

995.

APPROVAL, BONDS OF CITY OF WARREN, OHIO, IN THE AMOUNT OF \$19,000 FOR STREET IMPROVEMENTS.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 9, 1920.

996.

APPROVAL, BONDS OF EAST LIVERPOOL, OHIO, IN THE AMOUNT OF \$10,200 FOR STREET IMPROVEMENTS.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 9, 1920.

997.

NEW DITCH CODE—COMPENSATION OF COUNTY COMMISSIONERS
—HOW PAID—TREATED AS PART OF COST OF IMPROVEMENT.

1. *The compensation of county commissioners for services on improvements undertaken in conformity with the New Ditch Code (sections 6442, et seq. 108 O. L. 926) is to be paid in accordance with section 57 of said Code, even though the commissioners may have taken office before said Code became effective.*

2. *The compensation of county commissioners, and the fees of clerks of courts for services in ditch matters under said New Ditch Code, are to be treated as part of the cost of the improvement, are to be paid out of the general ditch improvement fund, and are to be included in the assessment against affected lands-*

COLUMBUS, OHIO, February 10, 1920.

HON. A. F. ALLYN, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date wherein after making reference to several sections of the New Ditch Code (now sections 6442 et seq.; 108 O. L. 926) you submit the following questions:

"1. What items of cost and expense of an improvement are included under sections 11, 12 and 28 of said law?

2. Are the compensation to the commissioners, the auditor's fees, clerk of court's fees, surveyor's expense and fees to be included in the cost and expense of an improvement?

3. From what fund are the compensation to the commissioners, the auditor's fees, the clerk of court's fees and the surveyor's fees and expenses to be paid, the general ditch improvement fund or the general county fund?

4. What costs and expenses of the improvement are to be paid by assessment against property specially benefited by an improvement?

5. Our board of county commissioners took office last September. Said law took effect in October. Under which law do our commissioners draw their salary and compensation for ditch work, the old law or the new? "

The matters coming within the purview of your inquiry have in large measure been discussed in two earlier opinions of this department directed to the bureau of inspection and supervision of public offices, one of said opinions being dated December 24, 1919 (No. 896) and the other January 23, 1920 (No. 957), copies of which are enclosed for your information.

The first of these opinions holds in substance that as to improvements begun before the taking effect of the New Ditch Code on October 10, 1919, county commissioners who assumed office prior to October 10, 1919, might receive compensation at the rate specified in section 57 of said New Ditch Code for their services in ditch matters rendered after October 10, 1919. The reasons on which such holding was based furnish answer to your fifth question,—the compensation of the commissioners for service as to improvements under the New Ditch Code is governed by the provisions of section 57 of that Code.

The second opinion above referred to, deals particularly with the matter of services of the county surveyor and his employes and of the county auditor with reference to ditch proceedings under the New Ditch Code. The holding is in substance:

"1. Under the New Ditch Code (108 O. L. 926) the services of the county surveyor and of such employes as chainmen, axemen and rodmen in connection with a ditch improvement, are not to be calculated on a fee basis, but are to be calculated and assessed against affected lands at actual cost to the county as represented by the proportionate part of the salary of the surveyor and the proportionate part of the compensation of his assistants and employes as fixed by him under the provisions of section 2788 G. C. The amount of such salary and compensation so assessed is to be returned to the general fund out of the general ditch improvement fund.

2. County auditors are not under the New Ditch Code entitled to any fees; nor are they entitled to a percentage on ditch assessment collections, except in the event that an assessment on becoming delinquent is carried to the general duplicate and collected as provided in section 31 of said Code, in which event the auditor is entitled to the percentage on such delinquent assessment named in section 2624 G. C. said percentage to be charged to the general county fund and credited to the fee fund."

The opinion last noted furnishes answer to your second and third questions, except in so far as said questions inquire whether the compensation of commissioners and fees of the clerk of courts are to be included in the cost and expense of an improvement, and whether such respective compensation and fees are payable out of the general ditch improvement fund, or of the general county fund.

Sections 11, 28, 50, 57 and 58 of the New Ditch Code read respectively as follows:

"Sec. 11. If the county commissioners, or the court, find an improvement by ditch or drain or other means is necessary, and grant the petition therefor, either for the line set forth in the petition, or upon one which in their judgment is more feasible to accomplish the object of the petition, all the cost and expense connected with their proceedings, as well as the cost and expense of construction of the improvement shall be assessed upon the property affected beneficially by such improvement, including any highway or other public grounds, according to the benefit derived therefrom and in proportion thereto. And as a part of such cost and expenses, to be so assessed, shall be included such portion of the expense of enlarging any waterway through a public highway or constructing, altering or reconstructing any bridge over such water way, as may be determined by the county commissioners, or the court, and such portion of such expense shall be paid by the county from its bridge fund.

Sec. 28. After the granting of the petition for any improvement under this chapter, and the letting of contracts for work and material, and the ascertainment and determination of all known claims for compensation for property taken, or damages to property from the construction of the improvement, the total cost thereof including the preliminary cost, and the actual or estimated cost of supervision and any known costs of litigation taxed against the county shall be assessed proportionately according to special benefits conferred, upon all the lots and parcels of land specially benefited thereby, the owners of which have, as in this chapter provided, had notice of the proceedings for such improvement, whether such lots and parcels of land abut on the improvement or not. Such assessment shall be made as well against the lands of any railway company, township, county, municipality, school district or board of education, or any other public board, as against privately owned property, for the benefit to the premises owned or controlled by such public corporation or body.

And in arriving at the amount of benefit to any piece of property due regard shall be had to any conditions that would require precedent expense before the benefit from the improvement would be available, and to any conditions that would permanently affect the degree of benefit that could be derived.

Provided that the county commissioners, or the court, 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.

"Sec. 50. From the general ditch improvement fund, except as otherwise by law provided, all costs and expenses of improvements under this chapter shall be paid including damages, compensation, contract prices of construction, engineering expenses, except the salary of the county engineer, costs and expenses of litigation, except the services of the prosecuting attorney and of any other county officer, deputy or employee for whose services, fees or costs are by law collected, which go into the county fee fund for payment of the same.

But no warrants shall be drawn to be paid from said fund unless it contain a sufficient amount not otherwise specifically appropriated to pay the

same, and the letting and approving of any contract for an improvement or any award or judgment for compensation, damages or refund of assessments shall be deemed to be a specific appropriation of the amount of such obligation, and such amount shall be set apart for the purpose of such payment and contingently charged against said fund. If at any time said fund contains the proceeds of bonds issued and sold under this chapter, then said fund shall not be depleted below the obligation incurred by such bond issue or issues unless assessments or levies have been made or ordered made and in sufficient amount to redeem the same as they fall due. In case at any time obligations legally incurred exceed the amount of said improvement fund, an amount of the general revenue fund in the county treasury, if otherwise unappropriated, equal to the deficiency, may by resolution of the board of county commissioners be transferred to the general ditch improvement fund."

"Sec. 57. In addition to the regular salary provided by law for the county commissioners, each county commissioner shall receive five dollars per day for each day he is actually engaged on improvements under this act, but in no case shall any commissioner receive an aggregate of more than twenty-five dollars for services on one improvement, nor shall they receive pay for two separate improvements on the same day. Such amounts shall be paid by warrants issued by the county auditor upon the county treasurer, upon the finding in his office of an itemized statement by the commissioner of such service provided, however, that the aggregate compensation paid a county commissioner under this section for said service shall not exceed in one year five hundred dollars.

"Sec. 58. The fees that shall be charged and collected for services required of any public officer under this chapter, if not specifically otherwise designated, shall be the fees allowed for like service in the office to which he was elected or appointed, and if he be an officer receiving a salary, and his collection of fees go to the county, then such fees collected hereunder shall be in like manner accounted for.

Publication of notices, and service by publication in this chapter required, shall be paid at the legal rate provided for publication of like matter originating in the common pleas court."

In so far as compensation to county commissioners is concerned, it is clearly to be charged to the specific improvement on which the commissioners' services are rendered. Section 11, which immediately follows those sections providing for such preliminary steps as filing of petition, report of engineer, hearing, view, etc., provides that "all the cost and expense connected with their proceedings,"—that is, the preliminary proceedings—shall be assessed, etc. Section 28 states that the "total cost" of the improvement "including the preliminary cost" is to be assessed "upon all the lots and parcels of land specially benefited." Section 57 fixes the per diem for services of the commissioners, and describes such per diem as being "for each day he is actually engaged on improvements under this act." It then goes on to fix a limit of \$25.00 "for services on one improvement." It thus becomes clear that the New Ditch Code regards the services of the commissioners as being rendered for and in connection with the improvement rather than for the county as a whole. Besides, the general policy of providing a per diem as apart from the annual salary of the commissioners indicates a purpose that the value of the services or the commissioners as represented by the per diem be charged to the improvement. Therefore, when sections 11, 28 and 57 are read together the conclusion follows that the per diem is to be taken as part of the cost of the improvement and assessed accordingly, as provided in section 28.

This conclusion having been reached, it is clear from the provisions of section 50

that the per diem of the commissioners is to be paid out of the general ditch improvement fund for that section reads in part "from the general ditch improvement fund, except as otherwise by law provided, all costs and expenses of improvements under this chapter shall be paid," etc. No provision in the New Ditch Code is found which indicates that the per diem of the commissioners is to be paid out of any other fund than the general ditch improvement fund; and no practical reason is perceived why such payment may not be made out of the general ditch improvement fund, especially when it is kept in mind that the per diem of the commissioners as provided in section 57 is to be "*in addition* to the regular salary provided by law for the county commissioners."

