1868.

ASSESSMENTS—FOR STREET WIDENING—RESOLUTION OF NECESSITY—SECTIONS 3812-5a AND 3812-6, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *Sections* 3812-5a *and* 3812-6 *of the General Code authorize the acquisition of additional property for the widening of a street as a part of the improvement thereof, and fifty per cent of the cost of appropriating such property may be assessed in a subsequent assessment for the improvement of such street by widening and paving, subject to the limitation that such assessment shall not exceed the special benefits conferred. In the event of an improvement of a street by widening and paving, the resolution of necessity for such an improvement should set forth the necessity of both widening and paving, a uniform plan of assessment should be adopted and one assessment district of benefited lots and lands should be established.*

2. *Where a street has been paved a width of ten feet and the cost thereof assessed against the abutting property owner, the cost of paving an additional width of ten feet may be assessed against abutting property as an original assessment.*

COLUMBUS, OHIO, March 19, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication, as follows:

> "Section 3896, General Code, reads:
>
> 'The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury when appropriated, the costs and expenses of the proceedings, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure.'
>
> *Question* 1. May the cost of property needed for the purpose of widening a street be made a part of a subsequent assessment against property abutting on the improvement of such street by widening and paving?
>
> *Question* 2. When a street has been paved a width of ten feet and the cost thereof assessed against the abutting property, may the cost of paving an additional width of ten feet be assessed against abutting property as an original assessment or is such assessment limited by Section 3822, General Code?"

An answer to your first question demands a careful examination of all of the statutes relating to the subject of assessments. Section 3896 of the General Code, which you quote, has existed in its present form for many years. Its provisions must, therefore, be read in the light of any changes in the constitution or statutes made since its enactment.

It would be interesting but unprofitable to review the many decisions of the Supreme Court bearing upon the right of a municipality to assess against benefited property the amount paid for land appropriated in the course of an improvement. It is sufficient to state that a series of cases, commencing with *Cleveland* vs. *Wick*, 18 O. S. 303, held that such assessments were proper and constitutional. Later the Supreme Court, in the case of *Railway* vs. *Cincinnati*, 62 O. S. 465, reversed its position and held that assessments could not be levied for such a purpose. In the comparatively late case of *State ex rel* vs. *Otter*, 106 O. S. 415, the Supreme Court has, however, again changed its position on the question and has reverted to the position taken in the case of *Cleveland* vs. *Wick*, *supra*. All of these cases dealt with the constitutionality of assessments of this character in view of the provisions of Section 19 of Article I and Section 6 of Article XIII of the Constitution of Ohio. It is to be noted that the case in 106 O. S., supra, deals with assessments in connection with a county ditch proceeding, but the opinion reviews all of the cases dealing with the subject of assessments and expressly overrules the case of *Railway* vs. *Cincinnati*, 62 O. S. 465, on the subject of assessments, and approves the earlier case of *Cleveland* vs. *Wick*, *supra*.

It is, however, unnecessary for me to review the reasoning of the court in any of the cases mentioned. Since the decision of the earlier cases to which I have referred, Section 11 of Article XVIII of the Constitution has been adopted. That section is in the following language:

> "Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent and other property in the district benefited shall in no case be levied for more than fifty per centum of the cost of such appropriation."

The Constitution has, therefore, settled once for all the question of the right of a municipality to assess benefited property for the cost of appropriating private property in connection with a public improvement and has, at the same time, fixed a definite limitation upon the amount of such assessment of fifty per cent of the cost of such an appropriation, provided such assessment does not exceed the benefits conferred.

In harmony with the provisions of the Constitution, the Legislature has enacted Sections 3812-5a and 3812-6 of the General Code, which are as follows:

> Sec. 3812-5a. "Whenever any municipality appropriates or purchases property for a public improvement, the council of the municipality may provide funds in part by assessments upon the lots and lands benefited by such improvement when a district established by ordinance of council, to pay any part of the entire cost and expense connected with such public improvement, and may include as one of the items of such total cost and expense, not more than fifty (50) per centum of the cost of appropriating private property for such public improvement. Such assessments may be levied by any of the following methods:
>
> First. By a percentage of the tax value of the property assessed;
>
> Second. In proportion to the benefits which may result from the improvement; or,
>
> Third. By the foot front of the property bounding and abutting any street, alley, public road or place, or part thereof, within such district."
>
> Sec. 3812-6. "Such special assessments shall not be in excess of the

special benefits conferred upon such lots and lands by such public improvement, and the proceedings of council providing for levying and collecting such special assessments shall be the same as are provided in title 12, division 3, chapter 5, of the General Code of Ohio, and the amendments and supplements thereto, providing for the improvement of streets, except that in setting forth specifically the lots and lands to be assessed it shall be sufficient to describe them as all the lots and lands bounding and abutting the respective streets, alleys, public roads, or places, or parts thereof, within the district established by council, and in describing those which do not so abut, it shall be sufficient to describe the lots by their appropriate lot numbers, and the lands by metes and bounds.

