1307.

MUNICIPALITY—AUTHORITY TO ASSESS COUNTY JAIL PROPERTY TO DEFRAY COST OF STREET LIGHTING—COMMISSIONERS MAY BE SUED IF PAYMENT REFUSED.

SYLLABUS:

1. *Section* 3812, *General Code, confers upon a municipality general authority to levy assessments for the lighting of streets within the municipality against property belonging to the county bounding and abutting upon the improvement, and no provisions exist in the General Code exempting such property from that general authority.*

2. *In the event of failure of the board of county commissioners to pay an assessment so levied, an action may be brought by the municipal corporation against such board of county commissioners to recover the amount of such assessment.*

COLUMBUS, OHIO, December 18, 1929.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"The County Commissioners of Licking County have presented to this office a question which involves the right of the municipality of Newark to levy an assessment for street lighting improvement against lots and lands upon which a jail and garage for official use have been constructed by the Board of County Commissioners. The street lighting improvement abuts the county property and the assessment was made according to the foot front rule. The assessment was made upon the county jail property and upon all other property abutting upon the street at the same rate per foot front. The County Commissioners have declined to pay this assessment, until they are advised that it is proper and may be collected from them. They feel that any suit brought against them in this matter would not state a legal cause of action.

It is understood that the city authorities are relying upon the case of *Jackson, Treasurer,* vs. *Board of Education of Cedarville Township Rural School District,* reported in 115 O. S., 368. It is true that Section 3812, G. C., is general authority to levy an assessment, which assessment is levied against the property itself. But the County Commissioners seem to regard the statute as not sufficient in itself to be authority for levying against the jail property and creating a debt against the county. They point out that the county is an instrumentality of government, clothed with such powers and such only as are given by statute, and liable to such extent and such only as the statute prescribes. (*Commissioners* vs. *Gates,* 83 O. S., 19.) They invite attention also to the holding that a county can neither sue nor be sued, except by express power conferred by statute, and in the manner so expressed, and that none of its officers, by virtue of such office, can sue or be sued, except as provided by statute. (*Hunter* vs. *Commissioners,* 10 O. S., 515.)

The liability of County Commissioners seems to be defined by Section 2408 of the General Code. By that statute, certain actions sounding in tort may be brought against the Commissioners.

The County Commissioners also maintain that their discretion, and not that of the municipal corporation, should control the lighting of county premises, such as the jail, and that this discretion applies to the outside as well as the inside of the jail property. In investigating the grounds for their position, it has been found that Section 2419, General Code, states that a jail, among other public buildings, etc., shall be provided by the Com-

missioners when, in their judgment, it is needed, and that they shall provide equipment and facilities therefor. By virtue of Section 2433 of the General Code, the taxing authority of any county has power to improve, equip and furnish a jail and site therefor; the statute continues:

'Also, such real estate adjoining an existing site as such taxing authority may deem necessary for any of the purposes aforesaid, including real estate necessary to afford light, air, protection from fire, suitable surroundings, ingress and egress.'

Section 2435-1 provides that the Commissioners of any county may, at any time, either before or after the completion of any county building, invite bids and award contracts for supplying such building with light. The matter of lighting, therefore, the County Commissioners declare is a matter for them to act upon. They have, for some years, lighted the premises surrounding the jail in a manner they thought proper and they consider any attempt to alter that plan of lighting as an infringement of an inferior taxing authority upon their province. They feel that the street lighting improvement in no wise benefits the jail property or the taxpayers of the county generally who would, if the assessment be collectible, be called upon to pay for an improvement which not they but citizens of the city, principally, would enjoy.

All steps in connection with the giving of notice by the municipality have been properly carried out.

Your opinion as to the right of the municipality of Newark to levy such assessment and its power to collect it from the county is respectfully requested."

I am aware of no cases in Ohio involving the right of a municipality to levy assessments upon property belonging to the county.

Section 3812, General Code, provides in part as follows:

"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, * * * and any part of the cost of lighting * * * which the council may declare conducive to the public health, convenience or welfare, by any of the following methods.

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

The case of *Jackson* vs. *Board of Education*, to which you refer, holds as set forth in the syllabus:

"1. Section 3812, General Code, confers upon a municipality general authority to levy assessments for street improvements against property within such corporation belonging to a board of education and being used for school purposes, and no provision exists in the General Code of Ohio exempting such property from that general authority.

2. In the event of failure of such board of education to pay an assessment so levied, an action may be brought by the municipal corporation against such board of education to recover the amount of such assessment."

Upon consideration, I am of the view that the reasoning of the court in this case in holding that property belonging to a board of education within a municipality may be assessed for street improvements, is applicable to the question here presented. The court in its opinion by Chief Justice Marshall discussed the case of *Lima* vs. *Cemetery Association*, 42 O. S., 148, which held that property of a cemetery association which was exempt from taxation was nevertheless subject to assessment. It was pointed out that, as Section 3812, General Code, gives general authority to levy an assessment, which assessment is levied against the property itself, if that authority creates a debt against the owner of property in the case of a cemetery association, then it must also create a debt against a board of education. It seems to me that it is perfectly sound logic to say that if Section 3812 gives authority to levy an assessment against the property itself which creates a debt against the owner of property in the case of a board of education, then by parity of reasoning, it must also create a debt against a board of county commissioners. The opinion further held as set forth at pp. 374, 375:

> "If the Cedarville rural school district were identical with Cedarville village, there would be no injustice in permitting the assessment to be paid out of the general fund of the village. To compel the board of education of the village to levy a tax to pay the assessment would be in no sense different from compelling the council of the village to levy a tax upon the same property for the same ultimate purpose. The school district, however, not being identical with the village, if the assessments should be paid out of the general fund of the village all the patrons of the school including those in the township outside of the village as well as those within the village, would be equally benefited, and yet those patrons of the school outside of the village would have nothing to pay. The injustice of such a result would be shocking.
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> We have not, however, reached our conclusion upon consideration of justice or injustice, but we find ample general authority in Section 3812 for making the assessment, and nowhere do we find any exemption of boards of education from the operation of that general authority.
>
> We find further that the statutes now make ample provision for levies of taxes for payment of improvements upon school property and for payment of assessments levied by other taxing authorities, under the provisions of Section 3812. The levy of the assessment upon the abutting property belonging to the rural school district created a debt against the board of education, in every respect as valid as if a contract had been made for the same improvement by the board of education itself. If the board of education should not voluntarily make a levy to pay the assessment, the board could be compelled to do so by a writ of mandamus. We have therefore reached the conclusion that the assessment is valid and that the county treasurer may maintain an action to recover the amount of the assessment so levied."

In the instant case, it should be noted that the county is not co-terminus with the municipality and if the assessment should be paid out of the general fund of the municipality, the citizens of the county outside of the municipality who are equally benefited by the improvement of the county property would have nothing to pay. I do not find any exemption of county commissioners from the operation of the general authority contained in Section 3812. I am of the view, under the holding of this case, that the levy of the assessment upon the property of the county abutting upon the improvement creates a debt against the county in every respect as valid as if a contract had been made for the improvement by the board of county commissioners itself.

I concur in your view to the effect that Section 2435-1, General Code, author-

izes county commissioners to provide for lighting county buildings, which authority would very properly extend to the exterior as well as the interior of said buildings. It must be borne in mind, however, that any individual owner of property may provide for its lighting but such authority does not preclude such owner from the obligation of paying his part of an assessment which a municipality, in which such property lies, has levied for a lighting improvement benefiting such property.

In view of the foregoing and in specific answer to your question, I am of the opinion that:

1. Section 3812, General Code, confers upon a municipality general authority to levy assessments for the lighting of streets within the municipality against property belonging to the county bounding and abutting upon the improvement, and no provisions exist in the General Code exempting such property from the general authority.

2. In the event of failure of the Board of County Commissioners to pay an assessment so levied, an action may be brought by the municipal corporation against such Board of County Commissioners to recover the amount of such assessment.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1308.

APPROVAL, ABSTRACT OF TITLE TO LAND OF ANNA R. OVERLY, BENTON TOWNSHIP, PIKE COUNTY, OHIO.

COLUMBUS, OHIO, December 18, 1929.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date, submitting therewith abstract of title, warranty deed, encumbrance estimate No. 5839 and Controlling Board's certificate relating to the proposed purchase of a tract of 300 acres of land situated in Benton Township, Pike County, Ohio, the same being owned of record by Anna R. Overly, a widow, and being more particularly described as follows:

"FIRST TRACT: Part of the E. T. and H. H. Conways Survey No. 15593, beginning at a black oak, N. W. corner of the Littlejohn tract of this survey; thence N. 63 poles to a black oak, thence N. 38 deg. W. 36 poles to a black oak and white oak; thence N. 81 deg. W. 22 poles to two white oaks; thence S. 26 deg. W. 40 poles to a stake; thence S. 3 deg. W. 200 poles to a stake; thence S. 75 deg. E. 64 poles to the southwest corner of said Littlejohn tract; thence with the same N. 3½ deg. W. 198 poles to the beginning, containing One Hundred (100) Acres, more or less. Being bounded on the north by the lands of A. Vincent, on the east by the lands of Littlejohn, on the south by the lands of Ferdinand Hawthal, and on the west by the C. C. Colman tract.

SECOND TRACT: Being part of said Conway's Survey No. 15593, beginning at a white oak N. W. corner of T. J. Yauger tract of said survey; thence S. 3½ deg. W. 192 poles and 16 links to a stake; thence S. 62 deg. E. 88 poles to a stake in the line of the original survey corner to the D. E. Blain tract; thence E. 2½ deg. E. 200 poles to a stake in the north line of said sur-