

From the foregoing language of the court it appears to be clear that the real conclusion was based upon the lack of power in the Legislature to make a business that of a common carrier which was not that at common law. Although the language last quoted would indicate that the court was interpreting the language of Section 614-2 of the Code, rather than denying its application, yet I feel that the conclusion was nothing more or less than a denial of the right of the Legislature to regulate a business private in character. And this was said in spite of the language of Section 614-2 and not because of that language.

This analysis of the two Supreme Court decisions has been necessary because the language of the statutes under consideration is substantially the same as that found in the excise tax law. If, however, I be correct in my conclusion that these cases were not decided upon statutory interpretation, but rather upon constitutional limitation, then there exists no definite action of the Supreme Court which may be used as a yardstick in the interpretation of the excise tax law. This is so because in the laying of an excise tax the Legislature is subject to no such constitutional objection as is involved in the regulation of the rates and service of public utilities. The latter power can not extend to businesses other than those which are affected with a public interest. Consequently the legislative fiat, declaring those engaged in transporting persons or property for hire upon the highways of the state to be common carriers, was of no effect except they actually be common carriers under the common law definition of that term.

It is, however, an entirely different matter for the Legislature, by its own fiat, to declare that certain businesses shall be subject to the excise tax. In order to sustain such a tax it is unnecessary that the businesses covered be of a public character. While it is of course true that the vast majority of the businesses included have that characteristic, yet the Legislature has specifically gone farther and defined as subject to the tax, all corporations, firms, etc., engaged in the business of furnishing electric current for lighting purposes to consumers. The corporation here in question is clearly so engaged, since a separate charge for such current is made in addition to the rental, and no qualifying language is used in the statute permitting it to escape the tax on the ground that such business is merely incidental to the main purpose of the corporation. You are accordingly advised that the corporation in question is subject to the excise tax.

Summarizing my conclusion and in specific answer to your inquiry, I am of the opinion that a corporation which habitually and customarily furnishes electric current to consumers and charges separately therefor is an electric light company within the meaning of Section 5416 of the General Code, and hence is subject to the excise tax provided by the succeeding sections of the Code, it being immaterial that such business is incidental to the main purpose of the corporation or that the class of consumers to whom such current is furnished is restricted so that there is no holding out of such service to the general public.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2426.

SANITARY ENGINEERING SERVICE—CONTRACT WITH COUNTY COMMISSIONERS FOR SEWER DISTRICT IMPROVEMENT—BASED ON COST OF IMPROVEMENT.

SYLLABUS:

1. *Certain contracts with the board of county commissioners of Portage County, for sanitary engineering services in connection with county sewer district improvement, con-*

sidered, and same held to provide for the compensation of sanitary engineers only on the basis of the actual cost of the improvement or the estimate thereof.

2. Assuming Section 6602-14, General Code, to be constitutional, the additional percentage compensation of county commissioners for their services therein provided in connection with the construction of a county sewer district improvement is to be figured upon the cost of the improvement as defined by Section 6602-7, General Code, exclusive of the compensation paid the county commissioners under Section 6602-14, General Code.

COLUMBUS, OHIO, August 6, 1928.

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

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

“You are respectfully requested to render this department your written opinion upon the following:

We enclose two proposals to render services to Portage County, one in the capacity of Sanitary Engineer and one in the capacity of Assistant Engineer made under the provisions of Section 6602-1, G. C. The Board of County Commissioners accepted the proposals, thereby contracting for the services at the rates specified.

Question 1. In determining the compensation of the Engineer and Assistant, may the rates specified be applied to the cost of the improvement as the same is defined in Sections 6602-7 and 6602-23, which includes interest on certificates of indebtedness and on bonds, or on the actual cost of construction?

Question 2. If it is held that interest may be included as a basis for determining the compensation, for what period, during which the same accrues, may it be included?

Question 3. In determining the compensation of the members of the board of county commissioners under the provisions of Section 6602-14, G. C., may interest on certificates of indebtedness and on bonds be included as a basis for the application of the percentages provided in said section?”

Section 6602-1, General Code, the same being a part of Chapter 4a of Title III, relating to county sewer districts, provides that for the purpose of preserving and promoting the public health and welfare the boards of county commissioners of the several counties of the state may, by resolution, lay out, establish and maintain one or more sewer districts within their respective counties outside of municipalities. To this end said section further provides:

“Any such board of county commissioners may employ a competent sanitary engineer for such time or times, on such terms as they deem best, and may authorize such engineer to employ necessary assistants upon such terms as may be fixed by said board.”

