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FENCES, PARTITION—FAILURE OF LANDOWNER TO CONSTRUCT AND MAINTAIN PORTION ASSIGNED BY BOARD OF TOWNSHIP TRUSTEES — §971.04 R.C. — CONSTRUCTION BY TRUSTEES IN ACCORDANCE WITH §§971.04 to 971.09 R.C.

SYLLABUS :

When an owner of land fails to build a portion of fence assigned to him by the board of township trustees as provided in Section 971.04, Revised Code, assuming that there has been strict compliance with the statutes by such board, then that agency may proceed to build such fence and to collect the costs thereof from such owner in the manner provided in Sections 971.01 *et seq.*, Revised Code, particularly as provided in Sections 971.04 to 971.09, Revised Code, inclusive.

Columbus, Ohio, March 30, 1959

Hon. Richard F. Liggett, Prosecuting Attorney
Brown County, Georgetown, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Sections 871.01, *et seq.*, of the Ohio Revised Code provide for the construction of partition fences and the duties of township trustees in regard thereto. Section 971.04 of the Ohio Revised Code provides that the township trustees, after complaint, shall assign equal portions of a partition fence to be constructed or kept in repair by adjoining property owners. Section 971.05 of the Ohio Revised Code provides for the cost of making such assignment to be certified to the County Auditor, and Section 971.06 provides that the County Auditor shall place said amount upon the tax duplicate to be collected as other taxes. Section 971.07, 971.08 and 971.09 provide that if a person fails to build the portion of a fence assigned to him, the Board of Township Trustees, after application, shall sell the contract to build the fence and for the certification of the costs thereof to the Township Clerk and then to the County Auditor where the same shall be a lien upon real estate, and collected as other taxes.

“Sections 971.07, 971.08 and 971.09 of the Ohio Revised Code are substantially the same as the earlier General Code sections on the same matter. The earlier General Code sections were held to be unconstitutional in *Beach vs. Roth*, 18 CC (NS) 579, affirmed without opinion in 80 O.S. 746. In spite of this, the General Assembly saw fit to re-enact these sections in adopting the Revised Code. (Emphasis added)

“Therefore, is there presently any lawful procedure for the township trustees to follow when a person fails to build a portion of fence assigned to him by the trustees under Section 971.04 of the Revised Code of Ohio.”

It is true that the Circuit Court of Medina County in the case of *Beach v. Roth*, 18 O.C.C. (N.S.), 579, seemed to regard the entire fence act unconstitutional and that this judgment was affirmed by the Ohio Supreme Court. However, in affirming this judgment without opinion on June 15, 1909, in the case of *Roth v. Beech*, 80 Ohio St., 746, the court stated:

“* * * Judgment affirmed on authority of *The Alma Coal Co. v. Cozad, Treasurer*, 79 Ohio St., 348. * * *”

In the case of *The Alma Coal Co. v. Cozad, Treasurer*, 79 Ohio St., 348, the syllabus reads as follows:

"1. The provisions of the constitution forbid not only the taking of the private property of one, but as well the laying of an imposition upon it, *for the sole benefit of another*.

"2. The act of April 18, 1904 (97 O.L., 138), may not be so construed and administered as to charge an owner of lands which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence *for the sole benefit of the adjoining proprietor*." (Emphasis added)

Thus, it seems clear on the basis of the foregoing that: the law of Ohio as to the constitutionality of the Ohio fence law was as stated by the Ohio Supreme Court in the above quoted syllabus, that the Medina Circuit Court judgment was proper to the extent that it held that the plaintiff therein was entitled to an injunction on the basis of the fact that he would receive no benefit from the fence, and that in affirming the judgment of the Medina Circuit Court the Supreme Court did not affirm that part of the judgment holding the act unconstitutional but held merely that the act may not be so construed or administered as to take the private property of one for the sole benefit of another.

In support of this construction restricting the effect of the decisions rendered in the *Beach v. Roth* case, the Supreme Court subsequently, on April 25, 1916, in the case of *McDorman v. Ballard*, 94 Ohio St., 183, held that Sections 508 *et seq.*, General Code were constitutional, and on page 184, it was stated:

"In the case of *The Alma Coal Co. v. Cozad, Treas.*, 79 Ohio St., 348, the constitutionality of the act of April 18, 1904 (97 O. L., 138), which act is carried into the General Code as Section 5908 *et seq.*, was considered by this court. It was held that the act could not be so construed and administered as to charge an owner of lands which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor. It does not appear in the present case that the lands of plaintiff in error are unenclosed, and therefore they do not come within the exceptions of the provisions of the statute mentioned in the case to which we have referred, and upon the authority and the holding in that case the judgment of the court of appeals is therefore affirmed."

Further support of this construction of these statutes as not being unconstitutional is found in a subsequent opinion of the Ohio Supreme

Court in *Zarbaugh, Treas., v. Ellinger*, 99 Ohio St., 133, wherein the court says, on page 137, in referring to the case of *The Alma Coal Co. v. Cozad, Treas.*, 79 Ohio St., 348:

“It will be observed that the court did not in that case hold the amended Section 4239, Revised Statutes, to be unconstitutional. But the right to invoke its application to a situation such as found in that case was denied. In the facts as they there existed there was no possible basis for the assessment on account of benefit, for there was none.”

The syllabus of this case states the law of the case as follows:

“1. Where the owner of a private right of way which passes through farm lands owned by others, uses it as a farm outlet to a public highway, he is required by the provisions of Sections 5908 and 5919, General Code, to build and keep up one-half of the fence on each side of his private right of way.

“2. *The enforcement of that obligation in the manner provided by the statute is not a taking of the property of the owner of such private right of way, in violation of the constitution.*” (Emphasis added)

It is therefore clear that notwithstanding the language contained in the decision of the Circuit Court in *Beach v. Roth*, the

“* * * statutes with reference to the subject of partition fences constitute regulations within the police power, as held by the Supreme Court in the *Zarbaugh case*, * * *.” (See *Kloepfel v. Putnam, Treas.*, 76 Ohio App., 130, p. 135);

and that if a party does not perform this statutory duty,

“* * * the enforcement of the requirements of the statute is not a violation of rights guaranteed by the constitution.” (See *Zarbaugh, Treas. v. Ellinger*, 99 Ohio St., 133, page 138)

It is my opinion, therefore, that when an owner of land fails to build a portion of fence assigned to him by the board of township trustees as provided in Section 971.04, Revised Code, assuming that there has been strict compliance with the statutes by such board, then that agency may proceed to build such fence and to collect the costs thereof from such owner in the manner provided in Sections 971.01 *et seq.*, Revised Code, particularly as provided in Sections 971.04 to 971.09, Revised Code, inclusive.

Respectfully,

MARK McELROY

Attorney General