

2071.

APPROVAL, DEED TO LAND OF LOUISE DOHRMAN, IN NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, May 8, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a new deed from Louise Dohrman to the State of Ohio, conveying certain lands situated in Nile Township, Scioto County, Ohio, more particularly described in Opinion No. 1954 rendered to you under date of April 11, 1928.

I have carefully examined the deed as submitted, and finding the same to have been properly drawn and executed and in proper form, and that the same will, when delivered, convey in fee simple the property therein described to the State of Ohio, I hereby approve the same.

The deed, a copy of Opinion No. 1954, abstract of title, encumbrance estimate No. 3385 and other papers submitted in connection with said deed are herewith returned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2072.

COUNTY COMMISSIONERS—REQUIRED TO REPAIR COUNTY ROADS WITHOUT ASSESSMENTS—EXCEPTION—SECTION 6907, GENERAL CODE, DISCUSSED.

SYLLABUS:

County commissioners are now required to make ordinary repair of county roads without assessment of any part of the cost thereof against the property owners, unless petition for such improvement be filed under the provisions of Section 6907, of the General Code. The cost of such an improvement may be paid from the levies provided by Sections 6926 and 6956-1, of the General Code.

COLUMBUS, OHIO, May 8, 1928.

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

GENTLEMEN:—This will acknowledge your recent communication as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

Section 6906, G. C., as amended 112 O. L., 487, provides that the county commissioners in any county shall have the power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, widening, draining, dragging, graveling, macad-

amizing, resurfacing or applying dust preventatives, or by otherwise improving the same.

Section 6919 of the same act provides how the compensation, damages, costs and expenses of an improvement shall be apportioned and in each instance some part of the cost must be assessed against the property abutting upon or within certain distances of the road.

Question: Do these provisions preclude the county commissioners from making ordinary repair to county roads without assessing any part of the cost thereof against the property owners? In other words, may the county commissioners use the tax levies made under the provisions of Sections 6926 and 6956-1, G. C., for the improvement of roads without assessing any part of the cost against the property owners?"

General authority with respect to roads is conferred upon the county commissioners by Section 6906, General Code, to which you refer, which reads as follows:

"The board of commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or by otherwise improving the same. The county commissioners shall have power to alter, widen, straighten, vacate or change the direction of any part of such road in connection with the proceedings for such improvement."

This section was amended to read as it now does in the Norton-Edwards Act found in 112 O. L. 487.

It is to be observed that this section confers specific authority upon the commissioners to repair roads in every possible manner.

When you speak of the right of county commissioners to make "ordinary repair," your exact meaning is not clear. It is to be observed, however, that Section 2792-1 of the General Code authorizes and requires the county surveyor to make what are called "emergency repairs" to all roads in the county, including state highways. By the express provision of that section this term means any necessary repair the total cost of which is not more than two hundred dollars, and provision is therein made for an annual appropriation by the county commissioners for the purpose of establishing a "county surveyor's emergency repair fund." I take it, however, that you do not have in mind minor repairs of this character, but are inquiring with respect to repairs of greater magnitude than these so-called emergency repairs, which may generally be regarded as maintenance or replacement, rather than new construction.

Before the enactment of the Norton-Edwards Act, heretofore referred to, it is probable that no right to make repairs on county roads, other than the emergency repairs just mentioned, existed in the county commissioners unless assessments were levied against property owners in connection with the improvement except under the provisions of Section 6921 hereinafter noted. It is doubtless because of this fact that you are making your present inquiry. Without quoting Section 6919 of the Code, it is sufficient to state that the methods of apportionment therein provided in no case permit the assumption of the whole cost of the improvement by the county. It is therefore important to ascertain whether one of these methods of apportionment must be followed in every kind of improvement of a county road made by the county commissioners.

Section 6907, General Code, provides for a petition signed by land-owners to be specially taxed, asking for the "construction, reconstruction, improvement or repair of any public road." County commissioners are then required to determine whether or not the improvement shall be made, and it is further provided that the petition shall state the method of paying for the improvement, which shall be in any one of the methods provided by Section 6919 of the General Code. This section was not changed in the enactment of the Norton-Edwards Act. From what I have said, I believe it follows necessarily, that now, as well as prior to the enactment of the Norton-Edwards Act, wherever a petition is presented for an improvement which is either a construction, reconstruction, improvement or repair of a public road, it is essential that a portion of the cost of such improvement be assessed.

Sections 6910 and 6911 of the General Code were formerly as follows :

Sec. 6910. "The county commissioners may, without the presentation of a petition, take the necessary steps to construct, reconstruct, improve or repair a public road or part thereof, as hereinbefore provided, upon the passage of a resolution by unanimous vote declaring the necessity therefor. The cost and expense thereof may be paid in any one of the methods provided in Section 6919 of the General Code, as may be determined by the county commissioners in said resolution."

Sec. 6911. "When the board of commissioners has determined that any road shall be constructed, reconstructed, improved or repaired, as herein provided for, such board shall determine by resolution by unanimous vote, if acting without a petition, and by a majority vote, if acting upon a petition, the route and termini of such road, the kind and extent of the improvement, and at the same time shall order the county surveyor to make such surveys, plans, profiles, cross-sections, estimates and specifications as may be required for such improvement. The county commissioners may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials or other similar variations, and approve all or any number of such alternate surveys, plans, profiles, cross-sections, estimates and specifications. The county surveyor may, without instructions from the county commissioners, prepare alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials, or other similar variations. Where alternate surveys, plans, profiles, cross-sections, estimates and specifications are approved by the county commissioners or submitted by the county surveyor on his own motion the county commissioners and county surveyor shall after the opening of the bids agree which of such surveys, plans, profiles, cross-sections, estimates and specifications shall be finally adopted for the construction of the improvement."

The Norton-Edwards Act repealed Section 6910 and no section carrying the same number was enacted. Section 6911 was amended to read as follows :

"The board of county commissioners may by resolution, which said resolution shall be adopted by a unanimous vote, find that the public convenience and welfare require the improving of any public road or part thereof by grading, draining, paving, straightening or widening the same and constructing or reconstructing any bridges and culverts necessary for such improvement, and in said resolution shall fix the route and termini of such

improvement, and shall apportion the cost thereof, which shall be apportioned and paid in any one of the methods provided for by Section 6919 of the General Code.

They shall in said resolution order the county surveyor to prepare the necessary surveys, plans, profiles, cross-sections, estimates of cost and specifications for said improvement as may be necessary, together with an estimated assessment, based upon the estimate of cost so made, upon the real estate to be charged therewith, of such part of the estimated damages, costs and expenses of such improvement as are to be specially assessed, which estimated assessment shall be according to the benefits which will result to such real estate. In making such estimated assessment, the surveyor may take into consideration any previous special assessment made upon such real estate for road improvements. The county commissioners may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials or other similar variations. The county surveyor may, without instructions from the county commissioners, prepare and submit to the county commissioners alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials or other similar variations. Where alternate surveys, plans, profiles, cross-sections, estimates and specifications are approved by the county commissioners or submitted by the county surveyor on his own motion, the county commissioners and county surveyor acting together, shall constitute a board for the selection of the particular plan, profile, cross-sections, estimate and specifications to be used and shall, after the opening of bids, determine by a majority vote of such board which of said surveys, plans, profiles, cross-sections, estimates and specifications shall be finally adopted for said improvement. After the passage of the resolution provided for in this section, all subsequent proceedings of the county commissioners with respect to said improvement may be had by a majority vote."

It is to be observed that the language of Section 6911, General Code, has been substantially changed. The section as it now reads authorizes the board of county commissioners by a unanimous vote to find that the public convenience and welfare require "the improving of any road or part thereof by grading, draining, paving, straightening or widening the same and constructing or reconstructing any bridges and culverts necessary for such improvement," whereas the authority in the old section extended to any case in which it was determined by the board that a road should be "constructed, reconstructed, improved or repaired." Manifestly, therefore, the section is no longer applicable to a repair which does not contemplate either a grading, draining, paving, straightening or widening. The necessity and authority for apportionment of the cost in accordance with one of the methods provided by Section 6919 of the Code exists only as to such improvement which includes work of the character just mentioned. That there are other methods of repairing roads is clear from the broad language of Section 6906, *supra*, which mentions dragging, graveling, macadamizing, resurfacing and applying dust preventatives. Consequently, it remains to be determined what authority is conferred, and what procedure is prescribed, for repairs coming within the descriptive terms just referred to and found in Section 6906 of the Code.

From what has been said, it is evident that the Legislature apparently had in mind a restriction of the application of Section 6911 when that section was amended in 112 O. L. It is to be observed, however, that the latter portion of the section provides for the preparation of surveys, plans, profiles, cross-sections, estimates of cost

and specifications for the improvement by the county surveyor. The succeeding section provides for the filing of the plans and publication of notices thereof, together with an estimated assessment upon the lands benefited. The section has therefore apparent application only to such proceedings by the board of county commissioners as contemplate an assessment against property owners. The succeeding sections, to and including Section 6918, provide the various steps with respect to notice of the improvement, compensation for land taken and damages and the official determination of the commissioners to proceed with the improvement. Standing alone, these sections would apparently be only applicable to cases where assessments were to be made against abutting property owners and no procedure is provided whereby the commissioners may proceed with the improvement of a road by way of repairs thereof without assessing a portion of the cost, unless general authority is conferred by Section 6906, *supra*.

The provisions of Section 6921 of the General Code, must not be overlooked. That section was untouched in the enactment of the Norton-Edwards Act and reads as follows:

"The county commissioners, or joint board thereof, upon a unanimous vote, may without a petition therefor, order that all the compensation and damages, costs and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, or out of any road improvement fund available therefor, or the county commissioners or joint board thereof, may enter into an agreement with the trustees of the township or townships in which said improvement is in whole or part situated, whereby said county and township, or one or more of them may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them."

The language of the section is comprehensive of any improvement made under authority of the county commissioners, and authorizes by unanimous vote of the commissioners the assumption of all the cost of the improvement by the county, to be paid from the proceeds of any levy for road improvements on the duplicate of the county. It is manifest that the preceding sections must be read in the light of this section, and if the commissioners so order, proceedings shall be had in accordance with the sections governing improvements by assessment, omitting such steps as are made unnecessary by reason of the fact that the assessment feature is omitted.

The foregoing discussion indicates the probable result sought by the Legislature in its amendment of the section under discussion.

Prior to the enactment of the Norton-Edwards Act, county commissioners in the improvement of county roads had jurisdiction to proceed under Section 6910 to repair roads by the passage of a resolution by unanimous vote and assess the cost of such repair against property owners in any of the methods described by Section 6919 of the Code. They could, of course, by a similar unanimous vote assume all of the cost and pay it from the general road levy by authority of Section 6921, but this they were often unwilling to do. The result was that in many instances roads which were subject to heavy traffic necessitated recurrent repairs which, under the law then in existence, could be assessed recurrently against the property owners. The property owners accordingly were continually subjected to expense for maintenance although the road was worked out by through traffic in the main. This result is discussed in the case of *Spaulding, Treasurer, vs. Wickham*, 105 O. S. 434, where, on page 436, occurs the following:

"We agree with the defendant in error that there are many cases, and this may be one, where the method of assessment may be unjust. The repair,

at the cost of the abutting owners, of a public highway subject to heavy traffic, requiring frequent resurfacing to keep it in condition for travel, may prove to be inequitable in many cases, especially if the cost of repair should be heavy and frequent; but this is a question of policy which the Legislature has left to the board of county commissioners for its exercise. This court cannot control the discretion of the county commissioners in choosing the method by which these assessments will be made. Section 6910, General Code, provides that the county commissioners may take the necessary steps to improve or repair a public road, or part thereof, upon the passage of a resolution by unanimous vote declaring the necessity therefor, and that the cost and expense of improvement may be paid in any one of the methods provided in Section 6919, General Code, as may be determined by the county commissioners in such resolution."

In recognition of this injustice, the Legislature has now deprived the county commissioners of the right to make assessments for repairs which do not include either grading, draining, paving, straightening or widening. This was accomplished by the amendment of Section 6911, heretofore discussed, and it is no longer possible to make recurrent assessments for what may be described generally as ordinary maintenance and repair.

To summarize the foregoing, it may be stated that the county commissioners, with respect to the improvement of county roads, have the following powers:

1. Where the improvement includes grading, draining, paving, straightening or widening and constructing and reconstructing bridges and culverts, the commissioners may:

(a) Acting upon petition and a resolution adopted by a majority vote, proceed with the improvement and assess in any one of the methods provided by Section 6919 of the Code, which method must be stated in the petition. (G. C. 6907.)

(b) Acting without a petition by a resolution adopted by unanimous vote, proceed with the improvement and assess property owners in any one of the methods provided in Section 6919 of the Code. (G. C. 6911.)

(c) By unanimous vote, proceed with the improvement and order that the compensation and damages, costs and expenses of the improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county. (G. C. 6921.)

2. Where the improvement is one which does not include either grading, draining, paving, straightening or widening and constructing or reconstructing bridges and culverts, and consequently would come within the broad definition of an ordinary repair, the commissioners may:

(a) Upon petition and the passage of a resolution by a majority vote, proceed with the improvement and assess in any one of the methods provided by Section 6919 of the Code which method must be stated in the petition. (G. C. 6907.)

(b) By unanimous vote, proceed with the improvement, and order that the compensation and damages, costs and expenses thereof be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county. (G. C. 6921.)

You further inquire whether the county commissioners may use the tax levies made under the provisions of Sections 6926 and 6956-1 of the General Code, for the improvement of roads without assessing any part of the cost against the property owners.

This question presents little difficulty in view of the fact that appropriations for ordinary repairs must be made, as I have before stated, under authority of Section

6921 of the Code, which states that the commissioners may order the expenses of the improvement paid

“out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, or out of any road improvement fund available therefor.”

Section 6926 of the General Code, reads as follows:

“The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the county shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the county’s proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining, and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force.”

Clearly the levy provided by this section is a levy for road purposes on the grand duplicate of the county, and comes within the terms of Section 6921, General Code.

Sections 6956-1 and 6956-1a of the General Code, read as follows:

Sec. 6956-1. “After the annual estimate for the county has been filed with the county commissioners by the county surveyor, and the county commissioners have made such changes and modifications in said estimate as they deem proper, they shall then make their levy for the purposes set forth in said estimate, upon all the taxable property of the county not exceeding in the aggregate two mills upon each dollar of the taxable property of said county. Such levy shall be in addition to all other levies authorized by law for said purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The provisions of this section shall not, however, prevent the commissioners from using any surplus in the general funds of the county for the purposes set forth in said estimate.

Sec. 6956-1a. “The board of county commissioners of each county shall provide annually by taxation an adequate fund for the maintenance and repair of improved county highways. Such fund shall be provided by levies made under Sections 6926, 6927 and 6956-1 of the General Code and the several sections amendatory thereof or supplementary thereto. The maintenance and repair fund so provided shall not be less than one hundred dollars for each mile of improved county highway within the county. Such levy or levies for maintenance and repair purposes shall be separately set forth in the annual budget of the county commissioners presented to the budget commission, and the maintenance and repair levies so made by the county commissioners pursuant to the provisions of this section shall be preferred levies as against any other levies made by the commissioners for county road purposes. Should the budget commission of any county be unable, by reason of the limitations of law, to allow all of the road levies made by county commissioners, such reductions as are necessary therein shall be first made in levies other than

those for maintenance and repair purposes made under the provisions of this section. The fund produced by such levy or levies for maintenance and repair purposes shall not be subject to transfer by order of court or otherwise and shall be used solely for the maintenance and repair of the improved county roads within the county. The provisions of this section shall not prevent the county commissioners from using any other available road funds for the maintenance and repair of improved county roads."

The levies therein provided are also clearly road levies within the terms of Section 6921 of the General Code, and, accordingly, I am of the opinion that the ordinary repair of county roads may be made by the county commissioners from the levies provided by Section 6956 and 6956-1 of the General Code.

By way of specific answer to your inquiry, I am of the opinion that county commissioners are now required to make ordinary repair of county roads without assessment of any part of the cost thereof against the property owners, unless petition for such improvement be filed under the provisions of Section 6907 of the General Code. The cost of such an improvement may be paid from the levies provided by Sections 6926 and 6956-1 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2073.

APPROVAL, NOTES OF LIBERTY TOWNSHIP SCHOOL DISTRICT,
BUTLER COUNTY, OHIO—\$100,000.00.

COLUMBUS, OHIO, May 8, 1928.

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

2074.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF DUTIES—
C. L. SAWYER.

COLUMBUS, OHIO, May 8, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval an official bond of C. L. Sawyer, given in accordance with the requirements of Section 1182 of the General Code, for the faithful performance of his duties as Resident District Deputy Director.

To this bond is attached a certificate of the Surety Company to the effect that the persons signing said bond in behalf of said company are its attorneys-in-fact and are authorized to sign an official bond of this nature for the amount therein involved,