

1668.

DITCHES—NEW DITCH CODE (108 O. L. 926)—PER DIEM OF COUNTY COMMISSIONERS FOR SERVICES ON DITCH WORK IS PART OF COST TO BE ASSESSED AGAINST BENEFITED LANDS—PAID OUT OF GENERAL DITCH IMPROVEMENT FUND.

Under the new ditch code (Sections 6442, G. C. et seq., 108 O. L. 926), the per diem of county commissioners for services on ditch work (Section 6498, amended 108 O. L. Pt. II, p. 1120) is to be treated as part of the cost to be assessed against benefited lands. Such per diem is, by virtue of section 6491 G. C. to be paid to the commissioners out of the general ditch improvement fund.

COLUMBUS, OHIO, December 2, 1920.

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

GENTLEMEN:—You have recently submitted for opinion the following:

“Section 6498 of the General Code, as amended, 108 O. L., Part II, page 1120, provides for additional per diem for county commissioners on ditch improvements.

Question: Are these per diems to be charged to the particular ditch improvement upon which the county commissioners are engaged at the time or is it a salary that is chargeable against the general county fund?”

Said section 6498 originally appeared as section 57 of the new ditch code (sections 6442, et seq., 108 O. L. 926). It has been amended in a respect not material to your inquiry and as so amended reads (108 O. L., Part II, p. 1120):

“In addition to the regular salary provided by law for the county commissioners, each county commissioner shall receive five dollars per day for each day he is actually engaged on improvements under this act, but in no case shall any commissioner receive an aggregate of more than twenty-five dollars for services on one improvement, unless such improvement is more than ten miles in length within the county or is an inter-county improvement, in which case such aggregate shall be not more than fifty dollars, nor shall they receive pay for two separate improvements on the same day. Such amounts shall be paid by warrants issued by the county auditor upon the county treasurer, upon the filing in his office of an itemized statement by the commissioner of such survey; provided, however, that the aggregate compensation paid a county commissioner under this section for said service shall not exceed in one year five hundred dollars.”

Since the question whether a given item may be included in an assessment against benefited lands on account of an improvement is one to be determined from ascertaining whether the legislature has authorized or directed the inclusion of such item, and since the new ditch code repealed all earlier enactments on the subject of ditch improvement, it becomes necessary in seeking answer to your question to examine other parts of said code related to the section above quoted. Attention is therefore directed to the following provisions:

Sec. 6452. “If the county commissioners, or the court, find an im-

provement by ditch or drain or other means is necessary, and grant the petition therefor, either for the line set forth in the petition, or upon one which in their judgment is more feasible to accomplish the object of the petition, all the cost and expense connected with their proceedings, as well as the cost and expense of construction of the improvement shall be assessed upon the property affected beneficially by such improvement, including any highways or other public grounds, according to the benefit derived therefrom and in proportion thereto. And as a part of such cost and expenses, to be so assessed, shall be included such portion of the expense of enlarging any waterway through a public highway or constructing, altering or reconstructing any bridges over such waterway, as may be determined by the county commissioners, or the court, and such portion of such expense shall be paid by the county from its bridge fund."

Sec. 6453. "If the county commissioners, or the court, shall find that the improvement petitioned for is not necessary and will not confer benefit upon the lands of the petitioners, and will not be conducive to the public welfare; or that if conferring some benefit to the lands of the petitioners or conducive to some extent to the advantage and welfare of the public that the inconvenience thereof to others, or the probable cost and expense thereof will be disproportionate to such benefit to petitioner, or advantage and welfare to the public, said commissioners, or the court, shall dismiss the petition and proceedings at the cost of the petitioners. Such costs shall be itemized by the auditor, or the clerk of court, and approved by the county commissioners, or the court, and ordered paid by the petitioners and bondsmen within a period to be fixed in such order, which shall not exceed thirty days; and such dismissal and order as to costs shall be entered on record on the journal of the county commissioners, or the court, as are final orders; and such order of dismissal shall contain a statement of the finding of facts on which the order is based, but such order shall be suspended by an appeal as in this chapter provided.

But if the county commissioners, or the court, shall grant the petition and no appeal therefrom be taken, then all the said costs with other costs of construction and any award for damages to, or compensation for property taken shall be assessed upon the benefited property as in this chapter provided, and the petitioner and bondsmen shall from such finding and expiration of the time fixed for appeal be released from all obligation for said costs and under said bond therefor."

Sec. 6469. "After the granting of the petition for any improvement under this chapter, and the letting of contracts for work and material, and the ascertainment and determination of all known claims for compensation for property taken, or damages to property from the construction of the improvement, the total cost thereof including the preliminary cost, and the actual or estimated cost of supervision and any known costs of litigation taxed against the county shall be assessed proportionately, according to special benefits conferred, upon all the lots and parcels of land specially benefited thereby, the owners of which have, as in this chapter provided, had notice of the proceedings for such improvement, whether such lots and parcels of land abut on the improvement or not. Such assessment shall be made as well against the lands of any railway company, township, county, municipality, school district or board of education, or any other public board, as against privately owned property,

for the benefit to the premises owned or controlled by such public corporation or body.

And in arriving at the amount of benefit to any piece of property due regard shall be had to any conditions that would require precedent expense before the benefit from the improvement would be available, and to any conditions that would permanently affect the degree of benefit that could be derived.

Provided that the county commissioners, or the court, if, and when, it is found that the improvement will benefit the public health, convenience and welfare, or the result will increase to a practicable degree the valuation of property for public taxation, may order such an amount of such total cost, not exceeding ten per cent, paid from the general ditch improvement fund, or if there be not sufficient unappropriated in such fund, from any unappropriated money of the general fund of the county. And the balance shall be assessed according to benefits as herein provided."

The point to be noted as to these several sections is their broad scope in defining the items which are to be included in the amount to be assessed. Such amount, according to section 6452, will include

all the cost and expense connected with their proceedings, as well as the cost and expense of construction of the improvement."

Again, section 6453:

"all the said costs, with other costs of construction and any award for damages to, or compensation for property taken."

And, finally, section 6469:

"the total cost thereof including the preliminary cost, and the actual or estimated cost of supervision and any known costs of litigation taxed against the county."

These provisions are very clear in their showing that the assessment is to include other costs than those involved in compensation and damages to property owners and in construction work. On the score of what items are embraced in such other costs, it would be difficult to suggest broader language than that last above quoted from section 6452,—*all the cost and expense connected with their proceedings.*" When we recur to section 6498, we find that the per diem provided for each commissioner is carefully confined to

"each day he is actually engaged on improvements under this act,"

and that an aggregate compensation is fixed "for services on one improvement." As it thus appears that the services of the commissioner are treated separately from his general services to the county for which his "regular salary" compensates him, and that his receiving pay for ditch work is dependent entirely on his rendering services in such work, it is difficult indeed to perceive how the per diem can be regarded as anything else than an item of cost or expense "connected with" the proceedings.

Again, it will have been noted from section 6453 that if the commissioners or

court find that the improvement petitioned for will not be conducive to the public welfare, then the commissioners or the court are to "dismiss the petition *and proceedings* at the cost of the petitioners." In connection with this provision, reference may be had to an opinion of this department of date January 4, 1915, Annual Report Attorney-General, 1914, Vol. II, p. 1732, wherein consideration was given to a series of sections enacted 102 O. L. 575, designated sections 6563-1 to 6563-48 and relating to a particular class of joint county ditch improvements. In said series of sections, it was provided in section 6563-10 that

"if said joint board determines not to proceed with said petition, then said petitioners shall pay the expenses of said proceeding."

In commenting on this provision my predecessor said:

"In this event, of course, the expenses and compensation of the commissioners will be paid neither from the county treasury, nor will it be deemed part of the costs of the improvement to be paid from the proceeds of the bond issue and assessed against the property."

The second paragraph of the headnotes to said opinion reads:

"If the commissioners decide not to go on with the improvement, upon filing of the petition, the costs, in accordance with section 6563-10, G. C., are paid by the petitioners and they are liable for the same upon their bond. The compensation and expenses of the commissioners in such event will be so paid."

This conclusion of my predecessor would seem to be equally applicable to present section 6453; and if the compensation of the commissioners is an item chargeable to the petitioners in case the petition be dismissed, no reason appears why the legislature would seek to make such item a charge against the county rather than the property owners in case the petition is granted and the project carried out.

