4682.

MUNICIPALITY—MAY APPROPRIATE PRIVATE PROPERTY TO IMPROVE WATERCOURSE—COST MAY BE ASSESSED AGAINST PROPERTY BENEFITED—WHERE NECESSARY, CULVERTS MAY BE CONSTRUCTED AS PART OF IMPROVEMENT—SECTION 3820, G. C., CONSTRUED.

SYLLABUS:

1. *A municipality may enter upon private property for the purpose of improving a watercourse within its corporate limits after having complied with the provisions of Sections 3677, et seq., General Code, and paid full compensation or secured the same to be paid for such property.*

2. *The cost of appropriating property for the improvement of a watercourse may be included as part of the cost of such improvement and assessed against specially benefited property.*

3. *When the improvement of a watercourse running under a street requires the construction of culverts, it is not necessary that such culverts be constructed as a separate improvement but such construction may be included as part of the improvement of the watercourse.*

4. *Section 3820, General Code, has no reference to the intersection of a watercourse with a street unless such point of intersection is at the intersection of streets.*

COLUMBUS, OHIO, October 11, 1932.

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

GENTLEMEN:—You have recently requested my opinion upon various inquiries set forth in a letter to your bureau from the village solicitor of one of the villages in this state. The solicitor's letter is as follows:

> "It is the desire of Council of the Village of B., and it appears necessary for the health of the community, to straighten and deepen a certain water course passing through the Village, known as Wischmeier Creek. This improvement involves the construction of new and larger culverts, placed at a lower elevation than that of existing culverts, where this water course crosses certain village streets. It is the desire to assess the cost of this improvement against the property benefited, practically all of which front on the streets mentioned.
>
> The terms of General Code Section 3812 appear to constitute authority for such deepening and straightening in this language:
>
> "The council * * * may assess upon * * * benefited lots * * * any part of the cost and expense connected with or made for changing the channel of * * * deepening or improving any water course * * *."
>
> Section 3939, Subdivision 17, also authorizes Council to improve water courses, and Subdivision 18 grants power to Council to construct culverts.
>
> In Section 3623 we find further authority for Council to deepen and straighten water courses.
>
> Section 3677, subsection 9, authorizes the appropriation of property for the improving of water courses, and Section 3939 authorizes the

municipality to acquire easements for any lawful purpose.

Our inquiries are these:

(1) Does the village have the authority, under favor of the statutes above mentioned, to enter upon private property and make the improvements in question without the consent of the owners?

(2) If not, will the procurement of perpetual easements suffice, and may the expense of procuring those easements be charged as part of the cost of the improvement?

(3) Is the construction of new culverts running under the streets in question to be considered as incidental to and a part of the deepening and straightening operation, and may all the work be treated as one improvement?

(4) If so, do the terms of Section 3820, insofar as they relate to cost of intersections, apply to this character of improvement, and must, therefore, the Village pay the cost of the intersection of the improvements with the streets?

(5) If so, what is to be construed as the cost of an intersection—the cost of that part of the improvement actually lying within the limits of the street, that is, the cost of the culverts, or the percentage of the total cost based upon the proportion which the width of the street bears to the entire length of the improvement?

(6) If the construction of culverts and the deepening and straightening of the water course constitute two separate improvements, may the cost of the culverts as a street improvement be assessed under favor of Section 3812 against the lots fronting on that part of the street, the natural drainage of which is towards the water course in question?"

The questions enumerated will be considered in the order submitted.

1. Section 3677, General Code, expressly provides that:

"Municipal corporations shall have special power to appropriate, enter upon and hold real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter.

* * * * * * * * * * * * * * *

9. For constructing, opening, excavating, improving or extending any canal, or watercourse, located in whole or in part within the limits of the corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvement;

* * * * * * * * * * * * * * *

Section 3691, being one of the sections in the chapter containing Section 3677, supra, provides when the estate sought to be acquired by appropriation proceedings shall vest in the corporation. The section is as follows:

"Upon the payment or deposit, by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in such corporation, unless a lesser estate or interest is asked

for in the application, in which case such lesser estate or interest as is so asked for shall be vested."

