

1002.

MIAMI RIVER—STATE IS LIABLE FOR ITS PORTION OF THE COST OF  
THE IMPROVEMENT—SOURCE OF MONEY.

SYLLABUS:

*The state is liable for its portion of the cost of the improvement of the Miami River as provided in House Bill No. 512, 111 Ohio Laws, p. 521, and the money therefor is available by virtue of the provisions of the first paragraph of Section 2 of the General Appropriation Act (House Bill No. 502) of the 87th General Assembly.*

COLUMBUS, OHIO, September 14, 1927.

HON. ELMER L. GODWIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your request for my opinion, as follows:

“The legislature in 1925 appropriated \$40,000.00 to be paid as the state's share in the above improvement (Miami-Muchinippi River Improvement.) The legislature of 1927 reappropriated the same amount, which amount was in the appropriation measure passed by the legislature and which was vetoed by the Governor. The \$40,000.00 appropriated by the state is not to exceed in any instance more than one-fourth of the improvement, and if \$40,000.00 is a fourth of the improvement you can readily see that this improvement is of some importance, affecting three counties, Auglaize, Shelby and Logan.

The engineers have gone ahead with their part of the work and have gone so far that the assessments against those benefited by the improvement have been made upon the basis of the state paying the \$40,000.00. This improvement has come to a stand-still by reason of the failure to receive from the state the \$40,000.00, and if there is no way which this matter can be taken up with the emergency board as an emergency measure this improvement will be delayed until after the legislature of 1929 reappropriates this amount.

What I want to know is: Can this matter be taken up with the emergency board as an emergency measure in securing the \$40,000.00 appropriation for immediate use? Knowing that you are a member of the emergency board I am writing you the above facts.”

The improvement in question is being made under the provisions of House Bill No. 512 of the 86th General Assembly, found in 111 Ohio Laws, page 521. This is a special act providing for the improvement of that portion of the Miami River located in Logan County between the Lewiston Reservoir and Quincy. The act provides, in part, that except as provided therein, said improvement shall be made in the manner provided in Sections 6536 to 6545, both inclusive, of the General Code. These sections relate to joint county ditches and are made applicable to the improvement in question, it being a joint county improvement affecting Shelby, Logan and Auglaize Counties.

The act provides that the state shall pay one-fourth of the expense of such improvement, not, however, to exceed the sum of forty thousand dollars, this provision being made for the reason that the state owns about sixty-three hundred acres of land in and about Lewiston Reservoir, which is in the water basin drained by said improvement. The act also appropriated forty thousand dollars for that purpose, Section 5 thereof reading as follows:

"For the benefit to the state's lands benefited by said improvement, the state shall pay twenty-five per cent of the total cost of said improvement, but in no event to exceed the sum of forty thousand dollars.

There is hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund and not otherwise appropriated the sum of forty thousand dollars for the payment of the state's share of the costs of such improvement.

Within thirty days after the contract is entered into, the Director of Highways and Public Works shall draw his voucher in favor of the treasurer of the proper county against his appropriation in an amount equal to twenty-five per cent of the contract price and from time to time said Director of Highways and Public Works shall draw his voucher against this appropriation in favor of such treasurer in an amount sufficient to cover the state's share of damages and other proper costs and expenses, which various amounts shall be paid into said county treasury to the credit of the fund of said improvement; but in no event shall such vouchers exceed the sum of forty thousand dollars."

Section 3 of said act provides :

"When the joint board of county commissioners find for such improvement, as provided in Section 2 of this act, and the surveyor has been ordered to make a survey, report and schedules, as provided in Section 6541 of the General Code, such survey, report and schedules shall also be submitted to the Director of Highways and Public Works for his approval. Upon the written approval of the Director of Highways and Public Works, the surveyor who did the field work shall then proceed as provided in Section 6541 of the General Code."

