ment with the owner of the real estate that he will be secured by a first mortgage on the real estate in question, is subrogated to all the rights of the first mortgagee in such real estate."

2. The fact that such subrogation gives the third party a preference over a prior intervening mortgagee, who had no knowledge of such agreement, in no wise affects the application of the doctrine of subrogation, when the burdens of such prior intervening mortgagee are in no wise increased. *Straman, Adm'r.,* vs. *Rechtine et al,* 58 Ohio St., 443, 51 N. E., 44, approved and followed."

Specifically answering your inquiry it is my opinion:

1. When a judgment on a recognizance bond running to the state of Ohio as obligee, has been rendered, the prosecuting attorney has no authority to waive the priority of the lien of such judgment in favor of a subsequent mortgage the proceeds of which are being used to satisfy a mortgage the lien of which is prior to the lien of the recognizance.

2. When a judgment on a recognizance bond running to the state of Ohio as obligee, has been rendered, the county commissioners have no authority to waive the priority of the lien of such judgment in favor of a subsequent mortgage the proceeds of which are being used to satisfy a mortgage the lien of which is prior to the lien of the recognizance.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2492.

BOARD OF EDUCATION—MEMBER MAY NOT LAWFULLY PURCHASE BONDS ISSUED BY SCHOOL DISTRICT.

SYLLABUS:

A member of a board of education may not lawfully purchase bonds issued by the school district either directly from the board or from a third party who has theretofore purchased the bonds.

COLUMBUS, OHIO, April 13, 1934.

HON. EMORY F. SMITH, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Your recent request for opinion reads as follows:

"I received an inquiry yesterday whether or not a member of a board of education could lawfully purchase bonds of such board of education directly or from a third party who had theretofore purchased the same. This question involves an interpretation of the meaning of the word 'contract' in the statutes prohibiting the members of a board of education from being financially interested, directly or indirectly, in contracts of such board of education.

I would appreciate receiving your opinion in this matter."

From the wording of your communication, I presume you have reference to section 4757, General Code, which reads as follows:

"Conveyances made by a board of education shall be executed by the president and clerk thereof. *No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board* or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meetin of such board." (Italics mine.)

In my opinion No. 1597, rendered September 21, 1933, I held that a bond issued by a political subdivision in accordance with the provisions of the uniform bond act constituted a "written contractural obligation" within the meaning of such words appearing in section 2 of House Bill No. 94 of the 90th General Assembly, regular session (115 O. L. 222). Such opinion thoroughly discussed the nature of a bond issued by a political subdivision, and it is therefore believed unnecessary to further define it here, as it comes clearly within the ordinary scope of the word "contract." A copy of such opinion is enclosed herewith.

The question arises whether or not the legislature in passing section 4757, General Code, supra, intended to include a written contractual obligation such as a "bond" within the scope of the word "contract" as used in such section.

The underscored statutory provision of section 4757, supra, is similar to provisions appearing in many other sections of the General Code applying to officers of various political subdivisions and boards. For instance, see sections 4207, 4218, and 7638, General Code. Such provisions have been held to be express legislative declarations of the common law doctrine, and thus declaratory of the common law on the subject. See 2 Dillon on Municipal Corporations (5th Ed.), sections 772, 773; 2 McQuillan on Municipal Corporations, (2nd Ed.) (1928), pages 211 et seq., section 531; 46 Corpus Juris, 1038, "Officers," section 309, citing the fairly recent case of *Stockton Plumbing and Supply Co.* vs. *Wheeler,* 68 Cal. App. 592; 229 Pac. Rep., 1020.

In the case just mentioned, it was held in paragraphs 2, 8 and 9 of the syllabus: (229 Pac. 1020).

"2. Pol. Code, secs. 920-922, and Civ. Code, sec. 1667, prohibiting public officers from becoming financially interested in any contract made in their official capacity, etc. Held generally merely to express legislative declaration of common law, and applies to municipal as well as to other public officers.

8. Public officers are denied right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, on principle that no person can safely serve two masters representing divers or inconsistent interests at same time.

9. Statutes prohibiting public officers from having interest in contracts executed in their official capacity remove grounds for equitable considerations in such cases."

In the opinion, at pages 1022 and 1024, the court stated:

"These statutory provisions, with the possible exception of those contained in section 71 of the Penal Code, are, generally speaking, merely express legislative declarations of the common law doctrine on the subject, and apply, as does the common law rule, to municipal as well as other public officers. 2 Dillon on Municipal Corporations (5th Ed.) secs. 772, 773.

* * * *

The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is involved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing divers or inconsistent interests with respect to the service to be performed. The principle has always been one of the essential attributes of every rational system of positive law, even reaching to private contractual relations, whereby there are created between individuals, trust or fiduciary relations. The voice of divinity, speaking from within the sublimest incarnation, known to all history, proclaimed and emphasized the maxim nearly two thousand years ago on occasions of infinite sacredness.

* * * *

It should be added that the statutory provisions emphasizing the general or common law rule as to such contracts remove all grounds for equitable considerations in such cases. *City of Northport* vs. *Northport Townsite Co.,* 27 Wash., 543, 68 Pac. 204, 205."

