of such extra work contract. However, in the case of an emergency which will not permit of the delay necessary to adverise, the Director may let the contract without advertising, when he has made a finding of such fact on his journal.

Applying the provisions of the above section to the facts stated, it would appear that the excavation is increased about twenty-five per cent by reason of the relocation of the highway and that the cost thereof will be far in excess of two thousand dollars. Therefore it will be seen that it will be necessary to let an extra work contract in pursuance of advertising or competitive bids unless, of course, there is an emergency which will not permit of such delay and the Director so concludes and makes a finding of such fact upon his journal.

While I have not had before me the provisions of the contract to which you refer it is believed unnecessary to consider its provisions upon the question presented for the reason that the statute above mentioned must be regarded as a part of the contract and will be the controlling factor irrespective of any provisions that may be contained therein.

Based upon the foregoing and in specific answer to your inquiries, it is my opinion that, under the circumstances you present:

1. The contractor cannot be required to do the extra work which you describe at the unit price stated in the contract.

2. The contractor and the Director of Highways, under such facts and circumstances, may not agree unon a new unit price for the extra work unless an emergency exists which will not permit of the delay necessary to advertise said extra work contract and the Director makes a finding of such fact upon his journal.

3. In the event an emergency does not exist the Director of Highways should proceed to advertise for bids for the extra work and award a contract to construct the same.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1823.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN FULTON COUNTY.

COLUMBUS, OHIO, May 3, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

1824.

APPEARANCE BOND—GIVEN TO STATE IN BASTARDY PROCEEDING—PROPER PARTY TO INSTITUTE SUIT ON SUCH BOND, WHEN FORFEITED, DETERMINED.

SYLLABUS:

An action upon a recognizance given for the appearance of a defendant in a bastardy proceeding may be brought by the prosecuting attorney in the name of the State of Ohio.

However, when a judgment has been obtained in the bastardy proceeding against the putative father and the amount of such judgment is equal to, or greater than the amount of the recognizance given for the appearance of the defendant the claimant may institute an action on such recognizance in the name of the state on her relation.

COLUMBUS, OHIO, May 3, 1930.

HON. RAY T. MILLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date, in which you submit the following inquiry:

> "Whether forfeited appearance bonds given to the State of Ohio in bastardy proceedings may be sued on by the attorney for the Humane Society in the name of the complainant, or whether suit should be filed in the name of the State of Ohio by the Prosecuting Attorney."

Recognizance for the appearance of a defendant in a bastardy proceeding is authorized by virtue of the provisions of sections 12113, 12115, and 12116 of the General Code. Section 12113 of the General Code, authorizes the justice of the peace to continue a bastardy proceedings upon the accused entering into a recognizance to the state, with sufficient surety, in not less than three hundred nor more than one thousand dollars, to appear and answer the complaint, at the time fixed for its hearing, and abide the order of the judge or justice.

Section 12115, General Code, authorizes the juvenile court to fully hear and determine a bastardy proceedings and when the time is fixed for trial, the judge shall require the accused to furnish bail for his appearance in an amount not less than three hundred nor more than one thousand dollars, and with such security as he may approve. This section further provides that where a complaint is filed before a justice of the peace after examination where no compromise is effected, the justice of the peace is required to bind the accused to appear before a juvenile court or at the next term of the common pleas court, in a recognizance to the state with sufficient security of not less than three hundred nor more than one thousand dollars to answer the accusation and abide the order of the court.

Section 12116, General Code, provides that after a person is committed to jail for failure to give a recognizance for his appearance, he may give a recognizance with sufficient security of not less than three hundred nor more than one thousand dollars to be taken and approved by a judge of the court in which such cause is pending.

Section 12120, General Code, authorizes the forfeiture of a recognizance by the court when the defendant fails to appear, and it provides as follows:

> "If the accused fails to appear at the term of court to which he is recognized, or at the time set for trial in the juvenile court, his recognizance shall be forfeited. If a verdict of guilty be rendered, and the judgment entered thereon as hereinafter provided, the amount of such forfeited recognizance shall be applied in payment of the judgment."

An act for the maintenance and support of illegitimate children was first passed on April 3, 1873 (70 O. L. 112). Section 8 of this Act provided, as follows:

> "That in case the accused fails to appear at the term of the court to which he is recognized, his recognizance shall be forfeited, and if a verdict of guilty be rendered, and judgment therein as hereinafter provided, the amount of such forfeited recognizance shall be applied in payment thereof to the extent of such recognizance."

Attention is directed to the provisions of Section 8 as it was first enacted, because this section was given consideration by the Supreme Court of Ohio in at least two early cases in which the court had before it the question as to who was a proper party to institute an action on a forfeited recognizance given for the appearance of a defendant in a bastardy proceeding.

It will be observed that no substantial change has been made in the provisions of Section 8 of the original act, which is now Section 12120 of the General Code, except that in its present form it includes the authority to forfeit a recognizance given for appearance in the Juvenile Court.

The provisions of Section 12120, General Code, with reference to the character of the bond and the application of its proceeds remain the same as they were in Section 8 of the original act.

In the case of *Porter* vs. *The State of Ohio*, 23 O. S., 320, the court had before it a case in which the prosecuting attorney brought an action in the name of the State, upon a bond forfeited for non-appearance of a defendant in a bastardy proceeding. The action was brought before a final determination of the bastardy proceeding. The court, in the course of the opinion, said:

> "If we are right in thus construing the statute, the recognizance is not a bond of indemnity, or in the nature of such a bond, and the state, the obligee named therein, is the proper party, in the absence of legislation to the contrary, to bring a suit thereon, and is entitled to bring such suit upon breach of its condition, without showing that any special damage or loss has accrued. For whose ultimate use the money, when so recovered, shall be held or paid, is a question outside of the case."

In the case of *Frank M. Clark*, vs. *Susannah J. Petty*, 29 O. S., 452, the court held as shown by the first branch of the syllabus, as follows:

> "An action on a recognizance taken under the fourth section of the bastardy act of April 13, 1873 (70 Ohio L. 111), and duly forfeited, must be brought in the name of the state."

The claimant in a bastardy proceeding sought to recover from the sureties on an appearance bond the amount of a judgment in her favor in a bastardy proceeding. The amount of the judgment was $400.00, and the amount of the forfeited bond was $500.00. The court in the course of the opinion in this case said:

> "* * * But we are of the opinion that the complainant in bastardy can not maintain the action. It is true, in the case at bar, the complainant is entitled to the greater part of the fund when collected, by virtue of the order directing the sum charged on the putative father for the support of the child to be paid to her, taken in connection with section 8 of the bastardy act, which directs the amount of the forfeited recognizance to be applied, to the extent necessary, to the extinguishment of the sum or sums so charged upon him. But the recognizance runs to the state, and necessarily so. And when properly forfeited, the whole sum, in which the recognizors acknowledged themselves to be indebted to the state, became due. As above intimated, it is not a mere bond of indemnity, nor in the nature of such bond. *Porter* vs. *The State*, 23 Ohio St. 320. And when forfeited for the non-appearance of him for whose appearance it was given, the penalty is due, although such person may subsequently appear and submit to the order and judgment of the court. The cause of action can not be split into two, nor divided so as to authorize more than one action upon it."

The court further says:

"In an action upon a recognizance of the character here sued upon, the recognizance fixes and determines the extent of liability. Either the whole penalty is due or nothing. The action to recover it is one at law, and not in equity. The case well illustrates the necessity of the rule requiring the action upon the recognizance to be brought in the name of the state. Its penal sum was $500. This, with interest upon it from the date of forfeiture, was the exact measure of the defendant's liability. The plaintiff was entitled to less than $400, and this not in her own right, but in right of the child, to the support of which the sum, when received, was to be applied. The balance belonged to the township, and its right to maintain an action for the residue of the penalty, would be of the same nature as that insisted on by the plaintiff to sue for the sum charged on the putative father, for the child's support. But it is very clear that the forfeiture of the recognizance gave rise to but one right of action; or, rather, it was a judicial determination that the condition of the recognizance had not been complied with. The acknowledged indebtedness to the state was therefore left subsisting, And to recover that debt one action only will lie, and that action must be brought by the state, the common trustee, for the purposes of the action, for all who are or may be entitled to the fund when collected."

A recognizance given by virtue of the provisions of Sections 12113, 12115 and 12116, General Code is made to the State of Ohio, conditioned that the defendant will appear in court on the day fixed. While Section 12120 of the General Code, authorizes the application of the proceeds of the recognizance upon the payment of the judgment, it does not necessarily follow that the recognizance is given for the benefit of the complainant in bastardy or that she is entitled to the benefits of the recognizance. The complainant is not entitled to any benefits of the proceeds of the recognizance until judgment is entered in her favor in the bastardy proceeding, and she is not entitled to any benefits from the proceeds of the forfeited recognizance if the judgment is satisfied either by the levying of execution on the property of the defendant or by payment of the judgment. The recognizance is given to assure the appearance of the defendant, and while eventually she may derive some benefit from the proceeds, this does not entitle her to bring an action in her own name.

The conclusions reached by the Supreme Court in the cases cited herein, appear to me to be applicable to Section 12120 of the General Code, as it now reads, and in view of these decisions, I am of the opinion that an action upon a recognizance given for the appearance of the defendant in a bastardy proceeding must be brought in the name of the State of Ohio, and since Section 2916, General Code, makes it the duty of the prosecuting attorney to prosecute on behalf of the state complaints, suits and controversies in which the state is a party, it therefore follows that the action may be instituted by the prosecuting attorney in the name of the State of Ohio.

The question arises at this point, however, whether or not the complainant may institute action in the name of the state on her relation. It is apparent that in cases in which she has received a judgment in her favor in a bastardy proceedings in a sum equal to or greater than the amount of the recognizance, the State of Ohio would be merely a naked trustee, and she would be entitled to the full amount of the proceeds of the recognizance. While it is true that she is not the real party in interest, she is the party who is to actually receive the proceeds of the recognizance, and therefore, while the question is not without doubt, I can see no objection to an action on the recognizance being brought in the name of the state on her relation. The question of whether or not the complainant could institute the action in the name of the State of Ohio on her relation was before the court in the case of *Edward Hazzard* vs. *State, ex rel. Anna Dickson*, 6 O. D. Rep. 308. The court, in the course of the opinion, said:

"The action was brought below by the State of Ohio, for the use of Anna Dickson, against E. Hazzard et al., on a bond given by Hazzard in a bastardy proceeding. The exceptions are all based on the same theory of the case. It was claimed, in the first place, that an action could not be instituted by the mother against the putative father in the name of the state without it appearing that the State of Ohio, by its counsel, prosecuted the suit. Another objection was made, namely, that no entry appeared upon the minutes of the court continuing this recognizance from the November term of 1878 to the following term, at which defendant was convicted, and that the condition of the bond was therefore broken. The Supreme Court has decided that an action upon a bond of this character must be brought by the State of Ohio, the state being the sole obligee in the bond. The state, however, has not a scintilla of interest in the bond, but stands in the position of a naked trustee for the benefit of whom it concerns. It would be imposing upon the Attorney General and upon prosecuting attorney duties, which it would be almost impossible for them to perform, to bring suit upon all bonds in which the state is obligee. We see no objection to the party who has a real interest in the bond bringing an action in the name of the state without showing direct authority upon the part of the state to bring the suit."

In view of the authorities cited herein, I am of the view that an action upon a recognizance given for the appearance of a defendant in a bastardy proceeding may be brought by the prosecuting attorney in the name of the State of Ohio. However, when a judgment has been obtained in the bastardy proceeding against the putative father and the amount of such judgment is equal to, or greater than the amount of the recognizance given for the appearance of the defendant the claimant may institute an action on such recognizance in the name of the state on her relation.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1825.

APPROVAL, BONDS OF CARROLL VILLAGE SCHOOL DISTRICT, FAIRFIELD COUNTY—$3,000.00.

COLUMBUS, OHIO, May 3, 1930.

Industrial Commission of Ohio, Columbus, Ohio.

1826.

APPROVAL, ABSTRACT OF TITLE TO LAND OF ADDIE P. BOYER IN NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, May 5, 1930.

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

DEAR SIR:—This is to acknowledge receipt of your recent communication sub-