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Iowa Farm Fence Law

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and

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Agricultural Law Center

COLLEGE OF LAW

STATE UNIVERSITY OF IOWA

IOWA CITY, IOWA

Monograph No. 4

May 1964

Iowa
631.2026
H58



Iowa
631.2026
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AMENDMENTS TO IOWA FARM FENCE LAW
Changes for Agricultural Law Center Monograph No. 4

Sections 113.4 and 113.6 of the Iowa Code were amended by the 60th General Assembly. (Chapter 111, Laws of the 60th General Assembly.) The effect of the amendments is to alter the procedure involved in compelling the erection, rebuilding, or repair of a partition fence in a case where the adjoining owner refuses to comply with the fence viewers' orders. Instead of completing the job himself and having the fence viewers value his work, under the new provision the complaining owner must deposit with the fence viewers a sum of money sufficient to pay the cost of the work, the fees of the fence viewers, and costs. The fence viewers then cause the fence to be erected, rebuilt, or repaired. The complaining owner is reimbursed when the adjoining owner pays the cost of the work or when such cost is collected from him as taxes.

In the Farm Fence Law Monograph, appropriate changes should be made to the content of paragraphs 5 and 6 of the section Compel Construction or Repair (pages 13 and 14), the third paragraph of the section Notice (page 20), and the second paragraph of the section Costs (page 22) to reflect these amendments.

*(It is suggested that this sheet be affixed to the inside cover
of the Monograph)*

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ACKNOWLEDGMENT

The research assistance of A. Frank Craig, Jr. and Wallace B. Reed in preparation of this monograph while students in the law college is gratefully acknowledged. Mr. Craig currently practices law in Independence, Iowa. Mr. Reed practices with Reed and Holmes in Waterloo, Iowa.

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IOWA FARM FENCE LAW

N. William Hines* and Marshall Harris**

INTRODUCTION

Laws regulating farm fences are of great interest in a state with Iowa's agricultural orientation. Although the cost of erecting and maintaining a fence is no small item,¹ it is probably the strong feeling that a fence dispute can arouse that has led the legislature to develop over the years a comprehensive statutory fence law.² The number of fence cases that have reached the Iowa Supreme court, notwithstanding the extensive statutes evidences the seriousness with which Iowans regard their fence arguments.³

SCOPE OF COVERAGE

Although the fences themselves are principally the concern of the farmer who must build and maintain them, fence law is important to the township trustee and the local attorney. The farmer should know the extent of his legal rights, responsibilities, and privileges for his own protection. The trustees and the attorney must know these rights and duties to fulfill their statutory and professional obligations. Thus, while the farmer will find this monograph helpful and informative, it is primarily addressed to the layman township trustee to help him discharge his statutory duties as a fence viewer and in distraint proceedings, and to the practicing Iowa attorney to help him quickly and authoritatively answer legal problems on farm boundary fences.

This monograph deals only with boundary fences, that is, fences dividing the property of adjoining landowners. Interior fences are under the exclusive control of the landowner and are not discussed. Boundary fences are divided into three principal types: (1) Partition fences, which adjoining landowners must erect and maintain jointly;⁴ (2) highway fences, which a landowner must maintain by himself;⁵ and (3) railroad fences for which the railroads are exclusively responsible.⁶ The special rules pertaining to each type of boundary fence will be discussed separately.

The discussion is confined to the fencing rights and duties of the farmer and the responsibilities of the township trustee with regard to farm fences.

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¹ Figured at \$3 per rod, the value of the estimated 420,000 miles of fence that bounds Iowa farms is over \$400,000,000.

² See generally IOWA CODE chs. 113, 188, 478.

³ In all, 110 fence cases are cited in this monograph. In a substantial number of those cases the cost of the appeal far exceeded the value of the fence in issue.

⁴ IOWA CODE § 113.1 (1962).

⁵ See text accompanying notes 211-221 *infra*.

⁶ IOWA CODE § 478.2 (1962).

Recourse should be had to other Agricultural Law Center publications for treatment of the farmer's potential liabilities connected with fencing in respect to other parties, such as trespassers.⁷

It should be noted by the readers of this monograph that its scope is relatively limited. Any given fence question may involve many related legal problems which are not discussed herein. For example, a contract concerning the location or maintenance of a fence may encumber title to the properties involved in a manner never contemplated by the parties. Consulting a local attorney about fence law problems is safer than attempting to be your own lawyer, and it is often cheaper in the long run.

HISTORY OF PRESENT LAW

Much of the agricultural fence law is as old as the Iowa Code itself with many of the provisions descending unchanged from the original Code of 1851. One section, however, that has undergone considerable change is the portion which determines the basis for the legal responsibility of livestock owners for their stock. Generally, the law has made a complete about-face within the last one hundred years, changing from a "fencing out" to a "fencing in" theory. The difference between the two theories is simply that under the existing "fencing in" law, livestock owners are required to restrain their livestock from running at large. If livestock go upon the land of another, their owner may be liable for trespass and responsible for any damage they cause. Under the old "fencing out" theory, livestock were legally allowed to roam at will. A landowner who wanted to protect his property from trespassing livestock had to erect a fence to keep them out. The English common law "fencing in" theory was brought to the United States and adopted in most of the eastern states. In many of the western states, however, where cattle necessarily grazed over a large area, the legislatures and courts adopted the "fencing out" theory.⁸

The first Iowa case on this point was decided in 1856 and held that Iowa followed a "fencing out" theory.⁹ The 1870 Revision of the Code contained a provision known as the "herd law," that required a county-wide vote on which theory each county would follow.¹⁰ Subsequent legislatures changed various aspects of the "herd law."¹¹ In 1924, Iowa adopted the present "fencing in" law and affirmatively required the owner of animals to restrain them.¹² The

⁷ For a discussion of a part of this area see 48 IOWA L. REV. 939 (1963), Reprint No. 6, *Liability Resulting From Artificial Bodies of Water*, Agricultural Law Center (Aug. 1963), and future publications.

⁸ See generally, 7 IOWA L. BULL. 176 (1922).

⁹ *Wagner v. Bissell*, 3 Iowa 396 (1856).

¹⁰ IOWA CODE REV. § 250 (1860).

¹¹ Acts 1864, 10 G.A., ch. 65; Acts 1870, 13 G.A., ch. 26; Acts 1872, 14 G.A., ch. 55; Acts 1874, 15 G.A., ch. 70, § 2-4; Acts 1880, 18 G.A., ch. 188, § 1.

¹² Acts 1924, 40 G.A., Ex. Sess., H.F. 71 § 2.

current Iowa statute says, "All animals shall be restrained by the owners thereof from running at large."¹³ Since the Code has changed over the years, it is important to check the current code for changes and, when reading an old case, to check the particular statute in effect when the case was decided in order to determine its value as precedent.

BOUNDARIES

Boundary fences may or may not mark the boundary line between two tracts of land. Normally neighbors will try to place their fences on the boundary line, but they do not always agree on the precise location of the line. In such situations, familiarity with the Iowa law on the adjudication of boundary disputes becomes important. Because boundary law is not the main concern of this monograph, the following discussion will be a brief resume of the procedure to judicially settle boundaries.

ACQUIESCENCE BOUNDARIES

An existing boundary line, even if "incorrect," may become the true boundary line between two farms through application of the rule of acquiescence. This may happen notwithstanding the fact that neither party intends to claim more than is called for by his deed, and even though the existing line deviates from a government or private survey.¹⁴ The rule of acquiescence, as related to boundaries, is that a boundary will be considered established when for ten years the adjoining landowners occupy their premises to a mutually recognized line.¹⁵ Acquiescence is basically premised on the implied consent of the parties to the establishment of a boundary that is inferred from continued assent or prolonged lack of protest as shown by continued use of the land up to the boundary.¹⁶ Because acquiescence is based on consent, proof of notice or knowledge by both parties of the asserted boundary is essential to the invocation of the rule.¹⁷ Which party's deed description contains the disputed land is unimportant because, on proper proof, the adjoining landowner can establish ownership.¹⁸ The ac-

¹³ IOWA CODE § 188.2 (1962). As used in this context, animals includes horses, cattle, swine, sheep, goats, mules, and asses. Owner, in reference to animals, means "any person in possession or entitled to the present possession thereof, or having the care or charge of them, or holding the legal title to them." IOWA CODE § 188.1 (1), (3) (1962).

¹⁴ *Pruhs v. Stanlake*, 253 Iowa 642, 113 N.W.2d 300 (1962); *Kotze v. Sullivan*, 210 Iowa 600, 231 N.W. 339 (1930).

¹⁵ *Atkins v. Reagan*, 244 Iowa 1387, 60 N.W.2d 790 (1953); IOWA CODE § 650.14 (1962).

¹⁶ *Petrus v. Chicago, R.I. & P.R.R.*, 245 Iowa 222, 61 N.W.2d 439 (1953); *Dake v. Ward*, 168 Iowa 118, 150 N.W. 50 (1914).

¹⁷ *O'Dell v. Hanson*, 241 Iowa 657, 42 N.W.2d 86 (1950); *Morley v. Murphy*, 179 Iowa 853, 162 N.W. 63 (1917); *Dwight v. City of Des Moines*, 174 Iowa 178, 156 N.W. 336 (1916).

¹⁸ *Olson v. Clark*, 252 Iowa 1133, 109 N.W.2d 441 (1961).

quiescence relied upon must relate to the line as a boundary. The establishment and recognition of a fence as a barrier and not as a boundary will not establish the fence line as the true boundary.¹⁹

The ten-year acquiescence period may be achieved through "tacking"; that is, adding the former owner's time in possession to that of the purchaser to reach the required ten years. Once a boundary is established by acquiescence, the present owners and all who purchase the land believing the boundaries to be as recognized at the time of purchase, are bound.²⁰

Establishment of a boundary line by acquiescence is not the same as adverse possession and does not necessarily involve the same concepts.²¹ Because the technical requirements for adverse possession such as color of title, claim of right, and open, notorious, and hostile possession are not necessary,²² it is possible to acquire land by acquiescence where an action based on adverse possession would fail.²³ For example, acquiescence, but not adverse possession, may establish a new boundary even though neither party intends to claim more than called for by his deed.²⁴ In view of the complexity of the Iowa law of adverse possession, particularly when there is a question of mistake on the part of the possessor as to the true boundary of his property,²⁵ it is wise to proceed under the acquiescence statute whenever acquiescence may be established.²⁶

Even if the ten-year period required for acquiescence has not elapsed, a person may be estopped or prevented from asserting the old boundary. An estoppel may arise when, without objection, a person sees his neighbor in good faith build substantial improvements in the disputed area while acting on the assumption that the marked boundary is the true line.²⁷ Neither the doctrines of acquiescence nor estoppel apply to the fixing of a boundary between a used public highway and an abutting owner, because no one representing the public is authorized to acquiesce in any particular location.²⁸

¹⁹ *Petrus v. Chicago, R.I. & P.R.R.*, 245 Iowa 222, 61 N.W. 2d 439 (1953); *Davis v. Angerman*, 195 Iowa 180, 192 N.W. 129 (1923).

²⁰ *Helmick v. Davenport, R.I. & N.W. Ry.*, 174 Iowa 558, 156 N.W. 736 (1916); see also *Burgess v. Leverett & Associates*, 252 Iowa 31, 105 N.W.2d 703 (1960) (adverse possession).

²¹ *Nichols v. Kirchner*, 241 Iowa 99, 40 N.W.2d 13 (1949).

²² *Hughes v. Rhinehart*, 190 Iowa 560, 180 N.W. 643 (1920).

²³ *Patrick v. Cheney*, 226 Iowa 853, 285 N.W. 184 (1939); *Stone v. Richardson*, 206 Iowa 419, 218, N.W. 332 (1928).

²⁴ *Brown v. Bergman*, 204 Iowa 1006, 216 N.W. 731 (1927); *Johnson v. Trump*, 161 Iowa 512, 143 N.W. 510 (1913).

²⁵ See 24 Iowa L. REV. 601 (1930).

²⁶ Compare *Miller v. Mills County*, 111 Iowa 654, 82 N.W. 1038 (1900), with *Grube v. Wells*, 34 Iowa 148 (1871); see also 7 Iowa L. BULL. 129 (1922).

²⁷ *Mahrenholz v. Alff*, 253 Iowa 446, 112 N.W.2d 847 (1962); *Kennedy v. Oleson*, 251 Iowa 418, 100 N.W.2d 894 (1960); *Trimpl v. Meyer*, 246 Iowa 1245, 71 N.W.2d 437 (1955).

²⁸ *Pine v. Reynolds*, 187 Iowa 379, 174 N.W. 257 (1919); *Bidwell v. McCuen*, 183 Iowa 633, 166 N.W. 369 (1918).

Because of the dangers of acquiescence and adverse possession which can result in a change in the boundary and a corresponding loss of land, the safest rule where a fence does not appear to be correctly placed is to object to its location promptly and require a survey or agreement to fix the correct location.

NO ACQUIESCENCE

Whenever a corner or boundary is lost or disputed, one or more owners of adjoining land may bring an action in district court against the owners of other affected property to have the corners or boundaries ascertained and established.²⁹ This is a summary proceeding designed to determine the true boundary lines, unless acquiescence is pleaded,³⁰ and not to try title.³¹ This is not the exclusive remedy, but rather affords cumulative relief³² to other actions such as quiet title. The boundaries may be contested even if they have previously been established by a county survey.³³ Not only are government corners determined, but also lines which may have been established by adverse possession or acquiescence are determined.³⁴ To use this procedure a plaintiff must be the owner of the land and not just the holder of an easement.³⁵ All land owners within the section may be joined,³⁶ and all those interested should be joined, because those who are not, are not bound.³⁷ If any public road is likely to be affected, the proper county shall be made a defendant.³⁸

The petition should be filed in the county where the boundary is situated,³⁹ and if it is a county line, then the proper county is the county where the plaintiff's land lies.⁴⁰ The only pleading required is the petition, which must describe the land and the interests of the respective parties.⁴¹ Strict adherence to the ordinary rules of pleading is not required, but enough facts should be set out to enable the court to determine the nature of the controversy.⁴² Either the plaintiff or defendant may plead acquiescence.⁴³ The

²⁹ IOWA CODE § 650.1 (1962).

³⁰ Weikamp v. Jungers, 150 Iowa 292, 129 N.W. 953 (1911).

³¹ Gates v. Brooks, 59 Iowa 510, 6 N.W. 595 (1882).

³² Keller v. Harrison, 139 Iowa 383, 116 N.W. 327 (1908).

³³ Strait v. Cook, 46 Iowa 57 (1877).

³⁴ IOWA CODE § 650.6 (1962); Kraft v. Tennigkeit, 204 Iowa 15, 214 N.W. 562 (1927).

³⁵ Dickinson Co. v. Fouse, 112 Iowa 21, 83 N.W. 804 (1900).

³⁶ Lawrence v. Weiss, 163 Iowa 584, 145 N.W. 308 (1914); Rollins v. Davidson, 84 Iowa 237, 50 N.W. 1061 (1892).

³⁷ Strait v. Cook, 46 Iowa 57 (1877).

³⁸ IOWA CODE § 650.2 (1962).

³⁹ IOWA CODE § 650.1 (1962).

⁴⁰ Tooman v. Hidlebaugh, 83 Iowa 130, 49 N.W. 79 (1891).

⁴¹ IOWA CODE § 650.5 (1962).

⁴² Lawrence v. Weiss, 163 Iowa 584, 145 N.W. 308 (1914); Smith v. Scoles, 65 Iowa 733, 23 N.W. 146 (1885).

⁴³ IOWA CODE § 650.6 (1962).

burden of proving the true boundary line is on the complainant,⁴⁴ so the defendant has some tactical advantage.⁴⁵

Notice of the action must be given as in other cases.⁴⁶ After the pleadings, the court will appoint a commission of one or more surveyors to locate the boundaries,⁴⁷ unless the facts are conceded and the only disagreement is as to the law, in which case there is no need for a commission.⁴⁸ The commission must give notice of the time of the hearing to all parties, so that all parties have a reasonable chance to be heard.⁴⁹ Unless acquiescence is pleaded, the commission's sole function is to ascertain the true boundary lines by locating the markers or by survey.⁵⁰ The commission then files its report with the court,⁵¹ after which anyone interested can file objections. The court will then consider the commission's report and any other evidence presented, and then approve or modify the report.⁵² The corners and boundaries thus established by the court are binding on the parties.⁵³

PARTITION FENCES

Most of the Iowa fence law is concerned with landowners' rights and duties regarding partition fences. A "partition fence," is a boundary fence dividing the lands of adjoining private owners.

OWNER'S DUTIES

Erect and Maintain a Fence

The present Iowa statute provides: "The respective owners of adjoining tracts of land shall upon written request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year."⁵⁴ The effect of the statute is to require landowners to erect and maintain partition fences, if requested to do so in writing.⁵⁵ As pointed out earlier, the Iowa law did not always so provide. The first enactment on this subject did not require a person to contribute toward the erection and maintenance of a partition fence if he was satisfied to allow his land to be used in common.⁵⁶ A later amendment

⁴⁴ Sedore v. Turner, 202 Iowa 1373, 212 N.W. 61 (1927).

⁴⁵ See 12 IOWA L. REV. 438 (1927).

⁴⁶ IOWA CODE § 650.3 (1962).

⁴⁷ IOWA CODE § 650.7 (1962).

⁴⁸ Smith v. Scoles, 65 Iowa 733, 23 N.W. 146 (1885).

⁴⁹ Kraft v. Tennigkeit, 204 Iowa 15, 214 N.W. 562 (1927).

⁵⁰ IOWA CODE § 650.9 (1962); McGovern v. Heery, 159 Iowa 507, 141 N.W. 435 (1913).

⁵¹ IOWA CODE § 650.11 (1962).

⁵² IOWA CODE § 650.12 (1962).

⁵³ IOWA CODE § 650.13 (1962).

⁵⁴ IOWA CODE § 113.1 (1962).

⁵⁵ See 34 IOWA L. REV. 330 (1949).

⁵⁶ IOWA CODE § 901 (1851).

required landowners to erect a partition fence around all of their property except land used only for timber and land from which they did not derive any benefit or profit.⁵⁷

It appears from the wording of the present statute that if neither owner wants a partition fence, one would not be required.⁵⁸ This, however, would leave either owner liable to all persons except the adjoining owner for damages caused by his animals, and preclude recovery for trespass damages to his own land caused by animals coming across the partition line.⁵⁹ If either owner requests the other to build and maintain a partition fence, he can be compelled to do so.⁶⁰ A landowner cannot avoid the partition fence law by purposely erecting his fence a few feet from, instead of on, the boundary line.⁶¹ These requirements apply whether the fence is exactly on the boundary line or not.⁶²

Two exceptions exist to the general rule that a partition fence be built on the boundary line, if requested. A partition fence need not be built on the boundary line when adjoining landowners have agreed to maintain a private lane or roadway between their premises in lieu of a partition fence. In this case the fence may be built on either or both sides of the road. An agreement of this kind does not have to be in writing to be effective.⁶³ Again, the partition fence requirement does not apply where adjoining farms are separated by a watercourse in which it is impractical to erect a fence in midstream. There is still a duty to restrain the livestock by building a fence back from the stream and if a landowner does not, he is liable for the damages caused by his livestock if they trespass.⁶⁴

Meet Statutory Fence Requirements

The Iowa statute prescribes two kinds of partition fences, "lawful" and "tight." A "lawful" fence presumably may be used whenever a "tight" fence

⁵⁷ IOWA CODE § 2355 (1897).

⁵⁸ See OPPS. ATT'Y GEN. 396 (Iowa 1934) (within city limits); *Morrison v. Kipping*, 227 Iowa 1146, 290 N.W. 59 (1940) (dictum).

⁵⁹ IOWA CODE § 188.5 (1962); *Miracle Pressed Stone Co. v. Roth*, 144 Iowa 656, 123 N.W. 346 (1907); see *Nelson v. Wilson*, 157 Iowa 80, 137 N.W. 1048 (1912). This section limits the broad language of the "fencing in" section, IOWA CODE § 188.2 (1962), so that while all animals must be restrained, failure to do so creates no liability when the animals stray across a partition line where no lawful fence has been built or assigned. Although § 188.5 is phrased broadly, the only case construing it involved adjoining landowners. It is not clear that the statutes would also insulate a non-adjoining owner from liability for damages done by animals straying across an unfenced partition line.

⁶⁰ See IOWA CODE §§ 113.1, .3 (1962); see text accompanying notes 100-115 *infra*.

⁶¹ *Talbot v. Blacklege*, 22 Iowa 572 (1867).

⁶² IOWA CODE § 113.17 (1962).

⁶³ *Osgood v. Names*, 191 Iowa 1227, 184 N.W. 331 (1921) (dictum). This is not binding on a tenant who has no knowledge of the agreement. *De Mers v. Rohan*, 126 Iowa 488, 102 N.W. 413 (1905).

⁶⁴ *Foster v. Bussey*, 132 Iowa 640, 109 N.W. 1105 (1906).

is not required. Railroad and highway fences are not subject to the same requirements and will be discussed separately later.

Tight Fences. The Iowa law provides two situations in which a duty arises to maintain a "tight" fence. (1) If either adjoining owner makes his part of a partition fence tight, the other is required to similarly construct his portion of the fence.⁶⁵ (2) If either adjoining landowner or occupant pastures sheep or swine, each must maintain his portion of the fence in a condition that will restrain them.⁶⁶

A tight fence is a fence that will turn hogs and sheep and shall consist of:

- "1. Not less than twenty-six inches of substantial woven wire on the bottom, with three strands of barbed wire with not less than thirty-six barbs of at least two points to the rod, on top, the top wire to be not less than forty-eight inches, nor more than fifty-four inches high.
- "2. Good substantial woven wire not less than forty-eight inches nor more than fifty-four inches high with one barbed wire of not less than thirty-six barbs of two points to the rod, not more than four inches above said woven wire.
- "3. Any other kind of a tight partition fence which, in the opinion of the fence viewers, is equivalent thereto."⁶⁷

Lawful Fences. In the above two situations a tight fence is required, so presumably in all other places when a landowner is compelled to erect a partition fence, it need just be lawful, which is defined as follows:

- "1. Three rails of good substantial material fastened in or to good substantial posts not more than ten feet apart.
- "2. Three boards not less than six inches wide and three-quarters of an inch thick, fastened in or to good substantial posts not more than eight feet apart.
- "3. Three wires, barbed with not less than thirty-six iron barbs of two points each, or twenty-six iron barbs of four points each, on each rod of wire, or of four wires, two thus barbed and two smooth, the wires to be firmly fastened to posts not more than two rods apart, with not less than two stays between posts, or with posts not more than one rod apart without such stays, the top wire to be not more than fifty-four nor less than forty-eight inches in height.
- "4. Wire either wholly or in part, substantially built and kept in good repair, the lowest or bottom rail, wire, or board not more than twenty nor less than sixteen inches from the ground, the top rail, wire, or board to be between forty-eight and fifty-four inches in height and

⁶⁵ This duty applies only to landowners. IOWA CODE § 113.19 (1962); *Mitchell v. Graver*, 158 Iowa 188, 139 N.W. 460 (1913).

⁶⁶ IOWA CODE § 113.21 (1962); *Mitchell v. Graver*, *supra*, note 65. Note that this duty applies to occupants as well as landowners.

⁶⁷ IOWA CODE § 113.20 (1962).

the middle rail, wire, or board not less than twelve nor more than eighteen inches above the bottom rail, wire, or board.

"5. Any other kind of fence which, in the opinion of the fence viewers, shall be equivalent thereto."⁶⁸

A fence which affords equal strength and security to a tight or lawful fence meets the statutory requirements.⁶⁹ Upon application and after notice, the fence viewers are empowered to settle any controversy over the adequacy of any fence.⁷⁰ There are no cases involving electric fences, but they would seem to be capable of qualifying under the definition of either tight or lawful fences. Probably, however, a failure of electricity which would allow animals to cross the fence would not be a defence to a trespass suit.

Hedge Fences. Hedge fences are no longer popular in Iowa because, in most cases, wire fences are cheaper and easier to erect and maintain. A hedge fence, however, is a satisfactory partition fence. They should be accepted by the fence viewers as equivalents of lawful or tight fences if they will turn cattle or swine and sheep, respectively. Hedge fences used as partition fences must be trimmed twice a year, in June and September, and cut back to within five feet of the ground in the absence of contrary agreement between the adjoining owners. Such an agreement should be in writing and filed for record with the county clerk.⁷¹

Contribute to Fence Erection and Maintenance

The statute allows an adjoining landowner to compel his neighbor to contribute to the cost of erecting and maintaining the fence.⁷² It also contemplates that adjoining owners will divide equally the expenses of erecting and maintaining a partition fence. In most cases, the respective parties simply divide the fence, with each owner maintaining half by himself. It is permissible for the owners to agree to maintain the whole length of the fence jointly, but normally having each owner responsible for a portion is a more satisfactory arrangement.

Statutory Division. There are two statutory methods of dividing partition fences—(1) by order of the fence viewers,⁷³ or (2) by written agreement of the parties.⁷⁴ Either type of division may be recorded in the office of the county recorder in the county in which the property is located.⁷⁵ Such recordation will bind to the division the makers, their heirs and devisees, and

⁶⁸ IOWA CODE § 113.18 (1962).

⁶⁹ *Phillips v. Oystee*, 32 Iowa 257 (1871).

⁷⁰ IOWA CODE § 113.22 (1962). As to the proper notice see text accompanying notes 163-177 *infra*.

⁷¹ IOWA CODE § 113.2 (1962).

⁷² IOWA CODE § 113.1 (1962).

⁷³ IOWA CODE § 113.4 (1962).

⁷⁴ IOWA CODE § 113.12 (1962).

⁷⁵ IOWA CODE §§ 113.10, .11, .12 (1962).

subsequent grantees.⁷⁶ If the parties so intend, an agreement to "perpetually" maintain a division fence is a covenant running with the land and becomes a permanent part of the title to the property, binding on any subsequent owners of the land. The grantee of a deed with such covenant assumes his grantor's liability for the performance.⁷⁷ Oral agreements between owners are enforceable against the agreeing owners⁷⁸ and those with actual notice,⁷⁹ and if either owner has performed his promise, against the other owner by the performer's tenant.⁸⁰ They are not, however, binding upon subsequent owners who have neither actual nor record notice⁸¹ or as to a tenant without notice.⁸² Written division agreements may be made and recorded where no division of the partition fence has ever been made, where a division of part of the fence has been made, or where a part of the fence has been maintained for a period of time by one of the owners.⁸³ An agreement not to fence a certain line for a period of years will be enforced in equity, if it is not unreasonable or contrary to public policy.⁸⁴ Because these agreements become an integral part of the title to the property and run with the land, no one but a qualified lawyer should attempt to draft such an instrument.

Informal Division. Many divisions of partition fences are quite informal. In many instances, both owners simply accept the division that their predecessors established. Sometimes a satisfactory informal division of a partition fence is effected by the use of the so-called "Right Hand Rule." That is, each owner, standing on his own property and facing toward the fence, takes the right half of the total length of the fence. This method of division is satisfactory, quick, and convenient but is not required by law. Each owner legally could just as well take the left half, or if both parties so desired and agreed, the fence could be apportioned in any other manner. When measuring the total length of a fence for purposes of division, the surveying rule that length should be measured by the level lines enclosed within the vertical planes through the boundary lines is not applicable. Fences are measured over the undulating surface of the ground.⁸⁵

Creek Fence Division. When a partition fence crosses a watercourse, a problem may arise on how to divide it. Since the creek fences are more

⁷⁶ IOWA CODE § 113.13 (1962).

⁷⁷ Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907).

⁷⁸ Osgood v. Names, 191 Iowa 1227, 184 N.W. 331 (1921).

⁷⁹ *Ibid.*

⁸⁰ Little v. Laubach, 183 Iowa 1370, 168 N.W. 155 (1918).

⁸¹ Kruse v. Vail, 238 Iowa 1277, 30 N.W.2d 159 (1947) (dictum).

⁸² De Mers v. Rohan, 126 Iowa 488, 102 N.W. 413 (1905); but see Osgood v. Names, 191 Iowa 1227, 184 N.W. 331 (1921).

⁸³ Morrison v. Kipping, 227 Iowa 1146, 290 N.W. 59 (1940).

⁸⁴ Beck v. Heckman, 140 Iowa 351, 118 N.W. 510 (1908).

⁸⁵ Myers v. Tallman, 169 Iowa 104, 149 N.W. 259 (1915).

difficult to erect and more expensive to maintain than ordinary fences, it would be unfair to require one of the parties to bear all of the cost of the creek fence simply because he was assigned the half which included the creek. The Iowa statutory fence law has no specific solution for this situation.

