

574.

PARTITION FENCE ASSESSMENTS—DELINQUENT LANDS—
COLLECTION OF ASSESSMENTS.

SYLLABUS:

1. *Actions to enforce unpaid partition fence assessments can be brought under Section 2667, General Code.*
2. *Assessments of partition fence costs come within the terms of Section 5705, General Code, and non-payment of these assessments will operate to make lands delinquent and subject to the procedures given under taxation in Chapter 14 of the General Code of Ohio, relating to the collection of taxes on delinquent lands.*

COLUMBUS, OHIO, May 10, 1937.

HON. H. LLOYD JONES, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR: I acknowledge receipt of your recent communication which reads as follows:

“Where township trustees proceed under Section 5910 et seq., General Code, and assign to adjoining land owners equal parts of a partition fence to be built, and where one of the parties fails to comply with the assignment and it becomes necessary for the trustees to sell the contract for that construction, and the cost of the work is certified to the county auditor to be placed on the tax duplicate to be collected ‘as other taxes’ how can the collection of such cost be enforced?”

Wright vs. Batison, 30 N. P. (N. S.) holds that such cost does not constitute a lien. Section 5705, G. C., defining delinquent lands, does not include such costs in its definition.

Does the clause in Section 5914, G. C., ‘to be collected as other taxes’ mean that if such cost be not paid that the land will become delinquent as defined in Section 5705, G. C.?”

Partition fence procedure, where parties fail to comply with an assignment made by the township trustees, is provided for in Sections 5913, 5914 and 5915, General Code. These sections read as follows:

Sec. 5913. “If either person fails to build the portion of fence assigned to him, the township trustees, upon the application of the aggrieved person, shall sell the contract to the lowest responsible bidder agreeing to furnish the labor and

material and build such fence according to the specifications proposed by the trustees, after advertising them for ten days by posting notices thereof in three public places in the township."

Sec. 5914. "When the work is completed in conformity with such contract and to the satisfaction of the trustees, they shall forthwith certify the costs to the township clerk, and, if not paid within thirty days, such clerk shall certify them to the auditor of the county with a statement of the amount the fence sold for, adding thereto a proportionate amount of costs and expenses of such sale, with a correct description of each piece of land upon which the costs are assessed."

Sec. 5915. "The county auditor shall place such amounts upon the tax duplicate to be collected as other taxes, and the township trustees shall at the time certify the amount due each person for building such fence and the amount due each trustee and clerk for services rendered therein. The auditor may anticipate the collection thereof and draw orders for the payment of such amounts out of the county treasury."

Under these provisions the costs and expense of partition fences are assessed in equal amounts to the parties directly interested. Moreover when these amounts are certified to the county auditor they must "be accompanied with a correct description of each piece of land upon which they are *assessed*." The amounts are then placed upon the tax duplicate "to be collected as other taxes." This language clearly indicates that the costs assigned for partition fences are in fact assessments and were so considered by the legislature.

However, to throw more light upon what is generally meant by this term "assessment," the explanation given in Bouvier's Law Dictionary and in two Ohio cases will be considered.

In Bouvier on page 256 the following statement appears under "assessments."

"* * * A tax is a continuing burden; a local assessment is exceptional both as to time and locality; it is brought into being to accomplish a particular purpose. A tax is levied, collected, and administered by a public agency; a local assessment is made by an authority *ab extra*. Yet it is like a tax in that it is imposed under an authority derived from the legislature. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule. It is unlike a tax in that the proceeds must be expended in an improvement from which

a benefit, clearly exceptive and plainly perceived, must inure to the property upon which it is imposed * * *”

In *Raymond vs. Cleveland*, 42 O. S. 522, an assessment was defined as “a local imposition with reference to special benefits from expenditures.”

In *Prarie Township Trustees vs. Garver*, 41 O. A., 238, the matter of partition fence assignments was before the court, and was discussed as follows:

“The full cost of the erection of a partition fence is assessed against those directly interested and no portion thereof is assessed against other property owners. This sort of an assessment is not analogous to a public assessment, like one for county roads or city streets where the taxing district pays a portion. An assessment for a partition fence between property owners is not a public assessment but is in fact a private one in which no taxpayer is interested except the abutting property owners.”

There is no doubt then that partition fence costs assigned to interested parties are in nature assessments binding by law upon the parties in question.

Assessments are levied under the taxing laws of the State and as they are usually taxes affecting specific lands, they are, as a general rule, made liens by statute. However, in the case of the partition fence proceedings this was not done expressly in the statute and as a result of the legislature’s failure to so provide, in *Wright vs. Batison*, 30 N. P. (N. S.) 267, the court held that assessments under the partition fence sections did not constitute a lien on the premises affected. This rule applied in the case would defeat all rights to recover under Section 2667, General Code, which permits the county treasurer to bring actions on unpaid assessments. Section 2667, General Code, reads as follows:

“When special assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may enforce the lien of such assessments, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced.”

To adopt an interpretation rendering ineffective this remedy would, for all practical purposes, defeat the power and intent of the partition fence laws herein quoted. It has long been held that no taxes assessed upon land can be collected by action against the owner unless they are by law made a charge against him (*Dreake, Treasurer of Brown County vs. Beasley*, 26 O. S. 315) The expression "to be collected as other taxes" obviously refers to land taxes and to the procedure usually adopted for their collection. Definite instructions and provisions for the collection of these assessments are made in Section 2667, General Code, and to deny the collections of partition fence costs assessments under this section is to make ineffective the whole purpose of the partition fence laws and to make them wholly dependent upon the will of the parties. Undoubtedly the rule of *Wright vs. Batison, supra*, must be followed in Licking County until the rule of that jurisdiction is changed. However, such construction adopted generally would be directly contrary to all evidence of the intent of the legislature in Section 2667, supra, which refers in subject and content to special assessments against "land or lots or parts thereof on the tax duplicate." This general reference couched in general words is, it seems broad enough to take in assessments for partition fence costs. It is therefore my opinion in answer to your first question that actions to enforce unpaid partition fence assessments can be brought under Section 2667, of the General Code, relating to special assessments generally.

Your letter also refers to Section 5705, General Code. That section reads as follows:

"Delinquent lands as defined in this act (G. C. Sections 5704 to 5757) shall mean all lands upon which the taxes, assessments and penalties have not been paid for two consecutive semi-annual tax paying periods."

The term assessment is used generally here and would in consequence include all types of valid assessments. The assignment of partition fence costs is in its nature an assessment as has been hereinabove discussed. Moreover the language used by the legislature in referring to these costs as "assessed against the land" and "to be collected as other taxes" shows clearly an intent to give them the status of taxes to the extent that they are a charge upon the land and will affect its title. In view of these facts, it is my opinion that the assessments of partition fence costs come within the terms of Section 5705, supra, and non-payment of these assessments will operate to make lands delinquent and subject to the procedure given under Taxation in Chapter 14 of the

General Code of Ohio, relating to the collection of taxes on delinquent lands.

Yours truly,

HERBERT S. DUFFY,

Attorney General.

575.

APPROVAL—CERTIFICATE OF TITLE RELATING TO LITTLE FARMS ALLOTMENT IN GREEN TOWNSHIP, SUMMIT COUNTY, OHIO.

COLUMBUS, OHIO, May 10, 1937.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: This is to acknowledge receipt of your recent communication with which you resubmit for my examination and approval certificate of title No. 56998, certain deeds, contract encumbrance record No. 22 and other files relating to the proposed purchase of Lots Nos. 7 and 8 of C. C. McCue's Little Farms Allotment in Green Township, Summit County, Ohio.

The files above referred to were the subject of Opinion No. 382 directed to you under date of April 2, 1937.

The lots above referred to are owned by one Lillian Olsen and the present state of her title to these lots is indicated by the former opinion of this office above referred to.

In this opinion I disapproved the deeds executed by Augusta M. McCue, as executrix of the estate of C. Clifton McCue in and by which she conveyed this property to Lillian Olsen, for the reason that the certificate of title showed that this property had been sold by Augusta M. McCue, as executrix, to Steve Mitseff and Fota Mitseff, and that there was nothing to show that Steve Mitseff and Fota Mitseff had assigned their rights to this property or to a deed therefor, to Lillian Olsen. In this connection, you have now submitted to me a land contract executed by and between Augusta M. McCue, as executrix of the last will and testament of C. Clifton McCue, deceased, and Steve Mitseff and Fota Mitseff in and by which said executrix contracts and agrees to convey to the other parties to the contract, above named, said Lots 7 and 8 upon payment of the purchase price thereof. Endorsed upon this land contract is an assignment over the signature of Steve Mitseff