Based on this common law doctrine that a public officer may not be interested in a contract with the subdivision of which he is an officer, because no man can contract with himself, it was held in the cases of *Sherlock, et al* vs. *Village of Winnetka, et al.,* 59 Ill., 389; 68 Ill., 530, and *Hewitt vs. The Board of Education of Normal School District,* 94 Ill., 528, that a sale of municipal bonds and school district bonds to members of a council of a municipality and of a board of education, respectively, was void. See 44 Corpus Juris. 1216, "Municipal Corporations," section 4187.

The fourth paragraph of the syllabus of the Hewitt case reads as follows:

"Members of a board of education for a school district are virtually trustees of the school funds, and as such they are incapable of dealing with the fund as purchasers or donees, and bonds issued by them to raise money for the district and negotiated to members of the board are void, even though sold without any discount."

The fourth paragraph of the syllabus of the first of the two Sherlock cases, supra, states:

"The sale of its bonds by a municipal corporation to the members of its council, is void, irrespective of the principles of equity as applied to persons acting in a fiduciary capacity, and independent of the fact that it was a part of a scheme to pervert the property of the corporation from its legitimate municipal purposes to private ends. Such a sale is void, on the ground that no man can contract with himself * * *."

The ninth paragraph of the syllabus of the second of the two Sherlock cases, supra, provides:

"A member of a village council has no power to purchase bonds of the corporation he represents, at any sale made by himself, or by the

body of which he is a member, and if he does, a tax levied to pay interest on the same may be enjoined at the suit of the tax-payer."

While it is true that the conclusions of the foregoing cases were not based on statutory provisions containing language such as is incorporated in section 4757, General Code, nevertheless, inasmuch as it has been heretofore stated that these statutory provisions are declaratory of the common law on the subject, it would appear that such cases clearly show that the legislature in enacting said section 4757, must have intended that the word "contract" as used therein should include a "bond."

In arriving at this conclusion, I am cognizant of the recent case of *Davidson* vs. *Sewer Improvement District No.* 4, 182 Ark., 741, 32 S. W. Rep., 2nd series, 1062, decided by the Supreme Court of Arkansas on November 24, 1930, in which it was stated as disclosed by the third paragraph of the syllabus: (32 S. W. Ind. 1062).

> "Sale of sewer district's refunding bonds to bank of which one of commissioners was officer held not illegal (*Crawford* vs. *Moses' Dig.* sec. 5711; Acts 1927, p. 390, sect. 5).
>
> Crawford & Moses' Dig. sect. 5711, prohibits any member of a board of improvement from being interested, directly or indirectly, in any contract made by the board for or on behalf of the improvement district."

As the foregoing syllabus discloses, it appeared that refunding bonds of a sewer improvement district of a city had been sold by the commissioners of the district to a bank and trust company, in which company one of the commissioners was an officer. The court held in effect that such transaction did not make the commissioner-officer interested directly or indirectly in a *contract* with the board of the sewer improvement district, within such statutory language of the Arkansas statute, Acts 1909, page 222, sect. 1.

With reference to this matter, the court stated at page 1064 :

> "We are not prepared to hold that the sale of the refunding bonds to the McIllroy Bank and Trust Company was in violation of section 5711, Crawford & Moses' Dig., which prohibits any member of a board of improvement from being interested, either directly or indirectly, in any contract made by the board for or on behalf of the improvement district. There was no allegation of fraud, or that the district had not been fairly dealt with. *The sale of the bonds was not made to McIlroy, but to a corporation of which he was an officer.* But, if it were held that the transaction was of questionable propriety, or even in violation of law, the validity of assessment of benefits would not thereby be affected."

From the language of the court in the foregoing case, it will be seen that the sale of the bonds was not made to the commissioner of the sewer district, so that the conclusion of such case does not clash with the conclusions of the cases set forth in preceding paragraphs, holding that a public board may not sell directly or indirectly bonds of the subdivision it represents to one of its members. The commissioner of the improvement district could at no time be said to have possessed the refunding bonds either by direct purchase from the commissioners of the improvement district or from a third party who had purchased

same, after the manner of the facts upon which your question is predicated.

Based on the foregoing discussion, I am of the opinion, in specific answer to your question, that a member of a board of education of a school district may not lawfully purchase bonds of such school district, either directly from the board or from a third party who has theretofore purchased the bonds from the board.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2493.

APPROVAL—NOTES OF SEAMAN VILLAGE SCHOOL DISTRICT, ADAMS COUNTY, OHIO, $2,887.00.

COLUMBUS, OHIO, April 13, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2494.

APPROVAL—NOTES OF WAYNE No. 8 RURAL SCHOOL DISTRICT, CLERMONT COUNTY, OHIO—$445.00.

COLUMBUS, OHIO, April 13, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2495.

APPROVAL—NOTES OF GOSHEN RURAL SCHOOL DISTRICT, TUSCARAWAS COUNTY, OHIO, $5,609.00.

COLUMBUS, OHIO, April 13, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2496.

APPROVAL—NOTES OF DILLONVALE VILLAGE SCHOOL DISTRICT, JEFFERSON COUNTY, OHIO, $7,830.00.

COLUMBUS, OHIO, April 13, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.