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ROAD IMPROVEMENT—CO-OPERATION OF COUNTY COMMISSIONERS AND STATE—WHEN LIABILITY ACCRUES TO PREVENT LAPSE OF STATE APPROPRIATION.

SYLLABUS:

1. *Where, prior to January* 1, 1929, *a definite contract was entered into between the State of Ohio and a board of county commissioners, for the improvement of a state road, pursuant to the provisions of Section* 1200, *General Code, a liability upon the part of the state has been incurred and consequently moneys appropriated for such purpose by the* 87th *General Assembly may be expended for such improvement after December* 31, 1928.

2. *In a road improvement proceeding under provisions of law in effect prior to the adoption of the Norton-Edwards act, no liability upon the part of the state is incurred until the contract for the improvement is executed and, accordingly, unless such contract be executed prior to January* 1, 1929, *the appropriation lapses.*

3. *Where the Director of Highways is undertaking the improvement of a state road without the co-operation of any subdivision of the state, the contract for such improvement must be entered into on or before December* 31, 1928, *in order that the moneys appropriated for such purposes by the* 87th *General Assembly may be available therefor.*

COLUMBUS, OHIO, December 1, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, as follows:

"The General Appropriation Bill, enacted by the last Legislature, provides, among other things, that the amounts therein appropriated shall not be expended to pay liabilities incurred subsequent to December 31, 1928. There are pending in this Department a number of proceedings looking toward the improvement of various sections of highway and which proceedings will, in all probability, not terminate in the execution of actual contracts prior to January 1, 1929. In view of the fact that I am called upon to act as Director of Highways for approximately two weeks following January 1, 1929, and of the further fact that no action in the way of appropriations is to be expected from the Legislature during that short period following January 1st next, I desire your official opinion and advice as to my rights and duties during such period following December 31st as I may happen to be Director.

I have not the slightest desire to hasten official action so as to infringe in any way upon matters which ought, either as a matter of law or as a matter of courtesy, to be handled by my successor. At the same time I do not wish to be dilatory during the short remaining period of my incumbency or to leave for my successor matters which it might rightfully be said should have been closed up by me.

My specific question, therefore, is as to just how far a proceeding looking toward the making of a state highway contract must be carried prior to January 1st next in order that it may legally be said that a liability has been incurred within the meaning of the Appropriation Bill referred to above. It has been suggested that if a county co-operating with the state in one of these proceedings has appropriated its share of the funds and furnished me with the final resolution prior to January 1st next then a state liability has been in-

curred and that it would be my duty to continue the proceedings after January 1st and prior to the making of a new state appropriation. It has been suggested, on the other hand, that in a given proceeding of this character I have no power or authority to take any steps after January 1st unless the letting of the work has been advertised and the bids opened and an award made and the State's share of the necessary funds certified to by the Director of Finance prior to December 31st. It may be that neither of the above statements is exactly correct. I have made them in order to make clear the meaning of my question and would respectfully request your opinions to just how far one of these proceedings for the construction of a state highway must have advanced on December 31st next in order that the condition may exist where it may be said that a state liability has been incurred within the meaning of House Bill No. 502.

You will observe that the question raised so far is based solely upon those projects in which the county is co-operating. I also desire your opinion upon the situation where the state is bearing the entire cost. In this latter case there are, of course, no dealings or agreements whatsoever with the county, the state alone determining to proceed, advertising for bids, etc., as prescribed by law. In view of the necessity of arranging the affairs of this office in accordance with whatever may be the correct rule or law, your early opinion would be greatly appreciated."

I deem it necessary to give separate consideration to the two kinds of improvements concerning which you inquire. The first improvement which you mention is the improvement of a state road in which a county co-operates. The authority to participate in the cost of the improvement of a state highway is given by Section 1191 of the General Code, and, after certain steps which need not be detailed here, Section 1200 of the Code provides as follows:

"If the county commissioners, after adopting the maps, plans, profiles, specifications and estimates are still of the opinion that the work should be constructed, and that the county should co-operate upon the basis set forth in their proposal, they shall adopt a resolution requesting the Director of Highways to proceed with the work, and shall enter into a contract with the State of Ohio providing for the payment by such county of the agreed proportion of the cost and expense. The form of such contract shall be prescribed by the Attorney General, and all such contracts shall be submitted to the Attorney General and approved by him before the director shall be authorized to advertise for bids. The provisions of Section 5660 of the General Code shall apply to such contract to be made by the county commissioners, and a duplicate of the certificate of the county auditor made in compliance with the provisions of said section shall be filed in the office of the director. All improvements upon which any county may co-operate shall be constructed under the sole supervision of the Director of Highways. The proportion of the cost and expense, payable by the county, shall be paid by the treasurer of the county upon the warrant of the county auditor issued upon the requisition of the director, and at such times during the progress of the work as may be determined by such director. Upon completion of the improvement, the director shall ascertain the exact cost and expense thereof, and shall notify the county commissioners as to his conclusions, and thereupon any balance in the fund provided by such commissioners for the county's share of the cost shall be disposed of as provided by law."

You will observe that this provision directs the execution of a form of contract between the Director of Highways and the county commissioners. You are unauthorized to proceed to advertise the contract until such contract is made. Before entering into the contract the county must of necessity provide finances for its portion of the cost of the improvement, and, under the circumstances, I am of the opinion that the contract clearly was meant to be a definite commitment by both the state and the county with respect to the improvement in question. In other words, there is an obligation upon the part of both the county and the state to make the improvement and expend funds therefor. Such being the fact, I am further of the opinion that Section 2288-2 of the General Code is applicable, which section is as follows:

> "It shall be unlawful for any officer, board of commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the Director of Finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

I believe that a contract between you and the board of county commissioners is clearly an agreement involving the expenditure of money and that, in order that it may be effectual, it is necessary that a certificate of the Director of Finance be obtained prior to its execution.

With this in mind, it is necessary to examine the provisions of the General Appropriation Act of the 87th General Assembly. Section 1 of that act contains the following language:

> "The sums set forth herein designated 'Total Personal Service,' 'Total Maintenance' and 'Total Additions and Betterments,' for the purposes therein specified, are hereby appropriated out of any moneys in the state treasury not otherwise appropriated. Appropriations for departments, commissions, bureaus, institutions and offices, for the uses and purposes of which, or of any activity or function thereof, specific funds in the state treasury are provided by law, are hereby made from such specific funds, insofar as such funds are subject by law to appropriation and expenditure for the purposes herein mentioned, and to the extent that the moneys to the credit of such specific funds on July 1, 1927, or which may be credited thereto prior to December 31, 1928, shall be sufficient to satisfy such appropriations. Any sums necessary to supply the balance of such appropriations are hereby appropriated out of any monies in the state treasury to the credit of the general revenue fund, but no moneys shall be taken from the general revenue fund to support the activities of the Fish and Game Division of the Department of Agriculture. The sums herein appropriated in the column designated 'Six Months,' or in the column designated 'Eighteen Months' shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1927, or incurred subsequent to December 31, 1928; those appropriated in the column designated 'Year' shall not be expended prior to January 1, 1928, nor to pay liabilities incurred subsequent to December 31, 1928."

Section 2, so far as pertinent, is as follows:

> "Unexpended balances of all appropriations and reappropriations, made by the 86th General Assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities, and whether the same

have been lapsed prior to the taking effect of this act with respect thereto or not, hereby appropriated from the funds from which they were originally appropriated or reappropriated and made available for the purpose of discharging such contingent liabilities.

All balances in the funds hereinafter listed, exclusive of contingent liabilities which have been lawfully incurred to the extent of such liabilities, are hereby appropriated for the use of the departments under which the same are hereinafter listed and for the purposes hereinafter listed, viz., * * * ."

You will observe that by the terms of Section 1, supra, the moneys therein appropriated cannot be spent except to pay liabilities incurred on or before December 31, 1928. The inclusion of the quoted portion of Section 2 in this opinion is made for the purpose of anticipating the probable action of the next General Assembly. This section constitutes a reappropriation of all unexpended balances against which contingent liabilities have been lawfully incurred. As this is a usual provision in appropriation acts, it is reasonable to assume that a similar provision will be found in the appropriation act of the next General Assembly. Accordingly, if a contingent liability be incurred when the next appropriation act becomes effective, means will be provided by which that contingent liability may be met. This does not mean, however, that funds will be available for meeting contingent liabilities in the interim between December 31, 1928, and the effective date of the next appropriation bill. Hence, if the liability of the state, by virtue of the contract hereinabove referred to, for the improvement of a state road, be merely contingent, then no funds for the completion of the work will be available unless and until the next Legislature will have made effective a provision similar to that of Section 2 of the Appropriation Measure of the last General Assembly.

The problem narrows down to a determination of whether or not the liability arises by virtue of the contract of the county commissioners and the Director of Highways is contingent or absolute. If it be an existing liability entered into prior to January 1, 1929, then the appropriation available therefor does not lapse.

While the exact consequences of the contract are not clear, I am of the opinion that it is sufficiently definite and is enough of a commitment of the state to expend the money to permit of it being treated as a liability of the state so that the funds for the improvement could be available after the first of January, 1929, provided the contract with the county was entered into prior to that date. It is a definite agreement between the county commissioners and the director, and in order to make it effectual the county commissioners are required to have funds on hand or in process of collection. I feel safe in assuming that in the majority of the cases the issuance of bonds and notes is necessary in order that the action of the county commissioners in entering into the agreement may be legal. While thereafter the county commissioners take no steps and the actual letting of the contract and other details are part of the functions of the Director of Highways, I do not believe that such subsequent action on your part is discretionary. That is to say, when the agreement is entered into the state has directly obligated itself to make the improvement and it is your duty to proceed to do so. This duty, of course, involves the expenditure of money and is, therefore, in my opinion, a liability within the meaning of Section 1 of the Appropriation Act of the last General Assembly.

It may be argued that there cannot be any obligation for a specific sum, since the exact cost of the improvement cannot be ascertained until the contract is let. While there is some force in this argument, I do not believe it to be controlling. The estimated cost of the state's share of the improvement would certainly be sufficient for the purpose of securing the certificate of the Director of Finance, since the estimated cost is

regarded as sufficient for the purpose of the certificate of the county auditor with respect to the county's share.

In this connection I call your attention to an opinion rendered on June 30, 1927, and reported in Opinions of the Attorney General for 1927, Vol. 2, p. 1154. In that opinion the question was presented as to the effect upon a contract, to furnish services in the way of studies and reports of operating expenses and legal services in connection with the appraisal of the property of the Ohio Bell Telephone Company, of the lapse of the appropriation therefor, subsequent to the execution of the contract. In that instance the contract did not provide definitely the amount to be expended but merely fixed a per diem amount. I there held that the contract for the furnishing of the services, once made, constituted a liability of the state and prevented a lapse of so much of the appropriation as would be necessary for the payment of liabilities existing by reason of such contract. By similar process of reasoning, I am of the opinion that the contract between the county commissioners and the Director of Highways for the improvement of a state road constitutes an existing liability, although I am not unmindful of the fact that the payments to be made for the improvement are not made to the contracting parties but to third persons who are actually employed for making the improvement. The state has agreed to make the improvement and to expend money therefor and consequently I am of the opinion that it is a liability within the meaning of the Appropriation Act.

For the foregoing reasons, you are advised that when, prior to January 1, 1929, definite contracts are entered into between the State of Ohio and a board of county commissioners (approved by the Attorney General) for the improvement of a state road, pursuant to the authority contained in Section 1191, et seq., of the General Code, a liability upon the part of the state has been incurred and consequently moneys appropriated for such purpose by the 87th General Assembly may be expended for such improvement after December 31, 1928.

You further inquire as to the status of the funds with respect to the state projects undertaken by you direct without any cooperation on the part of other subdivisions. I deem it unnecessary to set forth herein the various provisions of law governing the procedure to be followed in an improvement of this character. It is sufficient to say that I am unable to discover any definite commitment on the part of the state until the contract for the improvement has actually been let pursuant to the usual procedure. The mere advertisement for bids is not controlling, since you have the right to reject any or all bids. I accordingly feel that there is no liability on the part of the state in this character of an improvement so as to prevent the lapsing of an appropriation therefor until a contract for the improvement has been properly entered into by you in accordance with law. I am aware of the fact that Section 1206 of the General Code, which authorizes and directs you to award the contract to the lowest responsible bidder, also extends to the bidder the right to enter into the contract and furnish the bond within ten days after notification that he has been awarded the contract. I do not feel, however, that the mere award of the contract without the contract being actually entered into would create such a liability as would prevent the lapse of the appropriation. In my opinion the definite commitment does not occur until the contract is made.

Accordingly, by way of specific answer to your second inquiry, I am of the opinion that where the Director of Highways is undertaking the improvement of a state road without the co-operation of any subdivision of the state, the contract for such improvement must be entered into on or before December 31, 1928, in order that the moneys appropriated for such purposes by the 87th General Assembly may be available therefor.

In answering your inquiries I have assumed that you had reference solely to such proceedings as have been initiated since January 2, 1928, the effective date of the Norton-Edwards act, to which the provisions of law contained therein would be applicable. As to those proceedings which were pending at the effective date of the Norton-Edwards act, a different rule would apply, in so far as those improvements are financed by the co-operation of the state and one of its subdivisions. It has been the uniform practice under the provisions of law applicable prior to the Norton-Edwards act to defer securing any certificate from the Director of Finance with respect to a state aid project until bids are ready to be opened. That is to say, no definite commitment of the state is made by way of contract at all until the award of the contract for the improvement itself. In view of the existing practice with reference to state aid projects, I do not feel there is any liability, in the sense that term is used in the appropriation act, until the contract for the improvement is actually executed. Accordingly, so far as proceedings initiated under the statutes in effect prior to the Norton-Edwards act are concerned, the contract must be actually executed prior to January 1, 1929, in order to prevent the lapse of the appropriations from which such improvements are to be made.

In this opinion I have indicated to you that Section 1200, General Code, now requires the execution of a formal contract between the State of Ohio and the board of county commissioners proposing to co-operate with the state. I have also indicated that, in my opinion, a certificate of the Director of Finance is necessary as to state funds from which the improvement is to be made. I feel that, in view of the express language of the statute, a definite contract should, in each instance, be executed by yourself and the county commissioners, which contract is separate and apart from the final resolution determining to proceed with the improvement which is adopted by the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2959.

BALLOT — ELECTION — MARKING DISCUSSED — DETERMINING VOTER'S INTENTION.

SYLLABUS:

Under the provisions of Section 5070, General Code, where a voter makes his cross mark in the circular space above his party ticket on which there is but one nominee for county commissioner when there are two county commissioners to be elected, and said voter makes a cross mark to the left of one of the nominees on another party ticket, the ballot should be counted for the candidate on his party ticket above which he has placed the cross mark in the circular space, and also for the candidate so marked on the other party ticket, the voter having evidenced a clear intention to vote for the two candidates for county commissioners.

COLUMBUS, OHIO, December 1, 1928.

HON. LOUIS H. KREITER, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows: