923.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN GUERNSEY COUNTY, OHIO.

COLUMBUS, OHIO, January 9, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

924.

ROADS AND HIGHWAYS—COUNTY AUDITORS NOT ENTITLED TO FEES FOR COUNTY ROAD ASSESSMENTS—COUNTY TREASURERS ARE ENTITLED TO SUCH FEES—HOW COMPUTED AND PAID.

County auditors are not entitled to any fees whatsoever in connection with the collection of county road assessments. County treasurers are entitled to fees of one-half of one per cent on the amount of such collections, to be paid upon the warrant of the county auditor upon the general fund of the county, and not deducted from the special assessments.

COLUMBUS, OHIO, January 12, 1920.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Some time ago this department was in receipt of a letter from you requesting advice as follows:

> "1. Can the auditor's and treasurer's fees for the collection of county special assessments be charged to the county general fund? It has been the custom to deduct the auditor's and treasurer's fees from the special assessments. This has resulted in a shortage in the property owners' share of the sinking funds as the county surveyor in making his assessments does not take into consideration the auditor's and treasurer's fees.
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> 2. Can the county commissioners and surveyor make supplemental assessments? The surveyor makes up his estimated assessments and the commissioners have a hearing on them. Invariably the assessments are less than the property owners' share of the real cost of the improvement and less than the property owners' share of the bonds sold for the improvement. This results in deficits in the sinking fund.
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> 3. If supplemental assessments cannot be made must the county or the township bear the deficits in which case it would be necessary to meet it by tax levy?
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> 4. Another thing that we are confronted with is that the surveyor's estimate of the cost of an improvement does not always include sufficient drainage, approaches, etc. This means that these extras have been paid for in the past by the county alone. Supplemental assessments would enable the property owners to be charged with their share of these extras, if legal to make them. Could townships also be assessed for their proportion of the same?"

All of these questions seem to present considerable difficulty. While they were under consideration other similar questions arose, so that it was deemed unwise to attempt to answer the questions which have been quoted until such other questions had received consideration and a conclusion had been reached with respect thereto.

You will please find enclosed copies of opinions Nos. 886 and 887, under date of December 24, 1919, which seem to answer questions Nos. 2, 3 and 4. These questions as stated seem to relate to road improvements (see question No. 4). The enclosed copies of opinion deal with road improvements under the county and the state law respectively and hold that assessments should not be made and confirmed finally until the total cost of the improvement is known. If this rule is adhered to questions like these submitted can never arise. It is true that the practice has been otherwise in many localities, else the questions which have been referred to this department for consideration would not have been asked. For the future, however, all such questions can be avoided by adhering to the rule stated, which is that the assessments should not be made until the thing to be assessed, viz., a proportion of the actual cost and expense of the improvement, becomes a known quantity. This is the only way to avoid supplemental assessments, and, as pointed out in the opinions enclosed, there is no authority in law for making supplemental assessments. What has just been said is not in any wise inconsistent with provisions found in sections 1210 G. C. and 6948 G. C. as to extra work, and in section 7212 G. C. as to approaches and driveways.

These statements leave for consideration in this opinion only question No. 1. This question has something in common with the other questions which have just been dealt with. The latter assume that the assessments are made before the actual cost of the improvement is known—an erroneous assumption; the former likewise assumes that county auditors and county treasurers are entitled to collection fees for collecting special assessments on account of road improvements. The correctness of this assumption must first be examined both as to the auditor and the treasurer.

Section 2624 of the General Code deals with the fees of the auditor. It provides as follows:

> "On all moneys collected by the county treasurer on any tax duplicates of the county, other than the liquor, inheritance and cigarette duplicates, the county auditor on settlement semi-annually with the county treasurer and auditor of state, shall be allowed as compensation for his services the following percentages:
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> On the first one hundred thousand dollars, one and one-half per cent; on the next two million dollars, five-tenths of one per cent; on the next two million dollars, four-tenths of one per cent, and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portions of the revenue payable to the state as well as to the county, townships, corporations and school districts."

The quotation is from amendment to the section made in 1919 (108 O. L., Part I, p. 561); but so far as the question now under consideration is involved the amendment is in nowise material.

This section, as it will be observed, authorizes the county treasurer to retain fees on moneys collected "on any tax duplicates of the county" other than certain enumerated duplicates. The question which now arises is as to whether or not a special assessment duplicate is a "tax duplicate" within the meaning of this section. It will be remembered that road assessments are not placed on a tax dupli-

cate as such, but on a special assessment duplicate (see section 6923 G. C.). It is true that that section provides that when so placed such assessments are "to be collected as other taxes", but this clause may not be sufficient to make the duplicate on which they are collected a "tax duplicate" for the purpose of section 2624.

On the other hand, the consequences of holding that the auditor is entitled to collection fees for the service under consideration are such, in the present state of the statutory law, as to dictate an opposite conclusion. For if the fees are to be retained then, as your question suggests, they must be retained from such distribution. Section 2624 speaks of retention from the "revenues", a word which is appropriately used only with respect to general taxes. No other section specifies just how this apportionment shall be charged when the revenues due the county are distributed in the county treasury to the respective funds. The only section even remotely bearing upon this question is the section dealing with the settlement between the county auditor and the county treasurer. That section, which is section 2597, provides that the treasurer's fees shall be deducted "from the several taxes charged on the duplicate in a just and ratable proportion." If this section is to furnish an analogy we would have to read the word "taxes" in a sense broad enough to include "assessments" in order to arrive at the conclusion that collection fees, which for the purpose of the present discussion are assumed to be properly chargeable, are to be deducted from the assessments. Suppose, however, this thought is pursued a step further: if the collection fees are properly chargeable and are to be deducted from the assessments, then how is the deficiency in the assessment account to be made up? This is the exact question submitted by you. It, however, involves another assumption, namely, that a deficiency in the assessment account will be thus produced. This would be the case if the collection fees do not constitute a part of the total cost and expense of the improvement. The state and county road statutes have been examined and without quotation of them it may be said that they do not expressly or by inference provide that such fees are to be considered in arriving at the total cost and expense of the improvement for which assessments are to be made. In the absence of any such express provision the rule is that such fees are not a part of the cost of the improvement (see Spangler vs. Cleveland, 35 O. S., 469). One of the reasons which was given by the supreme court in the case cited, which involved municipal assessments, does not exist in the case of county assessments, viz., uncertainty as to whether or not the cost of collection is an expense that will necessarily be incurred. The other reason suggested by the court in that case does, however, exist. Under section 2624 the percentages are computed on the total collections. There is no fee attributable to collecting assessments, as such. It would be impossible, therefore, except by arbitrary action, to assign any given percentage as an expense incurred in the collection of special assessments, as such. This point is worthy of consideration as reflecting upon the main issue, for it tends to show that section 2624 was intended as prescribing a rule of compensation for the collection of general taxes only, as distinguished from special assessments.

From all these considerations it is the opinion of this department that the supposed auditor's fees for collecting special assessments could not be a part of the total cost and expense of a road improvement for which such assessments are to be made. In addition to the above it might be said that to hold otherwise would involve the anomaly of allowing the auditor to collect fees upon his own fees, if they are to enter into the principal sum of the assessment to be apportioned and collected by him.

This conclusion leaves us in the following dilemma: Either, as suggested in your question, there must always be a deficiency in the special assessment account

due to the deduction of the supposed auditor's fees from the collections of special assessments without reimbursement from the property owners, and requiring us to search elsewhere for means of making up this deficiency; or else such fees when retained are to be charged against some fund other than the special assessment fund.

The first horn of the above stated dilemma must be eliminated from consideration. There is no way in which to make up this deficiency unless it be section 6929 of the General Code, as to county improvements, and section 1223 of the General Code, as to state improvements. These sections, respectively require the commissioners to provide before the issuance of bonds for the levy and collection of a tax on all the taxable property of the county "to cover any deficiency in the payment or collection of any special assessments or township taxes anticipated by such bonds."

But in the supposititious case under discussion there has been no deficiency in the collection of the assessments; all have been paid and collected as levied. Again, this provision would care only for a case where bonds had been issued, whereas it is possible for a road improvement to be made and assessments to be levied without the issuance of bonds.

Careful examination has failed to disclose any other manner of making up the deficiency which would exist where this horn of the dilemma followed. The existence of such a deficiency without any means of supplying it would be an impossible result.

We are thus thrown upon the other horn of the dilemma and must now search (always on the assumption that the fees in question are properly chargeable and subject to retention) for the proper county fund against which the sums retained on account of the collection of the assessments are to be charged. Such fund cannot be the road improvement fund authorized to be levied either by section 6926 or by section 1222, for these sections relate to levies for some proportion of the "compensation, damages, costs and expenses of such improvement" section 6926). This phraseology is substantially the same as that which appears in the assessment provisions themselves. Having reached the conclusion that the supposed collection fees are not proper items of cost and expense of the improvement for the purpose of assessment, similar reasoning compels the holding that they are not to enter into the cost of the improvement for the purpose of the tax levy. Moreover, the tax levies are to meet the county's proportion only, and we would have to reach the conclusion not only that the collection fees constitute items entering into the cost and expense of the improvement, but also that they constitute items entering into the *county's proportion* of such cost and expense. This it seems impossible to do.

Your letter suggests the possibility of retaining the fees and charging them to the general county fund. This is a possible result once it has been determined that the payment of such fees so retained is a proper general county expense. Here the general principle comes into play that no money is payable, either directly or indirectly, out of the county treasury except in pursuance of law. In fact, this principle appears in the constitution of the state, article X, section 5. No law expressly makes such fees a general county charge. If they are a general county charge it is only by the most remote of inferences, the real basis of which is that there is no other way to provide for their payment.

When, after pursuing the lines of thought just outlined, we return to the express language of section 2624 and note again the fact that it does not refer to special assessments and that its language is throughout appropriate only as regards collections on tax duplicates, as such, the conclusion that it should be limited to its exact terms becomes irresistible. Indeed, there may be said to be another general

principle, which is that all official services are presumed to be gratuitous or compensated for by the usual emoluments attaching to the office and that no fees are allowable save such as are authorized expressly by law. To warrant the inclusion of special assessment collections in the duplicate collections on the basis of which the auditor's percentages are computed, a very broad construction of section 2624 is required, which does considerable violence to its letter and involves us in a maze of doubtful and almost impossible consequences.

For all these reasons, it is the opinion of this department that county auditors are not entitled to any fees whatsoever under existing statutes for collecting road and highway assessments.

With respect to county treasurers, however, the situation is different. The compensation of these officers is regulated by section 2685 of the General Code, which provides in its present form as follows:

> "On settlement semi-annually with the county auditor, the county treasurer shall be allowed as fees on all moneys collected by him on any tax duplicates other than the liquor, inheritance and cigarette duplicates, the following percentages:
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> On the first one hundred thousand dollars, one and one-half per cent; on the next two million dollars, five-tenths of one per cent; on the next two million dollars, four-tenths of one per cent; and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portion of the revenue payable to the state as well as to the county, township, corporations and school district; and all moneys collected on liquor, and cigarette duplicate, one per cent, on all moneys collected otherwise than on the said duplicates, except moneys received from the state treasurer or his predecessors in office or his legal representatives or the sureties of such predecessors, and except moneys received from the proceeds of the bonds of the county or of any municipal corporation, five-tenths of one per cent, on the amount so received, to be paid upon the warrant of the county auditor out of the general fund of the county."

The phraseology in this section which is not found in section 2624 is the following:

> "on all moneys collected otherwise than on the said duplicates * * * five-tenths of one per cent on the amount so received, to be paid upon the warrant of the county auditor out of the general fund of the county".

Here is an express residuary clause applicable to all collections not provided for in the preceding portions of the section. This language is broad enough, in the opinion of this department, to entitle the county treasurer to charge and receive fees for collecting special road assessments. But this provision does not leave to inference the source from which these fees are to come; it expressly provides that they shall be paid out of the general county fund on the warrant of the county auditor. This provision constitutes a complete answer to your first question so far as the treasurer's fees are concerned, and obviates the difficulties suggested in your statement of the question.

It is therefore the opinion of this department that county auditors are not entitled to any fees whatsoever in connection with the collection of county road assessments. County treasurers are entitled to fees of one-half of one per cent

on the amount of such collections, to be paid upon the warrant of the county auditor upon the general fund of the county, and not deducted from the special assessments.

Respectfully,
JOHN G. PRICE,
Attorney-General.

925.

ROADS AND HIGHWAYS—STATE AID IMPROVEMENTS—COUNTY COMMISSIONERS WITHOUT AUTHORITY TO EXTEND ASSESSMENT ZONE INTO ADJOINING COUNTY.

There is no statutory authority in the county commissioners in connection with state aid improvements under sections 1178 *et seq. G. C. to exercise their option of providing an assessment zone of one-half mile or one mile in width on either side of the road to be improved when the adoption of a zone of such width would extend the assessment area into an adjoining county.*

COLUMBUS, OHIO, January 12, 1920.

HON. HARRY A. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Your communication of recent date is received submitting for opinion the following:

> "Where a main market road or inter-county highway is being improved by the state highway department in conjunction with the county commissioners under section 1191 et seq., or what is popularly known as the state aid plan, and the county commissioners have decided to make the assessment area one mile on each side of said road, and said road is situated so near the county line that said one mile assessment area extends across the line into an adjoining county, under what sections or by what procedure can the assessments be levied, if at all, on the lands within said one mile area in said adjoining county?"

If the road in question were to be improved by the county commissioners under authority of sections 6906 et seq. G. C. instead of under the so-called state aid plan provided for by sections 1178 et seq. G. C. the answer to your question would be found in section 6941 G. C. which as amended 107 O. L. 104 reads as follows:

> "When the proposed improvement is wholly within one county but within less than the legal assessment distance of the county line and a petition is filed asking for such improvement, signed by fifty-one per cent of the persons to be especially assessed therefor, such improvement shall be regarded as a joint county improvement, and shall be made in accordance with the provisions of sections 6930 to 6939 inclusive of the General Code of Ohio in so far as said sections are applicable."

No similar statute is found in the series relating to state aid projects, the nearest approach to it being section 1220 G. C. relating to roads *"upon a county*