

F I N A L R E P O R T
PARTITION FENCE LAWS SUBCOMMITTEE
OF THE
SENATE STANDING COMMITTEE ON JUDICIARY
AND THE
HOUSE STANDING COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT

December, 1978

Membership of the joint interim Subcommittee is as follows:

Senator Richard Ramsey, Co-chairperson
Representative Philip A. Davitt, Co-chairperson
Senator C. Joseph Coleman
Senator Alvin Miller
Representative John Pelton
Representative Donald H. Binneboese

The Subcommittee was authorized to hold three interim meetings for the purpose of reviewing and recommending as necessary, legislation pertaining to Iowa's partition fence law.

Specifically, the Subcommittee endeavored to examine the effectiveness of the law and the manner in which it is presently administered as follows:

1. To clearly establish who has the legal responsibility to erect, repair, build or maintain certain sections of fence along adjoining tracts of land where there is no written agreement.
2. The resolving of financial problems stemming from one party's inability or refusal to provide the finances necessary to build, erect, maintain or repair a fence.
3. Review of procedural safeguards and notice provisions to absentee, nonresidents and foreign landowners.

The interim Subcommittee held its first and second meetings on September 19 and 20 respectively. The first day of meeting involved a discussion of partition fence problems existing presently in the law, a review of a partition fence documentary film provided by Mr. Alan Teel, Iowa State Extension Services, and finally culminating with a public hearing at the farm of Mr. George Mueller, Van Meter, Iowa, for the purpose of hearing testimony from farmers, rural residents and other interests on the nature and quality of the Iowa fence law.

The second day of the interim meeting involved Subcommittee suggestions and recommendations. The Subcommittee, in addition to receiving testimony at the public hearing, was assisted by the Probate and Property Subcommittee, Iowa State Bar Association and by Mr. Shirley Webster, attorney at law, Winterset, Iowa in the discussion of legislative recommendations.

The Subcommittee requested and received an additional meeting for the purpose of reviewing proposed legislation and recommendations, which meeting was held on December 7, 1978.

The Subcommittee at its third meeting adopted and voted to recommend to the Legislative Council the proposed Subcommittee bill draft reorganizing the Iowa partition fence law, which bill is attached to and made part of this report.

The nature and general content of the proposed Subcommittee bill is as follows:

1. The bill has its origin in House File 495 as amended and passed by the House during the Second Session of the Sixty-seventh General Assembly.

2. The proposed bill repeals chapter 113 of the Code and completely reorganizes the existing law by making various technical corrections and deletions of obsolete language, and arranging the new and existing language in an orderly, logical format. With the exception of a few additions and technical corrections, the existing law remains intact.

3. Specifically, the bill creates a definition section incorporating existing definitions and adding additional new definitions to the law.

4. The bill outlines the rights, duties and responsibilities of adjoining landowners, fence viewers, the township clerk and county attorney.

5. The bill reestablishes the criteria and procedure for a defaulting landowner and the responsibility of the county in providing assistance and collecting fees to affected parties.

6. The bill clarifies and restates procedural due process safeguards pertaining to a hearing before the fence viewers, notice and return service to nonresident, resident and absentee landowners.

The bill establishes criteria for effectuating a statutory right hand rule by outlining the landowner's responsibility for the portion of a partition fence to the right of center point when standing on the owner's land facing the adjoining owner's land. The statutory right hand rule shall bind the adjoining landowners, their heirs, successors, and subsequent grantees three years after the effective date of the Act, unless a partition fence agreement is recorded under the Act.

PROPOSED BILL

By JOINT INTERIM SUBCOMMITTEE
ON PARTITION FENCE LAWS

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

1 An Act relating to the rights and responsibilities of land-
2 owners concerning partition fences.

3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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1 a. Twenty-six inches of substantial woven wire on the
2 bottom, with three strands of barbed wire not less than thirty-
3 six barbs with two points to the rod on top, the top wire
4 to be not less than forty-eight inches, nor more than fifty-
5 four inches high.

6 b. Good substantial woven wire not less than forty-eight
7 inches nor more than fifty-four inches high with one barbed
8 wire of not less than thirty-six barbs of at least two points
9 to the rod, not more than four inches above the woven wire.

10 c. Any other kind of partition fence which, in the opinion
11 of the fence viewers, is equivalent to those described in
12 this subsection.

13 Sec. 3. NEW SECTION. PARTITION FENCES--RESPONSIBILITY.

14 1. A landowner, upon the demand of an adjoining landowner,
15 shall erect, maintain, rebuild or repair his or her portion
16 of a partition fence as a lawful fence as provided in this
17 Act.

18 2. A landowner may erect, maintain, rebuild, or repair
19 his or her portion of a partition fence as a tight fence,
20 and upon the landowner's demand, an adjoining landowner shall
21 also erect, maintain, rebuild or repair his or her portion
22 of the partition fence as a tight fence as provided in this
23 chapter.

24 A landowner shall erect, maintain, rebuild or repair his
25 or her portion of a partition fence as a tight fence if that
26 portion of the partition fence abutts land used for pasturing
27 sheep or swine.

28 3. Adjoining landowners may agree upon the portion of
29 a partition fence between their land to be erected, maintained,
30 rebuilt, or repaired as a lawful or tight fence by each and
31 may record their agreement in the county or counties in which
32 the adjoining tracts of land are situated. The agreement
33 to be recorded must describe the land and the responsibilities
34 of the landowners in relation to the partition fence and must
35 be signed and acknowledged by the landowners.

1 4. A recorded agreement between adjoining landowners,
2 or an order of the fence viewers, is amendable or revocable
3 upon the written agreement of all affected landowners and
4 the recording of the agreement in the office of the recorder
5 of the county or counties in which the adjoining tracts of
6 land are situated.

7 5. A landowner's responsibility for a partition fence
8 pursuant to subsection one (1) or two (2) of this section
9 shall be for the portion of the partition fence to the right
10 of center point when standing on the owner's land facing the
11 adjoining owner's land if:

12 a. A partition fence agreement or order of the fence
13 viewers has not been recorded pursuant to subsection three
14 (3) of this section and the fence viewers have not been
15 requested within three years from the effective date of this
16 Act to determine a controversy pursuant to subsection one
17 (1) of section nine (9) of this Act; or

18 b. A partition fence agreement or order of the fence
19 viewers has been revoked pursuant to subsection four (4) of
20 this section and no other recorded partition fence agreement
21 has been substituted.

22 6. Partition fence responsibility under subsection five
23 (5) of this section attaches three years after the effective
24 date of this Act and binds the adjoining landowners, their
25 heirs, successors, and subsequent grantees, unless a partition
26 fence agreement is recorded pursuant to subsection three (3)
27 of this section.

28 Sec. 4. NEW SECTION. PARTITION FENCE BUILT ON ADJOINING
29 OWNER'S LAND. A landowner who places a partition fence or
30 structural improvement relating to a partition fence on the
31 land of another, may upon reasonable notice, enter upon the
32 land of the other and remove the fence or other structural
33 improvement, but is liable for damages resulting from the
34 placement or the removal of the partition fence or structural
35 improvement. Removal under this section shall be made as

1 soon as practicable after notice provided that the removal
2 does not expose the crops of the other owner. Damages which
3 cannot be agreed to by the landowners shall be determined
4 by the fence viewers consistent with this Act.

5 Sec. 5. NEW SECTION. POSITIONING OF PARTITION FENCE.

6 A landowner may build a partition fence directly on the
7 division line between adjoining tracts of land so that it
8 is partly on one side and partly on the other side or wholly
9 on one side of the division line. The provisions of this
10 Act and the rights and duties of a landowner apply equally
11 to a partition fence built directly on the division line or
12 wholly on one side of the division line.

13 II. LANDOWNERS' RESPONSIBILITY ENFORCED BY FENCE VIEWERS

14 Sec. 6. NEW SECTION. FENCE VIEWERS--TOWNSHIP TRUSTEES.

15 In accordance with section three hundred fifty-nine point
16 seventeen (359.17) of the Code and pursuant to the provisions
17 of this Act the township trustees shall serve as fence viewers
18 and shall determine and resolve controversies regarding
19 partition fences.

20 Sec. 7. NEW SECTION. LAND IN DIFFERENT TOWNSHIPS. When
21 adjoining lands are situated in different townships the clerk
22 of the township of the landowner making the application shall
23 select two trustees of the landowner's township as fence
24 viewers, and the clerk of the other township shall select
25 one trustee from his or her township as a fence viewer, all
26 of whom shall possess the powers given to fence viewers
27 pursuant to this Act.

28 Sec. 8. NEW SECTION. FENCE VIEWERS' CONFLICT OF INTEREST.

29 For purposes of this Act, the provisions of section three
30 hundred fifty-nine point seventeen (359.17) of the Code do
31 not apply to a township trustee who has an interest in a tract
32 of land where the erection, maintenance, rebuilding or
33 repairing of a partition fence as a lawful or tight fence
34 will result in an advantage or detriment to the trustee.

35 Instead the chairperson of the board of supervisors shall

1 designate a disinterested member of the board or another
2 disinterested person to act as a fence viewer with all the
3 rights and powers of fence viewers provided in this Act.

