

1869.

APPROVAL, BONDS OF CITY OF NEWARK, OHIO, IN AMOUNT OF  
\$20,000.00 FOR BRIDGE CONSTRUCTION.

COLUMBUS, OHIO, February 21, 1921.

*Industrial Commission of Ohio, Columbus, Ohio.*

1870.

DISAPPROVAL, BONDS OF AUGLAIZE COUNTY, OHIO, IN AMOUNT  
OF \$17,500.00 FOR CONSTRUCTION OF DITCHES.

COLUMBUS, OHIO, February 21, 1921.

*Industrial Commission of Ohio, Columbus, Ohio.*

Re: Bonds of Auglaize county in the amount of \$17,500 in anticipation of the collection of assessments for the construction of ditches, as follows:

Barber joint ditch, 2 bonds.....	\$900 each
Evans ditch, 2 bonds.....	1100 each
Hatfield ditch, 4 bonds.....	800 each
Price ditch, 2 bonds.....	950 each
St. Johns ditch, 2 bonds.....	500 each
Clear Creek ditch, 4 bonds.....	1850 each

GENTLEMEN:—I have examined the transcripts of proceedings relating to the above bond issues, six in number. The proceedings set out in four of the transcripts relate to single county ditches and those in the other two transcripts relate to joint county ditches. All of the proceedings were had and conducted under the provisions of the Codified and Consolidated Ditch Law enacted by the legislature June 19, 1919. (108 O. L., p. 926.)

An examination of the provisions of this law suggests, to say the least, grave doubts with respect to its constitutionality and for this reason aside from other defects in the transcripts submitted, I advise the rejection of the bonds by the Industrial Commission. Without attempting any exhaustive analysis of the provisions of this law, I desire to note only those provisions which are pertinent to a consideration of the question at hand.

Section 1 of the Act provides that the words "benefit" and "benefits", as used therein in directing the assessment of lands therefor, shall be deemed to cover any advantage to the owner of the land or lands by reason of the improvement either by making the same more healthful or increasing the productivity or value thereof to him, or by reclamation and increase of market value adding to the taxable value for the purpose of public taxation or increasing the healthfulness of the vicinity.

Section 2 of the Act provides that the petition for the ditch improvement shall, among other things, set forth the necessity and believed benefits and also the names of the persons, corporations, public or private, who will in any way be benefited or damaged by the improvement.

Apparently, there is nothing in the Act which requires the county commissioners before or at the time of granting the improvement to make any finding or determination with respect to said improvement other than possibly the necessity therefor. In this connection section 8 provides that if upon such hearing, and before deciding upon the *necessity* of such improvement, the county commissioners find that all parties have not been notified or they deem it necessary to personally inspect the location of the improvement they shall adjourn the hearing. This section further provides that if the county commissioners "find for the improvement they shall fix a day for the hearing of claims for the appropriation of land taken therefor and the damages to be sustained by any person affected by it, \* \*." This section further provides at some length for the hearing of claims for compensation and damages and further provides that where in the opinion of the county commissioners the damages that were sustained by any person in the construction of said improvement cannot be readily ascertained until after the completion of the improvement, the hearing thereon may be postponed until after the completion of the same.

By section 11 of the act it is provided that if the county commissioners "find an improvement by ditch or drain or other means is necessary and grant the petition therefor" the cost and expense of the construction of the improvement shall be assessed upon the property affected beneficially by such improvement.

Section 12 contains this language:

"If the county commissioners \* \* \* shall find that the improvement petitioned for is not necessary and will not confer benefit upon the lands of the petitioners, and will not be conducive to the public welfare; or that if conferring some benefit to the lands of the petitioners or conducive to some extent to the advantage and welfare of the public that the inconvenience thereof to others, or the probable cost and expense thereof will be disproportionate to such benefit to petitioner, or advantage and welfare to the public, said commissioners \* \* \* shall dismiss the proceedings at the cost of the petitioners."

This section further provides:

"But if the county commissioners shall grant the petition and no appeal therefrom be taken, then all the said costs with other costs of construction and any award of damages to, or compensation for property taken shall be assessed upon the benefited property."

By section 13 it is provided that "if the county commissioners find for the improvement" they may direct the county engineer to make a proper and more complete survey, etc.

Sections 27 and 28 make provision for the levying and payment of assessments for the improvement and section 28 further provides as follows:

"Provided that the county commissioners \* \* \* if and when it is found that the improvement will benefit the public health, convenience and welfare, or the result will increase to a practicable degree the valuation of property for public taxation, may order such an amount of such total cost, not exceeding ten per cent paid from the general ditch improvement fund, or if there be not sufficient unappropriated in such fund, from any unappropriated money of the general fund of the county. And the balance shall be assessed according to benefits as herein provided."

The provisions of the act relating to joint county ditches may be dismissed in a few words so far as the question in mind is concerned. Petitions for joint county ditches are acted upon by a joint board consisting of the commissioners of the several counties (Sec. 74 et seq.) and in this connection section 78 provides that in case the joint board of county commissioners upon hearing dismiss the petition, certain consequences as to the payment of costs be attached, while by section 79 it is provided that if such petition is granted by the joint board of county commissioners said board shall proceed under the provisions of this act for single boards of county commissioners.

The constitutional provision in mind is section 19 of Article I of the state constitution, which is as follows:

"Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Applying the provisions of this section of the state constitution to a case of this kind the supreme court in the case of *Reeves vs. Treasurer of Wood County*, 8 O. S., 333, held that the statute authorizing township trustees to establish, locate or improve a water course without requiring them to first determine if such improvement, would be conducive to the public health, convenience or welfare was unconstitutional and void for the reason that it placed no limit to official discretion, and the power thereby conferred would be exercised irrespective of public welfare without any violation of the provisions of that act.

See also:

*Kasch vs. City of Akron*, 100 O. S. 229.

*Edwards vs. Myers*, 99 O. S., 96.

*Chicago & Erie Railroad vs. Keith*, 67 O. S., 279.

*McQuillan vs. Hatton*, 42 O. S., 202.

*Miller vs. Graham*, 17 O. S. 1.

It is possible of course that the court might construe the provisions of section 12 of the act as importing the requirement that county commissioners before granting a ditch improvement under this act shall affirmatively find that said improvement will conduce to the public welfare and thus save the law so far as the constitutional question here made is concerned. This, however, is not clear to me. The provisions of section 12 seem to require that the county commissioners affirmatively find, among other things, that the improvement will not conduce to the public welfare before it is authorized to dismiss the petition, but there does not seem to be anything in the act which affirmatively requires the commissioners to find that the improvement will conduce to the public welfare before or at the time of granting the same.

With respect to the bonds in question, however, it may be said even though this act may be so construed as importing the necessity of an affirmative finding by the county commissioners that the ditch will conduce to public welfare before or at the time of granting the same, these bonds should be rejected for the reason

that nowhere in any of the proceedings of the county commissioners of Auglaize county or of the joint board were any such findings made. The petitions in each case allege that the improvement will conduce to the public health, convenience and welfare, but no such findings are made by the commissioners.

The several transcripts are in certain respects incomplete, but in view of the doubt in my mind as to the constitutionality of the ditch law, under authority of which the bonds were issued, I deem it unnecessary to go into detail or to suggest necessary corrections.

For the reasons expressed, I believe it my duty to advise that you decline to accept the bonds.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

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1871.

APPROVAL, BONDS OF UNION COUNTY, OHIO, IN AMOUNT OF  
\$25,000.00, FOR DITCH IMPROVEMENTS.

COLUMBUS, OHIO, February 21, 1921.

*Industrial Commission of Ohio, Columbus, Ohio.*

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1872.

DISAPPROVAL, REFUNDING BONDS OF WESTON VILLAGE SCHOOL  
DISTRICT IN AMOUNT OF \$14,000.00.

COLUMBUS, OHIO, February 23, 1921.

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

Re: Refunding bonds of Weston Village School District in the amount of \$14,000, being 28 bonds of \$500 each.

GENTLEMEN:—Upon examination of the transcript for the above bond issue I find that the resolution authorizing the issuance of the bonds was adopted November 10, 1920, and that it is provided in said bond resolution that the bonds shall be dated October 1, 1920. I find no provision in the General Code which authorizes a board of education to issue bonds bearing date prior to the date of the passage of the legislation authorizing their issuance. In fact, the General Code contains no provision relative to the dating of bonds issued under authority of section 5656. It can not, however, be assumed that the mere absence of any provision will authorize the board of education to issue bonds which shall bear date prior to their authorizing act. If they are authorized to issue bonds bearing date six weeks prior to the bond resolution, by the same reasoning they could issue bonds bearing date a year or more prior to the bond resolution. This practice should not to say the least be approved, and I therefore advise you not to accept the bonds.