fence serves or will serve to enclose an adjoining owner's land, the adjoining owner may be compelled to pay for half the cost of erecting and maintaining the fence.⁴¹ The theory behind the Division Fence Act is that if a land owner desires to erect or has erected a fence which serves entirely to enclose the adjoining neighbor's land, then the adjoining landowner is going to enjoy some benefit from the fence and should therefore be required to bear some of the cost of the fence. Thus, when one

interior fence) (held that Section 272.030 only applied to exterior fences and trespasses through interior fences were governed by common law under which owner is strictly liable for trespassing animals).

35. See *supra* notes 13-16 (relating to common law for trespass).

36. Calvert, *supra* note 6, at 526.

37. See *infra* Section VI (discussing applicability of Stock Law).

38. Calvert, *supra* note 6, at 522. This is because, "every man's land is, in the eye of the law, inclosed [sic] and set apart from his neighbor's . . . or by an ideal invisible boundary, existing only in the contemplation of law . . ." 3 WILLIAM BLACKSTONE, COMMENTARIES *209.

39. 1869 MO. LAWS §§ 1-7 (currently codified at MO. REV. STAT. §§ 272.060-272.130 (1994)).

40. A partition fence is one which is erected on the boundary between two owners of land. It may or may not be a "division fence." *Jeffries v. Burgin*, 57 Mo. 327, 329 (1874); *Anderson v. Cox*, 54 Iowa 578 (1880).

41. MO. REV. STAT. §§ 272.060, 272.090 (1994).

landowner has fenced three sides of his land, and his neighbor erects a fence serving to complete the enclosure, the neighbor's fence is likely to benefit the landowner, and the landowner will have to bear half its cost.⁴² The Division Fence Act creates the legal obligation among adjoining landowners to pay the cost of erection and maintenance for a designated portion of such a fence, thereby satisfying the cost and maintenance of the entire fence.⁴³

Any subsequent trespass resulting from an animal owner's failure to maintain his designated half of the division fence entitles the adjoining landowner to double damages for the costs of repairing the fence and a lien on the animal to enforce the right.⁴⁴ A significant limitation on the double-damage remedy is that the animal must have trespassed through the section of fence that the animal owner was required to maintain.⁴⁵ If the animal trespassed through the adjoining landowner's section of fence, the adjoining landowner is not entitled to any recovery of damages and only may eject the animal. In any event, an adjoining landowner may make necessary repairs to defective portions of a division fence at the cost of his neighbor as a means of avoiding subsequent livestock trespass.⁴⁶ However, if adjoining landowners whose lands are surrounded by a common enclosure elect not to construct a division fence, their duties to each other revert to the common law mandate that they restrain their own stock or pay damages associated with their animals' trespass.⁴⁷

VI. THE CLOSED RANGE ACT OR STOCK LAW

The 1883 Closed Range Act, or Stock Law, was the Missouri General Assembly's third significant enactment relating to landowners' liabilities for their animals.⁴⁸ The Act is almost identical to the English common law rule that animal owners are strictly liable for their animals' trespasses.

One key limitation of the Stock Law is that it does not apply to all species of animals. Rather, the Stock Law applies only to "any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat [or domesticated

42. Calvert, *supra* note 6, at 525.

43. *Matthews v. McVay*, 234 S.W.2d 983 (Mo. Ct. App. 1950); *Krueger*, *supra* note 7, § 6.3. Despite the statutorily created obligations among adjoining landowners by the Division Fence Act, at least one Missouri court has foregone applying the Division Fence Act and instead relied on contractual principles relating to division fences to analyze the trial court's verdict for the plaintiffs. *Griffin v. Anderson*, 369 S.W.2d 889, 891-92 (Mo. Ct. App. 1963).

44. MO. REV. STAT. § 272.110 (1994); *Mackler v. Cramer*, 32 Mo. App. 542, 543 (1888).

45. *Hopkins v. Ott*, 57 Mo. App. 292, 296 (1894).

46. MO. REV. STAT. § 272.110 (1994).

47. *Jackson v. Fulton*, 87 Mo. App. 228, 240 (1901).

48. MO. REV. STAT. §§ 270.010-270.070 (1994).

geese],”⁴⁹ although at least one Missouri court, in dictum, has disregarded the enumerated categories and applied the Act to trespassing dogs.⁵⁰ Like the Open Range Act, the Stock Law applies only to animals trespassing through exterior, non-division fences or enclosures.⁵¹ The Stock Law contains no direct requirement that an animal owner fence in his animals; rather, it requires the owner to restrain his stock from running at large.⁵²

The Stock Law initially was established as a local option law, but was made applicable statewide in 1969.⁵³ It preempts the Open Range Act provisions in counties that adopted, by local option, the Stock Law prior to 1969 and applies in all other counties as of 1969.⁵⁴

The Stock Law prohibits livestock from running at large outside their enclosures and provides a mechanism for restraining such animals and for receiving compensation for taking them up.⁵⁵ If the owner and “taker-up” cannot agree on damages or compensation for maintaining the stray animal, either party may seek to have the circuit court determine such cost or damages.⁵⁶ Of course, the taker-up of an animal running at large obligates himself to provide adequate care and nourishment to such livestock and is liable for any damage caused by his failure to use reasonable care.⁵⁷

49. MO. REV. STAT. §§ 270.010, 270.190 (1994) (the former covering horses, cattle, etc., and latter relating only to domestic geese).

