667.

APPROVAL, BONDS OF JOHNSTOWN-MONROE RURAL SCHOOL DISTRICT, LICKING COUNTY—$83,000.00.

COLUMBUS, OHIO, June 27, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

668.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO ASSESS VILLAGE FOR THE IMPROVEMENT OF AN INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD EXTENDED INTO OR THROUGH SUCH VILLAGE.

SYLLABUS:

Where, under the provisions of Section 1193-1, General Code, with the consent of a village, the improvement of an inter-county highway or main market road is extended into or through such village, no part of the cost or expense of such proposed improvement being assumed by the village, county commissioners are without authority to levy assessments for any portion of the cost of such improvement against the streets and alleys of said village abutting on the improvement or lying within any of the assessment areas provided for in Section 1214, General Code.

COLUMBUS, OHIO, June 28, 1927.

HON. E. B. UNVERFERTH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

"Upon the following statement of facts what is the opinion of your department, and what, if any, cases are in point?

The county commissioners of Putnam county in conjunction with the State Highway Department continued an intercounty highway through the village of Gilboa. However, the commissioners before constructing the same, obtained the permission of the council of that village to put the road in. Nothing was said as to any assessment but the commissioners in making the same, *assessed the streets and alleys of said village* and upon notice from the county treasurer they have refused to pay the same.

Section 1193-1, if I interpret the same correctly, seems to me, that where an inter-county highway is constructed through a village and the village grants permission but does not assume any part of the costs and expenses of the state highway, then the assessments are made 'in the same manner as though the improvement was situated wholly without a village.'

Now Section 5356 of the General Code as you will note provides that certain property is exempt from taxation and includes public squares and other public grounds of a city, village, etc.

What I desire to know is whether this sort of an assessment has been tested out in any part of the state and what the result has been if such a test has been made.

The amount of taxes in this particular case is rather small as against the said streets and alleys but we have the same situation in several small villages of the county."

You state that the village council did not assume any part of the cost and expense of such improvement, and I assume that the consent of the village to the construction of the highway in question was regularly obtained under the provisions of Section 1193-1, General Code, to which you refer in your letter, the first paragraph of this section reading as follows:

"When, upon the application of county commissioners or township trustees and under the supervision of the State Highway Department, the improvement of an intercounty highway or main market road is extended into or through a village, or an improvement constituting an extension of an improved intercounty highway or main market road is constructed within a village, it shall not be necessary for the village to assume any part of the cost and expense of the proposed improvement. *If no part of the cost and expense of the proposed improvement is assumed by the village, no action on the part of the village, other than the giving of its consent, shall be necessary; and in such event all other proceedings in connectioin with said improvement, including the making of assessments, shall be conducted in the same manner as though the improvement was situated wholly without a village.* * * * " (Italics the writer's)

It will be observed that by the provisions of the above section if no part of the cost and expense of the proposed improvement be assumed by the village and the village gives its consent to such improvement, all proceedings in connection therewith, including the making of assessments, are to be conducted in the same manner as though the improvement were situated wholly without a village.

Section 1214 of the General Code, providing for the assessment of a portion of the cost upon the property abutting on the improvement, or against the real estate within one-half mile, one mile or one and one-half miles of either side of such improvement, according to benefits accruing to such real estate, provides in part as follows:

" * * * Five per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed twenty per cent of the valuation of such abutting property for the purposes of taxation. Provided, however, that the county commissioners by resolution adopted by unanimous vote may increase the per cent of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvements; but in no event, except within municipalities, shall more than fifteen per cent of the total cost and expenses of the im-

provement, exclusive of the cost and expenses of bridges and culverts, be specially assessed unless, a consent in writing to any additional increases, over and above such fifteen per cent and signed by at least fifty-one per cent of the land or lot owners, residents of the county, who are to be especially assessed for said improvement, shall be first filed with said county commissioners. * * * Provided further, that the county commissioners by a resolution may make the assessment of five per cent or more, as the case may be, of the cost and expense of the improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement, or against the real estate situated within one and one-half miles of either side of such improvement, according to the benefits accruing to such real estate. * * * The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed which apportionment shall be made according to the benefits accruing to the land so located. The county surveyor shall file such apportionment with the county commissioners or township trustees for the inspection of the persons interested.

Before adopting the estimate so made and reported the commissioners or trustees shall publish once each week for two consecutive weeks in some newspaper published in the county and of general circulation in the township where the improvement is located notice that such estimated assessment has been made and that the same is on file in the office of the county commissioners or with the township trustees and the date when objection, if any, will be heard to such assessment.

If any owner of property affected thereby desires to make objections he may file his objection to said assessment in writing with the county commissioners or township trustees, as the case may be, before the time for said hearing. If any objections are filed the county commissioners or township trustees shall hear the same and act as an equalizing board and they may change said assessment if in their opinion any change is necessary to make the same just and equitable, and such commissioners or trustees shall approve and confirm said assessments as reported by the surveyor or modified by them.

Such assessments when so approved and confirmed shall be a lien on the land chargeable therewith. County commissioners shall be required to assume on behalf of the county all that part of the cost and expense of an improvement not assumed by or assigned by law to the state or to the township and not specially assessed."

It seems clear that by its terms this section would not authorize assessments upon streets and alleys. It will be noted that the section requires "five per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, *provided the total amount assessed against any owner of abutting property shall not exceed twenty per cent of the valuation of such abutting property for the purposes of taxation.*" Streets and alleys of course have no valuation for the purposes of taxation. The section further provides that "the assessment of five per cent or more, as the case may be, of the cost and expense of the improvement" may be made "against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement, or against the real estate situated within one and one-half miles of either side

of such improvement *according to the benefits accruing to such real estate.*" It is obvious that it can not be said that benefits accrue to streets and alleys by the improvement of another street in the sense that benefits accrue to lots and lands as the terms are used in this section. In addition it is provided by the section under consideration that the "assessments when so approved and confirmed *shall be a lien on the land chargeable therewith.*" Certainly it was never intended that a lien for assessments should be imposed upon streets and alleys or that streets and alleys should be sold to satisfy an assessment levied for the improvement of another street or highway.

It is unnecessary to quote authorities to the effect that a municipal corporation holds title to the streets and alleys in such municipality in trust for the public for all necessary street uses and other public uses necessary to the municipality and its inhabitants. See the concurring opinion of Chief Justice Marshall in the case of *Smith* vs. *The Central Power Co.,* 103 O. S. 681, and the authorities therein reviewed.

With reference to the levying of assessments against public streets and roads Page and Jones, at Section 587 of their work on Taxation by Assessment, say as follows:

> "In the absence of specific statutory authority for assessing a street, no assessment can be levied against it. This principle applies even though such street is in fact benefited by the construction of another street. This principle depends in part upon the fact that streets are public highways. The city may have the legal title to them, but it holds such title solely for the benefit of the general public and subject to their use. Such property is therefore devoted to a public use, even more than the other property belonging to a city. Another reason for holding such property not subject to assessment is found under statutes which provide for collecting an assessment by sale of the property assessed. A street cannot, of course, be sold, and therefore it cannot be the intention of the legislature by such a statute, to provide for assessing a street. Special stress is sometimes laid upon the statutory description of the property to be assessed as indicating an intention not to assess streets. Thus, if the statute provides for the assessment of 'lots, blocks, tracts and parcels of land contiguous to such improvement,' such description does not include streets which cross the improvement. So, if the statute provides for assessing abutting lots, such description does not include the street which crosses the improvement. Streets and highways cannot be assessed, even if the description of the land to be assessed might seem *prima facie* to include them. Thus, under a statute authorizing an assessment of land one hundred and fifty feet back from the line of the improvement, a public highway within that distance cannot be assessed. * * * "

As authority for the statement that since a street can not be sold it can not be said that it was the intention of the legislature to provide for assessing a street the authors cite the case of *State ex rel. The City of Columbus vs. John G. Mitchell et al., Commissioners,* 31 O. S. 592. The third syllabus in this case reads as follows:

> "Under the provisions of the act (72 v. 153), the intersecting streets and alleys are not subject to be assessed to pay for the improvement."

In the opinion the court said as follows:

> "This case arises under the act of May 30, 1875, entitled 'an act to pro-

vide for the improvement of streets and avenues in certain cities of the second class,' 72 Ohio L. 153.

The controversy originated between the city and the commissioners as to what constituted the abutting property subject to assessment under the act to pay for the improvement.

On the part of the city, it was contended that in levying the assessment upon the property abutting on the improvement, the intersecting streets and alleys were to be excluded, while, on the other hand, a majority of the commissioners claimed that such streets and alleys were to be charged with the assessment in common with the abutting lots.

The act provides that the cost of the improvement shall 'be assessed equally per foot front upon the property fronting or abutting upon said improvement.' The commissioners are required to cause a plat of the avenue or street to be prepared, 'showing the separate lots of ground and the names of several owners'; and they are also required to make 'a list or schedule of the names of all said owners and the amount assessed against each lot or piece of ground,' and the assessment is to be placed upon the duplicate of the county, and collected like other taxes.

Section 19 of the act is as follows: 'Said asssessments, with interest accruing thereon, shall be a lien upon the property abutting upon said street or avenue from the commencement of the work, and shall remain a lien until fully paid; and they shall have precedence of all other liens, and shall not be divested by any judicial sale; provided, that said lien shall be limited to the lots bounding or abutting on said street or avenue, and for not exceeding in depth from said avenue 187½ feet.'

It is quite apparent, from these provisions, that no property is subject to be assessed which is not also subject to be sold to pay the assessment. This fact is of itself sufficient to negative the claim of the commissioners that the public streets are subject to assessment." (Italics the writer's)

The reasoning and conclusions of the court in the above case are applicable here for the reason that both the statute construed in the Mitchell case and Section 1214, supra, provide for assessments "upon the property abutting on the improvement" and both provide that the assessments "shall be a lien".

In your letter you refer to Section 5356, General Code, which reads as follows:

"Market houses, public squares, or other public grounds of a city, village or township, houses or halls used exclusively for public purposes or erected by taxation for such purposes, notwithstanding that parts thereof may be lawfully leased, and property belonging to park districts, created pursuant to the provisions of Section 2976-1 et seq. of the General Code, shall be exempt from taxation."

This section does not in anywise affect the question under consideration for the reason that such section relates to taxation generally and not to special assessments for improvements.

Answering your question specifically, for the reasons and upon the authorities above stated it is my opinion that where, under the provisions of Section 1193-1, General Code, with the consent of a village, the improvement of an intercounty highway or main market road is extended into or through such village, no part of the cost or expense of such proposed improvement being assumed by the village, county commissioners are without authority to levy assessments for any portion of the

cost of such improvement against the streets and alleys of said village abutting on the improvement or lying within any of the assessment areas provided for in Section 1214, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

669.

VACANCY—OFFICE OF CORONER—TOTAL TENURE SHALL NOT EXCEED FOUR YEARS.

SYLLABUS:

Where there was no candidate for the office of coroner at the general election in November, 1926, the then incumbent may hold over under Section 8 of the General Code at least until his successor is elected or appointed and qualified, providing the total tenure under his election shall not exceed four (4) years. Whether after August 1, 1927, under amended Section 2829 G. C., a vacancy may be declared, question.

COLUMBUS, OHIO, June 28, 1927.

HON. CARL Z. GARLAND, *Prosecuting Attorney, Batavia, Ohio.*

DEAR MR. GARLAND:—I beg to acknowledge receipt of yours of June 17th, requesting the opinion of this department upon the following facts:

"In this county there was not a candidate for coroner and no one was elected to that office. The coroner who served before the last election has not given any new bond, which I presume would be useless. Is it now the duty of the county commissioners under Section 2829 of the General Code to appoint a coroner?

The commissioners up to this time have taken no action in the matter and I am desirous of knowing whether or not the coroner serving prior to the last election is coroner until his successor is appointed."

Section 2 of Article XVII of the Constitution of Ohio, as amended November 7, 1905, provides in part:

" * * * and the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) as may be so prescribed."

Section 2823 of the General Code provides:

"There shall be elected biennially in each county a sheriff and a coroner, each of whom shall hold his office for a term of two years, beginning on the first Monday of January next after his election."

Section 8 of the General Code provides: