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EXAMINER—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—NO AUTHORITY TO MAKE FINDINGS FOR RECOVERY IN FAVOR OF MUNICIPALITY AGAINST ABUTTING PROPERTY OWNERS — AMOUNT OF SPECIAL ASSESSMENTS ABATED AND ENJOINED AS ILLEGAL AND VOID—ORDER, COMMON PLEAS COURT—ACTION UNDER SECTION 12075 GC—COMPROMISE AGREED UPON BY PARTIES IN OPEN COURT—CITY SOLICITOR—CITY COUNCIL.

SYLLABUS:

An examiner of the bureau of inspection and supervision of public offices is without authority to make findings for recovery in favor of a municipality and against abutting property owners for the amount of special assessments abated and enjoined as illegal and void by an order of the common pleas court in an action brought under the provisions of Section 12075, General Code, even though the court's action was the result of a compromise agreed upon by the parties in open court, the city solicitor participating therein upon the authorization and under the direction of city council.

Columbus, Ohio, June 8, 1953

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"In connection with the examination of the accounts and records of municipalities of the state of Ohio, our examiners frequently encounter situations in which the municipal councils will authorize the abatement of assessments levied against the property owners for their share of the cost of public improvements, after special assessment bonds have been issued and sold and assessments have been certified to the county auditor, to be placed upon the tax duplicate and to be collected by the city treasurer, as are other real property taxes.

"In this connection, I wish to call attention to the opinion of the Supreme Court, Case No. 32961, decided on June 11, 1952, in the case of The State, ex rel. Donsante, a taxpayer, appellant, v. Pethtel, Auditor, et al., appellees, the first syllabus of which reads as follows:

" 'Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them, except as specifically authorized by statute.'

"The petition filed in this case set forth the facts that, during the years 1942 to 1947, the auditor of Lake County, pursuant to the direction of the council and officials of the village of Wickliffe, abated, discharged and removed from the tax list of the village, without payment having been made, certain of such special assessments theretofore duly levied and assessed, in a total amount in excess of $46,000.00.

"In several cities of Ohio, our examiners have found that several years after certain improvements had been completed, special assessment bonds had been issued, assessments had been levied and certified to the county auditor, said assessments had been placed upon the tax duplicate, and several installments of said assessments had been paid by the property owners, some controversy had arisen between certain property owners and the city about the amount of such assessments.

"As the result of said controversies, several property owners filed suits in the common pleas court to enjoin the collection of said assessments.

"Subsequent to the filing of these suits, the city councils passed numerous ordinances and resolutions, authorizing the city solicitors to approve journal entries in the common pleas court, upon agreed verdicts in open court, whereunder the city agreed to the abatement of as much as thirty three percent of these assessments, upon the ground that the assessments were excessive.

"Accordingly, such journal entries were drawn and approved by both the city solicitors and by the attorneys for the property owners, and the abatement of said assessments, in part, was ordered by the court.

"A typical journal entry approved by the court reads somewhat as follows:

" 'Upon the finding by this court that at the time of the enactment and passage of the resolutions and ordinances leading to the assessments and reassessments of said amounts of municipal paving assessments against said lots, the amounts so assessed and reassessed and certified were, in each case, when added to the county special assessments then levied and assessed against such lots, in excess of the true value of said lots, and each of them, and that by reason thereof, said municipal paving assessments and reassessments were therefore a violation of the plaintiff's constitutional rights and that said assessments and reassessments were illegal, void and of no effect.'

"Wherefore, it was ordered that the county auditor should abate all of said assessments and reassessments then standing on his records against such lots, and all defendants in this action were forever permanently enjoined from thereafter attempting to as-

sess, certify or collect any and all of said assessments and reassessments against such lots, and said assessments and reassessments were declared illegal, unlawful and void.

"These entries were filed and approved by the common pleas court, prior to the decision of the court of appeals in the case of Henri L. Mock, plaintiff, v. John J. Boyle, et al., No. 20737, 53 Ohio Abstract, page 567, appealed to the Supreme Court on July 18, 1949, Case No. 31889. The Supreme Court refused to review the Mock case.

"The question that now arises is this:

"Does an examiner of the Bureau of Inspection and Supervision of Public Offices have authority to make findings for recovery in favor of a municipality and against abutting property owners for the amount of the special assessments abated under order of the common pleas court, where the journal entry made by the court was based on an agreed compromise abatement, authorized by city council and agreed to in open court, by the city solicitor and the attorneys for the property owners?"

The action in the Boyle case, mentioned in your inquiry, was initiated by certain property owners to enjoin the collection of assessments levied upon real estate within a municipality. Judgment was rendered for the plaintiff in the common pleas court and upon appeal to the court of appeals judgment was reversed on the ground that the property owners concerned were estopped, in their attempt to enjoin, by the conduct of their predecessors in title in participating in action by which the assessments were initially imposed. It is true that in the instant case the several property owners might well have been similarly defeated had the city chosen to contest their claims. This, however, was not done and the city actually consented to judgment in which the assessments were judicially declared to be invalid.

In State ex rel. Donsante v. Pethtel, 158 Ohio St., 35, the first paragraph of the syllabus is as follows:

"1. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute."

In view of this plain statement of the law and because I do not understand that any claim is raised in the instant case as to the illegality of the assessment, it may be conceded that in none of the cases covered by your

inquiry was there any authority in law for the city council, solely by its own action, to abate or compromise any of the special assessments concerned.