Referring to the matter of fees of the clerk of courts: The general duties of that officer in connection with a ditch improvement may be found by reference to section 3 of the New Ditch Code. That section, among other things, provides that if the petition shall have been filed with the auditor by the board of county commissioners—in other words, if the board of county commissioners is the petitioner—then, and in that event, notice of the filing is to be given by the auditor to the clerk of courts and the petition turned over to the latter officer. Proceedings are then had before the court of common pleas in the same manner as the proceedings are conducted before the board of county commissioners when that body is not the petitioner.

It is thus seen that the clerk of courts will have certain duties to perform which would be performed by the county auditor had the proceedings taken place before the board of county commissioners. The fees of the clerk of courts are to be calculated as directed by the above quoted section 58 of the New Ditch Code, since there is no specific schedule of fees for clerks included in the new act; and of course, in accordance with the specific directions of said section 58, the fees so collected by the clerk are to be paid over to the county. Plainly, any fees paid the clerk in connection with a ditch proceeding constitute part of the total cost as described in section 28, and are to be included in the amount that is to be assessed against benefited lands in accordance with said last named section.

It is also clear that the fees of the clerk are to be paid from the general ditch improvement fund, for much the same reasons as have been stated above with respect to the per diem of the county commissioners. It is quite true that the first sentence of section 50 is somewhat confusing in specifying various items that are to be paid out of the general ditch improvement fund. The expression is used, "costs and expenses of litigation," and this expression is followed by the words "except the services of the prosecuting attorney, and of any other county officer, deputy or employe for whose services, fees or costs are by law collected which go into the county fee fund for payment of the same." The evident intent of the clause last quoted is not to except from the item "costs and expenses of litigation" anything but the services of the prosecuting attorney. In other words, the language "and of any other county officer, deputy or employe for whose services, fees or costs are by law collected which go into the county fee fund for the payment of same" is not intended to constitute an exemption from the costs and expenses of litigation directed to be paid out of the general ditch improvement fund, but is intended to convey the idea that the services of such officer, deputy or employe in ditch matters generally are to be paid from the general ditch improvement fund.

Your first and fourth questions are very general in character and cannot well be specifically answered, since it would be difficult to lay down an arbitrary statement of various items of expense which might go into ditch improvements of various types and in various places. However, it is believed that these questions are directed particularly to the matters which you specify in questions two and three, and that the general discussion in this opinion, taken in connection with the two opinions, copies of which are enclosed, will furnish a rule as to the matters you have in mind.

The conclusions from the foregoing may be summarized as follows:

(1) The compensation of county commissioners for services on improvements undertaken in conformity with the New Ditch Code (sections 6442, et seq. 108 O. L. 926) is to be paid in accordance with section 57 of said code, even though the commissioners may have taken office before said code became effective.

(2) The compensation of county commissioners, and the fees of clerks of courts for services in ditch matters under said New Ditch Code, are to be treated as part of the cost of the improvement, are to be paid out of the general ditch improvement fund, and are to be included in the assessment against affected lands.

Respectfully,

JOHN G. PRICE,
Attorney-General.

998.

INHERITANCE TAX LAW—WORDS "BROTHER" AND "SISTER" IN PARAGRAPH 3 OF SECTION 5334 G. C. INCLUDE HALF-BROTHERS AND HALF-SISTERS.

The words "brother" and "sister" as found in paragraph 3 of section 5334 of the General Code (the inheritance tax law) include half-brothers and half-sisters.

COLUMBUS, OHIO, February 10, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of January 26th requesting the opinion of this department on the question as to whether or not the words "brother" and "sister," as found in paragraph 3 of section 5334 of the General Code (the inheritance tax law), include half-brothers and half-sisters.

The part of the law to which you refer is that defining the classes of successions for the purposes of the exemption. It is in full as follows:

3. When the property passes to or for the use of a brother, or sister, niece, nephew, the wife or widow of a son, the husband of a daughter of the decedent, or to any child to whom the decedent, for not less than ten years prior to the succession stood in the mutually acknowledged relation of a parent, the exemption shall be five hundred dollars."

It might be pertinent to quote the entire section, but it is believed sufficient to remark that nowhere in that section nor in the entire law is any mention made of a distinction between relatives of the whole blood and relatives of the half blood.

The inheritance tax laws of other states contain similar provisions but, curiously enough, no authority seems to be available upon the precise question.

However, in a remote sense at least the inheritance tax law is in *pari materia* with the statutes of descent and distribution. In the latter sections, quotation of which may be omitted, we find use made of the terms "brothers and sisters of the intestate who are of the blood of the ancestor from whom the estate came." (Sec. 8573); "brothers and sisters of such ancestors" (Sec. 8573); "brothers and sisters of the half-blood of the intestate * * * though such brothers and sisters are not of the blood of the ancestor from whom the estate came" (Sec. 8573); "half-brothers and sisters of the intestate" (Sec. 8573); "brothers or sisters of the intestate of the whole blood" (Sec. 8574); "brothers and sisters of the half-blood" (Sec. 8574); "brothers and sisters of