therefrom but will not invade the field of discretion where discretion in the manner of the performance of a statutory duty is at issue.

Township trustees are expressly authorized by section 3298-1, and related sections of the General Code, to construct, reconstruct, resurface or improve certain public highways within the township, in some instances in co-operation with the county commissioners. *They are expressly authorized by sections* 3476, *et seq., of the General Code, to extend relief to certain needy poor within the township.* Certain specific duties of township trustees with respect to the establishment and maintenance of cemeteries are fixed by statute. Section 3441, et seq., General Code." (Words in parenthesis and italics mine.)

From the language of the foregoing opinion, it is apparent that the then Attorney General considered that township trustees in performing their duties under the poor laws, were engaged in "service in the business of the township" within the meaning of such phrase as used in section 3294, General Code.

In view of the foregoing opinions of former Attorneys General, and the clear language of section 3294, General Code, I am of the opinion that township trustees are entitled to $2.50 per day for their services in administering poor relief laws, so long as the total of per diems, plus the total of the fees payable to said trustees for other services performed in the business of the township and payable from the township treasury does not exceed in any one year the sum of $250.00.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2461.

SPECIAL ASSESSMENTS—COLLECTION OF LEVY ASSESSED FOR SEWER DISTRICT RESTRAINED BY COURT—COUNCIL OF MUNICIPALITY MAY RE-ASSESS WHEN—VOLUNTARY PAYMENT OF TAXES MAY NOT BE RECOVERED—COUNCIL MAY APPROPRIATE FUNDS TO REFUND TAXPAYER WHEN.

SYLLABUS:

1. *When a municipality has levied special assessments "according to benefits" for a sewer district, and thereafter a court of competent jurisdiction restrains the collection of such assessments on the ground that certain items were illegally included therein and that certain assessments were illegally made, the council of such municipality may re-assess the special assessment, using the same method of assessment as was theretofore used omitting from the amount thereof that quantum held by the court to be illegal.*

2. *When a city has assessed the cost of the construction of a sewer against the property benefited and has certified such assessment to the county auditor to be spread upon the general tax list and duplicate of real property, and thereafter a court of competent jurisdiction enjoins the collection of such taxes by reason of illegality in the manner of assessment the council of such municipality may be required by such bondholders to reassess such taxes according to the same method,*

when bonds have been issued and are outstanding in anticipation of the collection of such special assessments.

3. *When, by reason of a special assessment made by a municipality funds have been paid into the county treasury voluntarily, in payment of such assessment, and thereafter a court finds such assessment to have been illegally made, no action to recover such tax can be maintained when such payment was voluntarily made. If such payment was involuntarily made it can not be recovered unless the action is filed within one year from the date of payment.*

4. *When a taxpayer has voluntarily paid moneys into the county treasury in payment of special assessments illegally assessed, which moneys are thereafter received by the municipality, the council of such municipality may by suitable legislation appropriate moneys for the purpose of, and refund such moneys to such taxpayer, as in payment of a moral obligation.*

COLUMBUS, OHIO, April 5, 1934.

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

GENTLEMEN:—I am in receipt of your request for my opinion which encloses a letter from the Director of Law of the city of P., which reads as follows:

> "Some five years ago the City of P. constructed several trunk line sewers in compliance with an order from the State Board of Health. Certain districts drained by these sewers were designated 'Sewer Districts.' The cost of construction was assessed against property owners in said sewer districts according to benefits derived from the sewers.
>
> A great many of these assessments have not been paid and the sewer assessments combined with street assessments exceed the statutory limitation. Property owners have refused to pay them and can not pay their taxes without paying the assessments. This situation has raised a number of legal questions which are as follows:
>
> 1st: Can the cost of these trunk line sewers, after the same has been assessed against property owners in the respective districts and certified to the county auditor, be transferred to the general tax duplicate and the same removed from the property against which it was assessed?
>
> 2nd: After bonds are sold and still outstanding, can the city revise assessments against property assessed for the purpose of retiring bonds by reducing these assessments below an amount sufficient to retire the bonds?
>
> 3rd: If such a revision of assessments can be made, whose duty is it to make such re-assessment, the city council or the county auditor?
>
> 4th: Where a court order holds part of an assessment illegal by reason of the fact that certain expenditures were not included in the estimate filed and that other assessments were arbitrarily made, is it compulsory on council or the county auditor to re-assess when the court does not specifically order the same done?
>
> 5th: Where certain property owners assessed for the construction of such sewers paid in cash, voluntarily and without protest, can they be refunded any part thereof by reason of re-assessment and re-adjustment of levy against such property?
>
> 6th: After assessments have been certified to the auditor and where

it is apparent that they exceed benefits or statutory limitation, can council adjust the assessments, or can council by any order remove all assessments and allow the same to become a charge against the general tax duplicate?"

In an opinion of a former Attorney General found in the Annual Report of the Attorney General for 1906, at page 111, it was held as stated in the syllabus:

"Council may make alterations in special municipal assessments, upon objection thereto, before certification to county auditor; proper procedure for making objection; neither city engineer nor city solicitor may make such alterations; clerical mistakes may be corrected by council before certification to county auditor."

In the 1910-1911 Annual Report of the Attorney General, page 140, it is stated in the syllabus, that:

"Council may certify to county auditor clerical mistakes in assessments in process of collection; council may not reconsider question as to whether assessment exceeds thirty-three and one-third percent of the value of abutting property as improved."

Such opinion is based upon a construction of Sections 3902 and 3903, General Code.

In the Annual Report of the Attorney General for 1912, page 1617, the following statement is contained in the third paragraph of the syllabus:

"Reassessments may be made by council upon two grounds only; first, when proceedings have been informal or irregular and second, when the assessments have been adjudged illegal by a court of competent jurisdiction."

From the facts set forth in the letter of the Law Director, it is evident that the assessment in question, has been adjudged illegal by a court of competent jurisdiction. Among the enclosures submitted to me by such Director of Law is a copy of a journal entry of the Court of Appeals in a case in which the assessments in question were directly in issue. In such case the court held that the assessment in question included illegal items, among which was an item of $45,000.00 for the cost of steel to reenforce concrete sewers, which inclusion the court held to be illegal. The court held that by reason of such illegality, the entire special assessment should be enjoined, and so ordered. Inasmuch as no question is raised as to the jurisdiction of the court, either of the person or of the subject matter, I have assumed, for the purposes hereof, that the court was one of competent jurisdiction.

In an opinion of one of my predecessors in office, found in Opinions of the Attorney General for 1927, page 2,000, such predecessor held that the legislative body of a municipality may not lawfully reduce the assessments against abutting property for a street assessment after bonds have been sold for such improvement in anticipation of the collection of such assessments and supply the deficit created

in a sinking fund caused by such a reduction in the amount of the assessments by transferring thereto funds received under the provisions of Sections 6309-2 and 5537 of the General Code. Section 6309-2, General Code, refers to funds received from the motor vehicle license fund. Section 5537, General Code, refers to funds received from the gasoline tax fund.

In the case of *Ridenour* vs. *Biddle, Treas.,* 10 O. C. C. (N. S.) 438, it was held:

> "1. Where a street improvement assessment has been set aside after settlement has been made as to part of the lots and lands affected, a reassessment of the lots with respect to which there has been no settlement is not invalid because the lots covered by the settlement are omitted from the reassessment.
>
> 2. The fact that a parcel of land described in a special improvement ordinance is not specially assessed does not affect the validity of the assessment, provided such parcel is not specially benefited by the improvement.
>
> 4. An informality in an improvement assessment is not a sufficient ground for setting aside the whole assessment, unless it is shown that prejudice has resulted to the plaintiff by reason of such informality."

In *Upington* vs. *Oviatt,* 24 O. S. 232, it was held as stated in Syllabus No. 8:

> "In a case arising under the statute re-referred to, when it appears that the assessment placed upon the county duplicate for collection was made upon a wrong basis, by omitting property which ought to have been assessed, the collection of the assessment will be enjoined, but without prejudice to the right of the city to make a reassessment, and collect the same in accordance with the provisions of the statute."

The court intimates in the case of *Mocker* vs. *Cincinnati,* 5 O. N. P. 242, that the court might have held that the city council could make a reassessment of the tax after a former assessment was held illegal by a court of competent jurisdiction and for that reason partially enjoined. In *Dick* vs. *Toledo,* 11 O. C. C. (N. S.) 349, the court recognized the right of council to re-assess abutting property for the purposes of paying the costs of specific improvements but specifically held that the mode of assessment could not be changed after the improvement has been made.

In an unreported case of the Supreme Court found in 1922 W. L. B. 260, the court recognized the right of the council to re-assess property for the purpose of paying for special improvements.

I find no provision of statute purporting to authorize the county auditor to levy any special assessment or to amend such assessments when made. His duties are purely statutory.

In reply to your third inquiry it is my opinion that if a re-assessment may be made it must be made by the city council.

You further inquire whether or not council may order all assessments canceled and provide for the payment of such special improvements by levy on the general tax duplicate. I am informed that the city of "P" has certain bonds outstanding for the payment of which the special assessments in question have been pledged. I am not unmindful of the fact that the general faith and credit

of the City of "P" are pledged for the payment of such bonds in addition to the pledge of such special assessments, yet a bond of a taxing subdivision is a contract between the subdivision and the holder of the bond. Section 10 of the Federal Constitution as well as the Bill of Rights of the Ohio Constitution provide that laws shall not be passed which impair the obligation of contracts. It would appear to me that the obligation of the City of "P" was not alone to pay the bonds as they severally became due but to provide for the payment of such bonds by a levy of assessments against the property specially benefited as well as such general property taxes as may be necessary to pay such bonds, and that unless a new contract is entered into between the municipality and the bondholders such obligation could not be changed.

If, however, no bonds are outstanding such constitutional inhibition is not present. The only question that then arises is as to whether the council could have in the first instance made the improvement and paid the cost thereof from general taxation. If council had an election as to one or more methods of assessing a tax and enacted an ordinance making an election as to one of those methods, no vested property rights having intervened, it is elemental that the same council could repeal the ordinance levying such tax and enact in its stead another taxing ordinance.

You further inquire whether those taxpayers who have voluntarily paid their proportion of such special assessments may recover the payments already paid. It is a well established rule, especially in Ohio, that taxes voluntarily paid even though the tax was erroneously or illegally assessed, may not be recovered in the absence of a specific statutory provision authorizing such recovery. *Executors of Estate of Long* vs. *State,* 21 O. App. 412; *State ex rel. Pulskamp* vs. *Commissioners,* 119 O. S. 504; *Wilson* vs. *Pelton,* 40 O. S. 306; *Catoir* vs. *Watterson,* 38 O. S. 319.

Section 12075, General Code, is the only provision of statute which authorizes an action to recover taxes illegally paid. Such section reads:

> "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."

Such section specifically limits the action for the recovery of such taxes to payments made within one year prior to the time of the filing of the action for recovery of the illegal taxes paid.

Sections 2589, 2590 and 2591, General Code, contain certain provisions for the refund of a tax erroneously charged and collected from the funds created in whole or in part by the erroneous assessment. It appears, however, that the county commissioners would have no authority to make such refund unless there are in the possession of the county treasurer funds derived in whole or in part from the special assessment tax in question. Since it is the duty of the county treasurer to pay over such funds to the municipality immediately after his settlement with the auditor, it is self-evident that at this time there could be no funds in the possession of the county treasurer from which the county commissioners could make such refund.

Even though the taxpayer may not compel the repayment to him of such taxes so illegally assessed, the question arises as to whether the council has the

power through legislative enactment to repay such illegal taxes. It has been repeatedly held by the courts of this state that a municipal corporation may pay a moral obligation. *Spitzig* vs. *St. ex rel. Hile,* 119 O. S. 117; *Board of Education* vs. *State,* 51 O. S. 531.

A "moral obligation," as that term is used in law, is a debt, demand, obligation or wrong against a state or governmental body for the redress or recovery of which the aggrieved party has no legal remedy by reason of the fact that a sovereign power may not be sued without its consent, and no legislation having been theretofore enacted giving such consent. *Spitzig* vs. *St. ex rel. Hile, supra.*

If, therefore, the City of "P" has received, by reason of an illegal assessment certain moneys paid in taxes and the council enacts an ordinance appropriating the moneys for the payment of, and directs the repayment of such illegal taxes, I know of no rule of law which would then prevent such payment.

You further inquire whether it is compulsory for the council to re-assess the assessments against benefited property owners when a court of competent jurisdiction finds that the assessment was invalid in part, by reason of having included, in the amount of such assessment, certain items which could not be legally included and certain other items arbitrarily, and by reason thereof enjoins the collection of the assessment in part but without ordering a re-assessment.

You do not state whether the court enjoined the collection of the entire tax or whether it enjoined only certain specific items which were separable from the other items, or whether the part enjoined would prevent the collection of the aggregate assessment. In either event the decree of the court in and of itself, would make no action on the part of the city mandatory; it would merely require the city to refrain from collecting the enjoined tax or assessment. The mandatory provision, if any, would depend upon whether or not bonds have been issued and are outstanding and whether the holders of the bonds, if any, demand the assessment to be made. Inasmuch as I have already herein discussed such rights, I shall not reiterate my views concerning the same.

Specifically answering your inquiries it is my opinion that:

1. When a municipality has levied special assessments "according to benefits" for a sewer district, and thereafter a court of competent jurisdiction restrains the collection of such assessments on the ground that certain items were illegally included therein and that certain assessments were illegally made, the council of such municipality may re-assess the special assessment, using the same method of assessment as was theretofore used omitting from the amount thereof that quantum held by the court to be illegal.

2. When a city has assessed the cost of the construction of a sewer against the property benefited and has certified such assessment to the county auditor to be spread upon the general tax list and duplicate of real property, and thereafter a court of competent jurisdiction enjoins the collection of such assessments by reason of illegality in the manner of assessment the council of such municipality may be required by such bondholders to re-assess such assessments according to the same method, when bonds have been issued and are outstanding in anticipation of the collection of such special assessments.

3. When, by reason of a special assessment made by a municipality funds have been paid into the county treasury voluntarily, in payment of such assessment, and thereafter a court finds such assessment to have been illegally made, no action to recover such tax can be maintained when such payment was voluntarily made. If such payment was involuntarily made it cannot be recovered unless the action is filed within one year from the date of payment.

4. When a taxpayer has voluntarily paid moneys into the county treasury in payment of special assessments illegally assessed, which moneys are thereafter received by the municipality, the council of such municipality may by suitable legislation appropriate moneys for the purpose of, and refund such moneys to such taxpayer, as in payment of a moral obligation.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2462.

APPROVAL, NOTES OF UNION RURAL SCHOOL DISTRICT, CLERMONT COUNTY, OHIO—$4,215.00.

COLUMBUS, OHIO, April 6, 1934.

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

2463.

APPROVAL, BONDS OF CLEVELAND HEIGHTS CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—$26,000.00.

COLUMBUS, OHIO, April 6, 1934.

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

2464.

APPROVAL, NOTES OF SCOTT RURAL SCHOOL DISTRICT, ADAMS COUNTY, OHIO—$1,614.00.

COLUMBUS, OHIO, April 6, 1934.

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

2465.

APPROVAL, NOTES OF CENTER RURAL SCHOOL DISTRICT, MORGAN COUNTY, OHIO—$2,086.00.

COLUMBUS, OHIO, April 6, 1934.

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