

2356.

ROADS—ASSESSMENTS ON STATE HIGHWAY IN VILLAGE—AUTHORITY OF COUNTY COMMISSIONERS DISCUSSED—SECTIONS 1193-1 AND 1213-1, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *In a proceeding instituted prior to the effective date of the Norton-Edwards act, for the improvement of a state highway through a village, the village may, under authority of former Section 1193-1, General Code, assume any part or all of the cost of such improvement within the village to be paid by general taxation assumed in the first instance by the county commissioners, and may agree to pay all or any part of the portion which either the county or the township or townships would otherwise have to pay under the provisions of former Section 1213-1, General Code.*

2. *In such a road proceeding there exists no authority in the county commissioners to relieve property owners of their liability for special assessment and impose such liability upon the interested township or townships.*

COLUMBUS, OHIO, July 16, 1928.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—This will acknowledge your communication of recent date, reading as follows:

“I am presenting the following statement for an opinion:

The commissioners of this county (Meigs) wish to join with the state highway department and the corporations of Pomeroy and Middleport, Ohio, located in Salisbury Township, in paving the street through said villages, known as State Route No. 7 and wish to pay fifteen per cent of the costs thereof by issuing bonds upon the whole township of Salisbury to pay their part and portion of said improvement, the tax duplicate being amply sufficient to carry the same.

Can said bonds be legally issued by the county commissioners without the cooperation of the trustees of Salisbury Township?”

Your letter not being clear, I have ascertained that in this instance the county commissioners have agreed to pay forty per cent of the cost of the improvement. The villages in turn have agreed to pay twenty-five per cent of such cost and it is the desire of the county commissioners to make levy against Salisbury Township for the remaining fifteen per cent of the amount originally assumed by the county commissioners, thus relieving both the county and the property owners of any cost in connection with the improvement.

Additional information has been received to the effect that the proceedings for the improvement in question were started in 1927, under the provisions of former Section 1191, et seq., General Code. In other words, an application for state aid was filed and the same was approved by the highway director in 1927, prior to the going into effect of House Bill No. 67, commonly known as the Norton-Edwards Act.

In an opinion of this department, No. 776, addressed to Hon. G. F. Schlesinger, as Director of Highways and Public Works, on July 25, 1927, it was said:

“1. That a proceeding is ‘pending’ within the meaning of Section 26 of the General Code when a board of county commissioners makes application

for state aid under the provisions of Section 1191, General Code, and that such a proceeding may be completed under the present law after the effective date of House Bill No. 67 (Norton-Edwards Bill).

2. That a board of county commissioners or a board of township trustees contracts an obligation within the meaning of Section 91 of House Bill No. 67 at such time as it files an application under Section 1191 of the General Code for state aid, in that by filing such application a board of county commissioners or a board of township trustees agrees to pay one-half of the cost of surveys and other preliminary expenses incident to the construction, improvement, maintenance or repair of an inter-county highway or main market road."

It is quite apparent, therefore, that all steps necessary to complete the improvement in question, including the levying of taxes and the issuance of bonds, must be taken under former Sections 1191, et seq., General Code, without regard to the provisions of House Bill No. 67.

I have also determined from the department of highways that there are approximately one thousand eight miles of public highway located in Meigs County and I am informed by certain county officials that the tax duplicate of said county is less than twenty-two million dollars.

As stated in your communication, the improvement is being undertaken by the State Highway Department and Meigs County, and the incorporated villages of Pomeroy and Middleport are cooperating with the said State Highway Department and Board of County Commissioners, acting under authority of the provisions of Section 1193-1.

Section 1193-1, General Code, provides in part as follows:

"When, upon the application of county commissioners or township trustees and under the supervision of the state highway department, the improvement of an inter-county highway or main market road is extended into or through a village, or an improvement constituting an extension of an improved inter-county highway or main market road is constructed within a village, it shall not be necessary for the village to assume any part of the cost and expense of the proposed improvement. If no part of the cost and expense of the proposed improvement is assumed by the village, no action on the part of the village, other than the giving of its consent, shall be necessary; and in such event all other proceedings in connection with said improvement, including the making of assessments, shall be conducted in the same manner as though the improvement was situated wholly without a village.

The village may, however, by agreement of its council made with the county commissioners or township trustees, assume and agree to pay all or any part of the cost and expense of that part of the improvement within the village assumed in the first instance by the county commissioners or township trustees and to be paid by general taxation. A village agreeing to pay any portion of the cost and expense of the improvement is hereby authorized to levy taxes upon all the taxable property of such village under the same conditions and restrictions imposed by law in the case of taxes levied for the purpose of providing funds for the payment of the village's share of the cost of street improvements under the exclusive jurisdiction and control of the council of a village and is further authorized to sell its bonds in anticipation of the collection of such taxes under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a village. The village shall pay to the county or township treasury, as the case may be, its proportion of the esti-

mated cost and expense of said improvement as fixed in the agreement between the council and the county commissioners or township trustees, and after the completion of said work and the payment of the cost and expense thereof any balance of the funds contributed by said village shall be refunded to it to be disposed of according to law."

It is noted that, under the provisions of the above quoted section, when the extension or continuation of an inter-county highway or main market road is being improved within a village or villages, it is not necessary, but entirely optional, that the village assume any part of the cost of said improvement located within said village. Under the terms of the section the village is authorized to assume and agree to pay all or *any part* of the cost and expense of that part of the improvement within the village assumed in the *first instance* by the county commissioners. It accordingly becomes necessary to determine what is meant by the words "assumed in the first instance by the county commissioners". This evidently has reference to the agreement on behalf of the county in the making of the application for state aid, as authorized by Section 1191 et seq., of the General Code. In this connection, however, the provisions of Section 1213-1 of the General Code must not be overlooked. That section, so far as applicable to the proceedings concerning which you inquire, is as follows:

"In any county in which on the twentieth day of December of any year the aggregate of the tax duplicate for real estate and personal property is twenty-two million dollars or less, and in which county there are at least seven hundred miles of public highways, the director of highways and public works may, if he deems it proper, enter into an agreement with the county commissioners of such county at any time during the ensuing calendar year, by the terms of which agreement the state may assume and pay not more than ninety per cent of the cost of any improvement petitioned for by such county commissioners.

* * *

In any case in which the authority conferred by this section is exercised by the director of highways and public works, that part of the cost and expense of the improvement assumed in the first instance by the county shall be divided among the county, interested township or townships and property owners in the following proportions; five-eighths thereof shall be paid by the county, one-fourth thereof shall be paid by the interested township or townships and one-eighth thereof shall be specially assessed. The county commissioners and the trustees of the interested township or townships may, however, agree upon a different division of that part of the cost and expense to be paid by the county and such townships."

It will thus be seen that in the case of Meigs County the commissioners were authorized to assume in the first instance such amount as might be agreed upon between the board and the director of highways and the state might assume such portion of the expense as might be agreed upon up to ninety per cent. After this agreement, however, the latter portion of the section indicates that, in the absence of any further agreement, the portion assumed by the county shall be divided among the county, interested township or townships or property owners in the proportion of five-eighths to the county, one-fourth to the township or townships and one-eighth to the property owners. Assuming that the county commissioners should agree to pay forty per cent of the cost of the present improvement, which they would be authorized to do under the section above quoted, then, in the absence of any further agreement, the county would be required to pay twenty-five per cent of the total cost, the township or townships ten per cent and five per cent would have to be assessed.

Your specific question resolves itself into a determination of whether, in assuming part of the cost assumed originally by the county, the village may, under authority of Section 1193-1, supra, merely agree to pay a part of the forty per cent, leaving the remainder to be divided in accordance with the proportion designated in Section 1213-1, supra, or whether it may go farther and agree to assume that portion of the cost which, under the distribution required by Section 1213-1, supra, would be payable by any one of the particular subdivisions interested and so relieve either the county or the interested township of its burden without a corresponding relief to the other. The question is one that is not free from doubt and it is necessary to give that construction to the language of the two sections most effectual to accomplish the purpose of the laws governing the construction of state highways.

It is quite obvious that the purpose of the Legislature was to empower the county commissioners to make a contract for the construction of the road which would be binding not only upon the county but also upon the interested townships and property owners. Accordingly the board might agree to pay a certain proportion of the cost and thereupon the portion to be borne by the county, township and the property owners becomes definitely fixed by the terms of Section 1213-1, supra. This right exists entirely independent of any right to look to the village in which the improvement may lie for any part of the cost. The authority given to the village to contribute is broad in that it is authorized to contribute any part or all of that portion assumed in the first instance by the county to be paid from general taxation. By the use of this broad language I believe it to have been the intention of the Legislature to authorize the contribution by the village on such terms as it might see fit. That is to say, if the village desires to relieve the township of any expense, it may so stipulate in its agreement and, if the agreement is accepted, no township levy could thereafter be made. On the other hand, if the village desired to relieve the county of its portion of the cost, it could so stipulate.

At this point I should call to your attention the fact that the village may only assume that part of the cost which is to be paid from general taxation and this clearly negatives any right with respect to the assumption of the liability of property owners by reason of the proceeding. That is to say, in the present instance, by virtue of the assumption of forty per cent of the whole cost by the county commissioners, one-eighth thereof automatically becomes a charge against property owners, which would be five per cent of the total cost and the village has no authority whatsoever to assume and agree to pay any of this five per cent which must be assessed.

As I understand your inquiry, the village in this instance desires to assume that portion of the ultimate cost which, under the provisions of Section 1213-1, supra, would otherwise fall upon the county. I see no objection to this course. While such action relieves the county of any direct obligation in connection with the proposed improvement, it does not in any way add to the burden cast upon the township and the property owners. Their proportion of the cost is fixed and consequently it is immaterial whether or not the county, by reason of the village's action, is relieved of its obligation.

Of course if the right exists in the village to assume the portion of the cost which otherwise would ultimately fall upon the county, it would not be necessary for the county to issue bonds and levy taxes for the payment of that portion of the cost so assumed by the village. Section 1193-1, supra, makes provision for the issuance of bonds in such cases by the village. The county could, however, issue bonds under authority of Section 1223, General Code, in anticipation of the township levy and the assessments to be made for the improvement. That section is as follows:

"The county commissioners, in anticipation of the collection of such taxes and assessments or any part thereof, and whenever such construction, improvement or repair is being done upon their application, may, whenever in their judgment it is deemed necessary, sell the bonds of said county in any amount not greater than the aggregate sum necessary to pay the respective

shares of the estimated compensation, damages, cost and expense payable by the county, township or townships and the owners of the lands assessed or to be assessed for such improvement, but the aggregate amount of such bonds issued and outstanding at any one time and to be redeemed by a tax levy upon the grand duplicate of the county shall not be in excess of one per cent of the tax duplicate of such county. In computing such one per cent bonds to be redeemed by special assessments or by tax levies upon the interested township or townships shall not be taken into account. Bonds issued under authority of this section shall state for what purpose issued and bear interest at a rate not to exceed six per cent per annum, payable semi-annually, and in such amounts, and to mature in not more than ten years after their issue, as the county commissioners shall determine. Prior to the issuance of such bonds the county commissioners shall 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 any township taxes, or any deficiency in the levy, payment or collection of any special assessments, anticipated by such bonds. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued. If bids are made for a portion of the proposed issue, the commissioners may accept a combination of bids, if by so doing the bonds will produce the best price to the county, and at the request of the purchaser the bonds may be issued in denominations of one hundred dollars or multiples thereof, notwithstanding any provision of the resolution providing for their issue. Where such construction, improvement or repair is made upon the application of the township trustees such township trustees are hereby authorized to sell the bonds of the interested township in any amount not greater than the estimated compensation, damages, cost and expense of such construction, improvement or repair, and under like conditions hereinbefore prescribed for county commissioners. The making of the special assessment hereinbefore referred to shall not be a condition precedent to the issuance of bonds under the provisions of this section and such special assessments may be made either before bonds are issued under the provisions of this section or after the issuance of such bonds."

It should be borne in mind that the bonds as issued are county bonds for which the full faith and credit of the county are pledged in case any deficiency in the township levy or special assessments arises. I also again direct your attention to the fact that the foregoing discussion is only applicable to proceedings instituted prior to the enactment of the Norton-Edwards act and the statutes under discussion are no longer effective with respect to proceedings instituted since the effective date of that act.

Your letter states that the tax duplicate of the township is in this instance amply sufficient to carry the proposed bond issue and accordingly I am not in any way attempting to give consideration to any question of tax or bond issuing limitations.

In conclusion, and by way of specific answer to your inquiry, I am of the opinion that, in a proceeding instituted prior to the effective date of the Norton-Edwards act, for the improvement of a state highway through a village, the village may, under authority of former Section 1193-1, General Code, assume any part or all of the cost of such improvement within the village to be paid by general taxation assumed in the first instance by the county commissioners, and may agree to pay all or any part of the portion which either the county or the township or townships would otherwise have to pay under the provisions of former Section 1213-1, General Code. The village cannot, however, agree to assume any part of the cost which, under the provisions of Section 1213-1, *supra*, is to be assessed against property owners, and, accordingly, there exists no right in the county commissioners to relieve the property owners of their liability

to assessment and place the burden of their proportion of the cost upon the interested township or townships. This negatives the right of the county commissioners in the specific case under consideration to issue bonds for fifteen per cent of the cost and levy against Salisbury Township. The commissioners may, however, make a levy against the township for ten per cent of the cost and make assessments for the remaining five per cent not assumed by the village and issue bonds in anticipation of the collection of the township taxes and assessments, which bonds will be county bonds for which a deficiency levy must be made and in the issuance of which no cooperation on the part of the trustees of Salisbury Township is required.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2357.

PATROLMAN IN CITY—IS OFFICER WITHIN MEANING OF SECTION
4666, GENERAL CODE—MUST BE RESIDENT.

SYLLABUS:

1. *A city patrolman or policeman is an officer within the meaning of Section 4666, General Code, and as such is required to be an elector of the city in and for which he is appointed.*

2. *The appointment of a person as a city policeman who is not a resident of the city for which he is appointed, is illegal and where such illegality persists by reason of the continued non-residence of such officer he may be dismissed from the force without reference to the provisions of Section 486-17a, General Code, relating to the dismissal of persons in the classified civil service.*

COLUMBUS, OHIO, July 16, 1928.

State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your recent communication which reads as follows:

“The State Civil Service Commission has been requested to institute an investigation of a situation under the city civil service commission of Cambridge, Ohio. This investigation was requested by a discharged patrolman and the situation as presented to this Commission by the employe and the city commission, upon which we desire your opinion, is as follows:

Several years ago a very efficient ex-soldier living about three miles from Cambridge took the examination for patrolman and being the only applicant who could ride a motorcycle the Civil Service Commission was asked to amend its rules to permit employes to be residents of the county, which was done in accordance with the provisions of Section 4666 of the General Code. Subsequently the patrolman in question, also a non-resident of the city of Cambridge, took the examination and later received permanent appointment. An Examiner from the Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State objected to the Mayor to the payment of salary which had been made to the patrolman above referred to, stating that such payments were illegal and informed the mayor that further payments would be illegal. The mayor thereupon discharged such patrolman without complying with the provisions of Section 486-17a of the General Code, and without the formal filing of charges, assuming the position that the patrolman was illegally employed and therefore not entitled to a formal order of removal.”