2333.

APPROVAL, FINAL RESOLUTION, ROAD IMPROVEMENT, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 12, 1921.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

2334.

APPROVAL, BONDS OF KENMORE VILLAGE SCHOOL DISTRICT IN AMOUNT OF $30,000 TO REFUND OUTSTANDING INDEBTEDNESS.

COLUMBUS, OHIO, August 12, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2335.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS UNDER SECTION 1214 G. C. FIX COUNTY AND TOWNSHIP SHARE OF STATE AID HIGHWAY IMPROVEMENT—WITHOUT AUTHORITY TO CHANGE ASSESSMENT.

Where county commissioners, acting under authority of section 1214 *G. C. have fixed the assessment share of the cost of a state aid highway improvement at twenty-five per cent and the township's share at fifteen per cent and have thereafter issued bonds in anticipation of the collection of such share, the county commissioners and the township trustees of the affected township are without authority under sections* 1214 *and* 1217 *G. C., or otherwise, to change the respective assessment and township shares as so fixed.*

COLUMBUS, OHIO, August 12, 1921.

HON. DONALD KIRKPATRICK, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—You have recently written to this department as follows:

"Some time ago the board of commissioners of Clark county, Ohio, proceeding under authority given in sections 1178 to 1231-11 G. C. of Ohio, requested state aid in the matter of building and improving of the National pike running through Bethel township, Clark county, Ohio, and the village of Donnelsville.

The cost of the same was in the sum of $468,000.00, of which sum state aid to the amount of $93,300.00 was granted.

The commissioners, proceeding further in the matter under the provisions of the law, particularly section 1214 G. C., fixed the proportion of the balance above, to-wit: the sum of $374,700.00 was to be paid. This was fixed in the following manner:

'The township of Bethel, Clark county, Ohio, 15 per cent of the

same, excepting therefrom the costs and expenses of bridges and culverts;

The owners of property abutting said improvement within one mile of either side of the improvement to pay 25 per cent, excepting therefrom the costs and expenses of bridges and culverts;

And the county of Clark, Ohio, to pay the balance.'

Bonds of the county were thereupon issued by the commissioners in the sum of $374,700.00, in anticipation of the receipts of the above assessments and taxes were levied therefor. These bonds were sold and purchased by the industrial commission.

The trustees of Bethel township have been anxious to assume part, or all, of that 25 per cent of the aforesaid cost which was assessed against the aforesaid abutting property owners, and are asking if there is any provision in the law whereby they with, or without, the commissioners of Clark county, Ohio, may assume the said 25 per cent so assessed against the abutting property owners, or any part thereof.

I would be pleased if you would favor me with your opinion as to the legality of such a payment by the aforesaid trustees of Bethel township."

No provision of statute has been found which in terms permits township trustees to assume all or any part of the so-called "assessment share", or "property owners' share" of the cost of a state aid highway improvement. However, provisions appear in sections 1214 and 1217 G. C., which, if acted upon at the proper time, would, when applied to the facts which you recite, have the effect of causing the assessment share to be but ten per cent, instead of the twenty-five per cent which you mention, and the "township share" to be thirty per cent, instead of fifteen per cent. Section 1214 G. C. reads in part:

"Except as otherwise provided in this chapter, the county shall pay twenty-five per cent of all cost and expense of the improvement. Fifteen per cent of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. If the improvement lies in two or more townships the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. Ten per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation. Provided, however, that the county commissioners by a resolution adopted by unanimous vote may increase the per cent of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvement; and provided further, that the county commissioners by a resolution passed by unanimous vote may make the assessment of ten per cent or more, as the case may be, of the cost and expense of improvement against the real estate within one-half mile of either side of the improvement or against the real estate within

one mile of either side of the improvement. Township trustees shall have the same power to increase the per cent to be specially assessed and to change the assessment area where the improvement is made on their application. * * *."

(Remainder of section relates to method of determining the amounts of individual assessments.)

Section 1217 G. C. reads:

"The county commissioners of a county in which a highway is constructed or improved, under the provisions of this act, may, by resolution, waive a part or all of the apportionment of the cost and expense of such highway as herein provided to be paid by the township or townships, and assume a part or all of the cost and expense of such highway improvement, in excess of the amount received from the state, up to the entire cost and expense of such improvement without any assessment or charge whatever upon the township or townships. The township trustees of a township in which a highway is constructed under the provisions of this chapter (G. C. sections 1178 to 1231-3), may, by resolution, waive a part or all of the apportionment of the cost and expense of such highway as herein provided to be paid by the county, and assume any part or all of the cost and expense of such highway improvement, in excess of the amount received from the state without any assessment upon the county.

Where the application for said improvement is made by the township trustees, the state may assume all or any part of the county's proportion of the cost of said improvement. In no case shall the property owners abutting upon said improvement be relieved by the state, county or township, from the payment of ten per cent of the cost and expense of such improvement, excepting therefrom the cost and expense of bridges and culverts, provided the total amount assessed against any abutting property does not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation."

Clearly, instead of increasing the basic statutory ten per cent assessment share to twenty-five per cent under favor of section 1214 G. C., your commissioners might leave that share at ten per cent, and upon resolution of the township trustees as provided by section 1217 G. C., fix the township share at thirty per cent instead of the basic fifteen per cent named in section 1214. But, has the time gone by for action to that end in the particular case you mention?

It is true that no specific time is mentioned either in section 1214 or 1217 for the determination of the township and assessment shares. However, it is noted that in the case you describe, the county commissioners followed the procedure that must be resorted to in most instances,—that is, they issued and sold bonds under authority of section 1223 G. C., in anticipation not only of the county's share of the cost of the proposed improvement, but also of the township's share and assessment share. By implication, the respective shares of the county, township, and property owners are to be fixed before bonds are issued, since by the terms of section 1223 the bonds are issued and sold

"* * * in anticipation of the collection of such taxes and assess-

ments or any part thereof, * * * in any amount not greater than the aggregate sum necessary to pay *the respective shares* * * * payable by the county, township or townships and the owners of the lands assessed * * *."

This logical course was followed in the instance to which your inquiry refers.

It is therefore clear that the proposed change involves not only an increase in the burdens of the taxpayers of the township, other than those whose real estate is within the assessment area, but also concerns the vested rights of the purchasers of the bonds. Moreover, it is to be kept in mind that by reason of section 5630-1 G. C., the county, in issuing road bonds, must

"provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of such special assessments or township tax,"

so that the proposed change involves the possibility of an increase in the burdens of the taxpayers of the county.

In these circumstances, a negative answer to the question which the township trustees have submitted to you is believed to be imperative in the light of the rule of law laid down by our supreme court in the case of *State ex rel. Flowers* vs. *Board of Education,* 35 O. S., 368.

In that case, a board of education, by vote taken at a regular meeting held on August 12, 1879, adopted for use in the schools a certain text-book. The authority for the board's action was a statute providing in substance that the board should determine the text-books to be used and that a text-book adopted should not be changed within three years after its adoption except upon consent of three-fourths of the members of the board given at a regular meeting. Following the board's action of August 12, the plaintiff, or relator, in the case, purchased and paid for the newly-adopted text-books for the use of his child, who was attending school within the jurisdiction of the board. Subsequently, on August 26, 1879, at a regular meeting, it was voted by a majority of the board to re-consider the action of August 12. The supreme court held, in substance, that by its action of August 12 the board showed that "it intended to exercise the powers conferred upon it by law;" that by its action

"its power over the subject was exhausted for the period of three years from that date, unless the text-book so adopted should be changed within that time by the consent of three-fourths of the members of the board, given at a regular meeting thereof,"

and that the vote taken on August 26, to re-consider the previous action, was a nullity.

That the principle thus applied in Ohio has been generally accepted, is shown by the following text, quoted from 15 Corpus Juris, 470:

"Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time or manner, it may modify or repeal its action; but in no event has such court or board the power to set aside or modify a judicial decision or order made by it after rights

have lawfully been acquired thereunder, unless authorized so to do by express statutory provision. * * * Where the previous action of the board is in the nature of a contract which has been accepted by the other party, or on the faith of which the latter has acted, it cannot be rescinded by the board without the consent of the other party. Conversely, where the proposition has not been accepted or acted on by the other party, the board may restrict or rescind its action. In the absence of express statutory authority, a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law. A county board or court may, however, at the term or session at which an order is made, revise or rescind it, provided this is done before any rights accrue thereunder, but ordinarily they have no power to do such act subsequent to such term or session. * * *"

In the case of *Board of Commissioners of Cass County* vs. *Road Company* 88 Indiana, 199, the supreme court of Indiana held with reference to an attempt of a board of county commissioners to revoke an order granting a highway:

"County commissioners cannot annul or set aside decisions made or judgments rendered, after the close of the term at which they were entered."

The same court, in the later case of *Plew* vs. *Jones,* 165 Indiana, 21, held (first syllabus):

"Where the board of commissioners has made a final order for the establishment of a public drain, such board has no power subsequently to vacate such order and annul such prior proceedings."

The court said in the course of the opinion:

"When the board of commissioners, on April 10, made the final order for the establishment and construction of the ditch, its jurisdiction over the cause was at an end. It had no power, either express or implied, at a subsequent term to vacate that judgment and annul the proceedings theretofore taken."

In the case of *Wren* vs. *Fargo,* 2 Oregon, 19, it was held by the supreme court (second syllabus):

"The board of county commissioners is a body of limited jurisdiction, and having approved of the sheriff's bond, the commissioners could not afterward, on their own motion disapprove the same, and thus change the vested rights of parties in the bond."

Similar rules have been laid down as to the action of the legislative bodies of municipalities. McQuillin, Municipal Corporations, sections 612 and 613; Dillon, Municipal Corporations, section 539. And in *State ex rel. Calderwood* vs. *Miller,* 62 O. S., 436, it was held (first syllabus):

"Where all of the members of a city council, in a city of the second class, vote to elect a city clerk, and one of the candidates

voted for receives a plurality of the votes cast, such candidate is duly elected, and a formal declaration of the result is not necessary to fix his right to the office; and thereafter it is not within the power of any member of the council to change the result by changing his vote."

As against the views stated, it is not believed important that the statutes do not require the giving of public notice prior to the time of the fixing by the county commissioners of the shares of the county, township and property owners. The presumption is that when they took action originally, the commissioners were governed solely by the public interest, and that if anyone interested had been dissatisfied with the action taken, he would have made protest before the action was carried into effect through the issue of bonds.

While your letter does not specify the date at which the commissioners took the action which it is now proposed to modify, it has been learned that the original resolution was adopted prior to March 1, 1921. It thus appears that at least one regular session of the board (the March session) has elapsed in the meantime. (See section 2401, fixing the first Mondays of March, June, September and December as the commencement of the regular sessions of the commissioners). It is unnecessary to inquire into the question of the power of the commissioners to rescind action taken at a previous session or term, since in the present case, as already pointed out, the rights of third parties have intervened. However, it is to be inferred from the opinion in *Makemson* vs. *Kaufman,* 35 O. S. 444, that some weight at least is to be attached to the matter of sessions or terms of county commissioners. In that case, the court in holding that county commissioners had authority to vacate an order dismissing a petition for a road improvement for want of jurisdiction, took occasion to point out both in the opinion and in the first syllabus, that the order of vacation was made at the same session as the order of dismissal.

You are advised, then, in specific answer to your inquiry, that the board of trustees of Bethel township has no authority, either with or without action on the part of the county commissioners, to assume all or any part of the twenty-five per cent assessment share as heretofore fixed in the resolution of the county commissioners.

Respectfully,
JOHN G. PRICE,
Attorney-General.