

I deem further illustration of the distinction which I make unnecessary. The reasoning upon which the prior opinion is based is in my opinion, sound. That is to say, if the law requires the publisher to furnish proof of publication by affidavit, then he has not fulfilled all the terms of his contract with relation to such publication until such affidavit is furnished. On the other hand, where the statute is silent as to proof of publication, or makes other provision therefor than the affidavit of the publisher, I am of the opinion that such proof is not so necessarily incident to the publication itself as to require the publisher to furnish such proof by affidavit and assume the expense incident thereto.

In view of my conclusion, I feel that the syllabus of the prior opinion is too broad and that it should be modified in accordance with the views herein expressed.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2366.

ASSIGNMENT—PARTITION FENCES—TOWNSHIP TRUSTEES—JURISDICTION ONLY AFTER WRITTEN NOTICE TO ALL ADJOINING LAND OWNERS UNDER SECTION 5910, GENERAL CODE.

*SYLLABUS:*

*By the terms of Section 5910, General Code, in order to vest jurisdiction in a board of township trustees to make the assignment therein provided, written notice must be given to all adjoining land owners.*

COLUMBUS, OHIO, July 18, 1928.

HON. J. R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads as follows:

“I would like to have your opinion upon the following proposition concerning partition fences:

F. L. B. and A. S. B. are the owners of 160 acres, known as the Northeast quarter of Section 30, Tiffin Township, Defiance County, and H. C. R. and L. C. R. are the owners of 160 acres located in the Southeast quarter of Section 19 of said township and county. The length of the line between these premises is 160 rods.

Several weeks ago H. C. R. addressed a letter to F. L. B. requesting him to build a line fence. B. agreed to this proposition and two disinterested parties were called in to apportion the fence between them. A written agreement was drawn up, assigning to B. the first forty rods, to R. the second forty, to B. the third forty rods and to R. the last forty rods. The agreement was fixed in this manner by reason of certain hills and valleys along the line fence so that the apportionment would be substantially the same.

Accordingly B. commenced to build his portion of said fence but R. refused to abide by the agreement and neglected to build his portion of the fence. Thereupon B. filed an application with the trustees according to law requesting them to view the premises and the line and to assign to each party his portion of the fence to be built and maintained.

Notice of the hearing on said apportionment was served personally upon F. L. B. and H. C. R. but no notice was served upon either A. S. B. or L. C. R. Thereafter B. completed the building of his portion of said fence.

QUESTION: Is the failure of the Trustees to notify L. C. R. fatal to the proceeding?

Said assignment above referred to, was made upon the 21st day of May, 1928, and a copy of said assignment was given to F. L. B. and H. C. R.

The Trustees granted to the parties a period of twenty-one days to complete the building of said fence. Mr. B.'s apportionment is now completed. R. has done nothing towards the building of his fence, and the time allowed by the Trustees for the completion of said fence expires on June 21, 1928.

To further hinder the proceedings, on the 6th day of June R., transferred and deeded to his son R. R. five acres out of the southwest quarter of his premises, thereby bringing a new party on the line fence so that now the portion of the line fence between F. L. B. and H. C. R. is 140 rods and the portion of the line fence between F. L. B. and R. R. is twenty rods.

This transfer I am certain is solely for the purpose of defeating the proceedings of the Township Trustees.

QUESTION: Will a new apportionment have to be made of said line fence before the Trustees can proceed further?"

Section 5908, General Code, provides in part 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. \* \* \*"

As provided by Section 5910, General Code,

"Where 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." (Italics the writer's.)

In considering the first question that you present your attention is directed to the case of *Moore vs. Given*, 39 O. S. 661, the second and third paragraphs of the syllabus of which read:

"2. Where a statute requires notice of a proceeding, but is silent concerning its form or manner of service, actual notice will alone satisfy such requirement.

3. In a proceeding under 'an act to regulate inclosures, and to provide against trespassing animals' (1 S. and C. 649), as amended May 3, 1873 (70 Ohio L., 246), authorizing township trustees, after notice to all parties who may have any interest in the title or possession of premises affected by a par-

tion fence (and in the repair or construction of such fence), to proceed to view and assign to each party, for repairs, his share of it, notice to a tenant in common in sole possession of such premises, who is alone interested in the possession of them, and in the repair of such fence, is sufficient to invest the trustees with power to act."

Judge Owen, who rendered the opinion of the Court, on page 663, said:

"Did notice to the defendant, he being the owner of an undivided interest of the lands actually occupied by him, invest the trustees with power to view and assign to each party for repair, his share of the partition fence? \* \* \* The contention of the defendant was and is, that all persons interested in the title of the lands occupied by him should have had notice of the proposed action of the trustees before they could have become invested with jurisdiction to act. The defendant was the sole occupant of the lands. He was, by his own admission, the only person interested in the possession of it or in the repair of the fence. His co-tenants in common were beyond seas; their residences unknown. As the form and manner of notice are not prescribed by the act, the actual notice alone could satisfy its requirements. This would require of the plaintiff an impracticable, if not an impossible, thing.

\* \* \*

Section 3 of the act provides for notice 'to all parties who may have any interest in the title or possession of said premises, and the repair or construction of said fence. To entitle a party to notice it is not enough that he be interested in the title or possession of the premises; he must also be interested in the repair or construction of the fence'. How the defendant came to be alone interested in the construction and repair of this partition fence does not appear. It is sufficient for us to know that he admits the fact to exist, and this leaves us at liberty to suppose that it is so by some arrangement between himself and his cotenants in common. Notice to him was sufficient to authorize the trustees to act."

You will note that at the time the case of *Moore vs. Given* supra, was decided, Section 5910, General Code, (then R. S. Section 4242) provided:

"When any controversy shall arise about the respective owners of partition fences, and their obligation to keep up and maintain the same in good repair, if they cannot agree among themselves, either party may apply to the trustees of the township in which said fence may be situate, who, *after not less than ten day's notice to all parties who may have any interest in the title or possession of said premises, and the repair or construction of said fence*, shall proceed to view and assign to each party, in writing, his equal share of such partition fence, to be by him maintained in good repair." (Italics the writer's.)

Section 5910, supra, reads:

"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 \* \* \*." (Italics the writer's.)

Although the form of notice is not prescribed, the manner of notice is now provided by Section 5910, supra, viz., "written notice." Section 5910, supra, further provides that such notice must be given "to all adjoining land owners."

In order to vest jurisdiction in a board of township trustees to proceed under Section 5910, *supra*, "written notice to all adjoining land owners of the time and place of meeting" must be given. Such was not done in the case that you present.

I am therefore of the opinion that, inasmuch as written notice was not given to L. C. R., who was a co-owner with H. C. R. of the premises in question, the township trustees were without jurisdiction to make the assignment as provided by Section 5910, General Code. It is my opinion that a new assignment will have to be made after proper notice be given as provided by Section 5910, General Code.

Your attention is directed to the fact that if a new assignment is desired, as provided by Section 5910, *supra*, all adjoining land owners must be served with written notice of the time and place of meeting.

The answer to your first question renders it unnecessary to answer your second inquiry.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2367.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF EDWARD CUNNINGHAM  
AND WIFE, IN NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, July 18, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date enclosing an abstract of title and a warranty deed signed by Edward Cunningham and wife, covering certain land in Nile Township, Scioto County, Ohio, and more particularly described as follows:

"BEING known as part of Lot Number Ten (10) of Ohio State University Lands, more particularly bounded and described as follows, to wit:—BEGINNING at a stone marked "Y", two hickories, chestnut and chestnut oak, Southeast corner of this Lot Number Ten (10) and Northeast corner to Survey No. 15881; thence with one line thereof West 33-83/100 chains to the southeast corner of lands lately sold and deeded by Arthur R. Gleason and wife to Charles R. Williams; thence North along the East line of said lands last named forty-eight (48) chains to the South line of Survey No. 15587; thence East along said last named line 33-83/100 chains to a stone marked "K" "B" "O" and two hickories corner to Lot Eleven (11); thence south forty-eight (48) chains to the place of beginning, containing one hundred sixty one (161) acres, more or less. Being the same premises conveyed to Wallenstein, Loeb, Freiberg and Company from Andrew J. Miller by deed dated May 28, 1897, recorded in Volume 58, page 544, Scioto County, Ohio, Record of Deeds."

An examination of the abstract of title submitted discloses a question of some difficulty arising out of the fact that one of the deeds in the chain of title to the above described lands was executed to a partnership in the firm name. As to this, it appears that on and prior to May 28, 1897, the lands in question were owned in fee simple by one Andrew J. Miller. On said date said Andrew J. Miller and Mary Miller, his