2071.

COUNTY SEWER DISTRICT—WHEN COUNTY COMMISSIONERS LOSE JURISDICTION OVER PORTION OF DISTRICT THAT BECOMES PART OF MUNICIPAL CORPORATION—COUNTY COMMISSIONERS CAN ONLY MAINTAIN SEWERS IN MUNICIPAL CORPORATION BY CONTRACT.

1. *County commissioners lose jurisdiction over that portion of a county sewer district in the area of which a municipal corporation is created and in the area annexed to an existing municipal corporation, when no county sewers have been constructed therein before such acts take place.*

2. *County commissioners can only maintain sewers in a municipal corporation by contract creating joint sewer districts with such municipalities.*

COLUMBUS, OHIO, May 12, 1921.

HON. JOHN R. KING, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your first letter containing a statement of facts which has been corrected according to instructions of your second letter, the first letter, corrected, reading as follows:

"The city attorney of Columbus and this department have been unable to agree upon certain questions, mainly conflicts in jurisdiction of the county commissioners and the city of Columbus, arising out of procedure under sections 6602-1 to 6602-13 of the General Code.

The facts are substantially as follows:

The county commissioners of Franklin county created a sanitary engineering department under section 6602-1 and at various dates thereafter established by resolution several sanitary (sewer) districts outside of the city of Columbus, which districts were contiguous to the then existing corporate limits of the city.

A district was created north of the city of Columbus known as sewer district Clinton No. 2 which extended from the north corporation line as it then existed to the village of Worthington and from the Olentangy river several miles in an easterly direction. General plans were prepared by the sanitary department under section 6602-2, but to date no improvement has been made within the district, nor have any bonds been issued, or assessments made, or taxes levied. It is planned to proceed at once with the construction of the improvements within the district. During the present year the city of Columbus has extended its northerly corporation line so as to include a considerable part of the sewer district.

The city of Columbus has also annexed certain territory, a part of sewer district Marion No. 1, which was established to the south of the city of Columbus, but within which no improvement has, as yet, been made, nor bonds issued, nor assessments levied, but general plans have been made pursuant to section 6602-2.

In another instance county sewer district Franklin No. 1 was established, and within the district since the date of its establishment, the village of Upper Arlington has been incorporated; within the same district the village of Grandview Heights has annexed a substantial amount of territory. No improvements have been started, nor bonds issued, nor assessments levied

within this district, but general plans have been made pursuant to section 6602-2.

The act does not provide for the dissolution of the district when once created; nor does it make provision for the reduction of the district, upon the incorporation therein of a new city or village, or the annexation by a city or village of any territory of the sewer district so previously established.

The question for determination is whether the annexation of territory within the district to the city, or the incorporation within the district of a municipality, operates to exempt that territory so annexed or so incorporated into a municipality, from the provisions of the act, and whether the jurisdiction of the commissioners to proceed with the improvements as planned for, and levy taxes and assessments to pay the cost of the same, within the annexed or incorporated territory, is thereby terminated.

The city attorney in support of his contention that the act of annexation dissolves the district as to the part so annexed, cites the case of Blount vs. McDonald, 18 Aris. 1, and the case of In the Matter of the Petition of the Sanitary Board of East Fruitvale Sanitary District, etc., 158 Cal. 453. These cases seem quite persuasive but after all the question is to be determined from the intent to be derived from the provisions of the sanitary act.

Section 6602-1 provides for the formation of a district and section 6602-2 provides that after the establishment of the district, the county commissioners shall have prepared by the county sanitary engineer 'a general plan of sewerage and sewage disposal for such district, as complete as can be made at that time.' This, in our judgment, contemplates that a plan shall be made for the entire district as established by the county commissioners notwithstanding the subsequent annexation of some of the territory of the district by a municipality or the subsequent incorporation of a part of the territory of the district into a municipality.

Section 6602-8 provides for the assessment of the territory benefited for the construction of the sewer and contemplates that all property 'within said district' shall be so assessed. The same idea is found in section 6602-8a, and section 6602-8b makes provision also for the levying of taxes 'upon the taxable property of the district so improved.'

