918.

MECHANICS LIEN LAW—HIGHWAY DIRECTOR UNAUTHORIZED TO WITHHOLD FUNDS DUE CONTRACTOR BECAUSE ATTEMPTED LIEN AGAINST SAID CONTRACTOR HAS BEEN FILED WITH SUCH DIRECTOR.

SYLLABUS:

The provisions of Sections 8324, et seq., General Code, are not applicable to state works or improvements, and the Director of Highways is without authority to withhold funds due to a contractor under a contract entered into with the state for the construction of works or improvements of the state under the direction of the Director of Highways, on the ground that a person or corporation has filed with such Director a sworn itemized statement of material furnished to such contractor and used in the construction of such works or improvement for the purpose of seeking a lien upon such funds.

COLUMBUS, OHIO, September 25, 1929.

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

DEAR SIR:—This is to acknowledge receipt of a communication from your department over the signature of Mr. Frank L. Raschig, First Assistant Director, which reads as follows:

> "Miller, Brady & Yager, attorneys for the Pittsburgh Plate Glass Company are making claim in behalf of their client for the sum of $1,059.04 due said company for furnishing building material to M. Rabbitt & Sons, Inc., for the construction of a grade elimination crossing on the Bryan-Edgerton Road located in Center Township, Williams County, Ohio.
>
> They are asking us to hold this amount and have filed sworn and itemized statement for the amount due the Pittsburgh Plate Glass Company.
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> We have Opinion No. 1252 from the former Attorney General which states that the state is not liable and cannot be sued for such claims as mentioned in their letter. We have so notified the above mentioned attorneys, sending them a copy of the above mentioned opinion, and have twice returned the itemized statement. However, on July 27, 1929, they wrote us again and returned the itemized claim, stating that they do not agree with the opinion of the Attorney General.
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> I am sending you a complete photostatic copy of our file on the matter, and would be pleased to have your opinion as to whether we were correct in the matter."

The files referred to in said communication and inclosed therewith, include photostatic copies of certain correspondence between your department and the attorneys above named with respect to a claim of the Pittsburgh Plate Glass Company in the sum of $1,059.04, which has been filled with you as a sworn itemized account for the purpose of obtaining a lien upon funds of the State of Ohio due and payable to M. Rabbitt & Sons, Inc., for the construction of the grade elimination improvement mentioned in your communication.

The claim of the Pittsburgh Plate Glass Company here in question, was filed with you for the purpose above mentioned under the assumed authority of Section 8324, General Code, which among other things provides that any subcontractor, material man, laborer or mechanic, who has performed labor or furnished material,

fuel or machinery for the construction, improvement or repair of any turnpike, road improvement, sewer, street or other public improvement, or public building provided for in a contract between any board, officer or public authority and the principal contractor, and under a contract between such subcontractor, material man, laborer or mechanic, and the principal contractor or subcontractor, at any time, not to exceed four months from the performance of the labor or the delivery of the machinery, fuel or material, may file with said board or officer, or the authorized clerk or agent thereof, a sworn and itemized statement of the amount and value of such labor performed, or material, fuel or machinery furnished, containing a description of any promissory note or notes that have been given by the principal contractor or subcontractor on account of labor, machinery or material, or any part thereof, with all credits and set-offs thereon.

Sections 8325 to 8329, inclusive, provide for certain further steps to be taken by the person performing such labor or furnishing such material or machinery necessary in order that the itemized claim filed by him under the provisions of Section 8324, General Code, may be perfected as a lien upon funds in the hands of such board, officer or public authority due the contractor for the construction of a public building or other public improvements.

Opinion No. 1252 of this department referred to in your communication is an opinion by my immediate predecessor addressed to the then Director of Highways and Public Works under date of November 10, 1927, Opinions of the Attorney General, 1927, Vol. III, page 2221. In this opinion it was held:

> "There is no provision in the Mechanics Lien Law, (Section 8324, General Code) making the provisions thereof applicable to state funds, and the Director of Highways and Public Works is without power or authority to withhold funds due to a contractor under a contract entered into with the state for the furnishing of materials to be used in the construction, repair or maintenance of highways, on the ground that a person or company has filed with such director a statement or attempted lien, to the effect that the contractor owes to the person or company filing such statement or lien, money for work done or materials furnished in the manufacture of the materials furnished the Department of Highways and Public Works."

It is obvious that the ruling made by my predecessor in the opinion above referred to, is dispositive of the claim here made by the Pittsburgh Plate Glass Company that it can perfect a lien on funds in the hands of the State of Ohio due and payable to M. Rabbitt & Sons, Inc., for the construction of said grade crossing elimination improvement, by following the procedure outlined in Sections 8324 et seq., of the General Code.

In arriving at the conclusion noted in the opinion of my immediate predecessor, above noted, he followed previous rulings of this department upon this question. So far as I have been able to ascertain, the first time this department addressed itself to the question here presented was under date of October 25, 1911, when an opinion was directed to the Board of Public Works, Report of the Attorney General for 1911, Vol. I, page 476, the then Attorney General holding:

> "The mechanics lien law has no application to contracts for public improvements made by the state.
>
> A fortiori—when the Board of Public Works enters into a contract with a contractor, the board can under no consideration, recognize demands of subcontractors or material men who have not been paid by the main contractor."

This ruling has been consistently followed by this office through succeeding administrations down to the opinion of my immediate predecessor above referred to. The fundamental reason upon which the proposition that the mechanics lien laws of this state do not apply to state buildings, works or improvements, or to the funds of the state due to the principal contractor for the construction of public buildings, works or improvements, is that the state as a sovereign is not bound by the terms of a general statute unless it be so expressly enacted. See *State ex rel.* vs. *Board of Public Works,* 36 O. S. 409; *State ex rel.* vs. *Cappeller,* 39 O. S. 207; *State ex rel.* vs. *Brown,* 112 O. S. 590, 597.

In the case of *State ex rel.* vs. *Morrow,* 10 O. N. P. (N. S.) 279, it was held that the mechanics lien law, although general in its nature, and the language in the General Code being broad enough to include public improvements of the state, does not apply to any public improvement made by the state. It was further held in said case that any steps taken pursuant to the mechanics lien law to establish a lien or claim against funds in the hands of the state, set apart for public improvements, are ineffective in law and afford no ground for action either in law or equity against the state.

In the opinion of the court in this case, referring to the provisions of Section 8324, General Code, it is said:

> "That the words of the statute, 'or other public improvement, or public building' are broad enough to embrace the claim of the relator could not be disputed; but it is contended that the state is not embraced within the general words of the statute and could be held to be within the purview of the same only when so declared expressly, or by necessary implication. The doctrine of the common law as expressed in the maxim, 'The king is not bound by any statute if he be not expressly named to be so bound' is the law of the State of Ohio. The doctrine seems to be that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct. It is a familiar doctrine that the state is not affected by the statute of limitations, however general its terms may be. Upon the same principle it has been held that the statue providing that 'costs shall follow the event of every action or petition' does not apply to a party prevailing against the state even in a civil case. If in such cases the statute has no binding force upon the state, no good reason could be given as to why any statute of a general nature should apply to the state unless it was expressly provided."

In the case of *State* vs. *The Citizens Trust & Guarantee Company, et al.,* 15 N. P. (N. S.) 149, it was held that a mechanics lien filed on property belonging to the state is void, and that a proceeding does not lie to subject funds in the hands of the state to the payment of claims for work and material which went into a state building under a contract which was abandoned before its completion. In the opinion of the court in this case, it is said:

> "It is urged that Sections 8324 and 8325, General Code, part of the mechanic's lien law, are broad enough to include either the state or the armory board, and this is true if the words 'or other public buildings provided for in a contract between the owner, or the board officer, or public authority' would include an armory, and the clause authorizing sub-contractors to file with the owner, board officer or public authority, an itemized statement, would give a sub-contractor a right to a lien on the fund. The mechanic's lien sections of General Code, are general laws, and from such laws the state

is exempt (56 O. S., 175), and in *State, ex rel.* vs. *Morrow,* 10 N. P. (N. S.), the statutes are quoted and said not to apply to the state. That case, as said, was affirmed by the circuit court, and so far as I can find has not been overruled, and that case decides that neither a lien on the building nor on the fund can be acquired under the lien law, and it would be singular that a lien on either the building or the fund could be taken when no action could be prosecuted against the state to enforce the lien."

In consideration of the question presented by your communication, it is of interest to note that in the enactment of the so-called White-Mulcahy road law, 107 O. L. 69, Section 1208, General Code, was so amended as to provide, among other things, that "the provisions of Section 8324 of the General Code and the succeeding sections in favor of sub-contractors, material men, laborers and mechanics shall apply to contracts let under the provisions of the preceding sections as fully and to the same extent as in the case of counties." This section of the General Code as amended in the White-Mulcahy law likewise provided that:

> "The state highway commissioner shall not draw his requisition for any warrant in favor of any contractor or make any payment to any contractor for any estimate on account of any contract let under the provisions of the preceding sections, until the affidavit of such contractor, or its officer or agent in the case of a corporation, that all indebtedness of such contractor on account of material incorporated into the work or delivered on the site of the improvement, or labor performed thereon, has been paid, is filed with the state highway commission."

Said Section 1208, General Code, was enacted in its present form by amendment thereof, by an act of the 87th General Assembly, passed April 21, 1927, 112 O. L. 447. In Section 1208, General Code, as it now reads, both of the above quoted provisions enacted therein by the White-Mulcahy law above referred to, have been eliminated.

In this situation, aside from the right of the Pittsburgh Plate Glass Company to recover from the contractor for the material furnished to said contractor in the construction of the improvement here in question, its only remedy is that afforded by the contract bond of the contractor, which bond I assume is in substantial conformity with the provisions of Sections 2365 et seq., General Code, securing the payment of claims for labor and material furnished in the construction of this improvement.

In the file submitted with your communication, there is a photostatic copy of a letter from the attorneys above named, directed to you under date of July 27, 1929, in which the opinion is expressed that Sections 8324, et seq., General Code, apply to works and improvements constructed by the State of Ohio, and that the opinion of my immediate predecessor above referred to, is wrong. I cannot concur in this view. On the contrary, I am of the opinion that the former opinions of this department upon this question are correct and that the same should be followed.

By way of specific answer to the questions suggested, I am of the opinion that you are not authorized to withhold the payment of said sum of $1,059.04, on account of the itemized claim filed with you by the Pittsburgh Plate Glass Company. In view of the fact, as appears from the files submitted with your communication, that M. Rabbitt & Sons, Inc., abandoned the contract for the construction of this improvement, no opinion is expressed as to whether the retained money should be paid to the contractor, to the bonding company which completed the contract, or to the First National Bank of Toledo, which holds an assignment from M. Rabbitt & Sons, Inc., for all money due the contractor on this contract.

Respectfully,
GILBERT BETTMAN,
Attorney General.