

the Court of Common Pleas; it is, therefore, impossible to suppose that the costs are to be paid before the appeal. It would be an outrage on common sense to give the law such a construction, as would require the appellant to pay the cost, and, at the same time, to give security to pay them."

Although Sections 10383 and 10384, *supra*, have been amended since the *Leffingwell vs. Flint* case, *supra*, was decided, the provisions thereof have not been materially changed so as to affect the question that you present.

In view of the foregoing and answering your question specifically, it is my opinion that by the terms of Section 10384, General Code, it is the duty of a justice of the peace, upon the appellant's demand and the payment of the legal fee therefor, to deliver to appellant or his agent, a certified transcript of the proceedings had before such justice of the peace in order that appellant may perfect his appeal. Such appellant is not required to pay the costs of the entire proceedings had before such justice of the peace before he may demand such transcript.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1951.

#### COUNTY COMMISSIONERS—POWER TO IMPROVE WATERCOURSE LYING WITHIN LIMITS OF MUNICIPALITY—ASSESSMENT FOR IMPROVEMENT DISCUSSED.

##### SYLLABUS:

1. *When petitioned for by the mayor or council of a municipality, a board of county commissioners has power to improve a watercourse, by deepening and widening the same and constructing retaining walls along the banks thereof, notwithstanding the fact that the entire improvement lies within the corporate limits of such municipality.*

2. *Under the provisions of Sections 6454 to 6463, inclusive, and related sections of the General Code, all land affected by the improvement of a watercourse, by deepening and widening the same and building retaining walls along the banks thereof, shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise. That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare and such part of the assessment as may be found to benefit state or county roads or highways shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision. The entire cost of such an improvement may not be assessed against a city, except where the county surveyor and the board of county commissioners, in a sound exercise of their discretion, find that no land is benefited by the improvement.*

3. *A municipality, or other political subdivision of the state, is unauthorized to make a levy to pay an assessment made by a board of county commissioners for the improvement of a watercourse, without the fifteen mill limitation provided by law, without a vote of the people.*

COLUMBUS, OHIO, April 10, 1928.

HON. GEORGE E. SCHROTH, JR., *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

"Rock Creek is a natural water course which has its source some ten or twelve miles south of the City of Tiffin, and flows through a portion of the city, and enters the Sandusky River within the corporate limits.

The portion of the creek within the city of Tiffin is subject to overflow in times of high water and sometime ago the mayor on behalf of the city, filed a petition with the commissioners asking that this stream be deepened, widened and retaining walls constructed along the banks so as to take care of flood waters, all of the improvement being solely within the city of Tiffin. I would like if possible to have your opinion on the following propositions :

1. Have the commissioners authority to improve this water course where the improvement is entirely within the city of Tiffin?
2. If so, can the commissioners assess the entire cost of the improvement upon the city of Tiffin, provided the city does not object, although there are private owners of real estate abounding upon the stream and also within the water shed, who are benefited by the improvement?
3. This improvement will cost over \$100,000.00 and if it is all assessed against the city of Tiffin, can the city make a levy to pay for its assessments for the improvement outside of the fifteen mill limit without the vote of the people?
4. Can the commissioners assess any portion of the cost of the improvement against the county generally?"

You state that the mayor of the city of Tiffin on behalf of said city has filed a petition with the county commissioners asking that that portion of Rock Creek within the corporate limits of said city be deepened and widened, and that retaining walls be constructed along the banks so as to take care of flood waters. It is therefore assumed that this matter is now pending before the board of county commissioners of Seneca County.

The answers to your questions involve a consideration of various sections of the General Code relating to single county ditches, and also to various sections relating to special assessments.

Section 6442 of the General Code, in the chapter entitled "Single County Ditches," containing the definition of terms, reads as follows :

"The word 'owner,' as used in chapters 1, 2 and 8 of this title, shall be construed to include any owner of any right, title, estate, or interest in or to any real property, and shall be held to include persons, partnerships, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or council of a city or village, the trustees of any state, county, or municipal public institution.

The word 'land' shall include any estate or interest, of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property.

The word 'improvement,' as used in chapters 1, 2, and 8 of this title, shall include the location, construction, reconstruction, widening, deepening, straightening, boxing, tiling, filling, walling, arching, or any change in the course or location of any ditch, drain, or watercourse, and shall include the deepening, widening, straightening, or any change in the course or location of a river, creek, or run; and shall include a levee, or any wall, embankment, jetty, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet and shall include the vacating of a ditch, or drain.

All words in the singular number shall be read in the plural when the sense requires it. Commissioners shall mean the board of county commissioners."

It is noted that the word "owner" as defined herein shall be construed to include any owner of any right, title, estate, or interest in or to any real property, and shall be held to include the mayor or council of a city or village; and that the word "improvement" as used in "chapters 1, 2, and 8 of this title" shall include the deepening, widening, straightening or any change in the course or location of a river or creek, and any wall, embankment or other structure for the protection of lands from the overflow from any stream.

Section 6444, General Code, pertaining to the filing of a petition for an improvement reads as follows:

"Any owner of land may file a petition with the auditor of the county in which is located a part of the land that is averred to be benefited by the construction of the proposed improvement. The petition shall state that the construction of the improvement is necessary, and will be conducive to the public welfare; and shall state the nature of the work petitioned for; and may ask to locate, construct, reconstruct, straighten, deepen, widen, box, or tile a ditch, drain, or watercourse, or to change the course or location thereof; or may ask to construct a levee; or may ask to straighten, deepen, or widen a river, creek, or run, or to change the course or location thereof. The petition shall state the course and termini of the proposed improvement, and the branches, spurs, or laterals, if any are petitioned for. The petition shall contain a list of the names and addresses, where known, of all the owners of the land which the petitioner claims will be benefited or damaged by the construction of the proposed improvement. The petition shall be signed by one or more owners of land as petitioners."

Under this section, any owner of land as defined in Section 6442, *supra*, may petition the county commissioners for an improvement as defined in said Section 6442.

Section 6443, General Code, pertaining to the powers of the county commissioners, reads as follows:

"The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter (G. C. Sections 6442 to 6508) by any owner of any land, when the commissioners find that the granting of the petition and the construction of the improvement is necessary to drain any land or to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive to the public welfare, and further find that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement, may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, or arched, any ditch, drain, or watercourse, or construct any levee, or straighten, deepen, or widen any river, creek or run, or vacate any ditch, by proceedings as provided in chapters 1 and 2 of title III of the General Code of Ohio."

Under the provisions of this section, if the commissioners find that the granting of the petition and the construction of the improvement is necessary to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive to the public welfare, and that the cost of the proposed

improvement will be less than the benefits conferred by the construction of said improvement, they may cause to be deepened, widened and walled, any drain or watercourse. There is no limitation herein, that said improvement shall be in any particular part of the county.

The mayor, on behalf of the city of Tiffin, has petitioned for said improvement.

In the case of *Village of Pleasant Hill, et al vs The Commissioners, et al* 71 O. S. 133, the opinion at page 139 states :

"We do not believe that it was the purpose or policy of the Legislature to confer upon boards of county commissioners jurisdiction and authority to locate and construct a ditch or drain within a municipal corporation, except where such municipality shall petition for the same."

Section 4447, Revised Statutes, at the time of said decision, authorized the county commissioners to deepen and widen watercourses within the county.

Since the above case was decided, the statutes of Ohio relating to county ditches have been completely recodified, and this, and the later Ohio cases are not of much help in construing the statutes as they now read, which were last codified on April 3, 1923, (110 v. 161).

In Opinion No. 347, rendered by this department to the Prosecuting Attorney at Bellefontaine, Ohio, under date of April 19, 1927, the following question was submitted :

"The city of Bellefontaine has a ditch which passes through the entire city, originating beyond the corporate limits of said city and terminated beyond the corporate limits of the city. This is an open ditch most of the way, excepting, perhaps, a quarter or half a mile through the business portion of said city where the same is arched by stone.

At the time of high waters or big rains considerable damage is done to property in the city. The city and the County Commissioners have been passing the buck as to who has jurisdiction in this matter. I am writing you to ask your opinion as to whether or not the County Commissioners have authority under Section 6442 of the General Code, et seq., upon presentation of a petition by the mayor of said city? My opinion is that they have, but the County Commissioners are requesting your opinion in this matter."

In the opinion, after quoting Section 6442, General Code, in part, and Section 6443, it was said as follows:

"The drainage laws of the State of Ohio have been entirely re-codified several times during recent years and the law with reference thereto is to be determined entirely by the statutes now in force pertaining to the subject. Reported decisions of courts from other states with reference to the subject are of very little aid to us in determining the law with reference to drainage in Ohio. So also are the decisions of our own courts with reference to the subject, for the reason that the last codification which is found in 110 O. L. 161, et seq., has received very little judicial construction since its passage. \* \* \*

It will be noted from the provisions of Section 6443 as above set out that the county commissioners upon the filing of a petition by any owner of any land acquire jurisdiction to locate, construct, re-construct, straighten,

deepen, widen, box, tile, fill, wall or arch any ditch, drain or watercourse within the county when they find that the improvement is necessary to drain any land or to prevent the overflow of any land in the county. The only question to be determined is whether or not the fact that a village or city is on the route of the ditch ousts the jurisdiction of the county commissioners which otherwise would be perfect. \* \* \*

In construing the statutes which I have above quoted in part and other sections of the law with reference to the subject it is well to notice the provisions of Section 6603, General Code, with reference to township ditches which is a part of the same act as are the sections relating to county ditches \* \* \* .

\* \* \* the Legislature has provided that the township trustees shall have jurisdiction over ditches which are located wholly within such township *which do not pass into or through a municipality*, Section 6443, supra, not containing any such provision with reference to ditches under the jurisdiction of county commissioners. It would seem clear that if the Legislature had intended that the commissioners who have jurisdiction over a ditch are to be deprived of their jurisdiction over that portion of the ditch running into or through a municipality merely because it runs into or through such municipality it would have said so inasmuch as it has said so with reference to township ditches. It seems equally clear that Section 6443, supra, is comprehensive in its terms and vests in the county commissioners jurisdiction over ditch improvements to drain any land or to prevent the overflow of any land in the county. There is no further provision of the drainage laws which takes away the jurisdiction of the commissioners over any portion of a ditch over which they have acquired or are given jurisdiction.

\* \* \* \* \*

The county ditch law seems complete in itself and while it cannot be contended that the authorities of the municipality therein have no jurisdiction over the ditch, yet it is plain that the provisions of Section 6443 give to county commissioners complete jurisdiction and there are no other provisions of law which take it away. Whatever jurisdiction the municipality has over the ditch is concurrent with that of the commissioners."

In view of the provisions of Section 6442 and related sections of the General Code, for the reasons stated in Opinion No. 347, above quoted, in answer to your first question, it is my opinion that the county commissioners have authority to improve this watercourse, although said improvement is entirely within the city of Tiffin.

You next inquire whether the entire cost of said improvement can be assessed against the city of Tiffin.

Sections 6454, 6455, 6456, 6460 and 6463, General Code, read in part as follows:

Section 6454. "The auditor shall certify to the surveyor, forthwith, a copy of the findings and orders of the commissioners in favor of an improvement. The surveyor shall cause to be made the necessary survey for the proposed improvement, as found by the commissioners, and *suitable maps showing the location of the land proposed to be assessed*, and profiles showing the cuttings and gradient of the improvement, and shall make an estimate of the cost of the construction of such improvement.

\* \* \* *He shall also prepare a schedule containing the name of each owner of land, with a description of the land believed by him to be benefited by the proposed improvement, which names of land owners and descriptions of land believed to be benefited shall be taken from the tax duplicates of the county; and the surveyor shall enter in said schedule the proximate number of acres benefited by the proposed improvement, and the amount that said land, in his opinion, ought to be assessed, which opinion shall be based upon his surveys, levels, and contours taken on the line of the improvement and back from the improvement, and his observation of the location and elevation of the land relative to the improvement. \* \* \** ” (Italics the writer’s.)

Section 6455. “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.*” (Italics the writer’s.)

Section 6456. “Upon the filing with the auditor of the reports and schedules by the surveyor, the commissioners shall fix a date not less than twenty and not more than thirty days thereafter, when a hearing on said reports shall be had. Upon such day being fixed, the auditor shall forthwith give notice by mail, in a stamped five-day return envelope, *to all the owners whose names appear in the surveyor’s schedules of assessments.* Said notice shall be mailed to each address as given in the petition, or to such address as the auditor may learn to be the correct address. *If the schedule of assessments filed by the surveyor contains the names of land owners other than those mentioned in the petition, notices shall also be mailed to such landowners.* If the residence, of any person named in the schedule of assessments can not be ascertained, or if any mailed notice be returned undelivered, the auditor shall publish such notice to all such persons in a newspaper of general circulation of the county, by publishing the same in two successive weekly issues thereof, but on the same day of the week, if a daily paper, and the first publication shall be at least ten days before the date of hearing. *Such notice shall notify the owners of the assessment on each tract of land owned by said owner, as estimated and described in said schedule, and shall notify the owners of the date of the final hearing by the commissioners on the report of the surveyor, and on the proceedings for the improvement, and shall notify the owners that all claims for compensation or damages must be filed with the auditor before that date; and said notice shall further state that if bonds are to be issued, the owner must give notice within ten days after said final hearing of his intention to pay in cash and if he does not give such notice of his intention to pay in cash within ten days the installments will be payable with the interest added at the same rate that bonds bear interest. \* \* \** ” (Italics the writer’s.)

Section 6460. “The assessments shall be payable in not less than two and not more than ten semi-annual installments. At the time of the final hearing, in the order approving the levying of the assessments, the commissioners shall determine how long a period of time, in semi-annual installments, as taxes are paid, shall be given the owners of land benefited, to pay the assessments that may be made for the improvement. \* \* \*

Section 6463. “At the final hearing on said improvement, if the petition is not dismissed, the commissioners shall hear any evidence offered for or

against the assessment proposed to be levied against any owner, or on any land, as shown by the schedule of assessments filed by the surveyor, and shall hear any competent evidence on the question of benefits. The commissioners shall, from the evidence offered and from an actual view of the premises, amend and correct the assessments, and the assessments so amended or corrected shall be approved by the commissioners. *That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare shall be paid by the public, and shall be assessed against the county, and such part of the assessment as may be found to benefit state or county roads or highways, shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision, and shall be paid out of the general funds of such corporation or political subdivision of the state, except as otherwise provided by law.* The commissioners shall approve and confirm the assessments, and shall order the surveyor to let the contracts for the construction of the proposed improvement, and shall fix the time for the letting of the contracts, which shall be not less than twenty-five days after the date of said order, and shall determine when the assessments shall be paid, and shall determine whether bonds shall be issued in anticipation of and payable out of the installments of assessments. Their orders, approving the assessments, and ordering the surveyor to let the contract, and other orders made at this hearing, shall be entered on their journal.

Any owner opposed to the granting of the petition, or any owner opposed to further proceedings in the improvement; and any owner who claims that the assessment levied against him or it is excessive, or is not in proportion to benefits, may appeal from any order made pursuant to this section, as provided in this chapter."

While this section expressly provides that "such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision," and shall be paid out of the general funds of such corporation or political subdivision, it is clear, from the provisions of all the sections, above quoted in part, that the law contemplates that each tract of land benefited by the improvement, shall be assessed according to benefits. This conclusion is unescapable when the mandatory provisions of Section 6455, supra, to the effect that "*all land affected by said improvement shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise,*" are considered, together with the provisions of the other sections setting forth with great particularity the procedure to be followed by the county surveyor and the county commissioners in levying assessments on the lands benefited, the time such assessments are to be paid, etc.

What "part of the assessment \* \* \* may be found to benefit any public corporation," of course depends upon the facts in each particular improvement; though it is improbable that there would be any such improvement, which would not to some extent benefit the lands which it drains, even though it also benefited the general public, and in cases like the one you describe, a public corporation, or political subdivision, or both, as well.

Your third question is, if the entire cost of the improvement be assessed against the city, "can the city make a levy to pay for its assessments for the improvement outside of the fifteen mill limit", without a vote of the people. While, as above

pointed out, in view of the provisions of the statutes, it is difficult to see how the whole cost of the improvement can be assessed against the city, the power of the city to make a levy for the purpose in question without the fifteen mill limitation provided by law will be considered.

Section 5625-2, General Code, provides that:

"The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit of the state shall not in any one year exceed fifteen mills on each dollar of tax valuation of such subdivision or other taxing unit, except taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the 'fifteen mill limitation.'"

Certain exceptions to the foregoing limitations are provided in Section 5625-7, General Code, which reads:

"The taxing authority of any subdivision may make the following levies outside of the fifteen mill limitation and irrespective of all limitations on the tax rate:

(a) Tax levies for debt charges when such levies have, prior to the taking effect of this act, been excluded by the law of the state or by vote of the people from the limitation imposed by Section 5649-5b, and taxes authorized by the laws of the state, prior to the taking effect of this act, to be levied outside of the limitations imposed by Section 5649-5b of the General Code, in anticipation of which indebtedness has been incurred; but in either instance only until said indebtedness has been paid.

(b) Tax levies which, prior to the taking effect of this act, were excluded by vote of the people from the limitation imposed by Section 5649-5b, not exceeding the rate and the number of years authorized by such vote.

(c) Tax levies excluded by law from the fifteen mill limitation or hereafter authorized outside of said limitation by a vote of the people under the provisions of law applicable thereto.

(d) Tax levies under the provisions of Section 7639, but not to exceed one mill of said tax shall be outside the fifteen mill limitation."

It seems clear that there is nothing in this section authorizing the levying of a tax by a municipality, or other political subdivision, outside the fifteen mill limitation to provide funds to pay an assessment for a ditch improvement made by county commissioners.

Section 6463, General Code, provides that the assessment made against the public corporation shall be paid out of the general funds of such corporation. These funds must be supplied by taxation. In the case of *The State ex rel. The Village of Leipsic vs. Moenter, Auditor, et al.* 99 O. S. 110, the syllabus reads as follows:

"1. The proportion of the cost and expenses levied upon the grand duplicate against the taxable property of a township, for the construction of road improvement, under Sections 6926 and 6928, General Code, is a tax and not an assessment.

2. Levies made for the payment of such improvements are within the control of the budget commissioners, and the same are subject to the fifteen mill aggregate limitation provided for in Section 5649-5b, General Code."

This case involved an action in mandamus to compel the auditor of Putnam County, to levy 2.30 mills for stone road purposes. The county commissioners ordered two-thirds of the cost to be paid from the proceeds of levies upon the grand duplicate of the county against taxable property of the township. Judge Jones, in the opinion, said:

"The tax levies sought to be made were for the purpose of paying bonds for road improvements constructed under Section 6926 et seq. General Code.  
\* \* \*

For the purpose of this case it is not necessary to decide whether these levies are subject to any other limitation than the 15 mill limitation of the Smith one per cent. law. \* \* \*

Indisputably it is within the function of the legislative power of the state to curb and control its local governmental agencies in the matter of taxation, and it has been held that the foregoing provisions of the Smith law 'limit the rate of taxes that can be levied in any taxing district for any and all purposes.' \* \* \*

Apparently conceding the legal phase of the question heretofore considered, counsel for the relator insists, however, that the 2.30 mills levied by the county commissioners is not a tax, but an assessment, and that this road levy is especially exempted from the 15 mill limitation, under the provisions of Section 5649-3a, General Code.

Section 6928, General Code, provides that a portion of the cost and expense of the road improvement shall be paid out of the proceeds of levies upon the grand duplicate of the county against taxable property of the township, the balance of the cost and expense to be assessed upon and collected from the owners of the real estate, and from the real estate benefited by the improvement, in proportion to the benefit.

By the language of the statute it will be seen that the latter is not only an assessment in expressed terms, but is so in fact, and based upon proportional benefits to the real estate, while the former, the levy upon the grand duplicate of the county upon the taxable property of the township, is made irrespective of whether benefit accrues or not, and is upon the entire property of the township, both real and personal. The distinction between the two is well stated in the first proposition of the syllabus in *Lima vs. Cemetery Association*, 42 Ohio St., 128, which is as follows:

'In a general sense, a tax is an assessment, and an assessment is a tax; but there is a well-recognized distinction between them, an assessment being confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity, and levied with reference to special benefits to the property assessed.'"

This case relates to an assessment against a township for road purposes, but it is sufficiently analogous to apply the reasoning therein to the instant question.

It is evident from what has been said, that it will require a vote of the people in order to authorize a levy of the tax outside the fifteen-mill limitation necessary for the payment of the assessment for said improvement.

Your fourth question is as to whether the county commissioners can assess any portion of the cost of said improvement against the county generally. Section 6463, *supra*, provides that:

"That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare shall be paid by the public and shall be assessed against the county and such part of the assessment as may be found to benefit state or county roads or highways shall be assessed against the county."

It seems clear from the above section that if the county commissioners determine that said improvement will be beneficial to the general public because it will be conducive to the public welfare, that a portion of the cost of said improvement can be assessed against the county. Under the provisions of this section then, if the county commissioners find that said improvement will benefit state or county roads or highways, a portion can be assessed against the county under the express provisions of said section.

From the above discussion, I reach the following conclusions, which specifically answer your questions:

1. When petitioned for by the mayor or council of a municipality, a board of county commissioners has power to improve a watercourse, by deepening and widening the same and constructing retaining walls along the banks thereof, notwithstanding the fact that the entire improvement lies within the corporate limits of such municipality.

2. Under the provisions of Sections 6454 to 6463, inclusive, and related sections of the General Code, all land affected by the improvement of a watercourse, by deepening and widening the same and building retaining walls along the banks thereof, shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise. That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare and such part of the assessment as may be found to benefit state or county roads or highways shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision. The entire cost of such an improvement may not be assessed against a city, except where the county surveyor and the board of county commissioners, in a sound exercise of their discretion, find that no land is benefited by the improvement.

3. A municipality, or other political subdivision of the state, is unauthorized to make a levy to pay an assessment made by a board of county commissioners for the improvement of a watercourse, without the fifteen mill limitation provided by law, without a vote of the people.

4. That part of an assessment for the improvement of a watercourse, by deepening and widening the same and building retaining walls along the banks thereof, that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare, is required to be assessed against the county.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*