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ASSESSMENT, SEWER—CERTIFIED FOR COLLECTION—NO AUTHORITY TO DIVIDE AND RE-APPORTION SUCH ASSESSMENT TO LOTS COMPRISING ORIGINAL TRACT—§319.42 RC APPORTIONMENT BY ORIGINAL OWNER OF ORIGINAL TRACT AND PORTION OF ORIGINAL TRACT.

SYLLABUS:

When an assessment has been levied by the county commissioners on a tract of land for an extension of a sanitary sewer, and has been certified to the county auditor for collection and said tract or a portion thereof has later been subdivided, neither the auditor, county engineer nor any other officer has authority to divide and re-apportion such assessment to the several lots into which the original tract has been divided; but where such owner sells a portion of such original tract the original assessment may be apportioned as provided by Section 319.42, Revised Code, between the original tract and the tract so sold.

Columbus, Ohio, July 22, 1957

Hon. Mary F. Abel, Prosecuting Attorney
Logan County, Bellefontaine, Ohio

Dear Madam:

I have before me your request for my opinion reading as follows:

"Sometime ago at one of the resort areas, Indian Lake, an extension of the sanitary sewer was petitioned for and granted. At the time the final assessments were made and certified to the County Auditor one of the benefited tracts consisted of approximately 40 acres and the assessment, of course, was made on the entire tract. Since that time the owner has had a portion of the acreage platted and is selling lots. My question is whether or not the County Engineer can now apportion the assessments against the lots. In other words does he have authority to break down the total assessment and apportion it against the lots as they are benefited? Or must the assessments be apportioned by the present owner as she disposes of the lots? It is my opinion that the present owner is trying to make the few lots which she has platted take care of her entire assessment, probably that should not be my worry but I can see where a gross injustice might be done if the assessment is fixed by the owner. I can also see where the county might be the loser if the proper apportionment was not made."

I am assuming that the assessment in question was made by the county commissioners. However, it appears that the answer to your question will apply equally to an assessment by a county or municipality.

In view of the great number of subdivisions that have been made, both in municipalities and outlying territories after an assessment has been made on an undivided tract, it is strange that there is such a lack of judicial or other authority on the question involved in your inquiry.

In 36 Ohio Jurisprudence, page 1043, I find this statement:

"* * * In the event of the subdivision of a tract of land subject to the lien of an assessment, liability for such assessment, as between the owners of the various lots, rests upon such lots in the proportion of their respective areas, in the absence of any statutory provision to the contrary * * *."

The single case cited in support of that statement is Bloch v. Godfrey,

5 C. C. (N. S.) 318, which case was affirmed without report in 78 Ohio St., 538.

At page 1045 the editor continues:

> "* * * Provision was made under a former statute, in the event of the subdivision of a tract of land subject to the lien of an assessment, for the apportionment of such assessment among the different lots of such tract as so subdivided."

In the Bloch case it was held, as shown by the head note:

> "1. An assessment for a street improvement is not rendered invalid by reason of the fact that the amount apportioned to an entire tract was afterwards, with the consent of the owner and no injustice being done thereby, placed upon certain lots forming a part of the tract.
>
> "2. But where there has been an unauthorized certification of an assessment, a court can not upon the complaint of a lot owner, and without all the lot owners before it who are affected thereby, attempt to properly apportion the assessment over all the lots liable therefor, but will simply decree that the plaintiff pay that proportion of the entire amount of the assessment which the area of his lot or lots bears to the area of the entire tract to be assessed."

The court quoted, but did not appear to rely on Section 2601-1, General Code, which then read:

> "In cities of the third grade of the first class, before the common council shall accept the plat of any property upon which, or any portion of which, there is any special assessment either due or to become due, the city civil engineer shall make an apportionment of such special assessment among the different lots of such plat affected by such assessment, etc."

That section, applicable only to municipal assessments, has long since disappeared from the code, and I find nothing comparable to it in the present law.

It must be borne in mind that when an assessment is made either by a county or a municipality, a lien is created on the property assessed in the full amount of the assessment. The lien holder is the municipality or county which has provided the cost of the improvement, for which it seeks to reimburse itself by the levy of a special assessment on the property benefited.

It would appear that the city or county, being such lienholder, would have the right and duty to look to the entire property for its security for the assessment so levied and that no agreement by the owner of the property with any person to whom he may sell a subdivided portion thereof could affect the rights of the lienholder.

The same principle would apply to a mortgagee who holds a mortgage or an entire tract which was later subdivided and sold in lots. It is inconceivable that the extent or value of his security could in any way be affected or depreciated by an agreement made by the original mortgagor and one to whom he sold a portion of the land covered by the mortgage. In such case, it would be quite natural for the owner to make an agreement with the mortgagee, either before or after giving the mortgage, that on payment to him of a certain amount representing the proper share of each lot, he would release the mortgage as to such lot.

A like principle could be made to apply to the county or city as the holder of the lien of an assessment, but there appears to be no provision in the law authorizing either the assessing authority or any officer or board to make such adjustment either before or after the assessment is levied, or before or after the subdivision.

As a matter of fact, the county or municipality is not the actual beneficial owner of the lien, but rather the bondholders, where bonds have been issued in anticipation of the collection of assessments, and no action by any officer which would affect such lien, unless authorized by the law in force when the bonds were issued, could affect the security of the bondholders.

In Opinion No. 1279, Opinions of the Attorney General for 1939, page 1891, it was held:

> "When a sewer district organized under authority of Section 6602-17 et seq., General Code, after completing the sewer and water mains which it constructed through the medium of a special assessment against the property in the district and having issued bonds in anticipation of the collection thereof, has by virtue of an agreement between the board of county commissioners and the city to which the territory forming such district has been annexed, conveyed such lines and mains to such city without monetary consideration, such city may not several years after the completion of such conveyance and before such bonds have been fully paid and retired enter into an agreement with the county commissioners to the effect that the city will assume

the payment of such outstanding bonds and cause the abatement of such special assessments. Such agreement would not be supported by an adequate consideration, would be beyond the power of the municipality, and would impair the vested property rights of the bondholders."

On page 1896 of the opinion, it was said:

"* * * It has been held that when special assessments have been levied and bonds issued in anticipation of the collection thereof, not even the legislature may constitutionally release the taxpayer from the payment of such assessment. State, ex rel. Hostetter vs. Hunt, 132 O. S., 568, 581; Hunter vs. Smith, 104 Fla., 222. *Such abatement of assessment would impair the vested contract rights of the bondholders under their bonds.* * * *"
(Emphasis added.)

While this opinion did not deal with the same situation as that which you present, it appears to me that its principle is directly applicable.

I am informed that some county auditors have assumed that they have the power to re-apportion an assessment when the property assessed is subdivided. It is probable that they have confused this action with the authority given them by Section 5713.18, Revised Code, to make the apportionment as to tax valuation. Of course, that procedure has no relation whatsoever to the problem you have presented.

A partial solution of your problem may be found in Section 319.42, Revised Code. This section which was formerly Section 2595, General Code, was enacted in 1941. 119 O. L., 332. It reads as follows:

"Whenever a portion of a tract or parcel of real estate is conveyed to another owner, and such tract or parcel bears unpaid special assessments, the authority certifying such assessments shall, on request of the county auditor, furnish the auditor with the proportionate amounts of the assessments to be allocated to the portion of the original tract or parcel so conveyed to another owner, and the lien of the assessments, as levied against the original tract or parcel, shall extend to the portion conveyed only to the extent of the amount so allocated to the portion by the certifying authority. This section does not change the total amount of the assessments as originally levied, or the total amount of the balances due."

It will be observed that it does not furnish authority for the apportionment of an assessment upon the platting or subdivision of a tract against

which a single assessment had been levied; but does give the owner who sells off a portion of such tract the right to have a proportionate share of the original assessment set off against the portions so sold, and thereby the lien of the original assessment shall apply to such detached portion only in the amount so apportioned to it.

It would follow that holders of bonds issued after the effective date of this act, August 19, 1941, would take them subject to any diminution which might result from such proceeding. As to holders of bonds issued prior to the act in question, it would appear that such procedure could not limit their right to have the lien enforced against the entire original tract.

In specific answer to your question it is my opinion that when an assessment has been levied by the county commissioners on a tract of land for an extension of a sanitary sewer, and has been certified to the county auditor for collection and said tract or a portion thereof has later been subdivided, neither the auditor, county engineer nor any other officer has authority to divide and re-apportion such assessment to the several lots into which the original tract has been divided; but where such owner sells a portion of such original tract the original assessment may be apportioned as provided by Section 319.42, Revised Code, between the original tract and the tract so sold.

Respectfully,
WILLIAM SAXBE
Attorney General