1073.

MUNICIPALITY—BUYING SANITARY SEWER FROM PRIVATE COMPANY—WHAT PORTION OF PURCHASE PRICE INCLUDED IN COST OF CONSTRUCTING EXTENSIONS AND ASSESSED AGAINST BENEFITED PROPERTY.

SYLLABUS:

In the event a municipality purchases, without reservations as to future use, a privately owned main trunk sewer at a price equal to the actual cost of construction thereof, for the purpose of constructing extensions thereto, a portion of such purchase price, not exceeding a sum that in the opinion of council would be required to construct an ordinary street sewer of sufficient capacity to drain or sewer the lands served by the existing main trunk sewer, should be included within the cost of constructing extensions and assessed against all the property served, including that property already served by the existing main trunk sewer.

COLUMBUS, OHIO, October 19, 1929.

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

GENTLEMEN:—Your letter of recent date is as follows:

> "A sanitary sewer was constructed in a section of the Village of --------, by permission of city council and the State Department of Health, by a private company, for the benefit of properties owned by such company. The cost thereof was approximately $5,000.00. The village desires to purchase said sewer and then make extensions thereof to other sections of the city, and assess the cost of such extensions upon the abutting or benefited property.
>
> Question. Can the cost of purchasing the sanitary sewer from the private company be included in the cost of extending sanitary sewer and the total amount be assessed upon abutting or benefited property?"

With your communication is submitted a letter from the village solicitor of the municipality as follows:

> "Some time ago a large trunk, sanitary sewer was constructed in the northern part of ----------, Ohio, from some houses owned by the P. and O. Power Company to the Ohio River, the plans for which had been duly submitted to the Department of Health and approved by them. This trunk, sanitary sewer cost approximately $5,000. The sewer is of sufficient depth and size to be extended to drain a considerable portion of the village around it.
>
> The Council of the Village of ----------, desires to buy this trunk sewer at the actual cost of it, and extend this sanitary sewer over various streets and alleys to accommodate a large section of the village, and desire to assess the cost of the construction of the sanitary sewer back on the abutting property owners, by one of the methods outlined in 3812 of the General Code, either by benefit or by the foot front.
>
> The question is, 'Can the cost of purchasing the sanitary trunk sewer already constructed be included in the cost of extending the sanitary sewer and the total assessed upon the abutting property, or will it require two different proceedings; one to purchase the present trunk, sanitary sewer, and another proceeding to extend the sanitary sewer?'
>
> Of course I understand the proceedings for the construction of a sanitary

sewer to be as outlined in Sec. 3812, G. C., and following. I would like to have you submit the proposition to the Attorney General for his opinion. It appears to me that bonds would have to be issued under Sec. 3939 to buy the trunk sanitary sewer, already constructed, and different proceedings under 3812, G. C., to extend the said sanitary sewer."

Section 3812, General Code, is as follows:

"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, watercourses, water mains or laying of water pipe 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 watercourse, 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 drains incidental thereto, or making any other improvement of any river front or lake front (whether such river front or lake front be privately 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."

Section 3819, General Code, which has been held to be a restriction upon the power to assess for sewer purposes (*Cincinnati* vs. *Doerger,* 98 O. S., 161) provides:

"The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent of the actual value thereof after improvement is made. Assessments levied for the construction of main sewers shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith."

A consideration of this section gives rise to several questions bearing upon your inquiry. It may be said at the outset that it is a well established principle of law that assessments for special benefits cannot exceed the amount of the benefits conferred by the improvement.

Chamberlain vs. *Cleveland,* 34 O. S., 551;
Schroeder vs. *Overton,* 61 O. S., 1;
Walsh vs. *Sims,* 65 O. S., 211;
Dayton vs. *Bauman,* 66 O. S., 379.

It follows that the cost of purchasing the existing sewer may not be assessed solely upon the property benefited by the extensions to be built, for the reason that such property would not receive any greater benefit as a result of the purchase than would be received in case there were no sewer in existence and the entire system were being constructed. If there were no sewer in existence, no question would probably arise as to assessing the property served by the extensions for the portion of the benefits received by the property that is now served by the existing sewer.

It should next be observed that under the provisions of Section 3819, no lots or lands may be assessed that "do not need local drainage or which are provided therewith." If a new sewer were being constructed, for instance, paralleling the existing sewer, there would be no authority now to assess the property already served by the existing sewer in view of the facts presented.

Langmead, et al., vs. *Cincinnati, et al.*, 18 O. C. D., 64;
Cincinnati vs. *Doerger, supra.*

The question with which I am confronted is not exactly a question of assessing property already provided with local drainage within the meaning of the statute for the reason that in the event this main trunk sewer is sold to the municipality without any reservation as to its use, which I assume to be the proposed terms of the purchase in view of the price being the actual cost of construction, the right as it now exists to dispose of sewage and the right to continue to do so is a right that may be interfered with after sale. In the event the sewer is so sold, the right as to drainage would not include permanency of control. The sixth branch of the syllabus in the case of *Samuel Hildebrand* vs. *City of Toledo, et al.*, 6 O. C. C. (N. S.), 450, is in point and reads as follows:

> "Lots are not provided with adequate local drainage, such as will exempt them from paying their share of an assessment, levied to pay the cost of a sewer improvement, *unless the right exists to dispose of sewage as it is at the time being disposed of, and the right to continue so to do is one that can not be interfered with—that is, the present right must include not only permanency of structure but also of control.* Hence a claim of adequate local drainage, based upon the right to allow sewage to drain into a natural water course running through a municipality, is not sustained where such drainage will pollute the stream and create a nuisance and imperil the health of other riparian owners." (Italics the writer's.)

In view of this decision, the conclusion seems inescapable that after sale of the sewer in question, upon the facts here presented, the contention that the property previously drained may not be assessed upon the theory that it is provided with drainage, would probably not be sustained.

Having arrived at the conclusion that the property now served by the existing sewer would not be exempt from assessment under the facts presented in connection with the construction of extensions to such main trunk sewer, it is next necessary to consider the extent of the assessments which may be levied upon such property. The answer to this question is contained in Section 3819, supra, where it is provided:

> "Assessments levied for construction of main sewers shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement."

A further question is presented in the above quoted letter from the village solicitor

as to whether or not the purchase of the sewer in question and the construction of the contemplated extensions thereto may be consummated in a single proceeding under the provisions of Sections 3812, et seq., General Code. There are no facts before me indicative of any steps having been taken under Sections 3871, et seq., General Code, toward the establishment of sewer districts and I therefore assume that such districts have not been established. It may be noted that Section 3882, General Code, provides that council may provide for the construction of main drains and branch drains connecting therewith, without previously adopting any plan of sewerage or division of the territory of the municipal corporation into districts and may assess the cost and expense thereof upon such lots or lands as shall be designated in the ordinance to improve. It appears that there are provided in the same chapter of the General Code three different methods of procedure for the construction of sewers. I see no reason why in the event council should decide to proceed under Sections 3812, et seq., the purchase of the main trunk sewer and the construction of extensions may not be consummated as one procedure and assessments levied under any one of the methods outlined in Section 3812, General Code, subject, of course, to the limitations hereinabove commented upon, as contained in Section 3819.

In view of the foregoing, I am of the opinion that in the event a municipality purchases, without reservations as to future use, a privately owned main trunk sewer at a price equal to the actual cost of construction thereof, for the purpose of constructing extensions thereto, a portion of such purchase price, not exceeding a sum that in the opinion of council would be required to construct an ordinary street sewer of sufficient capacity to drain or sewer the lands served by the existing main trunk sewer, should be included within the cost of constructing extensions and assessed against all the property served, including that property already served by the existing main trunk sewer.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1074.

OFFICES INCOMPATIBLE—STATE HIGHWAY INSPECTOR AND TOWNSHIP CLERK.

SYLLABUS:

A state highway inspector, being in the classified civil service of the state, may not hold the office of township clerk at the same time without violating Section 486-23, *General Code.*

COLUMBUS, OHIO, October 19, 1929.

HON. EMMITT L. CHRIST, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I am in receipt of your recent communication, which reads as follows:

> "I submit the following inquiry for your opinion:
> May a clerk of a township, while holding that office, legally hold the position of state highway inspector and draw a salary for said position, in addition to the fees granted him as said clerk?"

The office of township clerk is an elective one by virtue of Section 3299, General Code, which reads: