General Code, these bonds may not be legally issued within the calendar year of 1928. A perusal of the sections last mentioned, together with the entire Uniform Bond Act will disclose a definite purpose in the mind of the Legislature in said enactments to limit indebtedness that may be incurred by a municipality in any one calendar year.

Section 2293-25, General Code, to which you refer, provides:

> "Whenever the taxing authority of a subdivision has legal authority to, and desires to issue bonds without vote of the people, it shall pass a resolution or ordinance declaring the necessity of such bond issue, its purpose and amount. In such resolution or ordinance the taxing authority shall determine, and in any case where an issue of bonds has been approved by a vote of the people, the taxing authority shall by ordinance or resolution determine, whether notes shall be issued in anticipation of the issue of bonds, and, if so, the amount of such anticipatory notes, not to exceed the amount of the bond issue, the rate of interest, the date of such notes, and their maturity, not to exceed two years. Such notes shall be redeemable at any interest period. A resolution or ordinance providing for the issue of notes in anticipation of the issue of bonds shall provide for the levy of a tax during the year or years which such notes run, not less than that which would have been levied if bonds had been issued without the prior issue of such notes."

Assuming, without deciding, that the council has authority to take preliminary steps in 1928, looking toward an issuance of bonds in 1929, it must be concluded that notes may not be issued during the year 1928 in anticipation of the sale thereof. This conclusion must be correct because the sections heretofore referred to limit the "net indebtedness" which a municipality may incur in a given calendar year and the definition of "net indebtedness" as set forth in Section 2293-13, supra, includes "notes". If a municipality may issue such notes the maximum limitations of the act as to the amount of indebtedness that may be incurred in any calendar year are nullified. It is my opinion that no such absurd results were intended.

You are, therefore, specifically advised that when a municipality has reached its maximum limitations in the issuance of bonds for the calendar year of 1928 and thereafter takes action to authorize bonds to be issued in the following calendar year, such municipality may not legally issue notes during the calendar year of 1928 in anticipation of the sale of said bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2672.

DITCH—ASSESSMENT MADE WITHOUT NOTICE TO PROPERTY OWNER —NO AUTHORITY FOR COUNTY COMMISSIONERS TO REDUCE SAID ASSESSMENT.

SYLLABUS:

A board of county commissioners, in Ohio, is unauthorized to reduce a ditch assessment standing charged upon the tax duplicate of the county on account of an irregularity claimed to exist by reason of failure to give notice of the apportionment of assessment.

COLUMBUS, OHIO, October 5, 1928.

HON. J. R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date, which reads as follows:

> "I wish to propound the following proposition for your opinion:
>
> In the year 1919 proceedings were had before the Board of County Commissioners of Defiance County, Ohio, for the location and construction of a certain ditch, commonly known as 'Slagle Ditch.' Said proceedings were completed and said ditch was constructed according to the petition.
>
> The assessments were apportioned according to the benefits and the same were taxed upon the Tax Duplicate of this county for collection.
>
> One of the interested parties by the name of R. N., who owned a considerable tract of land draining into said ditch was at the time said ditch was located and constructed a non-resident of Defiance County. It appears from the proceedings and the record thereof that said R. N. was not duly served with a notice of the hearing on said ditch by publication as required by law. Mr. N. claims he was not given a chance to present his objections to the apportionment and has ever since refused to pay the assessments which amounted in all to about six hundred and fifty ($650.00) dollars.
>
> In order to dispose of the matter it was suggested to me that proceedings be brought against Mr. N. for the collection of the assessments. Upon examining the records of the proceedings on said ditch, I learned that there was no proof of publication of the notice of the hearing on said improvement.
>
> Mr. N. is a learned attorney and I knew that he was relying upon this defect of the proceedings. I took the matter up with him and learned that he is willing to pay a portion of the assessment; namely, the sum of three hundred and twenty ($320.00) dollars, the amount which he claims he was benefited.
>
> The question I wish to propound for your opinion is this:
>
> Are the County Commissioners authorized to compromise and settle this assessment for the sum of three hundred and twenty dollars, or will it be necessary to file a suit to attempt to make the collection?"

At my request you further inform me that:

> "The petition for the improvement of said ditch was filed on February 12, 1919.
>
> The commission entered on their Journal Entry a finding in favor of the improvement as of the date May 12, 1919.
>
> The contract for the improvement was let on the 2nd day of June, 1919."

On June 19, 1919 (108 v. Pt. I, 926), the Legislature passed an act entitled:

> "An Act—To codify, consolidate, and clarify the ditch laws of the state according to the report of the commission appointed therefor, under an act passed March 21, 1917 (O. L. 107 v. 611), * * * and to repeal all sections of the General Code superseded by, or in conflict with such reported codified consolidation."

You will note that the proceedings incident to the ditch about which you inquire were instituted just prior to the enactment of such act and were, therefore, governed by prior provisions.

Your attention is directed to the following sections of the General Code which were in force and effect on the date when said ditch proceedings were instituted.

By the terms of Section 6443, General Code, it was provided that:

"The board of county commissioners, at a regular or called session, when necessary to drain any lots, lands, public or corporate road or railroad, and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed * * * a ditch, drain or watercourse * * *."

As provided by Section 6446, General Code:

"Application for such improvement shall be made to the commissioners of the county * * *."

Section 6447, General Code, required that:

"A petition shall be filed with the county auditor setting forth the necessity and benefits of the improvement and describing the beginning, route and termini thereof. It shall also contain the names of the persons and corporations, public or private, who, in the opinion of the petitioner or petitioners are in any way affected or benefited thereby. * * * If the name of a person or corporation, either public or private, in any way affected by the proposed improvement, is omitted from the petition, the county commissioners upon discovering that such omission has been made, shall supply the same, and cause notice to be served as herein provided."

Section 6448, General Code, provided that:

"The county auditor shall thereupon give notice to the commissioners of the filing of such petition * * *. He shall fix a day for the hearing thereon, not more than thirty days from the date of such notice. The auditor shall prepare and deliver to the petitioners, or any of them, a written notice directed to the lot or land owners and to the corporations, either public or private affected by the improvement, setting forth the substance, pendency and prayer of the petition."

As provided by Section 6449, General Code:

"The county auditor shall also prepare copies of the notice * * *. At least fifteen days before the date set for hearing one copy of the notice shall be served upon each lot or land owner, or left at his usual place of residence and upon an officer or agent of each public or private corporation operating or having a place of business in the county. The person who serves such copies shall make return on the notice, under oath, of time and manner of service, and file it with the auditor on or before such day, * * *."

Section 6450, General Code, then provided:

"The county auditor, at the same time shall give a like notice to each lot or land owner who is a non-resident of the county, by publication in a newspaper printed and of general circulation in the county, at least two weeks before the day set for hearing. Such notice shall be verified by affidavit of the

printer, or other person, knowing the fact, and filed with the auditor on or before such day, and no further notice of the petition or the proceedings had thereupon shall thereafter be required."

Section 6451, General Code, then provided:

"The county commissioners shall meet at the place of beginning of the ditch * * * on the day fixed * * * and hear the proof offered by any of the parties affected by said improvement, and other persons competent to testify * * *. If the commissioners find for the improvement, they shall fix a day for the hearing of applications for appropriation of land taken therefor and damages that persons, affected by said improvement, may sustain thereby * * *."

As provided by Section 6454, General Code,

"If the county commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor to go upon the line described in the petition * * * and survey and level it * * * make a report * * *."

By the terms of Section 6455, General Code:

"The commissioners shall, also by their order direct the county surveyor or engineer to make and return a schedule of all the lots and lands, and public or corporate roads or railroads that will be benefited, with an apportionment of the cost of location, and the labor of constructing the improvement, in money, according to the benefits which will result to each * * * and a specification of the manner in which the improvement shall be made. * * *"

Section 6489, General Code, provided:

"When the working sections of the improvement are let, and the costs and expenses of location and construction, and all compensation and damages are ascertained, the county commissioners shall meet and determine at what time and in what number of assessments they will require them to be paid, and order that such assessments be placed on the duplicate, against the lots, lands, corporate roads or railroads assessed. * * *"

Section 6490, General Code, provides:

"When the county commissioners make an assessment they shall cause an entry to be made, directing the auditor to make and furnish to the treasurer of the county a special duplicate with the assessments arranged thereon, as required by their order. The auditor shall retain a copy thereof in his office and all assessments shall be collected and accounted for by the treasurer as taxes. When an assessment remains uncollected for one year after it is placed upon the special duplicate, unless otherwise ordered by the commissioners, it shall be placed on the general duplicate for collection, together with a penalty of not less than six per cent annually, as county ditch taxes. * * *"

Sections 6499 and 6500, which were in effect at the time the improvement in question was authorized, have been superseded by analogous Sections 6503 and 6504, which now govern procedure for an attack upon the validity of the assessments in question.

Section 6503 now reads as follows:

"Any owner of land affected by an improvement who has not received notice thereof and has not had an opportunity to be heard as in this act (G. C. Sections 6442 to 6545, 6603 to 6607, 6653 and 6691 to 6704) provided, may bring an action in the common pleas court of the county wherein his land is located, against the board of county commissioners in their official capacity to recover any tax or assessment therefor, if paid, or to enjoin any tax, assessment or levy therefor upon his lands, or to recover for any damages sustained, or for compensation for any property taken, and his rights and remedies in such action shall be as for any like demand, but in such action it shall be competent for the board of county commissioners to plead and prove the value of any actual benefit to the land by reason of the improvement in litigation; the rights herein granted shall be in addition to all other rights provided by law."

Section 6504 now reads as follows:

"The court in which a proceeding is brought to recover a tax or assessment paid, or to declare void the proceeding to locate or construct an improvement, or to enjoin a tax or an assessment levied or ordered to be levied to pay the costs thereof, if there is manifest error in the proceedings, shall allow the plaintiff in the action to show that he has been injured thereby; if the court finds that the board of county commissioners had jurisdiction to hear and determine the petition and to levy the assessments, then the court may hear evidence to determine the amount of the assessment, if any, which the plaintiff shall be required to pay and enter a decree accordingly."

The Supreme Court of Ohio in the case of *County Commissioners* vs. *Gates*, 83 O. S. 19, held:

"Now a county is not a body corporate but rather a subordinate political division, an instrumentality of government, clothed with such powers and such only as are given by statute, and liable to such extent and such only as the statutes prescribe. The board of county commissioners acts in such matters as the construction of ditches in a political rather than a judicial capacity, and that body also in such action is clothed with such powers only as the statutes afford. The board represents in general in a proceeding of this character the land-owners whose lands are to be benefited by the improvement. In its corporate capacity the county has no special interest in the improvement."

The Supreme Court had previously announced in *Jones, Auditor*, vs. *Commissioners of Lucas County*, 57 O. S. 189, that:

"The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given to it by statute."

This principle is further affirmed in *Peter* vs. *Parkinson, Treasurer*, 83 O. S. 36:

"While in a sense the board of commissioners is the representative and financial agent of the county, its authority is limited to the exercise of such powers only as are conferred upon it by law." (p. 49.)

The specific authority of the county commissioners in regard to the release of claims against the county is found in Section 2416, General Code, which provides:

"The board may compound or release, in whole or in part, a debt, judgment, fine or amercement due the county, and for the use thereof, except where it, or either of its members, is personally interested. In such case the board shall enter upon its journal a statement of the facts in the case, and the reasons for such release or composition."

The terms "debt, judgment, fine or amercement" were held by the Ohio Supreme Court not to include personal taxes charged upon the tax duplicate of the county against an individual in the case of *Peter* vs. *Parkinson, Treasurer, supra.* While an assessment, though generally recognized as a special form of tax, may be distinguished from a general tax in certain respects, the distinctions made by the court in the above case are equally applicable to assessments. Clearly an assessment is no more a "fine" or an "amercement" than a personal tax. No more does an assessment constitute a judgment.

"That taxes are not embraced in either of the descriptive terms 'fine' or 'amercement' employed in the above statute is at once obvious, and is admitted, and we think it equally clear that although the assessment of the tax and its entry or charge upon the duplicate, may, for the purpose of statutory collection, as definitely and conclusively establish the right of the treasurer to demand such tax as would a judgment, yet such assessment and charge do not in a technical, or in any proper sense, constitute a judgment. A judgment is the judicial determination or sentence of a court rendered in a cause within its jurisdiction; and such is the common acceptation and meaning of the term, and it is in this sense, we think, and in this sense only, that the word judgment is used in the foregoing section." (*Peter* v. *Parkinson*, pp. 46, 47.)

Neither does an assessment supply any of the essentials of a "debt" not equally possessed by a tax.

"In *City of Camden* vs. *Allen*, 2 Dutcher's Reports (New Jersey), 398, Chief Justice Green says: 'A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement. It operates *in invitum*. *Pierce* vs. *City of Boston*, 3. Metc. 520. A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon contract express or implied.' In *Perry* vs. *Washburn*, 20 Cal. 318, Field, C. J., in discussing the provision of the act, of congress making United States notes 'a legal tender in payment of all debts public and private,' says: 'Taxes are not debts within the meaning of this provision. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and state; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It

owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer." (*Peter* v. *Parkinson*, pp. 46, 47.)

This view is in line with the authorities generally upon the subject. 26 R. C. L. 25.

There is, however, a distinction between the facts in *Peter* vs. *Parkinson, Treas., supra,* and those presented in your letter, in that the assessments were determined and certified by the county commissioners, while their only participation in the assessment of personal taxes is to fix the rate of taxation. This raises the further question of the power of the commissioners to correct or revise the amount of the assessments after they are entered upon the treasurer's duplicate for collection.

Section 6490, above quoted, provided, at the time the improvement in question was made, that the commissioners should direct the auditor to place the assessments upon a "special duplicate" and that when an assessment should remain uncollected for one year, it should be placed on the "general duplicate" for collection, with a penalty of not less than six per cent per annum, *"unless otherwise ordered by the county commissioners."* If it were intended by this section to invest the commissioners with power to make adjustments in the amounts of the assessments, it is clear that it was further intended to limit that power to the time during which the assessment appeared only upon the special duplicate.

Section 2589, General Code, also grants to the county auditor power to effect deductions from taxes or assessments where they have been "erroneously charged"; and to the county commissioners to authorize the repayment thereof when they have been "erroneously charged and collected." In the case of *Christ* vs. *Cuyahoga County Commissioners*, 23 O. D. 125, the court held that the errors contemplated in this section did not include "fundamental mistakes occurring in the original or primary act," but merely related to clerical errors.

The general powers of county commissioners are defined by Section 2408, General Code, which reads as follows:

> "The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain and defend all suits in law or in equity, involving an injury to any public, state or county road, bridge, ditch, drain or water-course established by such board in its county, and for the prevention of injury thereto. The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county or any money or other property due the county. The money so recovered shall be paid into the treasury of the county, and the board shall take the treasurer's receipt therefor and file it with the county auditor."

The decision in the case of *Peter* vs. *Parkinson, supra,* is further to the effect that:

> "Neither by this statute (2408) nor any other, is the board of county commissioners empowered to settle, remit or release either in whole or in part, taxes that stand charged on the duplicate and are unpaid."

It is obvious that the language of this section (2408) can not be construed as applying any differently in respect to the release of taxes than to the release in whole or in part of assessments.

From the foregoing it seems to have been the apparent intention of the Legislature to confine the power of county commissioners to the original levy of assessments. Where the owner of the assessed property has received notice and participated in the hearing, he may appeal by virtue of Section 6467 (formerly Section 6474). Where he claims lack of notice or other irregularity in the proceedings to assess, he may apply to the Common Pleas Court for the remedies provided in Sections 6503 and 6504, supra. Similar provisions exist for inquiry by the Common Pleas Courts into the reasonableness of road improvement assessments in Sections 12078-2 and 1231-6, General Code.

Answering your question specifically, I am of the opinion that the county commissioners are not authorized to compromise and settle the assessment concerning which you inquire for the sum of $320.00. It will be the duty of the county treasurer to enforce collection in a manner prescribed by law unless suit is brought to enjoin such action by the owner of the property assessed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2673.

CORONER—PER ANNUM COMPENSATION IN COUNTIES OF UNDER 400,000 POPULATION.

SYLLABUS:

The coroner of a county having a population of less than four hundred thousand, according to the last federal census, who was in office on August 1, 1927, *the effective date of House Bill No.* 485 (87*th General Assembly*, 112 *v.* 204, 205) *amending Sections* 2856-5a *and* 2866-1, *General Code, is entitled to the difference between the fees earned by such coroner and the minimum compensation of* $150.00 *per annum prescribed by Section* 2866-1 *as amended.*

COLUMBUS, OHIO, October 5, 1928.

HON. HARRY K. FORSYTH, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of September 26, 1928, requesting my opinion, which letter reads as follows:

> "Would the Coroner of Shelby County, said County having a population less than 400,000 according to the last Federal census, who was in office August 1, 1927, the effective date of House Bill No. 485 enacted by the last Legislature, be entitled to the difference between the earned fees and the minimum fee of $150.00 provided in said Bill, in case the earned fees for the period dating from the first Monday in September, 1927, to the first Monday in September, 1928, were less than the minimum fee provided by said Bill?
>
> I note by the Advance Opinions of the Attorney General, viz., Opinion No. 1057, that certain questions relating to the rights and duties of Coroners under House Bill No. 485 have been dealt with by you. If the specific question I ask is covered by said Opinion, kindly mail me a copy of same."

The question presented by you was answered by this office in Opinion No. 1057, rendered under date of September 26, 1927, to the Bureau of Inspection and Supervision of Public Offices, Opinions, Attorney General, 1927, Volume III, Page 1856. The second and fourth branches of the syllabus of this opinion read as follows: