2346.

ASSISTANT COUNTY SANITARY ENGINEER—COMPENSATION MAY BE FIXED BY COUNTY COMMISSIONERS ON PERCENTAGE BASIS—LIMITATIONS OF SECTION 6602-14 G. C. DO NOT APPLY.

SYLLABUS:

The board of county commissioners may employ an assistant to the county sanitary engineer and the compensation of such assistant may be fixed by the county commissioners on a percentage basis and the limitations of section 6602-14 do not apply to such assistant.

COLUMBUS, OHIO, April 6, 1925.

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

GENTLEMEN:—I am in receipt of your communication as follows:

"This department recently submitted to your office the procedure of the County Commissioners of Allen County in connection with the employment of a sanitary engineer and an assistant sanitary engineer, together with the contract entered into between the assistant sanitary engineer and the county commissioners and requested your opinion as to the legality of the contract. Under date of March 4, 1925, you replied to our request by stating:

"'Consideration of the statutes relating to the forming of county sanitary sewer and water districts and the employment of sanitary engineer and assistant engineer, will show that while the question of the amount of compensation which can be received by a county sanitary engineer is limited to the amount which the county auditor receives, the statute is not so definite as to the assistant sanitary engineer. A reading of section 6602-14, however, inclines us to believe that an assistant sanitary engineer of such district could not receive more than the sanitary engineer under this section.

"It is believed that the proper procedure would be to have the county auditor hold up any future vouchers for the compensation of the assistant sanitary engineer so that the matter may be properly determined by court.'"

"In accordance with this information, we advised the Auditor of Allen County to withhold any further payments to the assistant engineer under the contract and he is complying with our instructions. Since the receipt of your letter our attention has been called to the decision of the Court of Appeals of Montgomery County in the case of Allen vs. Lutz, which it is claimed has some bearing upon the legality of the contracts entered into by Allen County. We respectfully request you to advise us whether in the light of the decision referred to any change should be made in our instructions."

A reference, to the contract submitted with your communication shows that the assistant sanitary engineer of Allen County is employed under the following agreement:

"Now, therefore, said first party hereby agrees in consideration of the covenants and services to be performed on the part of the second party as hereinafter set forth to pay said second party for his services five (5%) per cent. of the total construction cost of improvements planned by him in the said district or districts. Said payments of the said five (5%) per cent. shall be paid in installments as follows: * * * "

A further resolution of the county commissioners provides:

"Be it further resolved, that K. B. Allen, of Dayton, Ohio, a competent consulting sanitary engineer, be and he is herewith employed to furnish to this county and its sanitary engineer such assistance and assistants, as may be required in the establishment and operation of the Westwood Sewer District, upon the same terms and conditions as set forth in the contract heretofore entered into by and between this board of county commissioners and said K. B. Allen and recorded in Commissioner's journal No. 25, pp. 338, 339."

Resolutions further show that on May 7, 1924, the county sanitary engineer of Allen County petitioned the board of county commssioners as folows:

"I respectfully ask your honorable board to authorize the employment of K. B. Allen as an Assistant in my office with the title of 'Consulting Engineer', upon such terms as may be fixed by your Board."

On the same date the county commissioners by resolution provided:

"Moved by A. J. Gray, seconded by W. W. Craig, that the report of the Sanitary Engineer, J. H. Meyer recommending the employment of K. B. Allen as Consulting Engineer of the Sanitary Sewer Districts of Allen County be accepted and approved. That said K. B. Allen be employed and said contract be spread on the minutes."

The above resolution was adopted on roll call by unanimous vote. The resolutions set out herein show that K. B. Allen was employed by the county sanitary engineer as an assistant in his office and that the board of county commissioners fixed the compensation of said assistant on the basis of five per cent. of the cost of construction. As the procedure for the employment of such assistant is legal, your question naturally turns on the question of whether the county commissioners may contract with an assistant in the office of the sanitary engineer to pay such assistant on a percentage basis and whether he may, under such contract, receive more than the county auditor of the county.

