1279.

SEWER DISTRICT—COMPLETION SEWER AND WATER MAINS—WHERE ORGANIZED UNDER SECTIONS 6602-17 ET SEQ. G. C.—CONSTRUCTED BY SPECIAL ASSESSMENTS, BONDS ISSUED—CONVEYANCE TO CITY BY BOARD OF COUNTY COMMISSIONERS—NO MONETARY CONSIDERATION—CITY MAY NOT LATER AGREE WITH COMMISSIONERS TO ASSUME PAYMENT OF BONDS AND ABATE ASSESSMENTS—NO CONSIDERATION—BEYOND POWER OF MUNICIPALITY—IMPAIR VESTED PROPERTY RIGHTS OF BONDHOLDERS.

SYLLABUS:

When a sewer district organized under authority of Section 6602-17 et seq., General Code, after completing the sewer and water mains which it constructed through the medium of a special assessment against the property in the district and having issued bonds in anticipation of the collection thereof, has by virtue of an agreement between the board of county commissioners and the city to which the territory forming such district has been annexed, conveyed such lines and mains to such city without monetary consideration, such city may not several years after the completion of such conveyance and before such bonds have been fully paid and retired enter into an agreement with the county commissioners to the effect that the city will assume the payment of such outstanding bonds and cause the abatement of such special assessments. Such agreement would not be supported by an adequate consideration, would be beyond the power of the municipality, and would impair the vested property rights of the bondholders.

COLUMBUS, OHIO, October 7, 1939.

HONORABLE WILLIAM A. AMBROSE, *Prosecuting Attorney, Mahoning County, Youngstown, Ohio.*

DEAR SIR: I am in receipt of your request for my opinion which reads as follows:

> "The Board of County Commissioners of Mahoning County desire to obtain your opinion with respect to a problem with which they are now confronted. I believe that the enclosed statement of facts, history of litigation and statement of problem will make the entire matter clear to you. It is the thought of the County Commissioners that the persons involved are entitled to some relief and that equity requires that the Water Department of the City of Youngstown, under present circumstances should

pay some compensation for the water system of the original Coitsville Sewer District No. 2, which it has acquired without compensation. The Commissioners are also of the opinion that the matter could be handled with the City, except for the thought of certain officials of the city that a contract clarifying the situation would be held illegal by the Bureau of Inspection because of the nature of the original contract delivering the water system in question to the city.

I would appreciate very much your opinion as to whether the Board of County Commissioners of Mahoning County and the City of Youngstown can modify the agreement heretofore entered into, to which reference has hereinbefore been made, to the extent that the city can pay Mahoning County by way of compensation for said system, which the city several years ago took over, a compromise agreed sum, which when paid would be applied to the payment of the assessments originally levied by the county to pay the bonds issued and sold to provide for the construction of said water system, and would the Board of County Commissioners be legally permitted to accept said sum, and if this agreement can be modified to permit the foregoing, must said sum be paid in a lump sum or can it be paid in installments?

I would be grateful for an opinion as promptly as possible as the failure to clarify this situation is causing considerable trouble in the collection of taxes."

I believe that the following may be considered as a summary of the memorandum of facts which you enclose:

Prior to April, 1925, the Board of County Commissioners of Mahoning County created Coitsville Sewer District No. 2, the westerly line of which was also the easterly corporation line of the city of Youngstown. On April 28, 1925 such board of county commissioners and the City of Youngstown under authority of Sections 6607-17 et seq., General Code, entered into an agreement with respect to the maintenance and operation of a water system for such district. Pursuant to such action and agreement, a water system was installed in such district at an expense of $209,075.29. The funds to pay same were obtained by the levy of special assessments against benefited property. Bonds were issued in anticipation of the receipt of such assessments, which bonds were sold to the public.

The Youngstown Water Department, pursuant to agreement, maintained such water system until October 30, 1928, when all of the property composing such Coitsville Sewer District No. 2, was annexed to the City of Youngstown.

An action was brought in the Mahoning County courts after such territory was annexed to the city of Youngstown, to enjoin the collection

of such special assessments, which was decided adversely to the plaintiff.

You do not inquire as to the validity of the agreement between the city of Youngstown and the sewer district, by virtue of which the city of Youngstown agreed, in substance, to maintain and operate the water system when constructed and the Board of County Commissioners agreed in part, as follows:

> "FIRST: To construct and maintain for a period of one year by special assessment a system of water pipes within said Coitsville Sewer District which shall conform to the standards of piping constructed and maintained by the City Water Department of Youngstown, the plan and specifications of said system of water pipes to be approved by the Commissioner of Water, of Youngstown, Ohio, before construction in all cases and the work during construction to be at all times subject to methods approved by said Commissioner of water.
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> SECOND: To release to the city of Youngstown Water Department all county rights of control and ownership of that part of the pipe systems so constructed lying within any territory as it becomes annexed to the City of Youngstown. This agreement, however, does not grant the city a right to discontinue the use and maintenance of feeder lines which might serve other territory within the Coitsville Sewer District without the agreement of the County Commissioners."