One way to settle the problem is to estimate the total cost of the entire fence over its anticipated years of use, and then divide that cost equally between the two parties, or to divide the fence in a manner that reflects the excessive cost of that part containing the creek. For example, if the partition fence were 160 rods long, with about two rods of creek fence, the cost might be figured this way: 158 rods of non-creek fence, assigned a cost of five dollars per rod, over a twenty-year period, for installation and maintenance, for a total of \$790.00. Two rods of creek fence, figured at fifty-five dollars per rod over the twenty years, a total of \$110.00. The total cost of the fence would be \$900.00 over the twenty-year period. The person assigned the two rods of creek fence would also have sixty-eight rods of non-creek fence, and the other owner would have ninety rods of non-creek fence.

OWNER'S RIGHTS

Ownership of the Fence

The adjoining owners own the partition fence (trees, hedge, or wire fence) as tenants in common, unless otherwise agreed. The fence is the common property of both adjoining landowners even where each party has built or maintained a specific part of the fence.⁸⁶ Thus, either party may be enjoined from removing, destroying, or injuring the fence without the consent of the other.⁸⁷ Neither may one landowner compel his adjoining neighbor to remove a hedge fence on the grounds that it is a nuisance.⁸⁸ The only relief available is to require the neighbor to keep the hedge fence trimmed within five feet of the ground.

The parties probably have the power to agree that each is the sole owner of the part he built or if one party built the entire fence, that he is the sole owner until he is reimbursed by the adjoining owner for a proper part of the expense.⁸⁹ In the latter event, the builder has the right to remove the fence,⁹⁰ subject, of course, to being compelled to maintain a partition fence if so requested.⁹¹

⁸⁶ Laughlin v. Franc, 247 Iowa 345, 73 N.W.2d 750 (1955).

⁸⁷ Laughlin v. Franc, *supra*, note 86 (wire fence); Musch v. Burkhart, 83 Iowa 301, 48 N.W. 1025 (1891) (trees with wire attached making fence); Hannabalsen v. Sessions, 116 Iowa 457, 90 N.W. 93 (1902) (dictum) (fence).

⁸⁸ Harndon v. Stultz, 124 Iowa 440, 100 N.W. 329 (1904).

⁸⁹ Laughlin v. Franc, 247 Iowa 345, 73 N.W.2d 750 (1955) (dictum).

⁹⁰ IOWA CODE § 113.16 (1962).

⁹¹ IOWA CODE § 113.1 (1962).

Move Fence

When a landowner mistakenly builds a partition fence on the land of an adjoining landowner, he has a right to enter upon the land and remove his fence upon paying, or offering to pay, the adjoining owner for any damage to the soil occasioned thereby. If the parties cannot agree upon the amount of damages caused, the fence viewers may be called. They determine the amount of damages in the same manner as they decide damages in other cases. The fence must be removed as soon as practicable after it is discovered to be on the other's land, but removal should not be made so as to expose the crops of the other party.⁹² If, however, one owner enters onto the land in the peaceable possession of an adjoining landowner and constructs a fence on what he erroneously claims to be the division line, he is a trespasser. He cannot prevent the owner of the land on which he built the fence from tearing it down.⁹³ The owner on whose land the fence is being erected may go to court and obtain a decree restraining the erection and maintenance of a fence on his property, and obtain an order allowing him to remove it.⁹⁴

Build Fence on Boundary

By statute, a person building a partition fence may lay it out exactly upon the boundary line, so that the fence is partly on his own side and partly on the adjoining owner's side.⁹⁵ This is the only circumstance under which a fence may encroach upon an adjoining owner's property. The fence builder must know exactly where the boundary line is and build the fence on it. Because partition fences are normally owned jointly, each adjoining landowner may use the fence as if it were wholly his own.⁹⁶

Remove Fence

A partition fence may be removed temporarily for the purpose of repairing or rebuilding it.⁹⁷ When the adjoining owners own a fence as tenants in common, one party cannot permanently remove any part of the fence without the permission of the other.⁹⁸ If requested to do so, the district court will enjoin destruction or injury to the jointly owned fence by one owner. If a fence erected on the boundary is the sole property of the person who erected it, the person building the fence may have the same right to remove it as if it were wholly on his land.⁹⁹

⁹² IOWA CODE § 113.15 (1962).

⁹³ *Currier v. Jones*, 121 Iowa 160, 90 N.W. 766 (1903) (defendant was the county).

⁹⁴ *Tice v. Shangle*, 182 Iowa 601, 164 N.W. 246 (1917).

⁹⁵ IOWA CODE § 113.16 (1962).

⁹⁶ *Hannabalsen v. Sessions*, 116 Iowa 457, 90 N.W. 93 (1902) (dictum); see text accompanying notes 89-91 *supra*.

⁹⁷ *Laughlin v. Franc*, 247 Iowa 345, 73 N.W.2d 750 (1955).

⁹⁸ *Musch v. Burkhart*, 83 Iowa 301, 48 N.W. 1025 (1891).

⁹⁹ IOWA CODE § 113.16 (1962).

As previously noted, either adjoining landowner can compel the other to build and maintain a partition fence.¹⁰⁰ To be sure of obtaining the desired results, care should be taken to follow closely the prescribed statutory procedure outlined below.

1. The complaining owner must give to the adjoining owner who refuses to build or maintain a lawful fence a written request that he erect or repair the fence. This notice is an essential prerequisite to legal compulsion.¹⁰¹ Any notice or request which informs the adjoining owner of the claim of the complaining owner is sufficient if it is in writing.¹⁰²
2. If the other owner makes no effort to erect or repair his fence within a reasonable time, the fence viewers should be requested to notify the other owner of a proposed hearing.¹⁰³ This request to the fence viewers need not be in writing,¹⁰⁴ although it should be. The request is probably sufficient if it indicates in general terms the nature of the dispute.¹⁰⁵
3. Having been properly requested, the fence viewers must give five days written notice to the other owner, advising him of the time, place, and subject of the hearing.¹⁰⁶
4. The fence viewers meet and determine the obligations, rights, and duties of the respective parties, assign to each the part he is to erect or repair, and prescribe a time limit for completion of the work.¹⁰⁷ This order must be written and recorded,¹⁰⁸ but if both parties have actual notice of the order, they are bound by it in any event.¹⁰⁹ Although neither party is required to be present at the time the fence viewers make their decision, it is a good idea for both of them to attend the meeting.
5. If the other owner fails to comply with the viewers' orders, the complaining owner has no direct procedure to force him to comply. Upon the expiration of thirty days after the time fixed by the fence viewers for compliance with their order, the complaining owner may proceed to construct or repair the fence himself, but he has no obligation to do so. If the complainant elects to construct or fix the fence on the completion

¹⁰⁰ IOWA CODE § 113.1 (1962).

¹⁰¹ IOWA CODE § 113.1 (1962); *Laughlin v. Franc*, 247 Iowa 345, 73 N.W.2d 750 (1955), *Sinnott v. District Court*, 201 Iowa 292, 207 N.W. 129 (1926).

¹⁰² *Kruse v. Vail*, 238 Iowa 1277, 20 N.W.2d 159 (1947). This can be expressly waived. *Gavin v. Linnane*, 206 Iowa 917, 221 N.W. 462 (1928).

¹⁰³ IOWA CODE § 113.3 (1962).

¹⁰⁴ *Tubbs v. Ogden*, 46 Iowa 134 (1877).

¹⁰⁵ *Scott v. Nesper*, 194 Iowa 538, 188 N.W. 889 (1922).

¹⁰⁶ IOWA CODE § 113.3 (1962).

¹⁰⁷ IOWA CODE § 113.4 (1962).

¹⁰⁸ IOWA CODE § 113.10 (1962).

¹⁰⁹ *Tantz v. Clark*, 31 Iowa 254 (1871).

of the work, he must again request the fence viewers to meet, this time to fix the value of the fence or repairs.¹¹⁰ The section of the statute authorizing this meeting does not require notice to the adjoining landowner,¹¹¹ but a case under this section has said that notice is a reasonable and necessary implication of the statute.¹¹² Thus, it would seem a safe practice to give a five-day written notice.¹¹³

6. After the fence viewers fix the value of the fence or repairs, the defaulting owner has ten days to pay for the work plus the fees and costs assessed to him. If the defaulting owner fails to make payment within ten days, the viewers may certify to the county auditor the full amount due from him. The auditor enters this amount against the defaulting owner on the tax list and it is collected from him as taxes. When collected, the fees and costs and the value of the fence or repairs are paid to the parties entitled thereto.¹¹⁴ If either owner is dissatisfied with the amount assessed, he may appeal to the district court.¹¹⁵

Appeal

The method of appeal will depend upon what is being challenged. If the jurisdiction of the fence viewers is challenged, a writ of certiorari may be sought.¹¹⁶ Certiorari is a discretionary writ or order from a higher court to a lower judicial tribunal to certify the record of the action to the higher court for review. Objections to jurisdiction may also be raised in an appeal to the district court from an order of the fence viewers.¹¹⁷

If the fence viewers have jurisdiction, appeal to the district court is the only method of reviewing their orders. An appeal may be taken to the district court from any order or decision of the fence viewers by any person bound by that order or decision.¹¹⁸ Notice of appeal may be given in one of two ways. The appealing party may file with the fence viewers, on the day when the decision is rendered, a written statement that he is appealing from

¹¹⁰ IOWA CODE § 113.6 (1962).

¹¹¹ *Ibid.*

¹¹² *Pickerell v. Davis*, 164 Iowa 576, 141 N.W. 34 (1914); *cf.* *Talbot v. Blacklege*, 22 Iowa 572 (1867).

¹¹³ If notice is given, it must be written. IOWA CODE § 113.9 (1962).

¹¹⁴ IOWA CODE § 113.6 (1962). The complainant normally will have already paid the trustees. IOWA CODE § 359.46 (3) (1962); OPS. ATT'Y GEN. 493 (Iowa 1938). The costs will not include the fees of the township clerk. *Miles v. Tomlinson*, 110 Iowa 322, 81 N.W. 587 (1900).

¹¹⁵ IOWA CODE § 113.23 (1962).

¹¹⁶ IOWA R. CIV. P. 306, 308; *Sinnott v. District Court*, 201 Iowa 292, 207 N.W. 129 (1926); *Scott v. Nesper*, 194 Iowa 538, 188 N.W. 889 (1922). *Laughlin v. Franc*, 247 Iowa 345, 73 N.W.2d 750 (1955) (*dictum*).

¹¹⁷ *Laughlin v. Franc*, *supra*, note 116.

¹¹⁸ IOWA CODE § 113.23 (1962).

the judgment, or he may within twenty days after the order, serve notice of the appeal upon the other party, his agent, or the attorney who appeared for him.

Notice of appeal is served in the same manner as the original notice.¹¹⁹ An appeal bond must be filed within twenty days after the date of the order or decision,¹²⁰ or the district court will not acquire jurisdiction and the appeal will be dismissed.¹²¹ The township clerk must inspect and approve the appeal bond, certify the original papers, and file them in the office of the clerk of the district court.¹²² If the appeal is not presented properly and promptly, it may be dismissed, and the decision of the viewers will stand, and the party appealing will be liable for any costs incurred, which may be taken out of his appeal bond.¹²³

Appeals to the district court from decisions of the fence viewers are triable at law by ordinary proceedings.¹²⁴ Either party may demand a jury trial or the case may be tried to the court.¹²⁵ The district court hears the case *de novo*, that is, hears all the evidence again, and neither the original complaint to the viewers nor their report are admissible as evidence.¹²⁶ Both sides may submit evidence and the decision is based on a preponderance of the evidence introduced. The district court decision may be reviewed by the supreme court.¹²⁷

Court costs on appeal may amount to as much or more than the total cost of the fence. By statute, the appellant must pay all costs of the appeal unless he obtains a judgment more favorable than that from which he appealed.¹²⁸ If judgment on the appeal goes against the party appealing, the costs may be enforced against his appeal bond. When the appellant is successful in having the order of the fence viewers set aside, he is entitled to recover the cost of the appeal.¹²⁹

¹¹⁹ IOWA R. CIV. P. 357. This section provides for notice being filed in the justice court, but since the appeal is from a fence viewers' decision, not a justice of the peace court, presumably only notice of appeal to the opponent is available. Notice of appeal to the opponent is not essential to appellate jurisdiction, but failure to give notice is grounds for a continuance. *Duran v. Northwestern Life & Sav. Co.*, 112 Iowa 296, 83 N.W. 972 (1900).

¹²⁰ IOWA R. CIV. P. 358.

¹²¹ *Hahn v. Lumpa Estate*, 131 Iowa 722, 109 N.W. 310 (1906).

¹²² IOWA CODE § 113.23 (1962). Except for the appeal bond, the appeal is taken in the same manner as appeals from justice of the peace courts.

¹²³ *Hahn v. Lumpa Estate*, 131 Iowa 722, 109 N.W. 310 (1906).

¹²⁴ IOWA CODE § 113.23 (1962); *Laughlin v. Franc*, 247 Iowa 345, 73 N.W.2d 750 (1955); *Moore v. Short*, 227 Iowa 380, 288 N.W. 407 (1939).

¹²⁵ See *Smith v. Ellyson*, 137 Iowa 391, 115 N.W. 40 (1908).

¹²⁶ *Smith v. Ellyson*, *supra*, note 125.

¹²⁷ *In re fence dispute between Swisher*, 204 Iowa 1072, 216 N.W. 673 (1928) (only questions of law are reviewable).

¹²⁸ IOWA CODE § 601.92 (1962).

¹²⁹ *Smith v. Ellyson*, 137 Iowa 391, 115 N.W. 40 (1908).

Distrain Livestock

A landowner whose land is lawfully fenced may "distrain," that is, seize and hold, any livestock he catches trespassing upon his land.¹³⁰ For this purpose, a landowner is anyone having the title to land, an occupier, or a tenant.¹³¹ No distraint will be allowed, however, if the animal trespasses through a place where a partition fence has been neither built nor assigned.¹³² Once the parties have agreed or the fence viewers have assigned a part of the boundary to each landowner, they are liable for trespass through that portion.¹³³ If the livestock came onto the complainant's land because of his failure to maintain his part of the partition fence in a lawful manner, there can be no distraint.¹³⁴ Even if the complainant's fence is not lawfully maintained throughout, he can distrain if the animals came onto his land through their owner's inadequate and unlawful part of the fence. It thus will be a jury question as to which party's negligence caused the damage.¹³⁵

The landowner may hold the distrained livestock until their owner¹³⁶ pays him for all of the damages they caused while upon his land and the expenses of the distraint.¹³⁷ Within twenty-four hours after distraining such livestock, the landowner (distrainor) must notify the owner of the stock of the seizure and of the amount of the damages caused by the livestock.¹³⁸ If the owner is not available, notice to the person having charge of the stock and the farm on which the animals were kept is sufficient.¹³⁹ If the owner fails to pay the damages asked within twenty-four hours after receiving such notice, the distrainor must immediately notify the township trustees and request them to come on the premises where the damage occurred and assess the amount of damages.¹⁴⁰ These two notices need not be written, but a writing will facilitate the required proof of notice.

¹³⁰ IOWA CODE §§ 188.3, .6 (1962); see generally 34 IOWA L. REV. 318, 324 (1949).

¹³¹ IOWA CODE § 188.1 (2) (1962).

¹³² IOWA CODE § 188.5 (1962).

¹³³ *Little v. Laubach*, 183 Iowa 1370, 168 N.W. 155 (1918). Potential liability appears to attach immediately upon assignment or agreement, so it behooves the landowner to construct his fence quickly.

¹³⁴ IOWA CODE § 188.3 (1962); *Mallory v. Jurgena*, 250 Iowa 16, 92 N.W.2d 387 (1958); *Wheeler v. Woods*, 205 Iowa 1240, 219 N.W. 402 (1928).

¹³⁵ *Noble v. Chase*, 60 Iowa 261, 14 N.W. 299 (1882). The landowner whose animals escaped through his defective fence is liable for damages they cause. IOWA CODE § 188.4 (1962).

¹³⁶ This includes any one in possession or having charge of them as well as the legal owner. IOWA CODE § 188.1 (1) (1962).

¹³⁷ IOWA CODE § 188.3 (1962); *Haack v. Rodenbour*, 234 Iowa 368, 12 N.W.2d 861 (1944). If they belong to more than one owner either may obtain the release of his animals on payment of a ratable share of the damages and costs. IOWA CODE § 188.10 (1962).

¹³⁸ IOWA CODE § 188.11 (1962).

¹³⁹ See IOWA CODE § 188.1 (2) (1962); *Lyons v. Van Gordner*, 77 Iowa 600, 42 N.W. 500 (1889).

¹⁴⁰ IOWA CODE § 188.11 (1962).

A person who distrains livestock is entitled to be paid by the livestock's owner for the expenses of distraint, including the value of care and feed while in his possession.¹⁴¹ If there are no trustees in a township, the distrainer can recover damages not only for the few days contemplated by the statute, but also for the entire time he has kept the animals.¹⁴² The distrainer must see that the distrained livestock receive adequate care and feed or he has committed a misdemeanor,¹⁴³ and probably is responsible civilly for any loss that occurs.

As an alternative to the distraint procedure, the injured party can sue the owner of the animal or the occupant of the land from which it escaped.¹⁴⁴ Where it appears that the trespasses by livestock will be a continuing thing, a landowner may be granted an injunction to prevent a multiplicity of suits for small amounts of damages.¹⁴⁵

TOWNSHIP TRUSTEES

FENCE VIEWERS

In each township having a board of township trustees, the trustees serve as fence viewers.¹⁴⁶ As fence viewers the trustees have the exclusive power to determine any controversy which arises in their township under the statutes concerning partition fences,¹⁴⁷ and no action can be taken to court until they have acted.¹⁴⁸ Only a person authorized by statute may exercise the powers of fence viewer.¹⁴⁹

The statute granting the fence viewers power to act as a special tribunal in partition fence disputes is not subject to constitutional objection on the ground that it deprives the parties of a court trial. The legislature has authority to create a special tribunal to determine, under appropriate rules, the rights of parties under the partition fence laws.¹⁵⁰

¹⁴¹ IOWA CODE § 188.48 (1962). These costs can be reduced by tendering the distrainer a reasonable amount for costs and damages. If the amount tendered is no less than the damages and costs subsequently awarded, the distrainer may not collect for costs accruing after the tender. IOWA CODE § 188.13 (1962).

¹⁴² Robinson v. Halley, 124 Iowa 443, 100 N.W. 328 (1904).

¹⁴³ IOWA CODE § 717.2 (1962).

¹⁴⁴ IOWA CODE § 188.8 (1962). If the distrained animals escape or are released without the consent of the distrainer, he can still recover his expenses until the time of the escape or release. IOWA CODE § 188.9 (1962).

¹⁴⁵ Tantlinger v. Sullivan, 80 Iowa 218, 45 N.W. 765 (1890).

¹⁴⁶ IOWA CODE § 359.17 (1962). This power also includes the power to act in distraint proceedings.

¹⁴⁷ IOWA CODE § 113.3 (1962).

¹⁴⁸ Lease v. Vance, 28 Iowa 509 (1870).

¹⁴⁹ The mayor and city council cannot act as fence viewers unless they qualify under IOWA CODE § 359.24 (1962), even though they can act in relation to fences and animals under IOWA CODE § 368.7 (1962). Ryan v. Heller, 232 Iowa 760, 6 N.W.2d 112 (1942).

¹⁵⁰ McKeever v. Jenks, 59 Iowa 300, 13 N.W. 295 (1882).

Jurisdiction

The fence viewers are a quasi-judicial body with sharply limited jurisdiction. Generally their power to adjudicate fence disputes is restricted to controversies involving partition fences.¹⁵¹ The fence viewers may not acquire jurisdiction by ruling that a fence is a partition fence when in fact it is not.¹⁵² In a case where only part of a disputed fence was partition fence, it was held that the fence viewers had jurisdiction to settle rights in only that part of the fence that was partition fence.¹⁵³ The viewers have jurisdiction to assign the part of a fence each adjoining landowner is to erect or maintain even though one owner is not yet liable to contribute thereto.¹⁵⁴ The fence viewers have no power to act within the corporate limits of any city or town,¹⁵⁵ nor may they regulate highway fences or railroad fences, except as provided in Iowa Code section 478.4(5). Boundary questions are beyond the authority of the fence viewers.¹⁵⁶

Fence viewers may only decide fence disputes arising over fences within the township in which they are elected. The decision of the fence viewers is valid only if arrived at within the township, but having once reached a decision they may leave the township to put their findings in writing.¹⁵⁷

A special board of fence viewers has jurisdiction to adjudicate disputes involving fences on the boundary line between two townships or counties. When such a dispute arises, the clerk of the township of the owner requesting the fence viewers to meet selects two trustees from his township, and the clerk of the other township appoints one trustee to serve on the special board. This group has all the powers generally given the regular fence viewers. All orders and decisions made by the special board are recorded in both townships or counties.¹⁵⁸

A further limitation on the power of the fence viewers is the requirement that they may not enter a controversy until summoned by one of the parties. A controversy does not technically exist until one party has made his demands upon the other in writing and failed to receive satisfaction.¹⁵⁹ Any situation

¹⁵¹ IOWA CODE § 113.3 (1962); *Scott v. Nesper*, 194 Iowa 538, 188 N.W. 889 (1922); *Anderson v. Cox*, 54 Iowa 578, 6 N.W. 895 (1880); see generally 34 IOWA L. REV. 330, 336-339 (1949). Fence viewers also have jurisdiction to pass on the adequacy of a railroad fence that does not conform to the statutory specifications. IOWA CODE § 478.4 (5) (1962).

¹⁵² *Bills v. Belknap*, 38 Iowa 225 (1874). The fence viewers determination is not conclusive if the fence is not on the boundary. *Peschongs v. Mueller*, 50 Iowa 237 (1878).

¹⁵³ *Farmer v. Young*, 86 Iowa 382, 53 N.W. 279 (1892).

¹⁵⁴ IOWA CODE § 113.5 (1962); see *Farmer v. Young*, *supra*, note 153; *Syas v. Peck*, 58 IOWA 256, 12 N.W. 304 (1882).

¹⁵⁵ OPS. ATT'Y GEN. 396 (Iowa 1934).

¹⁵⁶ *MacAvoy v. Saunders*, 161 Iowa 651, 143 N.W. 548 (1913).

¹⁵⁷ *Miles v. Tomlinson*, 110 Iowa 322, 81 N.W. 587 (1900).

¹⁵⁸ IOWA CODE § 113.14 (1962).

¹⁵⁹ *Nichols v. Fierce*, 202 Iowa 1358, 212 N.W. 151 (1927); *Sinnott v. District Court*,

where adjoining landowners cannot agree on the erection and maintenance of a partition fence may constitute a controversy over which the jurisdiction of the fence viewers may be invoked.¹⁶⁰

Once fence viewers have acquired jurisdiction, they are empowered to carry the case to a conclusion. They may decide any aspect of a controversy, including whether the fence is lawful or tight, deciding if the trimming or maintenance of a hedge fence meets proper standards, interpreting whether a fence agreement is being carried out according to its terms, determining a proper apportionment, compelling construction or repair of a fence, or deciding any other issue regarding partition fences.¹⁶¹ Interest in the particular question does not disqualify a fence viewer. A township trustee whose fence is complained against may serve as a fence viewer.¹⁶²

Notice

Notice requirements probably cause township trustees more difficulty than any other phase of the fence law. Generally, wide latitude is permitted in matters of form in the proceedings of fence viewers, but the legal requirements covering notice must be strictly followed. Fence viewers act as a judicial body, and notice as required by law is always essential in a judicial proceeding.¹⁶³

The first notice problem of significance to the fence viewers is the requirement that a sufficient written notice was given by one adjoining landowner to another to turn a fence dispute into a controversy.¹⁶⁴ At this stage any written notice or request which informs the adjoining owner of the claim of the complaining owner is sufficient,¹⁶⁵ and written notice may be waived by the party entitled to it.¹⁶⁶

Assuming a proper controversy exists, and one of the landowners has requested the fence viewers to take jurisdiction of the controversy, the viewers must, within a reasonable time, give a five day written notice to the other party or parties prescribing the time and place of the hearing and stating the matter to be decided.¹⁶⁷ Later, if the opposing owner fails to comply with an order of the fence viewers and the complaining party has built or repaired the fence, a similar notice must be given that another meeting of the

201 Iowa 292, 207 N.W. 129 (1926), where the court said a duty cannot be enforced until a duty to act has been imposed by a request of the adjoining owner.

¹⁶⁰ Scott v. Nesper, 194 Iowa 538, 188 N.W. 889 (1922).

¹⁶¹ See IOWA CODE § 113.3 (1962).

¹⁶² See OPS. ATT'Y GEN. 310 (Iowa 1940).

¹⁶³ Pickerell v. Davis, 164 Iowa 576, 146 N.W. 34 (1914); see Laughlin v. Franc, 247 Iowa 345, 73 N.W.2d 750 (1955).

¹⁶⁴ Sinnott v. District Court, 201 Iowa 292, 207 N.W. 129 (1926).

¹⁶⁵ Kruse v. Vail, 238 Iowa 1277, 30 N.W.2d 159 (1947).

¹⁶⁶ Gavin v. Linnane, 206 Iowa 917, 221 N.W. 462 (1928).

¹⁶⁷ IOWA CODE § 113.3 (1962); OPS. ATT'Y GEN. 396 (Iowa 1934).

fence viewers will take place for the purpose of evaluating the fence.¹⁶⁸ If these notices are not given as provided by law, any subsequent decision of the viewers is invalid as to those persons not properly notified.¹⁶⁹

Any notice of hearing must be signed by at least one trustee,¹⁷⁰ and must be in writing. The manner of service will depend on the legal residence of the owner. If he is a resident of the county where the fence is situated, he must be served personally.¹⁷¹ Should the landowner be an Iowa resident, but not of the county where the fence is, published notice may be used.¹⁷² The statute relies upon published notice plus delivery of the notice to the occupant of the land to acquire jurisdiction, but expanding concepts of constitutional due process require mailed notice to be sent to the adverse party if his address is ascertainable with reasonable diligence.¹⁷³ As against an owner who is a nonresident of Iowa, the notice may be by publication,¹⁷⁴ with mailed notice if his address is ascertainable by reasonably diligent inquiry.¹⁷⁵ In all cases, a return of service must be filed with the township clerk.¹⁷⁶ Whenever publication is used, proof of such publication must be made by a sworn statement of the publisher or an employee of the newspaper which is filed with the fence viewers and the occupant of the land.¹⁷⁷

Procedure

After proper notice has been given, the fence viewers meet at the time and place set in the notice. If possible, the meeting should be held at the site of the fence that is the cause of the controversy.

The fence viewers' meeting is informal. The viewers are a special judicial tribunal, but they do not have to proceed with the formality of a court of law. The Iowa Supreme Court has recognized that fence viewers are not usually legally trained men. It has stated that because of that fact their proceedings are to be viewed by the courts as to matters of form, "with at

¹⁶⁸ IOWA CODE § 113.6 (1962); *Pickerell v. Davis*, 164 Iowa 576, 146 N.W. 34 (1914) (notice necessary to give jurisdiction even though statute does not explicitly require it); see text accompanying notes 110-115 *supra*.

¹⁶⁹ *Pickerell v. Davis*, *supra*, note 168, where the court also held a subsequent notice will not relate back so as to give jurisdiction.

¹⁷⁰ OPS. ATT'Y GEN. 310 (Iowa 1940).

¹⁷¹ OPS. ATT'Y GEN. 396 (Iowa 1934); see IOWA CODE § 601.23 (1962), IOWA R. CIV. P. 56.

¹⁷² IOWA CODE § 113.7 (1962). Notice must be published once each week for two consecutive weeks in a newspaper printed in the county where the fence is situated, with proof of publication filed with the fence viewers and a copy sent the occupant of the land.

¹⁷³ IOWA R. CIV. P. 60.1; see *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

¹⁷⁴ IOWA R. CIV. P. 60 (f).

¹⁷⁵ IOWA R. CIV. P. 60.1.

¹⁷⁶ IOWA CODE § 113.9 (1962); IOWA R. CIV. P. 59.

¹⁷⁷ IOWA CODE § 113.7 (1962); IOWA R. CIV. P. 63.

least the same tender and indulgent consideration which is extended to proceedings before justices of the peace.”¹⁷⁸

At the first meeting, the fence viewers make their decision as to the rights and duties of the respective owners. If a second meeting is necessary to place a value on a fence erected or repaired by one landowner after his adjoining owner has defaulted, their duty is to determine and assess the value of the erection or repairs so made. It is not necessary that they view the fence together, but they must sit as a board when determining value.¹⁷⁹

There are no definite standards upon which fence viewers must make their decision. They are generally to base their decisions upon the particular facts of each case, the equities involved, and their own personal knowledge and experience.

All orders and decisions of the fence viewers must be in writing, signed by at least two of the trustees, and filed with the township clerk, who serves as administrative officer for the trustees.¹⁸⁰ The clerk is allowed a fee for recording and certifying decisions of the fence viewers.¹⁸¹ A copy of the clerk's record is certified to the county recorder, who records the decision in the land record books, indexing the record in the name of each adjoining owner as grantor.¹⁸² If the adjoining landowners are in different counties, all orders and notices must be recorded in the office of the recorder of deeds of each county.¹⁸³ Unless the decision of the fence viewers is modified by appeal, this record is conclusive evidence of the decision.¹⁸⁴ Since these decisions are a part of the title to the land, and are binding on the landowners and all grantees and heirs and devisees, they should be carefully drafted.

