

1991.

APPROVAL, BONDS OF CITY OF YOUNGSTOWN, OHIO, IN AMOUNT OF \$450,000 FOR BRIDGE BUILDING.

COLUMBUS, OHIO, April 9, 1921.

*Industrial Commission of Ohio, Columbus, Ohio.*

1992.

PARTITION FENCE—TOWNSHIP TRUSTEES HAVE AUTHORITY TO DETERMINE PROPORTIONATE SHARE EACH LAND OWNER IS REQUIRED TO BUILD AND MAINTAIN—SEE SECTION 5910 G. C.—HOW TO COMPUTE SUCH PROPORTION.

*Township trustees, under the provisions of section 5910 G. C., have authority to determine the proportionate share each land owner is required to build and maintain of the partition fence required by the provisions of section 5908 G. C. and in arriving at such finding any method or basis may be used by said trustees to compute such proportion, provided such method assigns to adjacent owners an equal share of the labor and expense of the construction and repair of such fence.*

COLUMBUS, OHIO, April 9, 1921.

HON. J. F. VANDENBROEK, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter of recent date requesting the opinion of this department, as follows:

“Under section 5910 General Code, when a person neglects to build or repair a partition fence, or the portion thereof which he is required to build or maintain, the aggrieved person may complain to the trustees of the township in which such land or fence is located. Such trustees, after not less than ten days’ written notice to all adjoining land owners of the time and place of meeting, shall view the fence or premises where such fence is to be built, and assign, in writing, to each person his equal share thereof, to be constructed or kept in repair by him so as to be good and substantial.

A. and B. are adjoining land owners and the owners of a fence between the respective adjoining lands. A. presents to the trustees of the township, in writing, a complaint relative to a portion of the fence, asking a partition thereof. The one portion of both lands abuts the river and in high water time destroys the lower portion of the fence.

#### QUERIES.

1. Could a fair proportionate be made of this fence in regard to the maintenance thereof?
2. Under the aforesaid section of the statute, can the total expenditure of the entire fence be proportioned equally among A. and B.?”

Section 5908 G. C. provides:

"The owners of adjoining lands shall build, keep up and maintain in good repair in equal shares all partition fences between them, unless otherwise agreed upon by them in writing and witnessed by two persons. This chapter shall not apply to the enclosure of lots in municipal corporations or of lands laid out into lots outside of municipal corporations, or affect any provision of law relating to fences required to be constructed by persons or corporations owning, controlling or managing a railroad."

It will be noted that the use of the words "equal shares" occurring in the above statute would seem to indicate that the owners of the adjoining lands, in the building of such partition fences, were to equally share the expense of such construction.

Section 5910 G. C. provides :

"When a person neglects to build or repair a partition fence, or the portion thereof which he is required to build or maintain, the aggrieved person may complain to the trustees of the township in which such land or fence is located. Such trustees, after not less than ten days' written notice to all adjoining land owners of the time and place of meeting, shall view the fence or premises where such fence is to be built, and assign, in writing, to each person his equal share thereof, to be constructed or kept in repair by him so as to be good and substantial."

Under the provisions of this section and in default of either party having an interest in the partition fence to build or maintain his portion of the same, the party not in default or the aggrieved person may complain to the township trustees and require a viewing of such fence in the manner described by law.

Section 5913 G. C. provides :

"If either person fails to build the portion of fence assigned to him, the township trustees, upon the application of the aggrieved person, shall sell the contract to the lowest responsible bidder agreeing to furnish the labor and material and build such fence according to the specifications proposed by the trustees, after advertising them for ten days by posting notices thereof in three public places in the township."

This section provides for the disposition of the matter by the township trustees in the event either party defaults upon the former findings of such board, as determined by the provisions of section 5910 G. C., while sections 5914 and 5915 G. C. provide for the manner of collecting and proportionate cost of such fence from the party so defaulting.

Analyzing the various sections of the statutes pertaining to the subject of partition fences, it would seem that the general intention of the law is to require adjoining land owners to pay an equal share of the cost of such fences, on the assumption that equal benefits accrue from the same to the adjacent owners. There seems to be no specific rule in such cases which governs the method of computing the proportionate cost of same, more than that of the general one which requires that each adjacent owner shall be liable for his proportionate and equal share in the cost of building or repairing such fence. It would also appear that in cases of dispute as to the proportionate of cost or labor each is to contribute, and when one of the aggrieved parties files a complaint with the township trustees relative thereto, it becomes the duty of such trustees to view the fence in question and adjudicate the matter in controversy, taking into consideration all the circumstances surrounding the same, and proportionately assign in writing to each party of interest his equal

and particular apportionment or share of the amount or portion of such fence as he is required to build or maintain.

In this connection may be cited a ruling of a former attorney-general, contained in Annual Report of Attorney-General, 1910-1911, page 754, pertinent to the question under discussion, and a partial quotation from which follows:

"I am of the opinion that the duties of the township trustees under this section are of a judicial nature, and in any controversy over the division of partition fences, it is their duty to take into consideration everything connected and pertaining to the building and maintaining of the partition fence, and the statute provides that they are to assign in writing to each person his equal share thereof. This in my opinion does not mean the equal number of rods, but does mean that after taking into consideration all the conditions of the making and maintaining of the fence, that each party is to be assigned his equal share, and if perchance one end of the fence requires the making and maintaining of a water gate across a stream, it is the duty of the trustees to take this fact into consideration, and having ascertained the whole amount, to assign in writing to each land owner his equal share thereof."

Such a view is also sustained in *Robb vs. Brachmann*, 24 O. S. 8; *Smith vs. Pierce, Auditor*, 17 O. N. P. 264; *Kingman vs. Williams*, 50 O. S. 722, and *Alma Coal Company vs. Cozad*, 79 O. S. 348.

The original section upon which section 5908 G. C. is based was formerly section 4239 Revised Statutes, passed April 18, 1904 (97 O. L. 138), which provided that the owners of adjoining lands shall build, keep up and maintain in good repair all partition fences between them in equal shares, unless otherwise agreed upon between them, and by sections 4242 and 4243 Revised Statutes (sections 5910 to 5915 General Code) it was provided that if any party neglects to build or repair a partition fence, or the portion thereof which he ought to build or maintain, proceedings may be had before the township trustees to secure the construction of the partition fence, the collection of the cost thereof, and the share of the resisting proprietor.

In answer, therefore, to questions Nos. 1 and 2 indicated in your inquiry, it would seem that if A. and B. cannot agree as to the proportionate cost or as to the portion each is to construct of the partition fence between them, and which in the particular case is that part abutting the river, the lower portion of which at times is destroyed or impaired by high water, such questions in controversy may be adjudicated by the township trustees, under the provisions of section 5910 G. C., whose finding in the matter is final and conclusive. It is the duty of such trustees under the provisions of this section to view the fence in question and to take into consideration all the conditions and circumstances surrounding the same and proportionately assign an equal share of the building or repairing thereof to the respective adjacent owners.

Whether the finding or conclusion of the trustees in the particular case presented could be based upon the conditions imposed by your questions Nos. 1 and 2 would be a matter to be judicially considered by such trustees, who, upon viewing the fence in question, could adopt the methods indicated or any other which in their estimation and under the circumstances would be a fair and just basis upon which to compute the proportionate or equal share of the building and maintaining of such partition fence,

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General,*