That part of Section 6602-32, General Code, which is pertinent to your inquiry reads:

> "At any time after the formation of any sewer district, the board of county commissioners, when deemed expedient, may, on application by a corporation, individual or public institution, outside of any sewer district, contract with such corporation, individual or public institution for supplying water to their premises on such terms and conditions as shall be by such board of county commissioners deemed equitable, but the amount to be paid shall in no case be less than the original assessment for similar property within the district, and such board of county commissioners, in any such case, shall appropriate to any moneys received for such service to and for the use and benefit of such sewer district; provided, however, that whenever the board of county commissioners deem it necessary to contract with a corporation, individual or public institution outside of any sewer district for supplying water to their premises from water supply lines constructed or to be constructed to serve such district, they shall so determine by resólution and may collect said amount

in cash, or the same may be assessed against said lots or parcels of land, and the method and manner of making such assessment, together with the notice thereof, shall be the same as provided herein for the original assessment.

* * * *

The board of county commissioners, by resolution, may determine to purchase said water supply line or lines at a cost not to exceed the present value of said water supply line or lines as certified by the sanitary engineer. For the purpose of paying for said water supply line or lines and the maintenance thereof, the board of county commissioners may issue bonds or certificates of indebtedness and assess the cost against the benefited property in the same method and manner as provided by law for the construction of an original water supply line or lines."

Section 6602-32a, General Code, reads:

"At any time after the formation of any sewer district the board of county commissioners may enter into a contract upon such terms and conditions and for such period of time as may be mutually agreed upon with any city or village or any other county to prepare necessary plans and estimates of cost and to construct any water supply improvement or improvements to be used jointly by the contracting parties, and to provide for the furnishing of water and for the joint use by such contracting parties of such water supply improvement or the joint use of any suitable existing water supply or water mains belonging to either of such parties."

In Opinions of the Attorney General for 1932, Volume 1, page 172, a former Attorney General held:

"When territory is annexed to a municipality from a county sanitary district, and the city has entered into an agreement for the purchase of the water lines within such annexed territory the payment of the sums agreed upon between the county commissioners and the munimipality is legal."

In the body of such Opinion, at page 174, the Attorney General observed:

"The statute does not specifically state or dictate upon what terms the mutual agreement or conveyance shall be entered into nor does it state upon what terms the county commissioners may retain the right to the joint use of such water supply."

In an opinion of a former Attorney General (Opinions of the At-

torney General for 1927, Volume I, page 483) the question as to whether upon annexation of the territory composing a sewer district to a municipality the board of county commissioners might convey the sewer and water mains to the annexing municipality without receiving a monetary compensation therefor, was considered. Such Attorney General held that under authority of Section 6602-32b, General Code, such mains might be conveyed upon such terms and conditions as the contracting parties, in the use of their discretion, deemed for the best interests of the inhabitants of the territory so being annexed, even though for no monetary consideration.

Neither in your request nor in the enclosures thereto annexed, is there any statement of fact which would indicate that such board of county commissioners was guilty of abuse of discretion or breach of trust in making such agreement. Especially since the question of such abuse of discretion or disregard of fiduciary duty must be judged in the light of facts which they knew or could have known, unaided by facts and circumstances discovered or becoming apparent after the act. As stated by Collin, J., in Costello vs. Costello, 209 N. Y., 252, 263, it is an obvious truth that:

> "A wisdom developed after an event, and having it and its consequences as a source, is a standard no man should be judged by."

On April 28, 1928, the county commissioners possibly had not knowledge nor idea how much in excess of cost might be expended by the city in the performance of its obligation of furnishing the same water service to the citizens of the district as was furnished to the citizens of the city. The commissioners had no means at that time of determining the rate at which residences would be constructed in the area of the district. They had no means of determining the time at which such territory would be sufficiently populated to make the furnishing of such service profitable or to make it desirable to annex such territory to the city. I am therefore unable, from the facts presented, to come to the conclusion that there was any illegality in the original contract between the county commissioners and the city with reference to the construction of the sewer and water lines, and the agreement to convey the same to the city in the event such territory should become annexed to the city.

If such contract was valid when made and performed the question arises as to whether it is within the legal power of the original parties thereto to modify it.

In Ricketts vs. City of Mansfield, 43 O. App., 316, the question was presented as to whether a municipality had power to modify a contract with a public utility. The court held in the fourth paragraph of the syllabus that "municipality has power to modify contract with public

utility for its service, where done for public convenience and welfare (Article XVIII, Section 4, Constitution)". On page 328 the Court says:

> If a municipality has the power to contract with a utility, it likewise has the power to modify that contract or make a new contract for reasons deemed to be for the public convenience and welfare of its citizens. * * *"

It is generally stated that a municipality has the same power to modify a contract as it has to enter into a new contract, unless there is some positive statutory or charter provision preventing the particular modification. Section 3, McQuillin on Municipal Corporations, 2d Edition, Section 1374, and cases there cited.

In the alteration of a contract, as in the making of a contract, one of the required elements is the consideration, unless the original contract expressly reserves the right to the parties to alter the contract at a later date, in which case the consideration supporting the original agreement supports also the amendment. Harrison vs. Tampa, 274 Fed., 569.