4 Sec. 9. NEW SECTION. POWERS AND DUTIES OF THE FENCE
5 VIEWERS. The fence viewers shall determine controversies
6 regarding partition fences when adjoining landowners have
7 not agreed or recorded an agreement as follows:

8 1. Upon the written request of a landowner stating that
9 a controversy exists pertaining to the erection, maintenance,
10 rebuilding or repair of a partition fence between the owner's
11 land and adjoining land, the fence viewers shall within five
12 days from the receipt of the written request establish a date
13 for a hearing.

14 2. The fence viewers shall give notice to each owner with
15 an interest in the land divided by the partition fence at
16 least twenty days prior to the hearing. The notice shall
17 apprise the landowners of the nature of the controversy and
18 prescribe the time and place of the hearing in order to afford
19 the landowners an opportunity to present their contentions
20 and objections. The hearing may be held before the expiration
21 of the twenty-day notice period if all interested landowners
22 waive notice and agree to an earlier hearing.

23 3. The fence viewers shall issue a final order within
24 five days from the date of the hearing, unless the hearing
25 is continued for good cause, in which case the fence viewers
26 shall issue a final order within five days of the continuance
27 date and within thirty days from the original date of the
28 hearing.

29 4. The fence viewers shall consider maintenance costs
30 as well as construction costs when determining the
31 responsibility of the landowners.

32 5. Consistent with the provisions of this Act, the fence
33 viewers shall meet at the time and place prescribed in the
34 notice and determine by written order the obligations and
35 rights of the landowners, and assign to each landowner the

1 portion of the partition fence which the landowner shall
2 erect, maintain, rebuild or repair as a lawful or tight fence
3 or pay for, and shall prescribe the time within which the
4 work shall be completed or paid for, and may fix the value
5 or specify the kind of repairs to be made.

6 6. An order of the fence viewers shall:

7 a. Describe the land subject to the order.

8 b. Outline the responsibilities of the landowners.

9 c. Be signed by at least two fence viewers and recorded
10 as provided in subsection one (1) of section thirteen (13)
11 of this Act.

12 d. Be acknowledged by the landowners.

13 Sec. 10. NEW SECTION. PARTITION FENCE COSTS. If a land-
14 owner fails to appear at a fence viewers' hearing or to sub-
15 stantially comply with an order of the fence viewers, the
16 fence viewers shall contract to have that portion of the
17 partition fence which does not substantially comply with the
18 fence viewers' order erected, maintained, rebuilt or repaired
19 immediately. The fence viewers shall submit the contract
20 costs to the board of supervisors from the county of the
21 noncomplying landowner and the board of supervisors shall
22 pay the contract costs, fees, and other costs from the general
23 fund of the county. If the general fund of the county is
24 insufficient to pay all contract costs, fees, and other costs
25 the board of supervisors may purchase warrants at a reasonable
26 rate of interest to finance extraordinary costs of the fence
27 erection, maintenance, rebuilding or repair. The general
28 fund of the county shall be reimbursed as from a defaulting
29 landowner pursuant to section eleven (11) of this Act.

30 Sec. 11. NEW SECTION. DEFAULT--COSTS AND FEES COLLECTED
31 AS TAXES.

32 1. A landowner who has failed to erect, maintain, rebuild
33 or repair a partition fence, as required by the fence viewers,
34 within thirty days from the date of the order of the fence
35 viewers is in default.

1 shall record with the appropriate deeds or index in the name
2 of each adjoining landowner as grantor.

3 2. The county recorder may charge ten cents for each one
4 hundred words entered in the record or in a certified copy
5 of a document recorded pursuant to this Act, and twenty-five
6 cents additional for the certificate.

7 3. The clerk of the district court shall prepare and make
8 available forms for partition fence agreements and fence
9 viewers' orders.

10 4. An order or other document issued by the fence viewers,
11 or an agreement between adjoining landowners which is re-
12 corded in the office of the appropriate county recorder is
13 prima facie evidence of the stated agreement or order, and
14 binds the makers, their heirs, and subsequent grantees
15 according to its terms. The record or a certified copy of
16 it is competent evidence in a court.

17 IV. DUE PROCESS--NOTICE AND APPEAL.

18 Sec. 14. NEW SECTION. SERVICE OF NOTICE--RETURN OF NOTICE.

19 1. Notice of a hearing of the fence viewers, or notice
20 of default to a resident or nonresident landowner of this
21 state shall be served as provided in rule fifty-six point
22 one (56.1) or fifty-six point two (56.2) of the rules of civil
23 procedure and service shall be completed within the time
24 period established in subsection two (2) of section nine (9)
25 of this Act.

