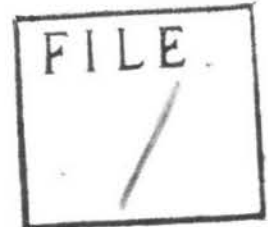


SCHOOLS:
SCHOOL DISTRICTS:
PARTITION FENCES:

Liability of public school districts
for costs of partition fences.

March 23, 1942



Hon. George Adams
Prosecuting Attorney
Mexico, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following question:

"May I have your opinion as to whether or not a common school district can be compelled to put in a partition fence under the statutes relative to fences and enclosures,"

The question which you submit does not involve the question of the authority of a school district to erect fences but it involves the question of whether or not it is mandatory on a school district to erect division fences. On the question of the authority of the district to erect fences, we are enclosing a copy of an opinion to Honorable P. C. Hays, Secretary of School Board, Poplar Bluff, Missouri. This opinion is dated March 24, 1936. While it is not pertinent to the question you have submitted, we thought it might be of some value to you in settling this matter.

On the question of whether or not it is mandatory for the district to erect and pay for a division fence dividing the properties of the school district from other owners, I find that section 14574, R. S. Mo., 1939, pertaining to division fences provides as follows:

"Whenever the fence of any owner of real estate, now erected or constructed, or which shall hereafter be erected or constructed, the same being a lawful fence, as defined by sections 14569 and 14570, serves to enclose the land of another,

or which shall become a part of the fence enclosing the lands of another, on demand made by the person owning such fence, such other person shall pay the owner one-half the value of so much thereof as serves to enclose his land, and upon such payment shall own an undivided half of such fence.

You will also note that by section 14575 that if the owners fail to agree on the value of the fence, then it is submitted to a Board of Reviewers. And by section 14576, it is provided that if the person charged with his part of the value of the fence does not pay for same, that it might be recovered before some justice of the peace of competent jurisdiction. If the controversy is between individuals, then there is no question but that the foregoing provisions of the statute are applicable. However, a school district is a subordinate agency, subdivision, or instrumentality of the state, which performs the duties of the state in the conduct and maintenance of the public schools. State vs. Whittle 63 S. W. (2) l. c. 102. That being the case, the school district is in a different class than that of a person involved in a division fence line controversy.

We do not find where such question has been before the courts of this State or any other state. However, we think that the question in which it was attempted to impose a sewer tax against a school district is analogous to the question here. In the case of Normandy Consolidated School District of St. Louis County v. Wellston Sewer District of St. Louis County et al. 77 S.W. (2d) 477, the Sewer district was attempting to collect from the school district the portion of the sewer tax which the lands of the school district were liable for. The sewer tax act under which the suit was brought provided that a uniform tax should be levied "upon all the lands" within any sewer district and that upon the assessment of benefits a tax of a portion of such benefits should be levied "on all lots, tracts and parcels of lands, railroads and other property in the district etc." In that suit the defense was that a school district being a public instrumentality of the government was not included within the act. At l. c. 478 the court said:

"Now it is accepted doctrine that public schools constitute an arm of the state government and perform a public or governmental function, from which it necessarily

follows that the question of whether the property of school districts is to be held liable to the imposition of a tax against it is to be determined in the light of the rules pertaining to the subject of taxation of public property generally. * * * * *"
Citing cases.

* * * * *

"But even though the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit, yet the rule is that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the lawmakers have manifested a clear legislative intent that such public property shall be subject to the assessment. This doctrine traces its ancestry back to the ancient common-law principle that the crown was not to be bound by any statute, the words of which restrained or diminished any of his rights or interests, unless he was specially named therein; and the theory of the modernized restatement of the principle is that to require public funds to be paid out for taxes would necessarily divert such funds from the true public use which they are otherwise designed to serve. And of course, if a clear expression of legislative intent is to be required as the basis for the enforcement of special tax bills against public property strictly devoted to public use, then mere general language in a statute will not suffice to warrant such assessment, and public property will not be held included within the scope of any such statute unless by express enactment or clear implication." Citing cases.

March 23, 1942

In that case the court held that the school district was not included within the sewer tax act because the lawmakers had not expressly included it. The imposition of the expenses of erecting a division fence upon a school district would be similar to the imposition of the sewer tax expense on a school district. Since the court in the Normandy Consolidated School District case above, held that since the school district is not expressly included in the sewer district act, that it is not liable for the tax; then by the same process of reasoning, since the school district is not expressly included in the statutes pertaining to division fences cited above, we do not think that a school district could be charged with the costs of value of its one-half of any fence which may be erected between its property and other property.

CONCLUSION

From the foregoing, it is the opinion of this department that a common school district cannot be compelled to put in a partition fence nor can it be charged with one-half of the value of the fence.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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