From the copy of the contract between the county commissioners and the municipality, it appears that the county agreed to release to the municipality its right of control as well as the rights of ownership of the watermains when the territory served thereby should be annexed by the municipality. The memorandum accompanying your request states that this release was made in October, 1928.

It is questionable as to whether at the present time there would be any consideration sufficient to support an agreement to modify the contract of April 28, 1925. In view of other considerations it is unecessary to determine such proposition.

At the time of the construction of the sewers and water mains, the board of county commissioners levied special assessments against the benefited property to pay therefor. It issued and sold bonds in anticipation of the collection of such assessments. The county commissioners not only pledged the credit of the county for the payment of the bonds, but also pledged the proceeds of the special assessments for such purpose. In view of the rights of the bondholders, under the contract widening the indebtedness so owned by them, may the board of county commissioners and the city by virtue of an agreement modify this contract right by abating such special assessments or a portion thereof?

It has been held that when special assessments have been levied and bonds issued in anticipation of the collection thereof, not even the legislature may constitutionally release the taxpayer from the payment of such assessment. State ex rel. Hostetter vs. Hunt, 132 O. S., 568, 581; Hunter vs. Smith, 104 Fla., 222. Such abatement of assessment would impair the vested contract rights of the bondholders under their bonds.

In fact, in the case of State ex rel. Huntington National Bank vs.

Putnam, 121 O. S., 109, the court held that when bonds had been issued by a subdivision in anticipation of the collection of special assessments there is a duty specially enjoined by law upon the issuing authority to levy and cause such levy to be placed upon the tax list and duplicate thereof an assessment for the payment of such bonds and that a writ of mandumus would issue to compel such acts. A similar ruling was made in State ex rel. Bruml vs. Village of Brooklyn, 126 O. S., 459, 130 O. S., 223.

It therefore appears that unless the outstanding bonds have been retired the assessments for the payment theerof may not, in whole or in part, be abated.

As I have above pointed out, the City of Youngstown has no contractual obligation to pay such bonds. It may be inquired as to whether the city may not pay all or a portion of such bonds from its general funds as a moral obligation. It may scarcely be denied that the legislative authority of a municipal corporation may recognize and pay a moral obligation against it. The difficulty is experienced when we seek to define "moral obligation." The term was defined by the court in Longstrett vs. Philadelphia, 245 Pa. St., 253, as follows:

> "A duty which would be enforceable at law were it not for some positive rule which exempts a party in that particular instance from legal liability."

Similar definitions may be found in:

Cooley on Taxation, 4th Edition, §§194 and 433;
People vs. Westchester County National Bank, 231 N. Y., 465, 476;
6 Am. and Eng. Encyc. of Law, 2nd Ed., 680;
Kessler vs. Brown, 4 O. C. D., 345;
Chapman vs. City of New York, 168 N. Y., 80;
Board of Ed. vs. Blodgett, 155 Ill., 441;
Board of Ed. vs. State, 51 O. S., 531;
State ex rel. vs. Wall., 15 O. D. N. P., 349;

Thus a claim may be a moral obligation even though its enforcement is barred by the statute of limitations or similar law. It may be such type of obligation even though it may not be enforced because no provision of law has been made for its enforcement. There may be other types of moral claims (see cases above cited), yet as above pointed out, under the contract in question, the city has performed each and every one of its covenants concerning the sewer district and its acquisition not only according to the letter but its spirit. The obligation on the bonds is not that of the city but of the county and sewer district. There can

be moving to the city no consideration to support an amendment of its contract to acquire the sewer and water mains. They have already been acquired and the agreed consideration paid therefor; viz., the maintenance and operation of the facilities until annexation was accomplished. The contract has been performed and is out of existence. I am therefore unable to perceive of any legal authority for the transfer of municipal funds to the payment of the bonds in question. It may be that such could be accomplished by the enactment of an enabling act by the legislature. Upon such question I express no opinion.

My conclusion herein arrived at would be reached if we were to attack the matter from a different approach.

Section 6602-32b, supra, specifically provides that by the conveyance such as was made by the District to the City the validity of the assessments made for the construction of the improvement "shall not be affected thereby." Even had it not been for the contract provisions, if the conveyance was made upon the same terms and conditions, a similar conclusion would be reached.

Specifically answering your inquiry it is my opinion that, when a sewer district organized under authority of Sections 6602-17 et seq. General Code, after completing the sewer and water mains which it constructed through the medium of a special assessment against the property in the district and has issued bonds in anticipation of the collection thereof, has by virtue of an agreement between the board of county commissioners and the city, to which the territory forming such district has been annexed, conveyed such lines and mains to such city without monetary consideration, such city may not several years after the completion of such conveyance and before such bonds have been fully paid and retired, enter into an agreement with the county commissioners to the effect that the city will assume the payment of such outstanding bonds and cause the abatement of such special assessments. Such agreement would not be supported by an adequate consideration, would be beyond the power of the municipality and would impair the vested property rights of the bondholders.

Respectfully,

THOMAS J. HERBERT,

Attorney General.