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A TOWNSHIP CLERK MAY ACT IN A PARTITIONING FENCE PROCEEDING ALTHOUGH HE IS ONE OF THE INTERESTED PARTIES—§971.02, R.C.

SYLLABUS:

A township clerk may act in his official capacity in a partition fence proceeding under Chapter 971., Revised Code, although he is also one of the interested land owners.

Columbus, Ohio, September 20, 1962

Hon. Fred F. Fox, Prosecuting Attorney
Noble County, Caldwell, Ohio

Dear Sir:

I have received your request for my opinion on whether a township clerk may act as such in a partition fence proceeding under Chapter 971., Revised Code, where that clerk is one of the adjoining landowners interested in the partition fence in question; and, if he may not so act, who is to assume his duties under such chapter.

Section 971.02, Revised Code, provides in part:

“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. * * *”

Section 971.04, Revised Code, 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 board of township trustees of the township in which such land or fence is located. Such board, after not less than ten days’ written notice to all adjoining landowners 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.”

Action by the township clerk in these proceedings where he has an interest is nowhere specifically prohibited by statute. It is the general rule, however, that “officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided.” (*Tumey v. Ohio*, 273 U. S. 510, 522, (1926); *Gregory v. Cleveland, C. and C. R. Co.*, 4 Ohio St., 675 (1855)). This principle has been embodied in the Ohio statute dealing with disqualification of judges for interest (Section 2701.03, Revised Code); and it has been said to apply to township trustees acting in a partition fence proceeding. (*Robb v. Brachman*, 38 Ohio St., 423 (1882)). If the township clerk’s function in a partition fence proceeding can be said to be judicial or quasi judicial, then,

there is a serious question as to the propriety of his serving in an official capacity where he is one of the parties interested in the proceeding.

In order to answer your question, therefore, it is necessary to examine the nature of the duties imposed upon a township clerk. After a careful examination of Section 501.15 and Chapter 507., Revised Code, which deal generally with the duties of the township clerk, I find nothing therein which indicates that such officer has judicial or quasi judicial responsibility in a partition fence proceeding. If there is such a responsibility it must appear, if at all, in Chapter 971., Revised Code, which deals with partition fences specifically.

An examination of Chapter 971., Revised Code, reveals that the township clerk has clerical and fiscal duties under several of its sections. Under Section 971.05, Revised Code, the clerk may receive equally taxed costs due him as a result of the proceeding and, if not paid within thirty days, shall certify such to the county auditor for placement upon the tax duplicate; and under Section 971.06, Revised Code, the clerk may receive his costs from the auditor when collected. Section 971.08, Revised Code, provides that the clerk shall certify to the county auditor the unpaid costs of a partition fence erected by the board of township trustees for inclusion on the tax duplicate. Under Section 971.12, Revised Code, the clerk is required to certify the assignment of partition fences to the county recorder. And, finally, under Section 971.37, Revised Code, the clerk is entitled to fees for making, filing, and recording papers in partition fence proceedings as are provided by law for similar services, which fees are specifically set out in Section 507.09, Revised Code. In my opinion, none of these duties or rights are either judicial or quasi judicial, but rather are purely ministerial in character.

There being neither specific statutory prohibition nor the imposition of judicial or quasi judicial responsibility, it is my opinion and you are advised that a township clerk may act in his official capacity in a partition fence proceeding under Chapter 971., Revised Code, although he is also one of the interested land owners.

Respectfully,

MARK McELROY

Attorney General