If the sentence as imposed by the court, viz., $150.00, was erroneous, and the court in fact, on October 24, 1928, actually sentenced the accused to pay $100.00 and costs, I am of the opinion the sentencing court had a right to correct the entry. Pertinent to this question is the former opinion, No. 1830, of this office, rendered March 9, 1928, and addressed to Hon. P. E. Thomas, Warden, Ohio Penitentiary, the first branch of the syllabus of which is as follows:

> "It is the duty of a court and it has power at any time to make an order correcting a mistake in the record of a judgment. A court has power to amend its records so as to make them conform to the truth even after the term has expired."

However, if what the court did on December 8, 1928, was to change the sentence imposed, the effect of which was to remit the payment by the accused of the sum of $50.00, then I am of the opinion that the court was without lawful power to do so. Giving the entry as it appears of record, however, the most favorable interpretation, it would seem that the entry as first entered was erroneous and a later one made to correct the error. Upon the latter hypothesis, it would appear the sentencing court had the power and authority to correct the entry.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3134.

ROADS—COUNTY—EXTENT OF USE OF GASOLINE TAX FOR WIDENING ROADS AND DEFINING DITCHES—SECTION 5654-1, GENERAL CODE, CONSIDERED.

SYLLABUS:

1. *Roads on county highway systems may be widened and the ditches along them may be defined by the use of funds derived from the gasoline excise tax, only to such an extent as is reasonably necessary to keep them in or restore them to, a proper condition for travel.*

2. *Where a road has been advertised for construction, all bids rejected and a resolution adopted authorizing the county surveyor to build the road by force account, the county commissioners cannot proceed to issue notes in anticipation of a bond issue under Section 5654-1, General Code, for the financing of such construction.*

COLUMBUS, OHIO, January 14, 1929.

HON. FRANK L. MYERS, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

> "We are asking for an opinion from you concerning some matters of import to our county:
>
> Question 1: To what extent may the county use the money derived from the gasoline tax for the maintenance and repair of roads on the county road system, if in the future permanent improvement is contemplated?

Question 2: Can the county use the money derived from the gasoline tax for properly defining the ditches for drainage purposes and widening the roadway to accommodate present day traffic on the county road system?

Question 3: Where a road has been advertised for construction, all bids rejected and the County Commissioners pass a resolution authorizing the surveyor to build the road by force account, can the County Commissioners issue notes in anticipation of a bond issue under Sec. 5654-1, for the construction of said road, if the County Commissioners fail to let said contract and proceed with said road by force account?"

Provision for the expenditure of money derived from the gasoline tax for the maintenance and repair of roads on the county road system is contained in the following sections of the General Code:

Sec. 5537. " * * * The balance of taxes collected under the provisions of this act (G. C. 5526 to 5540, 6292 and 6295), after the credits to said rotary fund, shall be credited to a fund to be known as the gasoline tax excise fund.

* * *

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 such counties.

* * * "

Sec. 5538. "As soon as this act shall take effect and funds become available, and as soon as it is practicable to organize proper working forces, the Director of Highways and Public Works shall take over for maintenance purposes as hereinafter defined, such mileage of the present system of main market roads and inter-county highways outside of incorporated municipalities as have not been constructed by the state or taken over by the state for maintenance, provided that all such portions of the inter-county highway system not at present under state maintenance, be first improved by the county to an extent which in the opinion of the Director of Highways and Public Works will permit of economical maintenance for the purpose of making them passable for traffic.

From the time such roads and highways are taken over, the Director of Highways and Public Works shall maintain said roads and highways, and the respective counties and townships of the state in which such roads and highways are located shall thenceforth be relieved of the duty of the maintenance thereof, but for the purpose of this section, maintenance shall not be construed to include the construction of any new bridges or culverts or the replacement of any bridges or culverts destroyed by the elements or by natural wear and tear, nor any construction work changing the type of construction existing on said roads at the time the same are taken over in accordance with the provisions of this section.

Nothing in this act (G. C. 5526 to 5540, 6292 and 6295) shall be construed to prevent the authorities of any county or township from co-operating with the state in the construction, maintenance or repair of any section of main market road or inter-county highway within such county or township."

The section last quoted has not been expressly repealed, but it has been modified by the enactment of Section 7464, General Code, which became effective on the first Monday of January, 1928, (112 O. L., 496) amending the former section bearing that number. Said section, as amended, now reads as follows:

> "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 on 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."

In answer to your first question I think that the condition which you impose therein, "if in the future permanent improvement is contemplated," is of no significance, for the reason that the intentions of county commissioners in regard to future improvement have no bearing upon the power granted to them by statute with respect to the expenditure of the funds in question. It is somewhat difficult to establish definite limitations on the extent to which county commissioners may use money derived from the gasoline tax for the maintenance and repair of roads on the county road system but, in general, it may be stated that such maintenance and repair is contemplated to keep up existing roads rather than to prepare for future permanent improvement. During the years 1927 and 1928 I have been called upon to render numerous opinions dealing with the use of such funds by counties and municipalities, each of which has presented a different aspect, based upon the facts in the individual case.

In these various opinions, I have held that since the amendment of Section 7464, General Code, as above set forth, such funds may be expended by a county upon unimproved as well as improved roads, (Opinion No. 1674, dated February 4th, 1928); that said funds may be used for the purchase of road drags to be used in the repair and maintenance of county roads, (Opinions of the Attorney General, 1927, page 154); they may not be used, however, for the acquisition of real estate to be used as a storage yard for material (Opinions of the Attorney General, 1927, page 64); streets of a municipality may be resurfaced from such funds where the original subsurface is used in whole or in substantial part, (Idem); a municipality may expend such funds for the purpose of placing gravel and cinders on streets or roadways which had previously been graded or improved by the placing of gravel or cinders thereon, (Opinion No. 1785, dated February 29, 1928).

A very thorough discussion of this question is contained in my Opinion No. 1738, issued under date of February 21st, 1928, to Hon. Clarence J. Brown, Secretary of State, a copy of which I herewith enclosed.

Your second question must be answered in accordance with the principles above set forth. The distinction between "maintenance and repair" on one hand, and "con-

struction" on the other, presents a rather difficult question under all circumstances. The Ohio Supreme Court has dealt with this question, as applied to the expenditure of gasoline tax funds, in the case of *State ex rel.* vs. *Brown,* 112 Ohio State, 590. In discussing the question of the widening of the surface of highways, the court, in its opinion in said case, used the following language:

> "We therefore are of opinion that the Department of Highways and Public Works, the counties and the municipalities of the state, are limited in the expenditure of the respective appropriations made to them in this act to maintenance and repair, and that the power of such department, or subdivisions, to use this particular fund for the purpose of widening the surfaces of the highways, must be measured by whether such widening constitutes maintenance or repair, or, on the other hand, is of such a character as to amount to new construction;"

I think that it is clear from the context of Section 1191, General Code, (112 O. L. 469) that the widening of the paved portion of any road is considered to be construction, as distinguished from maintenance or repair. The pertinent part of said section reads as follows:

> " * * * 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. * * * "

Also, the Ohio Supreme Court held in the case of *State* vs. *Brown, supra,* that the maintaining and repairing of roads constitutes "current expense" as distinguished from new construction. While not synonymous with the term "new construction", "permanent improvement" has substantially the same contradistinction to current expense. In Section 6863, General Code, (112 O. L. 484), the Legislature has included the "widening" of a public road in the meaning of the word "improvement". Said section reads as follows:

> "The commissioners shall, in said resolution, fix a date when they shall view the proposed improvement, and also a date for a final hearing thereof.
>
> The word 'improvement' used in this and related sections signifies any location, establishment, alteration, widening, straightening, vacation or change in the direction of a public road, or part thereof, as determined upon by a board of county commissioners or joint board by resolution."

It does not appear from your inquiry whether the proposed widening will constitute a widening of the surface or merely the building up of the unimproved roadway to a greater width. The wording of your letter rather indicates the latter. While "maintenance and repair", as we have heretofore seen, generally contemplates the restoration of a highway to a former condition, in the case of unimproved highways it is plain that greater latitude should be given to the expenditure of funds. The word "repair" as used in a franchise was construed by the Circuit Court of Hamilton

County, to contemplate the "filling up of holes and evening up of surface in such a manner that ordinary and expected traffic of the locality may pass with reasonable ease and safety". *Village* vs. *Traction Company*, 4 O. C. C. (N. S.) 191. It is quite apparent that any degree of maintenance and repair of an unimproved road will entail the increasing of the width of the part adapted to the passage of traffic and the defining of ditches for the purpose of drainage. Such repair must, however, stop short of a program of grading and drainage, which would properly form the subject of the preliminary part of permanent improvement. The law contemplates that the funds in question be expended only for the purpose of restoring the highway to a proper condition for travel, and local authorities must be guided by the rule of reason applied to the facts in each individual case.

Your third question, in practically its same form, was before me for an opinion which I rendered to the Prosecuting Attorney of Clermont County under date of May 27th, 1927, Opinions of the Attorney General, Volume 2, page 883, of that year, of which the second branch of the syllabus is as follows:

> "When notes are issued under Section 5654-1 of the General Code, the work of restoring or repairing bridges must be accomplished by the letting of a contract after advertisement for bids and such work cannot be done by force account."

The reasons upon which the foregoing conclusion was based appear from the following language of that opinion:

> "It will be observed that before notes may be issued the board of county commissioners must first provide by proper legislation for the issuance of bonds in anticipation of which notes are issued. Not only must a resolution be passed for the issuance of bonds by the board of county commissioners, but the commissioners must prior to the issuance of notes send a certified copy of the resolution authorizing the issuance of the bonds to the county auditor in order that a tax for the retirement of such bonds may be included in the annual budget as required by law.
>
> I am assuming from your statement that these preliminary steps have been taken and that bonds have already been authorized under Section 2434, General Code, since the notes can only be issued in anticipation of a specific bond issue.
>
> Your statement would make it appear that, having gone so far as to get the money by sale of notes under Section 5654-1 of the General Code, the commissioners now desire to change their plans and proceed with the work by force account. Since the money was borrowed under authority of Section 5654-1, its use is clearly restricted by the language of that section which was enacted in 111 O. L., page 494, and became effective July 24, 1925, as a part of the budget law. As pointed out by this department in Opinion No. 404, rendered on the 28th day of April, 1927, said section:
>
> ' * * * expressly prohibits the advertisement for the sale and the issuance of bonds until the contract is let and the amount of bonds to be issued is expressly limited to the amount of the accepted bid as well as the estimated amount of such other items of cost as may be legally included in the cost of such construction and improvement.'
>
> It was further pointed out in the same opinion that the purpose of the Legislature in enacting Section 5654-1 was to confine the amount of the bond issue to the actual cost of the improvement."

Another opinion to the same effect is found in Opinions of the Attorney General, 1921, at page 829.

Specifically answering your questions, therefore, you are advised that:

First, regardless of the contemplation of a future permanent improvement of a highway, county commissioners are restricted in the use of funds derived from the gasoline excise tax to maintenance and repair of existing highways, whether improved or not, and the extent to which such highways may be widened or the ditches bounding them may be defined, depends upon the reasonable amount of such repair required to restore them to a reasonably proper condition for travel.

Second, county commissioners may not issue notes in anticipation of a bond issue under Section 5654-1, General Code, for the construction of a road by force account, where the preliminary steps for such improvement and the issuance of bonds for the payment thereof are for the construction of said improvement by contract.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3135.

OFFICES—COMPATIBLE AND INCOMPATIBLE—AUTHORITY OF NON-CHARTER VILLAGE CLERK TO SERVE AS SECRETARY TO SINKING FUND TRUSTEES—SAID CLERK MAY NOT ASSIST BOARD OF PUBLIC AFFAIRS OR PLANNING COMMISSION.

SYLLABUS:

The clerk of a non-charter village cannot legally perform the duties of clerk of the board of public affairs and clerk of the planning commission, in addition to his duties as clerk of the village, but may perform the duties of secretary of the board of sinking fund trustees, and is required to do so, unless the village council provides by ordinance for the appointment of a secretary to such board of trustees and fixes the duties, bond and compensation of such secretary, in which case the clerk of the village is ineligible to be appointed to the position.

COLUMBUS, OHIO, January 14, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your communication which reads as follows:

"The rule of incompatibility established by the court in the case of *State, ex rel.* vs. *Gebert,* 12 C. C. N. S. Page 274, is as follows:

'Offices are considered incompatible when one is subordinate to, or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both.'

QUESTION: When the Council or village, by ordinance, provides that the regularly elected clerk, in addition to his duties as clerk, shall serve as Secretary of the Sinking Fund Trustees, Clerk of the Board of Public Affairs, and Clerk of the Planning Commission, must, or may, such Clerk legally perform such additional duties? No additional compensation is provided for, or paid."