The National Agricultural Law Center

University of Arkansas
System Division of Agriculture
NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

Iowa Agricultural Fence Law: Good Fences Make Good Neighbors

by

David S. Steward

Originally published in DRAKE LAW REVIEW
43 DRAKE L. REV. 709 (1995)

www.NationalAgLawCenter.org

IOWA AGRICULTURAL FENCE LAW: GOOD FENCES MAKE GOOD NEIGHBORS

TABLE OF CONTENTS

I. INTRODUCTION

There is no question about the immense impact agriculture has on the economic and social structure of Iowa. Farmers invest over $8 billion in Iowa's agriculture annually[1] and realize a return of over $11 billion in revenue.[2] With agriculture playing such a prominent role in Iowa's economy, it is no surprise that of the state's 36 million acres of land, over 33 million acres are devoted to agriculture production.[3] This agricultural land is divided into approximately 107,000 farms[4] and is surrounded by over an estimated 400,000 miles of fence.[5] The time and cost necessary to erect and maintain such an extensive network of fences is not a trivial matter to Iowa's farming community.[6] Therefore, laws regulating boundaries and fence disputes between farmers are of great interest not only to the farmer, but also to the Iowa attorney, legislator, and township trustee.[7]

---

1. IOWA DEP'T OF AGRIC. AND LAND STEWARDSHIP, IOWA AGRICULTURAL STATISTICS 60 (1988).

2. *Id.* at 59.

3. *Id.* at 2.

4. *Id.*

5. N. WILLIAM HINES & MARSHALL HARRIS, IOWA FARM FENCE LAW 1 n.1 (IOWA AGRIC. L. CTR., Monograph no. 4, 1964).

6. With posts and fence costing $3 per rod, the cost to surround Iowa's farms with fence is over $400,000,000. *Id.*

7. *See* IOWA CODE chs. 359A, 169B (1993).

One primary area of Iowa fence law concerns the rights and duties of landowners on adjoining property to jointly erect and maintain a partition fence.[8] Iowa Code chapter 359A provides a comprehensive statutory framework for the regulation of partition fences and any disputes concerning these fences. In theory, chapter 359A has converted the adage from Robert Frost's *Mending Wall*[9]—"Good fences make good neighbors"[10]—into a legal obligation between adjoining landowners to jointly build and repair a partition fence.

This Note provides an analysis of Iowa law concerning partition fences[11] and the duties of fence viewers to resolve conflicts.[12] Additionally, this Note provides a summary of statutory procedures, with special attention to Iowa's statutory duty.[13] This Note, however, will not discuss laws concerning interior fences, other boundary fences, or other property issues that may arise over boundary disputes.

II. HISTORY OF THE CURRENT LAW

Most of Iowa's statutory fence law was established in the original Iowa Code of 1851 and has descended intact to the present Code.[14] The common-law rule of England was that landowners had a duty to fence in their livestock and restrain them from running at large.[15] An owner of livestock was strictly liable to others for injuries or property damage caused by trespassing animals.[16] This common-law theory was brought to the United States and adopted by most of the eastern states.[17] In Iowa and other western states, however, large areas of land were needed for grazing cattle, and most state legislatures and courts required landowners to fence out animals with a lawful fence before they could collect any damages for animal trespass.[18]

Current Iowa law has followed both a fence-in theory and a conditional fence-out theory. Iowa law requires that "[a]ll animals shall be restrained by the owners thereof from running at large."[19] This fence-in requirement, however, is conditional when the trespassing animal has escaped from adjoining land separated by a "fence[] as provided by law."[20] A trespassing animal may be distrained by a landowner in order to recover damages caused by a trespass,

---

8. *Id.* § 359A.1. A partition fence is any boundary fence which serves as a division of property among adjoining landowners. Kundel Farms v. Vir-Jo Farms, Inc., 467 N.W.2d 291, 293 (Iowa Ct. App. 1991).

9. ROBERT FROST, *Mending Wall, in* THE POETRY OF ROBERT FROST 33-34 (Edward Lathem ed., 1969).

10. *Id.*

11. *See infra* part III.

12. *See infra* part IV.

13. *See infra* parts V-VI.

14. IOWA CODE ch. 359A (1993). Thirteen of chapter 359A's twenty-five sections date from the original Code of 1851. *See* IOWA CODE ch. 52 (1851).

15. Note, *The Iowa Fencing Laws*, 7 IOWA L. BULL. 176, 176-77 (1922).

16. *Id.*

17. *Id.* at 177.

18. *Id.*; *see* Wagner v. Bissell, 3 Clarke 396, 404-09 (Iowa 1856).

19. IOWA CODE § 169B.2 (1993).

20. *Id.* § 169B.3.

"unless it escaped from adjoining land in consequence of the neglect of such landowner to maintain the landowner's part of a lawful partition fence."[21] This limited fence-out requirement demonstrates the importance of understanding when a partition fence conforms to statutory requirements, which adjoining landowner is required to erect and maintain such fence, and how fence disputes can legally be settled out of court.

III. PARTITION FENCES

A. *Duty to Erect and Maintain a Partition Fence*

There is no common-law duty requiring adjoining landowners to fence their property.[22] Two statutory provisions, however, address circumstances in which erecting and maintaining partition fences are required: (1) when a written order of a fence viewer is issued,[23] or (2) when a written agreement between landowners exists.[24]

1. *Order by Fence Viewers*

The Iowa Code currently 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."[25] When one landowner requests an adjoining landowner to erect or maintain a partition fence, both landowners are under a duty to build or repair the fence without regard to the use of either owner's land.[26] When a conflict arises concerning the duties and rights of the landowners, the fence viewers, on request of one of the landowners, decide the conflict and may order one or both of the landowners to erect and maintain their assigned portions of the fence.[27] Once an order is made by the fence viewers and is recorded in the office of the county recorder of deeds, it legally binds the "makers, their heirs, and subsequent grantees."[28]

The fence viewers only have jurisdiction to decide a fence dispute when there is (1) a controversy concerning the partition fence, and (2) "as provided in

---

21. *Id.*; *see infra* text accompanying notes 90-95.

22. Jacobs v. Stover, 243 N.W.2d 642, 644 (Iowa 1976). "[The owner of animals] is not liable . . . on account of the absence of a lawful partition fence, if no portion of the fence has been assigned to him to keep in repair, either by the fence viewers or by agreement with the parties." Little v. Laubach, 168 N.W. 155, 157 (Iowa 1918).

23. IOWA CODE § 359A.4 (1993). The fence viewer is a township trustee who is empowered by statutory law to determine any controversy arising under chapter 359A concerning partition fences. *Id.* § 359A.3; *see also id.* § 359.17 (requiring township trustees to act as fence viewers and to perform other duties assigned them by law).

24. *Id.* § 359A.12.

25. *Id.* § 359A.1.

26. Sinnott v. District Court, 207 N.W. 129, 131 (Iowa 1926).

27. IOWA CODE §§ 359A.3-.4 (1993). For a more detailed discussion of the powers of the fence viewers, see *infra* text accompanying footnotes 102-132.

28. IOWA CODE § 359A.12 (1993).

section 113.1,[29] a written request."[30] Section 359A.1 does not require any particular form of request; thus, any notice or written request for apportionment and maintenance to the adjoining landowner is sufficient.[31] The Iowa Supreme Court recognized that "the written request is an essential prerequisite to the creation of the duty the fence viewers may enforce; it is essential to their jurisdiction to act at all. Without it there is nothing of which they could take jurisdiction."[32]

2. *Division by Agreement*

Section 359A.12 of the Iowa Code allows the adjoining landowners to agree in writing "upon the partition fences between their lands which shall be erected and maintained by each."[33] This agreement is effective on the acknowledgment and signatures of the landowners and on its filing and recording in the county recorder of deed's office.[34] Once recorded, the agreement, like an order of the fence viewers, is binding on the "makers, their heirs, and subsequent grantees."[35]

The plain language of section 359A.12 requires the agreements to be in writing.[36] Iowa courts, however, have held oral agreements between the owners are enforceable because the owners have the right to waive the provisions of this section.[37] The primary requirement for enforcing an oral agreement is that the adjacent landowners have actual notice of the agreement.[38] Thus, an unwritten agreement, having been performed by one party with knowledge and consent of the other, serves as actual notice and is binding on the parties as though it were reduced to writing and recorded.[39] Failure to record the agreement does not invalidate the agreement on the grounds of actual notice.[40] This agreement, as required by the statute, is only enforceable between landowners.[41]

The parties to an agreement may intend to perpetually maintain the partition fence as a covenant to run with the land.[42] Subsequent landowners are bound

---

29. Chapter 113 of the 1991 Iowa Code is currently chapter 359A of the 1993 Iowa Code.
30. Kruse v. Vail, 30 N.W.2d 159, 162 (Iowa 1947).
31. *Id.*
32. *Id.*
33. IOWA CODE § 359A.12 (1993).
34. *Id.*
35. *Id.* § 359A.13.
36. *Id.* § 359A.12.
37. Osgood v. Names, 184 N.W. 331, 332 (Iowa 1921). The court in *Osgood* found landowners may "obligate themselves by contract to maintain boundary and division fences" independent of the statutory requirements. *Id.* The fencing statute was intended to be remedial and must be liberally construed. *Id.*
38. *Id.*
39. Little v. Laubach, 168 N.W. 155, 156 (Iowa 1918).
40. *Id.*
41. De Mers v. Rohan, 102 N.W. 413, 414 (Iowa 1905). The statute outlines the methods necessary to establish a partition fence. *Id.* When a lessor is not given notice of an agreement between the lessee and an adjoining landowner, the lessor is in no way obligated by such an agreement. *Id.*
42. Sexauer v. Wilson, 113 N.W. 941, 943 (Iowa 1907). This covenant would be indicated in the deed. *Id.*

by the covenant and assume the responsibilities of the former owner.[43] The agreements, however, are not binding on later owners when there is no recorded agreement or actual notice.[44]

The division of partition fences is often done through an informal understanding between the adjacent landowners.[45] One way to make the division is to adopt the division agreed to by the former owners.[46] Another way to make the division is to use the "Right Hand Rule."[47] Under this rule, each owner maintains the length of the fence to the owner's right side as though both landowners were standing on their property facing each other over the partition fence.[48] The law does not require any particular division, and the adjacent landowners may agree to apportion the fence in any manner they desire.[49]

An order made by the fence viewers and an agreement in writing are given equal force under the law.[50] The Iowa Code is silent as to whether making one bars enforcement of the other. It can be assumed, however, that when given equal force, the establishment of one would preclude advancement of the other.[51] In support of this assumption, the Iowa Supreme Court stated in *Nichols v. Fierce*[52] that when an oral agreement meets common-law contractual requirements and has been performed for many years, the fence viewers are barred from apportioning the partition fence.[53] When a partition fence was jointly maintained for several years without a written or oral agreement, however, fence viewers were not barred from apportioning the fence.[54] This case history supports the conclusion that an agreement or a fence viewers' order made in compliance with chapter 359A will legally bar any subsequent consideration of the other.

