

In an inverse condemnation action, by the owner of a farm, to recover damages for injuries allegedly caused by installation of a culvert and landfill for road improvement, claimed to have disrupted the drainage and caused flooding or water-soaking of part of the land, credible evidence (albeit disputed), supported the trial court's findings which supported the conclusion that there was no occupying of the lands by the town without having the right to do so. *Novak v. Agenda*, 44 W (2d) 644, 172 NW (2d) 38.

Neither the county, town nor state is liable for damages resulting from faulty drainage of surface water, where a road was reconstructed by the state. 29 Atty. Gen. 378.

Rights in cases of flood damage. *O'Brien*, 1963 WLR 649.

88.88 History: 1963 c. 572; Stats. 1963 s. 88.88.

Legislative Council Note, 1963: Consolidates and restates s. 88.39 and part of s. 88.40. [Bill 1-A]

88.89 History: 1963 c. 572; Stats. 1963 s. 88.89.

Legislative Council Note, 1963: This section restates s. 89.65. [Bill 1-A]

89.65, Stats. 1927, requiring railway companies to enlarge natural waterways obstructed by culverts, merely declares the common-law rule. *Lemonweir River D. Dist. v. Chicago, M., St. P. & P. R. Co.* 199 W 46, 225 NW 132.

The duty of counties and towns to reconstruct bridges over natural watercourses where the bridges have become too small to accommodate the increased flow resulting from artificial drainage is discussed in 9 Atty. Gen. 268.

88.90 History: 1963 c. 572; Stats. 1963 s. 88.90.

Legislative Council Note, 1963: Restates s. 88.41. [Bill 1-A]

88.41, Stats. 1937, does not apply to a watercourse which drains surface waters only, notwithstanding it formerly drained spring water, such watercourse not being a "natural watercourse" within the meaning of the statute. 26 Atty. Gen. 344.

88.91 History: 1963 c. 572; Stats. 1963 s. 88.91.

Legislative Council Note, 1963: Consolidates and restates s. 89.69 and most of s. 88.32. Part of s. 88.32 is covered by the general statute on criminal damage. [Bill 1-A]

88.92 History: 1963 c. 572; Stats. 1963 s. 88.92.

Legislative Council Note, 1963: Restates s. 89.42, except that a fine of not more than \$50 has been substituted for the \$5 to \$25 fine of the present section. [Bill 1-A]

88.93 History: 1963 c. 572; Stats. 1963 s. 88.93.

Legislative Council Note, 1963: This section restates s. 89.64 with minor clarifications. [Bill 1-A]

88.94 History: 1963 c. 572; Stats. 1963 s. 88.94.

Legislative Council Note, 1963: This section revises and restates s. 88.42. One change results from the fact that the petition is to go to the drainage board if there is one in the county; the present section provides for petitions only to the town board. Because of the ambiguity of present s. 88.42 which results from its cross reference to s. 89.50, it is difficult to state what other substantive changes, if any, result from the revision. The new section, however, makes clear that lands of others are not to be assessed for costs even though benefited by the drain. Benefits to other lands are to be assessed solely for the purpose of using them to offset damages which may be caused to lands of others by the construction of the drain. This may be a change in the law. [Bill 1-A]

CHAPTER 90.

Fences.

90.01 History: R. S. 1858 c. 17 s. 20; 1872 c. 41; 1875 c. 285; R. S. 1878 s. 1389; 1895 c. 14; Stats. 1898 s. 1389; 1923 c. 204 s. 1a; Stats. 1923 s. 90.01.

90.02 History: 1905 c. 374 s. 1; Supl. 1906 s. 1390a; 1907 c. 91; 1923 c. 204 s. 4; 1923 c. 276 s. 1, 3; 1923 c. 449 s. 35; Stats. 1923 s. 90.02; 1951 c. 110; 1963 c. 286.

90.03 History: R. S. 1849 c. 14 s. 2; R. S. 1858 c. 17 s. 2, 9; R. S. 1878 s. 1391; 1880 c. 138; 1880 c. 307; Ann. Stats. 1889 s. 1391; Stats. 1898 s. 1391; 1915 c. 618; 1923 c. 204 s. 5; Stats. 1923 s. 90.03; 1935 c. 145.

