

I am in accord with the reasoning and conclusion of that opinion and you are consequently advised that, before the prosecuting attorney is authorized to draw upon the allowance provided in Section 3004, General Code, he must give the bond therein provided in addition to the official bond given by him as required by Section 2911, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1674.

HIGHWAYS—COUNTY COMMISSIONERS—DUTIES AND OBLIGATIONS FULLY DISCUSSED

SYLLABUS:

1. *Under the provisions of the various sections of the General Code relating to the state highway system, as amended in House Bill No. 67, passed by the 87th General Assembly, (Norton-Edwards Act), county commissioners are not under obligation to furnish any money for the construction and maintenance of roads and highways in the state highway system.*

2. *By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act), county roads are defined as including all roads, which have been or may be established as a part of the county system of roads as provided for in Sections 6965, 6966, 6967 and 6968, General Code, (commonly called the Green law), which shall be known as the county highway system.*

3. *By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act) and Section 7467, General Code, the duty of maintaining and repairing all county roads is placed on the county commissioners regardless of whether they be dirt roads or otherwise.*

4. *The county's portion of gasoline excise tax funds (Section 5537 and related sections of the General Code) may be only used for the purpose of maintenance and repair of roads in the county highway system, including roads that are unimproved.*

5. *The term "maintenance and repair" as used in Section 5537, General Code, embraces all work done upon roads and highways within the meaning of the term in its ordinary acceptation, and in addition thereto, includes all work done upon any public road or highway in which the existing foundations thereof are used as the subsurface of the improvement thereof in whole or in substantial part.*

6. *By the terms of Section 1224, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act) it is the duty of the Director of Highways to maintain and repair all roads and highways and all the bridges and culverts thereon in the state highway system.*

7. *By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act) and Sections 2421, 7557 and 7467, General Code, it is the duty of county commissioners to maintain and keep in repair all bridges on county roads.*

8. *It is also the duty of county commissioners to maintain and keep in repair bridges on township roads, although township trustees are authorized to appro-*

priate and use township road funds in the maintenance and repair of bridges within their jurisdiction. (Opinion No. 668, rendered under date of September 28, 1917, Opinions, Attorney General, 1917, Vol. II, page 1813, as modified by Opinion No. 2557, rendered under date of June 10, 1925, Opinions, Attorney General, 1925, page 389, approved and followed).

COLUMBUS, OHIO, February 4, 1928.

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

DEAR SIR:—Receipt is acknowledged of your communication of recent date reading as follows:

“Find enclosed herewith letter addressed to myself by Charles M. Gordon, Surveyor of Brown County, which is self explanatory.

Both the commissioners of Brown County, and the surveyor are desirous of having answered the questions set forth in the accompanying request.”

Enclosed therewith is a communication from your county surveyor in which he asks certain questions relative to Section 7464, General Code, as follows:

“I wish you would explain for me Section 7464 of Ohio Laws, 1927, Section A State Roads,—

‘(a) State roads shall include the roads and highways on the state highway system.’

Are the county commissioners obligated to furnish any money for the construction and maintenance of these roads?

‘(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under Sections 6965, 6966, 6967 and 6968 of the General Code, which shall be known as the county highway system, and all such roads shall be maintained by the county commissioners.’

Do the county commissioners have to keep in repair the roads which are taken over under these named sections, which are at present dirt roads, and can they use gas tax on their upkeep?

‘(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act.’

Do the county commissioners have to maintain and keep in repair all the bridges under this above named section?”

Section 7464, General Code, was amended by the 87th General Assembly in House Bill No. 67, known as the Norton-Edwards Act (112 v. 496), which by its terms became effective the first Monday of January, 1928, and as amended, now reads:

“The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include the roads and highways of the state highway system.

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under Sections 6965, 6966, 6967 and 6968 of the General Code, which shall be known as the county highway system, and *all such roads shall be maintained by the county commissioners.*

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

It will be observed that the above statute defines and classifies state, county and township roads.

1. Section 7457 of the General Code, which was not changed by the 87th General Assembly, provides:

"The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county or township or any two or more of them may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto."

In Opinion No. 776, rendered under date of July 25, 1927, to the Director of Highways and Public Works, it was said as follows:

"By the enactment of House Bill No. 67 (Norton-Edwards Act) the Eighty-seventh General Assembly completely revised and codified the existing highway laws. When such act becomes effective, viz., on the first Monday in January, 1928, it will result in the placing of the responsibility of a state highway system in the State of Ohio, acting by and through its Department of Highways, and will relieve the smaller counties from the burden of taxation, resulting from its co-operating with the State Highway Department in the construction of inter-county highways and main market roads under * * * (Sections 1191 et seq., General Code)."

With reference to co-operation between the state and counties in the improvement of inter-county highways or main market roads, in Opinion No. 1423, rendered under date of December 22, 1927, to the Director of Highways and Public Works, the following language was used:

"* * * An examination of House Bill No. 67 will reveal that the only sections of that act relating to the subject of co-operation between the

state and county in the matter of road improvements, are Sections 1191 to 1193, both inclusive of the General Code." Section 1191, General Code, as enacted in 112 O. L. 469, provides:

'The commissioners of any county may co-operate with the department of highways in the abolishment of railway grade crossings on the state highway system or any extension thereof, and in the construction or reconstruction of bridges and viaducts within municipal corporations, and shall be authorized to pay such portion of the cost of any such work as may be agreed upon between said commissioners and the director of highways. Said commissioners shall also be authorized to co-operate with said department in widening the paved portion of any state road where the paved portion of such road is constructed or reconstructed to a width greater than eighteen feet; and such commissioners shall be authorized to pay such portion of the cost occasioned by or resulting from such widening as may be agreed upon between them and said director. Any board of county commissioners desiring to co-operate as above, may, by resolution, propose such co-operation to the director, and a copy of such resolution, which resolution shall set forth the proportion of the cost and expense to be contributed by the county, shall be filed with the director. Where any portion of the work covered by such proposal is within the limits of a village, such proposal shall be accompanied by the consent of the village to the doing of such work, evidenced by proper legislation by its council, unless such consent has already been given by said village to the director. Provided, however, the county commissioners of any county having a tax duplicate of real and personal property in excess of three hundred million dollars also be authorized to co-operate with the Department of Highways in the reconstruction of state roads by paying such portion of the cost thereof as is agreed upon by the county commissioners and director of highways.'

It will be observed that, under the provisions of the above quoted statute, the only cases in which the county will be able to co-operate with the state after the first day of January, 1928, are:

- (1) In the abolishment of railway grade crossings on the state highway system or any extension thereof;
- (2) In the construction or reconstruction of bridges and viaducts within municipal corporations;
- (3) In widening the paved portion of any state road where the paved portion of such road is constructed or reconstructed to a width greater than eighteen feet;
- (4) In those counties having a tax duplicate of real and personal property in excess of three hundred million dollars, the county commissioners shall be authorized to co-operate with the Department of Highways in the reconstruction of state roads.

It is important to note that after the first day of January, 1928, the only basis upon which the smaller counties will be able to co-operate with the state in the matter of the construction and reconstruction of highways is where the highway is being widened to a width greater than eighteen feet. Even then such co-operation is limited to participating in such portion of the cost as is occasioned by such widening.

Your attention is also directed to the fact that in the several larger counties having a tax duplicate of real and personal property in excess of three hundred million dollars, under the express terms of Section 1191,

supra, co-operation is limited to the *reconstruction* of state roads within said counties."

Under former Sections 1191 et seq., of the General Code, commonly known as the "State Aid" statutes, co-operation in the improvement of inter-county highways and main market roads between the state and a county or township, or both, was voluntary upon the part of such county or township and not compulsory. The same statement may be made in reference to the limited co-operation provided in House Bill No. 67 (112 v. 430).

In your first question you ask whether county commissioners are obligated to furnish any money for the construction and maintenance of roads which are a part of the state highway system. By the use of the word "obligated" I take it that you are inquiring whether the county commissioners are required to contribute toward the construction and maintenance of roads which are a part of the state highway system.

As heretofore stated, there is nothing in the provisions of House Bill No. 67 which requires, or makes it the duty of county commissioners to co-operate with the state highway department in constructing roads on the state highway system under the provisions of Section 1191 of the General Code, this section permitting, but not requiring co-operation in the cases pointed out in Opinion No. 1423 above quoted. Under the express terms and provisions of Section 7467, General Code, it is the duty of the state to maintain the roads and highways, which are a part of the state highway system. Your first question is therefore answered in the negative.

2. Your second inquiry presents two questions. First, is it the duty of the county commissioners to keep in repair all roads in the county highway system as the term is used in Section 7464 of the General Code; and, second, may gasoline excise tax funds apportioned to the county be used for such purpose, whether or not such roads be improved?

Section 7464, supra, provides that "county roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under Sections 6965, 6966 and 6968 of the General Code which shall be known as the county highway system."

Sections 6965 to 6972, inclusive, of the General Code, were enacted on April 6, 1923 as Sections 1 to 6, inclusive, of an act (commonly called the Green law), entitled:

"An Act—To afford relief to townships by providing for the creation of a system of county highways in each county of the state and authorizing state aid in the construction thereof." (110 v. 267).

Section 6965, General Code, provides in part as follows:

"There shall be created in each county within the state a system of county highways, which system shall be selected and determined in the following manner, to-wit:

Within sixty days after the taking effect of this act, the township trustees of each township within the state shall upon request and under direction of the county commissioners * * * make a report to the county commissioners setting forth the relative value of each road in the township in consecutive order as a used highway, the kind of traffic over such road, its length and present condition, together with such other information as may be desired and requested by the county commissioners,

* * * "

In Section 6966, General Code, it is provided, *inter alia*, that:

"It shall be the duty of the board of commissioners of each county to determine from the statistics and information furnished by the several boards of township trustees within such county the relative importance and value for traffic of the various public highways of the entire county. They * * * after a careful review and consideration of the information furnished by such trustees shall select and designate a connected system of county highways of such mileage as they may deem proper and expedient, connecting with the intercounty highways and main market roads of such counties all of the villages, hamlets and centers of rural population within the county. Such system of highways when selected and designated by the county commissioners in the manner herein prescribed shall be known as the system of county highways of said county, and all of the roads composing said system shall thereafter be known and designated as county roads. * * * "

Sections 6967 and 6968, together with Sections 6969 and 6970 relate to the construction, reconstruction and improvement of highways in the county system by the county commissioners and the apportionment of the cost thereof to the county, township and abutting property owners. Section 6971 provides for financial aid by the state for "the purpose of encouraging the construction of a secondary, or county system of highways."