26 2. Notice to a tenant of affected land shall be served
27 by personal service and service shall be completed within
28 the time period established in subsection two (2) of section
29 nine (9) of this Act.

30 3. Return of service shall be made as provided in rule
31 fifty-nine (59) of the rules of civil procedure.

32 Sec. 15. NEW SECTION. APPEAL. A landowner affected by
33 an order of the fence viewers may appeal to the district court
34 by filing with the clerk of court a notice of appeal within
35 twenty days after the issuance of the order appealed from

1 and by filing an appeal bond in an amount approved by the
2 county recorder. The county recorder upon request shall file
3 a certified copy of the fence viewers' order in the office
4 of the clerk of the district court. The clerk shall docket
5 the case, entitling the applicant as plaintiff, and it shall
6 stand for trial as an action in equity.

7 Sec. 16. NEW SECTION. CERTIFICATION OF DECREE. Upon
8 the final determination of an appeal the clerk of the district
9 court shall certify to the county recorder in the county or
10 counties in which the adjoining tracts of land are situated
11 the fact that a judgment has been entered upon the appeal,
12 with the book and page of the judgment, and the county recorder
13 shall record a notation that a judgement on appeal has been
14 entered and may be found in the office of the clerk of the
15 district court, in the book and page designated in the
16 certificate.

17 Sec. 17. This Act is effective January first following
18 its enactment.

19 EXPLANATION

20 This bill repeals chapter 113 of the Code relating to Iowa
21 partition fence law and completely rewrites and provides
22 various technical corrections to existing sections in order
23 to provide a logical and orderly arrangement and approach
24 to the subject matter of the chapter. A definitional section
25 is added.

26 The bill provides that landowners shall, upon the demand
27 of an adjoining landowner, erect, maintain, rebuild or repair
28 a partition fence as a lawful or tight fence as provided by
29 the bill. The owners of adjoining tracts of land may agree
30 upon the portion of partition fence between their land to
31 be erected, maintained, rebuilt, or repaired by each and may
32 record the agreement in the county or counties in which the
33 land is situated. A recorded agreement between adjoining
34 landowners or an order of the fence viewers is amendable or
35 revocable upon the written agreement of all affected owners

1 and the recording of the agreement in the office of the
2 appropriate county recorder.

3 Subsection 5 of section 3 of the bill provides a mandatory,
4 statutory right-hand division of fence responsibility upon
5 a conveyance of land where a recorded agreement or order of
6 the fence viewers is not currently effective or where the
7 fence viewers have not been requested to determine a partition
8 fence controversy. Subsection 5 further provides that upon
9 three years after the effective date of this Act, if a recorded
10 agreement or order of the fence viewers has not been requested
11 to determine a partition fence controversy, the statutory
12 right-hand division of responsibility shall be in force.

13 Both subsections establish the customary right-hand rule
14 as statutory law and change the present case law recognition
15 of provable oral agreements. Under the change a recorded
16 agreement, fence viewers' order, or the statutory right-hand
17 rule would supersede an oral agreement. The statutory division
18 binds the adjoining landowners, their heirs, and subsequent
19 grantees. The statutory division can be superseded under
20 subsection 3 of section 3 by the recording of a voluntary
21 agreement between all affected landowners. The statutory
22 division may be amended or revoked by the fence viewers under
23 section 9 where an undue hardship or injustice is created
24 or may arise.

25 If an agreement cannot be reached the township trustees
26 acting as fence viewers may, upon request and upon giving
27 proper notice to the appropriate persons, determine the
28 responsibilities of landowners to erect and maintain lawful
29 or tight fences. The fence viewers' power to overturn a
30 recorded agreement, a prior order of the fence viewers, or
31 a statutory right-hand division is limited to the occurrence,
32 after the recording or division, of a material change of
33 circumstance resulting in undue hardship.

34 A township trustee who has a conflict of interest relating
35 to a tract of land where the erection and maintenance of a

1 partition fence is the issue is prohibited from performing
2 the duty of fence viewer. The fence viewers' orders and other
3 documents shall also be recorded and filed in the office of
4 the appropriate county recorder.

5 The county attorney shall at the request of the fence
6 viewers, advise and represent the fence viewers in all mat-
7 ters and controversies pertaining to partition fences, and
8 shall sign and keep a record of orders issued by the fence
9 viewers.

10 Notice under the bill pertaining to hearings and default
11 shall be conducted in accordance with rule 56.1 or 56.2 of
12 the rules of civil procedure. The bill would become law on
13 January first following its enactment.

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