

4086.

WATER GATES—LAND OWNER MAY NOT BE COMPELLED TO ERECT AND MAINTAIN WHERE SUCH LOCATED UPON LAND OF AN ADJACENT OWNER.

SYLLABUS:

A land owner may not be compelled to contribute to the expense of the construction and maintenance of a water gate not located on a division line but upon the land of an adjacent owner.

COLUMBUS, OHIO, February 23, 1932.

HON. PAUL A. FLYNN, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—YOUR recent communication reads:

“Two adjacent land owners in a township in this county are having a controversy concerning the line fence, which will be referred to the trustees for decision. The fence crosses a stream of water, so that it is necessary to construct and maintain a water gate. The original fence and water gate was constructed by one of the land owners, who, for convenience, because of the topography, moved the fence upon his land for some distance. He now insists that the adjacent land owner assist him in maintaining this fence and water gate. The latter owner refuses to do so, because the fence is not upon the line between the two pieces of property, on the ground that the fence being entirely upon the property of the other owner, any repairs which he might place upon it will become the property of the man upon whose land the fence is located.

“The question which will arise is whether or not the township trustees have a right to compel the land owner to assist in maintaining the fence, although it is not upon the line.

“Section 5931-1 of the General Code provides for the construction and maintenance of a water gate, but speaks entirely about it being upon the division line.”

Section 5931-1, General Code, to which you refer, reads as follows:

“That when the division line of adjacent land owners crosses a stream of water, through which stream of water it is impracticable to construct and maintain a partition fence, there shall be constructed and maintained a water gate or gates on the division line of the adjacent land owners across such stream, such that will turn live stock, and such water gate or gates shall be built, kept up and maintained in good repair in equal shares unless otherwise agreed upon by them in writing and witnessed by two persons, and if either of the adjacent land owners neglect to build, keep up and maintain such water gate or gates or cannot agree upon a division of the same that each shall build, keep up and maintain, the township trustees shall proceed to assign the portion of such water gate or gates each shall build, keep up and maintain the same as if such water gate or gates was a partition fence between adjacent owners, and all laws applicable to the building, keeping up and maintaining of partition

fences shall be applicable to this act, and for determining the liability of such adjacent land owners by reason of trespass of domestic animals upon the lands of the other, such water gate or gates shall be a partition fence."
(Italics the writer's.)

In the case of *Kingman vs. Williams*, 50 O. S. 722, in which sections of the General Code relating to partition fences were involved, the court stated at page 725:

"If the land of some other proprietor should be included in the enclosure there would be no equity in enforcing contribution against one thus situated, for he could not use the enclosure for his own animals, because they would trespass upon the lands of the other proprietor within the enclosure."

See also *Zarbaugh, Treas. vs. Ellinger*, 99 O. S. 133.

There is no doubt but the reasoning therein is applicable to the situation you present.

It should also be observed that the statute clearly contemplates a water gate constructed upon a division line and not the erection and maintenance of a water gate located at a distance from such line.

Accordingly, I am of the opinion that a land owner may not be compelled to contribute to the expense of the construction and maintenance of a water gate not located on a division line, but wholly upon the land of an adjacent owner.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4087.

APPROVAL, BONDS OF DENNISON VILLAGE SCHOOL DISTRICT,
TUSCARAWAS COUNTY, OHIO—\$9,600.00.

COLUMBUS, OHIO, February 24, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4088.

APPROVAL, NOTES OF W. SALEM RURAL SCHOOL DISTRICT, SHEL-
BY COUNTY, OHIO—\$1,000.00.

COLUMBUS, OHIO, February 24, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.