A division fence is a part of the realty, and an answer setting up title thereto raises the question of title to land. *Murray v. Van Derlyn*, 24 W 67.

Where both parties are under obligation to keep a partition fence in repair one cannot charge the other with negligence for the failure to do so. *Pitzer v. Shinnick*, 41 W 676.

Lawful partition fences mean line fences complying with the requirements of the statute, and it is immaterial whether or not they have been divided. *Taylor v. Young*, 61 W 314, 21 NW 488.

One owner in common of a line fence may sue in equity to prevent the opposite owner from removing the fence. *Hoff v. Olson*, 101 W 118, 76 NW 1121.

Compliance with secs. 1391 and 1395, Stats. 1898, is a condition precedent to an action for damages for trespass by cattle. *Walls v. Cunningham*, 123 W 346, 101 NW 696.

A tenant who fails to maintain a partition fence is within the term "owners." *Peterson v. Johnson*, 132 W 280, 111 NW 659.

See note to 172.01, citing *Reuter v. Swarthout*, 182 W 453, 196 NW 847.

An owner of land is relieved from maintaining a partition fence where he conveys to a county for highway purposes a parcel lying parallel to and adjoining said partition fence. 20 Atty. Gen. 128.

The provisions of 90.03, Stats. 1931, are not applicable when land is held in trust for the state by the state historical society. 21 Atty. Gen. 934.

A county cannot be required to maintain a line fence. 38 Atty. Gen. 358.

A county owning tax delinquent land is not required to share the cost of maintaining partition fences adjacent to such land. 43 Atty. Gen. 67.

90.035 History: 1963 c. 200; Stats. 1963 s. 90.035.

Sec. 90.035, Stats. 1965, does not apply to highway rights of way. 55 Atty. Gen. 177.

90.04 History: R. S. 1849 c. 14 s. 1, 2; R. S. 1858 c. 17 s. 1, 2, 9; 1861 c. 133 s. 1; R. S. 1878 s. 1390, 1391; 1880 c. 107, 138, 158, 307; 1881 c. 119; 1882 c. 201; 1889 c. 278; Ann. Stats. 1889 s. 1390, 1390a, 1391; Stats. 1898 s. 1390, 1391; 1915 c. 618; 1923 c. 204 s. 6; Stats. 1923 s. 90.04.

If adjoining landowners maintain and keep in repair a lawful partition fence, they may recover for trespasses by the animals of each other over or through such fences. For building and maintaining such a fence no agreement in writing is required; nor is it required for maintaining and keeping in repair such fence "in equal shares." Taylor v. Young, 61 W 314, 21 NW 488.

In order to maintain trespass for the incursion of a neighbor's cattle a plaintiff is required to maintain a proper partition fence; and it is immaterial whether the proceedings of fence viewers to establish such a fence were taken according to the statute, or whether the blame for failure to have the fence completed should be placed on the plaintiff or defendant or both. Sec. 1391, Stats. 1919, applies to such trespasses only as are occasioned by the natural propensity of the animals themselves, and not to intentional acts of the owner or keeper, whereby the trespass is occasioned. As to such wilful trespass the common law rule of absolute liability is still in force. To constitute such wilful trespass there must be more than a mere turning of cattle loose from the owner's barnyard onto his own fields, even if he has reason to believe that they will wander into the unfenced field of a neighbor. Schudlach v. Danner, 173 W 513, 181 NW 727.

90.05 History: R. S. 1849 c. 14 s. 7, 18; R. S. 1858 c. 17 s. 7, 18; R. S. 1878 s. 1392; 1880 c. 138 s. 2; Ann. Stats. 1889 s. 1392; Stats. 1898 s. 1392; 1915 c. 618; 1923 c. 204 s. 1a; Stats. 1923 s. 90.05.

A parol agreement for apportionment of a division fence may be good between the parties, but will not bind grantees or lessees who have not recognized or acted upon it. Pitzner v. Shinnick, 41 W 676.

In the absence of proof of legal division of a line fence the presumption is that it is the common property of adjoining owners. Sayles v. Bemis, 57 W 315, 15 NW 432.

90.06 History: 1883 c. 202; Ann. Stats. 1889 s. 1392a; Stats. 1898 s. 1392a; 1923 c. 204 s. 1a; Stats. 1923 s. 90.06; 1941 c. 26.