In *Cincinnati* vs. *Jones,* 24 O. C. C. 374, 376, the court said:

> "We are of the opinion that no appropriation can be made or fully completed, such as the one made in the case at bar, until there has been full compensation paid or secured to be paid for the property. In this case the appropriation was not completed until September 28, 1912, when the money was paid over by the city. Up to that date the title to the property vested in the defendants in error, and did not pass to the city or vest in it until September 12, 1912. Section 3691, General Code; *Wagner* vs. *Railway Co.,* 38 O. S., 32, 36; *Garvin* vs. *Columbus,* 5 N. P., 236."

In view of the foregoing, it follows that a municipality may enter upon private property for the purpose of improving a water course within its corporate limits after having complied with the provisions of Sections 3677, et seq., and paid full compensation or secured the same to be paid for such property.

2. In the second question presented, reference is made to the procurement of perpetual easements. While the reference to acquiring easements is predicated upon a negative answer to the first question, the matter should be clarified. It is clearly contemplatey by the law that a lesser estate than a fee simple estate may be acquired by appropriation proceedings. Section 3691, General Code, relating to application to the court which shall be made after the passage of the resolution to appropriate property, provides that the application shall show "the interest or estate therein to be taken." The second branch of the syllabus of *Pontiac Co.* vs. *Commissioners,* 104 O. S. 447, is as follows:

> "Where a lesser interest than a fee in real estate is sought to be appropriated in a condemnation proceeding by a municipality, or board, for public use, the lesser interest must be defined with such certainty as to apprise the owner of the nature and extent of the interest which is to be taken and also with such certainty as will enable a jury in accordance with the constitution to intelligently assess the compensation to be paid for the interest taken."

Coming now to the question of whether or not the expense of appropriating property may be included as part of the cost of the improvement, I assume your inquiry is as to whether or not such expense may not only be included as a part of the cost of the improvement, but whether or not it may be included in the amount assessed against specially benefited property. Section 3896, General Code, being one of the sections of the chapter relating to the levy and collection of special assessments by municipal corporations, provides 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 costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and in-

terest 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."

It was originally held in *Cleveland* vs. *Wick,* 18 O. S. 303, that the cost of appropriation proceedings, including the amount paid for land appropriated, could be included in the assessments, even if such assessments were levied on the residue of the original tract from which such land had been appropriated. This case was consistently followed until the year 1900, when the case of *Cincinnati, L. & N. Ry. Co.* vs. *City of Cincinnati,* 62 O. S. 465 was decided. This case held:

"Section 19 of article I of the constitution is a limitation upon section 6 of article 13 as to the power of assessments.

Compensation paid to a land owner for lands taken by appropriation proceedings to open a street, cannot be assessed back upon the lands of the owner remaining after such taking. Neither can the costs and expenses incurred in such proceeding be so assessed. *Cleveland* vs. *Wick,* 18 Ohio St., 303, over-ruled."

The case of *Railway Co.* vs. *Cincinnati, supra,* was followed in *Dayton* vs. *Bauman,* 66 O. S. 379. However, in the year 1922 the cases of *Railway* vs. *Cincinnati and Dayton* vs. *Bauman,* supra, were over-ruled by the Supreme Court in the decision of *State, ex rel.* vs. *Otter,* 106 O. S. 415, which case affirmed the early case of *Cleveland* vs. *Wick,* supra.

It is accordingly my opinion that the cost of appropriating property for the improvement of a watercourse may be included as part of the cost of such improvement and assessed against specially benefited property.

3. The General Code contains no provision to the effect that when a watercourse is to be improved within a municipality requiring the construction of new culverts running under the streets of the municipality, such culverts must be constructed as a separate improvement. It is true that Section 3939, General Code, in tabulating the powers of municipal corporations, provides in paragraph 17 that municipal corporations shall have power to improve any water course passing through the corporation and in the following paragraph, being paragraph 18, that such corporations shall have power to construct or improve culverts. This section, however, does not in my judgment require that each power which is separately enumerated must under all circumstances be exercised by separate and distinct proceedings. The reasoning of the Supreme Court in the case of *Longworth* vs. *Cincinnati,* 34 O. S. 101, is clearly applicable to a determination of this question. The first and fourth branches of the syllabus are as follows:

"1. In making a street improvement, by a city, under the provisions of sections 199, 544, and 576, of the municipal code, the expense of building a wall that is necessary for the protection of the street, which is built partly on the street, and partly on adjoining property, with the consent of the owners, may be assessed upon the property abutting on the improvement.

