658

DITCHES—OFFICERS OR AGENTS OF LOCAL SUBDIVISION WITHOUT LEGAL AUTHORITY TO LEVY AND COLLECT SPECIAL ASSESSMENT TO REPAIR, MAINTAIN OR IMPROVE COUNTY DITCHES—ABSENCE OF LEGISLATIVE PERMISSION—STATE PROPERTY—AMENDED S. B. 41, 98 GENERAL ASSEMBLY.

SYLLABUS:

In the absence of legislative permission, officers or agents of a local subdivision are without legal authority to levy and collect a special assessment for the repair, maintenance or improvement of county ditches to the extent that the same is made against property belonging to the State of Ohio.

Columbus, Ohio, June 24, 1949

Mr. O. A. Alderman, State Forester
Ohio Agricultural Experiment Station
Wooster, Ohio

Dear Sir:

Your communication requesting my opinion reads as follows:

"I am enclosing a copy of correspondence which concerns the obligation of the State in cleaning out county ditches. This question will arise in several of our state forest purchase units and it would be very helpful to us if an early opinion could be obtained. Your cooperation in rendering such an opinion will be greatly appreciated."

The correspondence referred to in your request consists of a letter addressed to your district office in Chillicothe by the local ditch supervisor. This letter reads:

"Under the provisions of the statutes, I, as the Ditch Supervisor, am required to give notice to you of certain matters, at the time the appointment is filed with the County Auditor and when the County Auditor has fixed the time for the hearing by the Board of County Commissioners of any protest that may be filed by any land owner affected by the apportionment.

"The County Auditor has fixed Monday, January 31st, 1949, at 2:00 o'clock P. M., as the time when the County Commissioners

will hear any protests made by any land owners affected by the apportionment. This hearing will be held in the office of the County Commissioners, in the Court House, Chillicothe, Ohio.

"I enclose copies of all pertinent papers which are hereby made a part of this notice and which contain an exact statement of the portion of the work allotted to you.

"In event you decide to file a protest, such protest must be filed with the County Auditor before the date of the hearing—that is, before January 31st, 1949.

"The work allotted to you must be completed not later than the 15th day of May, 1949.

"In the section apportioned to you, you are required to clean out or repair such portion of the ditch to its full depth and capacity as originally constructed, details of which are on file at the office of the County Commissioners."

From the foregoing, it appears that your inquiry is directed to the question of whether the state is under a duty or obligation to perform the portion of the work allotted to it by the ditch supervisor, or in lieu of performing such work, is the state liable for the cost thereof apportioned to it by the ditch supervisor.

Section 6442, General Code, provides:

"The word 'owner,' as used in chapters 1, 2, and 8 of this title, shall be construed to include any owner of any right, title, estate, or interest in or to any real property, and shall be held to include persons, partnerships, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or council of a city or village, the trustees of any state, county, or municipal public institution.

"The word 'land' shall include any estate or interest, of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property.

"The word 'improvement', as used in chapters 1, 2, and 8 of this title, shall include the location, construction, reconstruction, widening, deepening, straightening, boxing, tiling, filling, walling, arching, or any change in the course or location of any ditch, drain, or water course, and shall include the deepening, widening, straightening, or any change in the course or location of a river, creek, or run; and shall include a levee, or any wall, embankment, jetty, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet; and shall include the vacating of a ditch, or drain.

"All words in the singular number shall be read in the plural when the sense requires it. Commissioners shall mean the board of county commissioners."

Chapter 1, referred to in the above quoted section, deals with single county ditches, and Chapter 2 concerns joint county ditches. Chapter 8 provides for the cleaning and repair of all ditches which have been constructed in a township. Section 6691, et seq. of the General Code, Chapter 8, provide that the repair work is to be supervised by the ditch supervisor and provide for the apportionment of the work, according to the benefits, among the various landowners and if the landowners fail to perform the work, the county surveyor or ditch supervisor may perform the work. The cost of the work is paid from the general ditch improvement fund of the county, and the county commissioners certify the cost of the work to the county auditor, who is required to collect the same and when collected to credit such payments to the general ditch improvement fund.

Section 6691, General Code, reads in part:

"In any township or townships in which a ditch, drain or watercourse or part thereof has been or may hereafter be located and constructed, the county commissioners for the purpose of keeping such ditches, drains or watercourses clean and in repair, may delegate such duty to the county surveyor who shall execute the necessary work and assess the cost thereof in accordance with the provisions of this chapter as they relate to the duties of a ditch supervisor, or employ a ditch supervisor for such township; the same person may be employed as a ditch supervisor for one or more townships in the county; * * *."

Section 6693, General Code, reads in part:

"The ditch supervisor shall have supervision of the cleaning out or repair of all ditches, drains or watercourses located and constructed in his township or townships, which have theretofore been located and constructed by township trustees, or by county commissioners as single county ditches, or by county commissioners as joint county ditches, and shall at all times be under the direction and control of the commissioners. The ditch supervisor is authorized to repair tile that are broken, uncovered, or stopped up; to open the outlet of tile; to repair any abutment, catch basin, or retaining wall that has been constructed on any ditch, drain or watercourse; and to clean out and keep ditches, drains or watercourses in repair as provided by law; * * *."

It is manifest that the assessment referred to in your aforesaid inquiry was made by the ditch supervisor pursuant to the terms of the aforementioned sections.

