

299.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS, MUSKINGUM, MERCER and MEDINA COUNTIES.

COLUMBUS, OHIO, May 3, 1923.

Department of Highways and Public Works, Division of Highways, Columbus, Columbus, Ohio.

300.

ASSESSMENTS—ENTIRE COST OF STREET LIGHTING MAY NOT BE ASSESSED AGAINST SPECIALLY BENEFITED LANDS—CORPORATION MUST PAY COST OF INTERSECTIONS—MUST ASSUME ONE-FIFTIETH OF ENTIRE COST—SECTION 3820 G. C. LIMITED BY SECTION 3822 G. C.—SECTION 3812-4 CONSTRUED.

COLUMBUS, OHIO, May 4, 1923.

SYLLABUS:

1. *Under the provisions of section 3012-4 of the General Code, when read in connection with section 3820 of the General Code, the entire cost of street lighting may not be assessed against abutting, adjacent and contiguous or other specially benefited lots or lands.*

2. *Under the provisions of section 3812-4 of the General Code, the corporation must assume not less than one-fiftieth of the entire cost, and must pay the cost of intersections in providing for the lighting of a street.*

3. *The provisions of section 3820 of the General Code are limited by the provisions of section 3822 of the General Code only to the extent that not more than one-half of the cost and expense of improving a street by repaving may be assessed against the abutting, adjacent and contiguous or other specially benefited lots or lands.*

4. *Under the provisions of sections 3820 and 3822 of the General Code a corporation, in a proceeding to improve a street by repaving, must at least pay (1) at least one-fiftieth of the entire cost of such improvement, and (2) the cost of intersections.*

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

GENTLEMEN:—You have recently submitted to this department two questions:

1. Under the provisions of Section 3812-4 G. C., may the entire cost of street lighting be assessed against abutting, contiguous or benefited property or must the city assume not less than two per cent. and the cost of the intersections?

2. Are the provisions of section 3820 G. C. applicable to the cost of repaving under the provisions of section 3822 G. C., that is, must the city assume in addition to one-half the cost and expense of such repaving, the cost of intersections?

The proposition submitted involves section 3822 of the General Code, to which section 3812-4 of the General Code is supplementary, and the other sections of the General Code referred to in your questions are a part of an act originally passed April 22, 1902, which act provides for the organization of cities and incorporated villages and restricts their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such powers, and are still largely in substantially the same form and are now all found in Chapter V of the Municipal Code, which chapter is entitled "Assessments", contained in sections 3812 to 3911 of the General Code, both inclusive.

Section 3812-4 of the General Code (109 O. L. 221), was passed April 29, 1921, as supplementary to said section 3612.

Section 3812 of the General Code reads:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or watercourse, and for constructing, or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkhead, culverts, approaches, flood gates, or water ways or drains incidental thereto, or making any other improvement of any river, front or lake front (whether such river front or lake front be privately or publicly owned), which the council may declare conducive to the public health, convenience or welfare by any of the following methods.

First: By a percentage of the tax value of the property assessed.

Second: In proportion to the benefits which may result from the improvement, or

Third: By the foot front of the property bounding and abutting upon the improvement."

Section 3812-4 of the General Code reads:

"The council of a city upon the recommendation of the director of public service, or the council of a village, may provide for lighting any street, alley, dock, wharf, pier, public road or place, or parts thereof, and levying and collecting special assessments therefor, by any one of the methods mentioned in section 3812, General Code of Ohio. For the purpose of carrying out the provisions of this supplementary section one resolution, ordinance or contract may be made to include one or more streets, alleys, docks, wharves, public roads or places, or parts thereof, and the proceedings by council providing for such lighting and levying and collecting special assessments therefor shall be the same as provided in this chapter

for proceedings by council for the improvement of streets, except that notices of the passage of the resolution declaring the necessity for such lighting shall be given to the owners of the lots and lands to be assessed for the payment of the cost and expense of such lighting by publishing such a resolution once a week for two consecutive weeks in two newspapers of opposite politics published and of general circulation within the corporation, and no other or further notice shall be required; provided, however, that in municipal corporations in which no two newspapers of opposite politics are printed, as defined in section 6255 of the General Code, notice of the passage of such resolution shall be given to the owners of the lots and lands to be assessed for the payment of the cost and expense of such lighting by publishing such notice in either of the following manners to be determined by council, viz: by posting copies thereof in not less than five (5) of the most public places in the municipality, to be determined by council, for a period of not less than fifteen (15) days prior to the taking effect thereof, or by publication thereof in any newspaper printed in Ohio and of general circulation in such municipality; provided further that in all municipal corporations which have adopted a charter the notice to the property owners may be published in accordance with the provisions of such charter."

Section 3820 of the General Code reads:

"The Corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

Section 3822 of the General Code reads:

"When a special assessment for the improvement of a street or other public place has been levied and paid, the property so assessed shall not again be assessed for more than one-half the cost and expense of repaving or repairing such street or other public place unless the grade thereof is changed."

The first question is:

Under the provisions of section 3812-4 G. C., may the entire cost of street lighting be assessed against abutting, contiguous or benefited property or must the city assume not less than two per cent. and the cost of the intersections?

This question particularly involves said section 3812 as supplemented by said section 3812-4, and also section 3820 of the General Code. Your second question involves section 3822 of the General Code.

It is a general rule that an amended statute is construed, as regards any action had after the amendment was made, as if the statute had been originally enacted in the amended form. Sutherland, Section 337.

As was said by the Court in the case of *Lyon v. Railway Co.*, 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402-5:

"An original statute with all its amendments must be read together and viewed as one act passed at the same time."

A review of the rules of construction involved are given by Judge Johnson in the opinion in the case of *State ex rel v. Fulton*, 99 O. S. 176:

"In *state, ex rel. Durr, Auditor v. Spiegel et al.*, Budget Commissioners, 91 Ohio St., 13, cited, it is held:

'Where an amendatory act contains the entire section or sections as amended and repeals the original section or sections in compliance with Section 16, Article II of the Constitution, the amended sections are to be given the meaning they would have had if they had read from the beginning as they do as amended, except where such construction would be inconsistent with the manifest intent of the legislature.

'An act amending one or more sections of a statute should be considered in connection with the whole statute of which it has become a part, the object intended to be accomplished by the law, the imperfections to be removed and the changes to be made by the amendment.

'In 1 Sutherland's *Statutory Construction* (2 ed.), Section 237, it is said:

'So far as the section is changed it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the more nominal re-enactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since the first enactment.'

'In *McKibben v. Lester*, 9 Ohio St., 627, it is held: 'Where one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, the section or sections as amended must be *construed* as though introduced into the place of the repealed section or sections in the original act, and, therefore, *in view of the provisions of the original act, as it stands after the amendatory sections are so introduced.*'"

I assume that had section 3812-4 been originally enacted, it would not now give rise to the present inquiry; and yet we should read it and the other sections on the same subject as if they had been passed at the same time.

It will be noted that Section 3812-4 of the General Code specifically authorizes the municipal council to provide for the lighting of streets, etc., and provides that the special assessments shall be levied and collected by one of the three methods set out in section 3812 of the General Code. The remainder of the section has to do with the legislation and procedure of the council in the matter. Nowhere in the section itself is it provided as to how the cost and expenses are to be paid or apportioned, other than the provision relating to the special assessment, and no doubt the legislature had in mind and contemplated other sections of this chapter making such provision. Section 3812-4 of the General Code should be read in connection with section 3820 of the General Code, which latter section makes such provision. As said in Sutherland, Section 443:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act."

Section 3812-4 above quoted provides that the council may provide for lighting streets, etc., and levy and collect special assessments therefor by one of the methods enumerated in section 3812 of the General Code. This provision of the section when read in connection with the provisions of section 3820 is qualified by the provisions of said section 3820 to the extent that the corporation must pay at least one-fiftieth part of the cost and expense of the improvement, and the cost of the intersection.

It follows, in answer to your first question, that under the provisions of section 3812-4 when read in connection with section 3820, the entire cost of street lighting may not be assessed against abutting, adjacent and contiguous or benefited property; and that the corporation, under the provisions of said sections of the General Code, must assume not less than one-fiftieth of the total cost and must also pay the cost of intersections.

Your second question is:

Are the provisions of section 3820 G. C., applicable to the cost of repaving under the provisions of section 3822 G. C., that is, must the city assume in addition to one-half the cost and expense of such repaving, the cost of intersections?

The rule of construction hereinbefore given, statutes *in pari materia* are treated and construed together, should be kept in mind in determining this question. Also, section 3911 of the General Code furnishes rules of construction which, by the provisions of the statute itself, must be adhered to. The pertinent part of the section reads:

"Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained."

Section 3812 of the General Code provides that each municipal corporation shall have special power to levy and collect said assessments and to assess abutting, adjacent and contiguous or other specially benefited lots or land to pay any part of the cost and expense connected with the improvement of any street, etc., by grading, draining, curbing, paving, repaving, etc.

The purpose of this section and related sections is to provide legislative authority to municipal corporations to improve their streets in the manner as set out in the statute and to provide for the payment of the cost and expense thereof. Various related sections provide the legislative machinery whereby this purpose may be accomplished.

It will be observed that under section 3812 of the General Code the improvement which may be made and the cost thereof assessed in the manner provided by law may consist of any one or more of the different forms of improvement enumerated in said section. It may consist of paving or it may consist of repaving.

The legislature has provided a complete mode or plan by which any of the improvements specified in said section may be made and a certain portion of the cost thereof assessed upon the abutting, adjacent and contiguous or other specially benefited lots or lands.

These sections should be read together as much as though they were under the same section number. They provide the mode or plan by which the cost and expense of the improvement may be assessed and paid and by which a certain portion of the cost and expense may be assessed upon the abutting, adjacent and contiguous or other specially benefited lands or lots.

Section 3812 of the General Code provides generally that cost and expense may be assessed upon the abutting, adjacent and contiguous or other specially benefited lots and lands.

Section 3812 of the General Code provides that the corporation shall pay such portion of the cost and expense as the council deems just, and further provides that the corporation *must* pay.

- (1) At least one-fiftieth of all cost, and
- (2) The cost of intersections.

In an improvement by paving of original construction or otherwise, this section specially and definitely states what the corporation in that event must pay. However, the provisions of this section are limited by the provisions of section 3822 of the General Code. Limited in one particular only, namely, in an improvement of a street by repaving, not more than one-half of the cost and expense of the improvement may be assessed against the abutting property unless the grade of the street is changed. While the provisions of this section are a limitation upon the provisions of section 3820 of the General Code, they are a limitation only in the instance given. Under section 3820 of the General Code the corporation must pay the cost of intersections in all improvements, including both paving and repaving. There is no provision in section 3822 of the General Code which in any way changes, limits or modifies this provision that the corporation shall pay the cost of intersections in an improvement by repaving, or otherwise.

This interpretation conforms to the elementary general rule of construction referred to and in practice it will do no violence to the statutory rule as enacted by the legislature. It should be noted, however, that section 3822 of the General Code provides that the property shall not again be assessed for more than one-half of the cost and expense of repaving such street. The word "street" contemplates the whole improvement, including intersections as well as any other part thereof. Intersections are a part of the street. Dillon, Sec. 538. The phrase "cost and expense" contemplates the whole cost and expense of the improvement of the street by repaving; the cost of intersections as well as any other part thereof.

It follows that the cost and expense of improving the street by repaving should, under the sections involved, be assessed and paid:

Against and by the corporation: (1) Not less than one-fiftieth of the cost, (2) The cost of intersections, and (3) Such part of the cost for which special assessments are levied as the council deems just.

Against and by the abutting property: Not more than one-half the cost thereof.

It would also follow that whatever balance, if any, of the cost remaining would, under the reasonable implication of the statutes involved and of necessity, have to be assessed against and paid by the corporation.

In view of the foregoing discussion, it is believed that it is unnecessary to specifically answer your question.

Respectfully,
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Attorney General.