Paragraph (b) of Section 7464 before its amendment by the 87th General Assembly provided that:

"County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the inter-county or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners."

It will thus be seen that the recent Legislature has reclassified and redefined county roads, so as to embrace only those roads which have been or may be established as a part of the county system of roads as provided for under the Green law. While the Green law makes provision for the creation of the "system of county highways" and Section 7464, as amended, uses the phrase "county highway system", not only are the terms substantially identical, but Section 7464 specifically refers to the roads selected and designated as part of the county system provided for under Sections 6965 et seq., of the General Code, above referred to. It is clear, therefore, that under the present law county roads are those, and only those, which have been duly selected and designated by the county commissioners as a part of the county system.

With reference to the maintenance and repair of these roads, paragraph (b) of Section 7464, *supra*, expressly provides that "all such roads shall be maintained by the county commissioners." This provision is consistent with the provisions of Section 7467, General Code, to the effect that the "state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth." There is no provision in Section 7464, as amended, or any other section of the Code relieving the county commissioners from their duty of maintaining

and repairing roads in the county highway system, which have not been improved, and it is clear from the provisions of Section 7464, as amended, and Section 7467 that the duty of maintaining and repairing all county roads is placed on the county commissioners regardless of whether they be dirt roads or otherwise.

This brings me to the second branch of your second question.

Section 5537 of the General Code provides in part as follows:

* * *

Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state and shall be used *for the sole purpose of maintaining and repairing the county system of public roads and highways within said counties.*"

This section is a part of the gasoline tax law, which was enacted April 17, 1925 (111 v. 294). It will be noted that here again, while a descriptive term is used different from that contained in either the Green law or in Section 7467, as amended, namely, "the county system of public roads and highways", undoubtedly the same county highway system was intended. Section 5537 and Section 7464 in their present form were both enacted after the passage of the Green law, under which the system of county highways was created. There is no other system of county highways provided for in the Code, and there can be no question, therefore, but that Sections 5537, 7464 and Sections 6965 to 6972 all relate to the same system of county highways.

That Section 5537 did refer to the system of county highways created under the provisions of Section 6966 and related sections of the General Code was held in Opinion No. 179, rendered under date of March 12, 1927, to the Bureau of Inspection and Supervision of Public Offices, the second branch of the syllabus reading:

"The term 'the county system of public roads and highways' as used in Section 5537, General Code, refers to the system of county highways created under the provisions of Section 6966, General Code, and related sections, and county commissioners may use that part of the gasoline tax funds apportioned to the county for the sole and only purpose of maintaining and repairing roads in the county system of roads provided for in Section 6966, supra, and related sections."

This opinion was approved and followed in Opinion No. 274, rendered under date of April 4, 1927, to the prosecuting attorney at Washington C. H., Ohio. The first branch of the syllabus of this opinion reads:

"Gasoline excise tax funds apportioned to the county by virtue of the provisions of Section 5537, General Code, may be used for the sole and only purpose of maintaining and repairing roads in the county system of roads and highways provided for in Section 6966 and related sections of the General Code."

While a change in the classification and definition of county roads is made in Section 7464, General Code, as amended in House Bill No. 67, the provisions of

Sections 6966 et seq., remain unchanged, as do the terms of Section 5537, and the conclusions reached in Opinions Nos. 179 and 274 are still the law. It therefore follows that county commissioners may use the county's apportionment of the gasoline excise tax funds for the purpose of maintaining and repairing any and all roads in the county highway system, including roads that are unimproved,

In connection with this question of maintenance and repair, your attention is directed to the provisions of Section 6309-2, General Code, relating to funds derived from the motor vehicle license tax, to the effect that in

"the treasuries of such municipal corporation and counties, such monies shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose and shall not be subject to transfer to any other fund. 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway, or upon any street, in which the existing foundations thereof is (are) used as the subsurface of the improvement thereof, in whole or in substantial part."

With reference to the meaning of the words "maintenance and repair" as they are used in Section 5537, when construed in connection with 6309-2, General Code, this office in Opinion No. 374, rendered under date of April 23, 1927, to the Bureau of Inspection and Supervision of Public Offices, said as follows:

"Since the gasoline excise tax law is a later enactment than the law with reference to the registration of motor vehicles, it is apparent that, when reference is made in the gasoline tax law to the motor vehicle registration law and the gasoline tax law provides that the monies derived from the tax created thereby are for the purpose of supplementing the monies arising under the motor vehicle registration law, and directs that these monies shall be used for the same purpose as those arising under the former law, the definition of the expression 'maintenance and repair' as contained in the former law is adopted in the later one."