It will further have been observed that the language last above quoted from section 6469 opens with the words

"the total cost thereof including the preliminary cost,"

and when reference is had to section 6449, relating to preliminary procedure, provision is found to the effect that if the commissioners or the court upon the formal hearing of the petition, conclude that a personal inspection and view of the proposed improvement is necessary, an adjournment may be taken for not more than twenty days for the purpose among others of making such inspection and that

"If the postponement be for inspection, it shall be made before the adjourned date of hearing, and the *actual cost thereof* shall be included with the other cost of said improvement."

Surely there is no escaping the conclusion that the actual cost of the inspection would include the item of compensation of the commissioners for their "services" in making the inspection, and would thus become part of the "preliminary cost" which is directed in section 6469 to be included in the assessment.

In the opinion of my predecessor above referred to, consideration was given other sections in said series than section 6563-10, among them section 6563-38, which provided:

"All of the costs and expenses connected with ordering and granting said improvement shall be taken as a part of the cost thereof and shall be included in the amount ordered paid by each county, except their costs of arbitration as provided in section 29 (G. C. section 6563-29)."

Construing this in connection with section 6563-35, which provided in substance that the commissioners have power to pay such part of the cost as they might deem fit out of general taxes, leaving the balance to be paid by assessment, my predecessor held (fourth paragraph headnotes):

"When the work is proceeded with and the improvement accomplished, under sections 6563-38 and 6563-35, G. C., the commissioners may make their compensation and expenses payable either out of the county treasury or out of assessments levied against the property holders."

The terms of present section 6469, which have immediate relation to the making of the assessment, would seem to be as broad in their general tenor as the provisions which were being construed by my predecessor.

Upon the whole, the conclusion is very clear that the per diem of the commissioners as provided by section 6498 is to be treated as part of the cost that is to be assessed against benefited lands.

The conclusion just stated is arrived at upon the basis of the express provisions of the new ditch code, and without the support of judicial precedent. Indeed, judicial precedent is of little weight as to such questions as are herein considered, for the reason that a slight difference in phraseology as between two sets of statutes may lead to entirely different views as to what may be included in an assessment. However, in the case of *Thayer vs. City of Grand Rapids*, 82 Michigan, 298, the supreme court of Michigan passed upon a situation very similar to that presented by your inquiry. The facts in that case as set out in the opinion were in substance that the charter of the city authorized the common council after it ascertained the estimated expense of public improvements to declare

"by an entry in their minutes whether the whole or what portion thereof shall be assessed to such owners and occupants, specifying the sum to be assessed, and the portion of the city which they deem to be benefited by such improvement; the costs and expenses of making the estimates, plans, and assessments incidental thereto shall be included in the expense of such improvement."

The trial court had found that plaintiff was entitled to recover from the city his proportion of a surplus of the fund created by assessment as such surplus appeared on the completion of the improvement, but also found that the city was entitled to credit, among other things, for amounts paid by the city

"from its contingent and general funds for the salaries of the board of review and equalization"

in making the assessment rolls.

In affirming this finding of the trial court, the supreme court called attention to the following statute applying to the city:

"The members of said board of review and equalization, as such commissioners (to make these special assessments), as by this act constituted, shall each receive the sum of three dollars per day, when actually employed, to be paid out of the contingent fund of the city,"

and made the following comment thereon:

"If this provision were to be interpreted by itself, no doubt would arise, but the provision of the statute first above quoted (referring to the charter provision above abstracted) expressly makes the cost and expenses of the estimates, plans and assessments incidental thereto a part of the expense of the improvements. There could be no purpose in this provision other than to make the property owners benefited bear this expense. With this in mind, any apparent conflict or inconsistency between the two provisions disappears."

In arriving at the conclusion that the commissioners' per diem constitutes part of the assessable cost, the case of Longworth vs. Cincinnati, 34 O. S. 101, has not been overlooked. That case related to a municipal improvement on the assessment plan. The second and third branches of the syllabus read:

"2. Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his assistants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, can not be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement.

3. If a superintendent of such an improvement is necessary, and one is employed by the city for that particular improvement, the amount paid by the city, for his services, may properly be included in the assessment."

It is not believed that the principle embodied in the second syllabus has application to the present inquiry; for as has been seen the per diem of the commissioners as provided in section 6498 is "*in addition* to the *regular* salary provided by law" and is regulated by the actual services of the commissioners on specific improvements. Nor is there any specific direction of statute that the per diem of the commissioners be paid out of the general county fund. Hence, it may well be said that the services of the commissioners come within the general principle of the third syllabus of the Longworth case.

It may be noted in passing that even though the per diem provided for the commissioners be considered as "salary," that fact would not of itself lead to the conclusion that the item was not part of the assessable cost. The question would still remain whether authority existed under the terms of the new ditch code for including part of the salary in the assessment. The county surveyor and his assistants are compensated on a salary basis and the surveyor is designated by the ditch code as the officer having supervision of ditch work. As was pointed out in an earlier opinion of this department, the proportionate part of the salary of the surveyor and his assistants attributable to a given improvement is to be included

in the assessment. See Opinion No. 957, dated January 23, 1920, directed to your bureau,—first headnote of which reads:

"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 so assessed is to be returned to the general fund out of the general ditch improvement fund."

You do not inquire as to the fund out of which the per diem of the commissioners is to be paid; but it is believed necessary to discuss that matter here in order to prevent misunderstanding as between the present opinion and said Opinion No. 957 just referred to. The salaries of the surveyor and his assistants are in the first instance paid out of the general fund (see section 7181; former section 2788 and present section 2980 as appearing 108 O. L. Pt. II, p. 1216). Hence the statement in said Opinion No. 957 to the effect that when the proportionate part of such salaries is repaid to the county through the medium of assessments, such proportionate part is returnable to the general fund.

However, as to the per diem of the commissioners there is no direction in section 6498 that the per diem be paid out of the general fund. We are thus brought to section 6491 of the new ditch code, which reads:

"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.

But no warrants shall be drawn to be paid from said fund unless it contain a sufficient amount not otherwise specifically appropriated to pay the same, and the letting and approving of any contract for an improvement or any award or judgment for compensation, damages or refund of assessments shall be deemed to be a specific appropriation of the amount of such obligation, and such amount shall be set apart for the purpose of such payment and contingently charged against said fund. If at any time said fund contains the proceeds of bonds issued and sold under this chapter, then said fund shall not be depleted below the obligation incurred by such bond issue or issues unless assessments or levies have been made or ordered made and in sufficient amount to redeem the same as they fall due. In case at any time obligations legally incurred exceed the amount of said improvement fund, an amount of the general revenue fund in the county treasury, if otherwise unappropriated, equal to the deficiency, may by resolution of the board of county commissioners be transferred to the general ditch improvement fund."

In view of the conclusion that the per diem of the commissioners is to be treated as part of the cost that is to be assessed against benefited lands, it follows

that by virtue of section 6491 such per diem is to be paid to the commissioners from the general ditch improvement fund and not out of the general county fund.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1669.

APPROVAL, BONDS OF VILLAGE OF DUBLIN IN AMOUNT OF \$2,500
 FOR ELECTRICAL CONSTRUCTIONS.

COLUMBUS, OHIO, December 2, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1670.

APPROVAL, BONDS OF HAMILTON TOWNSHIP, LAWRENCE COUNTY,
 OHIO, IN AMOUNT OF \$16,000 FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, December 2, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1671.

PUBLIC WORKS—DISCUSSION OF OWNERSHIP OF ORCHARD ISLAND
 AND JOURNAL ISLAND, BUCKEYE LAKE, OHIO.

*The superintendent of public works advised as to the course to be followed
 in the matter of Orchard Island and Journal Island, Buckeye Lake, Ohio.*

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

COLUMBUS, OHIO, December 3, 1920.

DEAR SIR:—You have recently written to this department as follows:

“Herewith I am transmitting, for your consideration, three documents which have been presented to this department and which are in a measure, self-explanatory.

The claim has been set up by Mr. J. E. Butler that the aforesaid documents establish his rights to the ownership of a certain island at Buckeye Lake and part of another island.

He has requested in his letter that I make a certain certificate to the auditor of Fairfield county, renouncing the state's claim to Journal Island, and authorizing said auditor to place Journal Island on the tax duplicate of Fairfield county as belonging to Mr. Butler.

What are my rights and duties, as superintendent of public works, in the premises?”