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1. FENCES—OWNERS OF ADJOINING LANDS—MAY AGREE IN WRITING—WITNESSED BY TWO PERSONS—UNEQUAL DIVISION OF DUTY TO BUILD, KEEP UP AND MAINTAIN IN GOOD REPAIR PARTITION FENCES.
2. BARBED WIRE CONSTRUCTION FOR FENCES—WHEN WRITTEN CONSENT OF OWNER OF ADJOINING LAND REQUIRED—SECTION 971.03 RC.
3. DUTY IMPOSED BY SECTION 971.02 RC—OWNERS OF ADJOINING LAND—PARTITION FENCES—BENEFIT TO BOTH OWNERS OF ADJOINING LAND—LAND ENCLOSED—AGRICULTURAL USES—PROVISIONS OF STATUTE MAY NOT BE APPLIED WHERE FENCE IS FOR SOLE BENEFIT OF ONE OF ADJOINING OWNERS.
4. BENEFIT—QUESTION OF FACT—STATUS TO BE RESOLVED BY BOARD OF TOWNSHIP TRUSTEES OR JOINT BOARD OF TRUSTEES—SECTIONS 971.04, 971.16 RC.

SYLLABUS:

1. The owners of adjoining lands may agree in writing, but not otherwise, upon an unequal division of the duty to build, keep up, and maintain in good repair, the partition fences between them, and such agreement in writing must be witnessed by two persons.

2. Section 971.03, Revised Code, prohibits the construction of a fence from barbed wire, where such wire is less than forty-eight inches from the ground, unless written consent of the owner of adjoining land is first obtained; and an oral agreement on such subject is not sufficient to avoid such statutory prohibition.

3. The provisions of Section 971.02, Revised Code, impose a duty upon the owners of adjoining land other than land laid out into lots to construct and maintain partition fences between them unless otherwise agreed upon in the manner prescribed

in such section. Such duty exists where the lands of both adjoining owners will be benefited even though such land will not be entirely inclosed and even though there is no present or contemplated use of the land for agricultural purposes; but the provisions of this section may not be applied in any case where the construction or maintenance of a partition fence is for the sole benefit of one of the adjoining owners.

4. The question of whether any benefit will result to a particular landowner from the construction and maintenance of a partition fence is one of fact and where the provisions of Section 971.04 are invoked by one of the parties, such question of fact should be resolved by the board of township trustees as therein provided, or, in appropriate cases, by a joint board of trustees as provided in Section 971.16, Revised Code.

Columbus, Ohio, March 29, 1955

Hon. Mary (Nicholson) Snyder, Prosecuting Attorney
Jackson County, Jackson, Ohio

Dear Madam:

I have for consideration your two recent requests for my opinion the first of which is as follows:

“A property owner in Gallia County and one in Jackson County are in dispute as to a line fence. The fence in question is on the Gallia, Jackson County line. Originally the problem was taken to the Gallia County Board of Trustees, and the parties worked out an agreement, not in writing, concerning ten rods of this fence and built same.

“After the fence was built as agreed the property owner in Gallia County wrote the property owner in Jackson County and stated:

“‘Since it is the law that barb wire is not to constitute a part of a line fence closer than 48 inches of the ground you are hereby given notice to remove all barb wire from your line fence to comply with said law and construct a satisfactory fence between your property and that of * * * by the date of July 1, 1954—remove your barb wire from our posts so we can complete our part of line fence—remove all of your surplus material to your side of line fence and stay on your side of the fence constructing your fence.’

“The parties agreed to a barbed wire fence and as you can now see from the complaining property owner’s letter he wants the property owner in Jackson County to tear down his portion of the fence so that the fence can be rebuilt using barbed wire so that it will not be less than 48” above the ground.

“The Revised Code provides that when a partition fence in controversy is on a township or county line, the board of township

trustees of the adjacent townships has concurrent jurisdiction, and the board of either of such townships may be called to perform the duties imposed as to partition fences * * *.

“Since the dispute was originally taken before the Gallia County Board of Trustees, would they have jurisdiction of the problem or is it proper for the Madison Township Trustees to have jurisdiction of this problem?”

“Since the parties originally agreed upon a fence, isn’t it true that the matter has been settled and the Trustees would not have authority to require the property owner in Jackson County to build a new fence which would be not less than 48” from the ground even though the agreement was oral?”

“Furthermore, the property owner in Gallia County is also complaining as to 30 rods of fence on the Jackson, Gallia County line. This portion of the fence has never been in dispute before. The property owner in Gallia County is now complaining to the Madison Township trustees on the ground that the fence is not legal fence since it is not 48” from the ground. It appears to the Board of Trustees after viewing said fence that it is a substantial fence. The problem now arises if the fence would be substantial enough to keep cattle and horses in, would it be necessary that the Board order this property owner to rebuild 30 rods of fence?”

“It is to be noted that the property owner who is complaining at the present time has no livestock and that his land is unenclosed on one other side. Under these circumstances should the Board of Trustees in Madison Township require a new partition line fence to be built?”

Your second request is as follows:

“On one of the boards of township trustees in this County there is a member that has requested that a partition fence be constructed in accordance with Section 971.04 of the Revised Code of the State of Ohio. At one time the trustee whose land adjoins states that he did see a portion of a fence and there was also one other person that said there was a rail fence. However, at the present time, there is no fence between the two owners and the adjoining owner refuses to build a fence for the reason that the land is just timberland and he does not have stock nor intends to have any. The question is, is he required to build his portion of the fence since he is not using the land for any purposes other than just the timber and has no intentions of doing so. The adjoining landowner does keep livestock and cattle on his land.

“I would like to know whether under these circumstances the adjoining land-owners would be required to help construct the fence since he purchased the land only for the purpose of the use of the timber on it.”

Before turning to the several problems posed, it seems that four sections of Chapter 971, Revised Code, should be noted.

Section 971.02, Revised Code, reads 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. * * *”

The pertinent portion of Section 971.03, Revised Code, is as follows:

“(B) No person or corporation shall construct or cause to be constructed, a partition fence from barbed wire unless written consent of the adjoining owner is first obtained. Such consent is not necessary to the use of one or two barbed wires, provided that neither is less than forty-eight inches from the ground, and is placed on the top of a fence other than a barbed wire fence.”

Section 971.04, Revised Code reads:

“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 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.”

Section 971.16, Revised Code, is as follows:

“When a partition fence in controversy is on a township or county line, the board of township trustees of the adjacent townships has concurrent jurisdiction, and the board of either of such townships may be called to perform the duties imposed as to partition fences in sections 971.01 to 971.37, inclusive, of the Revised Code. Either party may call the board of the other township, in which case they shall act jointly, but separate record shall be made in both townships.”

Your question regarding the effect of the oral agreement, as described in your first inquiry, may be disposed of by reference to Section 971.02, *supra*, which imposes the duty upon adjoining owners to construct and maintain partition fences in equal shares unless otherwise agreed in writing. This provision, by the application of the familiar maxim of

“expressio unius,” plainly precludes the possibility of avoiding the statutory duty thus imposed by an oral agreement.

Your question regarding fence construction involving the use of barbed wire is likewise readily disposed of by reference to the statutes above quoted. Section 971.03, Revised Code, plainly limits the use of such wire “unless the *written* consent of the adjoining owner is first obtained.” Here again, it is not possible to avoid the force of this statutory limitation by an *oral* agreement. Such being the case it becomes clear that either party to the dispute may initiate proceedings under the provisions of Section 971.04, Revised Code, or of Section 971.16, Revised Code, to have the controversy resolved.

This leaves for consideration the question of the legal duty as to partition fences in the case of the owner of land which would not be benefited by inclosure.

We have already noted, in Section 971.02, *supra*, the provision in general terms imposing the duty to construct and maintain partition fences. In the recodification of 1953 there was omitted from this section the following language formerly set out in Section 5908, General Code:

“ * * * *The fact that any land or tract of land is wholly unenclosed or is not used, adapted or intended by its owner for use for agricultural purposes shall not excuse the owner thereof from the obligations imposed by this chapter on him as an adjoining owner.* * * *”
(Emphasis added.)

As pointed out in my informal opinion No. 377, Informal Opinions of the Attorney General for 1954, page 1302, by reason of the provisions of Section 1.24, Revised Code, this inadvertent omission does not effect a substantive change in the provisions of former Section 5908, General Code. It cannot be supposed, however, that this provision as to land which is not adapted or intended for use for agricultural purposes is sufficient to require the construction and maintenance of a partition fence in every case for it is plain that where such a fence would be of no benefit whatever to one owner the compulsion to contribute to the expense of inclosure for the sole benefit of the adjoining owner would amount to a taking of property for a private purpose in contravention of constitutional limitations. A prior analagous statutory provision of this sort was before the court in *Coal Co. v. Cozad*, 79 Ohio St., 348, the syllabus in which case is as follows:

“1. 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.

“2. 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.”

In the opinion by Judge Shauck it was said at page 355:

“ * * * In the contemplation of the Bill of Rights, a legislative act to transfer title to a portion of the plaintiff’s lands to its neighbor by compulsion, and without consideration, would not differ from one to assess its lands to an equivalent extent for his exclusive benefit. It would be neither more reprehensible nor less availing.”

In this view of the matter it will be seen that in every case in which Section 971.02, Revised Code, is sought to be enforced there must necessarily be a finding that both owners will benefit from the construction or maintenance of the fence involved. This involves a determination by the trustees concerned of a question of fact in each such case; and it would be entirely beyond the scope of my office to express an opinion on such a question even though you should undertake to describe in minute detail all of the facts involved in the case with which you are concerned.

I am in accord with the view expressed in 1946 by the then Attorney General that each case must be determined on the existing facts of the case; that a landowner has a duty under the provisions of Section 971.01, et seq., Revised Code, then Section 5908, et seq., General Code, to build, keep up, and maintain in good repair, a partition fence where he will be benefited by the fence, although there is no present or contemplated agricultural use and the land will not be inclosed by such fence; but where the fence will be solely for the benefit of the owner of the adjoining land, a landowner may not be assessed for the costs of construction or maintenance. See Opinion No. 104, Informal Opinions of the Attorney General for 1946, page 250.

Accordingly, in specific answer to your inquiries, it is my opinion that:

1. The owners of adjoining lands may agree in writing, but not otherwise, upon an unequal division of the duty to build, keep up, and

maintain in good repair, the partition fences between them, and such agreement in writing must be witnessed by two persons.

2. Section 971.03, Revised Code, prohibits the construction of a fence from barbed wire, where such wire is less than forty-eight inches from the ground, unless written consent of the owner of adjoining land is first obtained; and an oral agreement on such subject is not sufficient to avoid such statutory prohibition.

3. The provisions of Section 971.02, Revised Code, impose a duty upon the owners of adjoining land other than land laid out into lots to construct and maintain partition fences between them unless otherwise agreed upon in the manner prescribed in such section. Such duty exists where the lands of both adjoining owners will be benefited even though such land will not be entirely inclosed and even though there is no present or contemplated use of the land for agricultural purposes; but the provisions of this section may not be applied in any case where the construction or maintenance of a partition fence is for the sole benefit of one of the adjoining owners.

4. The question of whether any benefit will result to a particular landowner from the construction and maintenance of a partition fence is one of fact and where the provisions of Section 971.04 are invoked by one of the parties, such question of fact should be resolved by the board of township trustees as therein provided, or, in appropriate cases, by a joint board of trustees as provided in Section 971.16, Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General