Section 6541 of the General Code provides as follows :

"If the joint board of county commissioners finds for the improvement and orders the surveyor to make a survey, reports and schedules, the board may designate the surveyor of any one of the interested counties to do the field work, and make the survey and estimates; but the surveyor of each county interested shall assist in making the reports and schedules; if the joint board does not agree on a surveyor, the surveyor of the county in which the petition is filed shall do the field work and make the survey. All the reports and schedules of the surveyor shall be signed and approved by all the surveyors of the several counties interested, and shall be filed with the auditor with whom the petition is filed; if the surveyors of the several counties interested do not concur in the reports or schedules, separate reports or schedules may be filed by one or more of such surveyors, and the costs thereof shall be paid the same as other surveyor's costs. In making up the schedules and reports, the surveyors shall proceed to make such schedules and reports of such improvement the same as if the improvement were an improvement within a county of the size of the several counties interested in the proposed improvement. The surveyors who do not make the survey may make such observations and take such levels as they may deem necessary to assist them in making their schedules and in arriving at the proper amount to be assessed against each tract of land.

The surveyor who did the field work and made the survey shall let the contract, inspect the progress of the work, and make estimates and reports on

the progress of the work, accept the work and material for the improvement, issue certificates therefor, as in single county improvements, and shall do all things to be done by a surveyor after the letting of the contracts."

Section 6537 of the General Code provides, in part, as follows:

" \* \* \* The proceedings for a joint county improvement shall proceed before said joint board the same as if said joint board were a board of county commissioners representing a county that included all the territory of all the counties represented by the commissioners on said joint board.  
\* \* \* ."

This language refers to those provisions of law relative to single county ditches.

The county surveyor under Section 6541, supra, would therefore proceed as provided in Section 6454 of the General Code. The duties set forth in that section are those to be performed by the county surveyor after the commissioners have found for the improvement of single county ditches. Said section reads in part as follows:

" \* \* \* The surveyor shall cause to be made the necessary survey for the proposed improvement, as found by the commissioners, and suitable maps showing the location of the land proposed to be assessed, and profiles showing the cuttings and gradient of the improvement, and shall make an estimate of the cost of the construction of such improvement. \* \* \* The surveyor shall cause to be made a schedule of the work proposed to be done, which shall show the fall, the depth, the excavating to be done, \* \* \* . He shall also prepare a schedule containing the name of each owner of land, with a description of the land believed by him to be benefited by the proposed improvement, which names of land owners and descriptions of land believed to be benefited shall be taken from the tax duplicates of the county; and the surveyor shall enter in said schedule the proximate number of acres benefited by the proposed improvement and the amount that said land, in his opinion, ought to be assessed, which opinion shall be based upon his surveys, levels, and contours taken on the line of the improvement and back from the improvement, and his observation of the location and elevation of the land relative to the improvement. The surveyor shall also prepare proper working specifications for the construction of the improvement including catch basins, retaining walls, size and kind of tile, and such other things as may be needed to complete the improvement. He shall make estimates of the cost of excavating and of the cost of material, and shall divide the construction of such improvement into working sections such as he may deem expedient. \* \* \* ."

Your letter states that these acts have been done by the surveyor in the improvement in question. You also advise upon inquiry that the Director of Highways and Public Works approved the same as provided in Section 3 of the act, and that said approval was had on March 15, 1927.

The next thing to be done by the county surveyor thereafter is to let the contract according to law.

Your question is whether or not the joint board of county commissioners may proceed with the work and receive the state's share for the cost thereof as provided in the act hereinabove referred to. This question arises because of the constitutional provision (Article II, Section 22 of the Constitution of Ohio) that no appropriation can be made for a longer period than two years. It is apparent that the original ap-

propriation of forty thousand dollars contained in House Bill No. 512 has lapsed and may not be used for that purpose unless this sum has been re-appropriated for such use by the 87th General Assembly.

Your attention is directed to Section 2 of the General Appropriation Act of the 87th General Assembly (House Bill No. 502), page 169. This section is divided into two parts. The first part reads as follows:

*"Unexpended balances of all appropriations and re-appropriations, made by the 86th General Assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities, and whether the same have been lapsed prior to the taking effect of this act with respect thereto or not, hereby appropriated from the funds from which they were originally appropriated or re-appropriated and made available for the purpose of discharging such contingent liabilities." (Italics the writer's.)*

The language of this section provides that all the appropriations of the 86th General Assembly are re-appropriated to the extent of any "contingent liabilities that have been lawfully incurred."

The second part of the section reads as follows:

*"All balances in the funds hereinafter listed, exclusive of contingent liabilities which have been lawfully incurred to the extent of such liabilities, are hereby appropriated for the use of the departments under which the same are hereinafter listed for the purposes hereinafter listed, viz.:*

\* \* \* \* \*

DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS—ADMINISTRATION.

G 32. Other capital outlay—

Improvement of that portion of the Miami River, located in Logan County between Lewiston Reservoir and Quincy as provided by H. B. No. 512, 111 O. L., 521 -----\$40,000.00."  
(Italics the writer's.)

This part of the section re-appropriated any portion of the forty thousand dollars which was not necessary to pay "contingent liabilities which have been lawfully incurred."

The Governor vetoed this item of said appropriation act. This leads us to a consideration of the question of whether or not there were any "contingent liabilities \* \* \* lawfully incurred" in connection with the forty thousand dollar appropriation made by said House Bill No. 512.

In Words and Phrases, Volume II, I find "contingent liability" defined as follows:

*"Anderson's Law Dictionary defines 'contingent liability' to be a liability which is not absolute, but depends upon an uncertain event, as the liability of an endorser. The liability of an endorser or surety is contingent and not actual until default by the payee or principal."*

In the same authority I also find that:

*"A 'contingent liability' contracted by a bankrupt, in its legal signification, means an obligation of the bankrupt arising from his contract, the duty to*

perform which is dependent as to when and whether the obligation shall become absolute on the occurrence of an event, the happening of which is a matter of some uncertainty."

The legislature established the policy of the state in connection with said improvement when it passed House Bill No. 512, *supra*. This, however, did not place any liability, either contingent or otherwise, upon the state. After the plans, drawings, etc., as required by the act had been submitted to the Director of Highways and Public Works and he approved the same as provided therein, the surveyor was authorized to proceed to let the contract for the improvement. Within thirty days after the contract is let it is the duty of the Highway Director to issue his voucher as provided in Section 5 of the act, *supra*. After this approval was obtained the assessments against the land benefited were made by the proper authorities. In so doing they acted with the knowledge that the state had approved the plans and upon the theory that the state would pay one-fourth of the cost of the improvement, not to exceed forty thousand dollars. This was a material fact for consideration in making the assessments against the other property benefited.

It is my opinion that the approval of the plans as provided by law by the Director of Highways and Public Works created a contingent liability upon the part of the state to pay its portion of the cost of said improvement as provided in said act. It was therefore a "contingent liability" incurred in connection therewith. The amount thereof is uncertain, and whether or not the state would be finally obligated depends upon the letting of the contract. These are the contingencies in connection therewith. The obligation of the state would become absolute upon the letting of the contract, and should be paid if the funds are available for that purpose.

There is no other act required on the part of the state or any of its officers to fix its liability in connection with the proposed improvement. This contingent liability had been incurred previous to the passage of the appropriation act, *supra*, and it is my opinion that there were existing at the time the appropriation act was passed "contingent liabilities \* \* \* lawfully incurred" in connection with the forty thousand dollar appropriation of House Bill No. 512, *supra*.

Therefore, under the facts stated, it is my opinion that the state is liable for its portion of the cost of the improvement of the Miami River as provided in House Bill No. 512, 111 Ohio Laws, p. 521, and the money therefor is available by virtue of the provisions of the first paragraph of section 2 of the General Appropriation Act (House Bill No. 502) of the 87th General Assembly.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

---

1003.

DISAPPROVAL, BONDS OF THE VILLAGE OF PAULDING, PAULDING COUNTY, OHIO—\$12,582.57.

Re: Bonds of the Village of Paulding, Paulding County, Ohio, \$12,582.57.

COLUMBUS, OHIO, September 14, 1927.

*Retirement Board, State Teachers' Retirement System, Columbus, Ohio.*

GENTLEMEN:—I have examined the transcript of the proceedings of council and