For a more definite description of the above described property, reference is hereby made to Plat No. 127, Bruce Doughton's survey of said canal property, said plat being on file at the office of the Department of Public Works, Columbus, Ohio."

An examination of the transcript of the proceedings with respect to the sale of the above described parcel of land shows that the same is in substantial compliance with the statutory provisions authorizing and providing for the sale of such lands, and said proceedings are accordingly herewith approved as to form.

In this connection, I note that aside from the general authority conferred upon you by Section 13971, General Code, with respect to the sale of canal lands, the special authority with respect to your authority to sell the particular parcel of canal land here in question, and other canal lands in Madison Township, Licking County, Ohio, is found in the provisions of Section 14203-14, General Code, rather than in the provisions of Section 14203-22, General Code. The provisions of the latter section of the General Code apply only to canal lands between the city of Newark and the village of Hebron, abandoned by act of the General Assembly, in 1917, (107 O. L. 741), which act was carried into the General Code (Appendix) as Sections 14203-20 to 14203-25, inclusive of the General Code. As above noted, special authority is conferred upon you to sell the particular parcel of canal land here in question, by Section 14203-14, General Code, which is part of an act passed by the General Assembly in 1911 (102 O. L., 293) providing for the abandonment of that portion of the Ohio canal commencing at the junction of said canal with what is known as the Dresden Side Cut near Trinway, in Muskingum County, Ohio, and extending thence southwesterly to the southerly end of the aqueduct across Raccoon Creek in West Newark in Licking County, Ohio, which act has been carried into the General Code (Appendix) as Sections 14203-12 to 14203-19, inclusive.

Under the statutory provisions relating to the sale of abandoned Ohio canal lands at private sale, such sales are required to be approved by the Governor and the Attorney General.

In the present instance, the purchase price of the property to be sold to said Dwight M. Warner, is the sum of $320.00, the appraised value of said parcel. No facts relating to the appraisement of this property or other matters touching this proposed sale are presented which suggest any reason why the sale of this property should not be approved by me. My approval of this sale is accordingly hereby given, as is evidenced by my written approval of the resolution providing for the sale of this property found in said transcript.

Respectfully,
GILBERT BETTMAN,
Attorney General.

794.

INTOXICATED DRIVER—POST OFFICE EMPLOYEE—AMENABLE TO STATE LAW IN ABSENCE OF FEDERAL REGULATION—CONSTITUTIONAL QUESTIONS WITH REFERENCE TO SECTION 12628, GENERAL CODE, CONSIDERED.

SYLLABUS:

1. *In the absence of a rule or order of the Postmaster General of the United States or of a federal statute, regulating or punishing a driver of a motor vehicle used*

in transporting the mail over the streets and highways while in a state of intoxication, such an offender may be punished under the provisions of Section 12628-1, General Code, and his right to drive a motor vehicle over the streets and highways of the state suspended, as therein provided.

2. *The provisions of Section 12628-1, General Code, as enacted in 112 O. L. 217, are fairly within the police power of the state and the enforcement of the provisions of the statute will not be in violation of the "obligation of contract," or the "due process of law" provision of the Federal Constitution.*

3. *When a court has found an accused guilty of violating the provisions of Section 12628-1, General Code, and imposed a sentence, and the offender has entered on the execution of the sentence, such court is without power to modify or change the sentence so as to make it inapplicable to certain streets and highways.*

COLUMBUS, OHIO, August 26, 1929.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

> "I call your attention to Section 12628-1 of the General Code of Ohio, which said section provides the penalties for the operating of a motor vehicle by an intoxicated person. I particularly call your attention to that part of this section which provides for the suspension from the right to operate a motor vehicle for not less than six months nor for more than one year in case one is found guilty or pleads guilty to a charge under said section.
>
> One or two acute questions have arisen recently which pertain to this provisoin of this section of the law and I would like your opinion relative thereto in order to properly be advised in case said problems arise in the future which they likely will.
>
> Inasmuch as suspension of the right to drive a car automatically follows a plea of guilty or conviction under this section, does this provision operate against one who is under contract to run a motor car for the State, the United States Government Postoffice Department, or one whose livelihood is earned by operating a motor vehicle and who is under contract to a third person to do so. One problem involves a person working for the State Highway Department and who drives a truck for them. Another problem involves a rural mail carrier who uses a motor vehicle to carry mail. Still a third case involves one under contract to truck produce to market.
>
> It has been suggested that, especially with regard to the rural mail carrier, that to enforce the suspension of the right to drive of the mail carrier is an interference with the United States mails. The proposition with regard to the one driving a truck for the State Highway Department raises somewhat of a similar question. The problem of the one trucking for an individual and whose means of livelihood is earned thereby raises a question of impairment of the obligation of a contract and taking of property without due process of law.
>
> In other words, so far as the provision of this section suspends the right to drive of anyone coming under the three heads mentioned above, is not the law, in so far as it applies to them, unconstitutional?
>
> My next question is whether or not a justice of the peace, or other judicial officer imposing sentence and revoking the right to operate a motor vehicle, can modify his sentence—after same is passed—to permit anyone coming under the above heads to drive his motor vehicle within certain restricted limits, namely, in the course of his occupation?

I realize that these questions are rather perplexing but I feel that they are pertinent. There seems to be no interpretation of this law to be referred to to help one in this matter and I would appreciate your opinion on the above questions."

Section 12628-1 of the General Code, to which you refer, as amended, 112 Ohio Laws, page 217, reads as follows:

"Whoever operates a motor vehicle of any kind upon any public highway or street while in a state of intoxication, or under the influence of alcohol, narcotics or opiates, upon conviction thereof shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars or imprisonment in the county jail for not less than thirty days nor more than six months, or both, and shall be suspended from the right to operate a motor vehicle for not less than six months nor more than one year; and whoever operates a motor vehicle, upon any public highway or street, during the time he or she has been suspended from such operation, under the provision of this section, shall be guilty of a misdemeanor and shall be imprisoned in the county jail for not less than six months nor more than one year.

For a second or subsequent offense of driving while intoxicated, shall be suspended from the right to operate a motor vehicle for not less than one year nor more than five years. No person shall be charged with a second or subsequent offense unless such fact is set forth in the affidavit charging the offense."

Epitomized, your questions are: 1. Is said section of the statute constitutional? 2. Do the provisions of the statute apply to one who may be under a contract to operate a motor vehicle for the post office department as a rural free delivery or otherwise? 3. Does the statute apply to one driving a motor truck for the State Highway Department? 4. Do the provisions apply to one under contract to drive a motor vehicle; and if they do, would the enforcement of the statute in effect violate the "obligation of contract" and "due process of law" clause of the Federal Constitution? 5. May the judge or magistrate after imposing a sentence pursuant to Section 12628-1, General Code, in which an offender's right to operate a motor vehicle has been revoked, subsequently change that sentence so as to permit the offender to operate a motor vehicle on streets and highways within restricted limits?

With reference to question No. 1, I think the law is now well settled, to the effect that the state may by statute lawfully punish persons for misuse of property or rights, whenever such misuse impairs the health, public safety and morals, and general welfare of its citizens, under the authority of its general police power.

In the case of *State* vs. *Davis,* 118 O. S. page 25, the subject of the power of the state to enact laws under the police power is discussed, and Chief Justice Marshall at pages 28 and 29 of the opinion, pertinently says the following:

"In determining the constitutionality of the statute, as measured by the police power, we need only inquire whether this statute is an unreasonable, arbitrary and oppressive exercise of the police power, and whether it is really designed to accomplish a purpose falling within the scope of the police power. Every reasonable presumption is indulged in favor of its constitutionality, and if the statute bears any reasonable relation to the public welfare and public morals the courts may not declare it to be invalid. To do so would be a clear usurpation of legislative power."

As observed by Judge Marshall, supra, the Legislature is in the first instance, the judge of what is necessary for the public welfare, and unless a statute is clearly unreasonable and oppressive, its constitutionality may not successfully be assailed. Also, it is now well settled that all statutory enactments are presumed to be constitutional, and in the administration of the statutes enacted by the Legislature, all administrative officers are required to treat such laws as being constitutional until they have been otherwise declared by the courts. This office has uniformly and repeatedly refused to pass upon the constitutionality of acts of the Legislature after their enactment unless they are clearly repugnant to some constitutional provision.

2. I appreciate the significance of your question in reference to employes, servants and agents of the post office department of the United States, because the federal courts have held that where the federal government has enacted statutes on the subject or authorized federal officers to make federal provisions or rules peculiarly applicable to the operation of motor vehicles with reference to the movement of the mails, the states are then without power successfully to arrest and convict federal officers, servants and agents for the same act, as held in the case of Ex Parte Willman, 277 Fed. 819. In this case it appears that a driver of a mail delivery truck was arrested for operating the truck on the streets of Cincinnati without having on such truck certain equipment which a statute of Ohio prescribed. This statute made it a penal offense to operate a vehicle on the public streets without such equipment.

Likewise, I have in mind the case of *Johnson* vs. *Maryland*, 254 U. S. 41 (65 L. Ed. 127) which holds that a state law making it unlawful for one to operate a motor truck on a highway without having a license based on examination as to competency of driver, could not constitutionally apply to an employe of the post office department while engaged in driving a government motor truck over a post road in the performance of his official duty.

In the Willman case, supra, the following appears in head-note three thereof:

> "The driver of a mail truck, on a street which is a post road, held not subject to arrest, conviction and imprisonment because the lights on his truck, *which were those prescribed by the regulation of the department*, did not conform to the requirement of a state statute."

In the case supra, it appears the equipment on the motor vehicle had been prescribed and furnished by the post office department pursuant to a general order of the Postmaster General, in which was prescribed a type of equipment as a standard for such vehicles in cities throughout the country, which materially differed from that prescribed by the Ohio statute on the subject.

In the Maryland case, the state criminal statute made it an offense for one to drive a motor vehicle of any kind or character without having passed an examination prescribed by the state law. The one case had to do with the fitness of the driver and the other with the sufficiency of the equipment, provision for each of which had been specifically made by the Postmaster General.

In the federal cases, supra, it will be noted that there were two important elements present that are not present in reference to the Ohio statute under consideration; first, the United States government employes were presumed to be competent to operate a motor vehicle, and, second, the equipment of the motor vehicle used to transport the mails had been prescribed by the Postmaster General.

The United States Supreme Court in the Maryland case stated that a state officer has no lawful right to require the federal employes to desist from moving the mails until he had been examined, and had satisfied the state officer that he was competent to drive the vehicle and paid a state fee. At page 57 of the opinion by the court, Mr. Justice Holmes, among other things, said the following:

"Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the department to employ persons competent for their work and that duty it must be presumed has been performed. *Keim* vs. *United States,* 177 U. S. 290, 293."

While it is true that the Congress of the United States, as appears from Section 482, U. S. Code, Ann., Title 39 (U. S. Comp. Stat. 1916, Sec. 7457) has provided that: "all public roads and highways while kept up and maintained as such are post routes," and by Sec. 368, Title 5, U. S. Code, Ann., the Postmaster General is given general power to promulgate rules having the force of laws, I am unable to find any federal provision or rule of the Postmaster General punishing or in any way dealing with drivers of mail motor vehicles on the streets and highways while intoxicated. If there be nothing thus prescribed by Congress or the Postmaster General on the subject, then I am of the opinion a state statute on the subject, such as the one in question, applies with full force and effect to such employes. I think such an interference is plainly invited from the language employed in the case of *Johnson* vs. *Maryland,* referred to above, in which Mr. Justice Holmes on page 56, said the following:

"Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States* vs. *Hart,* Pet. C. C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth* vs. *Closson,* 229 Massachusetts, 329."

The Supreme Court of Ohio in the case of *King and Co.* vs. *Horton,* 116 O. S. 205, expresses the court's attitude on the general subject in the third paragraph of the syllabus, which reads as follows:

"The 'police power' is the power to guard the public morals, safety, and health, and to promote the public convenience and the common good, and is one of the powers not surrendered to the federal government, and therefore remains with the states respectively. It is within the power of the state to devise the means to be employed to those ends so long as they do not go beyond the necessities of the case and have a real and substantial relation to the object to be accomplished."

Without endeavoring to draw too fine a line of demarcation between the exclusive scope of the police power of each government, I believe I am safe in saying that regulations as to driving motor trucks on the highways, in delivering the United States mail, is not a subject exclusively cognizable under the authority of the United States Government; from which I think it logically follows that until the Congress or the Postmaster General acts and makes provision for punishing its employes for operating motor vehicles on the streets and highways in the handling of the mails, while intoxicated, such officers, servants and agents are amenable to the statutes in the states on the general subject.

The principles of law heretofore discussed, are quite applicable to questions 3 and 4. It seems axiomatic that an employe of the state, even if under contract with the

state for a specific period of time, could not use that fact as a cloak of immunity from punishment for violating the criminal law of the state or the local community. It certainly needs no citation of authority to arrive at the judicial destination that a motor vehicle driver for the state may be punished by suspending his right to operate a motor vehicle for the time indicated in the statute; and the fact that he may be engaged in operating such a vehicle as a party to a contract, either public or private, would not clothe him with immunity from arrest and punishment because of the "obligation of contracts" and "due process of law" provisions of the Constitution. Liberty of contract is not a universal right and may be abridged when required for the public good. *Barber* vs. *Connolly*, 113 U. S. 27.

In *C. B. & Q. Ry. Co.* vs. *McGuire*, 219 U. S. 549, the general law on the subject of liberty of contract is expressed in the headnote as follows:

> "Freedom of contract is a qualified and not absolute right. Liberty implies the absence of arbitrary restraint—not immunity from reasonable regulation. Where police legislation has a reasonable relation to an object within governmental authority the legislative discretion is not subject to judicial review."

In the case of *Fidelity & Deposit Co.* vs. *Commonwealth of Pennsylvania*, 240 U. S. 319, it is held:

> "Mere contracts between private corporations and the United States do not necessarily render the former essentially governmental agencies and confer freedom from state control."

In the case of *States* vs. *Wiles*, 116 Wash. 387, the court in the opinion at page 392, says:

> "A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state."

I am therefore of the opinion that the fact that one happens to be under contractual relationship with the State of Ohio, or under a private contractual relationship, would not be a bar to the imposition of the penalty provided for in the statute under consideration.

In your fifth question you desire to know if the sentencing court after he has imposed a sentence, in which the offender's right to operate has been suspended as provided by the section of the statute under consideration, may lawfully change the sentence so as to give him the right to operate the vehicle on the public streets and highways within certain limits therein designated.

It should be noted that the section of the statute under consideration specifically provides that when an accused is convicted of the offense mentioned in the statute, the statute provides that his right to operate a motor vehicle on any public highway or street shall be suspended for the period of time therein stated and provision is then made that it shall be a misdemeanor for the offender to operate the motor vehicle on said streets or highways within the time of his suspension.

I think it is clear that the right of the offender to drive or operate a motor vehicle on the public streets or highways during the time of the suspension, applies to all streets and highways of the state. While there is a general principle or rule that a sentencing court may later change or modify a sentence imposed, his power so to do is limited. For instance, if the court later discovers he acted under a misapprehension

of necessary facts which should have been known at the time he imposed the sentence, the court in the furtherance of justice, during the term, may use his discretionary power and modify the sentence which was imposed.

The language of the statute in reference to the suspension of the right to operate a motor vehicle, I think clearly imports the inference that the person convicted should not be permitted to operate a motor vehicle on any of the streets or highways during the time of his suspension. The evidence which would necessarily be present, to support a conviction and sentence of an accused under the provisions of the statute in question, necessarily results in revoking his right to operate a motor vehicle on the streets or highways of the state within the time prescribed in the statute, and I am unable to see how there could be any facts not disclosed which would authorize a court to either modify or change the sentence imposed, so as to permit the offender to operate a motor vehicle on highways in one locality and not in another.

On June 1, 1928, my predecessor rendered an opinion to you, with which I concur, found in Vol. II, page 1330, Opinions of the Attorney General, 1928, in which is reviewed the limitations on the power of a sentencing court to suspend or modify a sentence, paragraphs No. 1, 2, 3 and 5 of the syllabus of which read:

> "1. Where a court, in passing sentence in a criminal case, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion, and in furtherance of justice, at the same term, and before the original sentence has gone into operation, or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law.
>
> 2. Courts do not possess inherent power to suspend the execution of sentences imposed in criminal cases, except to stay the sentences for a time after conviction for the purpose of giving an opportunity for a motion for a new trial or in arrest of judgment, or during the pendency of a proceeding in error, or to afford time for executive clemency.
>
> 3. In the enactment of statutory provision dealing with the suspension of sentences in criminal cases, it will be presumed that the Legislature has exhausted the legislative intent in that respect and that it has not intended the practice to be followed in such cases to be extended further than the plain import of the statutory provisions.
>
> 5. Where a person convicted of operating, while intoxicated, a motor vehicle on the public streets or highways, is sentenced to pay a fine and costs and to be imprisoned in the county jail for a definite period of time, and such sentence has been carried into execution to the extent of committing such person to the county jail, the trial court is without power and jurisdiction to suspend so much of the jail sentence as remains unserved and release the prisoner, upon payment of the fine and costs."

In view of the manifest object of the statute under consideration and the general law on the subject, I am of the opinion that when a court, as part of a sentence authorized and directed to be imposed for violation of the statute in question, suspends the right of a person convicted, to drive for the time therein prescribed, he has no lawful right to later modify or change that sentence so as to make it inapplicable to certain streets and highways.

Respectfully,
GILBERT BETTMAN,
Attorney General.