lessee therein and the appraised valuation of the parcel of land covered by said lease, is the following:

Name	Valuation
Edward Palmer	$100.00

The above mentioned lease is executed under the authority of Section 471, General Code, as amended by the Conservation Act, passed by the 88th General Assembly.

Upon examination of the provisions of said lease, I find that the same is in conformity with the provisions of said section of the General Code and with other statutory provisions relating to leases of this kind.

Said lease is accordingly hereby approved by me as to its legality and form, which approval is evidenced by my authorized signature on said lease, and upon the duplicate and triplicate copies thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2905.

COUNTY DITCH IMPROVEMENT—RAILROAD RIGHT-OF-WAY HELD AS EASEMENT—SUCH PROPERTY MAY BE ASSESSED, COMMENSURATE WITH BENEFIT RECEIVED.

SYLLABUS:

Railroad right of way property may be assessed for a county ditch improvement benefiting such property, whether the same is owned in fee by the railroad company or is held as an easement by the company for railroad right of way purposes.

The assessment levied upon a particular tract or parcel of railroad right of way property for such county ditch improvement should be commensurate with the special benefit received by such tract or parcel as compared with the whole of the benefits conferred by such improvement.

COLUMBUS, OHIO, February 3, 1931.

HON. JOHN H. HOUSTON, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

> "The Commissioners of Brown County have caused to be constructed in this County certain ditch projects, in accordance with Sections 6442 of the General Code of Ohio to 6508, General Code of Ohio. These improvements include, in certain instances, sections of Railroad Right of Way in active use for Railroad purposes. The specific section involved in this construction is Section 6455 of the General Code, which reads as follows:
>
> 'The Surveyor in making his estimate of the amount to be assessed each tract of land, and the Commissioners in amending, correcting, confirming,

and approving the assessments, shall levy the assessments according to benefits; and all land affected by said improvement shall be assessed in proportion as it is specia'ly benefited by the improvement, and not otherwise.'

The attorneys for the Railroad asked this office to submit this question to the Attorney General, to-wit: Have the Commissioners and Surveyor, in fixing the assessments so levied, the right under the sections of law so quoted, to take into consideration the much higher valuation of Railroad property, and the peculiar benefits of drainage to said Railroad property, in making these assessments, or is it necessary that they only take into consideration the actual amount of territory drained by the proposed improvement and make assessments on a pro rata basis with all other drained territory? In other words, they propose to make a much greater assessment upon Railroad property than upon farm land, for the reason that they feel that Railroad property is specially benefited as provided in Section 5455 of the General Code. Should these special benefits according to land depend entirely upon its usefulness due to drainage which was given in making these assessments, or should the assessments be made upon the total amount of land involved which is drained by said improvement?

The Board of Commissioners of Brown County, Ohio, would be greatly indebted to your office for any advice upon this question. Find enclosed for your own information, a brief schedule of the proposed rates of assessment which possibly you do not care to consider especially in answering this question, but which may be of some use to you in answering this query."

With your communication you enclose a memorandum with respect to the projected ditch improvement here in question. From this memorandum it appears that the total acreage of land in the improvement and assessment area is 1,088 acres, including 19.28 acres of railroad right of way property. It further appears from said memorandum that the tentative assessments to pay the total cost of the improvement, amounting to one thousand and twelve dollars, have been levied upon the railroad right of way property referred to in your communication, on a basis of fifteen dollars per acre, while the assessments levied on farm and other outlying lands have been levied on a basis of from twelve cents to two dollars and fifty-five cents per acre, and that outlying property of the railroad company, amounting to 5.56 acres, has been assessed at the rate of thirty-four cents per acre.

Section 6442 and subsequent sections of the General Code provide, among other things, for the construction of single county ditch improvements upon the assessment plan. It will not be necessary, in consideration of the questions presented in your communication, to note any of the statutory provisions providing for such ditch improvements, other than those relating to the levy of assessments to pay the cost and expenses of the improvement. By Section 6454 it is provided, among other things, that the county surveyor, after there has been certified to him a copy of the findings of the county commissioners in favor of the improvement, shall prepare a schedule containing the name of each owner of land, with a description of the land believed by him to be benefited by the proposed improvement, which names of land owners and descriptions of land believed to be benefited shall be taken from the tax duplicates of the county; and that the surveyor shall enter in said schedule the approximate number of acres benefited by the proposed improvement, and the amount that said land, in his opinion, ought to be assessed, which opinion shall be based upon his surveys, levels, and contours taken on the line of the improvement and back from the improvement, and his observation of the location and elevation of the land relative to the improvement. Sections 6455 and 6463, General Code, provide as follows:

Sec. 6455. "The surveyor, in making his estimate of the amount to be

assessed each tract of land, and the commissioners, in amending, correcting, confirming, and approving the assessments, shall levy the assessments according to benefits; and all land affected by said improvement shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise."

Sec. 6563. "At the final hearing on said improvement, if the petition is not dismissed, the commissioners shall hear any evidence offered for or against the assessment proposed to be levied against any owner, or any on land, as shown by the schedule of assessments filed by the surveyor, and shall hear any competent evidence on the question of benefits. The commissioners shall, from the evidence offered and from an actual view of the premises, amend and correct the assessments, and the assessments so amended or corrected shall be approved by the commissioners. That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare shall be paid by the public, and shall be assessed against the county, and such part of the assessment as may be found to benefit state or county roads or highways, shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision, and shall be paid out of the general funds of such corporation or political subdivision of the state, except as otherwise provided by law. The commissioners shall approve and confirm the assessments, and shall order the surveyor to let the contracts for the construction of the proposed improvement, and shall fix the time for the letting of the contracts, which shall be not less than twenty-five days after the date of said order, and shall determine when the assessments shall be paid, and shall determine whether bonds shall be issued in anticipation of and payable out of the installments of assessments. Their orders, approving the assessments, and ordering the surveyor to let the contract, and other orders made at this hearing, shall be entered on their journal.

Any owner opposed to the granting of the petition, or any owner opposed to further proceedings in the improvement; and any owner who claims that the assessment levied against him or it is excessive, or is not in proportion to benefits, may appeal from any order made pursuant to this section, as provided in this chapter (G. C. secs. 6442 to 6508).

Construing the above quoted sections of the General Code relating to the levy of assessments to pay the cost and expenses of a county ditch improvement, the Supreme Court of this state, in the case of *Tygard* vs. *Board of County Commissioners*, 122 O. S. 226, held that the county commissioners, in the first instance, and the common pleas court of the county on appeal, if one is entered, are required to observe the rule applicable in such cases that the whole amount of the assessments to pay for the improvement shall be apportioned among the several lots and parcels of land specially benefited in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by the improvement. In so holding, the Supreme Court in the case above cited, followed the decision of that court in the case of *Chamberlin* vs. *City of Cleveland*, 34 O. S. 551, where the rule was stated in language quite identical with that above noted, as follows:

"The whole amount of the assessment must be apportioned among the several lots and parcels of land specially benefited, in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by the improvement."

Obviously the rule recognized by the Supreme Court of this state, with respect to the levy of assessments to pay the cost and expenses of an improvement of this kind, effectually negatives the suggestion noted in your communication that the total cost and expenses of the improvement should be apportioned against the several tracts, lots and parcels of land, including such railway right of way property, in the improvement or assessment area upon an acreage basis. For the rule requires that each particular lot, tract and parcel of land shall be assessed according to the special benefits accruing to such lot, tract or parcel of land by reason of the improvement; and, touching this question, the rule in this state is that railroad right of way property shall be assessed for the cost and expense of the improvement the same as the property of individuals is assessed, and that this is so whether the railroad company owns such right of way property in fee or holds the same merely as an easement for railroad purposes. *Northern Indiana Railroad Company* vs. *Connelly*, 10 O. S. 159; *C. C. C. and St. L. Railroad Company* vs. *Treasurer of Lorain County*, 19 O. App. 471; *B. & O. Railroad Company* vs. *Oak Hill*, 25 O. App. 301, 303.

On the other hand it is clear that there is nothing in the provisions of Sections 6455 and 6463, General Code, which supports the suggestion that the total cost and expenses of the improvement can be apportioned by way of assessment upon the several lots, tracts and parcels of land included in the assessment area according to the valuations of said lots, tracts and parcels of land assessed; and in this connection the valuation of any particular lot or tract of land is important only when such valuation, taken together with other considerations affecting the question, reflects in a material way upon the special benefit received by such lot or tract of land by reason of the improvement.

In this connection your communication especially refers to the railroad right of way property therein mentioned, and the rules to be observed in assessing said railroad right of way on account of the cost and expense incurred, or to be incurred, in this ditch improvement. Manifestly, without any knowledge with respect to the conditions affecting this improvement and the relation of the railroad right of way property to the same, it is impossible for me in this opinion, to state all of the factors that affect the question of the benefit received by this property by reason of the improvement. It may be properly stated, however, that consistent with the rule applicable in the assessment of property for ditch improvements recognized by the Supreme Court in the case of *Tygard* vs. *Board of County Commissioners*, supra, a finding that such railroad right of way property received some benefit from the improvement will not in itself support an assessment thereon which does not reflect the special benefit received by such property on account of the improvement, and which has been levied without regard to the special benefit received by such property.

It may be stated generally that, although to justify an assessment of such railroad right of way property the benefit received by it on account of the improvement must be certain, it is not necessary that the benefit should be direct and immediate. Under the provisions of Section 8908, General Code, the railroad company is required to reremove, at its own expense, by means of ditches or drains, water accumulating along its road bed which, if left standing, would be injurious to the public or to adjoining property. The ditch improvement here in question, to the extent that it will drain the railroad company's right of way and thereby obviate the necessity of the railroad company to drain the same, or to the extent that said ditch improvement affords facilities to said railroad company for the drainage and discharge of water along its road bed and right of way, will be a legally recognized benefit to said railroad company, which will support a commensurate assessment on the railroad right of way property so benefited to pay its proportionate share of the cost and expense of said ditch improvement. See *Drainage Commissioners* vs. *Illinois Central Railroad Company*, 158 Ill. 353; *P. C. C. and St. L. Railroad Company* vs. *Machelin*, 158 Ind. 159.

Although the foregoing observations constitute as definite an answer to your questions as the nature of these questions permits in the absence of further information with

respect to the conditions affecting said improvement and calling for the construction of the same, it may be stated in conclusion that while the total amount of the cost and expense of this improvement is to be apportioned by way of assessment upon all of the property in the improvement area benefited by the improvement, the assessment to be levied upon said railroad right of way or upon any other particular lot, tract or parcel of land in said improvement area should be such as is commensurate with the special benefit received by such particular lot, tract or parcel of land as compared to the whole of the special benefits conferred by the improvement.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2906.

FINES AND COSTS—SECURITY THEREFOR—MUNICIPAL COURT UNAUTHORIZED TO ACCEPT PROMISSORY NOTE SIGNED BY DEFENDANT ALONE.

SYLLABUS:

A municipal court may not accept a promissory note signed by a defendant alone, to secure the payment of a fine and costs as provided in Section 13451-9 *of the General Code.*

COLUMBUS, OHIO, February 3, 1931.

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

GENTLEMEN:—I am in receipt of your letter of recent date, which is as follows:

> "Section 13451-9 G. C., as amended, 113 O. L., page 199, reads:
>
> 'When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain in jail until such fine and costs are paid or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs, at the rate of $1.50 per day for each day's imprisonment; provided that no commitment under this section shall exceed six months, and this section shall not affect the laws relating to the workhouses.'
>
> Question: May a judge of a municipal court accept as security for the payment of a fine and costs, a note signed by the defendant, such note being a mere promise to pay at a given date, or in installments?"

Section 13451-9, General Code, quoted in your letter, provides that the "magistrate," which includes the municipal court, may order that a person sentenced remain in jail until his fine be paid or secured to be paid. The statutes of Ohio do not specify the kind of security which may be accepted by the magistrate under the provisions of this section, nor are there any court decisions in Ohio in which the meaning of the phrase "or secured to be paid", as used in this section or in congnate sections, has been determined.

In an opinion rendered by my predecessor under date of December 12, 1927, which is found in Opinions of the Attorney General, 1927, Volume 4, page 2455, consideration was given to similar language contained in Section 13717, General Code,