

# Michigan Law Review

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Volume 34 | Issue 7

---

1936

## MUNICIPAL CORPORATIONS-FENCING ORDINANCES

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### Recommended Citation

*MUNICIPAL CORPORATIONS-FENCING ORDINANCES*, 34 MICH. L. REV. 1050 (1936).

Available at: <https://repository.law.umich.edu/mlr/vol34/iss7/19>

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MUNICIPAL CORPORATIONS—FENCING ORDINANCES—Defendant city passed an ordinance which prohibited the erection of fences that exceeded four feet in height, or which were composed wholly or in part of barbed wire. Plaintiff was refused permission to build a woven wire fence, six feet high with barbed wire attached to arms extending inward at the top. Plaintiff thereupon sued to enjoin defendant city from enforcing this ordinance, claiming that it deprived her of property without "due process." *Held*, by the court, that the right to fence one's land is a right of property that cannot be unreasonably interfered with. The ordinance in question was held unconstitutional because such regulations could not be justified by any requirement of public health, safety or morals, and it was therefore an unreasonable exercise of the police power. *Williams v. City of Hudson*, (Wis. 1935) 262 N. W. 607.

The right to fence one's property has always been protected by common law as a property right.<sup>1</sup> In order to justify interference with the enjoyment of private property by the exercise of its police power, the city must have for its object the preservation of public health, safety, or morals.<sup>2</sup> For, although the aesthetic consideration is becoming more and more an important factor in many regulatory ordinances,<sup>3</sup> police power, at the present at least, cannot be invoked solely upon this ground, for the regulation of private property.<sup>4</sup> It is intimated, however, from the trend of the decisions that the increasing aesthetic sentiment will eventually sanction such practice.<sup>5</sup> While fencing ordinances are not common,<sup>6</sup> a municipal corporation may regulate the construction and erection of them to protect pedestrians' rights to comfortable enjoyment of the streets,<sup>7</sup> to prevent them from becoming a fire hazard,<sup>8</sup> or to eliminate driving hazards created by a fence shutting off the view of a street corner.<sup>9</sup> However, the ordinance in the principal case, if it intended to remedy these evils, was too broad, and it extended far beyond what was necessary to correct them.<sup>10</sup> The plaintiff's fence was, as pointed out by the court, in no way interfering with the convenience and comfort of the public. The barbed wire in question created no danger to anyone lawfully using the street or alley. Therefore, although no mention was made concerning aesthetic considerations involved, the court undoubtedly reached a fair result.

D. H. L.

<sup>1</sup> 11 R. C. L. 871 at 873 (1916).

<sup>2</sup> For the extent of municipal regulation of private property by use of police power see, 43 C. J., § 547 at p. 413 et seq. (1927). 2 DILLON, MUNICIPAL CORPORATIONS, § 695, p. 1056 (1911).

<sup>3</sup> As aptly expressed by Pound, C. J., "Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency." *Perlmutter v. Greene*, 259 N. Y. 327 at 332, 182 N. E. 5 (1932). See also Chandler, "The Attitude of Law Towards Beauty," 8 A. B. A. J. 470 (1922).

<sup>4</sup> Larremore, "Public Aesthetics," 20 HARV. L. REV. 35 at 43 (1906).

<sup>5</sup> *Ibid.*; Chandler, "The Attitude of Law Towards Beauty," 8 A. B. A. J. 470 (1922).

<sup>6</sup> Most fencing regulations are by the state in connection with railroad, division, or crop fences, 22 L. R. A. 105 (1894); or to prohibit "spite fences," *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390 (1889).

<sup>7</sup> Barbed wire fences have been held not to constitute a nuisance per se. *Mason City v. Barngrover*, 26 Ill. App. 296 (1887).

<sup>8</sup> Regulation of high wooden fences was said to be valid in *Jackson v. Miller*, 69 N. J. Eq. 182, 60 A. 1019 (1905).

<sup>9</sup> This was one of the reasons given for upholding the validity of a set-back ordinance in *Gorieb v. Fox*, 274 U. S. 603, 47 S. Ct. 675 (1927).

<sup>10</sup> *Chicago v. Gunning System*, 114 Ill. App. 377 (1904), *affd.* 214 Ill. 628, 73 N. E. 1035 (1905).