1627.

COUNTY COMMISSIONERS—STREET ON DEDICATED PLAT OUTSIDE OF MUNICIPALITY—MAY BE VACATED—SECTION 6680, GENERAL CODE, AS AMENDED BY 87TH GENERAL ASSEMBLY IN HOUSE BILL NO. 67, NOW IN FORCE AND EFFECT.

SYLLABUS:

1. *Section 6860 of the General Code, as amended in House Bill 67, of the 87th General Assembly, is now in force and effect.*

2. *Under Section 6860 of the General Code, county commissioners have authority to vacate a street on a dedicated plat lying without the corporate limits of a municipal corporation.*

COLUMBUS, OHIO, January 26, 1928.

HON. OTHO L. MCKINNEY, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

> "Senate Bill 86, which became effective August 2, 1927, gave the county commissioners power to vacate streets and alleys on any dedicated plat lying without the corporate limits of any municipal corporation. This is a part of Section 6860.
>
> The same legislature in House Bill 67, which became effective January 2, 1928, made no reference to any such power of the commissioners. That section was also numbered 6860. In House Bill 67 the original 6860 was repealed.
>
> The query is, does House Bill 67 supersede Senate Bill 86 on the power of commissioners to vacate any streets on a dedicated plat lying without the corporate limits of a municipal corporation?
>
> In the event Senate Bill 86 is superseded by House Bill 67, would there be sufficient authority under 6860 as enacted in House Bill 67 for the commissioners to vacate such a street?
>
> I call your attention to Volume 2 of the Attorney General's Opinions for 1919 at page 1104. Would you approve that opinion?"

Your inquiry points out the anomalous situation resulting from action on the part of the legislature on the same day making two separate and distinct amendments to the same section of the General Code, for upon reference to the bills to which you refer it is found that both of them were passed on April 21, 1927.

The question for determination, therefore, is the correct language of Section 6860 of the General Code on and after January 2, 1928.

As you state, Amended Senate Bill 86, passed April 21, 1927, approved by the Governor May 3, 1927, and effective on August 2, 1927, amended Section 6860 of the General Code to read as follows:

> "The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the inter-county and main market roads. The county commissioners shall have the further power to alter, widen, straighten, vacate or change the direction and name of streets and alleys on any dedicated plat lying without the corporate limits of any municipal corporation."

This act also amended Sections 6862, 6864 and 6869, which latter sections prescribe the detailed method of procedure in the exercise of the power conferred in Section 6860 of the Code. The only change in the language of Section 6860 was the addition of the last sentence thereto and the changes in the succeeding sections were made to make applicable the procedure to the enlarged powers of the county commissioners as granted by the amendment of Section 6860. In fact, it may be said that the whole purpose of the enactment of Amended Senate Bill No. 86 was to extend the authority the county commissioners theretofore had over roads other than state highways so as to include expressly the same power over streets and alleys on any dedicated plat lying without the corporate limits of any municipal corporation.

On the same day, however, the legislature also passed House Bill 67, which, by its title, constitutes a general revision of all of the laws relating to the department of highways, the state highway system and the construction, improvement and maintenance of all classes of highways. This act also amended Section 6860 of the Code, as well as all of the succeeding sections to and including Section 6869 of the Code. Section 6860, as therein amended, is as follows:

> "The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except that as to roads on the state highway system the approval of the director of highways shall be had."

The obvious purpose of the amendment in this instance was to extend the authority expressed in the first sentence to include roads on the state highway system, provided that the approval of the director of highways shall first be had. In other words, prior to this amendment, the county commissioners had no jurisdiction whatsoever to locate, establish, alter, widen, straighten, vacate or change the direction of any intercounty highway or main market road. Certain substantial changes are made in the procedure incident to the authority conferred by Section 6860 and the amendment to the succeeding sections, but it is unnecessary to point them out as they have no materiality to the question you present.

By the express language of Section 91 of House Bill 67, the act is made effective the first Monday of January, 1928.

We have, therefore, two distinct amendments of the same section, enacted upon the same day, each one extending the authority of the county commissioners over subject matter which had not theretofore been covered, at least by the express language of that section. In each of the amendments the constitutional requirement is carried out by the repeal of the original section and the recital of the language of the section as amended in full. In neither instance does the amended section incorporate the amendatory language contained in the other amendment, so that the conclusion must be reached that in the enactment of each one the action in the other instance was entirely overlooked or disregarded. There is no affirmative irreconcilability in the language of the two amendments and it might be argued that both the legislature and the governor intended the county commissioners to exercise both the additional powers conferred. I am, however, confronted with a lack of power on my part affirmatively to legislate in accordance with what I believe may have been the intent of the legislature, and I feel that a court, having before it this question, must also reach this conclusion. That is to say, the Constitution of Ohio, in Section 16 of Article II thereof used the following language:

> "No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended unless the new

act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

In each of the two bills in question the legislature has, in compliance with this constitutional requirement, specifically set forth the language of the section as it is to stand in the law and consequently the two sections cannot in any way be reconciled. Hence, the language of one must prevail over the other and it is impossible, in view of the constitutional provision, so to construe the language of either one as to include the additional amendatory matter contained in the other.

In several instances questions somewhat analogous to the one you present have been before this department for consideration, but, upon examination, I feel that none of them is particularly helpful in this instance. I believe, however, some light upon the question may be derived from the language of the Supreme Court in the case of *State* vs. *Lathrop*, 93 O. S. 79, where there was under consideration the question of two separate amendments of the same section enacted by the same legislature. In so far as the passage by the General Assembly was concerned, one of the bills antedated the other by two days. On presentation of the bills to the governor, however, he, as the court says, inadvertently first signed the bill later passed so that the last bill passed by the legislature became first effective and it was argued that the first bill passed, becoming a law thereafter, repealed the provisions of the section as found in the later bill. To this argument the court makes apt reply in the opinion by Judge Nichols, at page 81, as follows:

"The effect of this decision is that the bill last signed, although first passed, repealed the act first signed, although later passed.

We thus have presented the anomalous situation of the governor being granted an additional power of veto not contemplated by the constitution. He may, if this decision is permitted to stand, by mere order of the time of signing, determine which of two acts relating to the same subject matter may survive, and, although signing both, may kill the one as effectually as if he had vetoed it: and furthermore—as happened in this instance—may defeat the manifest purpose of the legislature by signing first in order the later expression thereof, and do this, it would appear, without intending to do so, and in effect defeat not only the intention of the legislature, but his own as well.

The anomaly of the situation is further emphasized by the apparent paradox of the executive killing the bill by approving it, whereas, by vetoing it, it most likely would have survived, for the general assembly would most certainly have repassed the bill by the required constitutional majority, there being no conceivable reason why the unrestricted sale of cocaine and its associated drugs should be forbidden, and opium and its derivatives permitted, and the time necessary to have brought this about would have made the later act the last to go into effect.

The executive should not be permitted to defeat the legislative will except by constitutional methods—that is, by the exercise of the veto power. If it were permitted him to do so, grave possibilities of encroachment on the legitimate functions of the general assembly might reasonably be apprehended."

Again, on page 84, we find the following language:

"We are not unmindful of the provisions of Section 16 of Article II of the Constitution, requiring that 'every bill passed by the general assembly

shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it, and thereupon it shall become a law and be filed with the secretary of state,' under the express terms of which the two measures in question became laws of the date of his approval. There is nothing in the record to indicate which of the two acts was first presented to the governor, but it must be presumed in the ordinary course of events that the act first passed was first presented, and had there been neither approval nor veto, then the act of April 17 would have been the act last to go into effect.

Approval by the executive is unnecessary to give force and effect to a law, since the same section of the constitution provides that if a bill be not returned by the governor within ten days after being presented to him, it shall become a law in like manner as if he had signed it.

We are constrained to hold that the act last actually signed did not operate to repeal the act last passed. We are persuaded that the manifest purpose of the law-making power should not be defeated by means wholly beyond its control."

The importance of this decision is the fact that the court recognized it to be its duty to give effect to the legislative intent by interpreting its action in the light of what it must be presumed to have known the results of that action to be.

Applying this rule to the present situation, I feel it is unnecessary for me to determine by reference to the legislative records which of the two bills in question actually was first passed on April 21, 1927. Amended Senate Bill 86 was an ordinary measure containing no specific date upon which the bill should become effective and consequently it must be assumed that the legislature realized that such bill, in the ordinary procedure, would become effective at the expiration of the time provided by the provisions of the constitution pertinent thereto. As I have pointed out, however, in the enactment of House Bill 67, the legislature specifically named the first Monday in January, 1928, as the effective date. The assumption must, therefore, be made that the legislature realized that House Bill 67 would, as to its effective date, be later in point of time than Amended Senate Bill 86. The right, in the absence of constitutional restrictions, to provide for a time in the future when an act shall take effect, scarcely needs argument. As stated in Sutherland, in his work on Statutory Construction, page 127:

"The power to enact laws includes the power, subject to constitutional restrictions, to provide when in the future, and upon what conditions or event, they shall take effect. Where a particular time for the commencement of a statute is appointed, it only begins to have effect and to speak from that time, unless a different intention is manifest, and will speak and operate from the beginning of that day. Where the provisions of a revising statute are to take effect at a future period, and the statute contains a clause repealing the former statute upon the same subject, the repealing clause will not take effect until the other provisions come into operation."

You will observe the rule to be that the repealing clause does not take effect until the other provisions come into operation. Therefore, in the enactment of House Bill 67, its clause repealing Section 6860 of the General Code did not become effective until January 2, 1928. On the other hand, the repealing clause of the same section as found in Amended Senate Bill 86 became operative at the time that bill went into effect. Consequently, Section 6860 was amended on August 2, 1927, to read as found

in Amended Senate Bill 86. The section in this form continued in effect until January 2, 1928, when it in turn was repealed by the repealing section of House Bill 67. On that date and thereafter Section 6860, as amended, in House Bill 67, became the law. This conclusion must be reached if it be assumed that the legislature, in the enactment of the bills in question, had in mind when, by their terms, they became operative.

I am, therefore, forced to the conclusion that the amendment of Section 6860 of the Code, as contained in Amended Senate Bill 86, is no longer the law and that said section is now in effect as amended in House Bill 67, although, as I have before stated, in reaching this conclusion I have no doubt that the real intention of the legislature is being disregarded.

My conclusion in answer to your first question necessitates an answer to your further inquiry as to whether or not, under Section 6860 of the General Code, as it now stands, county commissioners have the authority to alter, widen, straighten, vacate or change the direction of streets or alleys on platted ground outside of the limits of a municipality. You invite my attention to a former opinion of this department, found in Opinions of the Attorney General for 1919, page 1104, the syllabus of which is as follows:

> "Proceedings for the vacation of a street, road or highway in an unincorporated village may be had in accordance with Sections 6860, G. C., et seq., unless such street, road or highways be part of an intercounty or main market road."

That opinion was, however, rendered with reference to the particular facts therein involved and, since your question is general, it may be well to point out the varying circumstances under which the question might arise. Because of the provisions of the statute applicable thereto, it may be convenient to classify plats outside of a municipality into the following groups: (1) Plats within three miles of a city dedicated prior to the enactment of Sections 4346 and 3586-1 of the General Code; (2) plats located within three miles of a city and dedicated since the enactment of those sections; and (3) plats which are not within three miles of any city.

The reasons for these classifications appear upon examination of the sections pertinent to the platting of ground outside of municipalities. In the Municipal Code is found a chapter entitled "Plats," being Sections 3580 to 3614, inclusive, of the General Code. While, as I have stated, this is found linked with other sections of the Code with relation to municipal corporations, an examination of the provisions of the various sections makes it clear that they comprehend not only plats within municipalities but also plats located outside of the boundary of any municipality. The details incident to the accomplishment of a platting are given in those sections, and Section 3586-1, which was enacted in 110 O. L., p. 71, provides as follows:

> "Whenever a city planning commission of any city shall have adopted a plan for the major street or thoroughfares and for the parks and other open public grounds of said city or any part thereof or for the territory within three miles of the corporate limits thereof or any part thereof except a part lying within a village, then no plat of a subdivision of land within said city or part thereof or said territory or part thereof shall be recorded until it has been approved by such city planning commission and such approval be endorsed in writing on the plat. If such land lie within three miles of more than one city, then this section shall apply to the approval of the planning commission of the city whose boundary is nearest to the land. When a village planning commission shall have adopted a plan for the

major street and thoroughfares and parks and other public grounds of such village or any part thereof, then no plat of a subdivision of land within said village or part thereof shall be recorded until it has been approved by such village commission and such approval endorsed in writing on the plat. * * *"

This section has a counterpart in Section 4346 of the General Code, which is in the following language:

"The director of public service shall also be the platting commissioner of the city, who shall provide regulations governing the platting of all lands to require all streets and alleys to be the proper width and to be coterminous with adjoining streets and alleys.

Whenever council shall deem it expedient to plat any portion of the territory within the corporate limits in which the necessary or convenient streets, or alleys have not already been accepted by the corporation so as to become public streets, or when any person plats any lands within three miles of the corporate limits of a city, the platting commissioner shall, if they are in accordance with the rules as prescribed by him, endorse his written approval thereon and no plat of such land shall be entitled to record in the recorder's office in the county in which such city is located without such written approval so endorsed thereon; provided, that the approval of the platting commission of a city shall not be required, unless such city is the nearest to the lands sought to be allotted."

By these two sections the legislature made it clear that, in land adjacent to a municipality, the municipality has an anticipatory interest in the planning of the streets and alleys so that they will conform with those within its actual limits. In the ordinary course of events, it is to be anticipated that the boundaries of municipalities will be extended pursuant to normal growth and accordingly the municipal authorities are extended supervision over territory beyond its bounds in order that in the course of normal development there will exist logical and harmonious city planning. From these sections it is apparent that any plat within three miles of a city must, before record, secure the approval of the platting commission of the city.

Section 4355 of the General Code is as follows:

"Plats may be amended after adoption, by like proceedings by which they were originally adopted."

There is no corresponding specific provision found in the chapter on plats hereinabove referred to with relation to the amendment of plats dedicated in pursuance of those sections, but it is reasonable to assume that any amendment thereof would also have to secure the consent of the planning commission.

With relation to a plat of land outside of a municipality, Sections 3600 and 3601 of the Code provide as follows:

Sec. 3600. "Any person or persons owning, either jointly or severally, and either in their own right or in trust, and having the legal title to, any land laid out in town lots, not within the limits or subject to the control of a municipal corporation, may change such lots and the streets and alleys bounding them by making, acknowledging and having recorded, as in this

chapter provided, a new plat of such land, and having the proper transfers made in the office of the county auditor. No such change shall be made if it affects injuriously any lots on the streets or alleys, or within the plat so changed, unless all the owners of the lots so affected are parties joining in making the change, or they give their consent in writing on the new plat, and it be recorded therewith. Any change of a town plat so made shall have the same force and effect as if made by the judgment of a court having jurisdiction thereof."

Sec. 3601. "Any person or persons owning, either jointly or severally, either in their own right or in trust, and having the legal title to any land laid out in town lots, or to any whole block or blocks of lots in any land laid out in town lots, and not within the limits or under the control of a municipal corporation, may vacate such lots or block or blocks of lots upon giving notice of his, her or their intention so to do, for two weeks in a newspaper published, and of general circulation, in the county where such land lies, and if any of such lots have been sold, personal written notice to the owner thereof."

Quite obviously Section 3601 authorizes the entire vacation of a plat as therein provided and apparently the authority is extended by Section 3600 to make changes in existing plats in the same manner. Standing alone, these sections would seem to authorize a change on the initiative of the property owners interested alone, but in my opinion these sections must be read in connection with Section 3586-1 of the Code, supra, and, in the event a change is sought to be made by the property owners, the consent of the platting commission must be obtained as a condition precedent to such action, where the plat is located within three miles of a city.

Reverting to the 1919 opinion, it should be pointed out that the plat there in question had been recorded prior to the amendment of Section 4346, which required the consent of the platting commission of the city, the property in question being located within three miles thereof. Accordingly, the question of the necessity of securing the consent of the platting commission to the vacation of the street in question was not involved. That opinion does, however, point out that every character of public highway outside of a municipality must, of necessity, under the provisions of Section 7464 of the General Code, be either a state road, a county road or a township road. Streets and alleys in a plat ordinarily are neither state roads nor county roads and consequently the opinion holds that they must of necessity be township roads. While Section 7464 of the General Code, classifying and defining roads and highways, has since been amended, the amendment does not affect the reasoning in that opinion and my conclusion is that streets and alleys in a recorded plat outside of municipalities must be treated as township roads unless, by action of the county commissioners or the state, they are incorporated in either the county or state system.

After reaching this conclusion, the 1919 opinion concludes that Section 6860, of the General Code, as then in effect, gave to the county commissioners the authority to alter, widen, straighten, vacate or change the direction of all such streets and alleys, and I am in accord with that conclusion.

The only remaining question is, what effect, if any, must be given to the other sections of the General Code, hereinabove referred to, which provide methods for the amendment of plats previously recorded which might have the effect of vacating streets and alleys in such plat. In the determination of this question, it should be borne in mind that there are in a sense three adverse interests involved. The owners of the property in question were originally given authority to change at will

the plat by virtue of Section 3600 of the General Code, irrespective of where the plat was located. As I have before pointed out, by subsequent enactment a city from which the plat was distant less than three miles, became an interested party to the extent that the consent of its planning commission was made a condition precedent to action in either dedicating or amending a plat. This was in effect a limitation upon the prior absolute authority of the interested property owners to change the plat at will. The third interested party is the county which, in this respect, acts in most cases in behalf of the township, the latter having originally been vested with authority to vacate township roads, this jurisdiction having been taken away from the township and given to the county commissioners.

These streets and alleys being as they are township roads in most cases, impose an obligation upon the township to keep them in repair. This involves the expenditure of money, and, accordingly, the county commissioners are given the authority contained in Section 6860 of the General Code to make changes in the manner therein provided. In my opinion the authority in Section 6860 is not restricted by the provisions of Sections 4346, 4355 and 3586-1 of the General Code so as to require precedent consent by the planning commission to action by the county commissioners. In other words, I am of the opinion that Section 6860 of the General Code confers upon the county commissioners the authority to alter, widen, straighten, vacate or change the direction of streets and alleys in platted ground outside of the limits of a city, irrespective of the location of that ground and without securing the consent of the planning commission of any city, provided, of course, that the provisions governing the exercise of such power as found in the succeeding sections of the General Code be followed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1628.

APPROVAL, FINAL RESOLUTION ON ROAD IMPROVEMENTS IN WASHINGTON COUNTY.

COLUMBUS, OHIO, January 27, 1928.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

1629.

BONDS—SCHOOL DISTRICT—IMPROVEMENT RESTRAINED BY INJUNCTION—NOTES DUE AND PAYABLE—PROCEDURE OF BOARD OF EDUCATION DISCUSSED.

SYLLABUS:

1. *Where bonds have been authorized by the electors of a school district and where the board of education has borrowed money and issued notes in accordance with the provisions of Section 5654-1, General Code, and where an injunction proceeding has*