Costs

Township trustees receive four dollars for every eight-hour day when serving as fence viewers. Their fees are paid by the persons requiring their services. Primary liability for their fees falls upon the owner requesting them to take jurisdiction, but the trustees decide, as a part of their duties, who shall ultimately bear the cost. Apparently the fence viewers can assess the costs of their services in any manner they choose. They can assign all of the costs to one party or divide them between the parties involved. The assignment of costs is appended to the fence viewers' decision.¹⁸⁵

¹⁷⁸ Talbot v. Blacklege, 22 Iowa 572, 576 (1867).

¹⁷⁹ Tubbs v. Ogden, 46 Iowa 134 (1877). For a fuller discussion of this procedure, see text accompanying notes 110-115 *supra*.

¹⁸⁰ IOWA CODE § 113.8 (1962).

¹⁸¹ IOWA CODE § 113.25 (1962).

¹⁸² IOWA CODE § 113.10 (1962). See Little v. Laubach, 183 Iowa 1370, 168 N.W. 155 (1918); Gantz v. Clark, 31 Iowa 254 (1871), where, though the statute required notices to be recorded, failure to do so was not fatal because the other party had actual notice.

¹⁸³ IOWA CODE § 113.14 (1962).

¹⁸⁴ IOWA CODE § 113.11 (1962).

¹⁸⁵ IOWA CODE § 359.46 (1962); OPS. ATT'Y GEN. 473 (Iowa 1938).

When the owner who requests the services of the fence viewers advances their fees, he may collect them from the other owner if they are so assessed. If the party assessed refuses to pay, the owner who advanced the fees may bring an action at law to collect them. Only in cases when the fence viewers meet to assess the value of a fence built by one owner upon the default of an adjoining owner may the viewers certify their fees to the county auditor and have them collected as taxes, if not otherwise promptly paid.¹⁸⁶

The fees charged by the township clerk for recording and certifying decisions of the fence viewers may not be assessed as costs in the case but must be collected separately. For all matters required to be recorded concerning partition fence controversies, the clerk receives ten cents for every hundred words he records in his book or makes certified copies thereof as required. He also receives twenty-five cents for his certificate when certification is required.¹⁸⁷

DISTRAINT PROCEEDINGS

In addition to serving as fence viewers, the township trustees also have official duties in relation to distrained animals. As previously detailed,¹⁸⁸ a landowner whose land is lawfully fenced may distrain any livestock he catches trespassing upon his land. The trustees' only function is to fix the value of the damage caused to the distrainer's property by the trespassing livestock.

The trustees' assessment of damages is valid only if the distraint is lawful. If the distraint is not lawful, any assessment the trustees may make is void and of no effect.¹⁸⁹ However, the trustees do not have the power to determine whether livestock are being lawfully distrained. The rightfulness of the distraint can be decided only by a court. An action of replevin is appropriate to test the correctness of the distraint,¹⁹⁰ or the issue can be raised by appeal from the trustees' decision on damages.¹⁹¹ If a distraint is found unlawful, the distrainer is liable to the owner of the animals for any damages caused thereby.

The trustees may refuse to act if they do not think the livestock are being lawfully distrained.¹⁹² Thus, it is inferable that if they do assess damages, they think there is a basis for the liability of the livestock's owner. This in-

¹⁸⁶ IOWA CODE § 113.6 (1962); OPS. ATT'Y GEN. 473 (Iowa 1938).

¹⁸⁷ IOWA CODE § 113.25 (1962).

¹⁸⁸ See text accompanying notes 130-145 *supra*, on the owner's privilege of distraint.

¹⁸⁹ *Smith v. Flowers*, 185 Iowa 46, 169 N.W. 698 (1918).

¹⁹⁰ *Banks v. Lotimeier*, 188 Iowa 722, 176 N.W. 789 (1920). Since it will be the animal's owner who brings the action, he will have to prove ownership but the landowner will have the burden of proving the distraint is legal.

¹⁹¹ See *Durffees v. Judd*, 48 Iowa 256 (1878) (question of whether any damages warranted is considered).

¹⁹² See *Smith v. Flowers*, 185 Iowa 46, 169 N.W. 698 (1918) (dictum).

ference is reinforced by the fact that since they are also fence viewers the assessment of damages would indicate that the fences of the distrainor were lawful. Nevertheless, the action of the township trustees is not conclusive in regard to the lawfulness of the distraint.¹⁹³

Notice

Notice requirements in distraint cases are not as strict as in partition fence controversies. The statute provides for three notices. Within twenty-four hours of first distraining the animals, the landowner must notify the animal's owner of the distraint and the amount of the damages. If the landowner is not paid within the next twenty-four hours, he then notifies the trustees to appear and assess the damages.¹⁹⁴ All three trustees must be notified,¹⁹⁵ but only a majority need to be present to make a valid assessment of damages.¹⁹⁶ Immediately upon notification from the distrainor, the trustees must notify the animal's owner of the time fixed for the assessment.¹⁹⁷

The distraint section makes no requirement of written notices. Under an old statute specifying oral or written notice it was held that notice to the owner of the animal need not be in writing.¹⁹⁸ Because the notice setting the time of the assessment hearing is jurisdictional, it should be in writing, as a practical matter, to facilitate proof that it was given. The distrainor, too, must prove that he gave the two notices required of him, so a writing would be a prudent step on his part as well.

Procedure

After having been summoned and having notified the animal's owner of the assessment proceeding, the trustees meet and assess the damages and costs. If one or more of the trustees are unable to act, the available trustee(s) shall appoint one or more disinterested persons to take their place.¹⁹⁹ The trustees file a written report of their conclusions with the township clerk who records it. This assessment is final unless an appeal is taken.²⁰⁰

If the owner of the distrained livestock fails to pay the damages and costs assessed within two days from the date of assessment, the clerk is authorized to take the necessary steps to sell the livestock to pay such damages

¹⁹³ *Durffees v. Judd*, 48 Iowa 256 (1878).

¹⁹⁴ IOWA CODE § 188.11 (1962). The distrainor has twenty-four hours in which to notify the animal's owner, who has twenty-four hours to pay, or the trustees must be notified immediately.

¹⁹⁵ *Barrett v. Dolan*, 71 Iowa 94, 32 N.W. 189 (1887).

¹⁹⁶ IOWA CODE § 188.14 (1962); *Barrett v. Dolan*, *supra*, note 195.

¹⁹⁷ IOWA CODE § 188.11 (1962).

¹⁹⁸ *Healy Bros. v. Jordan*, 103 Iowa 735, 72 N.W. 495 (1897). Since the current statute says only "notice," the precedent value of this case is doubtful.

¹⁹⁹ IOWA CODE § 188.12 (1962).

²⁰⁰ IOWA CODE § 188.14 (1962).

and costs. He must post in three conspicuous places in the township a notice of the time and place at which the sale will be held. The place of sale must always be the place of distraint. Not more than ten nor less than five days may elapse between the posting of the notice and the sale.²⁰¹ The clerk sells the livestock for cash to the highest bidder. Only enough livestock may be sold to pay for the damages and costs. The unsold animals and any surplus sale proceeds are returned to the owner.²⁰²

Costs

Township trustees are paid one dollar a day when meeting to assess the damage done by trespassing stock.²⁰³ Nevertheless, costs in distraint cases may run very high. In addition to the actual damages done, a person distraining animals is entitled to a distraining fee of fifty cents a head for the first two head and twenty-five cents a head for each additional head distrained. In addition, the distrainer receives one dollar for each stallion, jack, bull, boar, or buck that is distrained. The distrainer also is entitled to fifty cents a day for keep and care of horses, cattle, mules, and asses, and twenty-five cents a day for others.²⁰⁴

Added to the above costs are the fees of the township clerk in recording the decision of the township trustees. For all matters required to be recorded concerning distraint cases, the clerk receives ten cents for every hundred words he records in his book or makes certified copies thereof as required.²⁰⁵ He also receives twenty-five cents for his certificate when certification is required. In addition, the clerk receives fifty cents for filing and approving any bond. For posting notice of the sale of distrained animals, he receives twenty-five cents and ten cents a mile for mileage each way. He can also assess as costs five per cent of the sales price.²⁰⁶

Appeal

Any person aggrieved by an assessment made by the township trustees in a distraint case may appeal to the district court by filing an appeal bond with the township clerk within four days after the report of the trustees is filed with the clerk.²⁰⁷ If the appeal is taken by the person distraining the

²⁰¹ IOWA CODE § 188.15 (1962).

²⁰² IOWA CODE § 188.17 (1962).

²⁰³ IOWA CODE § 359.46 (2) (1962).

²⁰⁴ IOWA CODE § 188.48 (1962). Note that the distraining fee is computed on a per head basis while the daily feed and care subsection does not mention per head. It is thus negatively inferable that the per diem is to cover all animals distrained, whether two or more. The more common sense approach is to rule that per head pay applies equally to the distraining fee and the daily feed allowance.

²⁰⁵ IOWA CODE § 188.48 (1962).

²⁰⁶ IOWA CODE §§ 188.48 (5)(9); 601.129 (17) (1962).

