

957.

NEW DITCH CODE—SERVICES OF COUNTY SURVEYOR AND SUCH EMPLOYEES AS CHAINMEN, AXEMEN AND RODMEN ARE NOT TO BE CALCULATED ON FEE BASIS—SALARY AND COMPENSATION HOW ASSESSED—COUNTY AUDITOR NOT ENTITLED TO FEES UNDER NEW DITCH CODE—EXCEPTION.

1. *Under the New Ditch Code (108 O. L. 926) the services of the county surveyor and of such employes as chainmen, axemen and rodmen in connection with a ditch improvement, are not to be calculated on a fee basis, but are to be calculated and assessed against affected lands at actual cost to the county as represented by the proportionate part of the salary of the surveyor and the proportionate part of the compensation of his assistants and employes as fixed by him under the provisions of section 2788 G. C. The amount of such salary and compensation as assessed is to be returned to the general fund out of the general ditch improvement fund.*

2. *County auditors are not under the New Ditch Code entitled to any fees; nor are they entitled to a percentage on ditch assessment collections, except in the event that an assessment on becoming delinquent is carried to the general duplicate and collected as provided in section 31 of said code, in which event the auditor is entitled to the percentage on such delinquent assessment named in section 2624 G. C., said percentage to be charged to the general county fund and credited to the fee fund.*

COLUMBUS, OHIO, January 23, 1920.

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

GENTLEMEN—Consideration has been given to your letter reading as follows:

"We respectfully request your written opinion upon the following matters:

Section 6530 G. C. formerly provided, under the chapter headed 'Single County Ditches,' that each chainman, axeman and rodman shall receive \$2.00 per day for the time actually employed. This section was repealed by Senate Bill No. 100, 108 O. L. 926, and so far as we are able to determine nothing in the re-codification of the ditch laws provides for the employment or payment of chainmen, axemen, and rodmen as such in ditch work. Where it is necessary to use such employes in the future, how are same to be appointed and paid?

Section 6529 G. C., which provided the fees of the surveyor or engineer on ditch work, was also repealed by Senate Bill No. 100. Is it not necessary for the surveyor in taxing his fees in ditch proceedings to proceed under the provisions of section 2822 of the General Code?

We observe that all of the sections under the sub-head 'Fees,' of the chapter entitled 'Single County Ditches,' from section 6523 to section 6535 G. C., inclusive, have been repealed. Hence, we take it that after Senate Bill No. 100 went into effect the county auditor would no longer be entitled to charge any fees, such as mentioned in the old sections 6524 and 6449 G. C., because of the fact that we know of no other section that provides fees for the auditor for services similar to those mentioned in said repealed sections."

Amended Senate Bill No. 100, referred to in your letter, is an act which went into effect October 10, 1919. Its purpose was "To codify, consolidate and clarify the ditch laws of the state * * * and to repeal all sections of the General Code superseded by or in conflict with such * * * codified consolidation." The provisions of the

act are now designated as sections 6442 to 6535 G. C. (108 O. L. 926), but for the sake of brevity the act will be herein referred to as the New Ditch Code, and the original section numbers will be used.

Prior to the adoption of the New Ditch Code, there was in force as part of the chapter entitled "Single County Ditches" a series of statutes, sections 6523 to 6535, prescribing the amount of fees or per diem to be paid for services under the provisions of said chapter, to county commissioners, auditors, sheriffs, jurors, witnesses, surveyor, chainmen, axemen, rodmen, and other employes. All of those sections, as noted in your letter, were repealed by the New Ditch Code.

In view of these radical changes, upon what basis are chainmen, axemen and rodmen to be paid when employed for ditch work, and what rule is to be applied in the matter of compensation for the services of the county surveyor in like work?

