village, and such streets therefore are to be included in calculating the mileage of public roads mentioned in section 7181.

Answer to your question is therefore given as follows:

The public roads to be taken into account in calculating the salary of the county surveyor as directed by the provisions of section 7181 G. C. are state roads, county roads and township roads within the county as defined by section 7464 G. C. The mileage of public ways within a municipal corporation is not to be included in such calculation, but the mileage of streets in unincorporated villages within the county is to be included.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1002.

CORPORATIONS—WITHOUT AUTHORITY TO ENTER INTO CONTRACTS WITH SUBSCRIBERS TO COMMON STOCK WHEREBY SUBSCRIBERS AGREE TO FIRST OFFER THEIR SHARES TO CORPORATIONS AT MARKET VALUE BEFORE SELLING THEM TO OTHERS.

A corporation organized under the general corporation laws of this state is without authority, as between it and the state, to enter into a contract with subscribers to its common capital stock whereby the latter bind themselves to first offer their shares to the corporation at market value before selling them to others.

COLUMBUS, OHIO, February 10, 1920.

Department of Securities, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date making inquiry concerning the authority of a corporation organized under the general corporation laws of this state, to enter into an executory contract with subscribers to its common capital stock whereby the subscribers bind themselves to offer their shares to the company at market value before selling them to others, was duly received.

While your question, as I understand it, does not involve the validity or effect of an executed transaction or purchase, that phase of the subject must necessarily be referred to in considering the Ohio cases dealing with an executory agreement.

In Coppin vs. Greenlees & Ransom Co. 38 O. S. 275, which involved an *executory* contract on the part of the corporation to purchase its own shares, the court held that:

> "An executory agreement between a manufacturing corporation of this state and one of its stockholders, for the purchase of the stock of such corporation, by the former from the latter, cannot be enforced either by action for specific performance or for damages."

Previous decisions of the Supreme Court of this and other states were referred to in the opinion and summed up by the court as follows:

> "The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been a subject of much discussion in the courts; and the conclusions reached by different courts have been conflicting. Cf course, cases, wherein the power is found to exist by express or implied grant in the charter, furnish no aid in the solution of the question before us; * * *.

The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a line of authorities; and, prominent among them, may be mentioned the cases of Dupee vs. Boston Water Power Co., 114 Mass. 37, and C. P. and S. R. R. Co. vs. Marsailles, 84 Ill. 145. But nevertheless, we think the decided weight of authority both in England and in the United States, is against the existence of the power unless conferred by express grant or clear implication. The foundation principle, upon which these latter cases rest, is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the supreme court of this state; and by no court more emphatically than by this court. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest on a necessity which arises in order to avoid loss; and was recognized in this state as early as Taylor vs. Miami Exporting Co., 6 Ohio 176, and has been incidentally referred to as an existing right since the adoption of our present constitution. State vs. Building Association, 35 Ohio St. 258."

In Morgan vs. Lewis, 46 O. S. 1, which involved an *executed* transaction, the court expressly acquiesced in the general principle that a corporation is without authority to purchase shares of its capital stock, but recognizes an exception to the general rule if the acquisition was necessary to save the company from loss. In that case, the same as in Coppin vs. Greenlees & Ransom Co., supra, previous decisions of the Supreme Court were referred to and reviewed by the court. In the opinion, at page 6, the court said:

"We have no disposition to call in question the general and well recognized principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon a want of power, rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due to it, has long been recognized in this state.

This has been recognized as an exception supposed to rest upon the necessity of avoiding loss. Coppin vs. Greenlees, 38 Ohio St. 279. It is, nevertheless, a relaxation of the general rule. It is, of course, because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt that the exception is recognized. If the same or a like necessity of avoiding loss should arise in any of the transactions of the company, it could not, with any show of reason, be contended that the application of this principle of necessity should be limited by any iron rule to the case of taking stock for an otherwise hopeless debt."

Near the close of the opinion it was made plain by the court that it was not considering the case of a corporation which had acquired shares of its capital stock, or in other words, an executed transaction.

Many decisions on the subject by lower Ohio courts will be found digested in 2 Page's Ohio Digest, p. 3931-3933, and 1 Page's Ohio Digest, Supp., p. 2382. Two of the more recent cases are Siders vs. Gem City Concrete Co., 13 C. C. (N. S.) 481, and Strauss vs. Car Co., 28 O. C. A., 574, both of which involved executed transactions and reviewed at length former decisions of the Supreme Court with respect to both

executory and executed transactions. In the latter case it was said, consistent with former decisions, that:

> "It is undoubtedly the law as sustained by the leading authorities, that a corporation cannot purchase or acquire its own stock except in satisfaction of a debt due to it or through other exceptional circumstances to save the company from loss."

The question you have presented being limited to the authority of an Ohio corporation to enter into an executory contract with its shareholders, and not involving the rights or interests of the corporation, its shareholders, or creditors, as between themselves, after a contract of purchase has been consummated, you are advised that, as between the state and the corporation, a general provision contained in a subscription to the common capital stock of a company organized under the general corporation laws of this state, that the subscribers shall first offer their stock to the company at its market value before selling the same to others, is without warrant of law and is unauthorized.

The effect of an executed transaction whereby the corporation acquired shares of its own capital stock, under a claim that the acquisition was necessary to save itself from loss, etc., would depend upon the facts and circumstances of each particular case, and hence is not considered in this opinion.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1003.

APPROVAL, BONDS OF CITY OF HAMILTON, OHIO, IN THE AMOUNT OF $50,000 FOR ELECTRIC LIGHT AND WATER WORKS.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 11, 1920.

1004.

APPROVAL, BONDS OF NORTH CANTON VILLAGE SCHOOL DISTRICT IN AMOUNT OF $80,000 FOR SCHOOL BUILDING.

COLUMBUS, OHIO, February 11, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1005.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN WASHINGTON COUNTY, OHIO.

COLUMBUS, OHIO, February 13, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*