Section 6602-7, General Code, referred to in your communication, reads as follows:

“The cost of any improvement herein provided for and the cost of the maintenance and operation thereof, shall include, in addition to the cost of construction, the cost of engineering, necessary publications, inspection, interest on certificates of indebtedness or on bonds, and all other items of cost incident to such improvement. The county may pay any part of the cost of

the improvement in this act provided for and of the maintenance and operation thereof if the board of county commissioners may deem such payment just."

Section 6602-23, General Code, likewise referred to by you, is a part of Chapter 4c of Title III, relating to county water supply systems, and in terms is identical with those of Section 6602-7, supra, above quoted.

The proposal upon which the contract of the sanitary engineer is based in paragraph A provides for certain preliminary services to be rendered by him for which he is to receive " $\frac{5}{8}$ of 1 per cent ($\frac{5}{8}\%$) of the estimated cost of such improvement." This paragraph of said proposal further provides as follows:

"If within the term of this agreement a contract shall be made for constructing any such proposed improvement, and the actual cost of the improvement is more or less than the estimated cost, the consideration shall be adjusted on a basis of actual cost instead of estimated cost."

Said proposal in paragraph B provides for certain additional services to be rendered by the sanitary engineer, his compensation for which services is provided for therein, as follows:

"For this service in connection with any improvement the consideration shall be five-eighths of one ($\frac{5}{8}\%$) per centum of the cost of the improvement, payable at the time the contractor's final estimate is due and payable. However, should the contractor for any improvement fail to complete the work within the time limit specified in the contract therefor, there shall be due and payable to me in addition to the above consideration, for each day beyond the time limit specified in the contract up to date of completion, an amount equivalent to five-eighths of one per centum of the contract price divided by the number of days included in the time specified in the contract for the completion of the work."

Said proposal in paragraph C thereof provides for a personal supervision of the engineer in the making of record surveys and maps of any improvement built and the preparation of estimated assessments therefor for which services he is to receive "one-fourth of one ($\frac{1}{4}\%$) per centum of the cost of the improvement."

Subject to the limitation provided for by Section 6602-14, General Code, that the compensation of the sanitary engineer shall not in any one year exceed the amount of compensation received during the current year by the county auditor of the county in which the improvement is being constructed, the board of county commissioners is authorized to make a contract with the sanitary engineer for such improvement on such terms as it may deem best; and the question here presented with respect to the contract of the county sanitary engineer, based on the proposal referred to in your communication, is simply one of construction with respect to the intention of the parties.

Without any extended discussion of the provisions of said proposal in the separate paragraphs thereof noted, I am clearly of the opinion that the terms "cost of improvement" and "estimated cost of the improvement", as used in such proposal with reference to the basis on which the percentage compensation of the sanitary engineer is to be figured, refer to the actual cost of the improvement or the estimate thereof, as the case may be, exclusive of the particular matters mentioned in Section 6602-7, General Code, to-wit: the cost of engineering, necessary publications, inspection and interest on certificates of indebtedness or on bonds issued for the improvement.

The other proposal referred to in your communication is one by the Wynber Engineering Company to furnish to Portage County, for the purpose of said improvement, all engineers, assistant engineers, rodmen, field assistants, draftsmen, tracers, office assistants, instruments and field and office supplies, that may be required to complete the engineering work in connection with said improvement. As compensation for services in this connection, said engineering company is to receive certain percentages on the "estimated cost of the improvement" or "cost of the improvement", provided for by separate paragraphs in said proposal.

Although the percentages upon which the compensation of the Wynber Engineering Company is figured for the services to be rendered by it are considerably higher than those upon which the compensation of the sanitary engineer is figured, the basis upon which such percentages are to be figured is the same as that above noted with respect to the compensation of the sanitary engineer, to-wit, the actual cost of the improvement or the estimate thereof, as the case may be.

