

205.

COUNTY DITCH IMPROVEMENT—DAMAGES CAUSED BY SUCH IMPROVEMENT MAY BE ASSESSED AGAINST SPECIALLY BENEFITED PROPERTY.

SYLLABUS:

Damages may be included as part of the cost of a county ditch improvement and assessed against specially benefited property.

COLUMBUS, OHIO, March 11, 1933.

HON. RAY W. DAVIS, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Your recent request for my opinion reads as follows:

“Where, in the construction of a county ditch, the County Commissioners awarded damages to one of the landowners through whose land the ditch runs, in the amount of \$800.00, may the auditor of the county assess other landowners who benefit by said ditch in the amount of \$800.00 to cover the damages paid by the County Commissioners?”

It is my understanding that the landowners who benefit by this ditch have been assessed their special assessment amounting to their individual benefits. However, the above mentioned \$800.00 assessment is to compensate the county paid from the ditch fund, for the money paid as damages to one of the landowners.”

An examination of the provisions of Sections 6442, et seq. of the General Code discloses that damages are to be considered as part of the cost of a county ditch improvement.

Section 6484, General Code, relating to the final levy of assessments for such an improvement, provides that such assessments shall not only be based upon the contract price, but shall include the cost of location. Estimated assessments are first made by the county surveyor as provided in Section 6455, General Code. Under Section 6456, notice of the filing of estimated assessments must be given to all property owners to be assessed. Under Section 6457, claims for damages must be filed on or before the date of final hearing. At the final hearing, if the commissioners find that the cost of the improvement will be equal to or greater than the benefits which will be derived therefrom if constructed, they shall set aside the first order finding in favor of the improvement and shall dismiss the petition. Section 6462, General Code. This last mentioned section clearly recognizes the matter of damages as part of the cost of the improvement. The section provides, *inter alia*, as follows:

“* * * * * In determining whether or not the improvement should be granted, the commissioners shall consider the cost of location and construction, the compensation for land taken, the damages to land along or in the vicinity of the route of the improvement, the damages, if any, to land below the lower terminus of the improvement which may be caused by constructing the improvement, the sufficiency or insufficiency of the outlet, the benefits to land needing the improvement; and shall consider any other proper matter which will lawfully assist them in finding for or against the improvement. * * * * *”

Section 6463, relating to the determination of assessments, authorizes the commissioners to amend and correct the estimated assessments theretofore filed. The obvious purpose of this provision is to enable the commissioners to include in the amount assessed upon specially benefited property the matter of damages or compensation which may be awarded at the final hearing. The propriety of including compensation and damages as part of the cost of a county ditch improvement and assessing the same upon specially benefited property is recognized in 14 O. Jur. 906. Under the heading "Items Included in Cost", the text is as follows:

"The cost of an improvement, for the payment of which an assessment may be levied upon the lands benefited thereby, consists of the contract price for the construction thereof, plus the cost of the establishment and location of the improvement and of supervising the construction thereof.

Although no deduction may be made from the amount of compensation to which the owner is entitled for lands taken for a drainage improvement, on account of benefits, if the remaining lands receive special benefits, different from and in addition to the benefits received by the owner as a member of the general public, the amount of such compensation may be included in the cost of the improvement and assessed upon such remaining lands in proportion to the special benefits so received."

Before concluding upon the question of this matter of including in assessments amounts paid as damages, it should be noted that in the case of *City of Cleveland vs. Wick*, 18 O. S. 303, the Supreme Court held as follows:

"An assessment upon lands fronting on a street, to reimburse the amount of compensation paid the owner for his other land taken for the use of the street, is authorized by the statute (S. & S. Stat. 834, sec. 1), and is not in violation of the constitutional provision which guarantees to owners of land so taken, a full compensation 'without deduction for benefit.'"

To the same effect was the holding in *Krumberg vs. City of Cincinnati*, 29 O. S. 69; *Meissner vs. City of Toledo*, 31 O. S. 387, and *Chamberlain vs. City of Cleveland*, 34 O. S. 551. In *Railway Co. vs. Cincinnati*, 62 O. S. 465, the case of *Cleveland vs. Wick* was overruled, the court holding that compensation paid to the landowner for lands taken by appropriation proceedings to open a street could not be assessed back upon the lands of the owner remaining after such taking. The case of *City of Dayton vs. Bauman*, 66 O. S. 379 followed *Railway Co. vs. Cincinnati* and held that neither amounts paid as compensation nor damages could be assessed.

In the case of *State, ex rel. vs. Otter*, 106 O. S. 415, *Railway Co. vs. Cincinnati*, and *Dayton vs. Bauman* were overruled and *Cleveland vs. Wick* was approved and followed. The Otter case involved including the matter of compensation and damages in special assessments levied for a county ditch improvement under the ditch law prior to its recodification in the year 1923.

Specifically answering your question, it is my opinion that damages may be included as part of the cost of a county ditch improvement and assessed against specially benefited property.

In the second paragraph of your letter which I have quoted above, you say that the landowners have already been assessed in accordance with special benefits. From the information which you have furnished with respect to these proceedings, I am unable to categorically state whether or not this specific amount of damages paid out of the general county ditch fund may be recovered from the proceeds of special assessments. It is sufficient to say that unless these damages were computed as part of the cost of the improvement before determining to proceed therewith at the final hearing under Section 6462, General Code, and considered in making up the assessments as finally adopted, there is clearly no authority at this time to levy an additional assessment to make up this amount.

Respectfully,

JOHN W. BRICKER,
Attorney General.

206.

DELINQUENT LANDS—TRANSFERRED TO STATE AT FORECLOSURE
SALE—STATE HAS NO RIGHT TO POSSESSION OF OR RENTS
FROM THE PROPERTY.

SYLLABUS:

When lands are "forfeited" to the state by reason of the fact that no bidders were obtained at a sale in foreclosure of the delinquent tax lien against a parcel of property pursuant to the provisions of Sections 5705 et seq. General Code, and become "forfeited lands" the only interest of the state in such lands is that of a holder of legal title thereof, to be disposed of, and the proceeds applied toward the payment of the taxes, assessments, penalty, interest and court costs standing charged against such parcel, and the state has no right to possession of such lands or to the rents arising therefrom, and must account to the "former owner" for any sum received in excess of the amount of such taxes and charges.

COLUMBUS, OHIO, March 11, 1933.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Your recent request for opinion reads:

"On February 25, 1932, this office filed a foreclosure suit to collect delinquent taxes in the sum of \$555.42 against property at No. 2713 East 36th Street, Cleveland, Ohio. In due course, this property was offered for sale by the sheriff, and there were no bidders. Thereafter, in due course, a journal entry was filed, forfeiting said property to the state of Ohio.

For your information, will state that the sheriff's docket disclosed that the property at No. 2713 East 36th Street is a dwelling house and was appraised by the sheriff at \$2100.00. We do not know whether this property is vacant, or, if not vacant, by whom it is occupied. In any event, the house and lot are now the property of the state of Ohio, and any accruing rental or profit should properly go to the state.

We expect to have a number of similar situations arising from time to time, during the coming year and would like to have a ruling from