369.

STATUTE OF LIMITATIONS—FINDING FOR RECOVERY BY BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—COMMENCES TO RUN WHEN REPORT FILED WITH OFFICIAL WHOSE DUTY IT IS TO BRING SUIT.

SYLLABUS:

When, upon the inspection of the accounts of a taxing district, public institution or public office by the Bureau of Inspection and Supervision of Public Offices, it is found that any public money has been illegally expended or that any public money collected has not been accounted for, or that any public money due has not been collected or that any public property has been converted or misapplied and the report of the examination sets forth that fact the cause of action for the recovery of said moneys does not accrue until the filing of the report with the offices charged with the duty under Section 286, General Code, to institute suit therefor, and all statutes of limitations otherwise applicable thereto do not begin to run until the date of such filing.

COLUMBUS, OHIO, March 24, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—My opinion is requested concerning a question which may be stated thus:

> Where a finding for recovery in favor of a municipality is made by the Bureau of Inspection and Supervision of Public Offices in pursuance of the authority granted to it by Section 286 of the General Code of Ohio does the time fixed by statute within which an action may be brought thereon, otherwise known as the statute of limitations, begin to run from the date of the said finding or from the due date of the items of alleged indebtedness to the municipality upon which the finding is based?

In connection with this inquiry you have submitted a letter from one of your examiners from which it appears that a grade crossing elimination project had been carried on by the city in question under and by virtue of a court decree bearing date May 15, 1916. This decree expressly states that it is made without prejudice to the right of the city to require any street railway company or companies constructing or operating a track or tracks over or upon said improvement, to pay the maximum proportion fixed by law of the cost of the improvement which the city, by the terms of the decree, was required to pay.

The part of the decree relating to the right of the city to require any street railway company or companies constructing or operating a track or tracks over or upon the said improvement, to pay a part of the cost of the improvement, and the subsequent legislation of the council of the city with reference thereto, was evidently made in conformity with Sections 8892 and 8893 of the General Code of Ohio. Said Section 8892, General Code, provides that in case the track or tracks of any street railway company or companies within the limits of a municipality where a grade crossing elimination project is being carried out, cross at grade or otherwise, a public street or the right of way of any railroad company or companies at a point where, under the plans and specifications therefor, it has

been determined to construct the said improvements, the municipality may by ordinance require such street railway company or companies to bear a reasonable proportion of the cost assumed by it in making the improvement, not to exceed one-half of the proportion payable by the municipality and that the said municipality shall have a right of action against such street railway company or companies for the part of the cost of the improvement which the ordinance requires it or them to bear.

Section 8893, General Code, provides that the council of such municipality may by ordinance provide the mode and time or times of payment for the proportion of the cost of such improvement to be borne by such street railway company or companies.

Pursuant to this authority the council of the city passed an ordinance on July 10, 1916, providing, in part, that the street railway company in question should pay one-half of the amount decreed by the court to be paid by the city, being seventeen and one-half percent of the entire cost of the improvement. The said ordinance further provided that each of the parties in charge of any part of the construction work should make monthly bills against each of the parties participating in the expenditure in connection with the work, for their proportion of the work done during the month; such bills, when properly certified and approved to be paid as provided by the ordinance, on or before the 25th day of the month following the month in which the bills were made.

Your examiner further states in his letter:

> "A search of the records fails to disclose that any formal agreement was entered into between the city and the street railway company.
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> Various expenditures were made by the city in connection with this improvement from 1916 to 1929; however, the bulk of the payments were made from 1919 to 1926.
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> In connection with the audit of the records and accounts of the City * * made under date of December 31, 1930, it was found that no payments had been received by the City from the street railway company, and consequently a finding for recovery was made against the * * Railway Co., * * for the sum of $273,454.27. The report was released under date of May 13, 1932.
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> Since no formal contract can be found we are not sure whether the limitations of cause of action of six years as set forth in Section 11222 General Code would apply in this case, or whether since the entire project was carried forward under court decree, the share of cost to be borne by the street railway company is to be considered as a judgment rendered against the street railway company.
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> The question now arises as follows:
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> If the limitation of six years applies in this case, does it begin to run with respect to the various items making up the amount due the city on the date such items became due or in view of the fact that a finding for recovery was rendered against the street railway company, should the limitation begin to run May 13, 1932."

The mere fact that this grade elimination project was carried out under court decree does not, in and of itself, create any liability against the street rail-

way company in question. The decree of the court does not even assume to fix any liability on the street railway company for a proportionate share of the cost of this improvement. That liability is fixed by ordinance of council. There is no ground for saying that the share of the cost of this improvement to be borne by the street railway company is to be considered as a judgment against the street railway company.

Section 8892, supra, provides that when the liability of a street railway company for a portion of the cost of a grade elimination project is fixed by ordinance, the municipality "shall have a right of action against such street railway company or companies for that part of the cost which the ordinance requires it or them to bear."

I am of the opinion that the limitation of time within which an action may be brought to enforce the "right of action" spoken of in Section 8892, supra, when a municipality has fixed by ordinance the liability of a street railway company in connection with a grade elimination project carried on by the municipality, is fixed by Section 11222 of the General Code. This section provides:

> "An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

The only question which will be considered in this opinion is whether or not the cause of action accrued at the time of the making of the finding for recovery by the Bureau of Inspection and Supervision of Public Offices, to wit: on May 13, 1932, or at the time of the due date of the several items of indebtedness due to the municipality upon which the finding was based. Pertinent sections of the General Code read in part, as follows:

> "Sec. 274. There shall be a bureau of inspection and supervision of public offices in the department of auditor of state which shall have power as hereinafter provided in sections two hundred seventy-five to two hundred eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state offices, * * of each taxing district or public institution in the state of Ohio. * *"
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> "Sec. 284. The bureau of inspection and supervision of public offices, shall examine each public office."
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> "Sec. 286. The report of the examination shall set forth, in such detail as may be deemed proper by the bureau, the result of the examination with respect to each and every matter and thing inquired into and shall be made and signed by the state examiner in charge of the examination or by a deputy inspector, and shall be filed in the office of the bureau of inspection and supervision of public offices and certified copies thereof filed as follows: one in the office of the auditing department of the taxing district reported upon, and one in the office of the attorney general, prosecuting attorney, city solicitor, or mayor of a village as hereinafter provided.
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> If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the

taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political sub-division or taxing district to which such public money is due or such public property belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. * *"

"Sec. 286-1. The civil actions provided for in section 286 of the General Code may be entertained, heard and determined by any court having jurisdiction of the amount involved or having jurisdiction to afford the remedy prayed for, notwithstanding the absence of any other provision of law authorizing such civil actions to be filed by the attorney general, prosecuting attorney, city solicitor or legal counsel employed by the mayor of a village. In any such action it shall be sufficient for the plaintiff to allege in the petition so much of the report of the bureau of inspection and supervision of public offices as relates to the claim against the defendant therein and that the amounts claimed against the defendant are unpaid, and it shall not be necessary in such petition separately to state and number any separate causes of action, the findings of such report, upon whatever claims or circumstances based, being considered for that purpose as constituting a single cause of action; nor shall the plaintiff be required to set forth in the petition any other or further matter relating to such claims. A certified copy of any portion thereof, shall constitute prima facie evidence of the truth of the allegations of the petition."

"Sec. 286-3. No cause of action on any matter set forth in any report made under authority and direction of section 286, General Code, shall be deemed to have accrued until such report is filed with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof, and all statutes of limitations otherwise applicable thereto shall not begin to run until the date of such filing."

It is a settled rule of law stated and applied by the courts of Ohio from the earliest times, that when the terms of a statute are not ambiguous nothing is left for construction. *Pancoast* vs. *Ruffin,* 1 Ohio, 381, 385; *McCormick* vs. *Alexander,* 2 Ohio 65, 74. As stated by the Supreme Court in the case of *Maxfield, Treasurer* vs. *Brooks, et al.,* 110 O. S. 566:

"Where the Legislature's language is clear there is nothing for the judiciary to construe. It is solely the duty of the courts to reasonably apply the statute so as to effect its obvious purpose."

The language of Section 286-3, supra, is not ambiguous. It clearly expresses the legislative intent that causes of action arising for the recovery of public moneys found to be due a taxing district or other public agency by virtue of Section 286, General Code, should not be deemed to have accrued until the report of the examination setting forth a statement of such moneys is filed with the officer or legal counsel charged with the duty of instituting suit for the recovery of the money.

These statutes, Sections 274, 284 and 286, et seq. General Code, creating the Bureau of Inspection and Supervision of Public Offices and defining its powers and duties were held to be constitutional by the Supreme Court in the case of *State ex rel Smith, Prosecuting Attorney* vs. *Maharry,* 97 O. S. 272. It is stated

by the court in this case that these sections are remedial statutes and therefore should be liberally construed and applied to effect their clear and controlling purpose. That clear and controlling purpose is said to be the conservation of public money and public property and the affording of a remedy for the recovery to the public of any such public money or public property misappropriated or improperly withheld.

The only instance in which Section 286-3, General Code, has been considered by the courts in its application to causes of action was in the case of *State ex rel. Campbell, Prosecuting Attorney* vs. *Ballard,* 8 O. App., page 44. In that case there was involved the recovery on account of illegal payments of public moneys which payments had been made before the enactment of Section 286-3, General Code. The report of the examination was filed by the Bureau of Inspection and Supervision of Public Offices subsequent to the enactment of the statute. It was held by the court as stated in the syllabus:

> "The special provisions of Section 286-3, General Code, that no cause of action on any matter set forth in any report made under authority and direction of Section 286, General Code, shall be deemed to have accrued until such report is filed with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof, and that all statutes of limitations otherwise applicable thereto shall not begin to run until the date of such filing, apply in a case founded upon a report filed after the taking effect of such provisions. This is true despite the fact that the illegal payments of public moneys were made before the enactment of Section 286-3. The legislature by the enactment of Sections 286, 286-1, 286-2 and 286-3, General Code, not only created a new right, but also provided therein a new remedy for this new right, and that the statute of limitations against this cause of action to recover an illegal or unauthorized payment of public moneys should not begin to run until the filing of the report by the state officials."

In the course of the opinion the court said:

> "It appears to us that the legislature not only created a new right by Sections 286, 286-1, 286-2 and 286-3, but also provided therein that all statutes of limitations otherwise applicable thereto shall not begin to run until the date of the filing of the report by the Bureau of Inspection and Supervision of Public Offices. In other words, they provided a new remedy for this new right and also that the statute of limitations against this cause of action to recover the illegal or unauthorized payment of public moneys should not begin to run until the filing of the report by the state officials."

In the instant case, the examiner determined that certain public money was due to the municipality and had not been collected, and found that this money was due from the street railway company in question. This fact was set forth in his report which was filed, as he states, on May 13, 1932. Thereupon, there accrued to the municipality a cause of action for the recovery of said moneys and I am of the opinion that any applicable statute of limitations began to run upon the date of the filing of said report.

Respectfully,
JOHN W. BRICKER,
Attorney General.