50. *State v. Marshall*, 821 S.W.2d 550, 552 (Mo. Ct. App. 1991) (court referred to the Stock Law to support the proposition that negligence in allowing dogs to run at large can be inferred from the fact that the dogs are outside of an enclosure). *Marshall* is likely a unique case, in that the court seemed to overlook the express provisions of the statute which state that the statute applies only to a specified group of animals which does not include dogs.

51. MO. REV. STAT. § 270.010 (1994); *Jones v. Habberman*, 67 S.W. 716 (Mo. Ct. App. 1902).

52. MO. REV. STAT. § 270.010 (1994).

53. In 1969, the General Assembly repealed Sections 270.080 through 270.160, which ended the Stock Law’s local option status and made it applicable statewide, thus abrogating the Open Range Act as it pertained to most farm animals. *See Krueger, supra* note 7, §6.5.

54. *Bowles v. Prentice*, 172 S.W. 429 (Mo. Ct. App. 1915). At least one court has overlooked the fact that the Stock Law is now applicable state-wide where the 1963 Fence Act local option provision has not been adopted. In *Gustke v. Redd*, the court of appeals neglected to point out that Section 270.010 was applicable state-wide where, in a summary judgment motion, the defendant raised the county’s failure to adopt the Closed Range Act as a local option during the period it was available. 848 S.W.2d 641, 641 (Mo. Ct. App. 1993).

55. MO. REV. STAT. § 270.010 (1994).

56. MO. REV. STAT. § 270.030 (1994).

57. MO. REV. STAT. § 270.050 (1994). *See also Woods v. Carty*, 85 S.W. 124, 125-26 (Mo. Ct. App. 1905); *Heald v. Grier* 12 Mo. App. 556, 559 (1882).

The Stock Law and subsequent cases have created a presumption of negligence on the part of the stock owner when animals are found running outside of their enclosures.⁵⁸ Section 270.010 states that a livestock owner shall not be responsible for an accident on a public highway if such owner proves that the livestock was outside its enclosure through no fault or negligence of the owner. The courts have interpreted this statutory directive as codifying the presumption of negligence against the livestock owner when his or her stock is found to be running at large on the public highways.⁵⁹

VII. THE 1963 FENCE ACT OR "LOCAL OPTION"

The 1963 Fence Act, also referred to as the "Local Option," is the latest substantive fence law enacted by the General Assembly.⁶⁰ The 1963 Fence Act abrogates the Open Range Act and the 1869 Division Fence Act⁶¹ if a county's voters elect, by simple majority, to adopt the 1963 Fence Act.⁶² An unofficial mail and telephone survey directed to Missouri's 114 county clerks revealed that eighteen counties have voted to adopt the 1963 Fence Act by county-wide election as of February 7, 1998.⁶³ These counties include: Bates, Clinton, Daviess, Grundy, Harrison, Knox, Linn, Macon, Mercer, Newton, Putnam, Reynolds, St. Clair, Schuyler, Scotland, Shannon, Shelby, and Sullivan.⁶⁴

58. MO. REV. STAT. § 270.010 (1994); *but see* *Anderson v. Glascock*, 271 S.W.2d 243, 247-48 (Mo. Ct. App. 1954) (while burden of proving absence of negligence is on the stock owner, absence of language invoking negligence in jury instruction that owner permitted horse to be on roadway is reversible error).

59. *See Moss v. Bonne Terre Farming & Cattle Co.*, 10 S.W.2d 338, 340 (Mo. Ct. App. 1928) (absent any statutory directive, the court of appeals created the presumption of negligence on the part of the stock owner when it is proven such animals were running at large outside their enclosures thus causing damage).

60. MO. REV. STAT. §§ 272.210-272.370 (1994).

61. MO. REV. STAT. § 272.370 (1994).

62. MO. REV. STAT. § 272.360 (1994).

63. Thanks goes to my assistant, Mary Hopwood, for administering the survey and compiling its results. A written questionnaire was sent via mail to Missouri's 114 county commission clerks in December 1997. The questionnaire asked specifically whether each county had adopted Missouri Revised Statutes Section 272.210, the 1963 Fence Act or Local Option, by county-wide vote. Approximately one-half of the counties responded to the survey via mail or telephone. The clerks of the remaining one-half of the counties were contacted via telephone and asked for their responses to the questionnaire counties identified by this survey include counties not identified by Krueger, *supra* note 7, § 6.14.

64. Caution is warranted in that some of the counties that have in fact adopted the Local Option reported that they had not. Similarly, some counties which had not adopted the Local Option reported that they had. At least one clerk (Shannon County) reported that the election results were destroyed by fire in the 1970s, but believed the Local Option to have been adopted. Practitioners are advised to make independent determinations as to the applicability of the 1963 Fence Act in any particular county.

The 1963 Fence Act makes no reference to suspending or abrogating the Stock Law if the Local Option is adopted by a county.⁶⁵ Presumably, the Stock Law is of no effect in the various counties which have adopted the Local Option.⁶⁶ No cases were found in which a plaintiff in a local option county sued under Chapter 270 for damages caused by roaming or trespassing stock. The absence of decisions on this issue tends to support other authors' conclusions that the 1963 Fence Act suspends the operation of the Stock Law.⁶⁷ One troubling aspect of the 1963 Fence Act is that its provisions do not apply in counties with "all or partial open range."⁶⁸

The 1963 Fence Act apparently "constitutes a compromise between the open range and closed range rules, a rejection of the 1869 division fence concept, and a general attempt to enhance the rights of animal owners . . ."⁶⁹ The 1963 Fence Act defines a lawful fence as one composed of four barbed wires on posts not more than twelve feet apart with no stays or the equivalent thereof.⁷⁰ The barbed wire requirements of the Act are quite a step forward from the stone, brick, turf, and hedge fences which are still allowable under the three other fence laws.

Missouri Revised Statutes Section 51.135 (1994) requires county clerks to apprise the revisor of statutes whether their county has adopted the 1963 Fence Act, but such notifications are not specifically filed, retained, recorded or even documented by the Secretary of State or the revisor of statutes because Section 51.135 contains no requirement for such handling. Thus, counties may have officially reported local votes to adopt the 1963 Fence Act to the revisor, but such notifications are not noted, indexed or retained.

Many county clerks had strong reactions to being asked about their counties' adopting the 1963 Fence Act such as, "No we have not nor will we ever." Others did not even know it existed.

65. One authoritative commentator suggests that the 1963 Fence Act supersedes the Stock Law. Calvert, *supra* note 6, at 526.

66. An extensive discussion justifying the notion that the 1963 Fence Act, where adopted, suspends the Stock Law can be found in Calvert, *supra* note 6, at 532 and in Krueger, *supra* note 7, § 6.10. If this is true, then in 1963 Fence Act counties, a livestock owner's only duty under Section 272.210 is to enclose his domestic animals within a lawful fence consisting of four strands of barbed wire.

67. See Krueger, *supra* note 7, at § 6.10; Calvert, *supra* note 6, at 526.

68. MO. REV. STAT. § 272.330.2 (1994). What this means is unintelligible. The Open Range Act with respect to horses, sheep, goats, etc., was suspended by the Stock Law. There is no longer open range except for nonstandard domestic animals. Thus, a county can only have open range with respect to ratites, ducks, non-geese fowl, buffalo, etc. One would suppose that Section 272.330.2 would make the 1963 Fence Act inapplicable in any county with free ranging ostrich, emu or buffalo. Practically speaking, this Section has no conceivable application.

69. Calvert, *supra* note 6, at 527.

70. MO. REV. STAT. § 272.210 (1994).

The 1963 Fence Act requires all fields or enclosures where livestock are "kept or placed" to be enclosed by a lawful fence.⁷¹ It provides an actual damage remedy when a trespassing animal makes an initial trespass.⁷² For subsequent trespasses, the Act allows an adjoining landowner to take up trespassing stock and receive reasonable care and feed costs and any actual damages incurred.⁷³ If the two parties cannot agree on the reasonable value of care and damages, the Act provides that they can request that the associate circuit judge determine the amounts due. Any amounts adjudged due will result in a lien upon the animals taken up, for which a special execution may issue.⁷⁴

Regarding construction and maintenance of division fences, if a need exists for a fence by either of two adjoining landowners, both will be obligated to contribute towards the construction and maintenance of the division fence.⁷⁵ Thus, under the 1963 Fence Act, a landowner can no longer leave two boundaries unfenced, thereby escaping the provisions of the Act, as a landowner could do under the Stock Law; under the 1963 Fence Act, so long as the proposed fence wholly or partially borders the land of another, a reluctant landowner can be forced to bear construction costs.⁷⁶

In any event, the Act provides that an adjoining landowner cannot be compelled to pay more than one-half of the value of a four-strand barbed wire fence, regardless of the type of fence actually constructed.⁷⁷ Under the Act, adjoining owners can agree upon the construction and maintenance of the division fences either by voluntary agreement⁷⁸ or by the decision of court-appointed viewers or appraisers.⁷⁹ If the owners agree in writing as to which fence portion each is to erect and maintain, and the agreement is recorded, it will

71. MO. REV. STAT. § 272.220 (1994).

72. MO. REV. STAT. § 272.230 (1994). Similar to the Stock Law, the trespass/damage provisions of Section 272.230 only apply to "horses, cattle or other stock" and do not appear to apply to other nonstandard domestic animals such as those referenced above. Furthermore, it would appear that the trespass provisions only apply to trespasses through exterior, non-division fences, but this point remains unclear in the absence of a case decision interpreting the division fence liabilities in a local option county. According to Calvert, "With respect to trespasses through division fences the statute appears to grant the landowner no remedy other than a right to repair a defective fence at the cost of the breaching party." Calvert, *supra* note 6, at 527-28.

73. Calvert, *supra* note 6, at 527-28.

74. Calvert, *supra* note 6, at 527-28.

75. MO. REV. STAT. § 272.235 (1994).

76. MO. REV. STAT. § 272.240 (1994). Of note is the fact that the partition fence may stand wholly upon one side of the division line between two adjoining parcels, MO. REV. STAT. § 272.330.1 (1994), so long as the fence "borders" the adjoining parcel, MO. REV. STAT. § 272.240 (1994).

77. MO. REV. STAT. § 272.240 (1994).

78. MO. REV. STAT. § 272.270 (1994).

79. MO. REV. STAT. § 272.250 (1994).

bind "the makers, their heirs and assigns."⁸⁰ Oral fence agreements are enforceable between the promisors, but such verbal agreements have been held not to bind successors in title who had no notice of the agreement and did not acquiesce to its provisions.⁸¹

According to Krueger, the 1963 Fence Act is popular with a majority of domestic livestock owners because it: (1) eliminates a landowner's double damage recovery from livestock trespass; (2) mandates fence cost contribution at a value equal to a four-strand barbed wire fence regardless of the actual type of fence erected; (3) provides for procedural notices for such requested cost contributions; Furthermore, the 1963 Fence Act is beneficial to livestock owners in that it also: (4) enables adjoining landowners to fix their future obligations by binding one another to maintain particular stretches of fences and recording their written agreement; (5) eliminates stock owners' statutory liability for trespass through division fences; and (6) limits, but does not eliminate, liability for an animal's first trespass through exterior fences. Finally, it seems that so long as a landowner has constructed a "lawful fence," as defined by Section 272.230, the Stock Law's presumption of negligence in cases in which stock escape through exterior fences is eliminated. Thus, livestock owners gain more rights and protections across the board under the 1963 Fence Act.

VIII. FENCE CONSTRUCTION AND MAINTENANCE: ADJOINING LANDOWNERS

Landowners' obligations to contribute to the costs of erection and maintenance of a partition fence arises only by mutual agreement⁸² or upon a final assessment by fence viewers or appraisers according to statute. One of two fence laws determines such fence disputes not controlled by mutual, recorded agreement. In non-local option counties, assuming no agreement between the parties, the 1869 Division Fence Act controls.⁸³ Again, under the Division Fence Act, landowners can be compelled to share in one-half the cost of constructing a division fence only if it serves to enclose the adjacent landowner's property.⁸⁴ The terms of this provision are of particular interest because the provision

80. MO. REV. STAT. § 272.270.1 (1994).

81. *McNaughton v. Schaffer*, 314 S.W.2d 245, 248 (Mo. Ct. App. 1958). "[A] covenant running with the land for the erection and maintenance of fences cannot, it has been held, be created by a stipulation in a deed poll, nor by parol agreement, nor by mere usage; and hence the mere fact that adjoining landowners had long been accustomed jointly to maintain a partition fence would not constitute a covenant running with the land." *Id.* (citations omitted).

82. *See Griffin v. Anderson*, 369 S.W.2d 889, 891-92 (Mo. Ct. App. 1963); *Mathews v. McVay*, 234 S.W.2d 983, 987 (Mo. Ct. App. 1950).

83. MO. REV. STAT. §§ 272.060-272.200 (1994).

84. MO. REV. STAT. § 272.060 (1994); *Kent v. Lix*, 47 Mo. App. 567 (1892); *Cook v. Cooksey*, 300 S.W. 1034 (Mo. Ct. App. 1928).

applies to all new fence construction resulting in enclosure of the adjoining land. Without the permission of his neighbor, a landowner can construct a fence along the common boundary line and demand one-half the value of the actual fence construction costs from his neighbor. In order for a row crop farmer, for example, to avoid his obligation under the Division Fence Act to bear the cost of a neighbor's fence, he must merely keep part of his land unfenced. If landowners cannot agree upon the reasonable value for fence construction or which part each owner will maintain and repair, the Division Fence Act provides that either party can apply to the court to have appraisers or reviewers appointed.⁸⁵ If the adjoining parties have not agreed upon which section of an existing division fence will be maintained by which party, the associate circuit judge *shall* appoint three householders to make the determination.⁸⁶ If an adjoining owner refuses to repair his section of a division fence, his neighbor can repair the fence and collect double damages or restrain stock trespassing through the damaged section and obtain a lien thereon.⁸⁷ No division fence may be removed without the consent of all owners of the fence.⁸⁸

On the other hand, in local option counties, the 1963 Fence Act requires that owners keeping livestock enclose their fields with a lawful fence.⁸⁹ Again, assuming no agreement between the parties, in local option counties, a duty upon adjoining landowners to share in the construction and maintenance of a division fence exists even if only one adjoining owner needs it.⁹⁰ While the 1963 Fence Act will require an unwilling landowner to shoulder half the cost of a fence, it limits the total cost to that of a four-strand barbed wire fence, regardless of what type of fence actually is constructed.⁹¹ Ninety-days notice is required before a landowner can apply to the associate circuit court for an order to proceed with division fence construction as well as an order to receive one-half the value of the enclosure based upon a lawful fence of four barbed wires.⁹² Once the fence is erected, adjacent landowners must agree upon which sections will be

85. MO. REV. STAT. § 272.070 (1994); *see* McNaughton v. Schaffer, 314 S.W.2d 245, 249 (Mo. Ct. App. 1958). An appeal from the court's decision lies via MO. REV. STAT. § 272.130 (1994).

86. MO. REV. STAT. § 272.090 (1994).

87. MO. REV. STAT. § 272.110 (1994).

88. MO. REV. STAT. § 272.120 (1994).

89. MO. REV. STAT. § 272.220 (1994). Livestock owners are wholly responsible for the costs of constructing all exterior, non-division, non-partition fences.

90. MO. REV. STAT. § 272.235 (1994). Likewise, adjoining landowners can agree that no fence is needed between their property. MO. REV. STAT. § 272.235 (1994). There is an exception, however, in that a farm owner may not require reimbursement from the state or county if he erects a fence between his land and state or county owned land. 202 Op. Att'y. Gen. (1966).

91. MO. REV. STAT. § 272.240 (1994).

92. MO. REV. STAT. § 272.240 (1994).

maintained by each party⁹³ and must thereafter keep their respective portion of the fence in good repair.⁹⁴ Upon failure of a landowner to maintain his portion of the fence, his neighbor may repair that portion at the landowner's cost.⁹⁵

IX. REMEDIES FOR LIVESTOCK RUNNING AT LARGE

All four of the previously discussed fence laws provide for landowner recovery of actual damages occasioned by a livestock owner's trespassing animals. For counties not adopting the Local Option, a landowner's remedy for trespass depends upon whether the animal trespassed through an exterior fence, an interior non-division fence, or a division fence. If the animal trespassed through an exterior fence, the remedy is found in the Open Range Act (for nonstandard domestic animals) and in the Stock Law (for horses, swine, cattle, etc.). Under the Stock Law, any person finding livestock running at large may restrain and take up the animal if it escaped through an exterior fence, regardless of whether such animal has committed a trespass or caused damage.⁹⁶ However, this provision applies only to horses, mules, asses, cattle, swine, sheep, goats, and domestic geese. Presumably, other species escaping through an exterior fence may be taken up only upon their second escape and trespass.⁹⁷ The proper notice and distraintment procedures for taking up an animal covered by the Stock Law is set forth in Section 270.010 and is discussed in detail by Calvert⁹⁸ and Krueger.⁹⁹

If the trespass is through the animal owner's portion of an interior division fence, judicial interpretations of the Division Fence Act provide for the possibility of money damages¹⁰⁰ and even injunctive relief for continuing trespasses.¹⁰¹ Of course, under the Division Fence Act, either of the adjoining landowners owning a division fence may repair his neighbor's portion of such fence if the neighbor refuses to do the repair. Thereafter, the landowner may

93. MO. REV. STAT. § 272.270 (1994). If the owners cannot agree on which section each will maintain, the court will appoint viewers and make the determination. MO. REV. STAT. § 272.280 (1994).

94. MO. REV. STAT. § 272.310 (1994).

95. MO. REV. STAT. § 272.310 (1994).

96. MO. REV. STAT. §§ 270.010, 270.190 (1994).

97. MO. REV. STAT. § 272.030 (1994).

98. Calvert, *supra* note 6, at 529-31.

99. Krueger, *supra* note 7, §§ 6.22-6.23.

100. MO. REV. STAT. § 272.060 (1994); *Engle v. Ferrell*, 105 S.W. 23, 23-24 (Mo. Ct. App. 1907); *Hopkins v. Ott*, 57 Mo. App. 292 (1894); *Mackler v. Cramer*, 32 Mo. App. 542 (1888). For an extensive discussion of trespass through interior division fences, see Krueger, *supra* note 7, § 6.21.

101. *Moschale v. Mock*, 591 S.W.2d 415, 418 (Mo. Ct. App. 1979) (granted injunctive relief where the livestock trespass was so frequent as to constitute a continuing trespass).

seek double recovery for damages resulting from the trespass by the neighbor's livestock through the neighbor's dilapidated portion of the division fence.¹⁰² The Division Fence Act provides that in animal trespass cases, the assigned judge shall appoint three householders to view the fence where the trespass occurred and testify at trial as to whether the fence was a lawful fence under Section 272.020.

Because none of the enactments seems to cover trespasses through an interior non-division fence, to successfully recover, a damaged landowner must prove common law negligence for trespass against the livestock owner.¹⁰³ Even though the Stock Law and the common law rules are nearly identical, the procedural distinction between the two is of crucial importance. Courts have refused to grant relief to aggrieved parties who plead violations of the Stock Law when a trespass occurs through a non-division interior fence.¹⁰⁴

For counties adopting the Local Option, the procedures and rights under the Open Range Act and Division Fence Act have no application. Trespasses through division fences are controlled by agreement between the landowners or by the provisions of the 1963 Fence Act.¹⁰⁵ The landowner has no remedy of restraining and distraining trespassing cattle. Rather, the landowner only may repair the defective fence at the cost of the breaching party.¹⁰⁶ In other words, a request for damage recovery brought under Section 272.310, when damage is caused by livestock trespassing through a division fence, apparently has no legal merit. In local option counties, a fence divided according to the statutory process is analogous to an "open range" between the land of such adjoining property owners.¹⁰⁷

In cases of trespasses through non-division exterior fences in local option counties, a practitioner has no choice but to wade into the mire of confusion and conflict between the Stock Law, arguably suspended in local option counties,

102. MO. REV. STAT. § 272.110 (1994). One commentator has suggested that Section 272.110 only permits double damages for the cost of fence repair and not a doubling of damages from livestock trespass through a defective half of a division fence. Krueger, *supra* note 7, § 6.21. No Missouri cases have ever allowed double damages although the statute expressly provides for such.

103. Krueger, *supra* note 7, § 6.21; Barnard v. Weaver, 224 S.W. 152 (Mo. Ct. App. 1920); Gillespie v. Hendren, 73 S.W. 361 (Mo. Ct. App. 1903); O'Riley v. Diss, 41 Mo. App. 184 (1890); Reddick v. Newburn, 76 Mo. 423, 425 (1882).

104. In *Jackson v. Fulton*, 87 Mo. App. 228 (1901) and *Jones v. Habberman*, 67 S.W. 716 (Mo. Ct. App. 1902), the losing parties tried their cases under the Stock Law where the trespass occurred through an interior non-division fence. The courts recognized a valid complaint on a common law theory but refused to grant relief because this theory was either abandoned or not asserted at trial.

105. MO. REV. STAT. §§ 272.210-272.370 (1994); *See also* Krueger, *supra* note 7, § 6.24.

106. Calvert, *supra* note 6, at 527-28.

107. Krueger, *supra* note 7, § 6.24; Calvert, *supra* note 6, at 537.

and the 1963 Fence Act. Under the Stock Law, a party may take up the animal as security for costs and damages, while under the 1963 Fence Act, the party is entitled to damages and costs of care but cannot take up the animal as security for damages.¹⁰⁸

X. MOTOR VEHICLE ACCIDENTS DUE TO LIVESTOCK ON PUBLIC ROADS

Much has been published on the issue of motor vehicle collisions with livestock running at large on public roadways.¹⁰⁹ Suits for such collisions can be prefaced upon common law negligence¹¹⁰ or upon the Stock Law.¹¹¹ While one may maintain a common law negligence suit against the owner of an animal to recover for injuries sustained in a collision,¹¹² the more prudent course is to maintain suit under the Stock Law statute, to the extent that it has not been superseded by a county's election under the 1963 Fence Act.¹¹³ Suing under the Stock Law places the burden of proving the absence of negligence upon the landowner when his animal is present on a roadway and is the proximate cause of the plaintiff's damages.¹¹⁴ Proving violation of the Stock Law is analogous

108. See Krueger, *supra* note 7, § 6.24.

109. See W.M., Annotation, *Liability for Damages to Vehicle or Person Riding Therein by Animal at Large in Street or Highway*, 45 A.L.R. 505 (1926); R.P.D., Annotation, *Liability for Damages to Vehicle or Person Riding Therein by Animal at Large in Street or Highway*, 140 A.L.R. 742 (1942); M.O., Regensteiner, Annotation, *Owner's Liability, Under Legislation Forbidding Domestic Animals to Run at Large on Highway, as Dependent on Negligence*, 34 A.L.R.2d 1285 (1954); James L. Rigelhaupt, Jr., Annotation, *Liability of Owner of Animal for Damages to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R.4th 431 (1984).

110. *Lins v. Boeckeler Lumber Co.*, 299 S.W. 150 (Mo. Ct. App. 1927).

111. *Claas v. Miller*, 806 S.W.2d 141, 145 (Mo. Ct. App. 1991); *Beeny v. Shaper*, 798 S.W.2d 162, 162-63 (Mo. Ct. App. 1990); *Beshore v. Gretzinger*, 641 S.W.2d 858 (Mo. Ct. App. 1982); *Scherffius v. Orr*, 442 S.W.2d 120, 123-24 (Mo. Ct. App. 1969); *Cox v. Moore*, 394 S.W.2d 65, 67-68 (Mo. Ct. App. 1965); *Keefer v. Hartzler*, 351 S.W.2d 479, 480-81 (Mo. Ct. App. 1961); *King v. Furry*, 317 S.W.2d 690 (Mo. Ct. App. 1958); *Anderson v. Glascock*, 271 S.W.2d 243 (Mo. Ct. App. 1954); *Carr v. Threlkeld*, 31 S.W.2d 592 (Mo. Ct. App. 1930); *Moss v. Bonne Terre Farming & Cattle Co.*, 10 S.W.2d 338 (Mo. Ct. App. 1928); *see also Moschale v. Mock*, 591 S.W.2d 415 (Mo. Ct. App. 1979) (suit for injunction based on Chapter 270).

112. *Gustke v. Redd*, 848 S.W.2d 641, 642 (Mo. Ct. App. 1993); *Anderson v. Glascock*, 271 S.W.2d 243, 246 (Mo. Ct. App. 1954) (citing *Lins v. Boeckeler Lumber Co.*, 299 S.W. 150 (Mo. Ct. App. 1927)).

113. Calvert, *supra* note 6, at 541; Krueger, *supra* note 7, § 6.32.

114. See *Cox v. Moore*, 394 S.W.2d 65, 68 (Mo. Ct. App. 1965); *Keefer v. Hartzler*, 351 S.W.2d 479, 480-81 (Mo. Ct. App. 1961); *King v. Furry*, 317 S.W.2d 690, 696 (Mo. Ct. App. 1958); *Anderson v. Glascock*, 271 S.W.2d 243, 247-48 (Mo. Ct. App. 1954).

to *res ipsa loquitur* with respect to making a case of primary negligence in that the mere presence of an unattended animal on the highway is sufficient for a prima facie case.¹¹⁵

In counties not adopting the Local Option, the Stock Law forms the basis for a cause of action. Since the Stock Law is applicable state-wide, courts should no longer require that a plaintiff bringing an action for motor vehicle damages plead and prove that the Stock Law is in effect in the county in which the accident occurred.¹¹⁶ For damages cases in non-local option counties, a plaintiff must plead and prove: (1) defendant owned the offending animal; (2) the animal was at large outside its enclosure on the highway at the time of the accident; and (3) the motorist was thereby damaged by the animal.¹¹⁷

In counties adopting the Local Option, animal owners' liability for damages caused by their animals running on the road may be substantially diminished, perhaps even completely abrogated, by the fact that the 1963 Fence Act may effectively have suspended the Stock Law. There are no cases from local option counties passing on this issue. If courts interpret the 1963 Fence Act in such a way that the local option counties are not subject to the Stock Law, then the elements necessary to sustain a cause of action for a motor vehicle collision in a local option county will not be the same as those required in non-local option counties. The presumption of negligence will evaporate and plaintiffs will be left with a common law cause of action.¹¹⁸ As discussed above, the common law has never favored motorists in animal collision cases, and an injured party bears the burden of establishing that the animal owner reasonably should have known that the animal would injure the aggrieved party.

Most likely, in local option counties, injured plaintiffs must look to common law negligence cases for guidance. The only authority available for guidance in bringing such common law negligence claims is *Lins v. Boeckeler Lumber Co.*¹¹⁹ According to *Lins*, a plaintiff must plead and prove: (1) the character of the public road or highway; (2) the allowable speed on the public roadway or highway; (3) the time of day; and (4) other attendant circumstances

115. *Cox*, 394 S.W.2d at 68.

116. *But see* *Gustke v. Redd*, 848 S.W.2d 641 (Mo. Ct. App. 1993); *Claas v. Miller*, 806 S.W.2d 141 (Mo. Ct. App. 1991); *Beshore v. Gretzinger*, 641 S.W.2d 858 (Mo. Ct. App. 1982) (each requiring plaintiff to plead and prove applicability of Stock Law although it was enacted state-wide for several years). As noted by Krueger, "Such proof requirement that the Stock Law is applicable so many years after its statewide enactment and application makes this writer question whether the courts were cognizant and aware of the implied abrogation issue [with respect to local option counties] during their review [and thus] . . . distinguishing between two possible causes of action." Krueger, *supra* note 7, § 6.38.

117. *Claas*, 806 S.W.2d at 145 (citing *Beshore*, 641 S.W.2d at 862). *But see* *Scherffius v. Orr*, 442 S.W.2d 120, 123-24 (Mo. Ct. App. 1969).

118. *See, e.g.*, *Scherffius*, 442 S.W.2d at 123-24.