Section 6602-14, found in 110 O. L., p. 341, as far as applicable, provides:

"In addition to the regular salary provided by law for county commissioners, each commissioner serving in a county having one or more regularly created county sewer districts, shall be paid the following amounts; for time spent in connection with the establishing of any sewer district or the preliminary work preceding the awarding of any contract for either sewer or water improvements, or both, or for the acquiring of sewer or water supply lines already constructed, the sum of five dollars per day for each day actually employed, but not exceeding the aggregate sum of seventy-five dollars on each or any sewer or water improvement; for each and every sewer or water improvement actually installed under this act, a sum equivalent to the following schedule of costs for all improvements or parts of improvements actually constructed during the current year ending June 30th; for the first $200,000, one-third of one per cent; for all above $200,000, and not exceeding $400,000, one-fourth of one per cent; for all above $400,000, and not exceeding $600,000, one-sixth of one per cent; for all above $600,000, one-tenth of one per cent., provided, however, that the maximum compensation received by any commissioners or sanitary engineer serving in

any county affected by this measure shall not exceed the amount of compensation received during the current year by the county auditor serving in the said county * * * * * * *"

The only question involved is whether under the above provision an assistant sanitary engineer may receive more compensation than the compensation paid the county auditor of such county during the current year.

Section 6602-1 (110 O. L., 392), as far as applicable to your question, provides:

"Any such board of county commissioners may employ a competent sanitary engineer for such time or times, on such terms as they deem best, and may authorize such engineer to employ necessary assistants upon such terms as may be fixed by said board."

This part of the section standing alone would permit the county commissioners to employ a sanitary engineer on such terms as they deem best and authorize the sanitary engineer to employ assistants upon such terms as might be fixed by the county commissioners.

The words in section 6602-14, "provided, however, that the maximum compensation received by any commissioners or sanitary engineer serving in any county affected by this measure shall not exceed the amount of compensation received during the current year by the county auditor serving in said county", are in the nature of a proviso upon section 6602-1. In other words, this phrase limits the applicability of section 6602-1 in regard to compensation of the persons mentioned.

In the case of *Allen* vs. *Parish*, 3 Ohio Reports, p. 193, the court says:

"A proviso is generally used in a statute to qualify, limit or restrain the operation of general terms contained in a previous part of the section or act and not to introduce a distinct and independent proposition."

In the case of *Zumstein* vs. *Mullen et al.*, 67 O. S., 409 the court say:

"A proviso is generally used in a statute to qualify, limit or restrain the operation of general terms contained in a previous part of the section or act, and not to introduce a distinct and independent proposition. *****

"In 23 Am. and Eng. Ency. Law (1st ed.), 436, the rule is stated thus: 'The proviso should be confined to what immediately precedes, unless the contrary intent clearly appears.'"

In the case of *Buckman* vs. *State*, 81 O. S., 171, the court say at page 180:

"As a general rule, unless the contrary intention plainly appears, a proviso is to be construed with reference to the immediately preceding paragraph to which it is attached, and qualifies or limits only the part or paragraph to which it is appended."

The proviso in this instance is attached to the paragraph providing for the compensation of the county commissioners and is no part of the paragraph providing for the compensation either of the sanitary engineer or the assistants. If a strict construction must be given to a proviso, we must look to the words immediately preceding the proviso and limit it to the person or thing mentioned immediately preceding. In this instance the commissioners and the sanitary engi-

neer are the persons designated in the same paragraph. Nothing is said as to an assistant sanitary engineer.

Applying the rule as to provisos as laid down by the above and numerous other cases, it would seem that the limitation as to the salary would apply only to the county commissioners and the sanitary engineer.

An examination of the history of these two sections (6602-1 and 6602-14) discloses that section 6602-14 is part of House Bill No. 23 which is entitled

> "To amend sections 6602-4, 6602-8c, 6602-11, 6602-17, 6602-20 and 6602-27 of the General Code and to enact supplemental sections 6602-1a, 6602-1b, 6602-1c, 6602-4a, 6602-14, 6602-17a, 6602-17b, 6602-20a, 6602-32a, 6602-32b, 6602-32c and 6602-32d of the General Code, relating to county sewer districts."

This act was finally passed by the legislature on April 3, 1923. At that time section 6602-1, in so far as applicable to this question, provided as follows:

> "Any such board of county commissioners may employ a competent sanitary engineer for such time or times and upon such terms as they deem best."

At that time there was no provision for the employment of an assistant to such engineer, so that any reference in a supplemental act to a sanitary engineer could not include an assistant. There could be no doubt as the law stood at the time this bill was enacted, as to what was meant by the words "sanitary engineer", as the only engineer provided for under the act at that time was a sanitary engineer.

Section 6602-14 is a part of House Bill 405, entitled "An act to amend section 6602-1 of the General Code, relative to employes in county sewer districts." This act was passed by the legislature on April 4, 1923, and did not become a law until July 27, 1923. At the time of the enactment of section 6602-14, original section 6602-1 was the law. However, House Bill No. 23 was vetoed by the governor and was repassed by the legislature over the objection of the governor April 28th and filed with the secretary of state April 30th, becoming a law on July 30th. It is not believed that the fact that House Bill No. 23 went into effect subsequent to House Bill 405 could have any effect on this question, as we can only use the history of an act to determine the intent of the legislature in its enactment and as House Bill No. 23 was finally enacted in the form in which it was enacted upon April 3d.

In the case of *Swetland et al* vs. *Miles,* 101 O. S., 501, the court say:

> "Where there is no real room for doubt, as to the meaning of a statute, there is no right to construe such statute."

In the instant case the words are plain and unambiguous and refer to county commissioners and the sanitary engineer. It will be noticed that the term "county commissioners" is used in the plural in this instance and "sanitary engineer" in the singular.

It seems that this statute is plain as to whom the limitations apply. It is only when we attempt to stretch the plain words of the law that the statute is made ambiguous. There is no doubt that the limitations apply to the board of county commissioners and the sanitary engineer, but when we attempt to apply them to the assistant sanitary engineer, this statute in connection with section 6602-1 becomes ambiguous; and viewing this statute with the history of the two acts, it is believed that it is clear as to what limitaions of compensation were intended.

In the case of *State ex rel Allen* vs. *Lutz,* 111 O. S., 246, Ohio Law Bulletin December 22, 1924, we find that the case was tried in the Supreme Court upon a finding of facts and conclusions of law which stated the essential matters in controversy, and in such findings of facts may be found the following:

> "The court further finds that the limitations of salary heretofore referred to, applies only to the compensation of the sanitary engineer, and that such sanitary engineer may employ assistants upon such reasonable terms as may be fixed by the board of county commissioners."

In the opinion of Judge Day, in sustaining the court of appeals in its findings, he concludes with the following:

> "The conclusion is that the court of appeals, in refusing the writ of mandamus, was right, and that its judgment in so doing, *and in all other respects,* should be affirmed."

While the case of Allen vs. Lutz, supra, was not upon the question of whether the assistant sanitary engineer was limted by section 6602-14, this question was submitted on brief and was argued in that case for the purpose, as stated in the brief, of avoiding another suit. While the opinion is not conclusive upon this subject and would not prevent the question from being again raised in the Supreme Court, it is believed that we should be constrained to follow this decision.

You are therefore advised that under the law as it now exists, the board of county commissioners may employ an assistant to the county sanitary engineeer and that the compensation of such assistant may be fixed by the county commissioners on a percentage basis and that the limitations of section 6602-14 do not apply to such assistant.

Respectfully,
C. C. CRABBE,
Attorney General.

2347.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN ALLEN AND CARROLL COUNTIES.

COLUMBUS, OHIO, April 6, 1925.

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

2348.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND THE REAUGH CONSTRUCTION COMPANY, OF CLEVELAND, OHIO, FOR CONSTRUCTION AND COMPLETION OF COMBINED GENERAL CONTRACT; INCLUDING ELECTRIC WIRING AND PLUMBING CONTRACTS FOR REPAIRING AND REMODELING FEMALE INFIRMARY