Special assessments are to be distinguished from taxes. In this connection it is stated in Home Owners Loan Corporation v. Tyson, et al., 133 O. S. 184, 188, that:

> "As is pointed out in City of Lima v. Lima Cemetery Assn., 42 Ohio St., 128, 51 Am. Rep. 809, in a broad sense an assessment is a tax and a tax an assessment. While there is a generic difference in that taxes are levied to pay the expense of government and an assessment is levied upon property abutting or adjacent to a public improvement with reference to the special benefits conferred for the purpose of paying the cost thereof, yet both are levied under the sovereign power of the state upon the assumption that they are for the public weal and both give rise to liens which have generally been held superior to all others. 30 L. R. A. (N. S.), 761; Hamilton on Laws of Special Assessments, 699, Section 708; 2 Page & Jones on Taxation by Assessment, 1770, Section 1068; 19 Ruling Case Law, 412, Section 192. In keeping with these principles courts of other jurisdictions have held that special assessments are a peculiar species of taxation."

The court then cited a number of cases from other jurisdictions.

It might be pertinent to observe at this point that it would make no difference in the conclusion hereinafter reached whether the property in question has or has not been exempted from taxation. In other words, where the General Assembly has provided that certain property may be exempted from taxation, it is not necessarily exempt from a special assessment. It is stated in 48 Am. Jur. 636, that:

> "It is a general rule, to which there are few exceptions, that a constitutional or statutory exemption from taxation is to be taken as an exemption from ordinary taxes only, and does not include special assessments for local improvements."

With respect to special assessments against public property, it is stated in 36 O. Jur. 943 that:

> "It has been held in a number of cases in which it did not appear that any provision was made for the levying or payment of an assessment upon public property, or property devoted to a public use, for the cost of public improvement, that such property is not subject to an assessment for such purpose. But it appears to be established in Ohio, as a general rule, that an essessment may be

levied against public property *where the payment or collection of such assessment may be enforced by means or remedies other than the sale of the property.* However, property belonging to the United States is not subject to assessment for the cost of public improvements by the state or by local taxing units thereof. And it is said that the legislature cannot delegate to the authorities of a local taxing unit the power to levy and collect an assessment against property owned by the state." (Emphasis added.)

Although somewhat lengthy I now quote a statement appearing in 48 Am. Jur. 641, to-wit:

"In the absence of state constitutional restrictions in the matter, a state legislature may subject state property to liability to special or local assessments; whether or not it does so is entirely a question of policy. A constitutional exemption of the property of the state from 'taxation' does not prevent such action by the legislature.

"The minority rule is that state property unless it is expressly exempted, is subject to a special or local assessment. The majority rule, however, is that in the absence of legislative permission, state property is not subject to special assessment. A grant of the power to levy special assessments on state property is not to be implied from a statute giving a general power to make assessments to meet the cost of local improvements. The intent that the property of the state shall be subject to assessment must be clearly expressed. One reason advanced for the rule that if the statute authorizing special assessments is in general terms, neither excluding nor including specifically the property of the state, such statute is to be so construed as to exclude property of the state, is that it is a general rule in the interpretation of statutes limiting rights and interests to construe them so as not to embrace the sovereign power or government, unless the same is expressly named therein or intended by necessary implication. The rule has sometimes been put on the ground that the property of the state cannot be taken on execution. So, a constitutional provision whereby certain state lands are made inalienable has been said to preclude the levy of a local assessment thereon. A constitutional prohibition against suits against the state has been held to preclude the levy of a special assessment on its property. Still another reason advanced is that it is unreasonable to tax one governmental agency for the benefit of another."

The Ohio decision that seems most nearly in point is State, ex rel. Monger, Director v. Board of County Commissioners, 119 O. S. 93, decided in 1928. The conclusion of the court is contained in one although

somewhat lengthy sentence. In order to make plain the holding of the court, the entire opinion is set forth, to-wit:

> "The demurrer to the petition will be sustained and a mandatory writ denied upon the ground that the present use of the state property, known as Buckeye Lake, is proprietary and the proposed improvement being in part for the benefit of such state property, the imposing of an assessment for the entire expense of such improvement upon a district less than the state, under the provisions of Chapter 4, Title III, Part Second, General Code, whether the proposed improvement be constructed under that Chapter as it existed at the time the director of health ordered the commissioners of Fairfield county to proceed or as it exists now would amount to an imposition on such district of a burden that belongs in part to and ought to be borne in part by the state at large and which amount cannot be apportioned to and collected from the state under Section 6602-33c, General Code, *for the reason that the Legislature is without power to delegate to a board of county commissioners the legislative power to levy and collect an assessment against the state.*" (Emphasis added.)

In Polk County Sav. Bank v. State (1886,) 69 Iowa 24, 28 N.W. 416, where it was stated that no specific statute existed as to the right to assess public property for benefits of improvements, it was held that property of the State used for a public purpose was not subject to a sewer assessment by the city in which the property was located.

See also Cotting v. Com. (1910,) 205 Mass. 523, 91 N.E. 900. In that case, where a state legislative commissioner sold land belonging to the commonwealth with a covenant against encumbrance, and a sewer assessment was later imposed on the land, the court said, at page 902:

> "We may assume that, under our decision, no assessment could be enforced against the commonwealth so long as it held the title."

It is believed that the emphasized matter in the opinion of State, ex rel. Monger v. Board of County Commissioners, supra, indicates, at least to some extent, that there is no authority to levy and collect an assessment against property belonging to the state. Therefore, in the absence of any legislative permission with respect to the matter, I am impelled to conclude, and it is my opinion, that the officers or agents of a local subdivision are without legal authority to levy and collect a special assessment for the repair, maintenance or improvement of county ditches to the extent that the same is made against property belonging to the State of Ohio.

Your attention is invited to Amended Senate Bill No. 41, which was passed by the 98th General Assembly, at its present regular session, wherein Sections 6554 to 6558, both inclusive, of the General Code, were amended, thereby affording a basis of cooperation between the State of Ohio and its political subdivisions in relation to the *construction* of drainage projects benefiting or abutting on state owned property.

Respectfully,

HERBERT S. DUFFY,
Attorney General.