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LAND — PARCEL UNPLATTED LAND WITHIN MUNICIPAL CORPORATION — BOUNDED IN PART BY BOUNDARY LINE OF SUCH CORPORATION — NOT SUBJECT TO PROVISIONS OF SECTION 5908 G. C. AND COGNATE SECTIONS— TOWNSHIP TRUSTEES — NO JURISDICTION TO ENFORCE BUILDING OR MAINTENANCE OR PARTITION FENCE BETWEEN SUCH LAND AND ADJACENT LAND OUTSIDE OF MUNICIPAL CORPORATION.

SYLLABUS:

A parcel of unplatted land within a municipal corporation, which land is bounded in part by the boundary line of such municipal corporation, is not subject to the provisions of Section 5908, General Code, and cognate sections, and the township trustees therefore have no jurisdiction to enforce the building or maintenance of a partition fence between such land and the land adjacent thereto outside of such municipal corporation.

Columbus, Ohio, February 1, 1944

Hon. J. Donald Kincaid, Prosecuting Attorney
Zanesville, Ohio

Dear Sir:

Your request for my opinion reads:

"This office is in receipt of a letter from the Board of Township Trustees of Wayne Township, Muskingum County, Ohio which reads as follows:

'Mr. L., a farmer, and resident of Wayne Township has requested Mr. A., a land owner, and a resident of the Zanesville city limits, to build his portion of the fence connecting the two lands.

Both men cultivate and use the adjoining fields. Mr. A's property is not laid out in city lots.

Is it possible to have Mr. A. construct his portion of the fence?'

The problem is the dividing of a partition fence by the Township Trustees under General Code Sec. 5908 et seq. The partition fence is built on the corporation line of the city of Zanesville. The portion within the city is a field and is being farmed as is the portion in Wayne Township. Sec. 5908 specifically says that 'this chapter shall not apply to the enclosures of lots in municipal corporations.' The land in question within the corporation limits seems to be in acreage on the tax duplicate and apparently has not been sub-divided.

Your opinion and answer to the following question in regard to the above facts is desired: May the Township Trustees enforce the building of the portion of the line fence to be assigned to the owner of the lands within the corporation of Zanesville, Ohio?"

Sections 5908 and 5910, General Code respectively provide:

Section 5908:

"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. This Chapter shall not apply to the enclosure of lots in municipal corporations or of lands laid out into lots outside of municipal corporations, or affect any provision of law relating to fences required to be constructed by persons or corporations owning, controlling or managing a railroad."

Section 5910:

"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 5908, General Code, had its origin in Section 1 of an act found in 56 O. L., 8, which provides as follows:

"Be it enacted by the General Assembly of the State of Ohio, That whenever a fence, of whatsoever materials constructed, and in all respects such as a good husbandman ought to keep, shall hereafter be erected by any person on the line of his land or that on which he may have a lease for one or more years, and the person owning the land adjoining* thereto, or holding a lease on the same for three or more years, shall make or cause to be made, or have an inclosure on the opposite side of such fence, so that such fence may answer the purpose of inclosing his field, meadow, lot or any other inclosure. such person shall pay the owner of such fence, already erected, one-half of the value of so much thereof as serves as a partition fence, to be adjudged by the township trustees of the township in which such fence may be situated; and the amount so adjudged, if not paid, may be recovered in a civil action before any court having competent jurisdiction, in the name of, and for the use of the owner of such fence, with costs of suit: Provided that nothing in this act contained shall apply to the inclosure of lots in cities and villages."

*So spelled in the original act.

This section, with some change in phraseology, but none in meaning, was carried into the Revised Statutes as Section 4239. In 1904 it was amended to read substantially as Section 5908, General Code, now reads. Some slight changes were made by the Codifying Commission which prepared

the General Code, but they in no way affected the meaning of the language used.

In the original enactment, therefore, the words "lots in cities and villages" were not used in association with the words "lands laid out into lots outside of municipal corporations." The 1904 amendment did not, in my opinion, change the meaning of the word "lots" as used in the original enactment and such word continues at the present time to have the same meaning in Section 5908, General Code, as it had in the Act of 1859. The word "lot" has various meanings and is often used in the sense of being a parcel of unplatted real estate, and such is the meaning which I believe it must be given as used in the Act of 1859. I therefore believe that the words "lots in municipal corporations" as used in Section 5908, General Code, refer to any land in a municipal corporation, whether or not it has been platted.

It is a matter of common knowledge that land lying within the confines of a municipal corporation is often unplatted. There is no logical reason why such unplatted property within a municipal corporation should be subject to the fence law if platted property is not. I therefore believe that when the General Assembly enacted the Act of 1859 it intended the word "lots" as used therein to refer to any land within the confines of a municipal corporation.

This view finds support in the following statement contained in 18 O. Jur., 1100, where it is said:

"The whole scheme of the legislation on this phase of the subject applies only to rural districts; urban districts are expressly excluded; nor does it affect the duties imposed by the railroad fence laws."

The syllabus of Opinion No. 441, found in Opinions of the Attorney General for 1933, at page 456, also supports this conclusion. Such syllabus reads as follows:

"The cost of erecting a partition fence located within the limits of an incorporated village may not be assessed against the land owners, nor is it payable by the township trustees."

Since the land owned by Mr. A. is entirely within the confines of the City of Zanesville, it is excepted from the operation of the chapter of which Section 5908, General Code, and cognate sections are a part.

The township trustees therefore have no jurisdiction to enforce the building or maintenance of a partition fence between the land of Mr. A. and Mr. L.

Respectfully,

THOMAS J. HERBERT
Attorney General