

931.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN
CHAMPAIGN, JEFFERSON, HARDIN AND PAULDING COUNTIES,
OHIO.

COLUMBUS, OHIO, January 12, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

932.

APPROVAL, BOND ISSUE, MEDINA COUNTY, OHIO, IN THE SUM OF
\$24,637.25.

COLUMBUS, OHIO, January 13, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

933.

APPROVAL, BONDS OF NEW WATERFORD VILLAGE SCHOOL DIS-
TRICT, COLUMBIANA COUNTY, OHIO, IN THE SUM OF \$7,257.51.

COLUMBUS, OHIO, January 13, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

934.

TOWNSHIP TREASURERS—WHEN ENTITLED TO FEES FOR ROAD
IMPROVEMENTS—NOT ENTITLED TO FEES ON MONEYS PAID
OVER IN REDEMPTION OF BONDS—DUTY OF COUNTY SUR-
VEYOR TO ESTIMATE FEES AND INCLUDE SAME IN COST OF IM-
PROVEMENT—LIMITATION OF FEES.

1. *Township treasurers, by virtue of section 3318 G. C. as amended, 107 O. L., 652, are entitled to the two per cent fee therein named upon moneys paid out by them on the order of the township trustees for the cost and expense of road improvements under sections 3298-1 to 3298-15n G. C.; but they are not entitled to fees on moneys paid over in redemption of bonds issued on account of such improvements, or in reimbursement of township funds for moneys advanced on account of the assessment share.*

2. *The fees so to be paid to township treasurers are to be estimated by the county surveyor when making up the estimate of cost and expense mentioned in section 3298-6 G. C., and they are to be included as part of the actual cost of the*

improvement as calculated after the improvement work is complete. Such actual cost, with the item of treasurer's fees included, is to be used in making the division between township and property owners in accordance with the apportionment that has been adopted under authority of section 3298-13 G. C.

3. *The fees so to be paid are within the purview of and subject to the respective limitations of one hundred and fifty dollars and three hundred dollars mentioned in said section 3318.*

COLUMBUS, OHIO, January 13, 1920.

HON. CARROLL A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—The receipt is acknowledged of your request for an opinion upon the following:

“Under section 3318 G. C. as amended in 107 Ohio Laws is the township treasurer entitled to two per cent on money paid into the township treasury from assessments on road improvements under the township law?

1. When such money comes directly into the township treasury from the land owners by reason of assessments being paid in cash?

2. When such money comes into the township treasury from the county auditor who collects assessments certified to him?

If he is entitled to two per cent in either of the above cases is he limited to the one hundred and fifty or three hundred dollar limit of section 3318 G. C. per year?”

In response to request for further information you have stated with reference to the above that your inquiries relate to road improvements under the direction of township trustees as authorized by sections 3298-1 to 3298-15n G. C.; that your first inquiry has special reference to an improvement in connection with which no bonds were issued, “payment being made in cash by the property owners, the township having sufficient funds on hand to pay its share”; and that your second inquiry relates to an improvement whereof one-half the cost was paid by the township and one-half by the property owners, bonds being issued in anticipation of the whole cost of the improvement.

Said section 3318 as amended 107 O. L. 652, reads as follows:

“The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees, but in no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars, except that in a township wherein a city is located and such city is a part of such township, a township treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in one year.”

While said statute authorizes the allowance to and retention by the treasurer of compensation for “receiving, safe keeping and paying out moneys belonging to the township treasury” yet said compensation is calculated at the rate of two per cent “of all moneys paid out by him upon the order of the township trustees;” so that no matter what may be the responsibilities and services of the treasurer in receiving and safe keeping the moneys before paying them out, his compensation does not accrue until the moneys are actually paid out.

Again, said statutes known as sections 3298-1 and 3298-15n do not in themselves make reference to any compensation to the township treasurer. Therefore,

if the treasurer is entitled to compensation with respect to moneys accruing and paid out in connection with improvements under said series of statutes, the authority for such compensation must be found in section 3318. Furthermore, such authority, if found in said section goes only to "moneys belonging to the township treasury;" hence it becomes evident that if the treasurer is entitled to compensation as to moneys in connection with the improvements in question it must be upon the basis that such moneys are "moneys belonging to the township treasury," and therefore subject to the respective limitations of one hundred and fifty dollars and three hundred dollars named in section 3318.

Having thus determined the authority for and limitations upon the compensation of the treasurer if he is entitled to it in connection with the improvements in question, we now inquire whether he is in fact entitled to such compensation; and for the purposes of that inquiry it is proper to make a short reference to the matter of assessments against affected lands arising out of improvements under sections 3298-1 to 3298-15n.

Your second inquiry, as has been stated, relates to a case where bonds have been issued for the whole cost of the improvement. In such a case, according to a recent holding of this department in an opinion (No. 916, dated January 6, 1920) directed to Hon. Watson H. Gregg, prosecuting attorney, Cambridge, Ohio, there is no statutory authority for the payment of the assessments otherwise than in installments, and if paid as a lump sum the tender of payment in lump must include interest on the assessments in full from date of issue to date of maturity of bonds issued by authority of section 3298-15e G. C. in anticipation of such assessments, rate of interest to be the same as that named in the bonds.

Your first inquiry, on the other hand, deals with a case where no bonds have been issued. From a legal standpoint the same rule would apply to the making of assessments in such a case as applies where bonds are issued—that is to say, the assessment is to be made on the basis of actual cost after such cost has been ascertained upon completion of the improvement. Thereupon, the purpose of the making of the assessment will be to reimburse the township for the money it has advanced directly out of its tax funds on account of the "property owners' share." The information furnished in connection with your first inquiry is open to the interpretation that the assessment may have been made on an estimated basis and all assessments paid by the property owners direct to the township treasurer before the work was done. Such a course, if followed, was without the sanction of direct statutory authority; and the corrective action which suggests itself is the making of an adjusted assessment upon the basis of actual cost. In the latter case, of course, the matter of treasurer's compensation may be taken into account upon the principles pointed out herein.

Further discussion of your question will therefore be with the understanding that whether bonds have been issued or not, the assessment is to be made after the work is completed, and payment thereof made by the owners of affected lands to the county treasurer in accordance with the provisions of section 3298-15b.

Section 3318 is very general in character and no reason is perceived for construing it otherwise than as embracing compensation on all moneys belonging to the township treasury which are paid out by the treasurer upon the order of the township trustees. In this view, the treasurer is entitled to compensation for moneys paid out in connection with improvements under said sections 3298-1, et seq., a statement which is made, however, as excluding payments either to the holders of bonds issued in connection with the improvement or to the township by way of reimbursement for moneys advanced out of its treasury on account of the assessment share of the improvement. As is hereinafter pointed out, there is no warrant for compensation to the treasurer on account of the latter class of payments.

If we are to find a source out of which the compensation of the treasurer is to be paid, we must find it in the fund which is created for the doing of the improvement, because the language of section 3318 is that the treasurer "shall be allowed and *may retain* as his fees," etc. and this proposition means that so far as the assessment or property owners' share is concerned, we must find that section 3318 is broad enough to permit of the including in the property owners' share the two per cent compensation for the treasurer.

In view of the general character already noted of section 3318, and the fact that it makes no exceptions based on the source of the funds, it must be held to contain authority for including in the assessments in question the compensation of the township treasurer. Certainly the fund for an improvement under sections 3298-1 to 3298-15n, including the part in anticipation of assessments, must, when it is in the township treasury, be considered legally as "money belonging to the township treasury," for the whole expense is to be paid in the first instance out of the township treasury. In this latter connection, there is found in section 3298-15h the statement that "the township clerk shall not draw his warrant on the township treasury in favor of any contractor for any estimates on account of any contract let under the provisions of the preceding sections" until certain affidavits are filed. Again, in section 3298-15-1, relating to payment of estimates to contractor, the statements appear :

"The trustees may pay such estimates as may be furnished from time to time by the county surveyor, and no payments shall be made except with the approval of such surveyor. The trustees shall inspect the work when completed and make final payment therefor, with the approval of the county surveyor."

It thus appearing that section 3318 contains authority for including the treasurer's compensation as part of the cost of the improvement, the question remains as to how such inclusion may be made as a practical proposition. Authority to issue bonds in connection with improvements now in question is conferred by section 3298-15e, whereof the first sentence reads as follows :

"The township trustees, in anticipation of the collection of such taxes and assessments, or any part thereof, may, whenever in their judgment it is deemed necessary, sell the bonds of said township in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement."

In view of the fact, as already stated, that the assessment is not to be made until the work is finished, of course, bonds may be issued before the work is started, and said bonds, as has just been seen, may be sold in any amount not greater than the aggregate sum necessary "to pay the *estimated* compensation, damages, costs and expenses of such improvement." Hence, whether on the one hand the fund for the doing of the work is to be furnished in whole or in part by an issue of bonds, or on the other hand, by township funds accruing directly from taxation, the item of treasurer's compensation may be included in the surveyor's estimates of the cost of the work. Then when the work is finished, the actual extent of the item "treasurer's compensation" will have become known, and the actual compensation so paid the treasurer will be definitely included in the total cost of the work, which total actual cost is the basis of division between township and property owners as mentioned in section 3298-13. In short, the item of treasurer's compensation will go through the same course as an item of expense of the improvement as will other items of the cost thereof.

The views above expressed are not inconsistent with the conclusion expressed in an opinion of this department of date November 20, 1917, found in Opinions of Attorney-General for 1917, Vol. 3, p. 2147, as follows:

"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."

That opinion had special reference to fees of county auditor and county treasurer in connection with street improvement assessments. It makes mention of a number of judicial decisions bearing on the subject. The conclusion reached seems to be based largely on the fact that it is impractical to determine in advance the cost of collecting a special assessment, and that therefore the case of Spangler vs. Cleveland, 35 O. S. 469, would apply. In the matter now being considered, the amount of treasurer's fees is susceptible of actual determination, and therefore, is not open to the objection underlying said opinion, and underlying the case of Spangler vs. Cleveland. In short, as has been pointed out, the item of treasurer's fees in connection with township road improvements is one which may be arrived at as accurately as any other item of expense, and will go into the sum total of actual cost as determined upon the completion of the work and the payment of all bills in respect thereto.

It has been stated that the treasurer is not to collect compensation for his payments on account of redemption of bonds or on account of reimbursement of the township treasury for moneys advanced on account of the assessment share. The reason for such statement is plain. It has been seen that fees accrue to the treasurer upon his paying, by order of the trustees, current items of expense of the improvement, such, for instance, as estimates to the contractor. The fund for paying such items is in the township treasury, either as the result of the sale of bonds or of the accrual of tax levies. Therefore, in paying over money by way of redeeming the bonds, or in reimbursing the proper fund of the township treasury for moneys advanced out of it on account of property owners' share, the treasurer is not in any true legal sense paying out moneys on the order of the township trustees, he is merely turning over to their owners funds which may be described as trust funds. No discretion rests either in the township trustees or the treasurer in the matter of turning over the funds, though of course they are under the duty of seeing that they are turned over to the person or fund entitled to them. The moneys which are so being repaid furnished in the first instance the very fund out of which treasurer's compensation has once accrued, and again, so far as assessment collections are concerned, they embrace a proportionate share of such compensation; so that to hold that the treasurer is entitled to compensation a second time would yield not only the illogical result of double fees, but also of fees on fees already paid him.

It may be urged that the respective limitations of one hundred and fifty dollars and three hundred dollars named in section 3318, when applied in the light of the views herein expressed, will have the practical result that one improvement may be charged with the item of treasurer's compensation and another improvement may not be so charged. To illustrate: If an improvement is begun on April first and completed on July first at a cost of \$7,500.00, the treasurer's compensation will be one hundred and fifty dollars, which in most instances will be the maximum that he may receive for the year. This will leave no basis for a charge of the item of treasurer's compensation against an improvement begun on August first and completed December first. All that need be said of this somewhat peculiar result is that it furnishes no reason for overthrowing the positive provisions of section

3318. In the supposed case, the terms of section 3318 would simply so operate that while the item of treasurer's compensation may have been estimated in the cost of the improvement begun on August first, it would develop on calculation of actual cost not to be an expense item. The case supposed is an extreme one and not likely to arise often in practice, inasmuch as in a given working season the township, if it undertakes more than one improvement, will likely carry along contemporaneously the work of the several improvements, in which case the comparatively small item of treasurer's fees will adjust itself automatically on an equitable basis as among the several improvements.

As a matter of caution, it should be stated that what is said in this opinion has reference only to township road improvements as distinguished from the township road district improvements provided for by sections 3298-25 to 3298-53.

The foregoing considerations probably result in a negative answer to your questions in the precise form in which they are stated; but the general rules for your guidance to be deduced from what has been said, are as follows:

(1) Township treasurers, by virtue of section 3318 G. C. as amended 107 O. L. 652, are entitled to the two per cent fee therein named upon moneys paid out by them on the order of the township trustees for the cost and expense of road improvements under sections 3298-1 to 3298-15n, G. C.; but they are not entitled to fees on moneys paid over in redemption of bonds issued on account of such improvements, or in reimbursement of township funds for moneys advanced on account of the assessment share.

(2) The fees so to be paid to township treasurers are to be estimated by the county surveyor when making up the estimate of cost and expense mentioned in section 3298-6 G. C., and they are to be included as part of the actual cost of the improvement as calculated after the improvement work is complete. Such actual cost, with the item of treasurer's fees included, is to be used in making the division between township and property owners in accordance with the apportionment that has been adopted under authority of section 3298-13 G. C.

(3) The fees so to be paid are within the purview of and subject to the respective limitations of one hundred and fifty dollars and three hundred dollars mentioned in said section 3318.

Respectfully,

JOHN G. PRICE,
Attorney-General.

935.

APPROVAL, BOND OF ADEN E. SMITH, STATE INSPECTOR OF PLUMBING, IN THE SUM OF \$5,000—CHICAGO BONDING AND INSURANCE COMPANY, SURETY.

COLUMBUS, OHIO, January 14, 1920.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Attached you will find bond of Aden E. Smith to the state of Ohio in the sum of \$5,000.00 with the Chicago Bonding and Insurance Company as surety, covering the faithful performance by Mr. Smith of his duties as state inspector of plumbing.

I have endorsed my approval on the bond in question in accordance with section 1261-7, and am transmitting it to you in accordance with the mandate of said last named section.

Respectfully,

JOHN G. PRICE,
Attorney-General.