This concession, however, is by no means dispositive of the matter for it clearly appears that the several city councils did not undertake, by their own action, to remit, abate or compromise such assessments but on the contrary merely consented, on behalf of the city, to such action by the common pleas court. The basic questions presented in your inquiry are, therefore, whether that court possesses such power of abatement, and whether a judgment to that effect is conclusive as to any action under the provisions of Section 286, General Code, in which the effectiveness of the judgment is questioned.

The jurisdiction of the common pleas court in actions to enjoin the collection of taxes and assessments is found in Section 12075, General Code, which reads as follows:

> "Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

In view of the plain language of this statute, it must be conceded that the court, in the cases described in your inquiry, had jurisdiction of the subject of the action. No question is raised, as I understand it, that the court likewise had jurisdiction of the parties and I assume that such was the case. Because the subject is not mentioned in your inquiry, I must assume also that there was no question of fraud, collusion or mistake in any of the litigation involved.

In these circumstances, the common pleas court, by the approval of a journal entry, made a finding that certain assessments were "illegal, void and of no effect," and for such reason "permanently enjoined" their assessment, certification and collection.

In 23 Ohio Jurisprudence, 823, et seq., Section 521, we find the following statement:

> "* * * In the absence of fraud, collusion, or mistake at least, a judgment upon the merits, rendered by a court of competent jurisdiction, is a final determination or adjudication of the claims,

> and rights of the parties, of the fact and amount of indebtedness and remedies of the parties, of the issues, or material facts, or matters necessarily, properly, or directly in issue, and, under proper circumstances, of questions which might have been litigated therein, but not of those matters which could not have been adjudicated therein; and is conclusive and binding as between the parties and privies, though subject to vacation or modification, while the judgment remains in force; that is to say, unless an appeal has been taken, or until the judgment is reversed or set aside by a direct proceeding for that purpose in a court of competent jurisdiction. * * *"

I am informed that no action was taken seeking to vacate these judgments during the term in which they were rendered, nor any action to vacate them after term on any of the grounds stated in Section 11631, General Code, nor was any appeal prosecuted within the time permitted by law. Such being the case, it would appear that such judgments became final and conclusive so far as the several cities were concerned, and this is so regardless of any claim presently raised that such judgments were erroneous, for even erroneous judgments are binding between the parties and privies until vacated or reversed. 23 Ohio Jurisprudence, 837, Section 528.

In your inquiry you state that the several judgments with which we are here concerned were brought about by action of the several city councils in passing certain ordinances and resolutions authorizing the city solicitors to approve journal entries in the common pleas court upon agreed verdicts in open court. The effect of judgments by consent is described in 23 Ohio Jurisprudence, 760, section 422, as follows:

> "The law has been broadly laid down that as between parties sui juris, and in the absence of fraud, a judgment or decree of a court having jurisdiction of the subject matter and rendered by consent of the parties, though without any ascertainment by the court of the truth of the facts averred, is binding and conclusive between the parties and their privies. In fact, such a judgment is considered as binding and conclusive as one rendered in an adversary suit, in which the conclusions embodied in the decree had been based upon controverted facts and due consideration thereof by the court."

Cited in support of this statement in Sponseller v. Sponseller, 110 Ohio St., 395, the second paragraph of the syllabus in which is as follows:

> "2. Where a court acquires jurisdiction over such subject-matter and the parties, a consent decree adjusting alimony can not be collaterally attacked."

In view of these statements of law, there would appear to be no ground for questioning the effectiveness of the judgments in the instant case merely on the ground that they have been entered by consent of parties.

We may next consider the effect of this situation on the authority to take a finding under the provisions of Section 286, General Code, against the several property owners and in favor of the municipality as to the assessments the collection of which has been permanently enjoined.

While it is true that judgments are not binding as to strangers, it can scarcely be said that the bureau of inspection and supervision of public offices is a stranger in the instant cases. It will be observed that any action which may be brought, as provided in Section 286, supra, based on a finding by the bureau, will be prosecuted by the city solicitor or specially employed counsel in the name of the city concerned. Thus it is clear that the interests of the bureau and of the city are identical and that the bureau may assert a claim only in the name of and for the benefit of the city. Such being the case, it is clear that the bureau is without authority to assert any claim which the city is estopped to assert.

As to the city, however, it is clear that its claims against the several property owners concerned are res judicata. This doctrine is described in 23 Ohio Jurisprudence, 961, 962, Section 730, as follows:

> "Briefly stated, the doctrine of res judicata is that an existing final judgment or decree, rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction. The rule has been said to be well expressed as follows: 'The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea in bar or as evidence, conclusive between the same parties, on the same matter, directly in question in another court. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

The reason for the rule is stated in the same work, p. 963, Section 731, as follows:

> "* * * The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted again to harass and vex his opponent in a second action involving the same matter."

It is clear from the facts stated in your inquiry that the several cities concerned are effectively estopped as to the claims in question and could not successfully prosecute an action, as provided in Section 286, General Code, on the basis of the bureau's finding with respect to such claims. Any such finding and any action prosecuted thereon would, therefore, constitute a mere harassment and vexation of the property owners concerned in a second action involving the same matter, a proceeding which is wholly at variance with the policy of the law.

Accordingly, in specific answer to your inquiry, it is my opinion that an examiner of the bureau of inspection and supervision of public offices is without authority to make findings for recovery in favor of a municipality and against abutting property owners for the amount of special assessments abated and enjoined as illegal and void by an order of the common pleas court in an action brought under the provisions of Section 12075, General Code, even though the court's action was the result of a compromise agreed upon by the parties in open court, the city solicitor participating therein upon the authorization and under the direction of city council.

Respectfully,

C. WILLIAM O'NEILL
Attorney General