

414.

APPROVAL, FINAL RESOLUTION ON ROAD IMPROVEMENT, LIMA-BELLEFONTAINE ROAD, I. C. H. NO. 130, LOGAN COUNTY, OHIO.

COLUMBUS, OHIO, April 29, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

415.

SPECIAL ASSESSMENT—STATUTE OF LIMITATIONS DOES NOT APPLY TO AN ACTION BROUGHT UNDER SECTION 2667, GENERAL CODE—WHO MAY BRING ACTION.

SYLLABUS:

Under the provisions of Section 2670, General Code, there is no statute of limitations applying to an action brought under Section 2667, General Code, to enforce the lien of a special assessment charged against real estate, and such an action may be brought to enforce a lien for a special assessment levied by either the Director of Highways and Public Works or county commissioners to pay the portion of the cost of the construction and improvement of an intercounty highway, authorized by law to be charged against the benefited property.

COLUMBUS, OHIO, April 29, 1927.

HON. C. O. TURNER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date, which reads as follows:

“I am writing you asking if the statute of limitations runs against a special assessment for the improvement of I. C. H. and if so, when does the statute begin to run? See 31 O. S. 652, Section 11222 G. C.”

In your letter you address two inquiries for my consideration:

1. Whether the six year statute of limitations (Section 11222, General Code,) runs against a special assessment levied against abutting property for the improvement of an intercounty highway, and

2. If the statute of limitations applies, when does the statute begin to run?

The state of Ohio, acting through its Department of Highways and Public works, levies assessments against abutting property for the construction and improvement of an intercounty highway only in those cases when said department is proceeding without the co-operation of a county or some township thereof under and by virtue of authority vested by Section 1191 of the General Code.

The pertinent part of Section 1191 reads as follows:

“* * * If the county commissioners or township trustees do not make application for the apportionment to such county on or before the first day of May then the state highway commissioner shall enter upon

and construct, improve, maintain or repair any of the intercounty highways or parts thereof in said county, either by contract, force account or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof, except that portion to be assessed against abutting property, from the apportionment of the appropriation due said county and unused or unapplied for by the said county or any board of trustees thereof, as hereinafter provided. * * *

When a part of the intercounty highway system or main market road system of the state is improved by the state, by contract or force account, without the co-operation with a county or some township thereof, ten per cent. of the cost of said construction or improvement shall be assessed against the land abutting thereon according to the benefits, provided the total amount assessed against any abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purpose of taxation. The state highway commissioner shall cause to be made a tentative apportionment of the amount to be assessed and shall fix a time and place for a hearing on such apportionment. He shall give notice to said abutting property owners of the time and place of such hearing by one publication in a newspaper of general circulation in the county in which said improvement is situated, which notice shall be published at least ten days before the date fixed for said hearing. The state highway commissioner shall attend such hearing in person or designate a deputy highway commissioner or division engineer to attend the same and if any objections in writing are presented to the tentative apportionment the proof offered by the aggrieved parties shall be heard. The tentative assessment shall be confirmed by the state highway commissioner as made, or in case objections are made thereto, with such modifications, if any, he may deem just and proper and the same shall be certified to the county auditor of the county in which such abutting property is situated to be by him placed upon the duplicate against said land and paid in such number of equal semi-annual payments as may be fixed by the state highway commissioner. Said assessments when collected by the county treasurer shall be paid into the state treasury to the credit of the state highway improvement fund to reimburse the state for the money advanced by it on account of said improvement." (Italics the writer's).

Section 1224, General Code, provides for the levying of special assessments by the Director of Highways and Public Works to cover ten per centum of the cost of repairing by resurfacing, reconstruction or widening intercounty highways.

In all other instances involving special assessments against abutting property owners for the constructing, improving, maintaining or repairing of an intercounty highway, or main market road, the Department of Highways, acting through the State Highway Commissioner, has only supervisory or co-operative powers over such improvements, and in all these instances the county commissioners make and levy special assessments against abutting property owners. See Section 1214, General Code.

Section 11222 of the General Code reads:

"An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

That the statute of limitations does not apply against the state of Ohio has been determined in a great many cases. In the case of *Wasteny vs. Schott*, 58 O. S., page 410, the court held:

"1. The rule that statutes of limitation do not run against the state unless it is expressly so provided, is applicable in actions where the state, though not a party to the record, is the real party in interest.

2. While actions under Section 2859, of the Revised Statutes, for the collection of personal taxes, are required to be brought in the name of the county treasurer, they are prosecuted in the interest and for the benefit of the state, and the plea of the statute of limitations is not available. *Hariman vs. Hunter*, 56 Ohio St., 175, distinguished."

The county treasurer is authorized by virtue of Section 2667 and related sections of the General Code to bring an action for collection of delinquent special assessments.

Section 2670 of the General Code reads as follows:

"Judgement shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisalment. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, *nor shall any statute of limitations apply to such action.* When the lands or lots stand charged on the tax duplicate as forfeited to the state, it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer."

Since the enactment of the above quoted section, Section 11222, General Code, does not apply to the actions brought under Section 2667, General Code, wherein a county treasurer is proceeding to collect delinquent special assessments inasmuch as assessments levied by the state or a board of county commissioners against abutting property for the improvement of an intercounty highway are special assessments, the lien for which may be enforced in the manner prescribed by Sections 2667, et seq., of the General Code.

In answer to your question, it is my opinion that by the provisions of Section 2670, General Code, there is no statute of limitations applying to an action brought under Section 2667, General Code, to enforce the lien of a special assessment charged against real estate, and that such an action may be brought to enforce a lien for a special assessment levied by either the Director of Highways and Public Works or county commissioners to pay the portion of the cost of the construction and improvement of an intercounty highway, authorized by law to be charged against the benefited property.

Respectfully,
EDWARD C. TURNER,
Attorney General.