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1. FENCE—SECTION 5933 ET SEQ., G. C.—DOES NOT AUTHORIZE TOWNSHIP TRUSTEES TO INSTITUTE ACTION AGAINST OWNER OF LAND BORDERING UPON PUBLIC ROAD OR HIGHWAY TO REMOVE HEDGE FENCE LOCATED THEREON IN WHOLE OR IN PART WITHIN HIGHWAY RIGHT OF WAY.
  
2. FENCE—HEDGE—BOUNDING ANY PUBLIC HIGHWAY AND LOCATED WHOLLY OR IN PART ON LAND BELONGING TO HIGHWAY—TOWNSHIP TRUSTEES—MAY DECLARE FENCE A NUISANCE—IF IT INTERFERES WITH GRADING, DRAINING OR DRAGGING OF HIGHWAY—IF IT CAUSES SNOW TO DRIFT OR IN ANY OTHER MANNER OBSTRUCTS OR ENDANGERS PUBLIC TRAVEL—OWNER, AGENT OR OCCUPANT OF LANDS ON OR BORDERING UPON LANDS WHERE FENCE MAINTAINED MAY BE ORDERED TO REMOVE FENCE—SECTION 3298-19 G. C.

## SYLLABUS:

1. Section 5933 et seq., General Code, does not authorize the township trustees to institute an action against the owner of land bordering upon a public road or highway to remove a hedge fence located thereon in whole or in part within the highway right of way.

2. Whenever any fence, including a hedge fence, bounding any public highway and located wholly or in part on the land belonging to such highway shall in any way interfere with the proper grading, draining or dragging of such highway, or if such fence shall cause the drifting of snow or in any other manner obstruct or endanger the public travel of such highway, the township trustees may declare such fence to be a public nuisance and order the owner, agent or occupant of the lands on or bordering upon which such fence is maintained, to remove the same from such highway pursuant to Section 3298-19, General Code of Ohio.

Columbus, Ohio, December 18, 1950

Hon. Clyde E. Lewis, Prosecuting Attorney  
Delaware County, Delaware, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The trustees of Radnor township, Delaware County, Ohio, have requested that I obtain from you an opinion concerning the following problem:

'May the township trustees bring an action for the removal by the owner of a hedge fence bordering a public highway pursuant to General Code Section 5933 et seq., when the hedge fence, placed there by a former owner, is within the confines of the public highway.'

"The trustees advise that they would appreciate your opinion at your earliest convenience."

For the context of your letter of inquiry I gather the pertinent facts to be that a prior owner of property abutting upon a public highway planted a hedge fence along such property within the highway right of way without the permission of the county commissioners and that the township trustees are now desiring to compel a subsequent owner of such property to remove such fence.

Section 5933, General Code, referred to in your letter reads as follows:

"An owner or occupant of land bordering upon a public road or highway, except a street or alley in a municipal corporation, or through which a public road or highway passes, may set, plant and cultivate a hedge or live fence on the line of such road or

public highway, and place on the margin of such road a protection fence, not to occupy more than six feet of such margin. Such protection fence, when placed opposite a live fence or hedge, set or planted, shall be permitted to remain for seven years." (Emphasis added.)

Also pertinent to a discussion of your question are the following sections of the General Code:

"Section 5934: The trustees of the township may grant permission in writing to the owner of the hedge or live fence, described in the next preceding section, to continue the *protection fence* such length of time as is necessary." (Emphasis added.)

"Section 5935: The owner of a hedge fence on a partition line, or along a public highway, shall not permit it to remain of a greater height or width than six feet, for a longer period than six months, or leave the cuttings from it on the public highway for a longer period than ten days" (Emphasis added.)

"Section 5936: A person violating the next preceding section shall be liable to the person damaged in a sum not exceeding twenty cents per rod of such hedge fence. *If the hedge is along a public highway, he shall be liable to the trustees of the township in which it is situate in a sum not exceeding fifteen cents per rod of such fence.*" (Emphasis added.)

It would appear that these sections, in so far as they relate to hedge fences along a road or public highway on land bordering upon a public highway refer only to those planted on the line of such road or public highway. Section 5933, *supra*, authorizes an owner or occupant of land bordering upon a road or public highway, except a street or alley in a municipal corporation, to set out and cultivate a hedge or live fence on the line of such road or public highway. Said section further authorizes such owner or occupant to maintain, for a limited time, within the right of way of such road or public highway, a fence to protect such live fence, which protection fence shall not occupy more than six feet of the margin of such right of way. Section 5934, *supra*, then authorizes the township trustees to grant permission to the owner of such live fence to continue the protection fence for a longer time than that authorized by the preceding section. Section 5935, *supra*, makes it unlawful for the owner of a hedge fence such as that authorized by Section 5933, to maintain it at a greater height or width than six feet for more than six months. Section 5936, *supra*, prescribes the penalties for such unlawful height or width of such fence. Where such fence is maintained unlawfully along such road

or highway the only remedy provided is that of an action in damages, not to exceed fifteen cents per rod of such fence, authorized to be instituted by the trustees. Said sections of the General Code would not authorize an action for the *removal* of a hedge fence located on the line of a road or public highway right of way. A fortiori, said sections of the General Code would not authorize an action for the removal of a hedge fence not located on the line of a road or public highway right of way. (See 18 O. Jur. 1094, Fences §6; 1917 Opinions of the Attorney General, Vol. II, p. 1530 at page 1536.)

Fences constructed of lawful materials, whether live fences or other types are not unlawful, per se, if located within a road or public highway right of way. Such fences, when located within such rights of way present the problem of whether or not the same constitute a nuisance. The removal of a fence obstructing a highway is a matter belonging to the public and to its officers, who may remove such fences without making themselves liable to trespass. (*Schueszler v. Cleveland, N. & S. E. R. Co.*, 25 O. C. C. N S 401, 45 O C C 292; *Baird v. Clark*, 12 O. S. 87; *Lane v. Kennedy*, 13 O. S. 42; *Grove v. Graham*, 41 O. S. 303; *Heddleston v. Hendricks* 52 O. S. 460.) Township trustees under circumstances therein described, may order the owner, agent or occupant of lands on or bordering any public highway upon which any fence is located in whole or in part on the land belonging to such highway, to remove the same pursuant to Section 3298-19, General Code, which reads as follows:

“Whenever any fence bounding any public highway and located wholly or in part on the land belonging to such highway shall in any way interfere with the proper grading, draining or dragging of such highway, or if such fence shall cause the drifting of snow or in any other manner obstruct or endanger the public travel of such highway, the township trustees may declare such fence to be a public nuisance and shall have power to order the owner, agent or occupant of the lands on or bordering upon which such fence is maintained, to remove same from such highway within thirty days, and if such owner, agent, or occupant refuses or neglects to comply with such order, the trustees shall have the same removed, and the expense so incurred shall be certified to the county auditor and entered on the tax duplicate against said land to be collected as other taxes.”

You are therefore advised that it is my opinion that:

1. Section 5933 et seq., General Code, does not authorize the township trustees to institute an action against the owner of land bordering

upon a public road or highway to remove a hedge fence located thereon in whole or in part within the highway right of way.

2. Whenever any fence, including a hedge fence, bounding any public highway and located wholly or in part on the land belonging to such highway shall in any way interfere with the proper grading, draining or dragging of such highway, or if such fence shall cause the drifting of snow or in any other manner obstruct or endanger the public travel of such highway, the township trustees may declare such fence to be a public nuisance and order the owner, agent or occupant of the lands on or bordering upon which such fence is maintained, to remove the same from such highway pursuant to Section 3298-19, General Code of Ohio.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.