

of Erie County you can probably make some arrangement with Mr. Matthes whereby he can protect the State of Ohio against the lien of any judgment rendered during the present term of said court, and which, as above noted would relate back to the first day of said term.

As noted in said former opinion, it appears from the corrected abstract that the taxes for the last half of the year 1927 which amount to the sum of \$40.89 as against lot No. 37, and \$10.89 against lot No. 38 are unpaid and a lien.

The corrected abstract does not show any leases outstanding against said premises or any part thereof. In this connection it may be observed that if any person other than the owner, George C. Matthes, is in actual possession of the premises under investigation or any part thereof, under any color or claim of right, the State of Ohio as a purchaser of said premises will be required to take notice of the rights of such person, whatever they may be.

It may be further observed that any purchaser of these premises is required to ascertain whether or not any person or persons are furnishing labor or material on any building or structure on said premises or whether they have done so within the statutory time within which a mechanic's lien might be perfected on said premises.

Subject to the above noted exceptions which can be adjusted by you at the time the transaction for the purchase of these lands is closed, I am of the opinion that said George C. Matthes has a good and merchantable fee simple title.

I am herewith returning with my approval the deed executed by said George C. Matthes and Ethel N. Matthes his wife, conveying to the State of Ohio the premises under investigation. The same has been properly executed and is in form sufficient to convey to the State of Ohio a fee simple title in said lands.

Your attention is called to the fact that no encumbrance estimate accompanied the corrected abstract submitted to me, but I assume that such encumbrance estimate is in your possession and that the same shows the proper certificate of the Director of Finance showing that there are unencumbered balances sufficient to cover the purchase price of said property. I note what you say in your communication with respect to the approval of the Controlling Board, and assume that the purchase price of said property does not exceed the amount so approved by the Controlling Board for the purchase of this property. I am returning herewith the corrected deed and corrected abstract covering the property under investigation.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1784.

TREES—DIRECTOR OF HIGHWAYS CANNOT EXPEND FUNDS TO CARE FOR TREES AND SHRUBS LOCATED WITHIN STATE HIGHWAYS.

SYLLABUS:

The Department of Highways is not authorized to expend any of the funds of the highway department for the purpose of caring for trees and shrubs located within state highways, there being no appropriation of money to the department for that purpose.

COLUMBUS, OHIO, February 29, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion, as follows:

"Section 1204 of the General Code reads as follows :

'With the consent of the abutting property owner, the director shall have control of all trees and shrubs in the roads and highways on the state highway system ; provided, that the department of agriculture or other proper department may, with the consent of the director, and abutting property owner, take charge of the care of such trees, and such department, in the event it takes charge of such trees, shall have authority, with the consent of the director, to plant trees along such roads or highways and pay the cost and expense of caring for or planting such trees out of any funds available for the development of forestry in the state.'

I desire to make some inquiries regarding the meaning of this law, of course, taking into consideration any other existing statutes there may be on the subject of trees along the highway.

(1) Could the department contract with a private company to treat or trim existing trees along the highway with the consent of abutting property owners or is the department required to refer such work to the Department of Agriculture or other proper state departments ?

(2) If such work is performed either by a state department or a private company, is the department authorized to expend any of the funds of the department for this purpose?"

Section 1204, General Code, as enacted in House Bill No. 67 (112 v. 474), reads as follows :

"With the consent of the abutting property owner, the director shall have control of all trees and shrubs in the roads and highways on the state highway system ; provided, that the department of agriculture or other proper department may, with the consent of the director, and abutting property owner, take charge of the care of such trees, and such department, in the event it takes charge of such trees, shall have authority, with the consent of the director, to plant trees along such roads or highways and pay the cost and expense of caring for or planting such trees out of any funds available for the development of forestry in the state."

It is obvious, from a reading of the foregoing statute, that the Legislature has conferred upon the Director of Highways the supervision and control over all trees and shrubs that are located within the bounds of a road or highway of the state system, providing the consent of the abutting property owner is first obtained.