A line fence cannot lawfully be removed by either party except as provided by sec. 1400, R. S. 1878. Sayles v. Bemis, 57 W 315, 15 NW 432.

90.07 History: R. S. 1849 c. 14 s. 6, 12, 13;

R. S. 1858 c. 17 s. 5, 6, 12, 13; R. S. 1878 s. 1393; Stats. 1898 s. 1393; 1915 c. 618; 1919 c. 205; 1923 c. 204 s. 1a, 3; 1923 c. 303; 1923 c. 449 s. 37; Stats. 1923 s. 90.07; 1957 c. 112; 1963 c. 289.

The jurisdiction conferred upon fence viewers being in derogation of the common law, their determinations can embrace no matters other than are confided to them by statute. Butler v. Barlow, 2 W 10.

90.08 History: R. S. 1849 c. 14 s. 4; R. S. 1858 c. 17 s. 17; R. S. 1878 s. 1394; Stats. 1898 s. 1394; 1923 c. 204 s. 1a; Stats. 1923 s. 90.08.

90.09 History: R. S. 1858 c. 17 s. 10, 11; 1872 c. 57; R. S. 1878 s. 1395; Stats. 1898 s. 1395; 1915 c. 618; 1923 c. 204 s. 1a, 3; Stats. 1923 s. 90.09.

90.10 History: R. S. 1849 c. 14 s. 3; R. S. 1858 c. 17 s. 3; R. S. 1878 s. 1396; Stats. 1898 s. 1396; 1915 c. 618; 1923 c. 204 s. 1a, 3; Stats. 1923 s. 90.10.

90.11 History: R. S. 1858 c. 17 s. 4; R. S. 1878 s. 1397; Stats. 1898 s. 1397; 1915 c. 618; 1923 c. 204 s. 1a, 3; Stats. 1923 s. 90.11.

Sec. 1397, R. S. 1878, is highly penal and must be strictly complied with. A certificate which merely states the value of the rebuilding is a gross and material departure from the statute, and is void on its face. Voelz v. Breitfield, 68 W 491, 32 NW 757.

90.12 History: R. S. 1849 c. 14 s. 8; R. S. 1858 c. 17 s. 8; R. S. 1878 s. 1398; Stats. 1898 s. 1398; 1923 c. 204 s. 1a; Stats. 1923 s. 90.12.

90.13 History: R. S. 1849 c. 14 s. 9, 15; R. S. 1858 c. 17 s. 15; R. S. 1878 s. 1399; Stats. 1898 s. 1399; 1923 c. 204 s. 1a, 3; Stats. 1923 s. 90.13.

90.14 History: R. S. 1849 c. 14 s. 16; R. S. 1858 c. 17 s. 16; R. S. 1878 s. 1401; Stats. 1898 s. 1401; 1923 c. 204 s. 1a; Stats. 1923 s. 90.14.

90.15 History: R. S. 1849 c. 14 s. 21, 22; R. S. 1858 c. 17 s. 21, 22; R. S. 1878 s. 1402; 1893 c. 155; Stats. 1898 s. 1402; 1923 c. 204 s. 7; 1923 c. 276 s. 2; 1923 c. 449 s. 35; Stats. 1923 s. 90.15; 1949 c. 162; 1961 c. 76.

90.16 History: R. S. 1878 s. 1403; Stats. 1898 s. 1403; 1923 c. 204 s. 1a; Stats. 1923 s. 90.16.

CHAPTER 92.

Soil and Water Conservation.

92.01 History: 1937 c. 341; Stats. 1937 s. 92.01; 1961 c. 40.

92.02 History: 1937 c. 341; Stats. 1937 s. 92.02; 1955 c. 334.

92.03 History: 1937 c. 341; Stats. 1937 s. 92.03; 1939 c. 323, 532; 1957 c. 672; 1961 c. 40; 1965 c. 252; 1969 c. 276.

92.04 History: 1937 c. 341; Stats. 1937 s. 92.04; 1939 c. 323; 1943 c. 303; 1949 c. 619; 1955 c. 10, 334; 1957 c. 158; 1961 c. 40; 1963 c. 476, 525; 1965 c. 163; 1967 c. 193; 1969 c. 276 ss. 352, 353, 603 (2), (7).