119. 299 S.W. 150 (Mo. Ct. App. 1927).

that should have led the livestock owner to anticipate injury would result from the animal's presence on the public road or highway.¹²⁰

Regardless of the county in which such a suit is brought, the defense is the same: that the animal causing the injury was outside the enclosure through no fault or negligence of the owner.¹²¹ Comparative fault also is a viable defense in a suit arising out of a collision with an animal on a roadway.¹²² Other defenses available to the stock owner may include: (1) exercise of due care by the animal owner, (2) that the offending species of animal is not encompassed by the Stock Law, (3) act of God or independent cause; and (4) contributory negligence.¹²³

XI. PROPOSED LEGISLATIVE CHANGES¹²⁴

An analysis of legislation proposed since 1989 discloses that no less than nine bills have been introduced which, in one form or another, seek to repeal the present provisions of Chapter 272 and replace them in whole or part.¹²⁵ Not one of them ever came close to seeing the governor's desk. Most of the bills introduced attempted to blend the provisions of the Open Range Act and the Division Fence Act, making each of them more equitable in light of competing stock versus crop land uses. Some of the bills introduced attempted to make the 1963 Fence Act, in part, applicable state-wide. Others attempted to create a second, more compromising Local Option fence law. Still others attempted to stiffen the penalties for animals trespassing through division fences.

None of the bills purported to resolve the many ambiguities and uncertainties identified herein regarding the continued applicability or viability of the Open Range Act as to nonstandard domestic animals, the applicability of the Stock Law to nonstandard domestic animals, the applicability of the Stock Law in counties having adopted the 1963 Local Option, or whether the

120. *Lins v. Boeckeler Lumber Co.*, 299 S.W. 150 (Mo. Ct. App. 1927). Remember that at common law, it was not negligent for an animal owner to allow his stock to roam on the roadway. See *supra* notes 17-26 and accompanying text.

121. *Lins*, 299 S.W.2d at 150.

122. *Cox v. Moore*, 394 S.W.2d 65, 68, 70 (Mo. Ct. App. 1965) (holding that where evidence supported submitting contributory negligence instruction regarding failure to keep a careful lookout, failure to submit was prejudicial error).

123. For a detailed discussion of these defenses, see Krueger, *supra* note 7, § 6.35.

124. Thanks is extended to Tom Crawford, J.D., University of Missouri-Columbia, 1994 and Co-Chairman of the Missouri Bar Agricultural Law Committee 1995-1997, for researching and compiling the introduced, but failing, fence legislation and for assisting in its analysis.

125. H.B. 50, 89th Gen. Ass. (Mo. 1997); H.B. 1175, 88th Gen. Ass. (Mo. 1996); H.B. 481, 88th Gen. Ass. (Mo. 1995); H.B. 26, 87th Gen. Ass. (Mo. 1992); H.B. 331, 86th Gen. Ass. (Mo. 1991); H.B. 925, 86th Gen. Ass. (Mo. 1991); H.B. 1654, 85th Gen. Ass. (Mo. 1990); H.B. 606, 85th Gen. Ass. (Mo. 1989).

presumption of negligence created by the Stock Law applies in counties that adopted the 1963 Local Option. With few exceptions, the bills represent poorly planned legislation designed to benefit some special, local interest of the introducing legislator's constituents.

Counties adopting the 1963 Fence Act have made a conscious choice to enact a fairly progressive, relatively simple, fair and equitable fence law. It seems a shame that the General Assembly did not put a conditional repealer into the legislation stating that the provisions of Chapter 270 are inapplicable in local option counties. One is needed. Whether the General Assembly needs to amend the 1963 Fence Act to include the burden shifting negligence presumption found in the Stock Law is a question for the General Assembly. However, in light of the deference given by the 1963 Fence Act to the rights of animal owners, the burden-shifting presumption may not be necessary.

The language of the Stock Law specifically limits its application to certain species of animals. At the time of its enactment, the General Assembly probably did not foresee the re-emergence of domestic buffalo and white tail deer or the introduction of ostriches, emus, llamas, and a host of other exotic animals now seen along Missouri's roadways. At best, the obligations and liabilities of the owners of such animals are unclear. Presently, it appears owners of such animals can allow them to roam free as if on the open range. Surely this was not the intent of the General Assembly, although it seems to be the present result. Thus, clarification and revision is required. The Stock Law should be amended to include most types of farm livestock, with few exclusions.

Finally, absent sweeping legislative change, counties can best serve their interests by placing the Local Option on their ballots and allowing their residents to decide whether they will be subject to fence laws created when Missouri was a primarily unmotorized, rural territory or nascent state, or whether they will be subject to fence laws created more recently by legislators with a view of land rights and varying land uses better suited to modern Missouri. Not surprisingly, many Missourians are unaware that they have a choice.

Agriculture is a key component of Missouri's economy, and fencing choices should be made with care. Few faults can be found with the 1963 Fence Act, other than that it did not put the final nails into the coffins of the Open Range Act and the Stock Law. These antiquated enactments finally should be laid to rest, at least in those counties electing to move into the future. For the remaining counties not adopting the Local Option, *caveat emptor*.