²⁰⁷ IOWA CODE § 188.19 (1962).

livestock, the bond must be twice the value of the livestock as set by the clerk. If the appeal is taken by the owner of the distrained livestock, the amount of the bond will be the greater of twice the value of the livestock as set by the clerk or twice the amount of damages and costs, as assessed by the township trustees.²⁰⁸ Within five days after the taking of an appeal, the township clerk must file a certified transcript of the record of the findings of the trustees, the notice of appeal, if in writing, and the bond with the clerk of the district court.²⁰⁹

While an appeal is pending, the distrainer keeps the animal, but the owner of distrained animals may secure their release at any time before judgment by filing with the township clerk, before the appeal is certified, or with the clerk of the district court thereafter, an approved bond sufficient to pay all damages and costs that may be recovered in the case on appeal. When the clerk receives and files the bond he certifies that fact to the person distraining the livestock. The distrainer must then release them to the owner.²¹⁰

HIGHWAY AND RAILROAD FENCES

HIGHWAY FENCES

Unlike partition fences, highway fences are maintained solely by the owner of the land they enclose. The Iowa fence statute says the respective owners of the adjoining tracts of land may be compelled to erect or maintain a partition fence,²¹¹ but apparently this refers only to private owners and not the state or county. Generally neither the county nor the state is responsible for fences along their roads, and they cannot be required to contribute to the erection or maintenance of highway fences.²¹²

No duty, as such, is imposed upon a landowner to fence in land bordering upon a highway which runs beside or through his land. Landowners have a duty to restrain their livestock from running at large, and generally will be liable for damage done by their straying animals.²¹³ Further, a landowner may not lawfully distrain trespassing animals unless his land is properly fenced.²¹⁴ For these reasons most landowners maintain adequate fences on their property that abuts on a highway.

Obstructions

Anything which obstructs travel on a public highway must be removed

²⁰⁸ IOWA CODE § 188.20 (1962).

²⁰⁹ IOWA CODE § 188.24 (1962).

²¹⁰ IOWA CODE §§ 188.21, .22, .23 (1962).

²¹¹ IOWA CODE §§ 113.1; 188.6 (1962).

²¹² Under special situations the state may undertake the construction and maintenance of highway fences; i.e., along the interstate highways, see Resolution of Iowa State Highway Commission, Aug. 19, 1958.

²¹³ IOWA CODE § 188.2 (1962).

²¹⁴ IOWA CODE § 188.3 (1962).

as soon as the responsible public authority has notice of it. This rule applies to fences as well as other obstructions. If any landowner either mistakenly or intentionally builds his fence so that it obstructs travel, the State Highway Commission and County Board of Supervisors shall cause it to be removed.²¹⁵ A notice in writing granting not less than sixty days to effect the removal is given to the owner, occupant, or agent of the land enclosed by such a fence.²¹⁶ The notice is served in the same manner as for original notice in a civil suit.²¹⁷ If the obstructing fence is not removed within the time allowed, then it may be removed by the Board of Supervisors and the State Highway Commission, at the expense of the owner.²¹⁸

When a landowner is notified to remove a fence, the notice must specify with reasonable certainty the line to which it must be removed. The fence boundary line of the highway will be designated by the state highway engineer or county engineer. In cases involving secondary roads, if there is no county engineer, the Board of Supervisors will designate the line which is the proper place for the location of the fence.²¹⁹

Hedge Fences

A hedge fence of osage orange may be maintained along the public highway. No other shrubbery may be used on the line or in the highway right-of-way except that a landowner is permitted forty rods of windbreak along the road. All hedge fences must be trimmed at least once every two years and kept within five feet of the ground.²²⁰ If hedge fences are not trimmed as required, the Board of Supervisors may have them trimmed and assess the cost of trimming as taxes.²²¹

RAILROAD FENCES

State, county, township, and city fence laws and regulations are not applicable to railroads, unless specifically so stated in the law.²²² In Iowa, railroads must maintain a fence on each side of their right-of-way. These fences must be connected to cattle guards at all public road crossings in order to prevent livestock from getting upon the tracks.²²³

In cases where a farm is divided by a railroad track or where the railroad runs parallel with a public highway and separates the farm from the high-

²¹⁵ IOWA CODE § 319.1 (1962).

²¹⁶ IOWA CODE § 319.2 (1962).

²¹⁷ IOWA CODE § 319.3 (1962).

²¹⁸ IOWA CODE § 319.6 (1962).

²¹⁹ IOWA CODE § 319.4 (1962).

²²⁰ IOWA CODE § 318.1 (1962).

²²¹ IOWA CODE § 318.2 (1962).

²²² IOWA CODE § 478.8 (1962).

²²³ IOWA CODE § 478.2 (1962). This section does not apply to class C railways that obtain a written waiver from the landowner. IOWA CODE § 478.3 (1962).

way, a railroad must construct and maintain a safe private crossing of its right-of-way if requested to do so by the owner.²²⁴ A private crossing must be connected by wing or cross fences to the railroad fence and must also have cattle guards on each side of the crossing.²²⁵ An "adequate" crossing must be provided. What is "adequate" is determined by reference to all relevant factors.²²⁶ It is the duty of the railroad to exercise ordinary care and prudence in the construction, and to provide gates that are reasonably sufficient to prevent livestock from going onto the tracks.²²⁷ A landowner may have his right to an adequate crossing enforced by bringing an action in the courts.²²⁸

The landowner may, by writing, request the railroad to provide more than one private crossing, or an overhead or underground crossing. If the railroad refuses or fails to answer within thirty days, the owner may file a written request for a hearing and determination of his rights with the State Commerce Commission. After notice to the railroad, and after a hearing, the Commission can make such order as it believes just.²²⁹ Orders of the Commission are enforceable by the district court.²³⁰

Fence Requirements

To be lawful, railroad fences ". . . shall be not less than fifty-four inches high and may be any of the following types:

- "1. Not less than five barbed wires, properly spaced.
 - "2. Not less than three barbed wires above and not less than twenty-four inches of woven wire below.
 - "3. Entirely of woven wire.
 - "4. Five boards properly spaced.
 - "5. Any other type which the fence viewers of any township through which it passes may determine as efficient as any of the above types.
- Each of the above types shall be securely nailed to posts firmly set, not more than twenty feet apart for the first three types, nor more than eight feet apart for the fourth."²³¹

Any person who maintains hog-tight fences on his land that abuts on the railroad may request the railroad, in writing, to make its part of the fence hog-tight.²³²

²²⁴ IOWA CODE § 478.12 (1962). The railroad has no duty absent a request by the owner. *Rutherford v. Iowa Cent. Ry.*, 142 Iowa 744, 121 N.W. 703 (1909).

²²⁵ *Herrstrom v. Newton & N.W. R.R.*, 129 Iowa 507, 105 N.W. 436 (1905).

²²⁶ *Klopp v. Chicago, M. & St. P. Ry.*, 175 Iowa 534, 157 N.W. 230 (1916).

²²⁷ *Wirsten v. Chicago, M. & St. P. Ry.*, 124 Iowa 170, 99 N.W. 697 (1904).

²²⁸ *O'Malley v. Chicago, M. & St. P. Ry.*, 183 Iowa 749, 165 N.W. 1002 (1918).

²²⁹ IOWA CODE § 478.13 (1962).

²³⁰ *State v. Mason City & F.D. Ry.*, 85 Iowa 516, 52 N.W. 490 (1892).

²³¹ IOWA CODE § 478.4 (1962).

²³² IOWA CODE § 478.5 (1962).

Railroad's Liability

No direct procedure is available to the landowner to force a railroad to build a fence.²³³ However, the railroad's potential liability will normally produce compliance with a reasonable fencing request.

A railroad's refusal to fence its right-of-way is a misdemeanor for which the railroad corporation, the officer responsible for the failure to fence, or any lessee owning or operating the railroad may be fined up to \$500.00 for each offense. Every thirty-day continuation of the neglect or refusal to fence constitutes a separate offense.²³⁴

If a railroad fails to fence its right-of-way or to maintain proper and sufficient cattle guards, it is absolutely liable for any livestock killed or injured because of the want of such a fence or cattle guard, unless the livestock was upon the track through the willful act of its owner. All that the owner has to do to recover damages is prove the fact of loss or injury to his stock. He need not prove negligence on the part of the railroad.²³⁵ If the railroad fails to pay for the loss within thirty days after notice accompanied by an affidavit, the owner of the stock may recover double the amount of damages actually sustained by him.²³⁶

In lieu of the above penalties, the railroad may be sued for its negligence in maintaining its fences.²³⁷ This will be an ordinary negligence action, and the animal's owner has the burden of proving the railroad's negligence.²³⁸ The owner's contributory negligence is a defense for the railroad,²³⁹ but the doctrine of last clear chance may negate it.²⁴⁰ If the fence was properly constructed, but has become defective through no fault of the railroad, the railroad is not liable unless and until it has notice of the defect and time to repair it.²⁴¹

²³³ OPS. ATT'Y GEN. 110 (Iowa 1917).

²³⁴ IOWA CODE § 478.10 (1962); *Titus v. Chicago, M. & St. P. Ry.*, 128 Iowa 194, 103 N.W. 343 (1905) (insufficient fences are no fences at all).

²³⁵ IOWA CODE § 478.6 (1962), *Mikesell v. Wabash R.R.*, 134 Iowa 736, 112 N.W. 201 (1907).

²³⁶ IOWA CODE § 478.7 (1962); *Boyer v. Chicago, R.I. & P. Ry.*, 123 Iowa 248, 98 N.W. 764 (1904).

²³⁷ IOWA CODE § 478.11 (1962).

²³⁸ E.g., *Gibson v. Iowa Cent. Ry.*, 136 Iowa 415, 113 N.W. 927 (1907); *Schneir v. Chicago, R.I. & P. Ry.*, 40 Iowa 337 (1875); *Comstock v. Des Moines Valley R.R.*, 32 Iowa 376 (1871).

²³⁹ *McGill v. Minneapolis & St. L. Ry.*, 113 Iowa 358, 85 N.W. 620 (1901).

²⁴⁰ *Wooster v. Chicago, M. & St. P. Ry.*, 74 Iowa 593, 38 N.W. 425 (1888). The last clear chance rule is that a person who has the last reasonable opportunity to avoid damage or injury to another is liable therefor.

²⁴¹ *Brentner v. Chicago, M. & St. P. Ry.*, 58 Iowa 625, 12 N.W. 615 (1882).

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