

"By the terms of House Bill No. 173, as passed by the 87th General Assembly of Ohio on the 4th day of April, 1927, the city of Dayton was required by the provisions of Section 3 of said act (G. C. 14177-2), to file a contract with the Superintendent of Public Works of the State of Ohio to the effect that if either the State of Ohio or the United States of America, or both, shall enter upon the construction of a ship or barge canal to connect Lake Erie with the Ohio River over a route upon and along the line of the Miami and Erie Canal through the city of Dayton, Ohio, by virtue of legislation enacted either by the General Assembly or the State of Ohio, or the Congress of the United States of America, or both, said city, in that event, is obligated to construct, at its own expense, a channel in the bed of the Miami River within the present corporate limits of said city of Dayton, of the same capacity as other sections of said canal connecting therewith.

WHEREAS, The said city of Dayton, by its city manager, F. O. Eichelberger, filed such contract with the Superintendent of Public Works, duly executed on behalf of said municipality as a preliminary to the purchase of a portion of the Mad River Feeder Canal within the corporate limits of said city, and a deed conveying said Mad River Feeder Canal lands to said city of Dayton, was executed by the Governor on the 13th day of August, 1929. In order to complete this contract, it is necessary that the Governor, the Attorney General, and the Superintendent of Public Works, execute the contract on behalf of the State of Ohio, and I am therefore submitting triplicate copies of this contract for approval by each of you, as required by the provisions of the act referred to above.

Kindly approve the contract at your convenience, and oblige."

I have carefully examined the contract submitted with your communication and therein referred to, and finding the fact to be that the abandoned Miami and Erie canal lands referred to in the act of April 4, 1927 (Secs. 14177-1, et seq. G. C.) have since been sold and conveyed by the State of Ohio to the city of Dayton, and that this contract complies in all respects with the provisions of said act, the same is hereby approved as is evidenced by my signature to said contract and to the duplicate and triplicate copies thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

868.

DITCH IMPROVEMENT—MAY BE RUN THROUGH SECTION 16 SCHOOL LANDS BY COUNTY COMMISSIONERS—HOW ASSESSMENTS FOR BENEFITS PAID FOR.

SYLLABUS:

A county ditch improvement may be constructed in and upon Section 16, school lands, by the county commissioners of the county in which such lands are located, but assessments for benefits accruing to such lands by reason of the improvement can be paid for only in the manner provided for by Section 5330, General Code.

COLUMBUS, OHIO, September 14, 1929.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of the communication from you in which my opinion is asked upon a question therein stated as follows:

"Can a county ditch be legally run through original survey, Section 16, school land?"

Touching the question presented in your communication, it is noted that in an opinion of this department under date of March 17, 1915, Opinions of the Attorney General, 1915, Vol. I, page 274, it was held that under the provisions of Section 3197, General Code, prescribing the duties of township trustees with respect to the administration of school and ministerial lands, such township trustees were not authorized to pay assessments levied by the county commissioners to pay the cost of establishing a county ditch through Section 16, school land, which benefited said land. It was further held in said opinion, however, that Section 16, school lands, which have been sold or are held under a permanent lease subject to revaluation as unimproved land, may be assessed against the lessee to pay a proportionate part of the cost and expense of establishing a county ditch through said land.

The proposition first above stated is supported by the decided cases both in this state and in other jurisdictions, practically all of which cases are cited in an opinion of my predecessor directed to you under date of June 18, 1928, Opinions of the Attorney General, 1928, Vol. II, page 1516, which opinion involves a consideration of a part of Section 5330, General Code, as amended 108 O. L. Part I, page 612, which among other things provides that when school or ministerial lands are held on leases for terms not renewable forever, such lands shall be subject to special assessments benefiting such lands, and shall be paid out of the annual rents accruing to the trust.

In the opinion of this department last above referred to, grave doubts were expressed with respect to the constitutionality of this statutory provision in view of the trust relation in which the state stands with respect to school and ministerial lands by reason of its compact with the United States in relation thereto.

In view of the policy of this office which forbids it from passing upon the constitutionality of laws enacted by the General Assembly, no opinion was expressed with respect to the constitutionality of the above noted provision, but you were advised that you in your capacity as state supervisor of schools and ministerial lands would be warranted in assuming the validity of said statutory provision, and in paying out of the rentals of said lands, assessments against the same to the extent they are benefited by the improvements for which the assessments are levied.

With respect to the question presented in your communication, however, it is to be noted that in none of the former opinions of this department, or in any of the decided cases in this state and elsewhere, above referred to, was any suggestion made that Section 16, school lands, were withdrawn from the political jurisdiction of the county commissioners in the county in which such lands may be located with respect to ditch improvements or other improvements carried on under the jurisdiction and authority of such commissioners. On the contrary, it seems quite clear that Section 16, school lands, are within the jurisdiction of the county commissioners with respect to improvements of this kind, but that assessments levied against such lands for improvements benefiting the same, can be paid for only in the manner provided by Section 5330, General Code, noted above.

By way of specific answer to your question, I am of the opinion that a county ditch improvement may be constructed through Section 16, school lands.

Respectfully,

GILBERT BETTMAN,

Attorney General.