

If, in the case here presented, The Mutual Electric Company to serve some purpose of its own, had obtained this agreement by indirection, deceit or other element of estoppel, the defense of want of consideration for the agreement on its part to be performed, would not perhaps be available to it or to its successor in name and interest, The Southern Ohio Electric Company. There is nothing, however, in the fact and circumstances attending the making of this agreement which even remotely suggests any element of equitable estoppel or estoppel by conduct on the part of The Mutual Electric Company. And said company and its successor now maintaining and operating said transmission line are not estopped to claim that the agreement on the part of The Mutual Electric Company to furnish free electricity for use in the dairy barns at the Athens State Hospital was and is without consideration. *Macklin vs. Home Telephone Company*, 1 Circuit Court (N. S.) 373; 70 O. S. 507.

For this reason as well as for the reason that the State has not ratified said unauthorized agreement, your second question is answered in the negative.

The conclusions here reached with respect to the first and second questions presented in your communication, makes any consideration or discussion of your third question unnecessary.

With respect to the contract executed by and between the Attorney General and The Southern Ohio Electric Company fixing the compensation to be paid by the company for the privilege of constructing and maintaining its transmission lines in and upon the lands of the state, the Athens State Hospital, and which contract is now in your possession, your only duty in the premises is to certify the same to the Auditor of State as required by the act of the General Assembly above referred to.

Respectfully,

GILBERT BETTMAN,
Attorney General.

294.

TAX AND TAXATION—MOTOR VEHICLE LICENSE AND GASOLINE TAXES—DISCUSSION OF SPECIFIC AUTHORIZED AND UNAUTHORIZED USES OF MUNICIPALITY'S PORTION OF RECEIPTS.

SYLLABUS:

1. *The cost of posts and wire mesh for repairing safety fences along the sides of streets and roadways and the cost of repairing loading platforms constructed in streets for the use of street car passengers may be paid from the funds arising from the motor vehicle license and gasoline tax receipts.*
2. *The proceeds of such taxes may not be used for the purposes of cleaning streets or removing ice and snow.*
3. *The cost of removing right angle curbs at street intersections and installing circular curbs may properly be paid from said tax receipts.*

COLUMBUS, OHIO, April 12, 1929.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent communication reading as follows:

"May a municipality's portion of the motor vehicle license and gasoline tax receipts be legally used for the following purposes:

Question 1. Paying the costs of posts and heavy wire mesh used for repairing safety fences along the sides of streets and roadways?

Question 2. Repairs to loading platforms constructed in streets for the protection and benefit of street car passengers?

Question 3. Removing right angle curbs at street intersections and installing circular curbs?

Question 4. Removal of snow from improved streets and sanding and cinders or treating with chemical compound icy sections of paved streets?"

The question as to the purpose for which receipts from the motor vehicle license tax and the gasoline tax may be expended by municipalities and counties has been before this office many times. Without undertaking to review the various opinions upon the subject, it may be stated that generally speaking such funds may be expended only for maintenance and repair of streets and highways having foundations which can be used in whole or in substantial part as the subsurface of the improvement.

Section 6309-2, General Code, which relates to the motor vehicle license tax, provides, among other things, that 50% of all taxes collected shall be for the use of municipal corporations or counties which constitute the district of registration. Said section further provides:

"In the treasuries of such municipal corporations and counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway, or upon any street, in which the existing foundations thereof is (are) used as a sub-surface of the improvement thereof, in whole or in substantial part."

Section 5537, General Code, provides for the levying of the so-called gasoline tax and in part provides:

"Thirty percent of such gasoline excise fund shall be paid on vouchers and warrants drawn by the Auditor of State to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the Secretary of State, and shall be used by such municipal corporations for the sole purpose of maintaining and repairing the public streets and roads within such corporation."

The act of which the latter section is a part was under consideration by the Supreme Court of Ohio in the case of *State, ex rel. Janes vs. Brown, Secretary of State*, 112 O. S. 590. One of the questions under consideration in that case was whether the act was subject to referendum or went into immediate effect because of being for the purpose of current expenses as mentioned in Section 1-d, Article 2, of the Ohio Constitution.

Notwithstanding the fact that Section 2 of the Act expressly mentions one of the purposes for which the levy is made to be for widening and extending surfaces of highways, the court held that the latter provisions of the Act limited its application to the sole purpose of maintenance and repair of streets within municipal corporations, for the sole purpose of maintaining and repairing the county system of public roads and highways, and for the purpose of maintaining and repairing and keeping in passable condition for travel roads and highways in this state required to be main-

tained by the Department of Highways. In other words, it seemed to be the opinion of the court that if said funds should be used for an extended widening process such use would amount to new construction of roads and streets, the result of which would be to take such appropriation out of the class of current expenses and make such law subject to the referendum provisions of the constitution.

The last paragraph of Judge Robinson's opinion in that case is as follows:

"We therefore are of opinion that the Department of Highways and Public Works, the counties and the municipalities of the state, are limited in the expenditures of the respective appropriations made to them in this act to maintenance and repair, and that the power of such department, or subdivisions, to use this particular fund for the purpose of widening the surfaces of the highways, must be measured by whether such widening constitutes maintenance or repair, or, on the other hand, is of such a character as to amount to new construction; that the expense of maintenance, repair and keeping the system of public roads and highways in passable condition for travel is current expense, and, since the act as a whole contemplates no other use of the fund, that all the appropriations of the act come within the exception of Section 1-d of Article 2 to Section 1 of Article 2 of the Constitution."

The opinion above mentioned is some authority for the proposition that some widening may be done by the use of the gasoline tax funds but it is indicated such a project shall not be so extensive as to amount to new construction.

In view of this decision, I am inclined to the view that question three submitted by you, which relates to the rounding out of right angle curbs, should be answered in the affirmative. The character of the work of rounding out right angled curbs in connection with streets is well known. While of course probably, the existing subsurface is not used for the particular foundation upon which new construction is placed, it is so closely connected with the original improvement as to constitute maintenance and repair. In any event, as hereinbefore indicated, the Supreme Court in *State, ex rel. vs. Brown, supra*, has inferred that some widening may be undertaken so long as it does not amount to new construction.

Where the line of demarcation between widening and new construction exists, the court does not undertake to define.

In an opinion of the Attorney General found in the Opinions of the Attorney General, 1921, page 180, it was held that the process of treatment with oil of municipal streets and public roads comes within the meaning of the words "maintenance and repair" as used in Section 6309-2, General Code. However, that opinion was based upon the proposition that treatment of oil preserved the surface and therefore was repair.

In an opinion of the Attorney General under date of January 11, 1928, (No. 1563) addressed to your department, it was held:

"Moneys allotted to municipal corporations from the 'motor vehicle license tax' or the 'gasoline excise tax funds' may not be lawfully expended for the purpose of sweeping or cleaning streets since the sweeping and cleaning of streets is not included in the term 'maintenance and repair' as that term is defined in Section 6309-2, G. C. and used in Sec. 5537, G. C."

Applying the principles of the opinion above referred to, to question four as submitted to you, which relates to the removal of snow and ice, etc., compels a negative answer.

In your first question you inquire as to the authority to pay for the cost of posts and wire mesh for the repair of safety fences along streets and highways from the revenues herein under discussion. Quite obviously these expenditures are maintenance and repair for they consist simply in returning the fences to their original condition. The only question is as to whether the fences may be regarded legitimately as a part of the highway.

Had this question been propounded in earlier times I have no doubt the answer would have been in the negative. It is necessary, however, to take into consideration changed conditions and the modern development of street and highway construction and traffic conditions before a proper answer can be reached. For example, the use of curbing in rural highway construction was practically unheard of until comparatively recent times. Similarly, the use of safety fences which, in the past, was a rarity, is now not only common practice but a virtual necessity by reason of the danger incident to the congestion and speed of modern traffic. For these reasons I am of the opinion that safety fences must now be regarded as a legitimate part of street and highway construction and accordingly the use of the funds in question for the maintenance and repair of such fences is proper.

The foregoing discussion is equally applicable to the repair of so-called loading platforms constructed in streets for the use of street car passengers. Here again is a direct and necessary result of changing traffic conditions. The safety of pedestrians in legitimate uses of the highways must be conceded to be a proper consideration in highway construction. Construction of these platforms is, in my opinion, the construction of a portion of the streets and constitutes an improvement thereof so as to authorize the expenditure of the funds in question in the maintenance and repair of such structures.

In view of the foregoing it is my opinion that the cost of repairing safety fences and loading platforms may be paid from funds derived from the motor vehicle license tax and the gasoline tax.

Respectfully,

GILBERT BETTMAN,
Attorney General.

295.

WATERWORKS IMPROVEMENT BONDS—MAY BE ISSUED ONLY WITHIN MUNICIPAL DEBT LIMITATIONS—WHAT BONDS ARE INCLUDED WITHIN TERMS OF SECTION 2293-14(d), GENERAL CODE.

SYLLABUS:

1. *Waterworks improvement bonds proposed to be issued by a municipality may be issued only within the limitations of debt of a municipality as provided in Section 2293-14, General Code.*
2. *Paragraph (d) of Section 2293-14, General Code, providing that waterworks improvement bonds need not be considered in ascertaining the limitations of debt of a municipality, to the extent that the income from such waterworks is sufficient to cover the cost of all operating expenses, and interest charges on such bonds, and to provide a sufficient amount for their retirement as they become due, refers only to waterworks bonds issued and outstanding at the time a computation is being made for the purpose of ascertaining the debt limitations of a municipality, and has no reference to water-*