* * * * * * * * * * * * *

4. The cost of lateral and cross drain-pipes, which are necessary to make the improvement in a good and workmanlike manner, may properly be assessed upon the abutting property, as an item of necessary expenditure in making the improvement."

Similar principles were followed by this office in an opinion appearing in Opinions of the Attorney General for 1929, Vol. I, p. 790, holding that a board of county commissioners could include a bridge as part of a road construction project.

4. In the fourth question, reference is made to Section 3820, General Code. This section provides as follows:

"The corporation shall pay such part of the cost and expense of improvements for which special assesments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

The reference in the foregoing section to the part of the cost and expense of the improvement which the corporation shall pay, is to any improvement for which special assessments may be levied as provided in Section 3812, General Code. Section 3812, General Code, authorizes municipal corporations to levy and collect special assessments upon specially benefited property to pay "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."

Obviously any cost in connection with the improvement of a watercourse at a point where such watercourse would intersect another watercourse would be chargeable to the municipality under Section 3820, supra. The question is one of whether or not an intersection of a watercourse with a street is an intersection within the meaning of this last mentioned section.

The case of *Close* vs. *Parker, Treas.*, 11 O. C. C. (N. S.) 85, affirmed by the Supreme Court without report, 79 O. S. 444, held as set forth in the third branch of the syllabus, which is as follows:

"The provisions of the municipal code as to improvements for which special assessments are made, that 'the corporation shall pay the cost of intersections' has reference to the parts of street improvements at the intersection of streets one with another, and has no application to the crossing of a street by a sewer for purposes of local sanitary drainage."

In reaching the foregoing conclusion, the court referred to Section 2274, Revised Statutes, as in force and effect prior to the passage of the Municipal Code of 1902. That section provided in part:

"That when the council of a city, * * * determines to grade, pave, sewer or otherwise improve a street, alley or other public highway, * * * the council shall levy and assess a tax, * * * for the estimated cost and expense of so much of the improvement as may be included in the crossing or intersection of such street, alley, or highway."

In 1902, Section 2274, Revised Statutes, was amended and the pertinent provisions of that section set forth in Section 53 of the Municipal Code of 1902 (Revised Statute 2373; 1536-213) as follows:

> "In all municipalities the corporation shall pay such part of the cost and expense of improvements for which special assesments are levied as council may deem just, which part shall not be less than one-fiftieth of all such costs and expenses; and in addition thereto, the corporation shall pay the cost of intersections."

These last quoted provisions of the Municipal Code of 1902 are now contained in Section 3820, General Code, supra. The construction the court placed upon the foregoing amendment of 1902 was contained in the language appearing on P. 90 of 11 O. C. C. (N. S.) as follows:

> "It will be noted that the word 'intersections' is here used without definition, but by the former statute were clearly contemplated, as counsel agree, improvements extending along or in streets, and the provision was that the city should pay the costs of such improvements in the squares made by the intersections of two streets. The examination that I have given to this matter leads my mind to the conclusion that the word had acquired at the time of the passage of the municipal code of 1902 a familiar meaning, and that it had reference to intersections of the character described in the statute in force up to and at the time of the passage of the municipal code; and although the definition of 'intersections' is dropped out, I think that the new section—53 of the code—still had reference to the same class of intersections that had been before known."

Subsequent to the decision in the case of *Close* vs. *Parker, supra,* the case of *Ball* vs. *City of Portsmouth, et al.,* 82 O. S. 151, was decided by the Supreme Court. That case involved the improvement of a street in which man holes, catch basins and tiling were located at intersections. The case is somewhat parallel to the one you present where culverts are so located. The language of the court on pp. 152 and 153 is as follows:

> "With respect to catch basins, manholes and tiling, their location in street improvements is determined by considerations which address themselves to engineers. When they are so located as to become a part of the intersections, the cost of their construction is imposed upon the city in terms which are too plain to admit of interpretation. If there were occasion to seek the reason for the provision of the statute it might be found in the fact that all that is included within the intersections is to be used in the improvement of the crossing streets when such improvement shall be made, and manifest inequality would result from assessing the cost of their construction upon property abutting upon the street first improved."

The Close case and the Ball case were both under consideration in an opinion of this office, appearing in Opinions for the Attorney General for 1918, Vol. I, p. 410. After quoting at length from the Close case, the then Attorney General said:

"The direct question that was presented for the consideration of the court in the foregoing case was whether or not the crossing of a street by a sanitary sewer constituted an intersection within the meaning of the statutory provision that a municipality shall pay the cost of intersections. The court held that such a crossing was not an intersection within the meaning of the assessment law, stating in effect that the term 'intersection' referred only to the crossing of one street or public highway by another.

I might say that I have taken occasion to examine the records on file in the above cause in the supreme court and find the following statement in the brief of the city solicitor (page 2):

'Woodsdale avenue and the boulevard, in which sewer 898 was constructed, are intersected by several streets and it was at once conceded by the city that the city should pay the cost of that part of said sewer lying within the lines of such intersecting streets. The amount of the cost of such intersection was agreed upon and an abatement made accordingly. As to this sewer plaintiff seeks no further relief. Plaintiff's brief, page 2.'

It is therefore seen that it was considered by the city that it should pay the cost of the sanitary sewer where it was located in the intersection of one street or public highway with another. In reference to this assessment, then, the city was only objecting to its paying the cost of that part of the sewer where it crossed a street, which said crossing being claimed by the property owners to constitute an intersection within the meaning of section 53 of the municipal code of 1902, now section 3820 G. C., and the city was sustained in this contention, as has been seen, by the court.

The first branch of the syllabus in the case of *Ball* vs. *City of Portsmouth, et al.,* 82 O. S. 151, reads:

'The provision of section 53, municipal code of 1902, which requires the corporation to "pay the costs of intersections" when streets are improved includes all manholes, catch basisns and tiling at intersections.'

Nothing is said in the opinion of the court in the Ball case, supra, to indicate whether the catch basins, manholes and tiling referred to therein were parts of a storm sewer or a sanitary sewer, or a combination of both. However, the court lays down the general proposition that when streets are improved and manholes, catch basins and tiling make up a part of the improvement, the city must pay the cost of these in the intersections formed by the crossing of streets."

In an opinion appearing in Opinions of the Attorney General for 1921, Vol. II, p. 1055, this office held that the provisions of Section 3820, General Code, were applicable to a sewer improvement. See also Opinions of the Attorney General for 1928, Vol. II, p. 1544, holding that in constructing a white way lighting system, the municipalities are required to pay two per cent of the cost and the cost of intersections.

In view of the foregoing authorities, I must conclude that Section 3820, General Code, has no reference to the intersection of a watercourse with a street unless such point of intersection is at the intersection of streets. The section would, however, apply in the event of the intersection of a watercourse with another watercourse. Consequently if the improvement is con-

structed as one improvement, the cost of culverts located where the watercourse crosses a street at points other than the intersections of streets is a part of the entire cost and assessable.

5. Your fifth question is predicated upon an affirmative answer to question number four and accordingly need not be answered.

6. It follows, in view of the foregoing, that should a culvert be constructed as a separate improvement, its cost may be assessed unless it should be located at the intersection of two streets or the intersection of two watercourses.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4683.

MUNICIPALITY — MAY NOT USE MOTOR VEHICLE OR GASOLINE TAX FOR STREET LIGHTING SYSTEM OR FOR SUPPLYING ELECTRICAL ENERGY THEREFOR.

SYLLABUS:

A municipality may not use any part of its portion of funds arising from the motor vehicle license fees or the gasoline excise tax to pay for the repair or reconstruction of its street lighting system or the supplying of electrical energy therefor.

COLUMBUS, OHIO, October 11, 1932.

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

GENTLEMEN:—I acknowledge receipt of your communication which reads as follows:

> "Owing to decreased tax duplicates and delinquent taxes municipalities generally are having difficulty in raising sufficient revenue to meet the ordinary expenses of government payable from the general fund, one of several items of which is the cost of street lighting, but in many instances large balances exist in the motor vehicle license and gasoline tax street rapair fund. Consequently, we are called upon to answer numerous inquiries as to whether these latter funds may be used to pay the cost of street lighting.
>
> Because of the wording contained in Sec. 6309-2, 5537 and 5541-8 of the General Code, all of which were amended in 114 O. L., this Department has always held against such use of said funds, but we are unable to find any opinions of your office wherein this question has been considered.
>
> We are therefore asking that you kindly render this Department your written opinion on the following questions:
>
> Question 1. May a municipality use any part of their portion of motor vehicle license fees and gasoline taxes for paying for electrical energy consumed for street lighting purposes: