2165.

SURVEY—COSTS OF SURVEY BY ENGINEERS OF CITY OF CINCINNATI CANNOT BE ASSESSED AGAINST PROPERTY OWNERS—NO REIMBURSEMENT OF GENERAL FUND FROM WHICH THEY ARE PAID.

SYLLABUS:

Where the surveying and engineering of an improvement are performed by engineers appointed for a definite period and paid regular salaries by a city from appropriations made by council from the general fund, the cost of such services, although it may be definitely and accurately ascertained, cannot be included in the cost of the improvement and assessed against property owners, thereby effecting a reimbursement of the general fund from which the salaries of such engineers are paid.

COLUMBUS, OHIO, May 28, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication, as follows:

> "The second paragraph of the case of *Longworth et al.* vs. *The City of Cincinnati et al.*, 34 O. S. 101, reads:
>
> 'Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his assistants, who were officers appointed for a definite period at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city of such surveying and engineering cannot be ascertained and assessed upon the abutting property as a necessary expenditure for the improvement.'
>
> The City of Cincinnati will shortly install a modern and efficient cost accounting system in its highways and sewer departments. When this system is in operation, it will accurately determine the cost of engineering on each separate street and sewer improvement.
>
> The engineers doing this work are paid regular salaries by the city from appropriations made by council for such purpose.
>
> Question. May the city legally charge such engineering cost against general bond and special assessment improvement funds and reimburse the appropriations for the highway and sewer departments?"

What may be included in the cost of an improvement and so subject to assessment is described in Section 3896 of the General Code, which is as follows:

> "The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the cost and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

By the express terms of this section the expense of the preliminary and other surveys may be included as a part of the cost of the improvement, but, as you have pointed out, the decision of the Supreme Court in the Longworth case has apparently negatived the right to include such cost where it constitutes an apportionment of the regular salaries of officials of the city. Your inquiry suggests that a possible basis for the conclusion of the Supreme Court was the inability to make exact computation of the amount chargeable to the particular project and that there may be a possibility of making the charge in view of the fact that the accounting system to be installed shortly will determine accurately the cost of engineering on each particular improvement. An analysis of the language used by the court in that case, however, discloses that this was not the basis for its conclusion. A discussion on the point in question is found on pages 111 and 112 of the opinion, as follows:

> "Did the court below err in holding that the charge for engineering was improperly included in the assessment, as assigned for error in the cross petition? Notwithstanding Section 544 does provide, that the costs of the improvement of a street, includes 'the expense of the preliminary and other surveys,' yet we think that this has reference only to cases in which the engineer doing the work was employed for that special purpose, and does not apply to work done by engineers appointed for a definite period of time, at fixed salaries, under the provisions of Section 4 of the act of March 17, 1876 (73 Ohio Laws, 44). The finding of fact shows that the work was done by the chief engineer of the board of public works and his assistants, all of whom were in the employ of the city, at fixed salaries, and paid out of the general fund of the city; and also shows the manner of arriving at the amount that was charged and assessed for this improvement.
>
> It is sufficient to say that when the salaries of these engineers were paid from the general funds of the city, as required by law, that was the end of it, unless there was some law expressly authorizing the charge and assessment that was made in this case, for the purpose of reimbursing the city for the amount so paid; and, inasmuch as there is no such law, the court did not err in holding that the charge was improperly included in the assessment."

The last paragraph very clearly discloses that the court excluded this cost for the reason that, the salaries having been paid out of the general fund of the city, there was no express authority in the assessment statute for a reimbursement of the general fund, although that reimbursement might be for an expenditure coming directly within the language of Section 3896. While this interpretation is, to say the least, extremely strict, it constitutes the only discussion by the Supreme Court which I have been able to find upon the particular subject and consequently is binding until modified by that court. There is little doubt from the language quoted that the Supreme Court did not consider the accuracy or inaccuracy of the proportionment of the cost as material.

Since you state that the engineers of the city of Cincinnati are paid regular salaries from appropriations made by council for such purpose, I am forced to the conclusion that, under the authority of the case to which you refer, the city cannot legally charge such of the engineering cost of a particular improvement as represents the services of its regularly employed engineers, paid from general appropriations by council, against the specific improvement funds and thereby reimburse the general appropriations from which the salaries of such officers and employes are paid.

In so concluding I am not unmindful of the case of *Adkins* vs. *Toledo*, 6 C. C. (N. S.) 433, the first branch of the syllabus of which is as follows:

"The cost of the necessary preliminary work or action pertaining to a street improvement, such as the cost of advertising, serving notices, etc., paid by the municipality from its general fund, may be included in the assessment and collected from the owners of property specially benefited by the improvement, in order to reimburse the general fund, notwithstanding all such costs were proper charges which could enter into the aggregate charge to be assessed upon the properties benefited as part of the costs of the improvement, and no fund to pay such costs existed at the time the expenses were incurred."

You will observe that this language apparently justifies payment of certain costs of an improvement out of the general fund and the subsequent reimbursement thereof from assessments, which is contrary to the language used by the Supreme Court in the Longworth case. The Longworth case was not considered at all by the Circuit Court in its opinion and the conclusion of the court is stated on page 438, as follows:

"We hold, notwithstanding the fact that these expenses were paid out of the general revenue fund, and even though there may have been an irregular mode of procedure, that the parties to be benefited by these improvements are not thereby relieved from paying this part of the expenses, and that they are not in a position to interfere with an effort of the city to reimburse the fund from which the money was temporarily borrowed."

With this question before me as a matter of first instance, I should be inclined to follow the reasoning adopted by the Circuit Court, but in view of the decision of the Longworth case I am forced to the conclusion that the inclusion of engineering costs, under the circumstances outlined by you, would be improper. It may be suggested that the Home Rule amendments of the Constitution, and the adoption of a charter in pursuance thereof by the City of Cincinnati, may have some bearing on the question presented. The question in this instance, however, is one in regard to the power of assessment. Section 6 of Article XIII of the Constitution of Ohio is as follows:

"The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

The Supreme Court of Ohio has construed this section of the Constitution as rendering ineffectual any action taken by municipalities with respect to assessment at variance with the general law.

In the case of *Berry et al.* vs. *City of Columbus*, 104 O. S. 607, a provision of the charter of the City of Columbus, which authorized the assessment of a greater proportion of the cost of the repavement of the street than that provided by general law, was under consideration. In holding that the provision of the charter was ineffectual, the court in the memorandum opinion says:

"The provisions of the city charter relating to assessments are in conflict with and must yield to the requirements of the state laws governing special assessments for street improvements."

In support of this conclusion the court cites the cases of *State ex rel. Dayton* vs. *Bish, et al.*, 104 O. S. 206; *Toledo* vs. *Cooper*, 97 O. S. 86. Apparently, therefore, the

authority with respect to the right of assessment must be sought in the general law. In this instance there is, of course, direct authority to include the cost of the preliminary and other surveys as a part of the improvement. The interpretation of the Supreme Court has been that this cost must be paid directly from the special funds available for the improvement and cannot be first paid out of the general fund and subsequently reimbursed. It may possibly be that, under charter authority, the city may make such provision as will satisfy the objection of the Supreme Court by providing that such of its engineers as are employed upon these special improvements shall be compensated directly from the special funds provided for such projects. I feel, however, that as long as the present method of payment of the engineers is continued this engineering expense cannot be charged as a part of the cost of the improvement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2166.

SCHOOLS—DIFFERENCES BETWEEN CONSOLIDATION AND CENTRALIZATION—CONSOLIDATION OF FIVE SCHOOLS OF MIAMI TOWNSHIP RURAL SCHOOL DISTRICT INTO ONE, WITHOUT VOTE OF ELECTORS, EFFECTED BY SECTION 7730, GENERAL CODE—CENTRALIZATION OF SCHOOLS MUST BE SUBMITTED TO ELECTORATE, UNDER SECTIONS 4726 AND 4726-1, GENERAL CODE.

SYLLABUS:

1. *Consolidation of schools by the suspension of certain schools, and the transportation of the pupils residing in the territory of the suspended school, to other schools may be accomplished by virtue of the provisions of Section 7730, General Code, without submitting the same to a vote of the electors residing in the territory affected by such consolidation.*

2. *There is no authority for submitting the question of consolidation or centralization of schools to a vote of the electors residing in the territory effected by such centralization or consolidation, except as contained in Sections 4726 and 4726-1, General Code.*

3. *The practical difference between the centralization of schools as authorized by Sections 4726 and 4726-1, General Code, and consolidation of schools by suspension of certain schools and transportation of pupils to other schools, as authorized by Section 7730, General Code, is that in centralization of schools the question must be submitted to a vote of the electorate, and the centralization must include all the schools of a rural school district, or all the schools of several districts either rural or village, located within a civil township, and the further difference that when centralization is effected, it must be continued for a period of three years, and then may not be discontinued except by a vote of the people, as is provided for centralization in the first place; whereas, consolidation may be effected by combining two or more schools of a district, and cannot be made absolute so long as a suitable school building exists in the territory of any suspended school involved in the consolidation.*

4. *When a board of education suspends a school, by authority of Section 7730, General Code, and assigns the pupils residing in the territory of the suspended school to other schools, it is forbidden to dispose of the schoolhouse in which the suspended school was conducted until after a period of four years from the date of such suspension, because of the right to have such school reestablished upon petition, as provided by Section 7730, General Code, unless the said building has been condemned for school use by proper state authorities.*