B. *Boundaries*

A person may build a partition fence on the boundary line between the person's land and the adjacent owner's land. Thus, the fence is considered to lay partially on one side of the boundary and partially on the other side.[55] Because partition fences are often jointly owned, each owner may treat the fence as if it was wholly owned individually.[56] If the partition fence does not lay on the

---

43. *Id.* at 944.
44. Kruse v. Vail, 30 N.W.2d 159, 163 (Iowa 1947).
45. HINES & HARRIS, *supra* note 5, at 10.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. IOWA CODE § 359A.13 (1993).
51. Note, *Iowa Agricultural Fencing Law*, 34 IOWA L. REV. 330, 331 (1949).
52. Nichols v. Fierce, 212 N.W. 151 (Iowa 1927).
53. *Id.* at 152.
54. Morrison v. Kipling, 290 N.W. 59, 60 (Iowa 1940).
55. IOWA CODE § 359A.16 (1993).
56. Laughlin v. Franc, 73 N.W.2d 750, 755-56 (Iowa 1955). "The entire fence, by whomever built, being placed upon the boundary, is in a just sense common property, and it would be an intolerable conclusion to say that neither party could touch the portion not built by himself without danger of a lawsuit." Hannabalson v. Sessions, 90 N.W. 93, 95 (Iowa 1902); *see* IOWA CODE § 359A.16 (1993).

boundary line, partition fence law shall still apply to determine an owner's rights and duties.[57] A landowner cannot evade the partition fence law by intentionally building a fence a few feet from the boundary line instead of on the boundary line.[58] The landowners are obligated to maintain or contribute to the construction of a partition fence, regardless of whether the fence is on the exact boundary line.[59]

When a landowner mistakenly builds a partition fence on another person's land, the landowner may enter the other's land to remove the fence, but the landowner must pay, or offer to pay, for any soil damage caused by the removal.[60] If the parties cannot agree on the damages, the fence viewers may decide the amount of damages.[61] The fence must be removed as soon as practicable, but "not so as to expose the crops of the other party."[62]

The general rule that a partition fence be built between adjacent owners has two exceptions. First, a partition fence is not required when adjoining land owners agree to maintain a private road or lane between the properties in lieu of a fence.[63] Thus, a landowner must only maintain a fence on that owner's side of the roadway and cannot be compelled to contribute to the maintenance of the adjoining owner's fence on the other side of the roadway.[64] An agreement such as this can be effective without being in writing.[65] Second, a partition fence is not required when adjoining farms are separated by a stream or other watercourse, as it would be impractical to maintain a fence midstream.[66] The landowners still have a duty to restrain livestock, and if animals cross the stream onto the adjacent owner's land, the livestock owner is liable for any damages caused by a trespass.[67]

C. *Ownership of Partition Fence*

A partition fence is common property of the adjoining landowners.[68] This is true whether one owner built the entire fence or each owner built and maintained separate parts of the fence.[69] Neither party may remove or destroy the fence without first obtaining the consent of the other.[70] The parties may agree,

---

57. IOWA CODE § 359A.17 (1993).

58. Talbot v. Blacklege, 22 Iowa 572, 578 (1867).

59. Card v. Dale, 25 N.W. 774, 775 (Iowa 1885); McAvoy v. Saunders, 143 N.W. 548, 549 (Iowa 1913).

60. IOWA CODE § 359A.15 (1993).

61. *Id.*

62. *Id.*

63. Bills v. Belknap, 38 Iowa 225, 228 (1874); Bland v. Hixenbaugh, 39 Iowa 532, 536 (1874).

64. Bland v. Hixenbaugh, 39 Iowa at 536.

65. Bills v. Belknap, 38 Iowa at 229.

66. Foster v. Bussey, 109 N.W. 1105, 1105-06 (Iowa 1906).

67. *Id.* at 1106.

68. Laughlin v. Franc, 73 N.W.2d 750, 755-56 (Iowa 1955).

69. *Id.*

70. *Id.* at 756-57; Musch v. Burkhart, 48 N.W. 1025, 1026 (Iowa 1891). A partition fence, however, may be temporarily removed in order to repair or rebuild it. Laughlin v. Franc, 73 N.W.2d at 756.

however, that the person who built the fence is the sole owner of it, or at least owns it until the person is reimbursed by the adjoining landowner for half of the cost of the construction and maintenance of the fence.[71] If the fence is erected on the boundary and is considered the sole property of the person who built it, that person has the right to remove it as if it were wholly on that person's land.[72] This right is subject to the adjacent owner's right to compel the maintenance of the fence upon written request.[73]

If the fence is erroneously built over the boundary line of the adjacent owner's land, this is a trespass, and the adjacent owner cannot be prevented by the builder from removing the fence.[74] If the fence is claimed to be built on the boundary line, and the adjoining owner does not object to this boundary for more than ten years, this boundary may become the true boundary line under the rule of acquiescence.[75] The owners must acquiesce to the fence as a boundary, not merely a barrier, to establish the fence as the true boundary.[76] Once the boundary is established by acquiescence, all future owners who recognize the fence as the true boundary are estopped from later insisting on the original boundary line.[77]

D. *Lawful and Tight Partition Fences*

Iowa law defines partition fences as either lawful or tight.[78] If adjoining landowners pasture neither sheep nor swine, a lawful fence is all that is required.[79] If sheep or swine are pastured by one landowner, either adjoining landowner can compel the other to make a partition fence tight to restrain the sheep or swine. [80]

1. *The Lawful Fence*

A lawful fence is not required between all adjoining farms, but when required, a lawful partition fence must be strong enough to turn away cattle.[81] An adjoining landowner cannot collect damages caused by trespassing cattle unless

---

71. Laughlin v. Franc, 73 N.W.2d at 756.

72. IOWA CODE § 359A.16 (1993).

73. *Id.* § 359A.1.

74. Currier v. Jones, 96 N.W. 766, 766 (Iowa 1903).

75. Atkins v. Reagan, 60 N.W.2d 790, 791 (Iowa 1953); Stone v. Richardson, 218 N.W. 332, 334 (Iowa 1928); IOWA CODE § 650.14 (1993). The acquiescence must be by both adjoining landowners and "involves notice or knowledge of the claim of the other party." Petrus v. Chicago, Rock Island & Pac. R.R., 61 N.W.2d 439, 442 (Iowa 1953). Acquiescence is usually determined "by inference or presumption from the conduct of the parties." *Id.* Acquiescence is not the same concept as adverse possession and does not require the elements of adverse possession. *Id.*; Nichols v. Kirchner, 40 N.W.2d 13, 16 (Iowa 1949); Hughes v. Rhinehart, 180 N.W. 643, 643 (Iowa 1920).

76. Petrus v. Chicago, Rock Island & Pac. R.R., 61 N.W.2d at 442; Eggers v. Mitchem, 34 N.W.2d 603, 606 (Iowa 1948).

77. Cheshire v. McCoy, 218 N.W. 329, 331 (Iowa 1928).

78. IOWA CODE §§ 359A.18, .20 (1993).

79. *Id.* § 359A.21.

80. *Id.* at § 359A.19; Mitchell v. Graver, 139 N.W. 460, 461 (Iowa 1913).

81. Miner v. Bennett, 45 Iowa 635, 638-39 (1877).

the land was enclosed by a lawful fence defined in chapter 359A, or a fence that is considered equivalent to a lawful fence by the fence viewers or by the Department of Agriculture and Land Stewardship.[82]

2. *The Tight Fence*

Two situations create a legal duty on a landowner to erect and maintain a tight partition fence:[83] (1) When one landowner constructs a tight partition fence, the adjoining landowner must also construct a tight partition fence;[84] (2) if both adjoining landowners pasture sheep or swine, each has a duty to erect and maintain a partition fence that will restrain the animals.[85]

---

82. *See* Frazier v. Nortinus, 34 Iowa 82, 83 (1871); Herold v. Meyers, 20 Iowa 378, 379-80 (1866); Heath v. Coltenback, 5 Clarke 490, 491 (Iowa 1857); Wagner v. Bissell, 3 Clarke 396, 409 (Iowa 1856).

The statute is very specific as to what constitutes a lawful partition fence and defines it 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 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 the fence viewers consider to be equivalent to a lawful fence or which meets standards established by the department of agriculture and land stewardship by rule as equivalent to a lawful fence.

IOWA CODE § 359A.18 (1993).

83. A lawfully tight partition fence is defined as follows:

> 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 fence which the fence viewers consider to be equivalent to a tight partition fence or which meets standards established by the department of agriculture and land stewardship by rule as equivalent to a tight partition fence.

IOWA CODE § 359A.20 (1993).

84. *Id.* § 359A.19; Mitchell v. Graver, 139 N.W. 460, 461 (1913).

85. IOWA CODE § 359A.21 (1993); Mitchell v. Graver, 139 N.W. at 461.

Iowa law recognizes a hedge as a valid partition fence.[86] Thus, a hedge can be considered lawful or tight depending on whether it can restrain the necessary animals. A hedge fence must be cut to within five feet of the ground in June and September of each year unless the adjoining owners agree otherwise.[87] Fence viewers may determine the sufficiency of a hedge and may divide the cost of erecting and maintaining a hedge fence between the adjoining owners.[88] Because a partition fence is considered common property of the adjoining owners, neither owner can destroy the hedge without the other's consent, even if it has become a nuisance through lack of maintenance.[89]

E. *Distrainment of Trespassing Animals*

The purpose of requiring lawful and tight partition fences is to prevent an owner's animals from running at large.[90] Thus, any animal found trespassing on lawfully fenced property may be distrained[91] by the landowner "unless it escaped from adjoining land in consequence of the neglect of such landowner to maintain the landowner's part of a lawful partition fence."[92] If the animal entered the owner's land as a consequence of the adjoining owner's failure to maintain that owner's part of the partition fence, the animal may be distrained and the adjoining owner will be liable.[93] If both parties fail to adequately maintain the partition fence, negligence will be determined by a jury based on the facts and circumstances.[94] An owner of an animal is not subject to liability for distraint, or damage caused by trespassing animals, if a fence viewer has not assigned a partition fence or if the landowners have not agreed on a partition line.[95]

A person who distrains an animal must notify the owner within twenty-four hours "of such distraint and of the actual amount of damages and costs caused by such animals."[96] If the owner of the animal fails to pay the damages within twenty-four hours after the notice, the distrainor must contact the township trustees, and the trustees must "appear on the premises where the damages

---

86. IOWA CODE § 359A.2.

87. *Id.*

88. *Id.* § 359A.3.

89. Harndon v. Stultz, 100 N.W. 329, 330 (Iowa 1904).

90. *See* IOWA CODE § 169B.2 (1993). An owner of an animal for the purpose of distrainment is "any person in possession or entitled to the present possession thereof, or having care or charge of them, or holding the legal title to them." *Id.* § 169B.1. The term "animal" includes "horses, cattle, swine, sheep, goats, mules, and asses." *Id.*

91. To distrain an animal is to seize and hold it in order to obtain satisfaction of a claim for damages caused by the trespassing animal. *See* HINES & HARRIS, *supra* note 5, at 16-17.

92. IOWA CODE § 169B.3 (1993); Mallory v. Jurgena, 92 N.W.2d 387, 389 (Iowa 1958); Wheeler v. Woods, 219 N.W. 407, 408-09 (Iowa 1928). An owner of land for this provision is the person having title to the land, the lessee, or the occupant of such land. IOWA CODE § 169B.1 (1993).