The council of the municipality may issue and sell bonds as other bonds are issued and sold, to pay the municipality's part of the cost and expense of any such improvement, and may issue and sell bonds in anticipation of the levying or collection of such special assessments, in accordance with the provisions of law pertaining to the issuance and sale of bonds now in force, or as they may be hereafter amended or supplemented."

You will observe that this language provides that the municipality shall establish a district of lots and lands benefited by such improvement to be assessed and authorize the assessments in any one of the three ordinary methods. The method of levying and collecting such special assessments is made the same as that for other special assessments under the provisions of Section 3812-6, with the minor exception that lot and lands to be assessed may be described with perhaps less detail than in the case of an ordinary assessment.

Sections 3812-5a and 3812-6 have been so placed as to be supplementary to Section 3812 of the Code. That section is in the following language:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, water-courses, water mains or laying of water pipes and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or water course, and for constructing or improving any levee or levees or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkhead, culverts, approaches, flood gates or water ways or trains incidental thereto, or making any other improvement of any river front or lake front (whether such river front or lake front be privately owned or publicly owned), which the council may declare conducive to the public health, convenience or welfare, by any of the following methods.

First: By a percentage of the tax value of the property assessed.

Second: In proportion to the benefits which may result from the improvement, or

Third: By the foot front of the property bounding and abutting upon the improvement."

Construing the two sections together, I am of the opinion that the power and authority to improve a street by widening it is by the terms of Sections 3812-5a and 3812-6 made a part of the general power of improvement by assessment conferred by Section 3812 of the Code. You will observe that Section 3812-5a permits the assessment of the cost of appropriation "whenever any municipality appropriates or purchases property *for a public improvement.*" It seems to me reasonable to conclude that the improvement of a street may, in one proceeding, comprehend not only its widening but also the paving necessary by reason of the additional width. If this be true, then quite obviously the fifty per cent of the cost of appropriation could be included with the cost of repavement in one assessment. In my opinion the effect of the enactment of Sections 3812-5a and 3812-6 is precisely as if there had been contained in Section 3812 an additional power of improvement of a street by widening. It was necessary, however, to make a separate section of this because of the fifty per cent limitation and the requirement that the assessment be made by a district. Obviously when assessments are levied pursuant to Section 3812 for ordinary street improvements, an assessment district is created, and by reference to Section 3812-5a this district obviously may serve also for the assessment of the cost of appropriation if so described in the resolution of necessity. In such case the assessment might properly be combined. If, however, council should see fit to create separate districts for the assessments for paving and widening, apparently it would be necessary to treat the two as separate proceedings requiring separate assessments.

I have heretofore suggested that Section 3896 of the Code must be read in the light of the constitution and the later statutes. In so far as that section purports to authorize the inclusion in an assessment of the entire cost of the acquisition of the real estate, of course its terms would be violative of the provisions of Section 11 of Article XVIII of the Constitution. If, however, the assessment be limited to fifty per cent of such cost, I believe it legal to include such cost in an assessment against the property abutting on the improvement of the street for both widening and paving.

Some contention might be made that an assessment ordinance levying assessments both for the widening and paving of a street would be objectionable because it would have more than one subject matter. I do not feel that such a contention is sound. The subject matter of the ordinance is the improvement of the street. While it is true that that improvement may consist of either one specific method or several methods of improvement, yet there is no question but what the general subject matter would be an assessment for the improvement of the street. It is quite ordinary and usual to provide in one assessment for the improvement of a street by grading, draining, curbing, paving, constructing sidewalks, sewers, water mains and street lights. The fact that there are several specific respects in which the street is improved does not prevent the aggregate cost being included in one assessment.

In the case of *Roebling* vs. *The City of Cincinnati, et al.,* 102 O. S. 460, an objection of this nature was before the court and in the opinion, at page 470, is found the following language:

> "Section 3812, General Code, provides for the improvement of any street, alley, etc., by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, sewers, drains, etc. The subject contained in this section is improvement, either of a street, alley, or other thing mentioned in the section; and in the improvement of a street the authority is given to do numerous things towards that improvement, such as paving, draining, curbing, constructing sewers, etc.
>
> The city council through proper legislation may do any one or all of these things, and it is very clear to us that it may do any one or all of such

things in one set of proceedings, so that the contention made here, that the paving of the street and the laying of the water mains were illegally considered under one such set of proceedings, is not well taken. The subject of the legislation is improvement, and the resolution of necessity contains only one subject."

I accordingly feel that as one of the incidental costs of improving a street, fifty per cent of the cost of appropriating property for its widening may be included in the assessment for such improvement, which assessment also includes the cost of repaving.

Specifically answering your first question, therefore, I am of the opinion that fifty per cent of the cost of property needed for the purpose of widening a street may be made a part of a subsequent assessment of property abutting on the improvement of such street by widening and paving. Since, however, Section 3812 of the Code requires that the assessment of fifty per cent of the cost of appropriating property for an improvement be made in accordance with the other provisions of law with relation to ordinary assessments, it is necessary that the usual course be followed and the resolution of necessity for the improvement must specifically declare the necessity of the acquisition of property and that the cost thereof is to be assessed in accordance with law. In addition, since the widening and repaving constitute in such an instance, as I have stated, one proceeding for the improvement of a street, the plan of assessment must be the same for both widening and paving and the lots and lands to be assessed must also be the same.

Your second question is whether, where a street has been paved a width of ten feet and the cost thereof is assessed against the abutting property, the cost of paving an additional width of ten feet may be assessed against the abutting property as an original assessment or is such assessment limited by Section 3822, General Code. That section is in the following language:

"When an assessment is levied for the reimprovement of any street, for the original improving of which an assessment has theretofore been levied and paid, there shall be deducted from the assessment calculated as an assessment for an original improvement, one-half of the amount paid on the highest prior assessment, but in no case shall the assessment for such reimprovement be reduced to less than fifty per cent of what it would have been as an original assessment, unless council deems a greater reduction equitable, and all amounts deducted under this section shall be paid as part of the municipal corporation's portion of the cost of the reimprovement."

I infer from your question that the original paving is not in this instance to be disturbed but the only improvement contemplated is an additional pavement of ten feet. I do not, however, deem the fact that the original paving is not to be disturbed as important or decisive, for I am convinced that my answer to your question would govern also the case in which an original pavement had existed of a particular width and the new improvement contemplated tearing up the old pavement and replacing it with one of greater width.

I find that a similar question has been before this department. The opinion of the then Attorney General is found in the Annual Report of the Attorney General for 1914, Volume 1, page 530. The syllabus of that opinion is as follows:

"Where a certain street was paved the width of forty feet, and repaved the width of forty-six feet, after the repaving of this street, three feet on the

sides thereof were to be considered as merely a repaving of the entire street, and consequently Section 3822, General Code, would apply and property cannot be assessed for more than one-half."

It is to be borne in mind that at the time of the writing of that opinion Section 3822 of the General Code limited the power of reassessment to one-half of the cost and expense of repaving, which differs substantially from the present language of that section. The writer of the opinion made a careful review of all the authorities, not only in Ohio but in other jurisdictions, bearing upon the question presented. His research discloses that at that time there was no unanimity as to the question involved, although he cites several cases in support of the position stated in the syllabus. The following quotation is made from the case of *Baldwin* vs. *Springfield,* 10 N. P. (n. s.) 65.

"The limitation of Section 53, Municipal Code of 1902 (G. C. 3822), as to 'repaving' assessments does not apply to assessments for curbing and guttering if the former improvement did not include and the property was not assessed therefor either as part of a street or sidewalk improvement."

This quotation is somewhat indicative of the right of a municipality to treat as a new improvement anything which was not contemplated in the original improvement. In spite of this language, however, the conclusion of the opinion was as follows:

"In this state of the authorities the precise question submitted by you is not one easy of solution. Looking to the facts of the case, in the light of the terms of the statute itself, it seems clear that the paving of the street in question to a width of 40 feet was an improvement of the street within the meaning of the section, as much so as if it had been paved to a width of 46 feet. The question as to the width of the improvement was a matter in the discretion of the city authorities, the improvement being one substantial in its nature, it was an 'improvement' within the terms of this section. The assessment for this former improvement having been paid, the question here presented, applying the facts stated in your inquiry to the terms of the statute itself, is not so much whether the particular 6 feet of the proposed improvement constitutes a repaving, but rather whether the proposed paving of the street to a width of 46 feet constitutes a repaving of the street.

Looking to the language of the section, and applying the spirit of the decisions which more nearly meet the situation of fact here presented, I am constrained to the opinion that the proposed action of the city to improve this street to a width of 46 feet will, in view of the former improvement of the street, constitute a repaving of the street within the meaning of this section, and that the abutting property cannot be assessed for more than one-half the cost and expense thereof."

From this discussion it is apparent that the opinion just referred to was not reached without some doubt existing in the mind of the writer as to the conclusion. I therefore feel at liberty to reconsider the matter in the light of such subsequent authorities as may be available.

In the case of *Huddleston* vs. *City of Ashland,* 289 So. W. 1091, the Court of Appeals of Kentucky had under consideration the question of whether or not the addition of five and one-half feet of pavement on each side of an existing street constituted original construction so as to authorize an assessment therefor as against abutting property owners. The charter applicable to this city provided:

"Any street, alley or other public way which has been improved or reconstructed with brick, granite, asphalt, concrete or other improved material or paving since March 1, 1909, or which may thereafter be improved or reconstructed with brick, granite, asphalt, concrete or other improved material or paving, entirely at the expense of the abutting property owners, as provided herein, shall thereafter be kept in repair, maintained, reconstructed and improved if and whenever it may be necessary to reconstruct or improve the same entirely at the expense of the city."

In effect, therefore, any reimprovement was required to be done entirely at the cost of the general tax payers and no assessment could be made. The following language appears on page 1093:

"Clearly, under these authorities, the work in question was not a reconstruction. There was nothing torn away except the curbings on each side erected in 1916 were necessarily removed in widening the street. That part of the street so constructed in 1924 was neither repaired, reconstructed, nor reestablished as a brick highway, but was an original construction upon that part of the street which had never theretofore been constructed under municipal authority.

Giving, therefore, to the charter what we conceive to be a reasonable and sound interpretation, it appears to be that no part of a city street has been originally constructed until that particular part has been in the manner set forth in the charter constructed under municipal authority, and that when a city shall have constructed a driveway along only a part of the street, that its subsequent action in providing for a widening of such driveway is not a reconstruction of the original work, but an original construction of that part of the work so last provided for."

This case is express authority for treating the improvement in the instance you present as a new improvement and therefore not subject to the limitation of Section 3822 of the Code, provided that I am correct in inferring that the existing ten feet pavement is not to be disturbed.

If, on the other hand, a new and wider pavement is to be substituted for a narrower one, the case is not express authority. I call your attention, however, to the case of *People* vs. *Buffalo,* 137 N. Y. Supp. 464. The opinion in that case is short and I quote a substantial part thereof, as follows:

"It is urged that, the street having once been paved, the proposed improvement is a repavement, although the new pavement is to be five feet wider on each side than the old paved portion of the street. If the relator is correct in this contention, one-third of the entire expense of the improvement must be met by general taxation; but, if the contention of the city prevails that the improvement is a repavement only to the width of the old pavement, the expense of the strips of new pavement on either side of the old roadway must be paid by local assessment on the property benefited and the assessment is properly so laid. City Charter, Sections 279, 400. No case is cited which holds that, where a street has been paved part of its width, the subsequent pavement of those parts where no pavement has ever been laid is a repavement, and the question is a novel one. Matter of Grube, 81 N. Y. 139, 141, where the Burmeister Case, 76 N. Y. 174, and the Garvey Case, 77 N. Y. 523, cited by relator, are explained and distinguished, indicates that it is only the relaying

of the old pavement that can be termed a repavement. Matter of Astor, 53 N. Y. 617, cited by relator, does not touch the question. Although *Ten Eyck* vs. *Rector,* 65 Hun, 194, 20 N. Y. Supp. 157, contains some loose expressions, defining paving and repaving, which might uphold relator's contention that 'paving' means when pavement is laid for the first time in a dirt road and that any subsequent paving thereof is 'repaving,' it decided merely that an agreement between landlord and tenant, whereby the latter is to pay all assessments for paving, is broad enough to include assessments for repaving.

The charter (Section 279) recognizes (a) repair of paved streets by the commissioner of public works, and (b) repaving, when the commissioner certifies that it is not expedient to make further repairs. 'Repairing' means restoration of the paved surface. 'Repaving' means paving again, taking up the old pavement and replacing it with new. To the extent that the new pavement extends beyond the lines of the old, the street is not repaved, but is paved for the first time. If a street is paved for one-half its width by local assessment, and later the pavement is extended to the entire width of the street without disturbing the first pavement, probably no one would claim that the new pavement was a repavement. The circumstances that the old pavement is relaid at the same time that the new pavement is laid does not make the work one of repaving. The purpose of the charter is, it would seem, to impose the entire original cost of new pavement on the property benefited, and to charge the city at large with one-third of the expense of replacing the old pavement when it becomes worn out."

In line with the foregoing case is the case of *In re Petition of Pittsburgh,* 79 Pa. Sup. Ct. 401.

In view of the foregoing, I feel that the trend of modern authority is to the effect that, where a wider pavement is substituted for an earlier narrower one, assessment of the cost of the additional width may be made as for a new improvement, but so much of the width of the new pavement as represents the prior existing pavement must be treated as a reimprovement and the assessments therefor must be governed accordingly.

In specific answer to your second question, therefore, I am of the opinion that where a street has been paved a width of ten feet and the cost thereof assessed against the abutting property owner, the cost of paving an additional width of ten feet may be assessed against abutting property as an original assessment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1869.

MUNICIPALITY—POWER TO BORROW MONEY—CERTIFICATES OF INDEBTEDNESS—TAX SETTLEMENT.

SYLLABUS:

1. *A municipal corporation may not borrow money in anticipation of the collection of current revenues other than tax levies.*