

TITLE XV.

FENCES.

CHAPTER 1.

FENCES.

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Rev. 387.

An Act regulating fences.

Passed January 23, 1799.

What fences  
adjudged to  
be lawful.

1. BE IT ENACTED *by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same,* That all fences, consisting of posts and rails, timber, boards, brick or stone walls, shall be esteemed lawful, if four feet and two inches high; and all other fences shall be lawful if four feet and six inches high, measuring from the level or surface of the earth, and close, strong and sufficient to prevent horses and neat cattle from going through or under the same; and all fences, set in the line of partition between persons, either of whom improve their adjoining lands, shall be so close, strong and sufficient, as to prevent sheep from going through or under the same; and all ditches and drains made in or through salt marshes and meadows, for fencing and draining the same, being five feet wide and three feet deep, shall also be esteemed and adjudged lawful fences; and all ditches and drains made in or through other meadows, being nine feet wide at the surface of the meadow, four feet and a half wide at bottom, and three feet deep, and lying on a mud or miry bottom, shall likewise be esteemed and adjudged lawful fences; and all brooks, rivers, ponds, creeks, and hedges, or other matter or thing equivalent to any such fence as aforesaid, may be adjudged lawful fences, at the discretion of those who may be called to view the same, as by this act is prescribed. And all such beasts, as shall creep through, get over or break down any such fence, may be impounded, and the owner thereof shall be obliged to pay and satisfy all damages occasioned thereby, in manner and form as by this act is directed.

Beasts creeping through or breaking over such fences may be impounded, and owner to pay damages.

2. *And be it enacted*, That where the lands, marshes or meadows of any two or more persons shall join each other, each of them shall make or amend and maintain a just proportion of the division or partition fence between them, except such persons as shall choose to let their adjoining lands lie vacant and open; and if any person shall, after due notice, neglect or refuse to make or amend and maintain his or her part or proportion of such fence, then the other party may make or amend and maintain the same wholly, and shall be entitled to receive one half of the expenses of the party so neglecting or refusing, as the same shall be appraised and certified in writing, by any two of the township committee where the lands lie, residing nearest the premises, and being disinterested and indifferent between the parties, together with the legal fees of such committee for their services, as the same shall also be ascertained in writing; and on nonpayment, by the party delinquent as aforesaid, of the sum so found, and fees certified to be due, it shall and may be lawful for the other party to recover the same, by action of debt, with costs of suit, in any court where the same may be cognizable.

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How division fences shall be made and repaired.

3. *And be it enacted*, That, to avoid the difficulty that may arise touching the placing of any partition fence, if the parties agree upon the place themselves, it shall and may be lawful for the person proposing to make the fence, to apply to any two of the township committee as aforesaid, residing nearest the premises, and being disinterested and indifferent between the parties, who, on hearing the allegations and proofs of the parties, shall fix and appoint (by writing under their hands, to be delivered to each of the parties) the place where such fence is to be made; and when made in the place so appointed, (if the other party shall have neglected or refused to make his just part or proportion thereof) it shall be sufficient to entitle the party so making the same, to recover such part or proportion of the charges thereof as aforesaid, although it may not happen to be exactly in the division line between the said parties; *provided always*, that the place so appointed for making the said fence shall not be construed to exclude or deprive any or either of the parties of any lawful claim to a greater quantity of land; but such person or persons may maintain his, her or their action for the same, as though such determination of the committee or partition fence had never been made.

If the parties cannot agree on the place for the partition fence, two of the township committee shall fix the same;

but the place so fixed upon shall not affect the claim of either party.

4. *And be it enacted*, That the place where any partition fence is or shall be made, shall be equally divided, regard being had to the quantity of fence necessary, and other conveniences of fencing, and each party shall take an equal share of such fence to make or amend and maintain, so that it may be known which part thereof

Partition fences shall be equally divided, made, and maintained by the parties.

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is his own; and if the parties cannot agree in making such division, then any two of the township committee as aforesaid, residing nearest the premises, and being disinterested and indifferent between the parties, shall, on the application of either party, in the presence of the parties, (if they will be present) make such division, and determine the part or share of such fence, which each party is to make or amend and maintain; which determination, being delivered to each of the parties in writing, shall be binding upon such parties and the succeeding owners or occupiers of the same lands.

If lands of different occupants be bounded upon, or divided by a pond or brook, how the partition fence shall be fixed, made, and maintained.

5. *And be it enacted*, That when lands, belonging to, or occupied by different persons, and subject to be fenced, are bounded upon or divided from each other, by any creek, brook, stream, pond or run of water, not navigable for boats or flats, and which of itself is not a sufficient fence, and the owner or possessor of the land on one side shall refuse to join with the owner or possessor of the land on the other side, in making a partition fence on the one side or the other, or cannot agree respecting the same, then any or either of such owners or possessors may apply to any two of the township committee as aforesaid, residing nearest the premises, and being disinterested and indifferent between the parties, and if the said committee, on examination, shall be of opinion that such creek, brook, stream, pond or run of water, does not answer the purpose of a sufficient fence, and that it is impracticable or inconvenient, without unreasonable expense, for such partition fence to be made in the middle, or other part of the water, being the true division line between the parties, they, the said committee, in the presence of the parties, (if they will be present) shall determine, fix and ascertain how or on which side thereof the fence shall be set up and maintained, or whether partly on the one side, and partly on the other side of such water, and the part or share of the fence which each person shall in such case make and maintain, as to them shall appear just and reasonable, and reduce their determination to writing, delivering a part thereof to each of the parties; and if either of the said parties shall refuse or neglect to make up and maintain the part of the fence to such party belonging or assigned, according to the determination of the said committee in writing as aforesaid, the same may be done and performed as in the second section of this act is provided; and the party delinquent shall be liable and subject to such recovery against him as in the said section is expressed and mentioned; *provided always*, that if lands, belonging to different persons, are bounded on the division line between two townships, then and in that case one person shall be taken from the township committee of each of the said townships, to determine the place where such fence shall be set up and maintained, and the

part or share thereof, which each person shall in such case make and maintain.

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6. *And be it enacted*, That when any partition fence is or shall be made between any two persons, as by this act is directed, if either of them shall think proper to give up his improvement, and leave the same open and common, such person shall not take up or remove the said fence so made between them, without giving twelve months notice in writing to the person or persons in possession of the lands adjoining thereto; and if such person shall remove such fence, without giving such notice, or before the expiration of the said year, then and in every such case, he shall be liable to make good all damages which the party injured by such removal shall sustain thereby, to be recovered, with costs of suit, in any court having cognizance of the same.

Partition fences not to be removed without giving twelve months notice to the other party.

7. *Provided always, and be it further enacted*, That nothing in this act contained, shall be construed to make void any written agreement between neighbours or others, respecting the making or maintaining partition fences.

But agreements respecting fences not to be affected by this act.

8. *And be it enacted*, That in every case, in which, by this act, two of the township committee shall be called to determine any matter in difference, and it shall so happen, that such two of the committee cannot agree in their determination, it shall and may be lawful for them to call upon some third person of the neighbourhood, being a freeholder, and disinterested and indifferent between the parties, to join them in the business, any two of whom agreeing, their determination, made and certified in writing in manner aforesaid, shall be binding and conclusive between the parties.

If two of the township committee cannot agree, they may call in a third person.

9. *And be it enacted*, That if any person, to whom any part or share of any partition fence is or shall be assigned to make or amend and maintain, as in and by this act is directed, shall neglect or refuse, after due notice given, to make and repair such part or share thereof, so that his own or the beasts of any other person shall break in, enter into or upon his neighbour's land, over or through the said fence, the person so neglecting or refusing is hereby rendered liable to make good all damages sustained thereby, to be ascertained according to the directions of this act, and for which such delinquent's beasts shall be liable to be impounded, and held in pound, until he shall pay the same, and all charges occasioned thereby, as herein after mentioned; or, if the beasts of any other person only shall have trespassed, by means of such neglect or refusal to make or repair the said fence, then the party injured may sue for and recover his damages against the party so neglecting or refusing to make or repair the said fence, in an action of trespass, with costs, in any court where the same may be cognizable.

Persons who neglect to make their part of a partition fence, to make good all damages.

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And if the beast of the person who shall have made and maintained his part or share of the partition fence assigned to him, according to the directions of this act, or the beasts of any other person, should trespass on his next adjoining neighbour, through that part of the fence so by him neglected or refused to be made or maintained as aforesaid, he or they shall not be liable to have his or their beasts impounded, nor be liable to any action to recover any damage accruing thereby.

Beasts of an innocent person, trespassing through an unlawful fence, not to be impounded, nor any damages recovered in consequence thereof.

Where persons do not keep up their part of fences, beasts trespassing through the same shall not be impounded nor damages recovered.

10. *And be it enacted*, That if any owner or possessor of land shall neglect or refuse to make and keep in good repair the fence and fences about his land, as by this act is directed, and for default thereof, the beasts of any other person shall break in, or enter into or upon the said land, over or through such fence, then the owner of the said beasts shall not be liable to any action, nor the beasts be impounded, for any damage sustained thereby; and if any action be commenced therefor, the owner of such beasts may plead the general issue, and give this act in evidence to support the same; *provided always*, that nothing in this section contained shall be deemed to affect any regulation as to partition fences, or to prevent the recovery of damages for any beasts entering into or upon any person's land, over or through such fence as by this act is directed and allowed.

And if they injure such beasts, they shall pay full damages, with costs.

11. *And be it enacted*, That if any owner or possessor of land, being damaged for want of such lawful and sufficient fence as by this act is directed, shall hurt, wound, lame, kill or destroy, or cause the same to be done, by shooting, hunting with dogs, or otherwise, any of the kind or breed of horses, cattle, or sheep, he, she or they so offending shall pay and satisfy to the owner of the beasts so injured or destroyed full damages, to be recovered in an action of trespass, with costs, in any court where the same may be cognizable.

Horses, cattle, or sheep, breaking over lawful fences, their owners shall pay all damages, to be ascertained by appraisers.

12. *And be it enacted*, That if any horses, cattle or sheep shall get over, creep through, or break down, any fence by this act declared lawful, the owner or owners of the beasts shall pay to the person injured, all damages occasioned thereby, to be appraised and certified in writing by two substantial and indifferent men of the neighbourhood, mutually chosen by the parties; but if the owner or owners of such beasts shall refuse or neglect to choose one of the said appraisers, then the injured party may choose them both himself, and in case the said appraisers, chosen as aforesaid, cannot agree upon an appraisement of the damages, then the said appraisers may choose a third person of the neighbourhood, being a freeholder, to join them therein, any two of whom agreeing, their appraisement, made and certified as aforesaid, shall be binding and

conclusive to the parties; and if any dispute shall arise concerning the sufficiency of the fence, it shall be determined, on a view thereof, by the same persons, and their decision respecting the same, in like manner reduced to writing, shall also be conclusive.

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And it shall and may be lawful for the party injured to take and impound such beasts found trespassing or doing damage as aforesaid, in his field or yard, or other enclosure, for the space of twenty-four hours, he giving notice thereof to the owner or owners of the said beasts, if known and easily to be found; and if such beasts are not redeemed within the said twenty-four hours, by payment of, or satisfaction for the damages so certified as aforesaid, he shall lead or drive them to the public pound of the township, where the pound-keeper shall receive and keep them, until the damages so certified, with the charges of conveying and pounding, are paid.

Party injured by beasts found trespassing, may impound them in his own enclosure for twenty-four hours, and then in the public pound

And the said party shall have four cents for horses and cattle, and one cent for sheep, per head, for taking such beasts to the pound, and the pound-keeper shall have the same fees, for letting in and out of the pound; and for pounding, feeding and attending, ten cents for horses and cattle, and three cents for sheep, per head, for every twenty-four hours they shall continue in the pound. And if the owner of any beasts, so impounded, shall not pay the damages and charges of impounding, within four days after such beast shall

Allowance for pounding and feeding.

Beasts impounded may be advertised and sold.

be impounded, or replevy the same beasts, then it shall be the duty of the pound-keeper to set up advertisements in at least three of the most public places in the township, to which the pound belongs, and in one or more of the most public places in the two next adjoining townships, particularly describing such beasts, and giving at least thirty days notice of an intended day and place of sale, and that if the owner do not appear and redeem the said beasts before the time so notified, they will then be sold at public vendue; at which time and place, if no owner, or other person for him, shall appear and redeem the said beasts, the said pound-keeper shall sell the same accordingly, and out of the moneys arising from such sale shall pay the said damage and charges of conveying to the pound, and retain in his hands his fees for pounding, keeping and feeding the said beasts, and forty cents for such sale and collecting the money, and return the overplus to the owner of the same beasts; and if no owner shall appear and claim such overplus, within twelve calendar months after such sale, the same shall be paid to the clerk of the township where such beasts were impounded, for the use of the said township.

Damages and charges to be first satisfied, and the residue paid to the owner or township.

13. *And be it enacted*, That where there is not a public pound kept within the township, then the person damnified by such beasts trespassing as aforesaid, may pound them in his or her own field,

Where there is no public pound, the person injured may

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pound beasts  
in his yard  
or field.

yard or other enclosure, till redeemed as aforesaid; and he shall act in such cases in all respects, and be entitled to the same fees, as the pound-keeper should or ought to have done, or been entitled to by this act; *and further*, shall enter all such trespassing creatures kept in his possession, at any time after the first day of November, and before the first day of April, in the town book, agreeably to the act entitled, "An act concerning stray cattle, horses and sheep."

## TITLE II.

Penalty on  
any of the  
township  
committee,  
who shall  
neglect or  
refuse to per-  
form the du-  
ties required  
by this act.

14. *And be it enacted*, That if any person, being of any township committee, who, on due notice given him, and being requested by any person interested to do any of the duties in and by this act assigned to him, shall refuse or neglect forthwith to attend accordingly, every person so neglecting or refusing shall forfeit and pay the sum of four dollars, with costs, to him or them who shall sue for the same, within thirty days after such neglect or refusal.

Their com-  
pensation,  
and by whom  
to be paid.

15. *And be it enacted*, That each and every person of such township committee shall be allowed one dollar per day, and fifty cents for a half day, for the time he shall be engaged in the duties of his office in virtue of this act, to be paid by the person or persons employing him; and in case such person or persons shall refuse or neglect to pay the said committee their legal fees, within thirty days after the service done, they may severally recover double the amount of such fees, by action of debt, with costs of suit. And each one of the committee may be a witness for or against his companion in any such suit.

16. Repealer.