93. IOWA CODE § 169B.4 (1993); Osgood v. Names, 184 N.W. 331, 332-33 (Iowa 1921); Little v. Laubach, 168 N.W. 155, 157 (Iowa 1918).

94. Noble v. Chase, 14 N.W. 299, 300-01 (Iowa 1882).

95. IOWA CODE § 169B.5 (1993).

96. *Id.* § 169B.11.

occurred and assess the damages."[97] The trustees must then set a time for the assessment of the damages and notify the owner of the animal.[98]

The animal's owner must compensate the landowner who distrains the animal for the costs associated with the distraint.[99] If the owner of the distrained animal fails to pay the amount due within two days after the assessment of damages, the township clerk will post notices that the animal will be sold.[100] The sale will be at the place of distraint within five to ten days after the notice postings.[101]

IV. POWERS OF FENCE VIEWERS

The fence viewers are members of the board of township trustees and are empowered by statute to determine any controversy concerning partition fences.[102] When landowners cannot agree on the construction and maintenance of a partition fence, the landowners cannot take a fence dispute to court until the fence viewers have acted in accord with the statute.[103] The fence viewers' authority is constitutional and does not deprive a person of property without due process of law.[104]

The jurisdiction of fence viewers is strictly limited to partition fences,[105] and this jurisdiction does not extend within the city limits when the city only covers part of the township.[106] Boundary line determinations are beyond the scope of the fence viewers' jurisdiction.[107] In order for the fence viewers to have jurisdiction, an actual controversy must exist concerning the partition fence,[108] and one landowner must have made a prior written request to the adjoining landowner to erect or maintain a portion of the partition fence.[109]

---

97. *Id.*
98. *Id.*
99. *Id.* § 169B.48.
100. *Id.* § 169B.15.
101. *Id.*
102. *Id.* § 359A.3; *see also id.* § 359.17. This power is exclusive to the fence viewers. Ryan v. Heller, 6 N.W.2d 112, 113 (Iowa 1942). The authority of the fence viewers, however, may be given to city or town councils when the town or city constitutes one or more civil townships. *Id.*
103. *See* Lease v. Vance, 28 Iowa 509, 511 (1870); *see also supra* text accompanying notes 22-54.
104. McKeever v. Jenks, 13 N.W. 295, 298 (Iowa 1882).
105. Bills v. Belknap, 38 Iowa 225, 228 (1874). The fence viewers do not have jurisdiction over a boundary fence which is not used as a partition fence. Farmer v. Young, 53 N.W. 279, 279-80 (Iowa 1892).
106. 20 Op. Att'y Gen. 396 (1934).
107. McAvoy v. Saunders, 143 N.W. 548, 549 (Iowa 1913). Fence viewers do not have authority to decide on a disputed boundary line. *Id.* They may only determine the obligations, rights, and duties of the parties involved. *Id.*
108. Scott v. Nesper, 188 N.W. 889, 891 (Iowa 1922). Any dispute, resistance, or disagreement concerning the erection or maintenance of a partition fence is a "controversy" sufficient to give the fence viewers jurisdiction. *Id.*
109. IOWA CODE § 359A.3 (1993); Laughlin v. Franc, 73 N.W.2d 750, 753 (Iowa 1955); Nichols v. Fierce, 212 N.W. 151, 151-52 (Iowa 1927); Sinnott v. District Court, 207 N.W. 129, 131 (Iowa 1926). This notice does not need to be in any particular form, and any written notice which

When a controversy concerns two lands in different townships, the statute provides for a special board of trustees to act as fence viewers.[110] The clerk of the township where the owner requesting the fence viewers lives appoints two trustees as fence viewers.[111] The clerk of the other township will appoint one trustee with equal power to the other two fence viewers.[112] All notices and orders of the fence viewers must be recorded in both townships and in each county involved.[113]

Once a controversy necessary to confer jurisdiction on the fence viewers exists, and one of the two adjoining owners has requested that the fence viewers become involved in the controversy, the fence viewers must, within a reasonable time, give five days notice "in writing to the opposite party or parties[] prescribing the time and place of meeting to hear and determine the matter" at issue.[114] If notice is not given to the other party, any action taken by the fence viewers is void for lack of jurisdiction.[115] At least one fence viewer must sign the notice, but it is not necessary for all the fence viewers to sign the notice.[116]

If the owner of land adjacent to a disputed partition fence is a nonresident of the county, the fence viewers' notice may be served by publication.[117] The fence viewers must publish the notice once each week for two consecutive weeks in a newspaper printed in the county where the land is situated.[118] A copy of the newspaper must be delivered to the occupant of the land or to the person in charge of it.[119]

At the time and place of the meeting designated in the notice, the fence viewers will determine the obligations, rights, and duties of the parties.[120] Their decision is made on personal inspection of the fence in controversy, although they need not inspect the fence together.[121] The fence viewers, sitting as a board, must determine the fence value.[122]

The fence viewers assign the portion of the fence each owner "shall erect, maintain, rebuild, trim or cut back, or pay for, and fix the value thereof, and prescribe the time within which the same shall be completed or paid for, and, in case of repair, may specify the kind of repairs to be made."[123] This order, as with all

---

alerts the adjoining owner of the landowner's claim is sufficient. Kruse v. Vail, 30 N.W.2d 159, 162 (Iowa 1947).

110. IOWA CODE § 359A.14 (1993).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* § 359A.3; 20 Op. Att'y Gen. 396 (1934).
115. Pickerell v. Davis, 146 N.W. 34, 36 (Iowa 1914).
116. 23 Op. Att'y Gen. 310 (1940).
117. IOWA CODE § 359A.7 (1993); *see* Scott v. Nesper, 188 N.W. 889, 892 (Iowa 1922).
118. IOWA CODE § 359A.7 (1993).
119. *Id.*
120. *Id.* § 359A.4.
121. Tubbs v. Ogden, 46 Iowa 134, 136 (1877).
122. *Id.* at 135.
123. IOWA CODE § 359A.4 (1993).

orders and decisions made by the fence viewers, must be in writing, signed by two of the trustees, and filed with the township clerk.[124]

If the landowners do not complete the duties conferred on them within thirty days of the time prescribed in the order, either party may complete the necessary fence construction or repairs and have the value of the repairs fixed by the fence viewers.[125] If the amount of the repairs and the fence viewers' fees are not paid within ten days, the amount will be collected in the form of taxes against the party in default and paid to the party who completed the construction or repair of the partition fence.[126]

If a party affected by a fence viewers' order is not satisfied with the result, the order can be appealed to the district court within twenty days.[127] An appeal bond in an amount approved by the township must be filed with the notice of appeal to perfect it, or the appeal will be dismissed.[128] The township clerk files the notice and bond with the office of the clerk of the district court, and the appeal is tried at law the same as other cases.[129] Once in district court, the appeal of the fence viewers' decision can be heard by a jury or by the court de novo.[130] If the appellant loses on appeal, judgment may be enforced against the appeal bond.[131] If the appellant is successful on appeal, the appellant is entitled to recover court costs.[132]

V. SUMMARY OF STATUTORY PROCEDURES

Compelling a landowner who does not want to contribute to the erection or maintenance of a shared partition fence can be a difficult and expensive undertaking. To enable landowners to acquire desired results under Iowa's partition fence law, a prescribed statutory procedure has been set forth, and it should be followed when a controversy arises concerning a partition fence.[133]

(1) The complaining landowner must give the adjoining landowner who refuses to build or maintain a lawful fence a written request to erect or repair the fence.[134] This notice is necessary to legally compel an adjoining landowner to

---

124. *Id.* §§ 359A.8, A.4. A fee is provided to the township clerk for recording and certifying any notice, order, or decision of the fence viewers. *Id.* § 359A.25. A copy of this record is certified to the county recorder where it is indexed in the name of each adjoining owner as grantor to the other. *Id.* § 359A.10. Unless modified by appeal, the record in the recorder's office "shall be conclusive evidence of the matters therein stated, and such record or a certified copy thereof shall be competent evidence in all courts." *Id.* § 359A.11.

125. *Id.* § 359A.6.

126. *Id.*

127. *Id.* § 359A.23.

128. IOWA R. CIV. P. 358; Hahan v. Lumpa's Estate, 109 N.W. 310, 310-11 (Iowa 1906).

129. IOWA CODE § 359A.23 (1993).

130. Smith v. Ellyson, 115 N.W. 40, 41-42 (Iowa 1908).

131. *Id.* at 42.

132. *Id.*

133. This statutory procedure is also set forth in HINES & HARRIS, *supra* note 5, at 13-14.

134. IOWA CODE § 359A.1 (1993).

erect or maintain a partition fence.[135] This notice does not need to be in any particular form; any written notice which alerts the adjoining owner of the landowner's claim is sufficient.[136]

(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."[137]

(3) Once the fence viewers' involvement has been requested, the fence viewers must, within a reasonable time, give five days written notice to the other owner prescribing the time, place, and subject of the hearing.[138]

(4) The fence viewers determine the obligations, rights, and duties of the parties involved, assign the portion of fence each owner is to erect or repair, and prescribe a time limit in which to complete the work.[139] This order must be in writing and filed with the township clerk.[140] "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."[141]

(5) "If the other owner fails to comply with the viewers' orders, the complaining owner has no direct procedure to force him to comply."[142] If the duties conferred on the other landowner are not completed within thirty days of the time prescribed in the order, "the complaining owner may proceed to construct or repair the fence himself, but he has no obligation to do so."[143] If the complaining party completes the necessary fence construction or repairs, that party must request the fence viewers to meet again and fix the value of the fence repairs.[144] The statute does not require notice to the adjoining landowner of this second meeting; however, "it would seem a safe practice to give a five-day written notice."[145]

(6) After the determination of the value of the fence repairs, the defaulting party has ten days to pay for the amount fixed plus the fence viewers' fees and costs.[146] If the defaulting party fails to make payments within ten days, the fence viewers may certify to the county auditor the full amount due.[147] The amount will be collected in the form of taxes against the defaulting party and paid to the party who completed the fence and the fence viewers for costs incurred.[148] If

---

135. Laughlin v. Franc, 73 N.W.2d 750, 753 (Iowa 1956); Sinnott v. District Court, 207 N.W. 129, 131 (Iowa 1926).
136. Kruse v. Vail, 30 N.W.2d 159, 162 (Iowa 1947).
137. HINES & HARRIS, *supra* note 5, at 13; IOWA CODE § 359A.3 (1993).
138. IOWA CODE § 359A.3 (1993).
139. *Id.* § 359A.4.
140. *Id.* §§ 359A.4, .8.
141. HINES & HARRIS, *supra* note 5, at 13.
142. *Id.*
143. *Id.*; IOWA CODE § 359A.6 (1993).
144. IOWA CODE § 359A.6 (1993).
145. HINES & HARRIS, *supra* note 5, at 14.
146. IOWA CODE § 359A.6 (1993).
147. *Id.*
148. *Id.*

either party is not satisfied with this result, the decision can be appealed to the district court, where it is tried the same as other cases.[149]

VI. THE DUTY TO ERECT AND MAINTAIN PARTITION FENCES: A JUSTIFIABLE APPLICATION OF THE STATE'S POLICE POWER?

Iowa law compels a landowner to construct a partition fence on written request of the adjoining landowner.[150] Likewise, the law requires a landowner to make a partition fence tight when the adjoining owner makes his part of the fence tight.[151] These provisions are enforceable against both parties regardless of whether both landowners have animals on the property.[152] Iowa's statute, like most state fence statutes, is justified as an exercise of the state's police power.[153] The exercise of a state's police power invokes consideration of eminent domain, due process, and equal protection concerns. The use of a state's police power must be reasonable and not arbitrary and capricious.[154] Thus, "[t]o justify the state in exercising such authority, . . . it must appear the public interest requires such interposition and that the means are reasonably necessary for accomplishing the purpose and not unduly oppressive to individuals."[155] A statute is within the scope of the state's police power if the social benefits outweigh the burden placed on individuals.[156]

Iowa's partition fence law was enacted primarily to prevent livestock from running at large and causing damage on another person's land.[157] Historically, this has served the public purpose of requiring adjoining landowners to share the cost of a partition fence regardless of land use.[158] Many provisions of the Iowa statute, however, are over a century old, and Iowa's changing social structure may cause a once valid exercise of police power to be unconstitutionally oppressive. Some partition fence statutes similar to Iowa's have been successfully challenged on the ground they are not sufficiently related to a predominantly public purpose.[159] These courts held the statutes were unconstitutional as applied

---

149. *Id.* § 359A.23.

150. *Id.* § 359A.1.

151. *Id.* § 359A.19.

152. Sinnott v. District Court, 207 N.W. 129, 131 (Iowa 1926) (stating an adjoining landowner can compel the other to contribute to the partition fence regardless of the use of land); Mitchell v. Graver, 139 N.W. 460, 461 (Iowa 1913) (stating an adjoining owner can require the other to make the fence tight even though the latter is not pasturing sheep or swine).

153. Chapter 359A of the Iowa Code is contained within Title V which contains the state's police power provisions.

154. Green v. Shama, 217 N.W.2d 547, 554 (Iowa 1974).

155. *Id.*

156. Kent v. Polk County Bd. of Supervisors, 391 N.W.2d 220, 226 (Iowa 1986).

157. *See supra* text accompanying notes 15-21.

158. *See* Sinnot v. District Court, 207 N.W. 129, 131 (Iowa 1926).

159. Sweeney v. Murphy, 334 N.Y.S.2d 239, 241-42 (N.Y. App. Div. 1972), *aff'd*, 342 N.Y.S.2d 70 (1973); Choquette v. Perrault, 569 A.2d 455, 460 (Vt. 1989). *But see* Glass v. Dryden, 248 N.E.2d 54, 55-56 (Ohio 1969) (stating benefit to adjacent housing project is presumed until the contrary is shown that the cost is in excess of the benefit conferred); Kloeppel v. Putnam, 63 N.E.2d 237, 239 (Ohio 1945) (requiring a landowner who kept no livestock but cultivated land to

to landowners who kept no livestock because the partition fence did not confer sufficient benefit to justify the burden of the duty to erect and maintain the fence.[160]

In *Sweeney v. Murphy,*[161] the court held "requiring an adjoining owner . . . who does not keep livestock, to share the cost of the fence for the benefit of [the] neighbor is not reasonably necessary to any legitimate public purpose and is oppressive" and therefore unconstitutional as applied.[162] The plaintiffs in *Sweeney* resided on 158 acres of land, kept no livestock, and only cultivated ten acres of land.[163] The defendants, however, owned the adjoining land and operated a dairy farm and grazed 110 milking cows.[164] The landowners shared a 2200-foot boundary.[165] In June 1971, fence viewers ordered the plaintiffs to repair approximately one-half of the fence on the boundary between the adjoining properties pursuant to New York law.[166] The plaintiffs refused to repair the fence and brought an action alleging the statute was unconstitutional.[167]

Relying on *Lawton v. Steele,*[168] the *Sweeney* court found that although the statute may have served a valid public purpose at the time it was enacted in 1788, it is now arbitrary and confiscatory when applied to certain real property.[169] If the statute was applied to the plaintiff's property, it would compel the plaintiff to erect and maintain a fence at the plaintiff's own expense that was neither needed nor wanted, and thus unconstitutionally deprived the plaintiff of the property.[170] Even if the statute benefited the general public, it failed constitutional scrutiny because it was oppressive and not reasonably necessary to achieve its goal.[171]

---

contribute to a partition fence and holding this was not an unconstitutional taking without compensation because the landowner derived sufficient benefits from the fence).

160. Sweeney v. Murphy, 334 N.Y.S.2d at 242; Choquette v. Perrault, 569 A.2d at 460.

161. Sweeney v. Murphy, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), *aff'd,* 342 N.Y.S.2d 70 (1973).

162. *Id.* at 242.

163. *Id.* at 240.

164. *Id.*

165. *Id.*

166. *Id.* at 241. The statute stated: "Each owner of two adjoining tracts of land, except when they otherwise agree, shall make and maintain a just and equitable portion of the division fence between such lands." N.Y. TOWN LAW § 300 (McKinney 1965), *amended by* N.Y. TOWN LAW § 300 (McKinney 1987).

167. Sweeney v. Murphy, 334 N.Y.S.2d 239, 241 (N.Y. App. Div. 1972), *aff'd* 342 N.Y.S.2d 70 (1973).

168. Lawton v. Steele, 152 U.S. 133 (1984). In *Lawton,* the Supreme Court stated that when evaluating the exercise of a state's police powers "it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals." *Id.* at 137.

169. Sweeney v. Murphy, 334 N.Y.S.2d at 241-42.

170. *Id.* at 242.

171. *Id.* Section 300 of the New York law was subsequently amended by the legislature to include the exception "that the owner of an adjoining tract of land who does not keep such animals thereon within five years of the date of the erection or repair of a division fence shall not be obligated or liable for erecting, maintaining or repairing such a division fence under this article." N.Y. TOWN LAW § 300 (McKinney 1987).

The facts of *Choquette v. Perrault*[172] are almost identical to those in *Sweeney*. The defendants owned fifty acres of land, but did not have livestock or domestic animals.[173] The plaintiffs owned a 310 acre parcel of land adjacent to the defendants' land and pastured cattle next to a division fence.[174] The fence, however, was in disrepair, and the cattle repeatedly trespassed onto the defendants' land.[175] The plaintiffs constructed an electric fence to prevent the trespassing, but that fence was later destroyed.[176] When asked to contribute to the reconstruction of a division fence, the defendants refused.[177] At the plaintiffs' request, local fence viewers assessed a portion of the cost to rebuild the fence against the defendants under Vermont law,[178] but the defendants still refused to contribute.[179] The plaintiffs built the 850 feet of fence assigned to the defendants and sued for recovery.[180]

The court in *Choquette* began its analysis by recognizing that "[a]bsent the involvement of a fundamental right or a suspect class, a legislative enactment is presumed to be constitutional . . . so long as the law's public purpose is 'paramount and the enactment reasonably related to that purpose.'"[181] The court found the Vermont fence law

> was enacted primarily to benefit landowners with livestock. . . . [Any] argument that a landowner without livestock benefits to the extent that he or she is protected by straying livestock is delusive, considering the fact that, absent the statute, the liability for trespassing livestock lies solely with the owner of the livestock.[182]

The fence law served a broad public interest in the nineteenth century; however, with changing land use patterns, this is not the case today.[183] Courts "can no longer assume that the fence law affects livestock owners almost exclusively. . . . [T]he law more and more often applies to landowners without livestock."[184] The court determined "the fence law is burdensome, arbitrary and confiscatory, and therefore cannot pass constitutional muster."[185]

---

172. Choquette v. Perrault, 569 A.2d 455 (Vt. 1989).
173. *Id.* at 456.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. VT. STAT. ANN. tit. 24, § 3802 (1975).
179. Choquette v. Perrault, 569 A.2d 455, 456 (Vt. 1989).
180. *Id.*
181. *Id.* at 458-59 (quoting Vermont Wollen Corp. v. Wackerman, 167 A.2d 533, 537 (Vt. 1961)).
182. *Id.* at 459.
183. *Id.* at 460.
184. *Id.*
185. *Id.*

The court found the statute unconstitutional under the Vermont Constitution when applied to landowners without livestock.[186] The court found a specific class of persons benefited at the expense of a few who were ensnared by a law which was not intended for them.[187] Thus, the police power as applied to the defendants does not legitimately further the statute's purpose and is no longer reasonably related to the promotion of a public purpose.[188]

Iowa's partition fence law serves the same purpose and has the same effect as the statutes deemed unconstitutional in *Sweeney* and *Choquette*. Sections 359A.1 and 359A.19 of the Iowa Code allow an owner of livestock to compel an adjoining owner who owns no animals to contribute to the construction and maintenance of a fence solely for the purpose of keeping the owner's animals from trespassing on another person's land.[189] Absent the Iowa statute, liability for trespassing animals would lie with the owner of the livestock. Under the current law, however, the landowner who owns no animals is compelled to protect himself and his land from an adjoining owner's livestock by contributing to a partition fence which he may not want or need. This fence out requirement was reasonably necessary to serve a public purpose when large acres of land were used in Iowa for grazing cattle. Today, however, land once used for grazing has been shifted to other purposes such as grain production, commercial development, and private development by citizens purchasing farm land for non-agricultural purposes. Unless Iowa fence law adapts to reflect the changing Iowa population and its demands, the law may be deemed burdensome, arbitrary, and confiscatory when applied to landowners who do not raise cattle, sheep, or swine.

VII. CONCLUSION

Iowa's fence law was written to facilitate the competing interests of an agricultural society. Today, the state's primary industry is still agriculture, and the partition fence law still serves a public interest. The cost to erect and maintain Iowa's vast network of fences, however, should be provided by the segment of the population most benefited by having the fences—the owners of livestock. A constitutional challenge has not been raised against Iowa's police power to compel a landowner to fence out another's livestock, but with the shifting land use in the state and the increasing costs to maintain such fences, it will likely be only a matter of time until such a challenge is successful.

To preserve the integrity of Iowa's fence law, the legislature should amend it to reflect a more equitable allocation of costs in the erection and maintenance of partition fences. This can be accomplished by including an exemption in sections 359A.1 and 359A.19 narrowing the application of the statute to situations in which both landowners keep animals requiring partition fences. This less

186. *Id.* Article 7 of the Vermont Constitution provides: "That government is, or ought to be instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community. . . ." VT. CONST. ch. 1, art. VII. This provision is somewhat analogous to the equal protection clause of the United States Constitution. *See* U.S. CONST. amend. XIV.

187. Choquette v. Perrault, 569 A.2d 455, 460 (Vt. 1989).

188. *Id.*

189. IOWA CODE §§ 359A.1, A.19 (1993).

restrictive alternative to the current law would promote agriculture without placing an unnecessary burden on landowners not engaged in agriculture, or who do not keep animals contemplated by the law. Until the statute is declared unconstitutional or amended, it will continue to strictly reflect Robert Frost's adage—"Good fences make good neighbors."[190]

David S. Steward

190. FROST, *supra* note 9, at 33-34.