

I have examined carefully the forms of bonds incorporated herein and am of the opinion that such forms are in accordance with the statutory requirements for the same.

4579.

PARTITION FENCE—COUNTY AUDITOR MAY ANTICIPATE COLLECTION OF COST INCURRED BY TOWNSHIP TRUSTEES IN ERECTING PARTITION FENCE—“MAY” IN SEC. 5915, G. C. DISCRETIONARY.

SYLLABUS:

When a board of township trustees has awarded a contract for the building of a partition fence as provided in Section 5913, General Code, and the township clerk has certified the costs to the county auditor as provided in Section 5914, General Code, and the county auditor has placed the amount of costs so certified on the tax duplicate pursuant to Section 5915, General Code, it is permissive and discretionary with the county auditor to anticipate the collection thereof and draw orders for the payment of such amounts out of the county treasury. “May” as used in Section 5915, General Code, should be given its generally accepted permissive and discretionary meaning.

COLUMBUS, OHIO, August 24, 1935.

HON. FREDERICK C. MYERS, *Prosecuting Attorney, Marietta, Ohio.*

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

“The County Auditor of Washington County, has asked for an opinion with reference to the latter part of Section 5915 of the General Code, which reads as follows:

‘The Auditor may anticipate the collection thereof and draw payments for such amount out of the County Treasury.’

The above quotation is from a section of law which relates to the duties of the County Auditor upon the completion of line fences and certification of the costs to him.

The question is, does the word ‘may’ in the language quoted make it obligatory upon the County Auditor to anticipate the collection of the cost and draw orders for the payment as if the language of the statute employed the word ‘shall’ instead of ‘may’?”

Where a controversy arises over the erection or repair of a partition fence,

complaint by the aggrieved person may be made to the township trustees. After viewing the premises the trustees are empowered, by Section 5910, General Code, "to assign, in writing, to each person his equal share thereof, to be constructed or kept in repair by him so as to be good and substantial."

Section 5913, General Code, provides:

"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." (Italics the writer's)

Section 5914, General Code, provides:

"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." (Italics the writer's)

Section 5915, General Code, reads as follows:

"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." (Italics the writer's)

I have italicized the words "shall" and "may" wherever used in the sections quoted supra. It will be observed that the word "shall" is used on five occasions in Sections 5913, 5914 and 5915, General Code, whereas the word "may" is used only once and then to state that "the auditor may anticipate the collection" of the costs of building the fence which costs he has placed upon the tax duplicate. You ask if the word "may" as used in Section 5915, Gen-

eral Code, should be interpreted as "shall" thereby making mandatory the anticipation of the tax collection by the county auditor.

It is a fundamental rule that ordinarily the words "may" and "shall" are not used interchangeably or synonymously. When such use is employed, the intention so to do must clearly appear. It is stated in Webster's Dictionary:

"Where the sense, purpose, or policy of a statute requires it, *may* as used in the statute will be construed as *must* or *shall*; otherwise *may* has its ordinary permissive and discretionary force." (Italics the writer's)

In 2 *Bouvier's Law Dictionary* at page 2168, these statements appear:

"In interpreting statutes the word *may* should be construed as equivalent to *shall* or *must* in cases where the sense of the entire enactment requires it; * * * Where there is nothing in the connection of the language or in the sense and policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary." (Italics the writer's)

The following statement of the rule appears in 25 *Ruling Case Law*, 767.

"There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished.

Whether the language of a statute is imperative or merely permissive depends on the intention as disclosed in the nature of the act and in the context. Although the words of a statute are merely permissive, directory, or enabling, they may nevertheless have the force of words of command where the power or duty to which they relate is for the advancement of public justice or the security and protection of public or private rights. Thus, the words 'may', 'shall' 'be lawful,' and the like, frequently are to be construed as 'shall' or 'must' where the rights of the public or of third persons depend on the exercise of the power, or performance of the duty, to which the statute refers, or where the construction is necessary to give effect to the clear intention of the legislature, or if a contrary construction would render the statute obnoxious to some constitutional inhibition;

but such a liberty can be taken with the plain words of a statute only where it is necessary to give effect to the clear policy and intention of the legislature.”

In *State, ex rel. vs. Board of Education*, 127 O. S. 337, the Supreme Court had before it an analogous situation. In the statute there under consideration the word *may* was used once while the word *shall* was used in nine places. The court held that “may” should be given its generally accepted meaning and said:

“However, there seems to be nothing in the context to indicate that the legislature did not have in mind the generally accepted sense in which the two words are ordinarily employed.”

I find nothing in the statutes under consideration here to indicate that the legislature did not have in mind the generally accepted sense in which the words “shall” and “may” are ordinarily used and am therefore of the opinion that the word “may” as used in Section 5915, General Code, should be given its generally accepted permissive and discretionary meaning. This position is further supported by *Stanton vs. Realty Co.*, 117 O. S. 345, wherein the Court cited with approval the following statement in *Lessee of Swazey’s Heirs vs. Blackman*, 8 Ohio, 5:

“ ‘May’ means ‘must’, in all those cases where the public are interested, or where a matter of public policy, and not merely of private rights, is involved.”

Specifically answering your inquiry I am of the opinion that when a board of township trustees has awarded a contract for the building of a partition fence as provided in Section 5913, General Code, and the township clerk has certified the costs to the county auditor as provided in Section 5914, General Code, and the county auditor has placed the amount of costs so certified on the tax duplicate pursuant to Section 5915, General Code, it is permissive and discretionary with the county auditor to anticipate the collection thereof and draw orders for the payment of such amounts out of the county treasury. “May” as used in Section 5915, General Code, should be given its generally accepted permissive and discretionary meaning.

Respectfully,

JOHN W. BRICKER,
Attorney General.