

3412.

PARTITION FENCE—TOWNSHIP TRUSTEES—NO AUTHORITY TO CAUSE CONSTRUCTION OF SUCH FENCE WHERE BOUNDARY LINE IS IN DISPUTE BETWEEN PROPERTIES OF ADJOINING LANDOWNERS—SECTIONS 5910, 5913 G.C.

SYLLABUS:

*Township trustees have no authority to cause the construction of a partition fence under the provisions of Sections 5910 and 5913, General Code, where the boundary line between the properties of adjoining landowners, upon which such fence is to be erected, is in dispute.*

Columbus, Ohio, February 11, 1941.

Hon. Harry A. Mettler, Prosecuting Attorney,  
Athens, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion as follows:

“The following question has been submitted to me by one of our Township Boards of Trustees:

A line between two properties within a Township has been established by a fence without dispute within the memory of the oldest local resident. Recently one of these two adjoining property holders had a survey made showing this fence to be in the wrong position, and proceeded to relocate the fence according to the survey. The other adjoining property owner has notified the Township Trustees of his desire that they build a line fence on the site of the old fence by authority of General Code, Section 5910.

The question presented is whether the Township Trustees must comply with this request under the statute when the location of the line is in question even though adverse possession and local custom are preponderantly in favor of one of the adjoining property owners. 1922 O.A.G. Page 893 bears upon this question, but I do not believe it to be conclusive.”

The duties of township trustees with relation to partition fences are defined in Sections 5910 and 5913, General Code, which provide:

## 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.”

## Section 5913, General Code:

“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.”

Under the power conferred upon township trustees by the above statutes, such trustees may cause a partition fence to be erected or repaired when a person whose duty it is to do so neglects to build or repair the same. From the facts stated in your letter, it does not appear that either of the adjoining landowners has failed to build a fence or the portion thereof assigned to him. In fact, you state that one of the said landowners has proceeded to relocate the fence. In such case it would appear that the provisions of the above sections have no application.

No authority is found therein for township trustees to settle boundary disputes between adjoining land-owners, nor can such authority be implied from the express powers granted to township trustees. As stated in Opinions of the Attorney General for 1922, Vol. II, page 894:

“ \* \* \* the purpose of the partition fence statutes is to provide an inexpensive method of allotting to affected landowners their respective shares of fences, which are of benefit to more than one owner, and not to provide a method of settling boundary disputes.”

In 22 Am. Jur. 536, the following statement is found:

“They (fence viewers) have no authority to fix the line if it is in dispute, \* \* \*.”

The same rule is pronounced in 25 C.J. 1028, as follows:

“They (fence viewers) have no authority to settle the rights of title of different claimants of land, nor to establish boundary

lines; but they are sometimes authorized by statute to designate the line upon which a partition line is to be built, where the boundary line is in dispute or is unknown."

Also see *Shaw vs. Gilfillan*, 11 Vt. 565, *Talcott vs. Stillman*, 28 Conn. 192.

In the instant situation, there is a dispute between landowners as to the division line between their properties. If the township trustees assumed jurisdiction by virtue of the partition fence statutes, they would have to fix the boundary line and settle the dispute. No such power or authority is vested in the township trustees.

Therefore, in specific answer to your inquiry, I am of the opinion that township trustees have no authority to cause the construction of a partition fence under the provisions of Sections 5910 and 5913, General Code, where the boundary line between the properties of adjoining landowners, upon which such fence is to be erected, is in dispute.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.