It is to be conceded that the municipalities are given authority by section 3871 et seq. to construct their own sewers, and supervision is provided for by sections 4325 and 4364. The city of Columbus is operating under a special charter, but the village of Grandview Heights is not so governed. As the provision for the establishment of the district is wholly legislative, we take it that the provisions for dissolving the district, either in whole or in part, must be legislative. See Bissell vs. Edwards River Dr. Dist., 259 Ill. 594, and People vs. Drainage Commission, 165 Ill. 156. See also in support of our position State Board of Health vs. Greenville, 86 O. S. 1, pp. 24-25, and County of Miami vs. City of Dayton, 92 O. S. 215.

The city attorney contends, however, that the recurrent use in section 6602-1 of the term 'outside of municipalities' makes clear the legislative intent to limit strictly the jurisdiction of the sewer district to unincorporated territory; that by reason of the provisions of General Code 3564, the inhabitants of the annexed territory acquire all the rights and privileges of the inhabitants within the original limits, which necessarily include the right of construction and supervision of sewers by city authorities under the above stated sections; and that the annexation law, in and of itself, is sufficient legislative authority for the termination of the jurisdiction of the sewer

district over territory annexed so long as no actual work has been done, or taxes or assessments levied, or bonds issued pursuant to the county sanitary act.

The city engineering department and the county sanitary engineering department desire to proceed amicably in accordance with the law, and in view of the disagreement between the city law department and this department as to the question indicated above, we have decided to submit the same to your department and ask your opinion on the same.

As an example of the importance of the matter, the city of Columbus may maintain that an 8 inch main through the annexed territory is sufficient for its use, both as to present and future conditions, whereas the county sanitary district must put down at least a 36 inch main in order to care for the territory to the north.

The county commissioners have power, under section 6602-8, to levy an assessment over the entire district to pay the cost of the main. If the city constructs the sewer, the commissioners may be obliged to enter into an agreement with the city to pay the difference between the cost of constructing an 8 inch sewer and a 36 inch sewer in order to secure an outlet to reach the city system (through which system the district will reach the city disposal plant) and the annexed territory will be exempt from assessment for the difference in cost.

Again, the smaller the territory within the district to be assessed, the higher the assessment will be, although the territory in the annexed portion will receive benefit on account of the construction within the district."

Section 6602-1 G. C., in part, is as follows:

"For the purpose of preserving and promoting the public health and welfare, the boards of county commissioners of the several counties of this state may, by resolution, lay out, establish and maintain one or more sewer districts within their respective counties, outside of incorporated municipalities. Each district shall be designated by an appropriate name or number. Any board of county commissioners may acquire, construct, maintain and operate such main, branch, intercepting or local sewer or sewers within any such sewer district, and such outlet sewer or sewers and sewage treatment or disposal works within or without such sewer district, as may be necessary to care for and conduct the sewage or surface water from any or all parts of such sewer district to a proper outlet, so as to properly treat or dispose of same. Any such board of county commissioners may employ a competent sanitary engineer for such time or times and on such terms as they deem best; and, in any county having a population exceeding 100,000, the board of county commissioners may create and maintain a sanitary engineering department, to be under their supervision and in charge of a competent sanitary engineer, to be appointed by such board of county commissioners, for the purpose of aiding them in the performance of their duties under this act or their other duties regarding sanitation provided by law; and said board shall provide suitable rooms for the use of such department and shall provide for and pay the compensation of such engineer and all necessary expenses of such engineer and department which may be authorized by such board. * * *."

The question to be answered is whether or not annexation of some part of the

territory of a sewer district to a municipal corporation or the creation of a municipal corporation within the area of a county sewer district takes such territory so affected out of the county sewer district and away from the jurisdiction of the county commissioners for sewer district purposes.

In order to answer this question some analysis of the statutes relating to joint sewer districts and county water supply systems must be made.

Sections 6602-1 G. C. et seq. permit the county commissioners to lay out, establish and maintain sewer districts outside of incorporated municipalities. Sections 6602-17 G. C. et seq. provide for county water supply systems that may be acquired, constructed, maintained, and operated "not outside of any established sewer district." Sections 6602-10 G. C. et seq. provide that joint sewer districts may be created by contract between the county commissioners and the councils of municipalities in districts where county sewers have already been, or are about to be constructed.

All these statutes leave the creation of these different systems to the discretion of the county commissioners. They add to the authority the commissioners already had and leave the exercise of that authority to their judgment. They are permissive in form, and are declared to be an exercise of the police power of the state.

