The county auditor, therefore, when there is presented to him a deed of conveyance of all the standing timber on a tract of land, with satisfactory proof of the value of said timber as compared with the whole valuation of said land and timber as charged on the duplicate, should divide and apportion the aggregate values of said land and timber, according to the relative value of the separate interests.

This rule applies even though it appear by the terms of the conveyance (otherwise absolute in form) that the rights of the grantee should become void as to any timber not cut and removed in five years from date of deed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1283.

FENCES—LAND OWNERS MAY BE COMPELLED TO BUILD AND KEEP UP ONE HALF OF A PARTITION FENCE UNLESS SUCH FENCE BE OF NO BENEFIT TO THEIR LANDS.

SYLLABUS:

1. *By the terms of Sections* 5908, *et seq., General Code, land owners must build partition fences, unless such fences will be of no benefit to their lands.*

2. *Under the provisions of Sections* 5908, *et seq., General Code, an owner of lands capable of being cultivated, which have to some extent been under cultivation and which in the future may be cultivated, may be compelled to build and keep up one-half of a partition fence, notwithstanding the fact that such owner has removed from such farm and is trying to sell the same. If such owner does not build and keep up that portion of the fence required of him, the township trustees may have it built and certify its cost to the tax assessing officials to be placed upon the tax duplicate and collected as ordinary taxes, as provided by said sections of the General Code.*

COLUMBUS, OHIO, November 22, 1927.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

> "Lee Township is a township in Athens County. A owns a farm in Lee Township of approximately eighty acres. A formerly lived upon and cultivated this farm. A few years ago A moved to Barberton and has continuously since been trying to sell this farm. Very little of A's farm has been cultivated since he moved off of it. The public highway runs through this farm and about thirty-seven acres lies on one side of this road and approximately forty-three acres on the other. This road was formerly fenced on both sides but the fence along the road and on the side which the thirty-seven acre piece abuts has heretofore decayed and due to lack of repair, has heretofore become and is now worthless and constitutes from a practical standpoint, no fence at all. There was a little hay cut last season from this thirty-seven acre tract and perhaps a small amount of corn raised thereon. Whether any of this thirty-

seven acre tract will ever again be under cultivation is entirely problematical and cannot be stated.

B owns a farm a part of which lies immediately adjacent to A's thirty-seven acres. There is now no partition fence between the two tracts. B is insisting that the trustees of Lee Township establish this partition fence and build a portion thereof in that A has refused and is refusing to build such fence or any part thereof.

QUERY: Under Section 5908, et seq., General Code, can the trustees of Lee Township cause A's portion of this partition fence to be constructed and cause the expense incident to such construction charged against A upon the tax duplicate of Athens County, Ohio?

I have before me an opinion rendered by one of your predecessors in office under date of February 11, 1913, and appearing in Volume II, Attorney General Reports for the year 1913, and on page 1124 thereof wherein it is held:

'The provisions of the constitution forbid the taking of private property, or the laying of an imposition upon it for the sole benefit of another. In accordance with the *Alma Coal Company* vs. *Cozard*, 79 O. S. 348, a person owning unenclosed lands may not be assessed for a portion of a fence erected for the benefit of a neighbor, the provision of Section 5908-10, etc., notwithstanding.'

I also have before me the case of *The Alma Coal Company* vs. *Cozard, Treasurer,* reported in 79 Ohio State at page 348, wherein it is held:

'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.

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.'

You will notice that the Supreme Court case above referred to was decided in 1909. In 1921 our own Appellate Court in the case of *David A. Jennings* vs. *Fred W. Wilson, et al.,* reported in 32 Ohio Court of Appeals and on page 453 held:

'Landowners must build partition fences as required by Section 5908 unless such fences will be of no benefit to their lands.'"

Section 5908, General Code, to which you refer in your letter, was formerly Section 4239, Revised Statutes, and, prior to its amendment on April 18, 1904, (97 v. 138) read as follows:

"The owner, or lessee for three or more years, of land adjoining a fence, of whatsoever material constructed, in all respects such as a good husbandman ought to keep, erected by the owner, or lessee for one or more years, on the line of his land, who makes or causes to be made an inclosure adjoining such fence, so that such fence answers the purpose of inclosing his land, shall pay the owner of such fence already erected one-half the value of so much thereof as serves as a partition fence, to be adjudged by the township trustees of the township in which the fence is situate; and the amount so adjudged, if not paid, may be recovered by the owner of such fence, with costs of suit; but nothing in this chapter contained, shall apply to the inclosure of lots in municipal corporations."

This statute was amended in 1904, as above stated, and now reads as follows:

> "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 observed that prior to the amendment above pointed out, in order to impose the liability on a farmer to pay for one-half of the line fence, it was necessary that his land should thereby be enclosed.

In the case of *Zarbough, Treas.,* vs. *Ellinger,* 99 O. S. 133, the court held 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."

In referring to the case of *Alma Coal Co.* vs. *Cozard, Treas.,* 79 O. S. 348, Judge Johnson who wrote the opinion of the court in the Ellinger case on page 136 said:

> "This amendment was under examination in *Alma Coal Co.* vs. *Cozard, Treas.,* 79 Ohio St. 348. The allegations of the petition, which were admitted by demurrer, showed that the lands of the coal company were *wild, uncultivated and unfenced;* that the company had no intention to improve, fence or cultivate any portion of them, and that the fence could be of no value to it whatsoever."

And on pages 137 and 138 of the same opinion, Judge Johnson makes this very pertinent comment.

> "From the fact that for so long a time the statutes required an owner to contribute to the cost only where the 'fence answered the purpose of enclosing his land,' it would seem to be apparent that at that time the general assembly felt that the only benefit conferred on a farmer's land by a fence was by its making a complete enclosure. *The amendment to the statute in* 1904, *now Section* 5908, *et seq., General Code, evidences a different view by the legislature and a determination to impose a larger duty, namely, the view that there are conditions and circumstances in which a partition fence is of advantage and value to a land owner, even though it does not make a complete enclosure."* (Italics the writer's.)

In the case of *David A. Jennings* vs. *Fred W. Wilkes, et al., Trustees of Wilkesville Township, Vinton County, Ohio,* 32 O. C. A. 453, upon the authority of the above decision of the Supreme Court, it was held:

"Land owners must build partition fences as required by Section 5908 *unless such fences will be of no benefit to their lands.*"

As held in the cases immediately above cited construing the statute under consideration after the amendment of 1904 whether or not an adjoining land owner may be compelled to participate in the cost of building a line fence depends upon whether or not the construction of said fence will be of some benefit to the lands of the owner called upon to participate equally with his neighbor in the cost of the fence and not whether the fence, after it is constructed, will have the effect of completely enclosing certain land of such owner.

From the facts in the case which you present it is clear that the thirty-seven acre tract of land has been under cultivation at least to some extent and is capable of being cultivated. If this tract of land be cultivated in the future or even if it be capable of being cultivated it cannot be successfully argued that the construction of such a fence will not be of benefit to the owner of such land, in that it would among other things keep the stock of his neighbor from destroying his crops.

As pointed out on page 456 of the opinion in the case of *Jennings* vs. *Nelson, et al.,* supra:

"That the building of the partition fence will benefit the land of the plaintiff we entertain no doubt. If land is cultivated or to be cultivated, no one can deny that a fence is beneficial to it. A fence which partially encloses cultivated land is beneficial to some extent. If it encloses the field adjoining, it will prevent injury from stock in that field. Even if it does not enclose such field it will prevent in some degree encroachment by stock kept therein. Besides, when a farm is fenced on one side it requires just that much less exercise of muscle and outlay of money to complete an entire enclosure, which is generally necessary to the proper cultivation of the tract. Every rod of partition fence added to a tract of land which is, and is intended for cultivation, adds that much to the value of the farm. It is no argument for the land owner to say that because he does not want a fence and that he will take all chances from straying live stock, the fence will be of no benefit or value to his land. *Except in cases where the partition fence will be of no benefit, as when the land is wild and uncultivated and is to remain so, the owner must build his fences whether he regards them as of any benefit or not.*

We adopt the suggestion of Judge Johnson in the case last referred to, because that comports with our view of the statute under consideration. The statute makes no mention of enclosures and is intended to operate in all cases and must do so except in case of land which will not be benefited by a partition fence—an exception written into the statute by the Supreme Court." (Italics the writer's.)

With reference to the constitutionality of Sections 5908, et seq., of the General Code, Rockel at page 236, Section 387, of his Complete Guide for Ohio Township Officers says as follows:

"In the State of Ohio the statute now provides that adjoining land-owners must build and maintain the partition fence in equal shares, making no provision as to whether the lands be enclosed or not, or used in any particular manner. * * * If the owner does not build the portion of the fence required of him, the township trustees may have it built, and certify its cost to the tax assessing official and it is put on the tax duplicate and collected as ordinary taxes. This statute has been assailed in the Supreme Court, as to

its constitutionality, three times. First is the case of *Alma Coal Co.* vs. *Cozard* (79 O. S. 34). Here the law was not held to be generally unconstitutional, but only in its application to the facts in this case, and as the coal company's land was uninclosed, and it would reap no benefit from the fence, and there was no such use of the coal company's property as to indicate probable injury to its neighbors or the community in absence of a fence, its land could not be assessed for construction of one-half of the fence on its boundary line. The next case was that of *McDorman* vs. *Ballard* (94 O. S. 183). Here it was held that as the facts did not show that the lands were uninclosed, the law was not unconstitutional and a valid assessment on the land could be made. Unless such fence will be of no benefit to their lands adjoining land owners must build partition fences. (*Jennings* vs. *Wilson,* 32 O. C. A. 453, 1922); 15 O. App. 395."

And in the next section at page 238, the same writer says the following:

" * * * But it would seem that if these fence laws rest upon the police power of the state, then the power vests in the legislature to determine the conditions upon which the power in the particular case would be applied, and unless it was clearly unreasonable and its enforcement is clearly confiscatory, the courts will not interfere with the discretionary power of the legislature. Generally in the use of lands the adjoining proprietors reap some benefit from a partition fence. It is some benefit to them that stock may be kept from trespassing thereon; it is some benefit to the community at large that controversies be avoided, which trespassing stock is sure to create.

In the recent case, *Jennings* vs. *Wilson,* 32 O. C. A. 453 (1922), the court lays down the broad proposition that landowners must build partition fences unless such fences will be of no benefit to their lands, and the only thing shown in this case was that the adjoining lands were suitable for, and were used as, agricultural lands."

In view of the authorities above quoted and for the reasons therein set forth, in answer to your question, it is my opinion that under the provisions of Sections 5908, et seq., an owner of lands capable of being cultivated, which have to some extent been under cultivation and which in the future may be cultivated, may be compelled to build and keep up one-half of a partition fence, notwithstanding the fact that such owner has removed from such farm and is trying to sell the same. If such owner does not build and keep up that portion of the fence required of him, the township trustees may have it built and certify its cost to the tax assessing officials to be placed upon the tax duplicate and collected as ordinary taxes, as provided by said sections of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.