So far as has been found upon an examination of the New Ditch Code, the only provisions therein for a standard of fees are those of sections 57 and 58. Section 57 relates to per diem of county commissioners. Section 58 reads:

"The fees that shall be charged and collected for services required of any public officer under this chapter, if not specifically otherwise designated, shall be the fees allowed for like service in the office to which he was elected or appointed, and if he be an officer receiving a salary, and his collection of fees go to the county, then such fees collected hereunder shall be in like manner accounted for.

Publication of notices, and service by publication in this chapter required, shall be paid at the legal rate provided for publication of like matter originating in the common pleas court."

In determining the status of the county surveyor as to compensation, heed should be given the following provisions of the new law:

In section 1, "Definitions," the following paragraph appears:

"The words 'county engineer' shall be deemed to refer to and include an elected or legally appointed county surveyor, and any legally appointed engineer in charge of any improvement provided for in this chapter; and also any duly appointed deputy of such county surveyor or engineer in charge of work, providing such appointment has been approved by the county commissioners, or court, as in this chapter provided."

Section 3, after referring to the matter of the filing of a petition for an improvement, goes on to provide in substance that the board of county commissioners or common pleas court which is to pass upon the petition shall order the county engineer to prepare maps, profiles and estimates of the proposed improvement; to report the cost of replacing bridges; and to estimate damages to lands, etc.

"And he shall file therewith a statement of the *actual cost and expenses* of his proceedings and report, including the time of any assistants, at its *actual cost to the county*, but not to exceed the rate regularly paid to the chief deputy of the county engineer."

Section 7, relating to hearing on petition, provides for the public reading at said hearing of the report and recommendations of the engineer.

Sections 11 and 12 provide, among other things, that if the petition be granted, all the cost and expense connected with the proceedings of the commissioners or court, as well as the cost and expense of the construction of the improvement, shall be assessed upon benefited property; while if the petition be refused, then the commissioners

or the court "shall dismiss the petition and proceedings at the cost of the petitioners."

Section 13 specifies in much detail the steps to be taken by the engineer if the petition is granted—such as completion of preliminary survey, making of records and schedules, preparation of drawings and specifications, and with the aid of the prosecuting attorney, the arrangement of forms of contract and bond.

Section 14 provides for submission by the county engineer of such plans and specifications to the county commissioners or the court; and section 15 provides for the letting of the work by the county engineer on the day fixed by the commissioners or court—notice of letting being given by the engineer. Sections 16 and 18 relate to receipt and canvassing of bids by the county engineer. Section 26 provides that all work done and material furnished shall be under the supervision and inspection of the county engineer. Section 28 directs the assessment against benefited lands of the total cost of the improvement, "including the preliminary cost, and the actual or estimated cost of supervision and any known costs of litigation taxed against the county," provided that a percentage of such total cost may be ordered paid by the county, and section 29 prescribes the plan to be followed by the county engineer in making the assessment.

Section 50 reads in part:

"From the general ditch improvement fund, except as otherwise by law provided, all costs and expenses of improvements under this chapter shall be paid including damages, compensation, contract prices of construction, engineering expense, *except the salary of the county engineer*, costs and expenses of litigation, except the services of the prosecuting attorney and of any other county officer, deputy or employee for whose services, fees or costs are by law collected, which go into the county fee fund for payment of the same."

In connection with these several references to the New Ditch Code it is proper to call attention to certain provisions of statute dealing directly with the office of county surveyor. Among these are section 2787, making provision for annual allowance by county commissioners of aggregate compensation to be expended during the year by the surveyor for "assistants, deputies, draughtsmen, inspectors, clerks or employes in his office," subject to the right of the surveyor to make application to the common pleas court for additional allowance; section 2788 authorizing the surveyor to appoint and fix the compensation of assistants, deputies, draughtsmen, inspectors, clerks or employees section 7181, stating, among other things, that the county surveyor shall give his entire time and attention to the duties of his office;" and that his salary, computed on a certain basis, "shall be paid monthly out of the general county fund * * * and shall be instead of all fees, costs, per diem and other allowances, and all other perquisites of whatever kind or description which any county surveyor may collect or receive;" and section 2792 reading:

"The county surveyor shall perform all duties or the county now or hereafter authorized or declared by law to be done by a civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches, and other public improvements, except buildings, constructed under the authority of any board within and for the county. When required by the county commissioners he shall inspect all bridges and culverts, and on or before the first day of June of each year report their condition to the commissioners. Such report shall be made oftener if the commissioners so require."

It is altogether plain from the foregoing notations that if the county surveyor is entitled to fees for ditch work, he is under the duty of paying them over to the county. But is he entitled to any fees?

Former section 6529, repealed with the going into effect of the New Ditch Code, read:

"The surveyor or engineer shall receive five dollars per day for the time actually employed on the work designated for him to do, and necessary and actual expenses for the time so employed."

While certain sections bearing on the fees of county surveyor remain in the series of sections 2782 to 2822, composing the chapter entitled "County Surveyor," yet it is not perceived how any of said sections are in point as furnishing a standard for fees in ditch matters, unless it be the final section of the chapter, namely, section 2822, referred to in your letter and reading as follows:

"When employed by the day, the surveyor shall receive five dollars for each day and his necessary actual expenses. When not so employed, he shall be entitled to charge and receive the following fees: For each rod run, not exceeding one mile, three fourths of one cent, and for each rod over one mile, one half of one cent; for making out or recording a plat not exceeding six lines, seventy-five cents, and for each line in addition, five cents for each one hundred words or figures therein, six cents for calculating the contents of a tract not exceeding four sides, six cents, and for each additional line, ten cents; for mileage, going and returning, five cents per mile; and for all other services, the same fees as those of other officers for like services. Chain carriers and markers are entitled, each to two dollars."

In considering whether we are to deduce from above quoted section 58 of the New Ditch Code, a legislative intent that section 2822 be treated as determining the fees of the surveyor, it would seem pertinent to recall that with his report as provided by section 3 of the New Ditch Code, the surveyor is to file a statement of the *actual* cost and expense of his proceedings and report, including the time of any assistants at its *actual cost* to the county, and that by section 28 such cost and expense, together with the *actual or estimated* cost of supervision, is to be assessed against benefited lands. Assuredly then, it becomes clear that the services of the county surveyor are not to be taxed on the basis of fees or per diem, but rather on the basis of the time he actually gives to the work, and that the value of the time is to be computed on the basis of the salary paid him by the county, just as the time of his assistants is to be computed at its actual cost to the county. The very fact of the repeal of former section 6529 fortifies the view just stated, as does also the fact that there is no specific schedule in the new law covering fees of the surveyor—and, as has been seen, the surveyor is the officer principally concerned in the administration of the law. It may also be mentioned that section 46 of the new law states that the county commissioners may in case of the inability of the county surveyor to act, appoint and fix the *compensation* of a civil engineer to take charge of an improvement.

What has been said as to the surveyor is applicable in principle to such employes as chainmen, axemen and rodmen. True, section 2822 mentions chain carriers and markers; but on the other hand, special provision is made by section 2787 for allowance to the surveyor for compensation to employes, and for the fixing by that officer of the compensation of employes. Hence, it is to be concluded that the "actual cost and expense" of engineering as mentioned in sections 3 and 28 of the new law embraces the intent that the services of chainmen, axemen and rodmen are to be computed at actual value of their time to the county. All engineering expense, save the salary of the county engineer, is to be paid in the first instance out of the general ditch fund (section 50), a provision which also points to the legislative intent that actual cost rather than fees

or per diem is to be the basis of computation as to engineering when making up the collection as to the total cost of the improvement.

It might be urged that the views above expressed are not altogether consistent with those of our supreme court as reported in the case of Longworth vs. City of Cincinnati, 34 O. S. 101. In its opinion in that case at page 111 the court held as to municipal street assessments that the statutory expression "the expense of the preliminary and other surveys" had reference only to cases in which the engineer doing the work was employed for that special purpose, and does not apply to work done by engineers who have fixed salaries, paid them by the municipality. The court after making particular mention of the fact that the salaries were paid out of the general funds of the municipality, said "that was the end of it, unless there was some law expressly authorizing the charge and assessment that was made in this case, for the purpose of reimbursing the city for the amount so paid."

This language of the court, fairly interpreted, does not mean that the matter of including in the assessment a part of the engineer's salary, depends on the existence of express statutory authority for reimbursing out of the assessment collections the general fund, from which the engineer's salary has been paid—it means, rather, that there must be express statutory authority for including in the assessment the part of the engineer's salary proportionate to his services on the improvement to which the assessment relates. See in this connection Adkins vs. Toledo, 6 O. C. C. (N. S.) 433, 436.

The New Ditch Code, it is submitted, does contain specific authority for including in the assessment the time of the engineer and his assistants at its actual cost to the county, as is shown by quotations above made from sections 3 and 28; and it follows as a matter of course that the general fund is to be reimbursed from the ditch improvement fund to the extent that there accrues to the latter fund on assessment collections the part of the salary of the engineer and the compensation of his assistants that is assessed to given improvements. Section 50 recognizes that "engineering expense" is to be assessed, since it is payable out of the ditch improvement fund, just as are the costs of the construction, compensation, etc.; so that the words "except the salary of the county engineer"; appearing in section 50, are to be understood as meaning merely that the salary of that officer is to be paid in the first instance out of the general fund (section 7181)—a procedure which on practical grounds is also applicable to payment of compensation of assistants (section 2788).

It is your impression, as noted in the closing paragraph of your letter, that because of the repeal of sections 6524 and 6449, there remains no statutory authority in the county auditor for the collection of fees in ditch matters.

Said section 6524, which before its repeal appeared in the chapter entitled "Single County Ditches," related to fees payable to the auditor for filing and recording papers, making copies, issuing warrants on county treasurer, furnishing copies of statements to printer, etc. Section 6449, which was a part of the same chapter, related to fees of the auditor for copies of notice of hearing.

Clearly, the repeal of these sections leaves no schedule of fees by which the auditor may be guided under the New Ditch Code, so that it must be concluded that he is not entitled to fees.

The question remains whether the auditor may charge a percentage on assessments made against affected realty under the new law.

While the provisions of section 28 of the new law are to the effect that the "total cost" of an improvement is taken as the basis of the assessment, yet a careful examination of the law as a whole fails to disclose any authority for treating percentage on collection of assessments as part of the "total cost." In the absence of such authority, an opinion of this department dealing with municipal assessments, found in Opinions of Attorney-General for 1917, page 2147, is pertinent. The conclusion reached therein was, as summarized, in the headnote:

"The fees provided for collections by the county auditor, under section 2624 General Code, and for the county treasurer, under section 2685 General Code, cannot be included in the cost of a special assessment for a public improvement, to be levied against abutting property owners."

However, the fact that the percentage now in question may not be included in the amount to be assessed against affected lands does not of itself mean that the auditor is not entitled thereto, for it would be possible for the legislature to provide that such percentage might be paid to the auditor from other than assessment funds. Has the legislature made such provisions? If it has done so, the provision must be found in section 2624, since that is the only section found having a bearing on the subject. That section as amended in 108 O. L. 561, reads:

"On all moneys collected by the county treasurer on any tax duplicates of the county, other than the liquor, inheritance and cigarette duplicates, the county auditor on settlement semi-annually with the county treasurer and auditor of state, shall be allowed as compensation for his services the following percentages:

On the first one hundred thousand dollars, one and one-half per cent.; on the next two million dollars, five-tenths of one per cent.; on the next two million dollars, four-tenths of one per cent., and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county auditor and deducted from the shares or portions of the revenue payable to the state as well as to the county, townships, corporations and school districts."

Assuredly an "assessment duplicate" is not a "tax duplicate" in any general or ordinary sense. Section 31 of the new ditch code provides that the auditor shall furnish the treasurer a "special duplicate with the assessment arranged thereon." The words "special duplicate" certainly do not import the idea of "tax duplicate" but rather of a record other than and apart from the tax duplicate. Nor does the further statement in said section 31 "all assessments shall be collected and accounted for by the treasurer as are taxes" furnish any authority, directly or by implication, for the payment to the auditor of a percentage. Again, section 2685 (amended 108 O. L. 561), relating to fees of county treasurer, which follows the general form of section 2624, after enumerating various duplicates, contains the general statement:

"On all moneys collected otherwise than on said duplicates * * * five-tenths of one per cent. on the amount so received, to be paid upon the warrant of the county auditor out of the general fund of the county."

No similar provision appears in section 2624.

It thus clearly appears that there is no statutory authority under which the county auditor may collect or be allowed a percentage on ditch assessment collections.

A minor exception to the general rule this stated appears to have been made by that provision of section 31 of the new ditch code reading as follows:

"When an assessment remains unpaid 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, and the amount of delinquent tax thus placed on the general duplicate shall be charged respectively to the several ditches on account of which such assessment has been made as a transfer from the general ditch improvement fund. And all collections of said assessments and interest penalties shall be paid into said fund."

A delinquent assessment when thus placed on the general duplicate comes within the letter, at least, of section 2624 "On all moneys collected * * * on any tax duplicate of the county," with the result that the auditor is entitled to the percentage thereon as named in said section. The percentage to which the county auditor thus becomes entitled should be charged to the general county fund and credited to the fee fund—this for the reason that there is no authority in the new ditch code or in section 2624 for charging the percentage against the lands assessed or against the ditch improvement fund.

Specific answer to your questions is therefore as follows:

(1) Under the new ditch code (108 O. L. 926) the services of the county surveyor and of such employes as chairmen, axemen and rodmen in connection with a ditch improvement, are not to be calculated on a fee basis, but are to be calculated and assessed against affected lands at actual cost to the county as represented by the proportionate part of the salary of the surveyor and the proportionate part of the compensation of his assistants and employes as fixed by him under the provisions of section 2788 G. C. The amount of such salary and compensation so assessed is to be returned to the general fund out of the general ditch improvement fund.

(2) County auditors are not under the new ditch code entitled to any fees; nor are they entitled to a percentage on ditch assessment collections, except in the event that an assessment on becoming delinquent is carried to the general duplicate and collected as provided in section 31 of said code, in which event the auditor is entitled to the percentage on such delinquent assessment named in section 2624 G. C. said percentage to be charged to the general county fund and credited to the fee fund.

Respectfully,

JOHN G. PRICE,
Attorney-General.

958.

TAXES AND TAXATION—TIME FOR LISTING PERSONAL PROPERTY OF CORPORATIONS—THE WORDS "AS OF THE FIRST DAY OF JANUARY" IN SECTION 5404-1 G. C. CONSTRUED

The words "as of the first day of January" occurring in section 5404-1 of the General Code, referring to the time for listing the personal property of corporations, indicate the state of affairs existing at the beginning of the business day, if any, on the first day of January, or at the close of business on December 31st.

COLUMBUS, OHIO, January 23, 1920.

HON. ALLEN J. SENEY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—You have requested the opinion of this department on the following question:

"Several days ago Ritter & Gardner, of this city, submitted an inquiry to me with the request that I get your opinion with respect to the interpretation of section 5404-1 of the General Code, as amended by the legislature in the year 1919. Through some oversight on my part I neglected to address you at that time.

The opinion that they are seeking is upon the interpretation of that section and is expressed by them in the following words:

"The inquiry naturally arises as to whether this means the close of business