Section 7210, General Code, which formerly vested in the Director of Highways the control over trees on inter-county highways and main market roads, regardless of the obtaining of the consent of the abutting property owner, was amended, 112 O. L. 496, and, as amended, reads as follows :

"With the consent of the abutting land owner the county surveyor shall have control of all trees and shrubs in the county roads of his county and the township trustees shall have control of all trees and shrubs in the township roads of their township. Provided, however, that the Ohio state agricultural or other proper department may, with the consent of the proper authorities, and abutting land owner take charge of the care of such trees, and such department shall have authority with the consent of the proper

authorities of the township, county or state to plant trees along the public highway and such department may use any funds available for the development of forestry in the state to pay the expense of the planting and care of such trees. The ownership of all trees so planted, shall remain in the public."

Inasmuch as the provisions of Section 7210, supra, as amended, do not contain any reference to the Director of Highways, it is quite obvious that the Legislature, by the enactment of Section 1204, supra, intended that the provisions thereof should be in lieu of that portion of former Section 7210, supra, which conferred upon the Director of Highways the control over trees and shrubs located within the bounds of inter-county highways and main market roads.

Section 7209, General Code, which was not amended or repealed by the last Legislature, reads as follows:

"The state highway commissioner may by a permit in writing authorize the owners of property adjoining inter-county highways and main market roads at their own expense to locate and plant trees and shrubs along inter-county highways and main market roads, subject to his approval as to kind, size and location. The county surveyor shall have the same authority on county roads as the township trustees on township roads."

I have examined the various appropriation acts made by the last Legislature and find no appropriation therein provided which would authorize the Director of Highways to expend funds of the department for the trimming and treating of trees. The Director of Highways is not authorized to enter into contracts involving the expenditure of public funds, unless specific appropriation is made which authorizes the particular expenditure contemplated. It therefore becomes unnecessary to determine at this time whether Section 1204, supra, means that the Director or the employees of the State Highway Department should accomplish such trimming and treating of trees within state highways as may be necessary, or whether he might contract the trimming and treating of trees to a third person.

Of course, if trees are located within the bounds of a state highway in such a position as to constitute an obstruction, the Director of Highways may cause their removal. Likewise, if the branches of such trees are so located in reference to the traveled portion of said highways that they interfere with the traffic thereon, it is equally clear that the Director may cause such trees to be trimmed so that the branches thereof will not interfere with such traffic.

Your attention is directed to the provisions of Sections 1199 and 1199-1, General Code, which respectively provide as follows:

Sec. 1199. "It shall be the duty of all individuals, firms and corporations using or occupying any part of a road or highway on the state highway system, or the bridges or culverts thereon, with telegraph or telephone lines, steam, electrical or industrial railways, oil, gas, water or other pipes, mains, conduits, or any object or structure, other than by virtue of a franchise or permit legally granted and in force and effect, to remove from the bounds of such road or highway, bridge or culvert, their poles and wires connected therewith, and any and all tracks, switches, spurs, or oil, gas, water, or other pipes, mains, conduits, or other objects or structures, when the same in the opinion of the director constitute obstructions in such roads, or highways, or the bridges and culverts thereon, or interfere or may interfere with the contemplated construction, reconstruction, improvement, maintenance or

repair of such roads or highways, or the bridges and culverts thereon, or interfere or may interfere with the use of such roads or highways, or the bridges and culverts thereon, by the traveling public.

It shall be the duty of all individuals, firms or corporations so occupying any road or highway on the state highway system, or the bridges or culverts thereon, under and by virtue of a franchise or permit legally granted and in force and effect, to relocate their properties and all parts thereof within the bounds of such road or highway, bridge or culvert when the same in the opinion of the director constitute obstructions in any such road or highway, bridge or culvert, or interfere with, or may interfere with the contemplated construction, reconstruction, improvement, maintenance or repair of such road or highway, bridge or culvert, or interfere with, or may interfere with the use of such road or highway, or bridge or culvert, which relocation within the bounds of such road or highway, or bridge or culvert, shall be in the manner and to the extent prescribed by the director.

If, in the opinion of the director, such individuals, firms or corporations have obstructed any road or highway on the state highway system, or the bridges or culverts thereon, or if any of their properties are, in his opinion, so located that they do or may interfere, with the contemplated construction, reconstruction, improvement, maintenance or repair of such road or highway, or bridge or culvert, or, if, in his opinion, they interfere with, or may interfere with the use of such road or highway, or bridge or culvert, by the traveling public, said director shall notify such individual, firm or corporation directing the removal of such obstruction or properties, or the relocation of such properties, as the case may be, and, if such individual, firm or corporation shall not within five days from the service of such notice proceed to remove or relocate the same and complete the removal or relocation of the same within a reasonable time, the director may remove or relocate the same by employing the necessary labor, tools and equipment. The costs and expense thereof shall, in the first instance, be paid by the director out of any appropriation of the department of highways available for the construction, reconstruction, improvement, maintenance or repair of highways, and the amount thereof shall be certified to the Attorney General for collection by civil action. Said notice shall be served by the sheriff in the manner as summons in civil actions."

Sec. 1199-1. "It shall be the duty of occupants of land situated along the roads and highways on the state highway system to remove all obstructions within the bounds of such roads and highways which have been placed there either by themselves or their agents, or with their consent, and not under a franchise or permit legally granted. Provided, by first obtaining the consent and approval of the director, obstructions heretofore placed within the bounds of such roads or highways may be permitted to remain upon the conditions hereinbefore in this act prescribed.

It shall be unlawful for any individual, firm or corporation to hereafter place or maintain except as otherwise provided by law, any post, sign or obstruction within the bounds of any road or highway on the state highway system without first obtaining the consent and approval of the director."

From the provisions of the statutes above quoted it is quite apparent that the Director of Highways may expend funds of the Department of Highways (maintenance and repair funds) for the purpose of trimming trees located within the bounds of state highways, the branches of which interfere with the traffic proceeding over said highways.

However, it is believed that your questions relate to the care of trees rather than their constituting obstructions within the bounds of such highways.

While no appropriation of funds for the trimming and treating of trees was made to your department by the last Legislature, you may consent to the Department of Agriculture, or some other department, taking charge of the care of all trees located within such state highways. If such department assumes such work it may make the expenditure necessary for the proper care of such trees from any funds available for the development of forestry.

Therefore, answering your first question specifically, it is my opinion that you may not, in the absence of an appropriation therefor, contract with a private company to trim or treat trees located within the bounds of state highways, except as hereinbefore pointed out. However, you may refer the matter of caring for such trees to the Department of Agriculture or some other proper state department.

Answering your second question specifically, in the absence of an appropriation therefor, your department is not authorized to expend any of its funds for trimming or treating trees along highways.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1785.

MUNICIPALITY—HOW IT MAY EXPEND MOTOR VEHICLE LICENSE TAX AND GASOLINE TAX.

SYLLABUS:

1. *A municipality may expend its share of the motor vehicle license tax and the gasoline excise tax fund for the purpose of placing gravel or cinders on streets or roadways which have previously been graded or improved by the placing of gravel or cinders thereon.*

2. *The funds received by a municipality from the motor vehicle license tax and the gasoline excise tax fund may be used for the purpose of oiling streets and roadways which have been improved with gravel or cinders.*

COLUMBUS, OHIO, February 29, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your communication of recent date requesting my opinion, as follows:

“Section 6309-2 and 5537, G. C., provide that a municipality may use its share of the motor vehicle license and gasoline tax receipts for the sole purpose of maintaining and repairing existing streets and roadways in the corporation, and maintenance and repair is defined as ‘all work done upon any public road or highway or upon any street in which the existing foundation thereof is used as the subsurface of the improvement thereof in whole or substantial part.’

The syllabus of Opinion No. 2748 to be found at page 1180 of the Opinions of the Attorney General for 1921 reads: