course subject to the right of the electors affected to file remonstrances. *Cline* vs. *Martin*, 94 O. S. 420; *Board of Education of Hancock County* vs. *Boehm et al.*, 102 O. S. 292; *Board of Education of Putnam County* vs. *Board of Education*, 112 O. S. 108.

5. The answer to your fourth question makes it unnecessary to answer your fifth.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2016.

COUNTY COMMISSIONERS—NO AUTHORITY TO EXPEND FROM CURRENT YEAR'S APPROPRIATIONS FOR CLAIMS ARISING FROM PURCHASE OF SUPPLIES IN PREVIOUS FISCAL YEAR—LIABLE IN DAMAGE.

SYLLABUS:

1. *No expenditures can be made from a county treasury until money has been appropriated therefor in accordance with law, including Sections* 5625-29 to 5625-33, *General Code.*

2. *County commissioners have no authority to pay from the current year's appropriation claims arising by reason of the procuring of supplies or material during the previous fiscal year.*

3. *When public authorities expend or authorize the expenditure of public moneys in pursuance of any contract, agreement, obligation or order, without first having obtained the certificate of the chief fiscal officer of the taxing subdivision for which they are acting, that the money required to meet such contract, agreement, obligation or order has been appropriated or authorized or directed for such purpose and is in the treasury to the credit of the appropriate fund, free from any previous and outstanding obligation or certification, as provided by Section* 5625-33, *General Code, and such contract, agreement, obligation or order has been executed by the delivery to the taxing subdivision of the subject of the contract, agreement, obligation or order, and the contract price fully paid, the taxing subdivision cannot recover from the contractor or obligor the amount paid on such void and illegal contract without first putting or showing readiness to put the contractor or obligor in status quo ante.*

4. *Public officers who expend or authorize the expenditure of public funds on void contracts, agreements, obligations or orders contrary to the provisions of Section* 5625-33, *General Code, are liable to the taxing district whose funds have been so expended for all damages or loss sustained by such taxing subdivision in an amount equal to the full amount of such funds paid on or on account of any such void contract, agreement, obligation or order.*

COLUMBUS, OHIO, April 25, 1928.

HON. ERNEST M. BOTKIN, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication as follows:

> "During the year 1927 an employee in charge of an institution maintained by the county, purchased certain material and supplies, which were used at the institution. The persons from whom the purchases were made charged same to the county. No certificate for the expenditure was made as provided by Section 5660 of the General Code. There were not sufficient funds

in the amount appropriated for the purpose for the year 1927 to pay the claims, and the County Commissioners were not aware that the obligations were outstanding until some time after January 1, 1928. The material and supplies were furnished in good faith and were used for the benefit of the institution, and in justice to the persons who furnished same the accounts should be paid. Would the County Commissioners be warranted in authorizing their payment from the 1928 appropriation?"

Former Section 5660, referred to in your inquiry, read in part as follows:

"No expenditure, excepting from the proceeds of bonds, shall be made unless authorized by appropriation both as regards purpose and amount, nor shall any expenditure be made from the proceeds of bonds unless duly authorized or directed. No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employee of any county or political subdivision or taxing district, nor shall any order for the payment or expenditure of money be approved by the county commissioners, council or by any body, board, officer or employee of any such subdivision or taxing district, unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous and then outstanding obligation or certification which certificate shall be filed with such authority, officer, employee, commissioners, council, body or board, or the chief clerk thereof. * * *"

In other provisions of said Section 5660, supra, and in Section 5660–1, General Code, certain exceptions are made to the rule above set out, but none of these exceptions are pertinent to your inquiry.

There were also in force during a part of the year 1927 Sections 5649-3g, 5649–3h and 5661, General Code, which read in part as follows:

Section 5649–3g. "At the beginning of each fiscal year, the county commissioners of every county, * * * shall make appropriations classified for the several purposes for which expenditures are to be made for and during the said fiscal year, from the funds of such county * * *."

Section 5649–3h. "Any appropriation ordinance or other appropriation measure may be amended or supplemented from time to time, or a transfer may be made from one appropriation item to another, provided that such amendment or supplement shall comply with all provisions of law governing the appropriating authority, including compliance with Section 5 of this act (G. C. Section 5649–3g), and provided further that no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation for such purpose. * * *"

Section 5661. "Every contract, agreement or other obligation and every order entered into or issued contrary to the provisions of the preceding section shall be null and void, and no claim or demand thereon shall be recoverable from any county or other political subdivision or taxing district or from any public fund.

Any officer, employee or other person who issues any order contrary to the provisions of the preceding section or who expends or authorizes the expenditure of any public funds for or on account of any such void contract, agreement, obligation, or order, shall be liable to the county or other political subdivision or taxing district for the full amount paid from the funds of such county, subdivision or district on or on account of any such void contract, agreement, obligation or order.

* * * * * * * *"

By the enactment of House Bill No. 80 by the 87th General Assembly, said Sections 5660, 5649-3g, 5649-3h and 5661, General Code, were repealed and provisions were enacted which were codified as Sections 5625-29, 5625-32, 5625-33 and 5625-37, General Code. The repeals and enactments contained in said House Bill No. 80 became effective July 12, 1927. It was provided, however, in Section 39 of this act (House Bill No. 80), that "this act shall in no manner affect existing funds established in any subdivision or the expenditures therefrom until January, 1928."

Sections 5625-29, 5625-32, 5625-33 and 5625-37, as enacted by the 87th General Assembly, read in part as follows:

Section 5625-29. "On or about the first day of each year, the taxing authority of each subdivision or other taxing unit shall pass an annual appropriation measure and thereafter during the year may pass such supplemental appropriation measures as it finds necessary, based on the revised tax budget and the official certificate of estimated resources or amendments thereof. * * *"

Section 5625-32. "Any appropriation ordinance or other appropriation measure may be amended or supplemented from time to time, provided that such amendment or supplement shall comply with all provisions of law governing the taxing authority in making an original appropriation and provided further, that no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation for such purpose. Transfers may be made by resolution or ordinance from one appropriation item to another. At the close of each fiscal year, the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated and shall be subject to future appropriations. * * *"

Section 5625-33. "No subdivision or taxing unit shall:

(a) Make any appropriation of money except as provided in this act. * * *.

(b) Make any expenditure of money unless it has been appropriated as provided in this act.

(c) Make any expenditure of money except by a proper warrant drawn against an appropriate fund which shall show upon its face the appropriation in pursuance of which such expenditure is made and the fund against which the warrant is drawn.

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (* * *), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances * * *."

Section 5625-37. "Any officer, employee or other person who issues any order contrary to the provisions of Section 33 of this act, or who expends or authorizes the expenditure of any public funds, or who authorizes or executes any contract contrary to the provisions of this act, unless payments thereon are subsequently ordered as provided in Section 33 (Section 5625-33 G. C.), or expends or authorizes the expenditure of any public funds on any void contract, obligation or order, unless subsequently approved as provided in such section, or issue a certificate under the provisions thereof, which contains any false statements, shall be liable to the political subdivision for the full amount paid from the funds of such subdivision on any such order, contract or obligation * * *."

It is clear from the provisions of law last above quoted that no expenditure could at this time be made by the county commissioners until funds had been appropriated and until the order for the goods to be purchased had attached thereto a certificate of the county auditor stating that the necessary money had been lawfully appropriated and was in the treasury, or in process of collection, to the credit of the appropriate fund free from any previous encumbrance.

The question arises whether or not appropriations may at this time be made to cover claims for the cost of goods delivered to the county during the previous fiscal year.

It is clear that the employee in charge of the institution, to which you refer in your inquiry, was not authorized to purchase any material and supplies therefor, until the cost thereof was covered by appropriation and until a certificate of the county auditor had been filed to the effect that money had been appropriated to cover the cost of material and supplies purchased and that said money was in the treasury, or in process of collection. Had this been done there would be no question as to the right to pay for this material and supplies at this time. Inasmuch as it was not done no legal obligation of the county was incurred by reason of the purchase of the said material and supplies.

In Opinion No. 76, rendered under date of February 12, 1927, to the Prosecuting Attorney at Ravenna, Ohio, there was considered the question of whether or not county commissioners were authorized to make appropriations during one fiscal year to cover allowances made by the Common Pleas Court during the previous fiscal year for the prosecuting attorney under and by virtue of Section 3004-1 of the General Code, and it was there held:

"County commissioners cannot make appropriations to cover allowances made to county officers for the previous fiscal year."

A similar question was before the Court of Appeals in Noble County in the case of *State of Ohio, ex rel. Buckey Prosecuting Attorney of Noble County*, vs. *Board of County Commissioners of Noble County and L. H. Tarleton, Auditor of Noble County*. This case was decided November 17, 1926, and so far as I know has not been reported. It was an action in mandamus brought against the county commissioners and county auditor of Noble County seeking to compel them to pay the salary of a clerk in the prosecutor's office, although there had not been an appropriation therefor.

It appears in this case that the Common Pleas Judge, under and by virtue of Section 2914 of the General Code, fixed an aggregate sum of $600.00 to be expended during the year 1926 for the compensation of assistants, clerks and stenographers in the office of the prosecuting attorney. The county commissioners only appropriated the sum of $300.00 for this purpose. The clerk in question, his salary having been fixed at $600.00 per year, drew $50.00 per month for the first six months and consequently drew out the entire amount of the appropriation. The action was brought against the

county commissioners and the auditor to compel them to provide an additional $300.00 for the last six months' salary. The court held that mandamus would not lie and that the commissioners and auditor could not be required to provide this additional $300.00. The court in its opinion cited Section 5649-3g and 5660, and said:

> "The latter section is controlling here and to the effect that the county auditor may not issue his warrant for the payment of any obligation until there is money in the county treasury to the credit of the fund out of which such payment must be made."

In the course of said Opinion No. 76, above referred to, it is said:

> "It is true it is provided in Section 5649-3h that the appropriation measure may be amended from time to time within the limits of the budget, but I know of no way that the county commissioners could after the first day of January of any year make an appropriation that would be retroactive. That is, after the end of any fiscal year the appropriating board could not amend an appropriation measure for the previous fiscal year so as to make funds available for use in accordance with the attempted amendment, nor could such board include in the appropriation made in any fiscal year allowances for expenditures in the previous fiscal year because the statute says that at the beginning of each fiscal year they shall make appropriations for expenditures for such fiscal year. To hold otherwise, would have the effect of completely nullifying the sections in question."

While the language of Section 5625-29 is not exactly the same as that contained in former Section 5649-3g, that is to say, Section 5625-29 does not say that county commissioners "shall make appropriations classified for the several purposes for which expenditures are to be made for and during the said fiscal year", whereas, Section 5649-3g, which was in effect at the time of the rendition of said Opinion No. 76, did use the above quoted language, it is my opinion that the language used in Section 5625-29 means the same as did that used in Section 5649-3g, and therefore it is my opinion that county commissioners are not authorized to make appropriations at this time to cover the cost of supplies and materials secured during the year 1927.

In connection with these conclusions, however, your attention is directed to Opinion No. 1091, rendered by this department, under date of September 14, 1927, to the Prosecuting Attorney at West Union, Ohio. The first and second paragraphs of the syllabus read.

> "1. When public authorities expend or authorize the expenditure of public moneys in pursuance of any contract, agreement, obligation or order, without first having obtained the certificate of the chief fiscal officer of the taxing subdivision for which they are acting, that the money required to meet such contract, agreement, obligation or order has been appropriated or authorized or directed for such purpose and is in the treasury to the credit of the appropriate fund, free from any previous and outstanding obligation or certification, as provided by Section 5660, General Code, and such contract, agreement, obligation or order has been executed by the delivery to the taxing subdivision of the subject of the contract, agreement, obligation or order, and the contract price fully paid, the taxing subdivision cannot recover from the contractor or obligor the amount paid on such void and illegal contract without first putting or showing readiness to put the contractor or obligor in statu quo.

2. Public officers who expend or authorize the expenditure of public funds on void contracts, agreements, obligations or orders contrary to the provisions of Section 5660, General Code, are liable to the taxing district whose funds have been so expended for all damages or loss sustained by such taxing subdivision in an amount equal to the full amount of such funds paid on or on account of any such void contract, agreement, obligation or order."

In this opinion the cases of *Buchanan Bridge Company* vs. *Campbell*, 60 O. S. 406, and *State, ex rel.* vs. *Fronizer*, 77 O. S. 7, were referred to and discussed as follows:

"In the case of *Buchanan Bridge Company* vs. *Campbell, et al. Commissioners*, 60 O. S. 406, it was held where the county authorities refused to pay for a bridge erected by a contractor under a contract entered into in violation of the statutes on the subject, the contractor could not recover when he sued on the contract for the price of the bridge; the court holding that it would leave the parties to such unlawful transaction in the situation in which they had placed themselves. In other words, the contract having been entered into without conformity to the legal requirements, the contractor could not when he came into court prove the legality of the contract that he had acted under and could not therefore maintain the burden of proof. However, the law as to irregularity in the making of contracts of this kind works very differently when a plaintiff sues upon a contract made in violation of the law, and when the city sues to recover back money rightfully paid or paid upon a contract which had been made in violation of law, but which has been performed. The latter situation was involved in the case of *State* vs. *Fronizer*, 77 O. S. 7. There the county authorities had caused a bridge to be constructed by a contractor and when the estimates were presented they paid for it. Thereafter the county undertook to get that money back, claiming the contract illegal because of the lack, through inadvertence, of a certificate of the county auditor that the money was in the treasury to the credit of the fund or had been levied and was in process of collection. The Supreme Court said that the money so paid could not be recovered back, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of the contract for said work, nor any claim of effort to put the contractor in statu quo by the return of the bridge or otherwise, the bridge having been accepted by the county commissioners and used as a part of the public highway. The court in this case said:

'The contract though void is not under the facts admitted by the pleadings in this case tainted * * *.

The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting or showing readiness to put the other party in statu quo, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases.' "

With reference to the principle of law in the second branch of the syllabus above quoted, it was said in the opinion as follows:

"The liability of the members of the board of education and its members who expend public funds or authorize the expenditure of public funds

contrary to the provisions of Section 5660, supra, is fixed by Section 5661, General Code, as follows:

'Any officer, employe or other person who issues any order contrary to the provisions of the preceding section or who expends or authorizes the expenditure of any public funds for or on account of any such void contract, agreement, obligation, or order, shall be liable to the county or other political subdivision or taxing district for the full amount paid from the funds of such county, subdivision or district on or on account of any such void contract, agreement, obligation or order.'

The foregoing provisions were incorporated in the statute by an amendment which became effective July 21, 1925, about five months prior to the allowance and payment of estimate number 3 as set out above.

The members of the Manchester Village Board of Education are therefore amenable to this provision of law.

Prior to the amendment of this statute, in the absence of bad faith or a corrupt motive, public officials were not personally responsible when acting within the scope of their powers even though in so doing they did not comply with the requirements of law and loss or damage resulted therefrom. See *Commissioners of Brown County* vs. *Butt*, 2 Ohio, 253; *Ramsey* vs. *Riley*, 13 Ohio, 107; *Stewart* vs. *Southard*, 17 Ohio, 402; *Gregory* vs. *Small*, 39 O. S. 346.

The rule established by these cases was cited with approval by Judge Schauck, in the case of *State* vs. *Bair*, 71 O. S. 410. In this case, two members of the Board of Commissioners of Sandusky County were indicted under Section 6915, Revised Statutes (now Section 12920, General Code) for misconduct in office, consisting of entering into a contract for the building of a bridge without first securing the certificate of the county auditor that the money therefor was appropriated and in the treasury to the credit of the fund from which it was to be drawn, as provided by a statute then in force very similar to section 5660, supra.

While the 'misconduct in office' under consideration in the Bair case was with reference to its relation to criminal conduct as defined by the statute, the court cited with approval and applied the principles laid down in the cases of *Stewart* vs. *Southard* and *Ramsey* vs. *Riley*, supra, to the effect that an officer acting within the scope of his duties is only responsible for an injury resulting from a corrupt motive. The syllabus of this case reads as follows:

'A county commissioner who without willfulness or a corrupt motive but through ignorance, disregards the provisions of a statute regulating the exercise of his faithful duties is not thereby guilty of misconduct in office within the meaning of Section 6915 of the Revised Statutes which prescribes a fine and the forfeiture of office for such misconduct.'

The provisions of Section 5661, General Code, as above quoted have not been the subject of judicial construction. The question arises whether the statute by its provisions provides a penalty, or does it merely fix the measure of liability and make it absolute, in derogation of the common law rule that public officials are not personally liable for their act in the absence of bad faith or corrupt motives, as applied in the case of *Steward* vs. *Southard* and other cases above cited.

If the statute is to be considered as providing a penalty, then clearly the principles laid down by Judge Shauck in the Bair case apply, and the

liability for the penalty is dependent on the imputation of willfulness, bad faith, fraud or corruption.

In my opinion, however, the statute is not to be regarded as penal in its nature but was intended to abrogate the common law rule of liability of public officers and to fix the measure of their liability when they expend public funds or authorize the expenditure of public funds for, or on account of any void contract, agreement, obligation or order so rendered void by reason of failure to comply with the provisions of Section 5660, General Code.

Adopting this construction of the statute, that is, that it is not a penal statute, but one fixing liability as absolute irrespective of willfulness or bad motive, it follows that the amount for which such officials may be held is the amount of actual damage or loss suffered by the taxing district by reason of such void contract in no case more than 'the full amount paid from the funds of such county, subdivision or district on account of any such void contract, obligation or order.' If as a matter of fact the taxing district sustained no damages, there would be no liability. Stated differently, the official is liable only for any damage caused by his wrongful act.

To hold otherwise, that is, to hold that such officials are liable for such full amount of public funds paid, whether or not loss or damage has been suffered by the county, subdivision or district is to be held that the statute is penal."

While as above pointed out Section 5661, General Code, construed in the above opinion was repealed and Section 5625-37, supra, enacted in its stead, yet the language in the new section here involved is the same as in the old, and the reasoning and conclusions of the opinion are equally applicable.

In conclusion it should be pointed out that this department cannot determine for the county commissioners what action they should take in the premises and cannot specifically answer your question, other than to advise as to what the law is in respect to the problem now confronting them. In so far as any questions of law are concerned, for the reasons suggested in the above discussion, I am of the opinion that:

1. No expenditures can be made from a county treasury until money has been appropriated therefor in accordance with law, including Section 5625-29 to 5625-33, General Code.

2. County commissioners have no authority to pay from the current year's appropriation claims arising by reason of the procuring of supplies or material during the previous fiscal year.

3. When public authorities expend or authorize the expenditure of public moneys in pursuance of any contract, agreement, obligation or order, without first having obtained the certificate of the chief fiscal officer of the taxing subdivision for which they are acting, that the money required to meet such contract, agreement, obligation or order has been appropriated or authorized or directed for such purpose and is in the treasury to the credit of the appropriate fund, free from any previous and outstanding obligation or certification, as provided by Section 5625-33, General Code, and such contract, agreement, obligation or order has been executed by the delivery to the taxing subdivision of the subject of the contract, agreement, obligation or order, and the contract price fully paid, the taxing subdivision cannot recover from the contractor or obligor the amount paid on such void and illegal contract without first putting or showing readiness to put the contractor or obligor in status quo ante.

4. Public officers who expend or authorize the expenditure of public funds on void contracts, agreements, obligations or orders contrary to the provisions of Section 5625-33, General Code, are liable to the taxing district whose funds have been so expended for all damages or loss sustained by such taxing subdivision in an amount equal to the full amount of such funds paid on or on account of any such void contract, agreement, obligation or order.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2017.

SCHOOLS—AUTHORITY OF LEGISLATURE TO ESTABLISH SCHOOLS AND COLLEGES—AUTHORITY OF BOARDS OF EDUCATION—JUNIOR COLLEGES.

SYLLABUS:

1. *The authority vested in the Legislature to provide a thorough and efficient system of common schools throughout the state includes authority to establish colleges and universities.*

2. *With the exception of the authority vested in county and city boards of education to establish normal schools, and the authority vested in city boards of education, by virtue of Section 7650-1, General Code (112 v. 115), to contract with a college or university for the purpose of obtaining in the school district instruction in special, technical, professional or other advanced studies, boards of education are not authorized to establish schools of a higher grade than high schools, which require for the taking of the course of study therein more than thirteen school years, including one year of kindergarten work, regardless of whether said proposed schools are to be maintained from public school funds or from tuition fees charged the attendants.*

3. *Boards of education may, subject to proper rules and regulations and upon payment of the proper janitor fees, permit the use of its school buildings by private educational institutions for the purpose of conducting school therein.*

COLUMBUS, OHIO, April 26, 1928.

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

GENTLEMEN:—I am in receipt of your communication requesting my opinion in answer to the following questions:

"Question 1: Can a Junior College be legally established in connection with the public school system in the State of Ohio?

Question 2: If Question 1 is answered in the affirmative, would the funds for its support be a separate tax levy outside of the fifteen mill limitation and would such a levy have to be a voted levy?

Question 3: The city board of education contemplating the establishment of a Junior College now enjoys a three mill levy outside of the fifteen mill limit, would it be possible to ask the voters to approve an additional levy of from two to four mills outside of the fifteen mill limitation without