My conclusion, therefore, is that in both cases referred to in your first question the compensation is to be figured on the actual cost of the improvement rather than upon the "cost of any improvement", as defined by Sections 6602-7 and 6602-23, General Code. The provisions of said section have their application with respect to the amount for which the county commissioners are authorized to levy assessments, as well as to the amount of the bonds issued by the board of county commissioners in anticipation of the collection of such assessments and the amount, if any, that the county is to pay towards the cost and expense of said improvements. The provisions of said Sections 6602-7 and 6602-23, General Code, have no necessary connection with the contract or contracts entered into by the board of county commissioners for engineering services in connection with said improvement and as above noted, it appears that so far as the contracts here in question are concerned, the intention of the parties was to limit the compensation for engineering services to the actual cost of the improvement, rather than to the cost of the improvement as defined by the sections of the General Code, above referred to.

With respect to your third question, it will be noted that the same is controlled by the provisions of Section 6602-14, General Code, which reads as follows:

"In addition to the regular salary provided by law for county commissioners, each commissioner serving in a county having one or more regularly created county sewer districts, shall be paid the following amount: for time spent in connection with the establishment of any sewer district or the preliminary work preceding the awarding of any contract for either sewer or water improvements or both, or for the acquiring of sewer or water supply lines already constructed, the sum of five dollars per day for each day actually employed, but not exceeding the aggregate sum of seventy-five dollars on each or any sewer or water improvements; for each and every sewer or water improvement actually installed under this act (G. C. Sections 6602-1 et seq.), a sum equivalent to the following schedule of costs for all improvements or parts of improvements actually constructed during the current year ending June 30th; for the first \$200,000 one-third of one per cent; for all above \$200,000, and not exceeding \$400,000, one-fourth of one per cent; for all above \$400,000, and not exceeding \$600,000, one-sixth of one per cent; for all above \$600,000, one-tenth of one per cent, provided, however, that the maximum compensation received by any commissioners or sanitary engineer serving in any county affected by this measure shall not exceed the amount of compensation received during the current year by the county auditor serving in the said county. The cost of any improvement shall be determined by estimates paid to the contractor for such improvements plus the cost of all engineering, publication and

other costs of such improvements, as defined in this act, exclusive of the compensation provided in this section. * * *"

It will be noted from the provisions of this section that the percentage compensation of the county commissioners for sewer or water improvements actually constructed is based on the cost of all improvements or parts of improvements actually constructed during the current year and that the cost of any improvement shall be determined by estimates paid to the contractor for such improvements, plus the cost of all engineering, publication and other costs of such improvements, as defined by the act, exclusive of the compensation provided for by county commissioners by said section.

These provisions of Section 6602-14, General Code, would seem to afford a complete answer to your third question. That is to say, the compensation of the county commissioners is to be figured upon the cost of the improvement as defined in Sections 6602-7 and 6602-23, General Code, exclusive of the compensation paid the county commissioners under Section 6602-14, General Code.

In connection with your third question, your attention is called to the fact that in the case of *M. E. Thraikill, a Tax Payer, vs. The Board of County Commissioners*, Case No. 113266, Common Pleas Court of Franklin County, Ohio, the constitutionality of the provisions of Sections 6602-1, et seq., General Code, relating to county sewer districts, was questioned. The court, however, sustained the sections of the act concerning this matter other than Section 6602-14, General Code, providing for the additional compensation of county commissioners, for the construction of county sewer district improvements. The court held this section of the county sewer district act to be unconstitutional for the reason, as stated, that the compensation therein provided for, in addition to the regular salary of the county commissioners, was an inducement to the county commissioners to establish and construct such improvements and to sustain petitions of land owners therefor, contrary to the principles announced by the Supreme Court of the United States in the case of *Timney vs. State*, 273 U. S. 510. The court, however, held that Section 6602-14, General Code, was severable from the other sections of the county sewer district law and that the unconstitutionality of this particular section did not affect the validity of the other sections of the law relating to the establishment and construction of county sewer district improvements. Said case having been taken to the Court of Appeals of Franklin County, Ohio, by proceedings in error, said court did not specifically pass upon the question as to the constitutionality of said Section 6602-14 of the General Code, but contented itself with the observation that if said section were unconstitutional it was severable from the other sections of the county sewer district act and that their validity was in no wise affected by the question raised with respect to the constitutionality of Section 6602-14 of the General Code. Following the usual rule of this department with respect to questions of this kind, no opinion is here expressed with respect to the constitutionality of the section under consideration in connection with your third question, but the validity of the same is assumed for the purposes of this opinion.

Respectfully,
EDWARD C. TURNER,
Attorney General.