When section 6602-1 G. C. was originally enacted it had a restriction that sewer districts could be created only within that part of a county "that lies within three miles of an incorporated city" (102 O. L. 418). Later, when amended, this section read "within that portion of their respective counties, that lies within three miles of and outside of any incorporated municipality." The tautology in the phrase "incorporated municipality" shows the plain purpose of the legislature to include the erstwhile hamlets of Ohio within county sewer districts and to exclude therefrom only cities and villages.

The statute in its present form, having cast off the restrictions above stated, retains the phrase "outside of incorporated municipalities" as the area in a county where a sewer district may be laid out, established and maintained. The statutes permitting joint sewer districts between counties and municipalities by agreement between the commissioners and the municipal council were first enacted in 103 O. L. 828, after the law was passed which authorized sewer districts.

The history of these statutes is traced to show the care taken to exclude municipalities from their operation. It must be remembered that the authority permitted county commissioners is to lay out, establish and maintain outside of municipalities, and until the enactment of the law permitting joint sewer districts and county waterworks systems, nothing is expressed in the law as to co-operation with municipalities in the maintenance of these districts. In joint sewer districts co-operation with municipalities is permitted, by contract.

It may also be said that municipalities, at the time of the passing of these statutes and for many years prior thereto, had authority to create sewer and waterworks systems and that, without a statement in the law itself, the areas over which they exercised jurisdiction, would have been excluded from the law's provisions unless by express terms the territory of then existing municipalities was included therein. So important a matter would not have been left to implication for its repeal.

If the county commissioners are permitted to exercise discretion in laying out and establishing sewer districts, it is not a violation of deductive reasoning to say they may also modify and abandon districts they have created where their action does not transgress vested rights. This is an inherent or necessary implied right in matters involving the exercise of sound judgment, honestly and justly arrived at. In a recent opinion of this department—1920 Vol. 1, page 428—it is held that county commissioners may discontinue a road improvement after issue and sale of bonds. From this opinion the following is quoted:

"No statute has been found expressly authorizing the discontinuance of road proceedings; hence any authority the commissioners may have in that connection must be ascribed to implication. * * *

Upon the whole, in the absence of express statute or judicial precedent, about the only rule that suggests itself as a guide in your situation, is that the proceedings may be discontinued unless private property rights will be adversely affected."

The necessary preliminary proceedings in the issuance of bonds, levying of assessments on benefited property, advertisements, etc., are similar in the case of road improvements and of the construction of sewers in a sewer district. So that if a road improvement may be abandoned after issue and sale of bonds, with greater force of reason a portion of a sewer district may be abandoned to a municipality when no bonds are issued or assessments made and no private property rights affected.

From Shryock vs. Zanesville, 92 O. S. 375, at page 382, the following is quoted:

"When we stop to consider that a large majority of the people of Ohio live in cities and municipalities and that the matters which such municipalities are authorized by law to control by legislative action are of the most vital importance to such citizens, frequently exceeding in interest matters of legislation controlled by the general assembly, it would be a matter of wonder and amazement that, having once reserved such powers to the several municipalities, the constitutional convention would leave unsettled the manner of the exercise of those mighty powers."

In this case the court is discussing the effect of sections 4 and 5 of Article XVIII in reference to the repairing and improving of a water-works system. The quotation well illustrates the broad powers possessed by municipal corporations under the constitution and the law as viewed by the supreme court, and is worthy of attention in the matter before us.

In describing the distinction between a county and a municipality, Dillon on Municipal Corporations, 5th Edition, Vol. 1, at page 64, cites *Hamilton County* vs. *Mighels,* 7 O. S. 110, from which, at page 119, this is taken:

"As before remarked, municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them.

Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

Municipalities are corporations organized under general incorporated acts; *counties* are quasi-corporations, or corporations of limited power or of lesser rank. It is elemental that two municipal corporations cannot exist in the same area or territory. It is not illogical to say that when a corporation of greater rank or power is legally created within an area before under jurisdiction of a quasi-corporation, the functions of the latter, when exercised by the former as one of the purposes of its creation, are lost or merged in the corporation of greater power or rank. One of the purposes of the creation of municipal corporations is to afford the people in such locality power to administer to their own local needs in police, sanitary and similar matters. This is the age-old reason for municipal governments, and this is exactly what happens in case of roads or highways included in municipal corporations. These roads or highways become streets of the village or city, over which it takes control, to the exclusion of the county commissioners, in very many, if not all, particulars. The maintenance of bridges in the corporation is the one such act that comes to mind as an exception.

In *Steubenville* vs. *King,* 23 O. S. 610, at page 614, the court says:

> "The grant of the owner made to the county commissioners, their acceptance of the grant, the opening and working of the road by the public authorities, and its use as such by the public, were sufficient to establish it a legal public highway, and its annexation to the city and continuous use as one of its streets, constituted it a street of the city."

Legislation is intended not only to meet the wants of the present, but to provide for the future. Statutes controlling annexation and those creating a municipal corportaion are in *pari materia* and must be considered together. See *Shugars* vs. *Williams,* 50 O. S. 297.

In either case, petition by the inhabitants is made to the county commissioners for annexation or incorporation. By granting the prayer of the petitioners the county commissioners relinquish to the people local control over matters specifically granted by law to municipalities, and lose many of the powers they before possessed among which is the right to establish and maintain sewer systems in these incorporated areas. Is it not reasonable to suppose that the county commissioners by their own act in granting the prayer of the petitioners, are estopped to claim jurisdiction in sewer matters under the law creating sewer districts where no sewers are laid or taxes or assessments made?

Section 3 of Article XVIII of the constitution of Ohio is one conferring all powers of local self-government generally upon municipalities, and expressly refers to sanitary regulations not in conflict with general laws.

Sections 6602-1 G. C. et seq. are laws supplemental to statutes long in force prior to the amendment of our organic law, and presumably were passed in conformity to the power granted therein.

The fact that the legislature in enacting the statutes establishing county water supply systems after the sewer district laws were put in their present form, saw fit to restrict such water systems to areas outside of any established sewer district and permitted them to be maintained like joint sewer systems, only by contract between county commissioners and municipal councils, is indicative of the intent to restrict maintaining of sewer districts, except by joint ownership of existing sewers, to areas outside of incorporated municipalities.

The authorities which you cite in your statement have been examined and they seem to me to add persuasion to the conclusion we feel obliged to reach in the instant matter. Nor has it been neglected to give consideration to the case of *Lewis* vs. *Laylin,* 46 O. S. 663, in which the court held that county commissioners had authority

to improve a portion of a highway within a municipal corporation under provisions of the then two-mile-assessment pike law. The law under which this decision was reached has been repealed and not re-enacted in the same form. The law giving control to municipalities of its streets has also been amended since that opinion was rendered. This case and the matter under discussion may be distinguished in that the opinion dealt with a state or county highway probably existing long before it became a street of the municipality, while in the present case no sewers have been laid nor have any legal steps been taken to construct or create the same. So it is believed that even if county commissioners have authority to deal with highways in the municipalities, that in no way affects our question, since only a paper sewer district has been created wherein no sewers exist.

It is therefore believed that the county commissioners cannot maintain a sewer district within the limits of a municipality, unless they have constructed a system of sewers therein prior to annexation or prior to the creation of a municipal corporation within the area of the sewer district, over which an agreement as to joint ownership can be had, and in such a district, where no sewers have been constructed, the creation of a municipal corporation or the annexation of a portion of the territory excludes such areas from the jurisdiction of the county commissioners for county sewer purposes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2072.

TAXES AND TAXATION—COMPANIES ENGAGED IN BUSINESS OF DEALING IN MORTGAGES ARE NOT "MERCHANTS" WITHIN MEANING OF PROPERTY TAX LAWS.

Companies engaged in the business of dealing in mortgages are not "merchants" within the meaning of the property tax laws.

COLUMBUS, OHIO, May 12, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission requests the opinion of this department upon a question submitted by the Fidelity Mortgage Company of Cleveland, Ohio, as follows:

> Is a company which takes and deals in mortgages entitled to list such mortgages on the average basis as a "merchant," or must it list the amount in value of mortgages held by it on tax listing day?

Section 5381 of the General Code defines a "merchant" for the purposes of the regulations governing the listing of personal property for taxation, as follows:

> "A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."