3012.

APPROVAL, DEED TO MIAMI AND ERIE CANAL LAND IN THE CITY OF CINCINNATI—JOHN W. MEINHART.

COLUMBUS, OHIO, December 11, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of November 30th, transmitting for my approval four deeds for surplus Miami and Erie Canal lands in the City of Cincinnati, Ohio, conveying parcels 23, 24, 25 and 26 to John W. Meinhart.

I have examined the deeds and am of the opinion that they are in proper form. By the terms of Section 9 of Amended Senate Bill No. 123 of the 87th General Assembly of Ohio (112 O. L. 210, 214), I am required to approve the sale of these surplus parcels of canal lands. You are accordingly advised that the sale of the parcels above referred to meets with my approval and I have noted such approval upon the deeds which I am returning herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3013.

DITCH IMPROVEMENT—OPEN AND TILE WORK—METHOD OF ASSESSING COST, DISCUSSED.

SYLLABUS:

Where a single ditch improvement consists partly of open work and partly of tile work, the cost thereof should be assessed upon the property benefited thereby without regard to the cost of the respective sections.

COLUMBUS, OHIO, December 12, 1928.

HON. OTTO J. BOESEL, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

> "We would be pleased to have your opinion on the law relating to the following statement of facts:
>
> The -------- Ditch petitioned for by ---------- and ----------, called for the improvement of a watercourse in ---------- Township. The nature of the work petitioned for was tile and open work.
>
> The total of the surveyor's estimate on this improvement was $1,799.05, and the actual cost to date is $1,515.76. The open work was bid for at a slight reduction of the surveyor's estimate. The ---------- Company underbid the surveyor's estimate considerably on tile, and now the landowners at the upper end of the ditch who have tile only, request that their assessments be reduced in the same ratio as the price bears to the estimated cost.

This improvement was made under the authority of one petition which requires that the nature of the improvement be tile and open work. We request that you please advise us if these assessments are to be made as one unit under the petition or if the assessments are to be separated and based upon the open work and upon the tile work."

In answering your question it is first necessary to consider whether "the open work and tile work" were properly combined in the same improvement.

Section 6443, General Code, provides that, upon the filing of a petition, the county commissioners, upon the granting thereof, may "cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, or arched, any ditch, drain or water course. * * *"

The Supreme Court of Ohio has held that the word "or" in the above provision may be read as "and" and that the construction of a ditch and the tiling of the same could be combined in one improvement. This decision was rendered at a time when there was no specific statutory provision in regard to the combination of such improvements. (*Railway* vs. *Commissioners,* 63 O. S. 32).

However, Section 6449, General Code, now provides that "any owner of land may file in said proceedings a written application for branches, laterals, or spurs, or boxing or tiling, any part of the improvement. * * *" This language undoubtedly contemplates the construction of a ditch improvement consisting partially of open work and partially of tile work.

All doubt concerning the legality of such a proceeding is removed by Section 6453, General Code, which provides that:

"The commissioners may hear and determine at the same time and under one petition, upon proper averments, the question of locating a new ditch, drain or water course, or one partly old and partly new, *or one partly open and partly tiled.* * * *"

We are next concerned with your inquiry as to whether or not assessments for such improvement are to be made for the improvement as a whole or apportioned according to sections of open work and tile work. I find no authority for such a division. I assume that your inquiry in this regard arises from a notion that the assessments are placed upon the abutting property upon the basis of the cost of the abutting improvement. However, this is clearly not the case. The lands assessed are not the abutting lands but "benefited lands".

It was held in the case of *Mason* vs. *Commissioners,* 80 O. S. 151, on page 181, quoting with approval from Judge Minshall, in the case of *Blue* vs. *Wentz,* 54 O. S. 247:

" * * * 3. In making an assessment on lands, benefited by artificial drainage, the extent of their watershed is not the proper rule, but the amount of surface water for which artificial drainage is required to make them cultivable, and the benefits that will accrue to the lands from such drainage. However much water may fall on them or arise from natural springs, if, by reason of their situation, they have adequate natural drainage therefor, they are not liable for the cost of artificial drainage to other lands.

"An assessment on lands presupposes some special benefit to the lands to be assessed, derived from the improvement for which the assessment is made. When, in the nature of things, there can be no special benefit to the lands from the proposed improvement, an assessment made on them for

any part of the cost of the improvement, would be a simple taking of the property of one person for the benefit of another; and the assessment would be void. * * *"

Section 6455, General Code, provides as follows:

"The surveyor, in making his estimate of the amount to be assessed each tract of land, and the commissioners, in amending, correcting, confirming, and approving the assessments, shall levy the assessments according to benefits; and all land affected by said improvement shall be assessed in proportion as it is specially benefited by the improvement, *and not otherwise.*"

In the case of *Chesbrough* vs. *Commissioners,* 37 O. S. 508, the Ohio State Supreme Court held, that in the absence of evidence to the contrary, it will be presumed that an apportionment of assessments under such a section is in accordance with the benefits. To the same effect is the case of *Miller* vs. *Commissioners,* 3 C. C. 617.

An examination of Section 6454, General Code, which I deem unnecessary to set forth herein in full, serves to confirm my conclusion that the assessments for the cost of the improvement are to be based upon the sole consideration of benefits derived and without any reference to the proportionate cost of the improvement in the immediate vicinity of the property assessed. As above pointed out, the open and tiled portions of the ditch improvement were properly included in one petition and are considered as a single improvement. It was held by the Ohio Supreme Court in the case of *Goodman* vs. *Commissioners,* 41 O. S. 399, that it was improper to grant a portion only of such a petition. The statutes above quoted clearly require the assessment of the entire improvement upon all property benefited.

I am therefore of the opinion that the assessments for the improvement described in your letter should be made as one unit under the petition for the improvement and that the fact that the contract price for one portion of the improvement was relatively lower than that for another portion of the improvement, should have no effect upon the assessments.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3014.

EXCISE TAX—MOTOR VEHICLE FUEL PURCHASED IN TANK CAR LOTS FROM OHIO MANUFACTURER—DEALER LIABLE—REGISTRATION PERMANENT.

SYLLABUS:

There being no provision in law for the withdrawal or cancellation of the registration of a dealer in motor vehicle fuel, a person, firm or corporation, when once duly registered as a dealer, is responsible for the excise tax upon motor vehicle fuel purchased in tank car lots from a person, firm or corporation producing, refining, preparing, distilling, manufacturing or compounding such motor vehicle fuel in Ohio.