

of the survey line of said State of Ohio; thence South eighty-nine degrees and forty-seven minutes West (S. 89° 47' W.) ninety-one and five-tenths (91.5) feet to a point in the westerly line of said Canal property; thence North thirty degrees and six minutes East (N. 30° 06' E.) along said westerly line, forty-six (46) feet to a point; thence North twenty degrees and thirty minutes east (N. 20° 30' E.) along said westerly line one hundred sixty-three (163) feet to a point; thence South eighty-three degrees and forty-two minutes East (S. 83° 42' E.) eighty-four and five-tenths (84.5) feet to a point in the easterly line of said Canal property; thence South twenty-two degrees and two minutes West (S. 22° 02' W.) along said easterly line one hundred ninety-four (194) feet to the point of beginning, containing an area of thirty-seven hundredths (0.37) of an acre, more or less.

I have carefully examined the transcript of the proceedings, as aforesaid, and find that the necessary steps for the sale of said lands have been taken as provided in Section 13971, General Code.

Finding said proceedings in all respects regular, I have therefore signed the resolution providing for the sale of said lands.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1300.

APPROVAL, FINAL RESOLUTION ON ROAD IMPROVEMENTS IN HAMILTON COUNTY, OHIO.

COLUMBUS, OHIO, November 25, 1927.

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

1301.

DAMAGES—FOR FENCE DESTROYED BY AGENTS OF FEDERAL AND STATE DEPARTMENTS OF AGRICULTURE—SHOULD BE FILED WITH SECRETARY OF AGRICULTURE OF THE U. S. AND THE SUN-DRY CLAIMS BOARD OF OHIO.

SYLLABUS:

A claim for damages by the owner of a fence destroyed by fire by a Federal "burning crew" composed of persons who were also agents of the Department of Agriculture of Ohio should be filed with the Secretary of Agriculture of the United States under Section 2, 42

(U. S.) Stat. 1066, and with the Sundry Claims Board under Sections 270-6 and 154-36, General Code.

COLUMBUS, OHIO, November 26, 1927.

HON. VIC DONAHEY, *Governor, Columbus, Ohio.*

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

“On or about the 25th day of June, 1927, the federal burning crew, operating under laws of the State of Ohio and the United States to exterminate the European Corn Borer in Ottawa County, Ohio, accidentally damaged and destroyed 168 rods of fence on the farm of John Lemke, a citizen of Ottawa County, Ohio.

Should Mr. Lemke present his claim to the General Assembly of Ohio or to the Federal Government?

The agent of the Federal Government in charge stated that no part of the federal appropriation for eradication could be used in paying damages to property by fire or otherwise.”

I am informed by the Department of Agriculture of Ohio that, with few exceptions, all men employed as federal “burning crews” were authorized agents of the Ohio Department of Agriculture in furtherance of this particular work.

The 87th General Assembly, on March 3, 1927, (112 v. 81) passed an act entitled:

“An Act—Providing for the quarantine and control of the European corn borer; imposing certain powers and duties on the department of agriculture; providing penalties and jurisdiction for offenses; making an appropriation therefor and declaring an emergency.”

Section 6 thereof (Section 1140-17, General Code,) reads:

“For the purpose of carrying out the provisions of this act there is hereby appropriated out of any monies in the state treasury not otherwise appropriated, the sum of two hundred thousand (\$200,000.00) dollars to be expended by the department of agriculture.”

Without discussing the several sections of this act in detail it will suffice to state that no portion of this appropriation would be available for the payment of damage claims such as referred to in your letter. Nowhere in the act in question is there any provision authorizing the payment of any such claim or providing machinery for a hearing and determination as to whether or not a valid claim exists and the amount thereof, the amount appropriated in H. B. No. 134, being for the purpose of paying the necessary expense of doing the things authorized and directed to be done by the act,

The 69th Congress of the United States by H. R. 15649, approved February 9, 1927, and entitled:

“An Act—To provide for the eradication or control of the European corn borer,”

appropriated the sum of \$10,000,000.00 to be expended in cooperation with “such authorities of the States concerned” as the Secretary of Agriculture may deem necessary to accomplish such purposes.

This act provides:

"That no part of this appropriation shall be used to pay the cost or value of corn or other farm crops or other property injured or destroyed."

As stated in 36 Cyc. 881:

"A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, the only relief the aggrieved person has in such case being an appeal to the legislature."

Your attention is directed to Section 215, Title 31 (Money and Finance), which appears on page 989, of the Code of Laws of the United States of America in force December 6, 1926, (Section 2, 42 Stat. 1066) and which reads as follows:

"The head of each department and establishment acting on behalf of the Government of the United States may consider, ascertain, adjust and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed \$1,000.00 caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor, together with a brief statement of the character of each claim, the amount claimed, and the amount allowed: Provided, That no claim shall be considered by a department or other independent establishment unless presented to it within one year from the date of the accrual of said claim."

By the terms of this section authority is given to the Secretary of Agriculture of the United States to "consider, ascertain, adjust, and determine any claim on account of damages to or loss of privately owned property where the amount of the claim does not exceed \$1,000.00, caused by the negligence of any officer or employe of the Government acting within the scope of his employment." You will note that such a claim must be presented within one year from the date of the accrual thereof in order that it may be considered under this section.

By the terms of Section 270-6 of the General Code of Ohio.

"There is hereby created a board to be known as the 'sundry claims board' * * *. In addition to any other duties that may by law devolve upon such board, it is hereby authorized and empowered to receive original papers representing claims against the State of Ohio for the payment of which no monies have been appropriated. * * * All such claims shall be carefully investigated by such board. * * * After such investigation the board shall either approve, approve with conditions and limitations or disapprove of each such claim, and append to the original papers * * * representing each claim, a concise statement of facts brought out in such investigation upon which its approval or disapproval is based. * * *"

Such original papers and appended statements shall, by the terms of Section 154-36, General Code, be filed in the office of the Department of Finance and by it delivered to the chairman of the finance committee of the House of Representatives of the next General Assembly promptly upon the appointment of such chairman. The Director

of Finance, as provided by said section shall include "all claims allowed by the Sundry Claims Board" in the state budget estimates.

The status of the employes engaged as "burning crews" is unusual in that they act in a dual capacity, viz., as agents both of the United States and of the State of Ohio. Mr. Lemke's claim, if any, is not a claim enforceable by law in the courts. In view of the dual agency of the employes in question, if a valid claim exists and it is so determined by the proper agencies of either the Federal or State Government, it would be the duty of either or both sovereignties to recompense him for his loss. In other words, I believe the question is close enough to warrant Mr. Lemke in presenting his claim under both sections last above quoted. I am of the opinion that he should at once present his claim to the Secretary of Agriculture of the United States in view of the one year period of limitations governing such officer's authority in considering such claims. And he may at the same time make due presentation of his claim to the Sundry Claims Board.

Specifically answering your question it is my opinion that Mr. Lemke should present his claim at once to the Secretary of Agriculture of the United States under Section 2, 42 (U. S.) Stat. 1066, and should also present the same claim to the Sundry Claims Board under Sections 270-6 and 154-36, General Code.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1302.

APPROVAL, BONDS OF GUERNSEY COUNTY, STATE OF OHIO— \$60,988.04.

COLUMBUS, OHIO, November 28, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1303.

DISAPPROVAL, BONDS OF POMEROY VILLAGE SCHOOL DISTRICT,
MEIGS COUNTY, OHIO—\$20,000.00.

COLUMBUS, OHIO, November 28, 1927.

Re: Bonds of Pomeroy Village School District, Meigs County, Ohio, \$20,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—An examination of the transcript pertaining to the above bond issue reveals that the bonds are being issued pursuant to a resolution adopted by the board of education of the school district on October 14, 1927. Said resolution provides for the issuing of \$20,000.00 of bonds, without a vote of the people, for the pur-