It is well settled that the "word 'includes' is not, ordinarily, a word of limitation, but rather of enlargement." See *Fraser vs. Bentel*, 161 Cal. 390, 394, and cases cited. As stated in *In re: Gretz's Will*, 75 N. Y. S. 750, 751:

"'Including' is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it."

It seems clear, therefore, that the term "maintenance and repair" as used in Section 5537, General Code, not only embraces all work within the meaning of the term in its ordinary acceptation, but in addition *includes* "all work done upon any public road or highway in which the existing foundations thereof is (are) used as the subsurface of the improvement thereof in whole or in substantial part."

Your attention is further directed to the fact that by the express terms of paragraph (c) of Section 7464, as amended, "the county commissioners shall have full power and authority to assist the township trustees in maintaining" township roads and that nothing in Section 7464 "shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act." Section 7467, *supra*, also provides that "either the county or

township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads of the other."

3. With reference to your third question, your attention is directed to Section 2421 of the General Code, which provides in part that:

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, *free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use*, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. * * * (Italics the writer's.)

Section 7557, General Code, reads as follows:

"The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such village or city."

Neither of these sections was amended by the 87th General Assembly in House Bill No. 67, or otherwise. With reference to these sections as they existed prior to the passage of House Bill No. 67, this department held in an opinion rendered under date of July 1, 1925, to the Prosecuting Attorney at Dayton, Ohio, as follows:

"1. It is the duty of county commissioners to construct necessary bridges in cities on state and county roads over streams and public canals.

2. It is the duty of county commissioners to maintain and repair bridges in cities on state and county roads over streams and public canals.

3. County commissioners have no authority over, nor duty to perform in connection with either the construction or maintenance and repair of bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road.

* * * * *

5. It is the duty of a city to exercise care, supervision and control over bridges in the city and keep them open, in repair and free from nuisance, including both bridges over streams and public canals on state and county roads and bridges on streets established by the city for the use and convenience of the city and not a part of a state or county road.

* * * * *

7. A city is authorized to make minor and extensive repairs on bridges over streams and public canals on state and county roads within the limits of the city, notwithstanding it is the duty of the county commissioners to keep such bridges in repair.

* * * * *

In the opinion it was said as follows:

"As a first proposition, it may be stated that it is the duty of county commissioners to construct and keep in repair necessary bridges over streams

and public canals on state and county roads and within the limits of a city. This proposition is sustained by a long line of well considered cases and opinions. The first paragraph of the syllabus of the case of *Interurban Railway & Terminal Co., vs. City of Cincinnati*, 94 Ohio St. 269, reads:

'It is the duty of county commissioners to construct and keep in repair necessary bridges in cities and villages on state or county roads of general public utility running into or through such cities or villages.'

On page 273 of the opinion, Matthias, J., says:

The provisions of Section 2421, General Code, impose upon the county commissioners the obligation to 'construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use,' and the provisions of Section 7557, General Code, specifically require the county commissioners to construct and keep in repair 'all necessary bridges * * on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such villages or city.'

Both of the above sections make exception of bridges within cities and villages having the right to demand, and which do demand and receive, a portion of the bridge fund levied upon property within such corporation. such exception, however, is no longer of any force or effect for the reason that there is now no statute authorizing any city or village to demand or receive any portion of the bridge fund created by county levy. Provision is made by Section 5635, General Code, for making a levy on the taxable property within the county for road and bridge purposes, and the county commissioners are required to set aside such portion as they deem proper to be applied for the building and repair of bridges, which is called a 'bridge fund.'

Sections 1178, 1184, 1197 and 1224 relating to roads and highways in the state system of highways were, however, amended in House Bill No. 67 and radical changes were made in the provisions thereof, including the provisions relating to the construction, maintenance and repair of bridges and culverts on state highways. These sections formerly read in part as follows:

Sec. 1178. "The department of highways and public works shall be for the purpose of constructing, improving, maintaining and repairing a state system of highways, co-operating with the federal government in the construction, improvement, maintenance and repair of post roads or other roads designated by the federal authorities, and affording instruction, assistance and co-operation to the counties, townships and other subdivisions of the state in the construction, improvement, maintenance and repair of the public roads and bridges of the state, under the provisions of this chapter."

Sec. 1184. "The state highway commissioner shall have general supervision of the construction, improvement, maintenance and repair of all inter-county highways and main market roads, and the bridges and culverts thereon. * * * he shall approve the design, construction, maintenance and repair of all bridges, including superstructure and substructure, and culverts or other improvements on inter-county or main market roads; and

in the case of bridges and culverts on other roads, when the estimated cost thereof exceeds ten thousand dollars, the plans therefor shall be submitted to and approved by him before contracts are let therefor.* * * ”

Sec. 1197. “The state highway commissioner shall cause plans, specifications and estimates to be made for the construction or improvement of all bridges and culverts upon the section of highway to be improved. The cost of the construction or improvement of such bridge or culvert shall be apportioned equally between the state and county unless the county has by resolution agreed to pay more than one-half of the cost of said improvement. Provided, however, that in all cases where the improvement is made upon the application of the township trustees, then the township shall pay one-half of the cost of said improvement unless a different apportionment has been agreed upon between the state and township. * * * ”

Sec. 1224. “The director of highways and public works shall maintain and repair to the required standard, and when in his judgment necessary, shall resurface, reconstruct or widen all inter-county highways, main market roads and bridges and culverts constructed by the state, by the aid of state money or taken over by the state after being constructed. * * *

* * * When a bridge or a culvert on a state highway shall require renewing, it shall be constructed and the cost apportioned as herein provided for the construction and improvement of bridges and culverts on inter-county highways.

* * * ”

As amended the pertinent parts of these sections provide :

Sec. 1178. “*The functions of the department of highways shall be constructing, reconstructing, widening, resurfacing, maintaining and repairing the state system of highways and the bridges and culverts thereon, co-operating with the federal government in the construction, reconstruction, improvement, maintaining and repairing of post roads and other roads designated by the federal authorities and co-operating with the counties, townships, villages and other subdivisions of the state in the construction, reconstruction, improvement, maintaining and repairing of the public roads and bridges of the state. * * * ”* (Italics the writer’s.)

Sec. 1184. “The director shall have general supervision of the *construction, improvement, maintenance and repair of all roads comprising the state highway system, and the bridges and culverts thereon. * * * he shall approve the design, construction, maintenance and repair of all bridges, including superstructure and substructure, and culverts or other improvements on all roads comprising the state highway system.* He may cause plans, specifications and estimates to be prepared for their construction, when so requested by the authorities having charge thereof. * * * ” (Italics the writer’s)

Sec. 1197. “Before undertaking the construction, improvement, maintenance or repair of a state highway, or a bridge or culvert thereon, the director of highways shall make, or cause to be made, an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, use of equipment and all other items of cost and expense. *In con-*

structing, improving, maintaining and repairing state highways, and the bridges and culverts thereon, the director shall proceed by contract let to the lowest competent and responsible bidder, after advertisement as provided in Section 28 (1206) of this act. The above provision relating to the performance of work by contract shall apply to all construction and reconstruction, except in the case of a bridge or culvert estimated to cost not more than five hundred dollars. * * * " (Italics the writer's.)

Sec. 1224. *"The director shall maintain and repair to the required standard, and, when in his judgment necessary, shall widen, reconstruct, resurface, repair or maintain all highways comprising the state highway system and bridges and culverts thereon. In repairing the state highway system the director shall not be limited to the use of the material with which such highways or roads and bridges and culverts thereon were originally constructed, but may reconstruct, widen, repair, resurface and maintain such highways or roads and bridges and culverts thereon by the use of any material which he deems proper. * * * "*

As above stated, the express terms of Sections 2421 and 7557, General Code, were not changed by the recent legislature, and it must be determined if the amendments of Sections 1178, 1184, 1197 and 1224 had the effect of impliedly repealing such parts of Sections 2421 and 7557, supra, as make it the duty of county commissioners to maintain and repair bridges and culverts on roads and highways in the state system. Repeals by implication are of course not favored and the presumption is always against the intention to repeal when express terms are not used. Yet, where two statutes are irreconcilable, or *where an intention to repeal be otherwise clearly expressed*, it must be said that the later repeals a former statute.

It might be urged that the provisions of Section 1224, as amended, and Section 2421 might be reconciled upon the theory that the Legislature intended to place the duty to maintain and repair bridges and culverts on state roads in both the Director of Highways and the Board of County Commissioners. It seems to me, however, that such a contention is untenable for two reasons. In the first place, as will have been gathered from the above discussion, with reference to your first and second questions, a new classification of the public roads and highways in the state was made in Section 7464, General Code, as amended in the Norton-Edwards Bill, which resulted in the placing of the responsibility for the construction, maintenance and repair of roads and highways in the state highway system in the State of Ohio, and in most cases relieved the counties of the burden of co-operating in the construction of inter-county highways and main market roads. In other words, the Legislature has evinced an intention to enlarge both the powers and duties of the State Highway Director, and to relieve the counties of some of the obligations which the old law placed upon them with reference to roads and highways in the state system. In the second place, to adopt the construction that it was the duty of both the State Highway Director and boards of county commissioners to maintain bridges and culverts on highways in the state system would have the effect of dividing the responsibility, thus causing the conflict of authority which would unquestionably follow. Generally speaking, what is the duty of one or two or more agencies is usually the duty of none, and I have no difficulty in concluding that the Legislature did not intend to create a situation leading to such a result.

In 36 Cyc. 1077 the rule of construction applicable to statutes such as the ones here under consideration is stated as follows:

"When two statutes cover, in whole or in part, the same subject-matter,

and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both. Where, however, a later act covers the whole subject of earlier acts and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act. But in order to effect such repeal by implication it must appear that the subsequent statute covered the whole subject-matter of the former one, and was intended as a substitute for it. If the later statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands."

In this connection the observations of Judge Donahue, speaking for the Supreme Court of Ohio in the case of *Goff, et al., vs Gates, et al.*, 87 O. S. 142, 149, are pertinent:

"If, however, a statute is in clear conflict with existing legislation upon the same subject-matter, effect must be given to the later act, even if the result is to repeal by implication the older statute. It is also a well-known rule of construction that where a statute purports to revise the whole subject-matter of a former act and thereby evidences the fact that it is intended as a substitute for the former, although it contains no express words to that effect, it operates as a repeal of the former law."

See also *Lorain Plank Road Co., vs. Cotton*, 12 O. S. 263, 272, and *Thorniley, Auditor, et al., vs. State, ex rel.* 81 O. S. 108, 118.

For the reasons stated, I therefore conclude that so much of the provisions of Sections 2421 and 7557 as make it the duty of county commissioners to keep in repair necessary bridges and culverts over streams and public canals on *state* roads were repealed by Section 1224 and related sections of the General Code, as amended by the 87th General Assembly in House Bill No. 67, and that it is the duty of the Director of Highways to maintain and repair all roads and highways and the bridges and culverts thereon in the state highway system.

In so far as bridges and culverts on county roads are concerned, the provisions of Sections 2421 and 7557, *supra*, to the effect that the commissioners shall construct and keep in repair certain bridges over streams and public canals on county roads are entirely consistent with the provisions of Sections 7464, as amended, and 7467 which provides that the county commissioners shall maintain all roads in the county highway system. There can be no question, therefore, but that it is the duty of county commissioners to maintain and keep in repair bridges on county roads.

It remains to consider the question as to whose duty it is to maintain and repair bridges on township roads.

I find that none of the sections affecting this question were amended or repealed by the 87th General Assembly with the exception of Section 5649, which was repealed in House Bill No. 80, commonly called the Budget law, passed on April 13, 1927. This section formerly provided that:

"Road taxes paid to the clerk by the county treasurer shall be paid over to the treasurer of the township * * * from which they were

collected and be expended on the public roads and in building and repairing bridges in the townships * * * from which they were collected under the direction of the trustees of the proper township or council of such municipal corporation."

It is my opinion that the repeal of this section in nowise changes the law as it formerly existed providing for the maintenance and repair of bridges and culverts on township roads.

In an opinion rendered under date of September 28, 1917, to the Prosecuting Attorney at Portsmouth, Ohio, reported in Opinions, Attorney General, 1917, Vol. II, page 1813, it was held :

" * * *

4. In the construction of bridges and culverts located on county and township roads, as well as the maintenance and repair of bridges so located, the county commissioners have jurisdiction.

5. In the maintenance and repair of culverts located on county and township roads, both the county commissioners and township trustees have jurisdiction, in their respective townships and counties."

In the opinion it was said as follows :

"We come now to the question which causes the main difficulty in giving a satisfactory answer, viz., the jurisdiction of the county commissioners and the township trustees in the matter of constructing and maintaining bridges and culverts on the highways of the state, and I must admit in the beginning that I am not able to give a very satisfactory answer to this question, owing to the uncertainty of the provisions of our statutes as they now exist in reference to this matter.

I note your question is limited to the construction and maintenance of bridges upon the township roads of the state, but this raises the general question as to the jurisdiction of the state, the county and the township in the construction and maintenance of bridges and culverts. In order to have a correct starting point for the consideration of this question, it is well that we keep in mind the provisions of Section 7464, G. C. This section classifies the roads of the state upon a different basis than they were classified before the enactment of said section."

Sections 7182 (since amended, 109 v. 154, 168) and repealed (112 v. 430, 500), 7184, 7187 and 7192 were all referred to, and it was pointed out that in all cases when referring to the duties of the county surveyor with reference to roads and highways under the jurisdiction of the state highway department and the county commissioners he was given charge of "all highways, bridges and culverts", while with reference to his duties under the jurisdiction of township trustees, his jurisdiction was limited to public roads. From this and other pertinent facts the then Attorney General concluded that :

"The matter to which I desire to call attention in the above quotation is, that the county surveyor is given charge of 'all highways, bridges and culverts within his county under the control of the state.' He is also given charge of 'all bridges and highways within his county under the jurisdiction of the county commissioners.' But when it comes to the

matter of the township trustees, he is merely given charge of the construction and improvement of 'roads.'

It seems to me this section clearly implies that the township trustees have no jurisdiction or authority in the construction of bridges and culverts and that the jurisdiction over bridges and culverts is divided between the county commissioners and the state highway commissioner; that is, the state is to build all bridges and culverts on state roads, under the conditions set out in Section 1224, G. C., while the county commissioners are to build all bridges and culverts located on the highways of the county, namely, on county and township roads, and not only would they be compelled to construct all bridges and culverts so located, but also to maintain all bridges. * * * "

After further discussion the following propositions were stated:

"1. The state must construct, maintain and repair all bridges and culverts located upon state roads, under the provisions and conditions set out in Section 1224, G. C.

2. The county commissioners must construct and maintain all bridges located upon county and township roads within their respective counties.

3. The county commissioners must construct all culverts located upon the county and township roads within their respective counties, and they also have full power and authority given them to repair and maintain culverts."

The opinion was then continued as follows:

"Section 3373, G. C., (107 O. L. 93) makes the following provision:

' * * * Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. * * * '

As above quoted, under the provisions of Section 3298-15d, supra, they also have authority to levy a tax for the purpose of carrying into effect the provisions of Section 3373, supra.

So that under Section 3373, supra, it is my opinion that the township trustees also have jurisdiction to maintain and repair culverts within their respective townships, irrespective of the fact whether they are located on county or township roads. This seems to be borne out also by the provisions of Section 7214, G. C., which reads in part as follows:

'Sec. 7214. The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. * * * '

I am aware that this section is broad enough to authorize the township trustees to construct, improve, maintain and repair bridges and culverts within the county; but in view of the provisions of the sections hereinbefore considered and which were enacted later than Section 7214, supra, I am of the opinion that said Section 7214 should be limited, in so far as it applies to the jurisdiction of township trustees, to the maintenance and repair of culverts as above set out.

Hence, it is my opinion, in addition to what I find above, that the township trustees also have jurisdiction in the maintenance and repair of culverts within the township.

In arriving at the above conclusions, I am not unmindful of a number of sections of the General Code, which might in some respects lead to different conclusions than those herein reached; for example, Sections 1197 and 7188-2 (107 O. L. 113) would seem to indicate that it was the intention of the Legislature that the township trustees should have authority to construct, improve, maintain and repair bridges and culverts within the township, but as said above, this authority seems nowhere to have been given.

Also in rendering this opinion, I am not unmindful of the provisions of Section 2421, G. C., which is in part as follows:

'The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use.'

This section provides that the commissioners shall construct and keep in repair necessary bridges on state roads. As shown by Section 1224 (107 O. L. 133), this provision is no longer in effect. Section 2421 also provides that the commissioners shall construct and keep in repair necessary bridges on improved roads, but owing to the general scheme and plan of the road laws of the state this provision can no longer be in full force and effect. Many of the improved roads are state roads and, as said before, the commissioners are not compelled to construct and maintain bridges on state roads excepting as provided in Section 1224, supra; that is, they must provide one-half the cost of the expense of reconstructing a bridge located upon a state road. So that a part of the provisions of Section 2421, supra, are necessarily impliedly repealed by the provisions of the later acts having to do with the highways of the state."

This opinion was subsequently modified by my predecessor in office in an opinion reported in Opinions, Attorney General, 1925, page 389, the syllabus reading:

"In performing the mandatory duty of keeping township roads in good repair, imposed by the provisions of Sections 3370 and 7464 of the General Code, township trustees may appropriate and use township road funds in the construction and maintenance of bridges and culverts on township roads within their respective jurisdictions.

Opinion found in volume 2, page 1813 of the Opinions of the Attorney General for 1917, modified."

This opinion after quoting Section 3370 of the General Code, which has not been amended since the date of such opinion, and referring to Sections 7464 and 7467, General Code, reads as follows:

"The sections noted impose upon the trustees of a township the mandatory duty of maintaining and repairing township roads within their respective jurisdictions.

It is noted that your inquiry goes to authority on the part of trustees in connection with the construction of bridges and culverts, as well as to the maintenance and repair thereof. However, it is not deemed necessary, for the purposes of this opinion, to give consideration to the difference between

construction on the one hand and maintenance and repair on the other hand, inasmuch as it is believed that the Legislature used the terms 'maintenance,' 'repair,' and 'good repair' synonymously and in their broad and general meaning, thereby imposing the duty of putting and keeping township roads in a good, usable and safe condition for travel.

The question then is, does the term 'road,' as used in the sections referred to, include within its definition the bridges and culverts on the road?

As was pointed out in a recent opinion of this department, rendered under date of May 16, 1925, to the Bureau of Inspection and Supervision of Public Offices, the word 'road' is synonymous with the word 'highway' and has no fixed meaning in the law, the meaning to be given it being dependent upon the context in which the word appears; that in its popular sense it is a generic term for all kinds of ways and, unless the context in which the word appears shows a different legislative intention, it may, and usually does, include all parts within the bounds thereof.

The question involved in the opinion referred to was whether or not the term 'public roads' as used in Section 6906 of the General Code included within its meaning bridges and culverts, and it was held therein, after a consideration of all legislation upon the subject of roads, bridges and culverts, that the term did not include bridges within its meaning, but did include culverts within its meaning. This conclusion was reached from the fact among others, that the legislature, in accordance with a legislative policy as old as any legislation upon the subject, had provided a separate, distinct and detailed administrative and quasi-legislative proceeding for the construction of bridges under the jurisdiction of the county commissioners, while, on the other hand, there was no such legislative dealing with the subject of culverts.

While there is no separate, distinct and detailed legislative, administrative and quasi-legislative proceeding for the construction of bridges and culverts on township roads, nevertheless there is, as hereinbefore pointed out, a mandatory duty on the part of the township trustees to keep the township roads in good repair.

This conclusion is strengthened when consideration is given to the provisions of Section 5649 of the General Code, which section provides that road taxes in the hands of the township treasurer shall be expended on the public roads in building and repairing bridges in the township, and to Section 7214 of the General Code, which, among other things, provides that 'the county commissioners and township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges, or culverts within the county.'

* * * * *

In conclusion, I am of the opinion, * * *, that township trustees may appropriate and use township road funds in the construction and maintenance of bridges and culverts on township roads."

Section 831 of Rockel's Complete Guide for Ohio Township Officers, reads as follows:

"As a general rule, it may be stated that the township trustees are not obliged to build any bridges even on township roads, but they must maintain

and keep in repair the culverts, and perhaps the small bridges. (See Attorney General, Opinion, 1925, p. 636). This is manifest from the language of Section 3373 (Sec. 854), wherein township trustees are authorized to purchase machinery, etc., necessary for use in 'maintaining and repairing roads and culverts in the township.' Another Section 7184, G. C., (Sec.----), confines the jurisdiction of the county superintendent to all bridges within the county, etc. Under Section 2421, G. C., (Sec.----), the commissioners are required to construct and keep in repair necessary bridges over streams and public canals on state and county roads, etc. County roads here meant, under the former law, all roads established by the county, as distinguished from roads laid out to a plantation or dwelling house, and we think it still retains this meaning.

A culvert is defined as a 'water-way or water-passage whether of wood or stone, square or arched, a covered drain under a road, designed for the passage of water from one side of the road to the other.'

A bridge is a 'structure of wood, iron, brick or stone ordinarily erected over a river, creek or other stream, or over a ditch or other place, in order to facilitate the passage over the same. When erected on a highway they become a part of the same.

The line of demarcation between a bridge and a culvert is not very clear. Under the old law when the cost of either a bridge or a culvert was not over \$50.00, the trustees were bound to construct and maintain the same, but this is now repealed, and the rule that will probably be applied is, that by the word culvert is here meant those structures that the trustees in the past have maintained, unless they are, or become bridges in the ordinary acceptance of the term."

Since none of the sections relating to bridges on township roads have been amended or repealed since the date of the opinion of June 10, 1925, above quoted, with the exception of Section 5649, General Code, the repeal of which, as above stated, in nowise affects the conclusion reached in this opinion or the opinion of September 28, 1917, above quoted, I see no reason to depart from the conclusions reached in the opinion of September 28, 1917, as modified by the later opinion of June 10, 1925.

From the above discussion, and in specific answer to your questions, it is my opinion that:

1. Under the provisions of the various sections of the General Code relating to the state highway system, as amended in House Bill No. 67, passed by the 87th General Assembly, (Norton-Edwards Act) county commissioners are not under obligation to furnish any money for the construction and maintenance of roads and highways in the state highway system.

2. By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act), county roads are defined as including all roads which have been or may be established as a part of the county system of roads as provided for in Sections 6965, 6966, 6967 and 6968, General Code (commonly called the Green law), which shall be known as the county highway system.

3. By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act) and Section 7467, General Code, the duty of maintaining and repairing all county roads is placed on the county commissioners regardless of whether they be dirt roads or otherwise.

4. The county's portion of gasoline excise tax funds (Section 5537 and related sections of the General Code) may be only used for the purpose of maintenance and repair of roads in the county highway system, including roads that are unimproved.

5. The term "maintenance and repair" as used in Section 5537, General Code, embraces all work done upon roads and highways within the meaning of the term in its ordinary acceptance, and in addition thereto, includes all work done upon any public road or highway in which the existing foundations thereof are used as the subsurface of the improvement thereof in whole or in substantial part.

6. By the terms of Section 1224, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act) it is the duty of the Director of Highways to maintain and repair all roads and highways and all the bridges and culverts thereon in the state highway system.

7. By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act) and Sections 2421, 7557 and 7467, General Code, it is the duty of county commissioners to maintain and keep in repair all bridges on county roads.

8. It is also the duty of county commissioners to maintain and keep in repair bridges on township roads, although township trustees are authorized to appropriate and use township road funds in the maintenance and repair of bridges within their jurisdiction.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1675.

APPROVAL, ABSTRACT OF TITLE TO LAND OF CLARA R. HERMAN
AND PHILLIP HERMAN, FRANKLIN TOWNSHIP, ADAMS COUNTY,
OHIO.

COLUMBUS, OHIO, February 4, 1928.

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

DEAR SIR:—You have resubmitted for my examination and opinion an abstract of title pertaining to three tracts of real estate in Franklin Township, Adams County, Ohio, which it is proposed to purchase from Clara R. Herman and Phillip Herman, her husband.

Under date of August 17, 1927, I rendered to you my opinion bearing number 885, in which I stated that in my opinion Clara R. Herman has a good and merchantable title to the premises, subject to a mortgage to Edward A. Day executed June 12, 1923, and recorded in Volume Q-2, page 446 of the record of mortgages, Adams County, Ohio, for the purpose of securing the mortgagor's note for \$2,100 and subject to taxes for the years 1926 and 1927.

Upon re-examination of the abstract, I find a notation on the page where the above mortgage is shown to the effect that the conditions of the mortgage have now been complied with, and the same is satisfied and discharged.

Among the papers submitted by you is a letter from T. J. Rice of Oberlin, Ohio, in which he says that he has advanced money to pay the taxes, and has the receipts