1533.

ROAD IMPROVEMENT—COUNTY AND MUNICIPALITY CO-OPERATING ON HIGHWAY WITHIN MUNICIPALITY—LATTER'S PORTION OF EXPENSE PAID AND CONTRACT ENTERED INTO—LITIGATION PENDING—RETURN OF MONEY TO MUNICIPALITY ILLEGAL.

SYLLABUS:

When, under a co-operative agreement between a county and a municipality for the construction of a road improvement within the municipality, as provided in Sections 6949, et seq., General Code, a municipality has paid into the county treasury its portion of the estimated cost and expense of such improvement and a contract has been entered into for such improvement after the certificate required by Section 5625-33, General Code, has been executed, there is no authority vested in the board of county commissioners of such county to return to the municipality such money so paid into the county treasury on account of the fact that pending litigation may result in delaying construction of the improvement.

COLUMBUS, OHIO, February 18, 1930.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"North Fourth street, between Locust street and North street, in the city of Newark, is a part of inter-county highway No. 337.

It became in bad repair and the City Council desired to have the street resurfaced and undertook to have such work done by arrangement between the city and the Board of County Commissioners of Licking County, as authorized by Section 6949 of the General Code of Ohio. The initial action taken looking to such improvement was by way of a resolution passed by the City Council on January 16, 1928, declaring the necessity for such improvement; consenting to such repair by the Board of Commissioners; directing the city solicitor to prepare and file with the Commissioners a petition for such repair and improvement by them; directing and agreeing that one-third of the cost and expense be paid by the county of Licking, one-third by the city and one-third by the abutting property owners; approving the plans, specifications and estimates theretofore prepared by the civil engineer of the city and authorizing the engineer to submit a copy of such plans, specifications and estimates to the county surveyor for his approval and for his presentation to the Board of County Commissioners. The directions and orders contained in this resolution were followed and the plans, specifications and estimates, together with the proposed division of the costs and expense were all duly approved by the County Commissioners.

The latter then advertised for bids on the improvement under these plans and specifications and determined to use a certain brand of pavement. Out of the use by the contractor of another brand or kind of pavement arose a suit to restrain the County Commissioners from paying the contractor for the resurfacing of this street, which case was decided in favor of the petitioner. An appeal has been made and this case, involving a considerable sum, may be in the courts for some time to come.

In August, 1928, the city of Newark paid to the County Commissioners the sum of twenty-four thousand dollars, part or all of which was to be used for the resurfacing of North Fourth street; $12,000.00 from the gas tax fund, representing the city's portion of said improvement, and $12,000.00 on notes, issued by the city, representing the assessed portion of the improvement. The

notes for $12,000.00 were issued on August 23, 1928, for a period of two years at six per cent interest, and as these notes must be retired with interest on August 23, 1930, at which time the case will, in all likelihood, still be pending in the courts, the city auditor of Newark is requesting that the above stated funds be retransferred to the city of Newark, so that the municipality may retire the notes at said time, enabling the city to save the interest on the last six or seven months, which should amount to almost four hundred dollars. The city auditor makes the point that if the higher courts should reverse the decision of the Common Pleas Court in the paving case, the municipality can re-issue notes sufficient to bear the city's portion and the assessed portion of the improvement.

The writer has been unable to find this situation directly covered by such authorities as he has examined and is therefore requesting the benefit of your counsel as to whether it is legal and proper, in the circumstances, to accede to the city's request to re-transfer such funds, in the amount aforementioned, from the Board of County Commissioners of Licking County to the city of Newark, Ohio; and if so, whether the city may re-issue said notes as suggested by the city auditor."

Section 6949, General Code, authorizes a board of county commissioners to construct a proposed road improvement into, within or through a municipality when the consent of the council of such municipality has been first obtained. This section further provides that the council may assume and pay a portion of the cost and expense of the improvement. In your letter, you say that the proposed improvement within the municipality is part of Inter-county Highway No. 337, so that no valid objection to these proceedings should be raised on the theory that the improvement does not form a part of a state or county highway. Opinions of the Attorney General, 1919, Vol. I, p. 661.

There may be some question raised as to the authority, contained in Section 6949, General Code, of a board of county commissioners to re-surface the road in question, since this section only refers to the construction of a proposed road improvement. You do not inquire as to this particular matter, however, and accordingly no opinion is expressed thereon.

Section 6950, General Code, relates to the approval of surveys, plans, etc., and provides that council may levy taxes and assessments to pay the part of the cost agreed upon to be borne by the municipality. Apparently the provisions of this section have been complied with, except perhaps as to the matter of the plans, specifications and estimates having been prepared by the civil engineer of the city instead of by the county surveyor. Since the improvement is constructed by the county, I am of the view that the surveys, plans, profiles, etc., probably should have been prepared by the county surveyor. I take it from your letter, however, that the approval of the county surveyor has been had, and probably no serious objection could be raised on this point.

Section 6951, General Code, provides as follows:

"The municipality shall pay to the county treasurer its estimated proportion of the cost and expense of said improvement as fixed in said agreement between the council and the county commissioners, out of any funds available therefore (therefor), and in anticipation of the collection of assessments to be made against abutting property as hereinbefore provided, and in anticipation of the collection of taxes levied for the purpose of providing for the payment of the municipality's share of the cost and expense of such improvement, said municipality is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a municipality."

The payment of $24,000.00 by the city of Newark to the county commissioners was apparently made in compliance with the provisions of this section, and I assume that the contract for the improvement was not entered into by the county commissioners until after the receipt of this money. The contract should not have been made by the county until such time, in view of the provisions of Section 5625-33 of the Budget Law, which prohibits a subdivision from making any contract involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer that the amount required to meet the same has been lawfully appropriated for such purpose and is in the treasury or in the process of collection to the credit of an appropriate fund free from any encumbrances. Section 5625-35, General Code, provides that when the cost of an improvement is to be paid in part by special assessments a contract may be executed without an appropriation or certificate for that portion of the cost derived from special assessments when a resolution or ordinance authorizing such assessments and notes to be issued in anticipation thereof has been duly passed. Under the state of facts here before me, however, there is serious doubt if the certificate required by Section 5625-33 may be dispensed with as to the portion of the cost to be paid by special assessments, in view of the fact that the assessments were not levied by the subdivision which entered into the contract for the improvement.

As hereinbefore indicated, I assume that Section 5625-33, General Code, has been complied with and this opinion is predicated upon that assumption.

It is next pertinent to determine whether or not there is any authority to expend this money, contributed by the municipality, which has been lawfully appropriated for the purpose of the improvement and which is in the treasury of the county to the credit of the construction fund, for a purpose other than the construction of the improvement.

Section 5625-10, General Code, provides that:

> "Money paid into any fund shall be used only for the purpose for which such fund is established."

Section 5625-33, General Code, provides in part:

> "No subdivision or taxing until shall:
>
> * * * * * * * * * * * *
>
> (c) Make any expenditure of money except by a proper warrant drawn against an appropriate fund which shall show upon its face the appropriation in pursuance of which such expenditure is made and the fund against which the warrant is drawn."

The proposed plan of refunding to the municipality the money heretofore paid to the county, in view of the pending litigation and the time which may elapse before its final determination, would appear to be equitable inasmuch as the municipality will be saved the payment of interest on its notes during such period, as you state in your letter. If the higher courts should uphold the validity of the contract and the municipality were to re-issue notes in anticipation of the collection of such part of the assessments as then remain uncollected and pay in the $24,000.00 in question to the county at that time, it is manifest that the municipality would be saved considerable expense. You state that the municipality would re-issue notes at such time sufficient to bear the city's portion and the assessed portion of the improvement. In view of the fact that the city's portion is payable out of moneys on hand from the gasoline tax fund, there would probably be no necessity for the issuance of notes for such portion.

Without overlooking the financial benefit which may be derived by the municipality by the return of these funds, it must be borne in mind that the proceedings which may affect the validity of the contract are still pending and the county is endeavoring to

have this contract upheld. Aside from the question of a lack of authority, it appears to me that the county would be placing itself in a rather inconsistent position if, while contending for the validity of the contract, it were to impair the funds which are to be used for carrying out the contract. In any event, the sections of the Budget Law herein quoted have made special provisions for the expenditure of public funds, and there appears no authority for adopting the course of procedure outlined in your letter.

Summarizing and in specific answer to your question, I am of the opinion that when, under a co-operative agreement between a county and a municipality for the construction of a road improvement within the municipality, as provided in Sections 6949, et seq., General Code, a municipality has paid into the county treasury its portion of the estimated cost and expense of such improvement and a contract has been entered into for such improvement after the certificate required by Section 5625-33, General Code, has been executed, there is no authority vested in the board of county commissioners of such county to return to the municipality such money so paid into the county treasury on account of the fact that pending litigation may result in delaying construction of the improvement.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1534.

APPROVAL, NOTES OF ADAMS RURAL SCHOOL DISTRICT, CHAMPAIGN COUNTY—$25,000.00.

COLUMBUS, OHIO, February 18, 1930.

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

1535.

APPROVAL, NOTES OF NORWICH TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY—$85,000.00.

COLUMBUS, OHIO, February 18, 1930.

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

1536.

WORKMEN'S COMPENSATION LAW—VOLUNTEER VILLAGE FIREMEN AS MEMBERS OF LAWFULLY CONSTITUTED FIRE DEPARTMENT UNDER AN APPONTMENT OR CONTRACT OF HIRE, ENTITLED TO SUCH LAW'S BENEFITS.

SYLLABUS:

Volunteer firemen of incorporated villages who are members of a lawfully constituted fire department of such village, and are serving as such under an appointment or contract of hire, are employes within the meaning of the workmen's compensation act